

PROHIBITION OF USE OF FORCE AND THREATS IN INTERNATIONAL RELATIONS

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Abstract. *Force and threat have been old accompanying phenomena to international relations and in the political and legal theory they were considered to originate from the sovereignty of states, that is, their limitless right to use all means to protect their interests. The only limits could be found in moral views on just and unjust wars. The more war was connected with sovereignty as a legal concept the more it became a legal institution. Originating from the right to wage war was the war law. Development of social consciousness has resulted in gradual limiting and final abolishing of the right to wage war turning into prohibition of any force and threat in relations among states becoming a supreme norm of international law and at the same time a norm of international criminal law the violence of which entails international criminal responsibility.*

Key words: *force, threat, war, prohibition of employing force, aggression, crime against peace*

I – GENERAL NOTES

Force and threat have been old accompanying phenomena to international relations. In the history of political thought force has particularly been singled out as a factor of the paramount importance. War was considered a normal phenomenon, like a fact legally neither permitted nor prohibited. That phenomenon was simply counted upon as a form of applying force, so that Tucidid came to a conclusion that relations among states were based upon force, but not upon law and morals. It was upon that ideological basis that views in the theory of international relations were established the central point of which is determination of the place and role of force in international relations. Undoubtedly contributing to this was a centuries old supremacy of politics over the law, which even nowadays has not vanished although for a whole century there has been a tendency to subjugate

the politics to the law at least to the extent necessary to preserve the highest values of the mankind such as peace and security.

Force in the international community, featured by high degree of decentralization, has been used to different purposes both for previous actions or pressure (intervention) and *ex post facto* for punishing because of nonperformance according to demand (sanctions). War as the hardest form was most frequently used for the purpose of grabbing parts of a territory or total subjugation some state. While reprisals have always been considered as violence of law, there was no a unique opinion on war. According to one view, war was considered a permissible means of politics coming from the sovereignty, neither delict nor sanction, says Kelsen.¹ However, it would be wrong to believe that there was indifference towards war and misfortunes it brought about the best testimonies on which are efforts to justify recourse to war from the ancient times to the present days. Even the peoples of ancient East knew about the division on defensive and offensive, that is, just and unjust wars. Greek writers and philosophers gruded against war while the statesmen searched for reasons to justify wars looking for responsibility to commence a war. Victorious countries even put to trial leaders of belligerent countries guilty for war.² Differentiation between just and unjust wars has further been developed in Rome, but the criterion was purely formal because respect for strict procedure of commencing war was in question. Essentially, an unjust war could formally be permissible. Thus, differentiation between just and unjust wars was turning or approaching to the differentiation between permissible and prohibited wars.

There appeared several views in the Middle Ages related to certain religions, but tightly connected for the existing social relations of the age. While exiled, christianity considered each use of force even war immoral and was against military service. When it became a state religion it changed its attitude towards war so that St. Augustin (354-430) formulated the theory on just war against the nonlaw. In Byzantium war was considered a normal and peace nonnormal state. War against non-Christians was always rihteous. Islamic teaching considered that war is just against the heretics and infidels as well.³ Nevertheless, prevailing were the views that were developed within the Catholic Church, at that time the only social power that linked all states and peoples of the Western Europe and imparted the spirit and essence to international law. Developed in the theory (T. Aquinas, Vittoria, Wolf) was a view on just and unjust wars. According to that view war is permissible as an answer to violations of rights as well as reprisals. Vittoria's opinion was that soldiers had the right to refuse obedience to their leaders if they thought that war was unjust. If not a sanction, war is delict.⁴ Some writers think that that view has later been expressed in the regulations of the League of Nation Pact,⁵ Kellogg-Briand Pact and

¹ For more details, see J. Даниловић, "Justum bellum"и репресалије у првим вековима римске историје, "Годишњак Правног факултета у Сарајеву", 1975, pp.39-64.

² М. Сукијасовић, *Појам агресије у међународном праву*, Београд, 1967, pp. 15, 20.

³ Ibid, p. 17.

⁴ H. Kelsen, *The Law of the United Nations*, Second impression, London 1951, p. 707; - Théorie pure de droit, Paris 1962, pp. 422, 423.

⁵ Ђ. Поповић, *Класици међународно-правне доктрине*, Београд 1933, p. 47; - M. Sibert, *Traité de droit international public*, Paris 1951, pp. 579-580.

the Charter of the United Nations although in these cases permissible defensive, that is, legal and illegal wars are in question.⁶

II – WAR AS A LEGAL INSTITUTION

According to Saint Thomas Aquinas' (1225-1274) theory of natural law, war was just if it fulfilled three conditions: 1) to be waged by the authorities empowered to do that (*auctoritas principis*), 2) that the cause is just (*justa causa*) and 3) that the intention is correct (*intentio recta*). Although the second condition is essential, the first one gained in importance in the passage of time because war was always linked with the sovereign. Thus, the right to wage war became an integral part of sovereignty. Since sovereignty was "deemed more or less unlimited thus neither the right to wage war could not come under any legal limitations".⁷ Having become a characteristic and expression of sovereignty⁸ as a legal concept war became a legal institution producing legal consequences⁹ during many centuries. One of the first and probably the most important consequences in practice was disappearance of differences between offensive and defensive wars, on the one hand, and unjust and just wars, on the other hand. According to Rutgers, the concept of absolute sovereignty has killed the doctrine on just war¹⁰ and, in fact, that doctrine has been transformed into the doctrine on legal war which can be declared by the legal authorities.¹¹ Thus, both the unjust and offensive wars could be legal if the competent authorities, according to their understanding, thought them justified. There resulted the same consequence as that in the Roman understanding of just war. Further consequence was that existence of war state and application of the war law rules then in the phase of creation depended on the formal moments (declaration of war and intention). From the right to wage war (*jus ad bellum*) there resulted war law (*jus in bello*) because war as a legal institution could be regulated by law and limited in a number of directions.

Hugo Grotius (1583-1645) was the first to point to the difference between *jus ad bellum* and *jus in bello* redressing balance between them such as between war and peace¹² replacing and mutually excluding each other (*inter bellum et pacem nihil est medium*). Justifying, like all the contemporaries, use of force he endeavoured by his doctrine *temperamenta belli* to find balance between the military need and human considerations. If war comes from discretionary (sovereign) right of state to decide how to gain or protect some of its right (self-help), then it can be used as the last resort (*ultimum medium regnorum*) if other resorts are insufficient. This opens the way to introducing peaceful settlement of disputes (at least optionally), while limiting the way of waging war (*jus in bello*) but not interfering with the very right to wage war (*jus ad bellum*). Moral causes are being

⁶ J.L. Kunz, *Bellum justum and bellum legale*, "American Journal of International Law", 1951, No. 3, p. 532.

⁷ Ђ. Нинчић, *Проблеми суверености у Повељи и пракси Уједињених нација*, Београд 1967, p. 65.

⁸ М. Радојковић, *Рат и међународно право*, Београд 1947, p. 6.

⁹ Ђ. Нинчић, *op.cit.*, p. 65.

¹⁰ V.H. Rutgers, *La mise en harmonie du Pacte de la Société des Nations avec le Pacte de Paris*, "Recueil des cours de l'Académie de droit international de La Haye", 1931, t. 38, p. 19.

¹¹ М. Сукијасовић, *Појам агресије*, p. 22.

¹² This is best shown by the title of his famous book *De jure belli ac pacis* (1625).

cited for both (*justa causa*, "just war") by means of which resorting to power is justified while the same causes explain alleviation of war misfortunes as an excuse "to have had to" resort to war. "Also, the writers admit, either directly or indirectly, the legitimacy of war as a means to conduct policy of states. If the old differentiation between just (*bellum justum*) and unjust (*bellum injustum*) wars becomes apparent that differentiation is still of enormous importance in moral sense although deprived of any value from the law point of view."¹³ From the international law point of view, by the end of the 19th and beginning of the 20th centuries war was considered an exception state but legal one.¹⁴ La Pradelle deemed that regulation of war meant its legalization.¹⁵ Contrary to that, Ilić thought that international law had legalized war recognizing it as an expression of sovereignty of states. "In other words, war was considered legal prior to and beyond any passing of regulations on it."¹⁶ International law deems war a social phenomenon and tries to subject its acts to certain regulations.¹⁷ "The right to war is nothing else but the right, possibility to wage war."¹⁸

Also, war was thought of as a sanction although it was, according to an author of ours, "monstrous reasoning" to think killing of those governed due to the acts of their rulers "a kind of law category" because war can result for want of disadvantages in the organization of both states and the world community. That is why that advocate of Duguit's view thinks that to pay due status of respect to sanction in international law – even collective sanction – means to essentially contribute to its existence as a phenomenon." According to him, such view is a sign of insufficient ideological level of the science of international law.¹⁹ Such average estimation of the level of the science of international law seems too strict, because a cursory glance at the literature shows that many theoreticians have been beyond reality of their times, which was not at all easy because science must operate on the basis of facts. Against any war were Wycliffe, Sir Thomas More, Erasmus and others. For example, Ilić was against war not only because war, as a form of violence, had never been in line with law, but also because its aftermaths were not in harmony with law²⁰ although he had to admit that in the past war was "an instrument of civilization", which showed that that civilization was only "a little bit civilizing".²¹ Considerably prior to him such view was developed in Germany by Ludwig Quidde,²² the renowned pacifist (later a Nobel peace prize winner), while anti-war activities in Europe are centuries old.²³

¹³ М. Радојковић, *Рат и међународно право*, р. 6.

