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A Normative and conceptual study of peace after the Second World War in light of the Nuremberg Tribunal and the United Nations

Mohammad Alipour
University of Szeged, Hungary

Abstract

The concept of peace is a source of much debate in the history of international law, and scholars have discussed it from different perspectives. State's consent formed the basis for the legal order prior to the Second World War. However, after the Second World War, peace requirements altered the order by imposing certain obligations upon States. These obligations are essential for universal peace, regardless of states' consent. Among these requirements, the salient sample is the prohibition of waging war, which was criminalized for the first time by the Nuremberg and Tokyo Tribunals. As part of the process of pursuing lasting peace the adoption of the Charter of the United Nations is a hallmark. The Charter outlined a new vision of peace, coupled with retaining the classic definition of peace as the absence of war. There are two characteristics of the Charter's peace; it is manifested in a particular form with a definite connotation. In terms of the form, certain articles of the Charter suggest that the form is the relationship between the members of the United Nations and that the connotation is the implementation of human rights. Charter law pledges States, individually and collectively, to observe human rights both at the domestic and international levels, and this understanding of peace has affected the structure of international law.

Keywords

The United Nations, peace, war, human rights, Nuremberg tribunal

Introduction[1]

Peace has been the subject of much debate in the history of international law, and many scholars have examined various aspects of it. Prior to the adoption of the Charter of the United Nations (the Charter), peace was primarily considered to be the absence of war. The principle of equality

Corresponding author:
Mohammad Alipour, University of Szeged, Petofi Sandor Sugarut, Building 40/A, Szeged 6720, Hungary.
Email: md_alipoor@yahoo.com

of states and its corollaries, namely contractual freedom and reciprocity, formed the basis of international order.

The former serves to implement sovereignty, while the latter serves to protect interests. A supremacy of equality of States was envisioned as a means of achieving peace. However, the idea of isolated equal sovereignties with full autonomy did not lead to perpetual peace since it rested on the foundation of absolute rationality. As a result of the ramifications of such an order, particularly during the Second World War, members of the international society revised the state-oriented international order. Following the Charter era, peace evolved from a normal legal norm into an axiological norm, which not only enjoys a higher rank than the principle of equality, but also controls the sovereign's absolute will. Peace is at the core of the new legal order and therefore pertains to every subject of international law. The Charter is a manifestation of this philosophy. The United Nations was established with the purpose of maintaining lasting peace for the international community, not just for its initial members. The recognition of the objective legal personality of the United Nations by the International Court of Justice (ICJ) at the very beginning of its work communicates a message of change in the contemporary international legal order, which is no longer solely based on the will of States. During its early years, the UN addressed the issues pertaining to non-member States under the rubric of peace. In this regard, it is crucial to analyze what the Charter implies in terms of the law of peace. According to the Charter, the Security Council (SC) has the primary responsibility of maintaining international peace and security and, as such, the SC has a discretionary power to decide what constitutes a threat to peace. The SC's discretionary power is so broad that some commentators believe that peace is what the SC determines. Nevertheless, several articles of the Charter provide insight into the meaning of peace. Initially, this article explores new understandings of post-Second World War peace, by emphasizing on Nuremberg Tribunal. Following is an analysis of the manifest of peace in the Charter of the United Nations.

Transformation of peace after the Second World War; upgraded to the fundamental norm

Before proceeding to examine peace after the Second World War, it is vital to understand peace in its background. Historically, peace has been considered a correlative concept to war, rather than an independent concept. Apart from the contemporary period, war has always been a legitimate means for achieving any objective. Therefore, natural status is the most appropriate term to describe the relationship between international actors. During the early ages, thinkers developed the theory of just war to limit waging war. As long as humanity continues to be in a state of sin, Augustine believed that there will not be true earthly peace (human interest in the inferior pleasures of the materialistic world rather than the higher, spiritual pleasures) (Busek, 2015: 11). For Augustine "[f]inal peace is where human being shall be freed from both sin and death" (Langan, 1984: 29). To build earthly peace, Augustine did not completely prohibit war. War would not be a sin if: (a) waged by a public authority; (b) for the purpose of punishing wrongdoers; and (c) with the intent of securing peace and helping the good or avoiding evil. For him, war should not be completely prohibited and in certain circumstances (Augustine, 1955: 26), the achievement of earthly peace requires war. He pointed out "the earthly city desires earthly peace, albeit only for the sake of the lowest kind of goods; and it is that peace which it desires to achieve by waging war" (Augustine, 1998: 639). First and foremost, a just war must be motivated by legitimate motives; the establishment or preservation of earthly peace and public authority (Kaczor and Kreeft, 2020: 229). The second criterion includes two situations; self-defense and offensive war

when "if some nation or some state which is warred upon has failed either to make reparation for an injurious action committed by its citizens or to return what has been wrongfully appropriated" (Deane, 1963: 312). In the end, Augustine concluded:

> A great deal depends on the causes for which men undertake wars, and on the authority, they have for doing so: for the natural order which seeks the peace of mankind ordains that the monarch should have the power of undertaking war if he thinks it advisable, and that the soldiers should perform their military duties in behalf of the peace and safety of the community (Augustine, 1887: 301).

