International Law Studies—Volume 50

THE LAW OF WAR AND NEUTRALITY AT SEA

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PART ONE

I. WAR AND THE LAW OF WAR

A. THE LEGAL POSITION OF WAR AND THE OPERATION OF THE LAW OF WAR: GENERAL CONSIDERATIONS

The problem of assessing the present state of that body of law serving to regulate the conduct of war is, in part, the result of recent changes in the international legal system, and particularly in the legal position of war itself. According to the generally accepted traditional theory the act of resorting to war was interpreted, save in exceptional circumstances, as being neither legal nor illegal, but simply a fact, situation or event which occurred periodically in the relations among states.[1] International law took cognizance of this event mainly through the provision of rules, the law of war and neutrality, designed to regulate the conduct of states once war did occur.

States actively participating in a war were therefore considered as possessing equal legal status as far as the war itself was concerned, this equality of legal status being the logical result of the purported liberty states had under customary international law to resort to war. In addition, the duties imposed and the rights conferred upon states participating in war presupposed a similar equality of legal status in the conduct of war. It also followed that the effects of war, territorial or otherwise, as registered principally through treaties of peace, created no special problems with respect to their validity. Finally, those states not choosing to participate in a war were governed, in their relations with the belligerents, by a special

[1] Not infrequently the resort to war was considered by writers to be "extra-legal," much as an event occurring in nature (e. g., an earthquake or flood) can be extra-legal. See A. D. McNair, "Collective Security," *British Yearbook of International Law* (cited throughout as *B. Y. I. L.*), 17 (1936), p. 152. The act of resorting to war can hardly be considered a natural event, however. It is, most thoroughly, a social action, and as such must be regarded as being either legal or illegal, as being either permitted or forbidden. Of course, it is not infrequent that an act may be permitted in a negative sense; though not specifically authorized by law, it is not legally forbidden since the law does not attach a sanction to the commission of the act. In the latter instance the act must be regarded as legal, and this would seem to be the correct explanation of the "extra-legal" interpretation of war. Thus Julius Stone states that: "Customary international law, indeed, does not even regulate *the occasions* on which extreme private force (i. e., war) may be resorted to by States *inter se*. Resort to war was neither legal nor illegal; international law suffered, as it were, a kind of blackout while the choice of peace or war was being made." *Legal Controls of International Conflict* (1954), p. 297. Later, however, Professor Stone speaks of the "liberty of States to resort to war under customary international law" (p. 303).

set of rules, whose principal purpose was to insure the strict impartiality of the non-participants in their behavior toward the belligerents.

It is unnecessary for present purposes to discuss or to criticize in any detail this traditional interpretation of war. Despite the fact that its acceptance made very doubtful the legal character of this so-called system of law, it was by no means an inaccurate reflection of the actual practices of states. However, the developments effected principally by the Covenant of the League of Nations, the General Treaty For the Renunciation of War (Kellogg-Briand Pact), and the Charter of the United Nations have resulted in the general abandonment of this traditional interpretation of war. For all three instruments are characterized by the distinction they make between a legal and an illegal resort to war. Indeed, the Charter of the United Nations goes much further than did the Covenant and the Kellogg-Briand Pact in avoiding altogether the use of the term "war." The Charter attempts to ensure—mainly through Article 2, paragraph 4[2]—that a distinction shall henceforth be made between the lawful and the unlawful resort to armed force. In principle, then, it is now possible to assert that the place of war in the international legal order has undergone a fundamental change. The resort to war can no longer be regarded as an act which states are at liberty to take for whatever reason they may deem proper.[3]

As a result of this general transformation in the legal position of war the question has been raised as to whether it is correct to assume the continued validity of the law that traditionally has served to regulate the conduct of war. Insofar as belligerents are no longer to be regarded as legally equal with respect to the act of initiating a war, and the resort to war is no longer a matter of indifference to the international legal order, then it would appear to some as contrary to principle to continue to assume equality with respect to the duties imposed and the rights conferred upon belligerents in the actual conduct of war. The suggestion has therefore been made that in a war waged unlawfully by one side, and particularly a war that assumes the character of a United Nations' enforcement action, the traditional law regulating inter-belligerent relations must be considered as substantially modified in its operation.[4]

The contention that the rules regulating inter-belligerent relations are no longer wholly operative when one side is waging an unlawful war is frequently based upon an application of the principle—assumed to be a

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[2] Article 2, paragraph 4: "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."

[3] For further reflections on the nature of this change in the legal position of war—particularly in relation to the present status of neutrality—see pp. 165-71.

[4] A quite different problem concerns the effects of the changed legal position of war, and the obligations incurred by states within a system of collective security, upon the institution of neutrality, especially if this institution is characterized by the principle of strict impartiality. See pp. 171-80 for an analysis of these and related problems.

principle of positive international law—*ex injuria jus non oritur.* Illegal acts cannot become a source of new legal rights beneficial to the wrongdoer. Yet if illegal acts may not serve to establish new legal rights intended by or beneficial to the wrongdoer, how then is it possible for a state, consistently with this principle, to acquire by virtue of its illegal acts those rights that have customarily accompanied belligerent status? The view that *ex injuria jus non oritur* is an inescapable principle of every legal order has led to the conclusion that a state "cannot acquire new powers under international law by illegal action; consequently a state which is illegally engaged in hostilities acquires no belligerent powers."[5]

At the same time there has been an understandable reluctance to press this argument to its logical conclusion, since it is recognized that a rigid reliance upon the principle *ex injuria jus non oritur* would have undesirable consequences. "In relation to the applicability of rules of warfare to the belligerent engaging in an unlawful war rigid reliance on that principle (i. e., *ex injuria jus non oritur*) would mean in practice that rules of war do not apply at all in a war of this nature. For, unless the aggressor has been defeated from the very outset . . . it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them. Accordingly, any application to the actual conduct of war of the principle *ex injuria jus non oritur* would transform the contest into a struggle which may be subject to no regulation at all. The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character." [6]

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[5] Quincy Wright, "The Outlawry of War and The Law of War," *American Journal of International Law* (cited throughout as *A. J. I. L.*), 47 (1953), pp. 370–1. Articles 2 and 3 of *Harvard Research in International Law, Draft Convention on Rights and Duties of States in Case of Aggression* (*A. J. I. L.*, 33 (1939), *Supp.* p. 828) read:

"*Article 2.* By becoming an aggressor, a state does not acquire rights or relieve itself of duties.

Article 3. (1) Subject to Article 14, an aggressor does not have any of the rights which it would have if it were a belligerent. Titles to property are not affected by an aggressor's purported exercise of such rights. (2) An aggressor has the duties which it would have if it were a belligerent."

It should be noted that whereas the preceding draft articles constitute no more than a statement *de lege ferenda*, Professor Wright offers his opinion as one representative of the existing law. And for a quite recent—and influential—view leaning toward the discriminatory character of the laws of war in an unlawful war, see "La Revision du Droit de la Guerre" (Institut de Droit International, Rapport des Trois—Francois, Coudert, Lauterpacht), *Annuaire de l'Institut de Droit International*, 45 (1954), I, p. 555.