¹⁴ *Ibid.* р. 5.

¹⁵ А. La Pradelle, *La Conférence de la Paix*, "Revue générale de droit international public", 1900, р. 13.

¹⁶ М. Илић, *Опита разматрања о Друштву народа и његовом праву*, Београд 1966, р.112.

¹⁷ *Ibid.*, р. 107.

¹⁸ *Ibid.*, р. 109.

¹⁹ Ј. Серб: *Неки основни проблеми међународног права*, "Југословенска ревија за међународно право", 1957, No.3, р. 345.

²⁰ М. Илић, *op. cit.*, р. 104.

²¹ *Ibid.*, р. 103.

²² М. St. Marković has published an extensive note on a lecture of L. Quidde, *Идеја о миру и ново међународно право*, "Архив за правне и друштвене науке", 1906, No. 1, pp. 71-74.

²³ On that, see: J. Graven, *Le difficile progrès du règne de la justice et de la paix internationales par le droit*, "René Cassin amicorum discipulorumque liber II", Paris 1970.

III – LEGAL LIMITING OF WAR

"Governing originally the whole world, in all human relations, power has seen how the domain of its rule decreases in favour of law."²⁴ The first tangible result in limiting use of force was recorded in 1899 when, under the Convention on Peaceful Settlement of Disputes, states committed themselves to do their utmost, "if circumstances permit", to provide peaceful settlement of disputes for the purpose of "as much as possible to avoid resorting to force" in their mutual relations (Article 1-2). That process of limiting war was continued at the Second Hague Conference (1907). Under the Convention (III) on Commencing Hostilities the states bound themselves not to commence war "without previous unambiguous warning that will have either a form of a justified declaration of war or a form of an ultimatum with a conditioned declaration of war" (Article 1).

Much greater importance is that of the partial limiting of the right to wage war under the Convention (II) on Limiting Use of Force for Collection of Contractual Claims. States have committed themselves not to resort to the armed force for the purpose of collecting contractual claims of their citizens except in case when a state debtor refuses or does not answer the arbitration offer or, in case of acceptance, makes compromise impossible or does not obey the verdict pronounced (Article 1).²⁵

The process of pushing out force by peaceful settlement of disputes has been continued on the American continent. Beginning from 1912, the United States have concluded agreements (Briand's agreements) with other states under which committees have been established to consider disputes and submit reports to the parties in dispute within 12 months. States did not have to resort to war until the committee submitted a report. That will be even more worked out in the League of Nations Pact where ideas from the Hague and Briand Conventions are combined and built into the system of collective security. Thus, according to Brownlie, "an assumption of illegitimacy of war as a means of self-help" has been introduced.²⁶

It is interesting that, after the World War I, the conquered states have accepted the responsibility for the war aftermaths, but not for its commencement,²⁷ for violations of the war law, not for the war itself. The Allies have refused that view and have taken a stance that the obligation to pay war damages results from the responsibility for war. This is the way some authors interpret peace agreements²⁸, although their regulations do not provide quite safe ground for that. The Committee for Establishing Responsibilities for War has concluded that Germany, Austria, Turkey and Bulgaria are also guilty of war and violation of neutrality of Belgium and Luxembourg and the borders of Serbia and France, but not for the criminal responsibility of individuals. The Peace Conference has taken a con-

²⁴ М. Илић, *op. cit.*, p. 181.

²⁵ In our literature, М. Новаковић, *О међународно-правној заштити поверилаца једне државе (поводом Драгове доктрине)*, "Архив за правне и друштвене науке", Book IV, 1907, No. 5, pp. 427-436; No. 6, pp. 554-565; Book V, 1908, No. 1, pp.93-100; No. 2, pp. 166-172.

²⁶ I. Brownlie, *International Law and the Use of Force by States*, Oxford 1963, p. 57

²⁷ In a note to the Allies of 13 May, 1919, the German delegation underlined that agreement to pay reparations did not mean acceptance of the responsibility for the war because the obligation to pay reparations could not be linked with the question of guilt of war. This corresponds to the view on differentiations between the war law and the right to war.

²⁸ I. Brownlie, *op. cit.*, pp. 135-140; - М. Сукијасовић, *Појам агресије*, p. 29.

trary stance. Pursuant to Article 227, paragraph 1, of the Versailles Peace Treaty,²⁹ Wilhelm II, the ex-emperor of Germany "has publicly been accused for the capital offence against the international morals and the saint importance of agreements". It is not clear whether the accusation referred to the violation of agreements under which war was forbidden (neutrality violence) or agreements regulating conduct in warfare, but a conclusion can be made from the documents on the work of the Conference that *jus ad bellum* violation was in question.³⁰ This is important because the then international law did not prohibit war, but prohibited a lot of things in war and violations of prohibitions were not considered to entail criminal responsibility.

Under the League of Nations Pact states have committed themselves to bring all disputes before the arbitration, court or the League of Nation Council and not to resort to war prior to the 3-month term expiration after the arbitration or court decision or the unanimously approved report of the Council. The verdict should have been pronounced within a "reasonable term" and the report of the Council within 6 months after the dispute has been submitted (Article 12). States were forbidden to wage war against states that observed those decisions, that is, war could be conducted only against a state that did not perform the decision or did not approve the report.³¹ Ninčić deems that the Pact did not oppose peaceful settlement of disputes to war as the only alternative, but only gave priority to the peaceful settlement of disputes which should reduce the possibility of applying violent means such as the Hague Conventions were intended to put an end to war by expanding the obligation of peaceful settlement of disputes.³²

According to the Pact, "just war" is waged by a state that observes the procedures prescribed by the Pact. Only that "just" war is "legal". Again, (or still) form has priority over essence. According to Lj. Aćimović war is "as a rule...forbidden" except in cases when it was permitted.³³ M. Sukijasović deems that each war according to the Pact was permitted.³⁴ Regardless of how the Pact is interpreted, it is obvious that wide possibility of resorting to force has been left. Observing the obligations from the Pact states could wage war in case of failure of peaceful settlement of disputes, first of all, if the Council does not make a report within six months or does not approve it unanimously. In addition, war could be commenced three months after the Council's report, which asserts that the subject of the dispute falls under the exclusive jurisdiction of the states. Also, after the expiration of the 3-month deadline both parties to the dispute have had the right to wage war if they do not accept unanimously the adopted report of the Council or arbitration, that is,

²⁹ "Службене новине СХС", 1920, No. 119a.

³⁰ In that sense, see С. Јовановић, *Конференција мира и питање о ратној одговорности*, "Југословенска књижевност", Загреб 1920, IV, p. 19; - М. Радојковић, *Међународна заједница и кривична одговорност у доба оружаног сукоба*, "Зборник института за криминолошка и социолошка истраживања", 1973, No. 2, p. 146. Egon Schwelb thinks that provision of Article 227 of the Versailles Peace Treaty represents a forerunner of crime against peace. E. Schwelb, *Crimes against humanity*, "British Year Book of International Law", 1946, pp. 182-183.

³¹ For more details, see J. Ray, *Commentaire du Pacte de la Société des Nations selon la politique et la jurisprudence des organes de la Société*, Paris 1930, pp. 395-416

³² Ђ. Нинчић, *op. cit.*, p. 71.

³³ Љ. Аћимовић, *Проблеми безбедности и сарадње у Европи*, Београд 1978, p. 227.

³⁴ М. Сукијасовић, *Појам агресије*, p. 39.

the verdict of the court. After the 3-month deadline expiration war could be waged against the state which does not proceed in line with the report or the verdict.³⁵

Partially forbidding only war was Article 12 of the Pact but not the use of other enforcement means such as occupation, reprisals and the like.³⁶ On the other hand, those forms of use of force were not considered either aggression aimed against the territorial integrity or political independence of states (Article 10), so that they could be used by the states in mutual fighting. It is obvious that use of the terms "war" and "aggression" made wide use of force possible in different forms against which the victim state had the right to fight back with the same or similar measure (if it was in position to do that). It had in no way to declare war state because it would run a risk to be pronounced guilty of having declared war without previously exhausting the means for peaceful settlement of dispute.³⁷

There were endeavours to correct the disadvantages of the Pact by subsequent acts. For that purpose under the Protocol on Peaceful Settlement of Disputes ("The Geneva Protocol" of 1924) any war was forbidden (Article 2) and use of force was permitted only in cases of self-defence and application of sanctions³⁸, while use of force was directly or indirectly excluded under a series of regional agreements, particularly for the sake of territorial conquests. The most famous among them in Europe are Locarno Agreements under which use of force in relations among signatory states is forbidden.³⁹ The most famous among the American agreements is the Treaty for the Suppression and Elimination of Disputes among American States ("Gondra Treaty") of 3 May, 1923. They were followed by the international organizations acts. The draft agreement on mutual help (made within the League of Nations in 1923) says that "offensive war is international crime" (Article 1). The same is said in the Preamble to the Geneva Protocol on Peaceful Settlement of International Disputes (1924). The Assembly of the League of Nations adopted resolutions on 25 September, 1925, under which offensive war is pronounced an international crime. At the 6th Pan-American Conference (Havana, 1928) unanimously was adopted a resolution which, starting from the fact that offensive war is an international crime against the humanity, points out that each aggression is considered unlawful and forbidden. Classification into "just" and "unjust" wars was replaced by the classification into "defensive" and "offensive" wars. Thus, existence of the conscience of

³⁵ Added to this by some authors is a defence war. М. Сукијасовић, *Појам агресије*, p. 33. We leave this aside because self-defence is in question.