Therefore, Augustine viewed war as a means to achieve peace (Augustine, 1950: 687). In the 13th century, Saint Thomas Aquinas developed the concept of just war.[2] He raised his point of view about war and other related forms of violence under the title of sin against peace (Reichberg, 2011: 479). Aquinas, inspired by Augustinian theology, believed that just war could be applied under three conditions. The first and third conditions are substantially similar to those presented by Augustine; "the authority of the sovereign by whose command the war is to be waged" and "the belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil." In relation to the second condition, however, there is a subtle shift in his perspective. Aquinas contented that "secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault" (Busek, 2015: 11). In this way, Aquinas delegitimized all other forms of war that are conducted for wrong reasons, such as to serve human greed. There was still such a perception of peace among scholars, despite modifications to the titles and criteria. Among them, Grotius occupied a prominent position. Grotius holds that the only possible cause for a just war is a wrong (Grotius, 1925: 3, 10). He continued there can be no other justification for going to war except for injury sustained (Grotius, 1925: 1, 2, 4).

> For law in our use of the term here means nothing else than what is just, […] that being lawful which is not unjust. Now that is unjust which is in conflict with the nature of society of beings endowed with reason On Grotius' account any wrong and any injury give cause to a just war (Straumann, 2006: 8).

Turning now to examine a landmark in international law history. A manifest failure of the League of Nations to prevent the Second World War led the international society to reassess methods for maintaining peace in the future. Hersch Lauterpacht (1946: 51) famously wrote in the wake of the Second World War that "international law should be functionally oriented towards … the establishment of peace between nations …" In the legal sense, despite being a legal norm, the Peace of the Covenant was unable to operate alongside the principle of sovereignty. It is essential to note that both accorded the same degree of enforcement and that in the event of a conflict, the principle of sovereignty could override the principle of peace both in theory and in practice. Thus, it was necessary to give a greater degree of importance to the norm of peace against sovereignties.

In order to accomplish this goal, Nation–States built an international legal order on the basis of peace in order to realize peace. As a result, the norm of peace has been upgraded to the status of an axiom, and therefore sovereignties cannot legally ignore complying with the requirements of peace as a fundamental norm. In contrast to the principle of equality of States as a rational axiomatic outcome of Westphalia order, peace of the post-Second World War stems from international social values. By virtue of the axiom of peace, the corpse of Westphalian principles is sanctified. This holy spirit controls the absolute will of States and allows them to direct their policies, as long as they are not detrimental to peace. In doing so, the prohibition of war becomes an essential

requirement of the maxim of peace. The Nuremberg and Tokyo Tribunals are prominent examples of a new understanding of dignity of peace in international legal order. A series of Nuremberg and Tokyo trials were held by the victorious States of the Second World War to prosecute and punish Nazi and Japanese leaders. The tribunals were set up to prosecute those accused of crimes against peace, crimes against humanity, and war crimes.[3] Due to sufficient foundations in customary international law, the charge of war crimes has not been subject to intense criticism (Finch, 1947: 20–22; Gallant, 2009: 69–79). Crimes against humanity, despite being a novel notion, were supported by the argument that they reflect the general rule of law among all civilized nations (Weigend, 2012: 42). Crimes against peace, however, in Article 6, were a controversial and problematic issue due to a lack of clarity regarding the legal grounds under which the crime was criminalized (Weigend, 2012: 42). The disagreement rested on different perspectives of scholars toward the application of the principle of *nullum crime sine lege*. According to this principle, no one shall be penalized for a charge that has not been criminalized in advance. The critics of The International Military Tribunals (IMT) Charter claimed that the precedents of international law do not recognize any crimes under the title of crimes against peace. The trial of individuals for crimes against peace (Article 6) is, therefore, an obvious violation of the prohibition on ex post facto punishments (Finch, 1947: 28; Kelsen, 1945: 8–9). In Article 6, crimes against peace are defined as:

> Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

It is a challenging question. How is possible to punish individuals for waging war, as a constituent element of crimes against peace, while it was not considered an illegitimate and illegal act under the Covenant of League of Nations? The issue should be viewed within the context of international law, rather than focusing solely on the conflict of principles. The IMT Charter has selected the title crimes against peace, but its definition referred to aggressive war. This Article indicates that the historical understanding of peace as the absence of war remains valid, and peace and war are still believed to be intertwined concepts. A transformation of peace has occurred in international law in response to the ramifications of the Second World War, with the memory of the dark years of the First World War. War's calamities led the international society to realize the necessity of ending aggressive warfare. This perception was missed in the League of Nations. There seems to be no way to maintain peace while war is still legitimate. The victorious States filled this gap in the IMT Charter by accommodating prohibition on aggressive war and punishing those responsible for aggression. In this regard, one may challenge the legitimacy of such criminalization. It appears to the author that criminalization by the IMT Charter may be justified merely based on the emergence of new international order. The IMT Charter would only be meaningful in a peace-oriented system where peace is a fundamental norm and is accompanied by all the necessary instruments for its preservation. The IMT Charter was not an initiative for prohibition of war. This was first agreed in the Pact of Paris (Kellogg-Briand) in 1928, which renounced the use of war as a means to resolve international disputes. However, a nuanced difference exists between Kellogg-Briand and the Charter of the IMT. The prohibition in the former was binding only on the signatures, not on third parties, thus it was a normal legal norm in the same sense as other norms that States agree upon in their relationships. It is a common point of view that Kellogg-Briand Pact did not trigger universal peace. Ethan Ellis (1968: 368) pointed out that although the treaty was a source of immense pride, that sense of achievement "would be turned to disillusionment during the author's lifetime." Ellis later wrote that the Pact "enlisted a world's promises, but no single sanction, in its support." International relations specialist (Morgenthau et al., 1978: 287) queried whether the Pact created international law or was