[6] H. Lauterpacht, "The Limits of the Operation of the Law of War," *B. Y. I. L.*, 30 (1953), p. 212. Nevertheless, Sir Hersch Lauterpacht has consistently expressed the conviction that the equal application of the law of war in an unlawful war represents a deviation from principle, justified largely out of humanitarian considerations. See, for example, Oppenheim-Lauterpacht, *International Law* (7th. ed., 1952), vol. II, pp. 217–22.—In a recent survey of the problem, Professor J. L. Kunz ("The Laws of War," *A. J. I. L.*, 50 (1956), pp. 317–21) has pointed out

In fact, a strict reliance upon the principle *ex injuria jus non oritur* presumably would imply that all acts of killing and destruction performed by the armed forces of a state that has resorted unlawfully to war would be equally unlawful and would thereby render the authors of such acts liable to appropriate punishment. The well known phrase in the Charter of the International Military Tribunal at Nuremberg, defining as a crime against peace the "waging of a war of aggression," would then become literally true.[7]

Hence, for humanitarian reasons alone there has been a marked reticence to contend that the full consequences of the principle *ex injuria jus non oritur* must be drawn in the case of a state waging an unlawful war. Instead, suggestions have been made that a distinction be drawn between the rules of warfare which bear a humanitarian character, particularly the rules relating to the treatment of victims of war, and other rules relating to the actual conduct of hostilities, only the former being considered equally applicable to all belligerents despite the fact that one side has resorted to war in violation of its international obligations. But whatever the specific consequences—and concessions to principle—drawn from the application of *ex injuria jus non oritur*, it is clear that the common premise underlying these varying consequences deserves a more careful consideration. For once the "inescapable" quality of this principle is granted its application becomes largely a matter of discretion; its limitation will depend upon the concessions made by those states waging war against an aggressor, concessions made either for humanitarian reasons or for reasons of expediency.

As already noted, the meaning of the principle *ex injuria jus non oritur* is that a violation of law may not give rise to a new legal situation, to new legal rights or duties, intended by or beneficial to the wrongdoer. The

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that the majority of writers remain opposed to the discriminatory application of the law of war—even though hostilities have been unlawfully initiated by one side. Yet the basis for this continued opposition to any discriminatory application of the law of war rests largely upon practical considerations, and particularly those considerations that emerge from the statement quoted in the text above. Among many writers, however, the feeling persists that continued equal application of the law of war as between an aggressor and his victim is somehow contrary to principle; and this uneasiness mounts in the possible case of United Nations enforcement action bearing the character of war. Hence, one of the principal purposes of the above comments is to attempt to show that the case for discrimination is open to criticism not only on practical grounds but on grounds of principle—or theory—as well.

[7] In their closing addresses before the International Military Tribunal at Nuremberg both the British and French Chief Prosecutors gave expression to this extreme view. The Chief British Prosecutor declared: "The killing of combatants in war is justifiable, both in International and in Municipal law, only where the war itself is legal. But where a war is illegal, as a war started not only in breach of the Pact of Paris but also without any sort of warning or declaration clearly is, there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands." *Nazi Conspiracy and Aggression* (1946), *Supp.* A, pp. 85–6.

rule forbidding theft may not, according to this principle, give rise to ownership. In international law conquest as a method of acquiring territory may not be considered as giving rise to a new legal situation, that is to rights and duties which would otherwise result from the acquisition of territory when undertaken in violation of a rule of international law forbidding conquest.[8]

There are, however, serious restrictions to the operation of this principle in international law. The contention that the unrestricted operation of *ex injuria jus non oritur* constitutes a logical necessity for the very existence of a legal order cannot be maintained. The existence of law does not preclude the possible operation of the contrary principle *ex injuria jus oritur* (or, as some prefer, *ex factis jus oritur*). Illegal acts may give rise to new legal rights intended by or beneficial to the wrongdoer. Of course, within a highly centralized and consequently a very effective legal system the principle *ex injuria jus oritur* will of necessity have a severely restricted operation. The case is quite different in international law.[9] Here, decentralization—the absence of centralized judicial, executive and legislative organs—and a relatively low degree of effectiveness have led to a corresponding restriction of the principle *ex injuria jus non oritur*.[10] A state may violate a rule of either customary or conventional international law, and yet this violation may give rise to a new legal situation beneficial to the wrongdoer. The consequence of an illegal resort to war—or to armed

[8] In this connection, it is necessary to observe that *ex injuria jus non oritur* does not mean, though this has been assumed on occasion, that an illegal act ought not to give rise to a new legal situation the legislator expressly intended to prevent through a rule of positive law. To so maintain would be to impute a tautological meaning to the principle. The legislator whose intention is to prevent a certain behavior does so by attaching a sanction to such behavior. He may also stipulate, however, that certain further consequences are not to follow from this behavior. In international law the resort to force may not only be forbidden under certain circumstances, in the sense that force when resorted to under these circumstances is made the condition of a sanction, but the law may further provide that the illegal use of force ought not to give rise to specific consequences intended by or beneficial to the wrongdoer (e. g., the acquisition of territory). The principle *ex injuria jus non oritur* has no application in this latter instance; it does not forbid what a rule of law already has expressly forbidden. It is of possible application only where the legislator has not expressly stipulated that an illegal act ought not to give rise to consequences intended by or beneficial to the wrongdoer.

[9] In rejecting the argument on behalf of the discriminatory application of the laws of war Professor Kunz (*op. cit.*, p. 318) emphasizes that: "The present primitive state of international law makes any analogy with an advanced municipal law futile. Even a more advanced international law, as a law binding on great groups of men who dispose of power, will be very different from municipal law, which is essentially a law among individuals."

[10] The scope of such restriction will be almost inversely proportional to the effectiveness of a legal system. The less effective a legal system, the greater the restrictions. Up to a certain ill-defined point this condition may be considered compatible with law. Beyond that point all attempts to account for this situation bear the character of a rather strained rationalization of the impossible, that is the attempt to equate law with power. It is for this reason, altogether understandable, that many writers have been so insistent in their emphasis upon the necessity of an unrestricted operation of the principle *ex injuria jus non oritur*.

force—may be the establishment of new legal rights and duties favorable to the wrongdoer. It is quite conceivable that this type of situation may occur under the Charter of the United Nations.[11] It did occur more than once under the Covenant of the League of Nations. Its occurrence under the Covenant did not imply that that instrument had ceased to be valid law. Nor would a similar event mean that the Charter had ceased to be valid. What it does mean is that a violation of a general rule of law may in time give rise to new law—to new legal rights and duties—if the illegal act is successfully consummated. And it will be successfully consummated if, and when, it is no longer effectively contested by other interested states. To contest effectively the illegal act can only mean to deprive the act of some—if not all—of the legal consequences it would otherwise have, had it not originated in a violation of law.[12]

But even if it is assumed that the principle *ex injuria jus non oritur* is operative as against a state waging an unlawful war it does not follow that the aggressor is thereby deprived of the rights traditionally accorded to belligerents for the regulation of the conduct of war. To forbid, in principle, the resort to war—or the resort to armed force—is to prohibit a specific act. The principle *ex injuria jus non oritur* may then have the effect of preventing this illegal act from giving rise to a new legal situation beneficial to the

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[11] The prohibition of the use of force under the Charter means, first and foremost, that the illegal use of force is made the condition of a sanction, which includes—though not limited to—the use of force as a lawful reaction. But although the use of force is in principle forbidden under the Charter it does not follow *from that fact alone* that the unlawful use of force may not in time give rise to a situation intended by or beneficial to the wrongdoer. The Charter does not contain a provision expressly prohibiting this possibility. According to the actual provisions of the Charter the Member states are under no obligation to refuse to "recognize" those advantages accruing to a state that has violated (and successfully so) its obligations by resorting to the use of force. It has been asserted that "non-recognition" in this instance is the only reasonable interpretation of the Charter; that we are obliged to infer that under the Charter the unlawful use of force has, in conformity with *ex injuria jus non oritur*, this effect (see, for example, Lauterpacht, *op. cit.*, pp. 208–10). But is this, in fact, the only reasonable interpretation? Do not the virtually unlimited powers accorded the Security Council under the Charter suggest that the Council may decide that the ends of peace and justice—if not law—are best served by recognizing the consequences of an illegal action? And if, which is more probable, the Security Council is unable to function as intended, there is all the more reason for believing that the resort to force—even though unlawful—may give rise to a situation beneficial to the wrongdoer.