³⁶ That was also the attitude of the Committee of Lawyers on the occasion of dispute between Greece and Italy (1923) when the Italians bombed and captured Corfu as an answer to the murder of general Tellini and members of his suite in Ioannina. The attitude of the Committee was that the League of Nations Council should decide whether the measures are in keeping with Articles 12-15 of the Pact. That attitude was accepted by the Council. Ђ. Нинчић, *op. cit.*, p. 72.

³⁷ М. Сукијасовић, *Појам агресије*, p. 34.

³⁸ For more details, see H. Wehberg, *Le Protocole de Genève*, "Recueil des Cours", 1925, t. 7, pp. 1-150.

³⁹ This is a general name for a number of agreements signed on 16 October, 1925: 1) Agreement on Guarantees ("Rhine Pact") among Germany, France and Belgium, 2) Agreement among Germany, Belgium, France, Great Britain and Italy, 3) Convention on Arbitration between Germany and Belgium, 4) Convention on Arbitration between Germany and France, 5) Agreement on Arbitration between Germany and Poland, 6) Agreement on Arbitration between Germany and Czechoslovakia. On the same day was signed an Agreement on Guarantees between France and Poland and an Agreement on Guarantees between France and Czechoslovakia.

the complete prohibition of war was approved, which would be soon done under the international agreements.

IV – PROHIBITION TO RESORT TO WAR

Among the acts under which resorting to war is prohibited occupying the most important place is undoubtedly a General Agreement on Renouncing War as an Instrument of National Policy, signed in Paris on 27 August, 1928.⁴⁰ On behalf of their peoples the states solemnly declare that they condemn resorting to war for the purpose of resolving international disputes and they renounce it as an instrument of the national policy in international relations (Article I). Solution to all disputes or clashes shall always be looked for by peaceful means (Article II). In view of the number of states (63) that have accepted it, it was considered a supplement to and revision of the League of Nations Pact.⁴¹ Since all wars were prohibited under it without distinctions, many states, when ratifying or joining it, declared that they did not deem defensive wars prohibited. The government of Yugoslavia declared that it "particularly agreed with that that the Agreement, the purpose of which was maintenance of peace, did not deprive the contractor of the right to defence in case of attack or invasion...the same that it fully frees contracting states towards anyone who would violate the Agreement. Also, the Yugoslav government shares the opinion that...nothing in that Agreement can give a pretext to interpretation contrary to the League of Nations Pact, the Agreement of Locarno or to the Agreement on Neutrality and generally to the international obligations Yugoslavia has concluded so far."⁴² According to the view of Miloš Radojković this explicative reservation "does not make either integral part of or supplementary part to the very agreement".⁴³ However, in the doctrine, the view was still advocated that defensive war was permitted under the Kellogg-Brinad Pact or within the application of sanctions.⁴⁴

⁴⁰ Known as the Paris or Kellogg-Briand Pact. It was signed by Germany, USA, Belgium, France, Great Britain, Italy, Japan, Poland and Czechoslovakia. For the text, see J. Ray, *op. cit.*, pp. 583-584. Effective from 24 July, 1929. Joined by many states among which by Yugoslavia as well. "Службене новине Краљевине СХС", 1929, No. 73-XXIX.

⁴¹ Ђ. Нинчић, *op. cit.*, p. 73. On 3 September, 1939, all independent states, except Bolivia, El Salvador, Uruguay and Argentine, were bound under it. М. Сукијасовић, *Појам агресије*, p. 38.

⁴² Quoted after М. Радјковић, *Рат и међународно право*, p. 14, Note 1.

⁴³ *Ibid.*, p. 14.

⁴⁴ Thus, Р. Вукадиновић, *Европска сигурност и сарадња*, Загреб 1977, p. 260, In his note of 23 June, 1928, sent to the governments of certain states, the American secretary of state Kellogg explained that the right to defence is a natural right and because of that need not be mentioned in the Agreement. Quoted after L. M. Goodrich – E. Hambro, *Commentaire de la Charte des Nations Unies*, Neuchâtel 1948, p. 267, et note 2. For more details, see И. Пржић, *Келогов пакт*, "Архив за правне и друштвене науке, Book XVIII (XXXV), 1929, No. 2, pp. 124-130; - Baron E.-E.-F. Deeschamps, *Le droit international nouveau. L'influence de la condamnation de la guerre sur l'évolution juridique internationale*, "Recueil des Cours", 1930, t. 31, pp. 393-559; - V.-H. Rutgers, *op. cit.*, pp. 1-123; - J. Whitton, *Le renforcement du Pacte de renonciation à la guerre*, "Revue générale de droit international public", 1932, No. 1, pp. 5-53; - C. Eagleton, *Faut-il proscrire seulement les guerres d'agression ou toutes les guerres*, "Revue générale de droit international public", 1932, pp. 498-511. For comment, see also J. Ray, *op. cit.*, pp. 584-589; - Ђ. Нинчић, *op. cit.*, p. 74; - ILA, *Report of the thirty-eighth Conference*, Budapest 1934.

The same ideas are repeated in the Pact on Non-Aggression and Reconciliation, signed in Rio de Janeiro on 10 October, 1933.⁴⁵ Both articles from the Kellogg-Briand Pact are included in Article 1 while Article 2 prescribes that territorial regulation, possession or gaining of a territory by means of force of arms shall not be recognized. This is a well-known Stimson doctrine adopted by the states of Latin America, but which is acceptable for all states. That is why the Pact is open to all states to joint it.⁴⁶

Thus, unambiguously forbidden in the order of the League of Nations was an aggression war by means of which the old view on just and unjust wars and formally replaced by the defensive and offensive wars. The former are permitted, the latter are forbidden. In spite of all that, instead of morals and politics law is taken as a measure of differentiation. That what has first been done under the declarations and resolutions has been confirmed under the agreements. However, there are differences between them in the contents. That what is in common is prohibition of offensive war, but the difference is in that the offensive war is pronounced an international crime in resolutions but not in the agreements. Many were suspicious on that matter. Starting from the view advocated by Quidde, pacifists made every efforts even at the beginning of the 20th century, and after the aforementioned agreements, to proclaim war a crime. Djordje Tasić wrote: "That what the pacifist law theory wants...it is not only absolute abolishing of war, but that war should be proclaimed a crime; it is that will and power of states shall be united to punish that one who offends international order and make him by force to respect it."⁴⁷ He missed only two years of life to see that comes true. On the contrary, Henry Stimson, the American secretary of state, declared (1932) that after the Kellogg-Briand Pact had been signed war became unlawful and that those who got into an armed conflict would be proclaimed the agreement violators.⁴⁸ Under the influence of such statements and actions of the peace movements there has been created a public conscience that offensive war is an international crime⁴⁹, the opinion shared also by many authors.⁵⁰

⁴⁵ More known as "Saavedra Lamas Pact" or Rio Pact.

⁴⁶ Among the states that joined it was Yugoslavia as well on 12 December, 1934. Enacted on 5 May, 1935. For more details, see Ж. Ледерер, *Значење Аргентинског пакта од 1933*, "Архив за правне и друштвене науке", 1935, Book XXXI (XLVIII), No. 4, pp. 370-384.

⁴⁷ Ђ. Тасић, *Пацифизам у правној филозофији*, "Архив за правне и друштвене науке", 1931, Book XXIII (XL), No. 4, p. 245. In lectures at the Hague Academy for International Law (1938) that attitude was slightly mitigated. Pacifism wants the mankind to accuse war and in an organized way to proceed against those who do not obey law and peace. Chapter III, The problem of war and peace. And Sociological Considerations on War and Justification of Pacifism, t. 3, next to last paragrah.

⁴⁸ Referring to that statement was the Nurember Court proving that war had been proclaimed a crime. *Нирнбершка пресуда*, published by "Архив за правне и друштвене науке", Београд 1948, pp. 86-87.

⁴⁹ М. Сукијасовић, *Појам агресије*, p. 64.

