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UNITED NATIONS AND WAR

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I

The purpose of this paper is to consider whether war as understood in international law is possible within the framework of the international peace organization known as the United Nations.

The first question raised on this subject is whether or not enforcement action by the United Nations constitutes war. Chapter VII of the UN Charter provides for procedures and measures to be taken by the international organization when there arises among states, particularly among UN members, a situation which threatens peace.

Provisions of the said chapter first define measures to be taken without resort to force and then spell out enforcement action when measures short of enforcement action fail to yield practical results. The question boils down to this: When enforcement action is taken in the name of the United Nations, does it imply that the organization makes war?

The second question raised is whether war is possible among UN members. The UN Charter has no provisions concerning whether war is possible among the member states. This is a significant departure from the League of Nations whose Covenant recognized the possibility of war among its members and provided for measures to be taken when war broke out.

The UN Charter has no such provisions. The preamble of the Charter provides that "armed force shall not be used, save in the common interest," while subsequent articles, especially those of Chapter VII, spell out measures that can be taken by the UN when peace is destroyed. It is for this reason that the word "war" is used only once in the preamble of the Charter throughout the document.

The UN Charter has led some people to believe that there can be armed struggle, but not war, in the United Nations Organization. These people maintain that war is impossible because it is renounced by the UN Charter and because the UN is compelled to take proper action whenever there arises an armed struggle which may threaten international peace and security.

But the propriety of this school of thinking should be judged on the basis of thorough analyses and reflection.

It is needless to say that present-day international law consists of universal and particular international law, the distinction so far having been made on the basis of the number of states subscribing to the law. But today the distinction should be regarded in the same way as that between general and particular laws in domestic law.

The UN Charter, as a written law subscribed to by a great majority of states in the world, regulates the actions of member states in their relations to the maintenance of peace, but it does not regulate other actions of the states in foreign affairs.

Consequently, UN members are quite free to take actions other than those provided for by the Charter, and to these actions universal or particular international law, other than the UN Charter, is applicable.

When the Charter has no provisions concerning war, existing universal international law applies to acts of war. As a result, whether war is possible within the framework of the United Nations, particularly among member states, should be determined on the basis of the definition of war in universal international law.

Furthermore, the thinking that war is impossible in the United Nations Organization because the Charter renounced it, also should be subjected to careful study.

It should be remembered that when law prohibits something it implies two things. One of them is to prohibit a situation in itself and the other is to prohibit an act which will lead to the situation.

For example, prohibition of murder means prohibiting the act of killing. On the contrary, prohibition of war means prohibiting the processes leading

to war and does not necessarily mean the state of war. This is also recognized in domestic law, a case in point being prohibition of private wars.

Prohibition of private war is considered on two levels. In this first place, an act which will lead to a private war is prohibited and, second, the situation of a private war is taken into the will of the state.

A process similar to domestic law concerning private war can be considered in the prohibition of war, i.e., to prohibit an act which will bring about war and to incorporate war into a will superior to the will of the state. When the latter process is possible, war will be deprived of its social *raison d'être*. But when prohibition is limited to the first process, war still has its social *raison d'être* and consequently law governing war continues to exist.

Mankind has not yet witnessed an international society whose will is superior to that of the state and which will destroy the social *raison d'être* of war.

This is true of the United Nations Charter which cannot exercise a superior will on member states. In other words, the UN is not an organization possessed of a will superior to the state. As a result, the provisions of the UN Charter concerning prohibition of war apply only to actions leading to a state of war and not to war itself arising from such actions.

For this reason, existing international law on war, not the UN Charter, should be the criterion for determining whether or not a certain state of relations among member states should be regarded as a war. If the situation is determined as war in international law, actions leading to it will be judged on the basis of the UN Charter.

II

A war centers around an armed struggle between states and represents the all-out efforts of one party to conquer the opponent by force. War has, as its *raison d'être*, victory over the opponent. This in itself has nothing to do with law, but a state attempts to achieve various objectives by means of war. It may seek to settle a pending dispute, to carry out

policies whose realization has been planned, or to achieve the purpose of self-defense.

Thus a war may be a way to settle an international dispute, a war as an instrument of national policy, or a war in self-defense, depending upon the objectives for which it is fought.

Originally, war has no special relationship with international law. But since it combines with the objectives of a state and becomes the attitude of a state to others, international law is compelled to regulate the action of the state which resorts to war. What are the conditions of a war in international law, how a state should act in such a situation, and how a war is terminated are all regulated by international law.

Under existing international law, war is not possible unless there exists an armed struggle or such possibility between the parties concerned. Next, the armed struggle or such possibility should be based on the will of a party to conquer the other. In other words, war becomes a reality when a state resorts to armed force to destroy the other on such a scale that is not permitted in ordinary international relations or raises such possibility.

This will of the state is called the will of war. Consequently, a war in international law is an armed struggle staged with the will of war. It is enough that the will of war is possessed by one party. The outstanding case in point in which the will is most clearly recognized is, of course, declaration of war.