[12] See R. W. Tucker, "The Principle of Effectiveness in International Law," in *Law and Politics in the World Community* (essays in honor of Hans Kelsen, ed. by George A. Lipsky) (1953), pp. 31–48. The statements made above therefore assert the existence of a rule of effectiveness in international law restricting the operation of *ex injuria jus non oritur*, and that it is through the operation of this rule that an illegal act may, in time, give rise to new legal rights and duties beneficial to the wrongdoer. Properly conceived, there is no essential conflict between this assertion of the operation of a rule of effectiveness, as a rule of positive law, and the general admission by writers that illegal acts may be "validated" through prescription, the consent of the injured party, or by general recognition.

aggressor. More specifically, this may mean that the aggressor is not entitled, though victorious, to legitimize those gains which would otherwise follow from his illegal act. The territory he has temporarily obtained through conquest, the peace treaty he attempts to impose upon the defeated party, and in general those rights he seeks to acquire by virtue of his victory are all *prima facie* deprived of legal validity.[13] But these considerations are quite independent of the assertion, which is here considered as unwarranted, that the same principle *ex injuria jus non oritur* must be interpreted further to mean that *no* legal consequence may result from the illegal act or that *no* legal rights of the wrongdoer may come into operation as a result of the act, legal rights specifically provided by law for just this very contingency.

War—or the resort to armed force—is an action constituting a legal status defined by law. This status consists in bringing into operation certain duties and rights as between the belligerent states. The argument that the unlawful act of resorting to war cannot become the condition for the acquisition of certain rights by the aggressor, rights determined by the law of war, is in principle mistaken. From the fact that the resort to war is, under certain circumstances, illegal, it follows only that the counter-war is, as a sanction, legal. It does not of necessity follow that the duties and rights of belligerents are, as a matter of positive law, different in an unlawful war from what they have been in a lawful war. Nor is it actually the unlawful act *per se* that here becomes the source of right beneficial to the wrongdoer; it is rather a certain status as determined by law which forms the necessary condition for the exercise of certain duties and rights expressly provided for by the law.[14]

Even if it is conceded that the principle *ex injuria jus non oritur* is not necessarily applicable to the relationships between belligerents as determined by the traditional law of war, the conviction nevertheless persists that it is

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[13] In time, however, this situation may nevertheless give rise, through the operation of the rule of effectiveness, to a new legal situation beneficial to the aggressor. Indeed, so long as the international legal order retains its decentralized and relatively weak character this latter consequence must remain a strong possibility, despite the assumed operation of *ex injuria jus non oritur*.

[14] If the argument dealt with above were really well-founded it would, again in principle, be applicable consistently to any violation of international law. It is not difficult, however, to demonstrate that it is not so applicable. The case of reprisals furnishes a convenient example. It is generally agreed that the reprisals an injured state may take against a delinquent state are subject to certain restrictions. Presumably the most important of these restrictions is that reprisals "must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation." Oppenheim-Lauterpacht, *op. cit.*, p. 141. But what is this restriction if not an obligation of the state taking the reprisal? And to whom must the obligation refer? Obviously to the delinquent state who possesses the right to see that "disproportionate" reprisals are not taken against it, and to take measures of reprisal itself in the event this rule of proportionality is not observed. Yet if the argument dealt with above were correct the delinquent state could not acquire this "new power," that is a new legal right, by virtue of its illegal action.

somehow illogical or contradictory to continue to assume that the status and content of this law remains unchanged once the resort to war has been rendered, in principle, unlawful. However, there is no contradiction—at least no logical contradiction—involved in asserting the validity of a rule which prohibits in principle a certain act (the resort to war) and in asserting at the same time that should this act occur certain behavior (as determined by the rules regulating war's conduct) is to be mutually observed by the aggressor state as well as by those states resisting the aggression. The legal inequality between belligerents with respect to the war itself does not logically preclude their legal equality as concerns the applicability of the rules regulating the conduct of war.[15]

Nor does the argument appear convincing which rests upon the belief that the historic origin and justification of the traditional rules regulating belligerent relations presupposed the legal equality of the belligerents in relation to the war itself; and that in the absence of this legal equality as between belligerents there no longer remains any justification for assuming equality of rights and duties in the conduct of war. Whatever the historic origin and justification of the law of war, these considerations cannot of themselves affect the positive law. They suggest, at best, a disparity between the purposes which prompted the development of this law and the purpose behind the attempt to prohibit war in principle. It is supposed that the law of war had its primary justification in the traditional interpretation of war as an "exercise of power." Assuming the effective prohibition of this "exercise of power," and the consequent change in the interpretation of war, the conclusion is drawn that the justification for retaining that law serving to regulate war's conduct has also ceased to exist.

There is strong reason, though, for maintaining that the rules of warfare had both their origin and justification not so much in any indifference to the legal character of war but in the conviction that whatever the interpretation given to war there must be rules for the regulation, and hence the mitigation, of war's conduct. It is not without significance that Grotius, though he was by no means alone in doing so, has given a classic expres-

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[15] In order to avoid a similar conclusion, while nevertheless seeking to retain at least a part of the law of war, a distinction has been made between war "in the legal sense" and war "in the material sense." For example, Quincy Wright, *op. cit.*, p. 365. This distinction seems both unacceptable and unnecessary. It is unacceptable because it implies that the fact or situation "war" is no longer recognized in law, though a part of the law of war may nevertheless apply to this situation. But if the law of war is at all applicable to this situation it is because this situation has been given a specific legal existence. Thus from the point of view of law there can only be war "in the legal sense." It would seem that the real reason for the distinction between war "in the legal sense" and war "in the material sense" is the desire to differentiate between a war in which parties are legally equal as regards the war itself and a war in which there is not this legal equality. See, *Harvard Research In International Law, Rights and Duties of States In Case of Aggression, op. cit.*, p. 823.

sion of this conviction.[16] Indeed, it must remain a source of some astonishment that so many writers have insisted that it is hopeless to believe violence (war) can be regulated—admittedly a paradox of no small proportion—and that the only solution is to do away with war itself. It is only a minor consideration that this opinion is not deterred by the fact that war has been regulated in the past, with varying degrees of effectiveness. More important is the dismissal of a relatively modest goal as being inherently unattainable and the ready acceptance of an ideal infinitely more difficult of realization.[17]