⁵⁰ Lauterpaht's opinion was that war, according to Kellogg-Briand Pact, became not only illegal, unlawful but criminal as well. That is a good basis even if the custom rule would not be considered to have been established under many international documents, according to which offensive wars are declared a crime. H. Lauterpacht, *Oppenheim's International Law*, II seventh ed., London 1952, pp. 129, 192; - I. Brownlie, *op. cit.*, p. 168; - J. Žourek, *La définition de l'agression et le droit international*, "Recueil des Cours", 1957, t. 92, pp. 767-768. In lectures at the Institute for High International Studies in Paris, held from 26 to 28 March, 1968, Žourek repeated the attitude that accusation of war represents its incrimination as an international crime, but he added that it was "proved only after the World War II by the verdict of the Internatioanal Military Tribunal in Nuremberg (1946)". J. Žourek, *Les concepts d'agression et de légitime défense en droit international public*, pp. 2-3, of the personal notes of the author of these lines. On the incrimination of crimes against peace in international law, see M. Марковић, *Међународна кривична дела*, "Југословенска ревија за међународно

Although such conclusion can be exaggerated for that time⁵¹, it is certain that some prohibitions in the international public law have paved the way to creating international criminal law. The prohibitions in the first one do not result automatically in sanctions for their violation in the second one. This is in the best way proved by the development of war law. Although the Institute for International Law has provided for in its "Manual on Laws and War Customs" (1880)⁵² that violations of war law are subject to punishment according to the criminal law (Article 84), the obligations of states to foresee sanctions is contained only in the Convention for Improvement of Destiny of the Wounded and the Sick in Armies in War (1906) under the mitigated name "measures" (Articles 27-28). Also, the Rule Book on Laws and Customs of Land War, added to the (IV) Hague Convention (1907) states a series of "prohibitions" (Article 23) while the very Convention foresees material (civilian) responsibility (Article 3), but some insufficiently clear provisions allow conclusion that criminal responsibility has also been considered.⁵³ If this is the situation with the rules that make *jus in bello*, what to say about *jus ad bellum*.

The very prohibition to resort to war was, no matter how much limited to offensive war, a great achievement, particularly when we have in mind that it was in all the gravest form of use of force with the grimmest aftermaths. That is why many pacifists (Ludwig Quidde in Germany and Djordje Tasić in Yugoslavia) and criminal lawyers requested the war to be proclaimed an international crime. In this country, Toma Živanović pointed out, starting "particularly from the experiences acquired in the World War" that specifically foreseen as international criminal acts should be offensive war, doings by means of which danger from war is created, encouraging offensive war and preparation doings for war (for example, maneuvers and mobilizations for the purpose of preparing war), interference of a state into political fight in other state, unjustified expelling of foreigners, internations and sequestrations. He saw the germs of those international criminal acts in the Kellogg-Briand Pact.⁵⁴ It will happen only during the World War II and immediately after cessation of hostilities in a step-by-step manner.

Mentioned in the Moscow Declaration, signed by Roosevelt, Churchill and Stalin (1943), is only criminal responsibility for violations of war law,⁵⁵ that is, for war crimes while a month later in the Communiqué of the Cairo Conference, held on 1 December, 1943, Roosevelt, Churchill and Chiang Kai-shek declared that the three great allies wage war to "repulse and punish the Japanese aggression".⁵⁶ Regardless of incompleteness of the

право", 1965, No. 1, pp. 36-39.

⁵¹ This is the opinion of M. Сукијасовић, *Појам агресије*, p 39.

⁵² Known as the "Oxford Manual".

⁵³ Thus was interpreted by the Nuremberg Court. *Нурнбершка пресуда*, pp. 78, 122; In the doctrine, R. Malézieux, *Le statut international des criminels de guerre*, "Revue générale de droit international public", 1941-1945, Vol. II, 168, note 2; - М. Бартош, *Општи поглед на развој међународног ратног права од 1907. до 1957. године*, "Југословенска ревија за међународно право", 1958, No. 2, p. 272. For more details, see М. Милојевић, *Обавеза кажњавања за међународна кривична дела*, "Југословенска ревија за криминологију и кривично право", 1969, No. 2, particularly pp. 215-217.

⁵⁴ T. Givanovitch, *Le Droit pénal interétatique*, "Annuaire de l'Association yougoslave de droit international", Belgrade-Paris 1931, p. 243.

⁵⁵ *Уједињене нације. Збирка докумената 1941-1945*, second edition, "Архив за правне и друштвене науке", 1947, pp. 17-18.

⁵⁶ *Ibid.*, p. 30.

aforementioned documents, the International Military Tribunal Statute, in Article 6, paragraph 2, clause a) states first and foremost crime against peace defining it as "planning, preparation, commencement or waging of offensive war or war by means of which international contracts, agreements or guarantees are violated or participation in a common plan or conspiracy for commitment of whatever of the aforementioned acts".⁵⁷ In Law No. 10 enacted by the Control Council for Germany (20 December, 1945) crime against peace was, in Article II, paragraph 1, clause a) more widely set up like "commencement of invasion of other states and offensive wars by means of which international law and agreements are violated, including but not limiting on them, planning, preparations, commencement and waging of offensive war or war by means of which international contracts, agreements or guarantees are violated or participation in a common plan or conspiracy for commitment of whatever of the aforementioned acts".⁵⁸ Similar is the provision of Article 5 of the International Military Tribunal Statute in Tokyo⁵⁹ according to which a crime against peace is represented by "planning, preparations, commencement or waging of the declared or nondeclared war or war by means of which international law, contracts, agreements and guarantees are violated, that is, participation in a common plan or conspiracy for commitment of whatever of the aforementioned acts."

Regardless of differences in the formulation of crime against peace in three different acts, it is important offensive war in the traditional meaning of the term or war by means of which international agreements, that is, international law are violated to be considered a criminal act. That supplement, included upon request of France, alludes to the Locarno Agreements, Kellogg-Briand Pact and other international agreements⁶⁰ by means of which the objection of retroactivity is eliminated in advance.⁶¹ Since the defence of the defendants has pointed out that objection the Court has said in the verdict: "The Statute is not an arbitrary performance of power by the victorious nations, but, according to the Court,...an expression of international law that existed in the times of its enactment. To that extent the Statute itself is a contribution to international law."⁶² In addition, the United Nations General Assembly has⁶³ confirmed the principles of international law contained in the Statute and the verdict of the Nuremberg Court and has called the International Law Commission⁶⁴ to formulate them. The Commission has done that pointing out that it is not responsible to discuss their contents⁶⁵, while the General

⁵⁷ *Нирнбершка пресуда*, p. 14. Yugoslavia joined The London Agreement on Prosecuting and Punishing War Criminals of the European Axis Forces of 8 August, 1945, with the International Military Tribunal Statute on 29 September, 1945.

⁵⁸ *Нирнбершка пресуда*, p. 20.

⁵⁹ The Statute was adopted by the Proclamation of the Supreme Commander of the Allied Forces on the Pacific of 19 January, 1946.

⁶⁰ 26 agreements and statements, violated by Germany, were mentioned in the indictment in Nuremberg (even the Munich Agreement of 30 September, 1938).

⁶¹ М. Сукијасовић, *Појам агресије*, p. 78.

⁶² *Нирнбершка пресуда*, p. 84 – H. Donnedieu de Vabres, *Le procès de Nuremberg devant les principes modernes du droit pénal international*, "Recueil des cours", 1947, t. 70, pp. 477-582.

⁶³ Under the Resolution No. 95 (I) of 11 December, 1946.

⁶⁴ Under the Resolution No. 95 (I) of 11 December, 1946, and 117 (II) of 21 November, 1947.

⁶⁵ *Assemblée générale, Documentes officiels, Conquiesième session, Supplément No 12, Rapport de la Commission du droit international sur les travaux de sa deuxième session du 5 juin au 29 juillet 1950*, p. 12.

Assembly has accepted the principles formulated.⁶⁶ This confirms not only that offensive war is forbidden by general international law, but that it is an international crime.⁶⁷ This is to a great extent a basis for understanding the provisions of the Charter of the United Nations which have formally been made on the second, separate line.

V – PROHIBITION TO USE FORCE AND THREATS

The Charter of the United Nations, as well the International Military Tribunal Statute, has been built upon international law valid in the times of its making. In its preamble pointed out first and foremost is that "We the peoples of the United Nations determined" to save the succeeding generations from the scourge of war which has brought untold sorrow to mankind and that armed force shall not be used, save in the common interest. It is already this that has shown that the Charter, although relying on the past, opens the way to future development because the word "war" has no the old legal and technical meaning of the armed conflict of sovereign states, but that it is becoming a synonym for armed conflicts or use force in general.⁶⁸ This is confirmed later on by the mention of "armed force". A note has to be made here that "war" is no more mentioned in the Charter, but only "force" and "enforcement measures", complete prohibition to use force is not indicated as well because its use is permitted "in common interest" that is nowhere more closely determined. Somewhat different is the provision of Article 2, paragraph 4, which reads:

"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."