merely "a statement of moral principle without legal effect." Kershaw (2015: 285) looked at it as "a dead letter from the moment it was signed." Kelsen (1944: 18) proposed that "the failure of the Briand-Kellogg Pact, however, is due to its own technical insufficiency"—its scope was too broad and it had not provided enforcement provisions. Recent commentators, Brunnée and Toope (2010: 274) were even more dismissive and contented that "the pact was declared moribund and treated as the prime example of naïve idealism." De Visscher (1968: 298–299), who was more cautious, stated, ''The significance of the Briand-Kellogg Pact lies in the moral imperative of which it was the expression," although he concluded that this imperative "sooner or later imposes itself on the legal order." Hathaway and Shapiro (2017: 21–24) in The Internationalists supported the thesis that the Pact of Paris created a new international legal order by transforming aggressive warfare from a legitimate to an illegitimate means. Despite this, Hathaway and Shapiro with their new attitude were not satisfied with the Paris Pact being the sole basis for the transformation from old to new legal order, rather the Paris Pact was a landmark in that process. The failure of the Paris Pact was very soon revealed to all parties in 1931 by Japan's attack on Manchuria, the Italian invasion of Ethiopia in 1935, the German occupation of Austria in 1938, and finally Second World War.

In contrast, the prohibition of war in the IMT Charter triggered universal peace, and the Nuremberg and Tokyo trials are a lucid testament to a ground-level norm of peace. Justice Jackson, Chief United States Prosecutor at the Nuremberg trials, justified the holding of the Nuremberg Tribunal and the necessity of US participation under the auspices of peace and according to the requirements of peace-oriented legal order. He pointed out (1949: 383–384):

> Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from the outset and hence we were not doing an illegal thing in extending aid to peoples who were unjustly and unlawfully attacked… No one excuses Germany for launching a war of aggression because she had grievances, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy.

Accordant to the IMT, existing international law permits the establishment of such tribunals that have the competence to punish belligerents of war. As discussed above, the international society saw war as the other side of peace. The disruption of peace is the primary reason for the illegitimacy of war. Only if international law is a peace-oriented system, could the IMT Charter be regarded as being consistence with international law. The Court held[4]:

> The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law already existing at the time of its creation; and to that extent is itself a contribution to international law. The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.

Regarding the achievements of the Nuremberg and Tokyo Tribunals for international law and the opportunity that peace could be reproduced in new forms, Paupp wrote (2014: 415):

> The historical record of the Nuremberg Tribunal still serves to demonstrate that advances in the international law of the human right to peace, as well as the actualization of peace itself, stem from

transformations in human consciousness, and in the creative capacity of people dedicated to the cause of peace to imagine and legally mandate a different kind of world.

Peace in the Charter of United Nations

The United Nations was established as a means for realizing universal peace, and every organ of the UN was entrusted with specific qualifications to accomplish this goal. The purposes and principles of the United Nations are outlined in Articles 1 and 2 of the Charter. It announced "[t]o maintain international peace and security" as the main goal of the UN. Article 4 provided that those States that are committed to peace are eligible for membership in the Organization. In compliance with Article 11, the General Assembly is authorized to discuss and consider "any questions or matters" pertaining to "the maintenance of international peace and security." Based on Article 24, the SC is entrusted with "primary responsibility for the maintenance of international peace and security." According to Article 62, the Economic and Social Council "may make or initiate studies and reports" regarding the purposes and principles of the United Nations. Article 76 stipulated "[t]he basic objectives of the trusteeship system … shall be: to further international peace and security." Based on Article 92, the ICJ would serve as a forum for the peaceful settlement of international disputes. Last but not least, Chapter XV of the Charter assigns the Secretary-General and the Secretariat the responsibility of carrying out the tasks entrusted by the organs of the UN. In addition, the Secretary-General can draw the attention of the SC to any matters which "may threaten the maintenance of international peace and security." As it is perspicuous, a fundamental principle of the Charter is the establishment of peace as its primary goal, and the organs are entrusted with specific functions to achieve this purpose. It is true that peace is a controversial concept and that scholars have discussed it from various perspectives, however, the author would like to draw attention to a subtle point concerning the concept of peace in the context of the Charter.

Having a clear understanding of what the Charter implies regarding peace requires distinguishing between the form and the connotation of peace. In general, more research has been conducted on the connotation of peace, but less attention has been given to the form of peace. Whatever the connotation of peace may be, it is not applicable without a form, just as a liquid is not applicable without a container. As per the Charter, the form of peace is a relationship, a connection, or a link, and the connotation is the implementation of human rights.

Form of peace

Article 1 of the Charter indicates that relationship is a form of peace. It is stated in Paragraph 1 of Article 1 that the realization of peace is contingent upon "collective measures" by all members. Paragraph 2 aimed to establish friendly "relations among nations." Paragraph 3 focused on "international cooperation" and the last paragraph considered the United Nations as a forum "for harmonizing the actions of nations." The language in Article 1 seems to suggest that the UN is dedicated to developing relationships among Nations–States. In other words, the Charter generates peace through interaction between its members.

The author would like to borrow an example from Galtung. He stated (1967: 13):

> [I]magine that between all the nations in the world today high walls are erected, and much more efficient than walls currently existing between nations, so that no interaction at all is possible. There is no communication, no contact, no interactions between the nations.

While this blueprint appears safe, less problematic, and all matters fall under the purview of domestic affairs, the framers of the Charter did not opt such a scenario for the future of humanity, and the fantasy of a wall is profoundly inconsistent with Article 1.