B. THE OPERATION OF THE LAW OF WAR DURING WORLD WAR II

The contention that the changed legal position of war must of necessity affect the operation of the law of war finds little, if any, historical support in the attitude and behavior of the belligerents during the second World War. Although the Axis Powers were regarded as having resorted to war in violation of their international commitments—especially the obligations assumed under the Kellogg-Briand Pact—there was no disposition for that reason to claim that the law regulating the conduct of hostilities did not apply equally to all belligerents. Nor has the attitude manifested toward this question by war crimes tribunals contributed in any substantial measure to the view that a state waging an unlawful war cannot enjoy those rights relating to the conduct of war that have heretofore been conceded to all belligerents. In the vast majority of war crimes trials the question simply did not arise, and the assumption that even in an unlawful war the rules regulating the conduct of war are equally applicable to all belligerents appears to have been taken for granted. It was only exceptionally that tribunals were called upon to declare otherwise legitimate acts of warfare unlawful for the reason that they had been performed on behalf of a state waging an illegal war. In these latter cases, the decisions of tribunals seem to indicate—on the whole—a refusal to deduce any consequences for

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[16] In his masterful essay on "The Grotian Tradition In International Law," *B. Y. I. L.*, 23 (1946), Sir Hersch Lauterpacht, while placing emphasis upon the distinction Grotius makes between just and unjust wars, goes on to state: "At the same time, in conformity with the view which has remained unchallenged and which is in accordance with the humanitarian character of his treatise, he (Grotius) lays down that the question of the justice or injustice of the war is irrelevant for the purpose of observing the rules of warfare as between the belligerents" (p. 39).

[17] See, for example, the excellent article by J. L. Kunz, "The Chaotic Status of the Laws of War and The Urgent Necessity for Their Revision," *A. J. I. L.*, 45 (1951), pp. 37–61.

the operation of the law of war from the fact that the war itself was unlawful.[18]

The same attitude characterized the judgment of courts, other than war crimes tribunals, in applying the rules regulating the economic aspects of warfare, i. e., the rules governing the lawful acquisition by belligerents of title over enemy property. In particular, the long-established right of belligerents to capture and condemn the public and private property of an enemy found at sea was not questioned, so long as the captured enemy vessels and goods were otherwise condemned in accordance with those rules governing the international law of prize.[19]

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[18] Thus the statement of the United States Military Tribunal in the Hostages Trial: ". . . we desire to point out that International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject." (*Trial of Wilhelm List and Others*), *Law Reports of Trials of War Criminals* (cited throughout as *Law Reports . . .*) 8 (1949), p. 59. In The Justice Trial another tribunal declared: "It is persuasively urged that the fact that Germany was waging a criminal war of aggression colours all of these acts with the dye of criminality. . . . If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality." (*Trial of Josef Altstotter and Others*), *Law Reports . . .*, 6 (1948), p. 52.—Very rarely have courts seen fit to deduce certain consequences for the operation of the law of war simply from the fact that the war itself was unlawful. In one case, the Netherlands Special Court of Cassation declared that Germany, as an occupant, had no right of reprisal against the Dutch population for acts performed by the latter which would *otherwise* have been unlawful according to the law of belligerent occupation. The apparent reason given for this opinion was the "unlawful war of aggression" initiated by Germany against the Kingdom of the Netherlands. (*Trial of Hans Albert Rauter*), *Law Reports . . .*, 14 (1949), pp. 133–8.

[19] "Neither judicial authority nor, to any substantial extent, the practice of Governments support the proposition that a State waging an unlawful war does not obtain or validly transmit title with respect to property acquired in connexion with the conduct of war and in accordance with international law." Lauterpacht, "The Limits of the Operation of the Law of War," p. 239 (for a review of cases bearing upon the acquisition by the aggressor of property in the course of an illegal war, pp. 224–33).

In this connection it may be noted that Annex XVII (A) of the Treaty of Peace between the Allied and Associated Powers and Italy, Paris, 10 February 1947, provided that: "Each of the Allied and Associated Powers reserves the right to examine, according to a procedure to be established by it, all decisions and orders of the Italian Prize Courts in cases involving ownership rights of its nationals, and to recommend to the Italian Government that revision shall be undertaken of such of those decisions or orders as may not be in conformity with international law." Text in *U. S. Naval War College, International Law Documents, 1946–47*, p. 104. The "international law" refetred to is the traditional law of prize.

C. COLLECTIVE SECURITY AND THE OPERATION OF THE LAW OF WAR: THE UNITED NATIONS [20]

The preceding considerations have concentrated upon pointing out that there appears to be no valid reason for assuming that the changed legal position of war must necessarily result in the alteration of the rules regulating inter-belligerent relations. To the extent that the experience of the second World War is relevant in this connection it serves to support the conclusion that a state unlawfully resorting to war cannot, for that reason alone, be deprived of established belligerent rights. It may be contended, however, that these considerations, even if accepted, can have only a limited bearing upon the present situation; that they are relevant mainly as applied to the period prior to the establishment of the United Nations. Whereas the Covenant of the League of Nations and the Kellogg-Briand Pact sought to place limitations upon the customary liberty of states to resort to war, both instruments recognized that war might nevertheless be resorted to by a state in violation of its obligations. Neither instrument provided for a procedure whereby the unlawful resort to war could be determined authoritatively, in a manner the signatory Parties were bound to accept. Although each state that was a Member of the League or a Party to the Paris Pact had the right to determine for itself when an unlawful resort to war had occurred, such determination—or interpretation—had no binding effect upon other states. Nor did either instrument provide for the establishment of an international armed force apart from the armed forces of the various states. In particular, the illegal "resort to war" under Article 16 of the Covenant presupposed the creation of a state of war between the state violating its obligations and other Member states choosing to resort to a counter-war. Despite the contemplated coordination of effort on the part of those states waging a counter-war under Article 16 there seems to have been little doubt that the rules of war would apply to such action.[21]

In brief, although the Covenant of the League of Nations and the Kellogg-Briand Pact placed limitations upon the circumstances under which war could be resorted to lawfully it was clearly assumed that war continued to enjoy a legal existence. But even more important was the fact that neither instrument overcame the normal conditions of decentralization that served

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[20] It must be made clear that the following pages are concerned only with inquiring into the possible effect of recent developments in collective security upon the operation of the law of war. The reader must look to other sources should he desire a detailed and systematic analysis of these recent developments. Among a vast literature, of particular value for further reference are Hans Kelsen, *The Law of the United Nations* (1951), and Julius Stone, *op. cit.*, pp. 165–293.

[21] *Reports and Resolutions on the Subject of Article 16 of the Covenant*, Report by the Secretary-General, League of Nations Doc. A. 14. 1927 V., pp. 83–7. See also H. J. Taubenfeld, "International Armed Forces and the Rules of War," A. J. I. L., 45 (1951), pp. 671–2.

in large measure to provide the justification for the traditional interpretation of war. This decentralization not only implied the absence of a procedure which would make possible an authoritative judgment that in a given instance a state had unlawfully resorted to war; it also rendered doubtful whether a counter-war could technically serve as an enforcement measure—as a sanction—in view of the unknown outcome of almost every war.