Use of force is certainly prohibited against the territorial integrity or political independence of states⁶⁹ which also includes armed force and intervention. There is no any doubt that different forms of armed reprisals are not joinable with the purposes of the United Nations. The use of the term "force" clearly shows that both war in the classical sense and every armed action of states are covered under prohibition.⁷⁰ In that sense the Charter of the United Nations goes further of all previous international acts under which use of force is prohibited. In that frameworks war as the gravest form of use of force ceases to be an institution of international law, legally permitted means for attainment of rights and interests, sanctions for violations of norms of international law and means of self-help. The Charter does not recognize just and unjust, offensive and defensive wars; it only speaks of legal and illegal use of force the latter being a rule and former an exception.⁷¹

⁶⁶ Under the Resolution No. 488 (V).

⁶⁷ For more detail, see M. Милојевић, *op. cit.*, p. 223.

⁶⁸ In that sense L. M. Goodrich – E. Hambro, *op. cit.*, p. 115.

⁶⁹ Territorial integrity and political independence were protected in the League of Nations Pact from "external aggression" (Article 10).

⁷⁰ Also interpreted in this way by L.M. Goodrich – E. Hambro, *op. cit.*, pp. 132-133.

⁷¹ Ђ. Нинчић, *op. cit.*, pp. 76,77.

Many authors are apt to interpret the notion "force" as "armed force"⁷² rejecting other forms of force such as political and economic, while other authors support wider understanding. In favour of this Sharmasancvilly says that different force can be used to the properties protected under Article 2, paragraph 4 of the Charter. Territorial integrity may be disturbed only by armed force, but political independence may be disturbed in different ways.⁷³ Needless to speak about the use of force contrary to the purposes of the United Nations. Therefore, Ninčić supports more extensive understanding.⁷⁴ Also contributing to a certain extent to this confusion were redactors of the Charter of the United Nations.

The greatest progress in the development of international law is certainly prohibition of threat with force as well as the use of force itself. Threat with force was not expressly prohibited by the League of Nations Pact, but "threat or danger from aggression" was a reason for the action of the League of Nations Council (Article 10).⁷⁵ Prohibition of threat was necessary to accomplish the principle purpose of the United Nations – maintenance of international peace and security and, to that end, taking effective collective measures for the purpose of "preventing and eliminating threats to peace and suppression of aggression or other breaches of peace" (Article 1, paragraph 1).⁷⁶ Prohibition to use force has been completed by prohibition of threat.

Legal and political importance of the prohibition of force and threat is great not only within the framework of the legal system of the United Nations, but of the general international law as well if they are not identified. The Charter has proved all previous prohibitions to resort to war and that newly introduced, as a part of the general international legal order, has enriched international law as such and the norms of the Charter have become a foundation of the modern general international law.⁷⁷ Parallel existence of former acts wherein the criticisms of resorting to war are narrower and obligations of states less does not affect obligatoriness based on the Charter because they all have to be harmonized with the provisions of the Charter (Article 2, paragraph 2, and Article 52, paragraph 1), but in case of inconsistency precedence shall be given to the obligations from the Charter (Article 103 of the Charter). This is valid for future agreements. This is the only way to explain that the prohibition to use force and threat has been formulated in the form of a principle that must be observed by the non-member states of the United Nations as well (Article 2, paragraph 6, of the Charter). Thanks to this, this prohi-

⁷² Thus L. M. Goodrich – E. Hambro, *op. cit.*, p. 115.

⁷³ Г. В. Шармазанавили, *Принципы ненападения в международном праве*, Москва 1958, стр. 42-43.

⁷⁴ Ђ. Нинчић, *op. cit.*, p. 80. For more extensive survey of attitudes, see pp. 78-80. See also H. Wehberg, *L'interdiction du recours à la force. Le principe et les problèmes qui se posent*, "Recueil des Cours", 1951, t. 78, 1-121; - H. Waldock, *The regulation of the use of force by individual States in International Law*, "Recueil des Cours", 1952, V. 81, pp. 451-517; - S. Glaser, *La guerre d'agression à la lumière des sources du droit international*, "Revue générale de droit international public", 1953, No. 3, pp. 398-443; - G. Scelle, *Quelque réflexions sur l'abolition de la compétence de guerre*, "Revue générale de droit international public", 1954, No. 1, pp. 5-22.

⁷⁵ For more detail, see J. Ray, *op. cit.*, pp. 345-346, 362-363.

⁷⁶ For more details, see M. Сукијасовић, *Претња миру у поретку Уједињених нација*, "Међународни проблеми", 1958, No. 1, pp. 54-68; - Ђ. Нинчић, *op. cit.*, pp. 77, 80.

⁷⁷ М. Сукијасовић, *Појам агресије*, p. 92.

bition has become a supreme norm of international law (*jus cogens*) from which there is no departure and which can be replaced only by the identical norm.

In spite of the striving that prohibition to use force and threat should be as inclusive as possible, possibilities for certain exception "in the common interest" and "in keeping with the purposes of the United Nations". Having that in mind, as well as some other provisions of the Charter which permit use of force, certain authors make mention of the most frequent cases of self-defence and collective measures of the United Nations⁷⁸, while other authors add self-help for the purpose of attaining their right and recently attainment of the right to self-determination, mass violation of human rights, "humanitarian catastrophes" and the like. However, cursory reading of Article 2, paragraph 4, of the Charter is well enough to understand that the prohibition to use force and threat is absolute and unconditional and that it does not permit exceptions. If there had been a wish to make an exception, sure that one would have proceeded according to paragraph 7 of the same Article, which at the end says that guarantee of non-intervention of the Organization shall not be valid in cases when Chapter VII of the Charter is applied.⁷⁹

If some exception from the general prohibition to use force and threat can be found in the Charter, it can be seen only in a rather poor formulated provisions on enemy states not protected under the principles of the Charter. Pointed out in the transitional provisions on the security is that the actions of the founders of the United Nations are not precluded that have been taken or authorized by their respective governments against the enemy states as a consequence of the World War II (Article 107). Based upon that provision, war against Japan could have been waged even after the adoption of the Charter. Much greater misfortune is that similar provision has been included in Article 53, paragraph 1, which refers to the actions of regional organizations in the performance of authorizations of the Security Council. According to this provision regional organizations and their members are authorized to take measures to prevent renewal of aggressive policy of enemy states. Both provisions are a consequence of the fact that the United Nations have been created during the war, but independently of it, so that it could not be interrupted under the Charter. After the end of the war these provisions have lost their importance, particularly those from Article 107.⁸⁰ There have been no enemy states for long in the sense of the Charter, but it is a great disadvantage that authorization from Article 53, paragraph 1, is not limited in time and of the whole Article that it is not clearly linked with Article 42 of the Charter. Therefore, it's no wonder that use of force or intervention "without the authorization of the Security Council", as if it is authorized to permit someone to proceed contrary to the express provision of Article 2, paragraph 4, of the Charter, is spoken of, although in the political jargon and without the conscience on the importance of the words used!

The thing is much easier when self-defence is in question. Although the former explanation of Stimson has been accepted that natural law of states⁸¹ is in question, the Charter

⁷⁸ As according to the Geneva Protocol. H. Lauterpacht, *op. cit.*, p. 154. In this country, for example, Љ. Аћимовић, *op. cit.*, p. 227.

⁷⁹ According to our opinion, this is needless because internal questions do not endanger international peace and security.

⁸⁰ For more details, see H. Kelsen, *The Law of the United Nations*, pp. 805-815.

⁸¹ See note 44.

clearly emphasizes that the right of states has not been abolished, but limited to taking measures by the Security Council. Thus, Articles 42 and 51 are clearly determined as an answer to the violation of Article 2, paragraph 4, of the Charter. Therefore, they do not represent any exception from the rule on the prohibition to use force. It is needless to discuss other cases of "permitted" use of force.⁸²

Prohibition to use force has been provided for in statutes of certain international political organizations. Thus, under Article 5 of the Arab League Pact resorting to the use of force for the purpose of settlement of disputes that may arise between the member states is prohibited.⁸³ Article 1 of the North Atlantic Treaty (1949) contains obligation of states from the Charter of the United Nations to abstain in international relations from resorting to threats and use of force in any way not joinable with the purposes of the United Nations.⁸⁴ The same obligation, also in Article 1 is repeated in the Warsaw Pact (1955)⁸⁵, Southeast Asia Treaty Organization (OTASE/SEATO, 1954)⁸⁶ and the Pact on Security of USA, Australia and New Zealand (ANZUS Pact, 1951). In the Charter of the Organization of American States (1948), in one of the principles, American states condemn offensive war (Article 5, paragraph e).⁸⁷

VI – DECLARATIONS ON THE PROHIBITION TO USE FORCE AND THREAT

Former development of the international community undoubtedly shows that the prohibition to use force and threat is one of the basic principles of international law. This is proved by many so far adopted documents, but also those which, for political reasons, cannot still be accepted by most of states. The top ranking among them is probably the declaration on rights and obligations of states. In the draft declaration, adopted by the International Law Commission of the United Nations, four articles are devoted to the questions of war and peace which are, because of their significance, worth quoting here:

"Article 7 – Each state must take care that the governing conditions in its territory shall not be a threat either to the peace or to the international order.