According to existing international law, two countries enter into a state of belligerency when one party attempts to resist armed action of the other preceded by the declaration of war.

In legal terms, war is a combination of the will of war and armed struggle. International law provides that the organization which can express the will of war is limited, in principle, to the state, the exception being belligerent parties which also can express the will of war.

The reason for this is that international law recognizes the fact that the state is authorized to take any action by domestic law. This capacity of the state is called the capacity of the state to wage war in international law. The state can legally make war on the strength of this capacity

which is one of the general capacities of the state recognized by international law. Therefore, the capacity is that of the state itself and one that is peculiar to the state.

Belligerent parties possess the capacity to wage war because they bear a close resemblance to the state and because they are treated in the same manner as the state in their relationships with war.

International law recognizes the capacity to wage war in the will of the state and regulates the action of the state in war. It is in this context that the relationship between the laws of war and the will of the state should be understood. Is the United Nations, then, capable of making war like the state ?

III

The United Nations is an organization of which there are two kinds. One of these is an organization which simplifies the relations among its component members, i. e., one designed only to create the relations between the organization and the common will of the component members.

An organization of the other kind is one in which its will, independent of the component members, can assert itself over both the members and outside groups.

International organization likewise can be divided into these two groups. The Universal Postal Union belongs to the former while the United Nations can be said to fall under the latter category.

Which of the two groups an organization belongs to is to be determined on the basis of the law on which it rests. In the case of a domestic organization, laws, statutes, regulations concerning donations or union charters should be the criteria while in the case of an international organization, treaties on which it is based should be the yardstick.

According to the UN Charter, the United Nations can act on its own will under Article 43. The article provides that the UN can under its own name enter into relations with the particular will of member states, i. e., the UN can conclude agreements with member states.

Moreover, enforcement action taken by the UN for the settlement of

disputes can be considered as the collective will of the member states, not as the will of individual states, and as such the UN can take action under its own name.

Thus, the United Nations is an organization which can conclude agreements on its own will and which can act under its own name. It does not follow, however, that the United Nations is capable of waging war. The UN is founded on the particular common will of the member states for the maintenance of peace. Therefore, the scope of the will and action of the UN should be determined by the UN Charter which represents the common will of all member states.

In other words, the capacity of the United Nations is an individual capacity determined by the Charter and, therefore, the action of the UN should be within the scope of the individual capacity.

International law recognizes that the general capacity of a state is unrestrained within the framework of its domestic law. The capacity of a state to go to war belongs to the general capacity.

Although the UN Charter provides that the UN can take enforcement action under its own name, the action should be within the limits laid down by the Charter. Unlike a state, the UN is not authorized to resort to all means in order to conquer its opponent. Therefore, it should be noted that because of the Charter the UN does not possess the capacity of a state to wage war. For this reason, the enforcement action taken by the United Nations, whatever its scale, cannot be called war from the viewpoint of international law.

VI

As stated earlier, the preamble of the UN Charter provides that the UN member nations shall not use armed force except in the common interest. Nonetheless, a state of war as understood in international law arises between a member and its opponent when the former resorts to armed force as a means of implementing its national policy or of settling a dispute to which it is a party and expresses the will to go to war. In this case, the war exists beyond the scope of the UN Charter. (Needless

to say, the UN, under the provisions of the Charter, will consider the war as a breach of peace and consequently take proper action.)

This is due to the fact that the UN Charter has no such provisions as will deprive war of its meaning in international society and of its legal meaning and that in their absence universal international law on war applies.

As mentioned parenthetically, however, the United Nations is bound to take proper joint action to deal with a threat to peace arising from war among member states. If the UN decides on enforcement action, what will be the relations between the UN and the member nations against which enforcement measures have been taken?

It has already been made clear that the enforcement action by the UN is not in itself a war, because the UN is an organization incapable of making war. However, member nations, as sovereign states, all have the capacity to make war in international law.

When the United Nations takes armed action, it means that member states intervene in a war between other states. In this case, a question is raised concerning the relationship between the warring states on one hand and the states which resort to armed action in the name of the UN on the other.

The answer to this question should be sought by considering the stands of the group of states which use armed force in the name of the UN and of its opponent group.

From the standpoint of the member states taking armed action in the name of the UN, there arises the question as to whether the armed forces, made available to the UN by these states, become no longer armed forces of the supplying countries. In other words, the question is whether the enforcement action becomes no longer the action of the individual participating members.

Under the present UN Chapter, there exists no United Nations force in the true sense of the term. The Charter provides only for a Military Staff Committee under whose command member states are to act. For this reason, the action of the UN is merely to take command of armed forces

furnished by member states and direct armed action is taken by the member states.

The consequence is that the states which take armed action are confronted with the state which is already in a state of war. In this case, when the member states taking enforcement action in the name of the UN do not express the will of war, but their opponent takes armed action after expressing its will of war, then a state of belligerency arises between the former and the latter in international law.

This is the result of the way international law applies over which the present UN Charter has no control. In such case, a state of war exists, on an individual basis, between the state already in war and each of the members taking enforcement action in the name of the United Nations.