The Charter of the United Nations, on the other hand, has been interpreted as effecting basic changes in the conditions that appeared to justify the traditional interpretation of war and that provided a favorable environment for the development of the law of war. Not only does the Charter refrain from the use of the term "war," speaking only of the illegal use of armed force (or of armed attacks) and of enforcement measures to be taken by the Organization, it also establishes a procedure whereby the unlawful resort to armed force can be determined in a manner binding upon the Member states.[22] In addition, the Charter provides for the establishment of what may appropriately be termed an international armed force, as distinguished from the armed forces of the Member states.[23] It is the assumption of the effective realization of these Charter provisions in practice that generally forms the basis of suggestions that the United Nations may select from the traditional law of war those rules considered desirable to govern the conduct of international armed forces and may determine the obligations

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[22] This is, in principle, the result of Articles 24, 25 and 39 of the Charter. According to Article 24 the Members of the United Nations confer on the Security Council "primary responsibility for the maintenance of international peace and security" and agree that in carrying out its duties the Security Council "acts on their behalf." In Article 25, the Members agree "to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 39 declares that the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 41 refers to acts not involving the use of armed force, Article 42 to acts involving the use of armed force.

[23] The statement in the text presupposes, of course, the conclusion of the agreements provided for in Article 43, whereby the Members of the United Nations "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." Article 47 authorizes establishment of a Military Staff Committee, and stipulates that one of the Committee's principal functions is to advise and assist the Security Council on questions relating to the "employment and command of forces placed at its [i. e., the Security Council's] disposal." In their *composition* the armed forces placed at the disposal of the Security Council would still remain units of the armed forces of the various Member states. Nevertheless, they could appropriately be designated as "international" armed forces, and, in this respect distinguished from "national" armed forces, by virtue of the fact that they would be placed at the disposal of the Security Council and would operate under its strategic direction and command. See, for example, Kelsen, *op. cit.*, pp. 762–8. To date, no agreements of the nature referred to in Article 43 have been concluded. Nor is there any real prospect of their conclusion in the foreseeable future.

and rights of the delinquent state(s) against which enforcement action is taken.[24]

In view of the present realities of international organization the assumption that the Security Council may make effective use of the powers granted it under Chapter VII of the Charter must clearly be regarded as improbable; so improbable, in fact, that the utility of a careful examination of the possible effect of this situation on the operation of the law of war appears distinctly limited. It may be observed, however, that it is by no means certain that even if this situation were realized the law of war would thereby cease to be equally applicable as between the international armed forces and the national armed forces against which action is taken. Whether or not these rules would cease to be applicable is a question that poses many difficult considerations. It is at least doubtful that these considerations can be resolved by inferential or deductive judgments which assert, in effect, that the law of the Charter may be interpreted to imply a change in the status and content of the law of war as one of its necessary effects.[25] In the absence of any reference—direct or indirect—to this matter in the Charter itself, the resulting uncertainty can be resolved only by a clear manifestation of the intention of the Member states of the United Nations. The most satisfactory methods for manifesting this intention would consist either in an amendment to the Charter or in a convention concluded by the General Assembly and ratified by all of the Member states. At the very least it would appear necessary that the intention to modify the rules of war in United Nations enforcement actions be established by a clear and effective practice to this effect.

In particular,[26] however, it is not sufficient to contend that in hostilities undertaken by *national armed forces* acting in response to a mere recommendation of the Security Council a change in the status and content of the rules of war must be assumed for the reason that the "United Nations acting on behalf of the organized community of nations against an offender, has a superior legal and moral position as compared with the other party to the

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[24] For proposals to this effect, see Philip C. Jessup, *A Modern Law of Nations* (1948), pp. 188–221. Also Taubenfeld, *op. cit.*, pp. 672–7.

[25] It is in this sense that Lauterpacht's remarks may be understood when, in referring to the possible effect of the Charter upon the law of war, he states: ". . . once a treaty has been adopted which is of fundamental and comprehensive character, it is difficult—and probably unscientific—to act on the view that it settles only that part of the law to which it expressly refers and nothing else. A treaty is not concluded in a legal vacuum. It is part of a legal system which, for that very reason, cannot contain rules which are contradictory. Any such contradiction must be removed by a reasonable application of the principle that newly enacted law, if it is of a general and fundamental character, alters rules inconsistent therewith." *op. cit.*, p. 209.

[26] The remarks made in the immediate paragraph of the text are largely relevant to the particular circumstances attending the outbreak of hostilities in Korea—circumstances dealt with in the following paragraphs—and must be read with this consideration in mind.

conflict." [27] As already noted, there is at present almost no possibility of the United Nations as such "acting on behalf" of the community of nations, implying thereby the existence of international armed forces at the disposal of the Organization, used to defend the legitimate interests of the Member states. On the contrary, the most reasonably optimistic situation—and the situation probably referred to in the above quoted statement—is that of national forces "acting on behalf of the United Nations," that is acting in conformity with a determination taken by a competent organ (at present only the Security Council) of the United Nations.[28] It is true that the legal position of states whose armed forces are acting on behalf of the United Nations—in the sense indicated above—is superior to the position of those parties unlawfully resorting to force. But this superiority does not of itself yield a right to modify the rules regulating war's conduct.

Thus the hostilities undertaken in Korea by Member states of the United Nations were preceded by a *determination* of the Security Council that the action of North Korea constituted a breach of the peace and a *recommendation* of the Council that members of the United Nations furnish assistance—including armed forces—to repel this unlawful action and to restore international peace and security.[29] It is possible to consider those states re-

[27] Report of Committee on Study of Legal Problems of the United Nations, "Should The Law of War Apply to United Nations Enforcement Action?" *Proceedings*, American Society of International Law (1952), p. 217. The report of the Committee, which has reference primarily to the Korean action, concludes that: ". . . in the present circumstances . . . the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purpose (e. g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purpose. We think it beyond doubt that the United Nations, representing practically all the nations of the earth, has the right to make such decisions."

[28] But a "determination" (e. g., that a "breach of the peace" has occurred) which does not—and in the Korean Case did not—impose upon Member states the *obligation* to take measures involving the use of armed force against the party unlawfully resorting to force.

[29] In its resolution of June 25, 1950 (*U. N. Security Council, Official Records, 5th year, No. 15 (Doc. S/1501)* p. 18.), the Security Council, after *determining* that the armed attack upon the Republic of Korea by forces from North Korea constituted a "breach of the peace," called for the immediate cessation of hostilities and for the "authorities of North Korea to withdraw forthwith their armed forces to the thirty-eighth parallel." In addition, the Council called upon all Members "to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities." In its resolution of June 27, 1950 (*U. N. Doc. S/1511*) the Council merely *recommended* that: "Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security within the area." On July 7, 1950, the Security Council adopted a resolution (*U. N. Doc. S/1588*) in which it welcomed the "prompt and vigorous support" given its earlier resolutions, noted the offers of assistance for the Republic of Korea on the part of Members, recommended that "all Members providing military forces and other assistance . . . make such forces and other assistance available to a unified command under the United States," requested the United States to designate the commander of such forces, authorized the use of the United Nations flag by the Unified Command, and requested the United States to provide the Council with periodic reports on the course of action taken under the Unified Command.

sponding to this recommendation as having acted "on behalf" of the United Nations.[30] There was no suggestion emanating from authoritative sources, however, that the opposing parties to this conflict were not equally bound by the existing rules of war. Neither the refusal to designate these

[30] This possibility necessarily assumes that the resolutions of the Security Council in the Korean Case—and particularly the resolution of June 25—not only were permitted by the Charter but that they imposed certain obligations and conferred certain rights upon the Member states. It will be recalled that the resolutions in question were passed in the absence of the Soviet Union. The question therefore arose as to whether valid decisions on nonprocedural matters could be made in the absence of a permanent Member (and a Member who later challenges the validity of such decisions). The opinions of writers have been sharply divided on this question. An impressive negative reply has been given by Julius Stone, *op. cit.*, pp. 207–12, and Leo Gross, "Voting in the Security Council: Abstention from Voting and Absence from Meetings," *Yale Law Journal*, 60 (1951), pp. 209–57. For an affirmative reply see Myres S. McDougal and Richard N. Gardner, "The Veto and The Charter: An Interpretation for Survival," *Yale Law Journal*, 60 (1951), pp. 258–92. And for an argument holding both answers equally possible, see Kelsen, *op. cit.*, pp. 290–4, 940–1.