Article 8 – The duty of each state shall be to settle all disputes with other states by peaceful means and in a manner so as not to endanger peace, international security and justice.

Article 9 – The duty of each state shall be to refrain from resorting to war as a means of national policy and to refrain of whatever threat or use of force either against the territorial integrity or political independence of any other state or whatever other manner inconsistent with law or international public order.

⁸² For our attitude on this, see M. Milojević, *Сила и претња у међународном праву*, "Сила и право", Београд 1999, particularly pages 108-115. Neither Goodrich and Hambro link those provisions in commenting the Charter.

⁸³ P. Reuter – A. Gross, *Traité et documents diplomatiques*, Paris 1963, p. 421; - П. Манговски, *Аранска лига*, Београд 1974, p. 199.

⁸⁴ P. Reuter – A. Gross, *op. cit.*, p. 169

⁸⁵ *Ibid.*, p. 175.

⁸⁶ *Ibid.*, p. 416

⁸⁷ "Revue générale de droit international public", 1948, Nos. 1-2, p. 317.

Article 11 – The duty of each state shall be not to recognize any territorial acquisitions effected by another state violating Article 9.⁸⁸

The principle of prohibition to use force and threat has even more been worked out in the Yugoslav Draft Declaration on the Rights and Obligations of States the text of which was revised at the Conference for International Law held in Belgrade in 1951. Dedicated to it were seven articles quoted herewith in full length:

"Article 9 – Each state shall be obliged to maintain peaceful relations with other states and to prevent any activity that would be directed to spreading hatred towards other peoples, offence of their honour and violence of dignity of other states.

Article 10 – Each state shall be obliged to provide the governing conditions in its territory not to endanger international peace and security and should such situation arise in the territory of one state other states shall have the only right to switch the attention of the Security Council to that situation.

...

Article 12 – Each state shall be obliged to prevent and punish any activity or propaganda in its territory intended to undermine other states, breach their sovereignty and independence or interfere in internal affairs of other states or other forms of war agitations against them.

Article 13 – Each state shall be obliged to refrain from threat or use of force and economic or political pressure against the sovereignty and territorial integrity or political or economic independence of other states and from any other measures contrary to the Charter of the United Nations and international law.

Article 14 – Each state shall be obliged to settle its disputes with other states by peaceful means in a manner that international peace and security, as well as justice, shall not be endangered.

Article 15 – Aggressive war shall be outlawed and represents a crime against the peace. It is obligation of each state to refrain both from aggressive war, except in case of self-defence provided for under Article 19 of this Declaration, and any other use of armed force as a means of its national policy.

...

Article 17 – Each state shall be obliged to refrain from creating aggressive blocks or from joining those blocks."⁸⁹

The Charter of the United Nations and other therefrom inspired documents of general nature do not place prohibition of use of force and threat in the forefront. They, first and foremost, underline principles referring to the state itself as the subject of international law (the right to existence, independence, sovereign equality, non-interference into internal affairs) and only then prohibition to use force, not rarely together with peaceful settlement of disputes or after that. This corresponds to the systematics of the doctrine of international law where in the first place state is discussed, particularly after the World

⁸⁸ Quoted after M. Бартош, *Међународно јавно право*, I, Београд 1954, p. 465; - *Rapport de la Commission du droit international sur les travaux de sa première session*, du 12 avril au 9 juin 1949, Lake Success, New York 1949, p. 9.

⁸⁹ M. Бартош, *Међународно јавно право*, I, p. 467.

War II since when peace is considered a normal state⁹⁰ and war an exception although such conclusion could not be drawn only based upon Article 12 of the League of Nations Pact. Mankind has passed a long way from Grotius' times when war and peace were equal states in the international relations. However, even when resorting to war and use of force is unambiguously prohibited one cannot lose sight of the danger of possible violation of that prohibition. Therefore, it is useful, in the interests of peace, to first and foremost emphasize prohibition of war. Starting from that point, M. Radojković wrote that the principle of mutual non-aggression was above other principles and rules belonging to what is called the right to peace. If that principle is called into question, that could cast doubt on all other principles as well, but if it is respected, the legal validity of other principles of customary or contractual law can obtain its full meaning.⁹¹

The principle of prohibition to use force and threat has come first in the documents and demands of non-aligned states to codify the principles of coexistence. That became apparent both within the scope of the International Law Association⁹² and in the United Nations, that is, the General Assembly Resolution No. 1815 (XVII) of 18 December, 1962, as well as in the works of our authors.⁹³ Correctness of that attitude has been proved by the discussions of the Special Committee that took the longest time just with reference to formulating this principle although all the drafts and proposals started from Article 2 of the Charter of the United Nations.⁹⁴

Even before the agreement at the Special Committee on formulating the principles has been reached, paragraph 2 of the Preamble to the Declaration of the United Nations on the non-permissibility of interference into internal affairs of states and on the protection of

⁹⁰ Not accidentally that general courses on international law at the Hague Academy for International Law, beginning from 1929, are named "General Rules of International Law of Peace"

⁹¹ M. Radojković, *La codification des principes de la coexistence pacifique*, "Jugoslovenska revija za međunarodno pravo", 1962, No. 2, pp. 172-173.

⁹² M. Radojković, *La codification des principes de la coexistence pacifique*, pp. 171-173; - Les principes ou règles juridiques de la coexistence pacifique devant l'International Law Association, "Jugoslovenska revija za međunarodno pravo", 1964, No. 1, p. 2; - I.L.A., *Report of the Thirty-first Conference*, Tokyo 1964, p. 810.

⁹³ Б. Јаковљевић, *Начело забране употребе силе и претње силом*, "Годишњак Института за међународну политику и привреду" 1963, pp. 661-690; - *The Principle of the Prohibition of the Threat and Use of Force*, "Jugoslovenska revija za međunarodno pravo", 1964, No.1, pp. 17-29; - К. Обрадовић, *Забрана претње или употребе силе*, "Кодификација принципа мирољубиве и активне коегзистенције", Београд 1969, pp. 47-107; - *Prohibition of the Threat or Use of Force*, "Principles of International Law Concerning Friendly Relations and Cooperation, Belgrade 1972, pp. 51-128.

⁹⁴ For more details, see М. Шаховић, *Заседање Специјалног комитета Уједињених нација за проучавање принципа међународног права о пријатељским односима и сарадњи држава*, "Годишњак Института за међународну политику и привреду" 1964, pp. 1144-1150; - *Друго заседање Специјалног комитета Уједињених нација за проучавање принципа међународног права о пријатељским односима и сарадњи држава*, "Годишњак Института за међународну политику и привреду" 1966, pp. 1179-1186; - О. Рачић, *Треће заседање Специјалног комитета Уједињених нација за проучавање принципа међународног права о пријатељским односима и сарадњи држава*, "Годишњак Института за међународну политику и привреду" 1967, pp. 1221-1225; - М.Шаховић, *Четврто заседање Специјалног комитета Уједињених нација за проучавање принципа међународног права о пријатељским односима и сарадњи држава*, "Годишњак Института за међународну политику и привреду", 1968, pp. 1283-1287; - *Пето заседање Специјалног комитета Уједињених нација за проучавање принципа међународног права о пријатељским односима и сарадњи држава*, "Годишњак Института за међународну политику и привреду", 1969, pp. 1504-1507.

independence and sovereignty, in the meantime adopted by the General Assembly of the United Nations⁹⁵ says that the United Nations have been created to "eliminate war, threats to the peace and acts of aggression". With this in mind, it is even more justified to emphasize in the first paragraph of the Preamble of the Charter of the United Nations on the principles of international law on friendly relations and co-operation of states in keeping with the Charter of the United Nations, adopted by the General Assembly by acclamation⁹⁶ that "maintenance of international peace and security" is one of the basic purposes of the United Nations, in the second one that the peoples of the United Nations are determined to be tolerant and to live one with another in peace as good neighbours and in the third one that it is important to "maintain and strengthen international peace" and "develop friendly relations among peoples". Emphasized in the fifth paragraph is that "strict observance of the principles of international law...conscientious performance of obligations accepted by the states... is of paramount importance for maintenance of international peace and security".⁹⁷ Directly dedicated to the principle of prohibition to use force are paragraphs 9 and 10. In paragraph 9 states are being reminded of the duty, in their international relations, to refrain from "force, military, political economic or other nature, directed against political independence or territorial integrity of a state" and in paragraph 10 that it is "essential that all states shall refrain in their international relations from the threat or use of force either against territorial integrity or political independence of each state, or in any other manner inconsistent with the purposes of the United Nations". It is obvious that only this paragraph was copied from the Charter of the United Nations and that in a worsened text, not as a duty or obligation, but that it is "essential", while the word "duty" is used in the previous paragraph on "force" against the integrity or independence of states which is completely needless. The same applies to the fifteenth paragraph which says that "any attempt the purpose of which to disturb, partially or completely, national unity and territorial integrity of a state or a country (?) or to make a damage to its political independence shall be inconsistent with the purposes and principles of the Charter".⁹⁸ Whether because a particular principle has not been dedicated to integrity?

