TWO APPROACHES IN THE INTERNATIONAL LEGAL REGULATION OF WAR

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Abstract

The topic of the research is renunciation of war as a means of international dispute settlement. As a permanent fulcrum of political philosophy and international law, war regulation applies two dynamically related focal approaches. They are either individually established or combined in various aspects. The first approach accepts war as a means of resolving disputes between sovereign states and creates rules for its humanization. The objective of the second approach is to determine international legal methods for war prevention. It is concluded that the current international law is neither based on, nor even aimed at a non-conflict foundation in international relations, but seeks its support in avoiding the wording "war".

Key words: *war, legal regulation, UN Charter*

One of the most significant aspects of international relations is based on the controversial relationships between law and power. The controversy is implicitly imposed by the nature of the two phenomena, by the negative nuance of the power that grows into violence, and by its exclusion from the law. The international community's effort to define and stabilize the "common good" is largely along the line of this distinction. Although it is a central axis in the efforts for lasting peace and tolerant coexistence, it encounters obstacles due to the paradox of the interaction of these two phenomena. In many cases, it is fostered by the same mechanisms that are designed to provide a solution, or by their deficiency.

The international struggle to preserve humanity identifies this counterpoint as the foundation of civilized legal thinking. The repudiation of force as a means of resolving disputes has different dimensions in law. They range from the legally established, universally recognized appraisement of natural or civil human rights, through the principles of international law detailed in various legal acts, to the dominant, universal legal denouncement of any mass threat intimidating not only the individual but states, peoples and nations as well.

Nevertheless, the development of tolerance and peaceful coexistence in international relations perhaps still fails to arrange the reason beyond the nature of the impulse. In law, it is transformed into a conflict of controversial values, which guide the development of relations between the universal value of the "common good" and the assertion of historical, ethnic, religious differences and the idealized notion of freedom of personality and peace. [Zheleva, 2009, p. 126 et seqq.]

The natural tension sparked by pole perceptions still leads to conflicts and makes the subject matter topical. The tension, however, ostensibly shifts its epicenter from the notion of "classical warfare" and puts out of focus the traditional bearers and authorities of historical clashes - the states. Nowadays, it has acquired new dimensions, building on our idea of the phenomenon of "war", with nuances introduced by new methods, other participants situated outside the representation in any state and military apparatus. Nonetheless, the grounds of everlasting conflicts (the struggle for the depleting resources, for territory, influence, supremacy, and assertion of national, ethnic, and religious values) hold valid and, despite the modification of the subjective substrate, they retain their essence. Notwithstanding the efforts to negate the cataclysm of war and the affirmation of peace as a supreme value in modern law, today's reality has given birth, although "illegally," to "new wars" [Munclair, 2006] and it is unclear whether they are privatizing violence from states through other, private titular mercenaries and terrorists, or they are conveniently being placed in the latter's hands. In any case, they provide the grounds and the potential for reactions, and the prospect of the distinction between official and "private", carries an additional threat and blurs the outlines, the correlation of law and reality.

Thus, the question arises as to whether and to what extent the common efforts towards lasting peace and the existing international legal protection of human rights provide a real framework of

common interest and whether their regulation is soundly based. It turns out that to protect one value it is necessary to affect another -state sovereignty - through mechanisms of armed humanitarian intervention. Another source of ambiguity is associated with the legal interpretation of the notion of peace. It is perceived as a state of non-war [Jackson, 1997; Online Etymology Dictionary], but the concept of "war" remains beyond modern law.

The formal direction of unity in the legal foundations of international relations shows inconsistencies related to the practical assertion of "common values", which in some cases is contradicted by identity - national, ideological, ethnic, or religious. Identity is increasingly adopting an extreme image, defended by all means, and military theories are already dealing with "new" or "modern" wars, but even the legal interpretation of the wars of the past has not been clarified so far. It is based on rejection.

Renunciation of war as a means of international dispute settlement is a permanent fulcrum of political philosophy and international law, which applies two dynamically related focal approaches to war regulation. They are either individually established or combined in various aspects.

The first approach accepts war as a means of resolving disputes between sovereign states and creates rules for its humanization. The objective of the second approach is to determine international legal methods for war prevention.

International law before the First World War acknowledged the acceptability of war, i.e. the right of any party involved to resort to military means to protect its interests. [Zheleva, 2014, p. 71] This conclusion was derived from the texts of The Hague Conventions (1889, 1907), which dealt with the methods of peaceful settlement of international conflicts and codified the standard practice of military action. The 1907 Convention was the first multilateral international act to introduce a systematized requirement for the use of peaceful means in resolving international disputes, but it did not explicitly prohibit the use of armed force, providing only for "avoidance if possible." (Art. 1) [Borisov, 2015, pp. 343-344]. Despite the lack of a legal definition of the term "war", its main features are implicit in the texts of the convention. Art. 1 defines war as an act of "resort to force by states in international relations". Possible reasons for the war are "serious disagreement or ... conflict" – Art. 2, which affect the honour or essential interests – art. 9. [Convention on the Pacific Regulation of International Conflicts. Translation in Bulgarian – Stefanova (1958), pp. 409-422.].