If the view is taken that an affirmative reply to the above question is possible—and it is the view adopted here—the problem remains of determining the duties imposed and the rights conferred upon Member states. Although the resolution of June 25 called upon all Members to render every assistance to the United Nations in the execution of that resolution it is extremely difficult—if not impossible—to contend that Member states were under any *obligation* to take active measures in support of South Korea, and particularly measures involving the use of armed force. This view is supported by the fact that the Security Council's two later resolutions merely recommended that Member states furnish assistance—including armed forces—to the Republic of Korea. The Security Council expressly refrained from making any decision under Article 39 to order those enforcement measures provided for in Article 42. It must be further observed that the obligation of Member states to take measures of armed force provided for in Article 42 is probably dependent upon the conclusion of the special agreements provided for in Article 43. In the absence of such agreements it is entirely doubtful that the Security Council is competent to obligate Member states to take military measures against a party considered by the Council to have committed a threat to or breach of the peace. For these reasons it does not appear possible to characterize the action in Korea as a "United Nations enforcement action"—at least not in the strict legal sense—since this would imply an enforcement action *ordered* by the Security Council under Articles 39 and 42. Similar doubt must be expressed over the accuracy of references to "United Nations forces" in Korea. The Unified Command in Korea was not created by the Security Council in conformity with Article 29 of the Charter. Strictly speaking the Unified Command was not an "organ" of the United Nations and the forces serving under this command were not—again in a strict sense—"United Nations forces." See, in this respect, Kelsen, *op. cit.*, pp. 936–40 and the excellent remarks of Richard R. Baxter, "Constitutional Forms and Some Legal Problems of International Military Command," *B. Y. I. L.*, 29 (1952), pp. 333–7.

On the other hand, it can be maintained that Member states were at least under the obligation "to refrain from giving assistance to the North Korean authorities." In addition, it seems clear that the effect of the Security Council's *determination* of a breach of the peace and of its later *recommendations* was to confer upon Members the right to take measures of armed force in support of the Republic of Korea. In so doing Member states acted "on behalf" of the United Nations, even though their action may not be strictly characterized as a "United Nations enforcement action." Of course, it may be contended that even in the absence of any Security Council action, under Article 51 (see p. 18) Member states could have claimed the right to assist in the collective defense of the Republic of Korea (though this requires interpreting Article

hostilities as "war" nor the questionable insistence upon considering the national contingents involved as "United Nations troops" [31] affected the application of the international law of war. On the contrary, there was on more than one occasion express affirmation that both the aggressor forces and the forces acting on behalf of the United Nations were equally obligated to conform in their actions to the law of war. It is quite true that in the Korean conflict the primary concern was to secure the observance of those rules governing the treatment by belligerents of prisoners of war. The rules governing the behavior of armed forces in actual combat received only minor consideration. But this does not detract from the conclusion that the Korean conflict saw no substantial alteration in the status and content of the rules regulating inter-belligerent relations.

The circumstances attending the outbreak of hostilities in Korea must be regarded as exceptional, however. In view of the factors which render any future decisions by the Security Council under Chapter VII extremely unlikely,[32] the most probable situation is that of armed conflict being waged under Article 51 of the Charter.[33] Each side must be expected to maintain that it is acting in self-defense—or collective defense—against an aggressor, with no subsequent decision taken either by the Security Council or by any other organ endowed with the proper competence to review—particularly while hostilities last—the competing claims of the contending parties. This situation would then resemble, in its essential features, that of World War II, and there would seem little doubt that in such a conflict the rules

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51 as applying—despite its wording—to non-Member states as well). At the same time, it must be admitted that there is a substantial difference between the resort to armed force under Article 51, and without any authoritative determination of the party that has unlawfully resorted to an armed attack, and the resort to armed force when taken in conformity with a valid determination to that effect by the Security Council (here again, the assumption being that such determination in the Korean Case was valid.).

For a quite different point of view from that taken in the present note, see particularly the learned and stimulating analysis of the Korean affair advanced by Professor Stone, *op. cit.*, pp. 228–37.

[31] See note 30 above.

[32] I. e., the voting provisions of the Charter, requiring as they do the unanimity of the permanent Members on any *decisions*—or *determinations*—taken under Chapter VII. And while it may be argued that Article 27 does not forbid such decisions in the absence of a permanent Member, it is altogether improbable that a permanent Member will ever again absent itself from the Council during a critical period.

[33] Article 51 reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

regulating the conduct of war would be fully applicable as between the belligerents.[34]

The above situation would not be substantially altered by the attempt, incident upon the outbreak of armed conflict, to obtain a "collective determination" of the party unlawfully resorting to armed force by a decision reached under the General Assembly Resolution "Uniting For Peace." [35] At present, such collective determinations the General Assembly may make under the Resolution "Uniting For Peace" constitute only recommendations to the Members. Although expressive of the opinion of the majority of states making up the Organization, these recommendations do not create legal obligations for the Member states.[36] Nor, for that reason, may the nature of these recommendations be compared with the decisions the Security Council is competent to render under Articles 39, 41 and 42 of the Charter. It is also necessary to distinguish between the "collective measures" that may be taken by the national armed forces of Member states acting in response to a recommendation of the General Assembly and

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[34] Occasionally, the opinion has been expressed that the situation resulting from the inability of the Security Council to reach an authoritative determination (of the party unlawfully resorting to the use of force) under Chapter VII of the Charter can be overcome by other, and equally binding, procedures. Thus Professor Quincy Wright states that: "While in some cases it may be difficult to obtain a decision as to the justifiability of a particular use of force because of the veto in the Security Council, customary international law provides a procedure, that of general recognition, applicable when conventional procedures fail to function." *op. cit.*, p. 370. The same writer has suggested that a two-thirds vote of the states making up the General Assembly will suffice for such "general recognition." It is difficult to find a basis in existing law in support of this opinion.

[35] For text of Resolution, see *U. N. General Assembly, Official Records, 5th Sess. Supp. No. 20 (Doc. A/1775)*, p. 10. The heart of this resolution is to be found in two operating paragraphs which read—in part—as follows:

"The General Assembly, . . .

1. Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. . . .

8. Recommends to the States Members of the United Nations that each Member maintain within its national armed forces elements so trained, organized, and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defense recognized in Article 51 of the Charter."