Connotation of peace

If peace is a relation between international subjects, it can be followed with an inquiry into the quality of such a relationship. To answer this question, special attention should be paid to the Preamble and Articles 1 and 2 of the Charter.

The Charter also holds the classic view of peace as being the absence of war. Article 2(4) stated that "[a]ll 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." Prior to the Charter, the predominant discourse both in international instruments and among scholars revolved around the prohibition of war. As one of the novel features of the Charter concerning the prohibition of war, one should point out the insertion of "use of force" instead of "war." That is because the term "war" paved the way for abuse of the caveat that existed in the classic definition of war. For instance, following the former Yugoslavia crisis, it was difficult to determine who was involved in the conflict. Italians believed they were engaged in war while the UK believed it was not or based on the assumption that Iran was at war against the Allies, the latter attacked and occupied Iran, whereas Iran consistently declared neutrality during the Second World War. Therefore, the term prohibition of use of force has been included in the Charter in order to prevent all possible circumventions of the classical understanding of war. It does not matter what the intentions, reasons, causes, or methods are. What matters is the actual use of force. There is no doubt that the use of force encompasses military and associated actions in the context of the Charter. It has been argued that not every forcible military act counts as a use of force. Depending on the scale or the confined purpose, certain military actions may not be considered as such. Hence, they believe that the prohibition of force is inapplicable below the "gravity threshold" (Corten, 2021: 77; O'Connell, 2013: 89; Ruys, 2014: 177). They have cited the report of the Independent International Fact-Finding Mission on the Conflict in Georgia to support their argument. The report stated: "prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity" and that "[o]nly very small incidents lie below this threshold, for instance the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft."[5] However, it seems that this argument is being made to achieve a greater objective, which is to prevent a serious armed conflict rather than to interpret the Charter precisely.

As international law prohibits the use of force as a peremptory norm and due to the unwilling ramifications that might result for the initiator, when States intend to exert pressure on other State, they prefer to use measures that are not armed force in nature. Thus, economic force is a common means to exert pressure on other countries in order to achieve the objectives desired. A consensus exists that the prohibition of force under Article 2(4) and under customary law does not prohibit the use of economic force. There was a proposal from the Brazilians (The United Nations Conference on International Organization, 1945: 558–559) to include the threat or use of economic measures in the prohibition of the use of force. However, this proposal was rejected by the San Francisco Conference. Similarly, the concept of "economic aggression," which would have prohibited the use of force as a means of exerting economic pressure, was not included in Resolution 3314 (XXIX) on the "Definition of Aggression" (1974). Hagemeyer-Witzleb (2021: 90–92) concluded after reviewing State practice both within and outside the UN that despite some attempts to incorporate economic force into the prohibition of force, particularly on behalf of

developing countries, there is no evidence of this inclusion and "the issue has not been rekindled since." Thus, there is no violation of the Charter prohibition on the use of force in implementing economic warfare measures during peacetime or even in the absence of armed conflict. Nevertheless, it is pertinent to remember that the non-extension of force to economic and political wars and their correlative concepts, such as economic sanctions, does not entail the legitimacy of such acts, and that such acts may be illegitimate under other rules of international law.

Last but not least, cyberwar is a subject that merits attention. In general, cyberwar is not equivalent to the use of force per se. However, if it has the same effects as an armed attack, it may be construed as such. ICJ passage in Nicaragua provides a basis for inferring the criterion of "similar effect."

Court has ruled that in customary international law, the prohibition against armed attacks may include sending armed bands across a frontier if the "scale and effects" would have been qualified as the effects of an armed attack.[6]

A major novelty of the Charter can be found in the Preamble and Article 1. In the Preamble, the original framers, the aim, and the *modus operendi* of the United Nations are illuminated. The new connotation of peace can be recognized by studying the Preamble and Article 1.

On 14 August 1941, a joint declaration between the United States and England, known as the Atlantic Charter, marked the beginning of the UN's history. According to principle 3 of the Atlantic Charter: "[T]hey(sovereignties) respect the right of all peoples to choose the form of government under which they will live." Principle 6 stated:

> [A]fter the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.

These two principles reflect the principle of "autonomy of I," whereby nations possess an inherent right to determine their fate and destiny, and such authority shall be respected by others. The Preamble of Declaration of United Nations (1 January 1942), which was signed by 26 States, promulgated the protection of "life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands." The Declaration, for the first time, stated that "the protection of human rights was stated explicitly as a peace aim of the Allies" (Heyns, 1995: 333).

Among the contributions of Jan Christian Smuts, the principal author of the Covenant of the League of Nations, was the proposal to adapt the preamble to the UN Charter and advocated the recognition of human rights as fundamental values (Heyns and Willem, 2017: 574–575). On 25 April 1945, the United Nations Conference on International Organization began its work in San Francisco with the aim of planning a new universal organization. During the sermon Smuts delivered to the Plenary Session on 1 May 1945, he explained his viewpoint regarding the adoption of the Preamble and stated: "The New Charter should not be a mere legalistic document for the prevention of war. I would suggest that the Charter should contain at its very outset and in its Preamble, a declaration of human rights and of the common faith which has sustained the Allied peoples in their bitter and prolonged struggle for the vindication of those rights and that faith … We have fought for justice and decency and for the fundamental freedoms and rights of man, which are basic to human advancement and progress and peace."[7] Afterward, a new version of the Preamble was proposed by the South African delegation which reaffirmed the accommodation of human rights.[8] In the last version of the Preamble, the human rights characteristic was retained, and the centrality of human rights was highlighted in paragraph 2 (Heyns and Willem, 2017: 592). In the definitive version, the phrase used to begin the Preamble was significantly changed.