The most important, however, was the contents of the principle that is "solemnly proclaimed" in the text like in Article 2, paragraph 4, of the Charter. In working out, the principle from the Charter was copied and added as follows: "Such resort to the threat or use of force is violation of international law and the Charter of the United Nations and shall never be used as a means for settlement of international questions".⁹⁹ Then, the next paragraph says that "a war of aggression" is a crime against the peace which entails responsibility according to international law, which is a changed order of words of the Nuremberg principles according to which a crime against the peace is a broader, general term while an offensive war is an explanation of the notion or one form of crime against the

⁹⁵ Under the Resolution No. 2131 (XX) of 21 December, 1965.

⁹⁶ Under the Resolution 2625 (XXV) of 24 December, 1970.

⁹⁷ Quoted after the text published in the Proceedings "Уједињене нације и савремени свет", Београд 1970, pp. 301-302.

⁹⁸ Ibid., pp. 302-303.

⁹⁹ Ibid., p. 303.

peace.¹⁰⁰ A novelty with reference to the Charter is a paragraph that states shall be obliged to refrain from propaganda of offensive wars which was included earlier into Article 20, paragraph 1, of the International Pact on Civilian and Political Rights (1966).

Particularly mentioned in the Declaration are cases in which states should refrain from the use of force or threat: violations of the existing state borders, settlement of international disputes (including territorial disputes and the questions referring to the state borders), violations of international demarcation lines (ceasefire lines), military occupation of a territory. Emphasized in the last case is that occupation (of course, by violating the prohibition to use force) can neither be used to acquire a territory nor such usurpation of a territory will be recognized. This goes without saying if the use of force against the territorial integrity of a state is prohibited. This is well enough from the principle point of view, but since none benefits can be acquired by unlawful doings it is logical that they cannot be recognized. Therefore, this attitude would be more justifiable in the principle dedicated to the territorial integrity. All the more so this is valid for exclusion from application of this principle of regimes created prior to the Charter of the United Nations. What is all recognized by this? Even worse is mentioning the authorizations of the Security Council. Could it use force against territorial integrity of a state or occupy it?

The worse comes at the end. The last paragraph of the Declaration reads:

"Nothing contained in previous paragraphs shall be interpreted as if it expands, that is, narrows, in any manner, the reach of the provisions of the Charter referring to the cases in which the use of force is permitted."

No more no less! As if it returns to the time of the League of Nations! There are no in the Charter "cases in which the use of force is permitted"! The enforcement measures of the Security Council (Article 42) and self-defence (Article 51) are no exceptions from the general prohibition to use force (Article 2, paragraph 4). Correct only is the attitude of the Declaration that states are obliged to refrain from reprisals by the use of force.¹⁰¹ Discussed can be justification that particularly emphasized in this act is prohibition to organize or encouragement to organize "irregular forces" or armed gangs, particularly mercenaries, for the purpose of their being committed into the territory of another state. Such provision at one time (1933) found its place in the definition of aggressor as a form of aggression (paragraph 5), which approaches intervention into internal affairs of states¹⁰² and particularly on the duties of states to refrain from inducting civil war or terrorism in other states or to tolerate organization in their territories which particularly coincides with the previous sentence. Although it is obvious that striking interference in internal affairs of other states is in question (devoted to which is a particular principle), a mention of it is made here probably because for many small states (particularly in Africa) it is by far a greater danger than possible invasion of foreign armed forces.

Non-aligned states are also "responsible" for including, in this place too, a duty of refraining from "resorting to any enforcement measure" against the people fighting for accomplishment of the right to self-determination. It is not justifiable, not only because this right has been included into the Declaration in the form of a separate principle, but be-

¹⁰⁰ For more details, see M. Сукијасовић, *Појам агресије*, p. 79.

¹⁰¹ See note 82.

¹⁰² M. Сукијасовић, *Појам агресије*, p. 53, deems this to be an "indirect aggression".

cause the Declaration contains principles on relations among states as well, but not among states and peoples.

Those disadvantages are more scarce in the Declaration on the principles to be used by states, signatories of the Final Act of the Conference on Security and Co-operation in Europe (1975), as guidelines in their mutual relations. The very text of the principles of refraining from the threat with force or use of force (which came second after the principles of sovereign equality) is considerably shorter. It has only three paragraphs, but use of force is also dealt with at other places. That problem was differently approached by states depending upon how much they were interested in. Also, this is reflected in the proposals. The proposals of great powers were shorter and more general (including the Soviet proposal as well), the French one being considerably broader, while those of Yugoslavia and Romania were even more broader.¹⁰³ The compromise was reached in that the prohibition to use force was discussed in several parts ("documents") of the Final Act: 1) Declaration within four principles,¹⁰⁴ 2) separate "document" on refraining from the use of force, 3) document on peaceful settlement of disputes and 4) document on military aspects of security.¹⁰⁵

The states are said in the principle on refraining from the threat with force or the use of force, such as in the Charter of the United Nations, that they will, "in their mutual relations as well as in their international relations in general", refrain from the threat with force or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations or this Declaration. Added to this was that any reason could not be referred to that would serve as a justification for resorting to the threat with force or the use of force by violating this principle. In line with this states will refrain from these acts which represent threat with force or direct or indirect use of force against another state. They will refrain from any demonstration of force for the purpose of making another state to renounce from exercising their sovereign rights and from any act of reprisals. No threat with force or use of force will be applied as a mode of settlement of disputes or questions that may cause disputes.¹⁰⁶

A supplement that no reason can serve as justification to use force or threat was adopted at the proposal of Yugoslavia, the similar attitude being assumed by Romania, which was directed against both great states.¹⁰⁷ This is the essence of the supplement by Politis to the definition of aggressor (1933). However, here, also, danger is left for incorrect interpretation according to which the use of force or threat with force could be permitted if "not joinable" or "contrary" or if the principle of prohibition "is not violated". Aggression of the member states of NATO on Yugoslavia (1999) has proved those fears.

¹⁰³ Љ. Аћимовић, *op. cit.*, p. 230.

¹⁰⁴ Prohibition to use force, non-interventions, non-violation of borders and territorial integrity added to which by Љ. Аћимовић is peaceful settlement of disputes as an alternative. Љ. Аћимовић, *op. cit.*, p. 228 and footnotes 166 and 167.

¹⁰⁵ Principles of prohibition to use force and non-intervention and military aspects of security were in all proposals, insisting on non-violations of borders and integrity were the USSR and her allies, Romania on a particular document on the use of force and Switzerland on a document on the peaceful settlement of disputes. Љ. Аћимовић, *op. cit.*, p. 228 and note 168.

¹⁰⁶ Quoted after "Документи КЕБС, Београд 1955, p. 12.

¹⁰⁷ Љ. Аћимовић, *op. cit.*, pp. 231, 232

The Conference did not adopt the proposal of Yugoslavia all the activities to be prohibited that could result in resorting to force and violation of the sovereign rights of states, endangerment of their security as well as distrust and hostilities in international relations.¹⁰⁸ That was unrealistic to expect because many things might cause the use of force or threat. Instead, an opinion was accepted that states should refrain from "all acts" that represented indirect use of force.

Romania insisted that particularly stated should be certain activities that represented use of force or threat whereby the very principle would be "reinforced". That was an obvious reaction to the intervention in Czechoslovakia (1968), which otherwise was differently interpreted, the most firecey opposing to which were the Soviet Union with her allies.¹⁰⁹ Instead, a separate text was adopted¹¹⁰ that was not "clearly singled out as a separate document", but was designated under i) as the first part of the document having a wider reach: "The questions referring to the accomplishment of some of the aforementioned principles". This is closer to the attitude of Yugoslavia and other states not to adopt a separate text referring to one principle only that would be singled out.¹¹¹

Confirmed again in the Preamble is the obligation of not resorting to the threat or use of force and the conviction in the necessity that this should become a realistic norm of international life. Under certain paragraphs states are obliged to fulfil in every manner and in all forms the obligation of refraining from the threat with force or use of force, particularly to refrain from invasion or attack on the territory of another state, then to refrain from any act of economic compulsion, from propagandizing offensive wars or threat or use of force. Repeated on the whole was the attitude from the principle that they would refrain from any demonstration of force with the purpose of making the other state to refrain from the full exercise of rights typical of sovereignty and thus ensure whatever benefits, which was partially repeated in connection with the economic compulsion.¹¹²

The obligation of refraining from the threat with force or use of force has from the first paragraph of the principle almost literally been copied to the third paragraph of the preamble of the Document on the measures of confidence and certain forms of security and disarmament.¹¹³ Probably because the purpose of the document is, as laid down in the fourth paragraph, to reduce danger from armed conflicts.