[36] "There is no warrant in the Charter for considering the designation of the aggressor by virtue of a Resolution of the General Assembly, and the resulting illegality of war on his part, as legally binding upon States which have not voted for the Resolution." Lauterpacht, *op. cit.*, p. 207. Indeed, there is no warrant for regarding the designation of an aggressor by virtue of a General Assembly Resolution as legally binding even upon states which have voted for the resolution.

measures of a collective character taken by national armed forces acting not merely in response to a recommendation of the Security Council but also in conformity with an authoritative determination of the aggressor by that same organ.[37] Although a considerable degree of coordination may be achieved among the national armed forces of Member states acting in response to General Assembly recommendations made under the "Uniting For Peace" Resolution, the present character of such recommendations does not appear to allow the conclusion that these forces may be considered as acting "on behalf" of the United Nations. Indeed, there would seem to be no substantial reason for differentiating between the coordination of collective military measures made in response to General Assembly recommendations and the coordination of collective defense measures allowed to Member states under Article 51 of the Charter, even though the moral authority with which the former would be endowed ought not to be neglected. In any event, it is significant to observe that the reports submitted to date by the Collective Measures Committee, established under the "Uniting For Peace" Resolution,[38] contain no suggestion that the rules traditionally regulating the conduct of hostilities between belligerents ought not to apply to hostilities undertaken in response to General Assembly recommendations. To the extent that the Collective Measures Committee has dealt with the question of the applicability of the law of war there is the assumption that these rules will continue to be applicable.[39]

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[37] Once again, the evident basis for the statement made in the text is provided by the cirtumstances attending the outbreak of the Korean hostilities. See notes 29 and 30 above.

[38] Paragraph 11 of the "Uniting For Peace" Resolution establishes "a Collective Measures Committee consisting of fourteen Members" and directs the Committee "in consultation with the Secretary-General and with Member states as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly, not later than September 1, 1951, on methods . . . which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter, taking account of collective self-defense and regional arrangements . . ." Since its establishment, the Collective Measures Committee has issued several reports. The first, and basic, report was completed in 1951; see *U. N. General Assembly, Official Records, 6th Sess. Supp. No. 13 (Doc. A/1891)*.

[39] Paragraph 246 of the first report of the Collective Measures Committee (*U. N. Doc. A/1891*, p. 29) states that: "In any future operations, the executive military authority designated by the United Nations should follow the humanitarian principles applied and recognized by civilized nations involved in armed conflict. In particular, the special position and functions of the International Committee of the Red Cross should be recognized, and its activities assisted, by the executive military authority." The "executive military authority" is to comprise a state or a group of states. Thus the Collective Measures Committee Report states that "upon the determination to adopt measures involving the use of United Nations armed force, the Organization should authorize a State or group of States to act on its behalf as executive military authority, within the framework of its policies and objectives as expressed through such resolutions as it may adopt at any stage of the collective action" (p. 25). At present, however, the executive military authority would not act "on behalf" of the Organization, but rather on behalf of the Member states of the Organization which decide to adopt collective military measures. Throughout the report the example of Korea is used as a guide and precedent a precedent which is apt to prove misleading. Although the forces acting in Korea could properly

D. CONCLUSIONS

It may be useful, at this point, to summarize the principal conclusions that appear to emerge from the preceding examination of the possible effects of the changed legal position of war on the operation of the law of war. In addition, brief attention will be directed to those situations involving the use of armed force between states, though situations not recognized by the parties involved as war, in which the law of war—or at least a part of this law—may nevertheless be considered as operative.

(1) A clear distinction must be drawn between the legality of the act of resorting to war and the applicability of the rules regulating the conduct of war. The fact that the resort to war has been rendered, in principle, unlawful does not compel the conclusion that in a war illegally resorted to by one side the rules regulating inter-belligerent relations are either inapplicable or substantially modified in their operation.[40] The rights conferred and the duties imposed upon belligerents in the conduct of war are not dependent for their operation upon an equality of legal status as concerns the war itself. Nor does it appear correct to assume that, given the changed legal position of war, a continued equality of belligerent status with respect to the rules regulating war's conduct is contrary to the principle *ex injuria jus non oritur*. For this principle ought not to be interpreted to mean that *no* legal rights may accrue to the lawbreaker as a result of his unlawful act, particularly those legal rights that have been expressly provided by law for just that situation arising out of the unlawful act.

(2) To the extent that the applicability of the law of war is to be restricted in its operation by virtue of the changed legal position of war in international law such restriction can be brought about only through the customary practice of states or by convention. Neither the Covenant of the League of Nations nor the Kellogg-Briand Pact have been interpreted as so restricting the operation of the law of war. It also seems clear that neither

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be considered as acting "on behalf" of the United Nations, the same phrase when used to describe the action of forces responding to a General Assembly recommendation overlooks the decisive legal difference between hostilities whose character rests upon a determination rendered by the Security Council under Article 39 of the Charter and hostilities whose character is determined by a recommendation of the General Assembly. Nor is it accurate to speak, as does the above report, of "measures involving the use of United Nations armed force," the obvious intention being to include in this term the national armed forces of Member states acting in response to General Assembly recommendations. For such forces bear to an even smaller degree the appellation of "United Nations armed forces" than did the armed forces serving in Korea—forces whose status has already been commented upon.—Once again, the general observation should be made that the decisions taken and the collective measures applied by virtue of the "Uniting for Peace" resolution do not substantially differ at present from decisions and measures of collective defense taken under Article 51. The altogether commendable desire to strengthen the present system of collective security should not serve to obscure this basic consideration.

[40] *Law of Naval Warfare* (see Appendix), Section 200.

the attitude of the belligerents during World War II nor the decisions rendered by courts in applying the law of war provide any solid basis for the opinion that the changed legal status of war has affected the applicability of the law of war.

(3) In general, it is difficult to establish any significant restriction on the operation of the rules regulating inter-belligerent relations consequent upon the avoidance of the term "war" in the Charter of the United Nations. (On the contrary, it is more than likely, as will be noted, that the Charter will have the contrary effect, i. e., of expanding the situations in which the law of war is applicable.) By forbidding to member states the use of armed force in their mutual relations, save as a measure taken in conformity with a decision of the Security Council or as a measure of individual or collective defense against an armed attack, the Charter seeks to regulate every use of armed force and not only the use of armed force which assumes the character of war. It has already been noted that the refusal on the part of certain states to designate the hostilities in Korea as "war" did not, for that reason, have any appreciable effect upon the operation of the international [41] law of war as this law applies to the mutual relations of belligerents. The same absence of effect upon the operation of the law of war will probably hold for future occasions, similar to Korea, in which states wish to avoid the use of the term war, mainly in order to give hostilities what is considered to be a higher dignity and purpose (i. e., by terming such hostilities "international police actions," "measures of collective defense") than war had according to the traditional doctrine. But it would seem a mistake to attach too great significance to verbal devices, particularly at the expense of legal reality. Insofar as the law of war is applied as between the parties to an armed conflict the legal relevance—or, rather, the lack of legal relevance—in refusing to term such a conflict war should be clearly understood.