While the Smuts Proposal started with the phrase "We, the United Nations" and South African Proposal began with "[t]he High Contracting Parties" the approved Preamble started with the terms "[w]e the peoples of the United Nations determined." Finding out to whom the pronoun(we) refers is imperative. The pronoun is neither a personal pronoun nor a conveyance of arrogance or modesty of the State; rather, it refers to the homogeneous conscience of human societies and organizations (Falsafi, 2002: 2). According to this fact, the Charter distinguishes itself from other treaties or legal documents, as its interpretation and implementation would be governed by the principles and rules of the UN system, independent of Member States' will (Falsafi, 2002: 2). The reference of "we" is "peoples," not the States. The plural form of people symbolizes the acceptance and recognition of polarity and equality among nations despite cultural diversity. The verb "determined" indicates that "the peoples" are the original framers of the Charter, but they have bestowed on their governments the responsibility of representing them in order to cooperate between each other on the axis of human "dignity." As the last paragraph of the Preamble states: "our respective Governments, … have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." Accordingly, the phrase "do herby" indicates that peoples are the *raison d'être* of the UN, not States, thereby conveying a hierarchy of authority in the Charter where the governments represent the peoples. States are parties to the Charter because they are subjects of international law (Jhabvala, 1997: 8) and humanity (the peoples) acts as the *modus operandi* of the Organization. The Preamble promises a description of the system whose organs and policies revolve around the transcendent value of human dignity (Falsafi, 2002: 2) and in Articles 1 and 2, the mechanism for achieving this goal is outlined. In Article 1, two historical streams are synthesized to promote universal peace: the prohibition of war (as an anti-peace phenomenon) and the implementation of human rights.

Due to the experience of wars, notably the Second World War, the Charter emphasized the link between war and violations of human rights, stating gross human rights violations are the results of war and can be a cause of war (Manikkalingam, 2006: 1). Article 1 of the Charter of United Nations spelled out that members shall refrain from waging war and build relations, relationships "based on respect for the principle of equal rights and self-determination of peoples," and since there are many obstacles which may weaken or hinder the relationships, the members shall cooperate "in solving international problems of an economic, social, cultural, or humanitarian character." It is important to note that these problems are primarily a matter of concern for the people and not for the governments. By this point, it appears that the Charter is intended to serve the interests of "the peoples" and that their rights should be respected and promoted without discrimination. As a point of clarification, the author does not see the Charter as an international humanitarian instrument, but rather would like to stress the central value upon which the UN system is built.

Obligations derived from connotation of peace

Bringing the Charter to full fruition seems to be a distant dream. As a result, the Charter focuses on the process of moving in this direction rather than the utopian goal of full realization. As a result, the Charter imposed a broad range of obligations on both the Organs and the Members, including obligations related to human rights. The Charter articulated human rights obligations in the Preamble, Articles 1, 8, 13, 55, 56, 62, 68, and 76. According to these Articles, the Members should cooperate with each other to promote and respect human rights, as well as to fulfill their separate individual obligations, and refraining from involving in UN arrangements "to promote observance" would constitute a violation of the Charter (Sohn, 1977: 131). The General Assembly[9] in the

Declaration on the Granting of Independence to Colonial Countries and Peoples 1960, adapted unanimously, declared that "[a]ll States shall observe faithfully and strictly the provisions of the Charter of the United Nations." The American delegation took the following stance during the San Francisco negotiations regarding Article 1 of the Charter that it is "binding on the Organization, its organs and its agencies, indicating the direction their activities should take and the limitations within which their activities should proceed" (Goodrich et al., 1949: 25). In the same vein, Hersch Lauterpacht (1950: 147) reckoned the Charter imposes the "legal duty to respect and observe fundamental human rights and freedoms" on the Members. Sohn (1977: 131) pointed out that the Charter's

> Provisions express clearly the obligations of all members and the powers of the organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all members must fulfil in good faith.

Human rights obligations can be categorized into three clusters: (a) publicity obligations on the UN organs; (b) the obligations of cooperation extend to both the Organs and the Members; and (c) executive obligation for members.

Publicity obligations on the UN organs: in accordance with Articles 8, 13, 62, and 68 of the UN Charter, different organs are responsible for working on matters related to human rights. According to Article 8, the UN may hire labor only based on eligibility and equality. The non-discrimination principle underlies this criterion. The General Assembly is mandated by Article 13 to assist the Members in "the realization of human rights and fundamental freedoms" through discussion and recommendations. Members may ask the General Assembly for assistance in resolving human rights issues, and the General Assembly by utilizing its capacities and expert teams can identify effective solutions to challenges the Members encounter in relation to human rights. Additionally, the General Assembly may initiate an *ex officio* investigation into existing barriers, and to this end, it should be able to assess to what extent the members adhere to human rights. A task such as this would be meaningful for the General Assembly if Members are already obligated to comply with and implement human rights obligations, otherwise, its actions would be *ultra vires* and futile. Under Article 68, the Economic and Social Council shall establish commissions for the promotion of human rights. In Article 62, a similar issue is raised. Repeating in separate Article aims to emphasize the concrete promotion of human rights and this can only be accomplished if the members collaborate to implement the resolutions, plans, and agenda that are recommended by the competent organ. At this point, it is important to recall the obligation of cooperating in good faith (Article 2). An interpretation that the Economic and Social Council merely holds a consultative position, and the members have discretion to disregard would be inconsistent with the essence of good faith.