The Hague Conventions do not provide regulation of the right to recourse to war. They treat the possibilities of avoiding armed conflicts with the help of good services and mediation, international commissions of inquiry, international arbitration, and the war itself is considered as an actual situation in which the belligerents are obliged to observe certain norms of conduct.

Although the use of force was not prohibited, the Convention on the Laws and Customs of War on Land (The Hague IV) was an important step towards the humanization of war. Since all the circumstances that arise in the course of military action cannot be legally covered, the "Martens Clause" was incorporated in the preamble to the Fourth Hague Convention, in the name of the Russian lawyer Fyodor Martens, who insisted on this supplement. It states that “the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”. Considered in a narrow sense, this clause recalls that customary international law continues to apply even after the adoption of a relevant treaty rule. More broadly, it implies that what is not prohibited in the contract should not be considered permissible. By this text, Martens actually refers to the fundamental principles of international law: (1) the generally established customs of civilized peoples; (2) the laws of humanity; (3) the public ‘conscience’. Therefore, the Martens Clause allows extending beyond the framework of contract law and international custom and pursues support in the principles of humanity and the requirements of the public consciousness [Batyr, 2006]. Thus, law establishes the gravity of its precepts on pure ideals and does not significantly alter the attitude towards the phenomenon of war.

Until the First World War, international law followed this logic and, without denying or defining the right to wage war, rather categorised it as an instrument, establishing its acceptability as based on the interests of the territorial state. The very fact that until the First World War there was an international legal regulation of war, endorsing its admissibility, implies that the modern principles of rejection of aggression, respect for state sovereignty, and prohibition of intervention could not be carried out consistently at that time. [Paenson, I., 1989, p. 18-20].

The First World War transformed these attitudes. As they found no grounds to claim a violation of existing international law, the victorious states argued that the start of a war of aggression constitutes an international crime from a morality point of view, which gave them grounds to claim reparations from Germany and its allies. The special commission established in February 1919 to investigate the problem of the criminal liability of the parties responsible for the outbreak of the war came to the conclusion that " [A] war of aggression may not be considered as an act directly contrary to positive law" but accepted that it is " desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law". The Commission proposed the establishment of an International Criminal Court for the investigation of war crimes. [Zheleva, p. 72]

Even the most cursory analysis of these circumstances identifies a fundamental contradiction. The conflict was between the concept of the objective phenomenon of war, as a relationship between states, i.e. independent legal entities, and its legal interpretation in this light, on the one hand, and on the other – the perspective on the individual subjective impetus for military aggression and the subsequent interactions. It is illogical and paradoxical that war was viewed as permissible or at least not forbidden, but at the same time, the instigation of war by an individual agent and a number of personal actions were considered reprehensible and condemnatory, with a tendency to be treated as an international crime. This emphasizes the hesitant moral grounds of the attitude toward the entire phenomenon. The current ensuing objectives were beyond law – moral and material reparations. It seems that the legal interrelations necessary for the substantiation of guilt and responsibility were not available due to the deficiency of clarification of the legal nature of the phenomenon of war and clear parameters of unlawfulness. Subjective responsibility was also based on morality and was devoid of established stability, as no international convention had treated the violation of the laws or customs of war as an international crime before. That was why, although recognized as directly responsible, the German Emperor Wilhelm II avoided the process and took refuge in the Netherlands, which rejected the Allies' request for extradition on the grounds mentioned above, referring to the principle of *nullum crimen sine lege*. [Zheleva, 2014, pp. 72; Mihailov, 2003, pp. 31-32].

This view creates the impression of isolating and, to a large extent, of neglecting the legal intolerance of "war of aggression" as a compact act of the aggressor state, compared to that of personal acts, the nature of which is criminal since they are committed contrary to the basic principles of humanity and international law. Furthermore, the notion of war (still valid) as an act not contrary to positive law is difficult to reconcile with the existence of military reality - aggregate, horrifying events caused by numerous acts conducted in the vortex and the chaos of the masses with the conviction that it is legitimate, permissible. This relativity of positions predetermines the avoidance of responsibility.

The first months of 1919 saw the approval of the Covenant of the League of Nations, which entered into force on January 10, 1920, together with the Treaty of Versailles. It became an integral part of all treaties concluded with the countries defeated in the First World War. The Covenant was intended by its authors to provide collective security by outlawing the war of aggression, creating a coalition of non-aggressive states, and punishing the aggressors. The Covenant established the means to achieve the proclaimed main goal - "to accept certain obligations not to resort to war": the use of peaceful border settlement procedures, the recognition of the legal distinction between admissible and inadmissible wars, the latter being considered a violation of the obligation of peaceful settlement of disputes (Articles 12, 13, 15); the formulation of the principle that a war

between two states affects the international community, represented by the UN as a whole (Article 11); the obligation to maintain the territorial integrity and political independence of all members of the organization against any external aggression (Article 10). [Nai, 1998, pp. 103-104, Paenson, 1989].