Although there was no wish to attach more importance to prohibition of using force or threat than to other principles, yet these efforts did not turn to be a complete success. Truly, the need to respect all principles of the Final Act¹¹⁴ is repeatedly emphasized in the Final Document of the Madrid Meeting of representatives of the member states of the Final Act (1983), but it is "again confirmed" that it was necessary to strictly and fully observe the principle of refraining from the threat with force or use of force "as norms of

¹⁰⁸ *Ibid.*, p. 232.

¹⁰⁹ *Ibid.*, p. 234.

¹¹⁰ Named by Lj. Aćimović "a document devoted to the question of refraining from the use of force". Љ. Аћимовић, *op.cit.*, p. 234.

¹¹¹ *Ibid.*, p. 234.

¹¹² This, combined with a military and political compulsion, has also been inserted into the principle of non-intervention into internal affairs. "Документи КЕБС", pp. 12, 13, 16-17.

¹¹³ *Ibid.*, pp. 19.

¹¹⁴ *Ibid.*, pp. 77, 78, 79

international life", while two paragraphs were devoted to the fight against terrorism.¹¹⁵ In the Paris Charter for new Europe (1990), the chiefs of states or governments in the document entitled "Friendly Relations among the Participating States" state:

"To preserve democracy, peace and unity in Europe, we solemnly promise that we will fully respect the ten principles of the Final Act from Helsinki. We declare that these ten principles have a lasting value and that we are determined to translate them into reality..."

Immediately in the next paragraph they declare:

"In accordance with our obligations toward the Charter of the United Nations and the Final Act from Helsinki we again confirm determination to refrain from resorting to threats or use of force against the territorial integrity or political independence of any state as well as any other actions inconsistent with the principles or purposes of those documents."¹¹⁶

The provisions of the Final Act of the Conference on Security and Co-operation in Europe have been differently estimated in the doctrine. According to some authors the Declaration from Helsinki means "a great step ahead in general efforts to define that universally important principle." While the Declaration of the United Nations (1970) binds to refraining from propaganda of war the Helsinki Declaration calls states to create a climate of confidence and in that framework war propaganda and threat and use of force are prohibited.¹¹⁷ Other authors underline engagement of indirect use of force¹¹⁸ and prohibition of demonstration of force the purpose of which is to make a state to refrain from the full exercise of its sovereign rights.¹¹⁹ On the contrary, A. N. Papadopoulos deems that the reach of the Helsinki Declaration is narrower because the prohibition is valid only for relations of states while the Charter of the United Nations speaks about the international relations. This is particularly important because the Declaration contains the prohibition of indirect use of force.¹²⁰ He has obviously lost the sight of the insertion "as well as in their international relations in general". According to his opinion the Final Document of Madrid contains legally stronger formulations although it does not say how the principles will be accomplished.¹²¹ The Conference for strengthening measures of confidence (Stockholm 1984-1986) provided a general validity to this principle.¹²²

VII – INTERNATIONAL RESPONSIBILITY

The comments do not mention that only the Declaration of the United Nations says that offensive war is a crime against peace, which entails responsibility according to in-

¹¹⁵ *Ibid.*, p. 80.

¹¹⁶ *Ibid.*, p. 145.

¹¹⁷ Р. Вукадиновић, *op. cit.*, p. 261.

¹¹⁸ Љ. Аћимовић, *op. cit.*, p. 232

No. 4, p. 309.

¹¹⁹ *Ibid.*, p. 233.

¹²⁰ A. N. Papadopoulos, Non-use of force and the Stockholm Conference, "Међународни проблеми", 1989, No. 4, p. 309.

¹²¹ *Ibid.*, pp. 309-310.

¹²² *Ibid.*, p. 323. For the text, see p. 329, paragraph 15.

ternational law. The Helsinki Declaration does not particularly mention offensive war probably because, during the conference, the General Assembly of the United Nations¹²³ adopted the definition of aggression. In the introductory part of the Declaration, the provisions of the Declaration of the United Nations of 1970 are again confirmed¹²⁴, thereby the attitude on the responsibility for the offensive war as well. Of greater importance is that offensive war is said to be a crime against international peace and that aggression entails international responsibility (Article 5, paragraph 2).¹²⁵ Neither the Declaration nor the Definition of aggression do not say what responsibility is in question. If criminal responsibility is in question then it is according to international criminal law because violation of international public law does not entail criminal responsibility. But if offensive war is said to be a crime (against the international peace) then international criminal responsibility is in question, while aggression entails only international responsibility. This is legally important because, on the one hand, the aggression as well that is not war entails international responsibility although it is not a crime against the international peace¹²⁶, and, on the other hand, clearly points to the difference between the notions of aggression and the war of aggression, which, unfortunately, in our circles, are not differentiated although the former is an act and the latter a state in relations among states.

The Draft Codex of Crimes against the International Peace and Security of the Mankind, unfortunately, does not provide for particular criminal acts against the peace (neither the war of aggression), but only the aggression (Article 15)¹²⁷ and the threat with aggression (Article 16).¹²⁸ The International Law Commission deems that, at this stage of work and expecting objections of states, it could neglect a differentiation among the crime against the peace, war crimes and the crimes against humanity.¹²⁹ Doubtlessly, the Codex must contain by far more international criminal acts, but surely must not be satisfied with aggression only, even more that the notion of offensive war is replaced by the notion use of force added to which are threat and other forms of enforcement or pressure. Needless to say that, in keeping with Article 6, paragraph 3, of the Statute of the International Military Tribunal in Nuremberg, in the indictment the crime against the peace was divided into two points: creation or carrying out of the mutual plan or conspiracy for commitment of crimes against the peace (and other crimes) and participation in the planning, preparing, commencing or conducting of offensive war. That is why the sentence for the crime against the peace says that the "supreme international crime that differentiates from other war crimes is only in that that it contains in itself the accumulated evil of the whole" (*le mal accumulé de tous les autres*).¹³⁰

¹²³ Under the Resoluition No. 3314 (XXIX) of 14 December, 1974.

¹²⁴ "Југословенска ревија за међународно право", 1976, No. 2, p. 235.

¹²⁵ *Ibid.*, p.236.

¹²⁶ In that sense, see M. Сукијасовић, *Агресија најзад дефинисана*, "Југословенска ревија за међународно право", 1976, No. 2, p. 131.

¹²⁷ Assemblée générale, *Documents officiels: quarante-sixième session, Supplément No. 10 (A/46/10), Rapport de la Commission du droit international sur les travaux de sa quarante-troisième session*, 29 avril – 19 juillet 1991, New York 1991, pp. 265-266.

¹²⁸ *Ibid.*, p. 267.

¹²⁹ *Ibid.*, p. 282.

¹³⁰ *Нирнбершка пресуда*, p. 49.

In spite of that crimes against the peace are increasingly disregarded in the practice of the United Nations. The top of it all is adoption of the Convention on not Time-limitation of War Crimes and Crimes against Humanity¹³¹ although its preamble *reminds* of the General Assembly Resolution No. 96 (I) of 11 December, 1946, whereby the principles of international law recognized under the Statute and the judgement of the International Military Tribunal in Nuremberg¹³² are confirmed. It was under the Convention that the General Assembly has only confirmed the practice of most of the states, which have included only war crimes and crimes against humanity into their afterwar criminal law, but not crimes against the peace. Experiences of certain states and Yugoslavia (1999) show that these disadvantages must most urgently be eliminated if the force that at one time governed as an empress in all relations among people, peoples and states is desired to be put in the service of law.¹³³

ZABRANA UPOTREBE SILE I PRETNJE U MEDJUNARODNIM ODNOSIMA

Momir Milojević

Sila i pretnja su davnašnji pratioci medjunarodnih odnosa a u političkoj i pravnoj teoriji se smatralo da proističu iz suverenosti država, odnosno njihovog neograničenog prava da upotrebljavaju sva sredstva da bi zaštitile svoje interese. Jedina ograničenja su se nalazila u moralnim shvatanjima o pravednim i nepravednim ratovima. Ukoliko je rat više vezivan za suverenost kao pravni pojam utoliko je više postajao pravna ustanova. Iz prava na vođenje rata je proisteklo ratno pravo. Razvoj društvene svesti je doveo do postepenog ograničavanja i najzad ukidanja prava na vođenje rata koje je preraslo u zabranu svake upotrebe sile i pretnje u odonsima između država koja je postala vrhovna norma medjunarodnog prava a istovremeno i norma medjunarodnog prava čije kršenje povlači medjunarodnu krivičnu odgovornost.

Ključne reči: *sila, pretnja, rat, zabrana upotrebe sile, agresija, zločin protiv mira*

¹³¹ Under the Resolution No. 2391 (XXIII) of 26 November, 1968.

¹³² Milan Marković emphasizes that it is usual that all three categories of crimes are in the "popular vocabulary" named "war crimes" and their executors "war criminlas". М.Марковић, *Међународна кривична дела*, "Југословенска ревија за међународно право", 1965, No. 1, p. 52. However, in the case of the Convention it is hardly applicable because crimes against humanity are mentioned there in particular.

¹³³ М. Илић, *op. cit.*, p. 182.