The obligations of cooperation extend to both the Organs and the Members: Article 1 cites cooperation in the "respect for human rights and freedoms for all" as one of the UN's purposes. Member's commitment to cooperating with the UN in the promotion of human rights, "provided the UN with the requisite legal authority to undertake a massive effort to define and codify these rights" (Buergenthal, 1997: 708). ICJ in the advisory opinion concerning Namibia[10] held that

> To establish … and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national' or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

Further details regarding the quality of collaboration are provided in Article 55, which should be read in conjunction with Article 1. Namely, cooperation in Article 1 shall give rise to the parameters of Article 55. Regarding the purpose of Article 55, Stavrinides (1999: 41) wrote that it

> Contains a statement which connects three ideas: (A) the promotion of respect for human rights; (B) the creation of conditions of stability and well-being; and (C) the establishment of peaceful and friendly relations among nations. Indeed, there is a strong suggestion that the justification of (A) is that it conduces to (B), and that of (B) is that it conduces to (C).

Executive obligation for members: under Article 56, each Member is directly pledged to take action toward fulfillment of Article 55 requirements. If there is any ambiguity as to whether the Charter merely aimed at cooperation without expectation of concrete results, Article 56 with its reference to "achievement of respect for, and observance of" explicitly imposed obligation to reach a certain outcome. In this line of reasoning, a noticeable aspect of the Article is its language. In terms of the quality of fulfilling the obligation, the Article is written in the active voice. This Article did not state that the Members are pledged, but rather that the Members "pledge themselves" and such an emphasis indicates the necessity of adaption of concrete measures. In the ordinary sense, the word "pledge" refers to a "solemn promise or undertaking" and it was "used as a term at least as "strong" as the word undertake (Schachter, 1950: 648), which vividly to some extent imposes a legal obligation on the Members. Moreover, regarding the phrase "separate action" Schluter believed that it is difficult to interpret this pledge in a way that the Members should have a general collaboration with the system of UN and its agencies (Schluter, 1973: 120–121). In the same vein, Schachter (1950: 649–650) wrote that the framers of the Charter did not intend to confine a "pledge" to merely cooperation with the UN along with discretionary power, and such interpretation would render the Article ineffective and meaningless. Despite imposing human rights obligations on its members, the UN Charter does not specify what rights are covered. That is because including a detailed list of human rights in the Charter would cause a problem. For instance, the incorporation of certain human rights could hinder the recognition of new rights within the context of the Charter, and thereby deteriorating the future performance of the UN Organs.

The practice of the United Nations: acting according to the requirement of peace

The UN represents the culmination of long-term efforts to achieve universal peace. In light of the past experiences, the Charter established a comprehensive system for maintaining peace. The Charter derived the rule of peace from the norm of peace. The formula is simple: if a state threatens or breaches peace, a collective security response will be initiated. The adoption of the Charter could serve to illuminate the thesis of peace as an axiological maxim that prompted international law to undergo significant changes. The UN founders opted peace as a lodestar and equipped the Charter with all feasible means of maintaining peace. The following cases illustrate how the structure of international law was influenced by peace-related requirements.

Case concerning North Korea: Article 4 of the UN Charter provided that membership in the UN "is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." It has been commented that the peace-loving criterion implies both in past and in present behavior of a State (Wolfrum, 2012: 348). Article 4 originally referred to those States which had entered into war against the Axis Powers or were not Fascists, as well as those which had been supported by the Axis Powers (Bailliet, 2019: 12). The criteria by which States were judged as

peace-loving at the San Francisco Conference were their international behavior; "including compliance with UN resolutions, guaranteeing innocent passage in territorial waters, settling border disputes peacefully, and respecting the principle of non-intervention" (Wolfrum, 2012: 348). In this regard, the Charter prohibited the use of force at the international level for the first time as a multilateral binding treaty. The idea of prohibition developed during the pre-establishment processes of the United Nations, particularly the Atlantic Charter of 1941. In their meeting, Roosevelt and Churchill agreed to "make known certain common principles in the national policies of their respective countries on which they base their hope of a better future for the world" (Stone, 1942: 5). The Atlantic Charter outlines eight common principles, among which the United States and the United Kingdom concurred that, "(…) all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force."[11] Subsequently, on 1 January 1942, 26 States signed a "Declaration by United Nations" in which they formally declared their commitment to the principles of the Atlantic Charter. In line with the scheme, Article 2(4) of the Charter of the United Nations requires the Members to refrain from using force except in cases of self-defense or authorization by the SC. As pointed out by García-Salmones (2011: 867) "the maxim of 'peace through law' goes, structurally, hand in hand with the maxim of 'war through law.'" Without a warrior of peace, the UN's destiny would be akin to that of the League of Nations, thus the SC mechanism was designated. It was evident at the beginning that the SC, sometimes due to the application of veto, would not be able to fulfill its duties.