The Covenant restricted the right to recourse to war but did not completely abolish it. It contained some ambiguities that render it difficult to apply the collective security measures and permissible to resort to war under certain circumstances, i.e. the insufficient number of votes in the Council or the Assembly – Art. 15; arbitration or judicial dictum not available – Art. 13; the refusal of the parties to accept the decision proposed by the Council. If the parties were not members of the League of Nations, they had the right to refuse to obey the rules for conflict resolution, mandatory for the member states of the organization – Art. 17. In addition to the abovementioned, in compliance with Art. 12, the Member States were obliged to submit any dispute likely to escalate to arbitration or judicial settlement or to an investigation by the Council and not to use force for three months following the adoption of a decision by one of those entities. This is indicative of the remaining admissibility of military action and the ambiguity in the wording of the principle of peaceful settlement of international disputes. [Borisov, 2015, p. 344]. The vague definition of the term "war" and the interpretation of war in the context of the subjective intentions of states created conditions for circumventing the restrictions arising from the Covenant. Thus, the term "war" was conveniently replaced by the term "armed conflict".

It was not until the Kellogg-Briand Pact of 1928 that war was banned for the first time and treated as an illegal way of resolving international disputes, reaffirming the principles for their peaceful settlement [Borisov, 2015, p. 344].

The Second World War is associated with significantly more focused and pronounced opposition of the international community against military violence. The concepts enshrined in the decisions of the Nuremberg and Tokyo trials gave impetus to the formulation of the concept of "aggression", the primary definition of which was set out in the Charter of the Nuremberg International Tribunal and generally reproduced in the International Military Tribunal for the Far East Charter (Tokyo Charter). The four Geneva Conventions of 1949, which extended the principles of humanization to clarify the status and improve the situation of certain groups of victims and participants, further developed The Hague Conventions [Borisov, 2015, pp. 506-507], but they also did not shift the focus from admissibility to inadmissibility of war. It still remained a condition forming a background against which additional criteria for humanity were established.

The end of the Second World War and the foundation of the United Nations (UN) marked a new semantic interpretation of the essence of international law as a law of peace that is entirely based on the principles designed to ensure the protection of peace and security. The peacekeeping function is the foundation of the UN Charter. Among the set of acts related to the activities of the UN is Resolution № 33/14 of 1974, which defines the term "aggression" through a long list of acts of using force – bombardment, invasion, attack, or any military occupation by armed forces on foreign territory; military attacks by land, sea, and air; the use of armed forces of a state permitted through an agreement within the territory of another state in contravention of the agreement conditions; sending armed bands, groups, irregulars or mercenaries to commit acts of armed force against another state, recruiting paramilitary units in the country that is affected. The fundamental point concerns the use of armed force by one state against the sovereignty, territorial integrity, or political independence of another state. It is assumed that the act of aggression can take place at any time, regardless of the existence of an ongoing war. The concept of "war" is established as parallel and independent, but its own formulation beyond law is a subject of the theories of military strategists, which show some discrepancies.

Moreover, the UN Charter allows the Security Council to add casuistic elements to the interpretation of aggression, defining other acts as aggression. According to Art. 39, the Security Council, whose decisions are subjected to the principle of unanimity of its permanent members, "... determines the existence of any threat to the peace, breach of the peace or act of aggression ...".

With this decision, the Council may legitimize " operations by air, sea, or land forces..." provided that the Council considers them necessary in order "to maintain or restore international peace and security".

These formulations no longer relate to war at all. The term is completely shifted, and the listed forms of use of force (influence) are "actions", "necessary" for peace.

Such a perspective is modest against the background of other premises in law that affect any novelty whether not covered or upcoming, but it shows an unrefined crack illustrated through historical indicators.

These tendencies and considerations lead to the conclusion that to a certain extent the fluctuating nature of the contemporary international conflicts, their dynamics, and the emergence of new approaches to establishing supremacy in international relations attempt at finding a modified way to impose the everlasting inducement to war. The renunciation of war becomes a mechanism of the ostensibility necessary to provide a framework for notions of peace and a flexible ground for interfering in foreign interests. It does not provide for peace as a reality, stabilized and community harmony, but introduces it in the form of "non-war" - unfortunately, "non-war" found in the dictionary, but not in the modern reality. This highlights the paradox that the situation is neither based on, nor even aimed at a non-conflict foundation in international relations in terms of realities and existing law, but seeks its support in avoiding the wording "war". There are many contradictions in this area. The definitions provide grounds that may be motivations outside the law as well, and their absence does not eliminate them, nor is it clear whether it is an incentive. Should we proceed further with defining or reconsider our path from old to "new wars", which of their traits remains consistent and unchanged…?! Perhaps it is the evolutionary rift that is constantly deforming the "golden mean" among all the solutions sought.

Although the still valid law deals with humane norms applicable in the "state of war" /jus in bello/, the term is increasingly being removed from the legal vocabulary, public discourse, and modern conflictology. Turning our eyes away from the dramatic symbolism of war and replacing it with alternative formulations can provide new parallels, expand the scope of lawful reactions, but leave a void in the place of our healthy fears and allow for more wars with new names.

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