(4) The assertion that the rules of warfare would not apply to international armed forces engaged in a United Nations enforcement action, must be very seriously questioned. Neither the principle *ex injuria jus non oritur* nor the admittedly superior legal position of the forces undertaking United Nations enforcement actions provide sufficient basis for contending against the continued applicability of the rules regulating inter-belligerent relations. Besides, given the present state of international organization these questions can possess no more than a remote hypothetical significance. At the very

[41] On the other hand, this refusal to designate the contest in Korea as war has had certain effects in relation to the decisions of municipal courts and the operation of municipal legislation intended for periods of war. It is, of course, always necessary to distinguish between the operation of municipal legislation, dependent upon a status or condition of war as defined by municipal law, and the operation of the international law of war. For some effects of this distinction in the case of Korea, see Lauterpacht, *op. cit.*, pp. 221–3. In the United States the highest military court, the United States Court of Military Appeals, considered the Korean conflict as war for the purpose of applying the provisions of the Uniform Code of Military Justice.

least, they must assume not only an authoritative determination by the Security Council of the party unlawfully resorting to armed force, but also the *actual direction* by this organ of the armed forces of Member states undertaking enforcement measures against the aggressor. National armed forces acting *under the direction* of the Security Council do so in response to a Council decision imposing a legal obligation upon the Member states. The exceptional conditions accompanying the outbreak of hostilities in Korea may be interpreted as having permitted the fulfillment of the first of these conditions, though not the second. And Korea is not likely to be repeated. The strong probability, then, is that in a future resort to armed conflict there will be no authoritative determination of the aggressor. Although it is not at all unlikely that in the event of hostilities some kind of collective determination will be made of the party considered to have unlawfully resorted to armed force, possibly under Article 51 of the Charter or according to the "Uniting For Peace" Resolution, such determination cannot be considered at present as binding—in any legally relevant sense—upon those states dissenting from it. Under these circumstances there is still less reason for asserting any restrictions upon the operation of the rules regulating war's conduct.

(5) Recent practice would appear to indicate that, if anything, the situations in which the law of war is considered applicable have expanded rather than contracted.[42] There is, in fact, a discernible tendency today to attempt to apply at least a substantial part of the rules governing the weapons and methods of war, and particularly the rules regulating the treatment of victims of war, to situations in which the parties engaged in armed conflict refrain from making a declaration of war and, at the same time, deny any intent of waging war. The evident purpose of this growing effort may be rightly described as the humanitarian one of extending as widely as possible the beneficial effects resulting from the application of the law of war.

Thus Article 2 common to the four 1949 Geneva Conventions for the Protection of the Victims of War, provides that the provisions of these Conventions are to be regarded as applicable "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The apparent intent of those drafting this article was to make the Geneva Conventions applicable to all international armed conflicts, without regard to whether or not such conflicts are recognized as war by the parties involved, though the wording of the article is not altogether

[42] See *Law of Naval Warfare*, Section 110 and notes thereto. In a sense, the tendency to apply the rules of war—or, at least, a substantial part of these rules—to armed conflicts regardless of whether these conflicts are considered by the parties involved as war finds a certain parallel in the attempt made in the Charter of the United Nations to regulate the resort to armed force generally and not merely the resort to war.

adequate in meeting this purpose.[43] It is also apparent that the 1949 Geneva Conventions are fully applicable either in the case of an illegal resort to war or an illegal resort to armed force; no differentiation is made in this respect, or even suggested, as between the rights and duties of the contracting parties.

At the same time, it is difficult to determine the precise extent to which other rules regulating the conduct of war apply to situations in which states—engaged in armed conflict—neither make a declaration of war [44] nor admit the intent of waging war. Although it has been claimed that even in the absence of a formal state of war the rules regulating the mutual relations of belligerents are applicable to states immediately involved in

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[43] See J. L. Kunz ("The Geneva Conventions of August 12, 1949," *Law and Politics in The World Community*, pp. 304–6), who asserts that since a state of war may not be recognized by any party to a conflict "such a conflict would, under the letter of Article 2, not be included." This, for the reason that Article 2 speaks only of armed conflicts not recognized as war by *one* party to the conflict. In this connection, it may be of interest to note that Article 2, paragraph 11 of the "Draft Code of Offences Against the Peace and Security of Mankind," prepared by the United Nations International Law Commission at the request of the General Assembly, refers to "acts in violation of the laws and customs of war." In the explanatory comment following this paragraph it is stated that the latter "applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even, if the existence of a state of war is recognized by none of them." *U. N. General Assembly, Official Records, 6th Sess., Supp. No. 9 (Doc. A/1858)*, p. 13. In the essay quoted above Professor Kunz also criticizes Article 2 of the 1949 Geneva Conventions for failing to provide clearly for "large scale fighting in the course of an international military enforcement action, as now going on in Korea. For this is not an armed international conflict 'between two or more of the High Contracting Parties'." But this interpretation assumes that the armed forces in Korea were United Nations armed forces in the strict sense, and not the national forces of member states acting on behalf of the Organization. If the latter assumption is made, and it is submitted to be the more feasible one, then this particular difficulty does not arise.

[44] Hague Convention III (1907) Relative to the Opening of Hostilities obligates the contracting parties not to commence hostilities "without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." It is doubtful whether customary international law required a state to give "previous and explicit warning" before commencing hostilities. Be that as it may, the commencement of hostilities without previous warning or declaration nevertheless results in a state of war if this is the intention of the state commencing hostilities. Thus: ". . . States which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency; but they are nevertheless engaged in war." Oppenheim-Lauterpacht, *op. cit.*, p. 299. The more difficult questions arise, however, as Professor Stone correctly points out, "where war is not openly intended by one or other parties, who insist rather on conducting their hostilities under some other name." *op. cit.*, p. 312.

armed conflict, the practice of states in this respect is still characterized by a substantial measure of uncertainty.[45]

[45] See generally on this problem, Fritz Grob, *The Relativity of War and Peace* (1949). With respect to Hague Conventions II (1899) and IV (1907) regulating the conduct of war on land Grob declares: "Whether or not military operations are accompanied by naval operations, whether they are geographically limited or not, whether they are conducted by large units or merely by minute detachments, whether they extend over a period of years or last a few minutes only, all this cannot possibly make any difference for the application of the above rules of law on war." (p. 217). Though this statement is probably correct it is doubtful whether the application of these conventions on land warfare to all international armed conflicts can be deduced—as the author contends—from the intent and purpose of those drafting the conventions. However, it is true that despite the fact that these conventions refer to "war," the recent practice of states has been to apply them to all international armed conflicts, and it is this practice rather than the strict wording of the conventions in question that may be regarded as decisive in determining their present application to armed conflicts ("military operations") generally. On the other hand, P. Guggenheim (*Traite de Droit International Public* (1954), Vol. II, p. 312) observes that while those rules having a military and humanitarian character are made increasingly applicable to all international armed conflicts, rules regulating the economic domain of war remain limited in their operation to war in the formal sense. Thus in hostilities at sea it is doubtful that the right to seize and, under appropriate circumstances, to destroy enemy private property may be extended at present to situations other than those characterized as war in the formal sense. (See pp. 102–3.) Indeed, instances of "undeclared hostilities" have been confined, by and large, to operations on land, and for this reason alone it is difficult to estimate the degree to which the rules regulating the mutual behavior of belligerents may be considered applicable to naval hostilities where the parties involved deny any intent to wage war. No doubt one reason for confining "undeclared hostilities" to operations on land is the desire to avoid raising problems concerning the position of third states or the nationals of third states. In naval hostilities it is seldom possible to avoid such problems.—Finally, distinguish clearly between the operation of the rules governing the mutual behavior of the combatants and the rules governing the mutual behavior of combatants and non-participating states. The latter rules—the law of neutrality—are clearly dependent for their operation upon recognition of a state of war, though such recognition may be effected either by the combatants or by third states acting independently of the parties directly involved in hostilities (see pp. 199–201).