During North Korea's armed attack on South Korea, this issue came to light. As a result of the USSR's Veto, the SC was unable to take any measures to restore peace. At this point, the UN Members had to decide whether to refrain from taking executive action to restore peace or find a viable solution. If the Members chose the former, they would adhere to the Charter, because executive measures can only be adopted by the SC, and meddling with executive measures by the General Assembly would be a derogation to the Charter (Tomuschat, 2001: 3). Because Article 11 provided that "Any such question on which action is necessary shall be referred to the SC by the General Assembly." Nevertheless, the General Assembly opted for the second option and adopted the resolution "Uniting for Peace." Under Article 14 of the Charter, it was conceived that the General Assembly could assume a subsidiary responsibility regarding international peace and security (Tomuschat, 2001: 3). In the light of this interpretation, resolution 377 A(V) authorized collective action including the use of force. The use of force by the General Assembly is clearly in violation of Articles 2(4) and 11 of the Charter. The General Assembly "is incapable of placing any forcible measures employed on a new juridical footing" (Dinstein, 2017: 275). Principally, the UN organs do not have the authority to exempt members from their obligations under international law or to cease the legal effect of an already existing law (Hailbronner and Klein, 2012: 738). Even though defenders of the resolution justified it based on the Charter (Goswami, 1961: 451–460), it is unclear why the same decision (collective action) has not been repeated to hitherto (Tomuschat, 2001: 3). The same features can be found in some cases such as Kosovo or Syria; however, "Uniting for Peace" did not occur again.

The author believes that the resolution was legitimate because it was based on the maxim of peace as a centralized norm of international law. It should be noted that the Charter is not a tool for the creation of peace, but rather a mechanism for maintaining peace. The mechanism's rules should be validated as long as function in favor of peace; otherwise, another mechanism may be substituted. The sponsors of the "Uniting for Peace" resolution were concerned with future chaos—if the resolution was not justified according to the Charter, it could weaken the UN and adversely affect its efficiency. This derogation from the Charter appears to be unjustified except on the basis of peace requirements. The essential component of the Sponsors' argument was the urgency of the situation. Section A of the

resolution[12] stated that where "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, the General Assembly shall seize itself of the matter." In this line, American delegation[13] wrote to the General Assembly that

> The Charter gives the General Assembly crucial functions to perform in the field of international peace and security, including the right to discuss any question relating to this field and the right to make recommendations. The experience of the United Nations in the five years since the Charter came into force has demonstrated the value of the Assembly's role. In the view of the United States, the Assembly's contribution can be enhanced both with respect to the avoidance of conflicts and with respect to the restoration of peace if need arises. The General Assembly should be enabled to meet on very short notice, in case of any breach of international peace or act of aggression, if the Security Council, because of lack of unanimity of the permanent members, is unable to discharge its primary responsibility for the maintenance of peace and security. To this end, the United States proposes that the Assembly should make provision for emergency special sessions to be convoked in twenty-four hours….

Case concerning Spain: Today, nearly all States are members of the United Nations, but at its inception, the UN was not comprehensive. It should be noted, however, that the Charter addressed both members and non-members. Incorporating all Nation–States in the Charter demonstrates peace-oriented international legal order, and that the issue of peace concerns all. Peace has an infrangible nature just like a river. A muddy portion of the river can contaminate other parts. The UN founders, as a majority of the international society, were fully aware of this fact. Hence, the UN system includes non-parties, as well. Article 2(6) provided: "[T]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." According to Verdross (1954: 344) "For the purpose of the United Nations is not only to maintain peace within the organization but within the whole international community." In the early years, the United Nations addressed the situation in Spain, despite the fact that Spain was not a member of the organization. By listing numerous facts like "the recent Spanish troop movements on the French frontier, the presence of large numbers of Nazis and war criminals on Spanish soil, and various allegations that Spain was engaged in atomic research and production," the Polish delegation suggested that the situation should be recognized as a threat to international peace and security pursuant to Article 34 of the Charter (Houston, 1952: 687), and by invoking Article 2(6) requested that the Spanish question be included on the SC's agenda. In the same vein, the delegations of Belgium, Czechoslovakia, Denmark, Norway, and Venezuela asked the General Assembly to put the question on the agenda of the second part of the first session of the General Assembly. On the other hand, during the debate in First Committee, a few delegations, cited Article 2(7) as a basis on which the UN does not have the authority to address Spain's situation.[14] Ultimately, both the SC and General Assembly seized the case. As Kelsen (1951: 106) wrote that it was outlined in the Charter that the UN organs are required to adopt necessary measures against non-parties to the Charter if their actions were inconsistent with the UN's principles, and by doing so, indirectly obliged non-parties to comply with the Charter. Verdross (1954: 346) at one with Kelsen argued that

> Article 39 of the Charter obliges the Security Council to determine the existence of an act of aggression, any other breach of the peace or of any threat to the peace, irrespective of whether it has been committed by a Member of the United Nations or not. Consequently, the measures of enforcement taken by the Security Council are not restricted to Members.

In the Korean conflict, such an interpretation was the basis for actions. In response to North Korea's armed attack on the Republic of Korea, the SC declared the situation a breach of peace in resolution 82 and "called for the immediate cessation of hostilities, 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."[15] By resolution 84,[16] the SC "recommended that Members should furnish such assistance to the Republic of Korea as might be necessary to repel the armed attack and to restore international peace and security in the area." In resolution 84,[17] the SC

> Recommended that all Members, providing military forces and other assistance pursuant to the aforesaid resolutions, should make such forces and assistance available to a unified command under the United States, requested the latter to designate the commander, and authorized the unified command at its discretion to use the United Nations flag in the operations against North Korea.

It is important to note that the resolutions targeted North Korea even though it was not a UN member state (Engel, 1953: 84). It is indisputable that the Charter intends to require non-Member States to refrain in their international relations from threatening or using force against territorial integrity or political independence of any state (Verdross, 1954: 346).

Practice of The ICJ: ICJ is a judicial organ of the United Nations charged with settling disputes in accordance with international law. The Court through its practice has reflected on how the requirements of a peace-oriented order reshape the structure of international law and international society. One cannot, inter alia, dismiss the Legal Personality case. ICJ illustrated the basis for the international legal personality of the UN by arguing that:

> The Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.[18]

In the first instance, it might appear that the UN Charter is a treaty, and under the principle of *res inter alios acta alteri nocere non debet*, it cannot affect third States. Nevertheless, the ICJ ruled that the UN possesses objective international personality, which entitles it to exercise its duties and rights even against non-members. In an interesting development, the ICJ did not tie the establishment of legal personality to the will of the state parties, that is, States can grant legal personality to a new entity as long as they constitute a majority (Alipour and Szalai, 2022: 302). Considering that the United Nations is tasked with defending the common good of the international community, it must necessarily enjoy rights and responsibilities under international law that must be opposable to all (Alipour and Szalai, 2022: 302). Therefore, the common good, for which the UN has responsibility, requires objective personality, and the will of 50 states, as representatives of the international community, provides evidence of the existence of such a personality (Alipour and Szalai, 2022: 302).

International Covenant on Civil and Political Rights: As a result of the horrors of the Second World War, a broad consensus emerged worldwide calling for the protection of human beings by the international community.[19] In pursuing "promoting and encouraging respect for human rights and for fundamental freedoms" as one of the purposes of the UN, by resolution 543 (VI) of 4 February 1952, the General Assembly directed the Commission on Human Rights to prepare a Covenant setting forth civil and political rights. Upon completion of the Commission's work in 1954, the draft was adopted by the General Assembly in resolution 2200A (XXI). A salient manifestation of the transformation of international order from a state-oriented order to a

humanistic peace-oriented order is Article 4 of the Covenant. Article 4 of the Covenant[20] prohibits the parties from suspending certain human rights when the lives of the nation are at risk. It is an unprecedented obligation in the history of international law. Because when a nation is in a state of emergency, international treaties often grant States the right to withdraw from the agreement or temporarily to suspend it. For example, Article 10 of the Treaty on the Non-Proliferation of Nuclear Weapons provided that "[e]ach Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." However, Article 4 of the Covenant makes it clear that violation of certain human rights even in "time of public emergency which threatens the life of the nation" is not allowed. Additionally, in the case of mass atrocities, the SC tends to see the case as a matter of international peace and security such as the Sudan and Libya situations, whereas prior to the Charter era, it was a common understanding that human rights fell under domestic jurisdiction and that sovereignties had discretion on how to approach human rights, let alone to concede human rights as a fundamental restriction on the scope of state performance.

Conclusion

As a result of the calamities of the Second World War, international society felt the need for an extensive revision of international law. A previous order to maintain international peace was deficient, since peace did not enjoy the status, it should have. Therefore, following the Second World War, peace was elevated to the status of a legal axiom—a fundamental principle that is superior to other principles concerning the protection of sovereignties, such as equality of States and reciprocity. An understanding of peace of this nature has led to a change in the structure of international law. Certain actions that were deemed lawful prior to the Second World War have been deemed illegal following a new understanding of peace. The Nuremberg and Tokyo Tribunals represent the salient sample. The crime against peace was included in the Charter of Tribunals whereas it has not been criminalized in positive international law. However, this crime was justified under the rubric of peace. The Charter of the United Nations is another testament to a new understanding of peace. According to the Charter, peace is an issue of concern to all subjects of international law. The Charter specifically calls on non-parties in Article 2(6) to act in accordance with its principles in order to maintain international peace and security. In this light, non-membership status was not a barrier to the UN and during the early workings of the Organization, both the SC and General Assembly dealt with the case of Spain and North Korea, despite their non-member status. It is evident that in conflict with the axiom of peace, the old rules of international law will lose their validity. Furthermore, the Charter makes certain promises regarding what peace is supposed to entail. To understand the concept of peace in the Charter, one must distinguish between its form and its connotation. According to the Charter, peace takes the form of a relationship between States and its connotation is respect for human rights. Human rights are the legal expression of humanity. Humanity, which is the modus operandi of the UN, stands outside the system and directs the entire system.

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ORCID iD

Mohammad Alipour https://orcid.org/0000-0002-4601-0226

Notes

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2. Available at: https://iep.utm.edu/justwar/ (accessed 5 December 2021).
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4. International Military Tribunal (Nuremberg) (1947) Judgment and Sentences, 41 AM. Journal of International Law at 172.
5. Independent International Fact-Finding Mission on the Conflict in Georgia, Report 242 & no. 49 (September 2009). Available at: http://www.ceiig.ch/Report.html.
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9. G.A. Res. 1514; 15 UN GAOR, Supp. (16)' 66–67, UN Doe. 'A/4684 (1960).
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11. Available at: https://avalon.law.yale.edu/wwii/atlantic.asp (accessed 29 June 2022).
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13. Note from the head of the US delegation to the UN Secretary-General (20 September 1950) 5 UNGAOR (279th plenary meeting) annexes (Agenda Item 68) 2–3 UN Doc A/1377.
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16. Resolution 84 (1950)/[adopted by the SC at its 476th meeting] of 7 July 1950 [S/1588].
17. Resolution 83 (1950)/[adopted by the SC at its 474th meeting] of 27 June 1950, S/RES/83.
18. 1 ICJ, reparation for injuries suffered in the service of the United Nations (Advisory Opinion), ICJ Reports 1949, p. 178.
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20. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16, and 18 may be made under this provision. Article 4(2). International Covenant on Civil and Political Rights, 16 December 1966, adapted by General Assembly resolution 2200A (XXI).

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