

IS WAR STILL A SCOURGE? UKRAINE AND THE INTERNATIONAL LEGAL (DIS)ORDER¹

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Nothing will be like before, again? In ‘the West’ the media coverage of the War on Ukraine and mainstream public opinion leave us such a feeling. We are supposed to see a previously unknown break in the international order, an attack on liberal democracies by the Russian authoritarian regime. On the other side, Putin’s propaganda openly speaks of the conflict commitment of the broader West and the NATO. Then, of course, there is the rest of the World. On March 2nd, 2022, the UN General Assembly “overwhelmingly” adopted a resolution demanding the “unconditional withdraw” of Russian army from Ukraine. But among the 35 abstentions there were countries like China, India, in an unusual agreement with Pakistan, Iran, South Africa. On April 8th China together with other 23 countries voted against the resolution calling for Russia to be suspended from the Human Rights Council; the 48 abstentions including Brazil, Mexico, Egypt, Saudi Arabia, Malaysia and Indonesia. The governments which represents the majority of humankind do not share the “Western” point of view. It would be easy to stress the authoritarian character of most of those governments, but it would be an error to underestimate the widespread – e.g., in Africa – latent hostility against “us” and the impatience against “our” double standards for what concerns aggressions and humanitarian emergencies.

Dealing with this issue, I assume a preliminary hypothesis: international law, the UN Charter and several international declarations and covenants are something more

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than a “paper world” constructed by lawyers, as in the scornful diagnosis proffered by Michael Walzer 45 years ago (Walzer, 1977, p. xxi). Furthermore, law is a necessary, even if insufficient, resource to face international conflicts, whereas the “*unmediated* moralization of politics” (Habermas, 1996, p. 212) lead to fundamentalism imposing „a kind of universalized ethnocentrism”. Only “inclusive legal procedures open to all of the parties involved that enjoin them to reciprocal perspective-taking” can enable “to engage in the degree of decentering of interpretive perspectives” (Habermas, 2004, p. 103). From a unilateral — e. g. Western — point of view a clear distinction between our own interests and universalizable principles is impossible. This function of law is quite evident in domestic contexts, were the high voltage of the moral conflicts emerging from value-polytheism can be reduced by their transformation in legal principles and norms. This is more arduous in the international context. But international law can weave a web of thin threads in order to tie the Leviathans to the ground as Lilliputians did with Gulliver.

An ambitious project of “peace through law” (Kelsen, 1944) has been implemented after World War II. In the preamble of the UN charter “we the peoples of the United Nations” declare the war to be a “scourge” and determine “to maintain international peace and security”. The states “shall refrain in their international relations from the threat or use of force” (art. 2). So, the “application of armed force” by the Security Council established in Chapter VII is not properly “war”. Article 51 acknowledges “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations” but “until the Security Council has taken measures necessary to maintain international peace and security”. In the same epoch the new constitutions of countries like Germany (art. 26), Japan (art. 9) and Italy (art. 11) included the refusal, or repudiation, of war.

There is no doubt that Russian invasion of Ukraine is an aggression — the “supreme international crime” according to the sentence of the Nuremberg trial, recognized within the principles of international law by the General Assembly resolution 95 (I) on 11 December 1946. The definition of aggression approved by the General Assembly in the resolution 3314 (XXIX – 14 December 1974) includes “the invasion or attack by the armed forces of a State of the territory of another State”. There is no justification for this invasion, even if in recent years the US have consistently armed and supported Ukraine in different ways, or if Ukraine itself has applied to join the NATO, which has “barked at the doors of Russia” according to Pope Francis (Fontana, 2022). Such as the Arab neighbors pressing under Israel did not justify in 1967 the Six Days War and the seizure

of whole Palestine. And there is no doubt that the Security Council will not intervene, because of the veto right entitled to the five permanent members, including Russia.

The impotence of the Security Council has been evident during the Cold War. Just remember USSR interventions in Hungary, Czechoslovakia, Afghanistan, coups d'état supported by Western powers such as in Iran and Chile or USA escalation in Vietnam. After 1989 seemed the UN seemed able to resume their original function. The Gulf War in 1991 — when Iraq perpetrated an act of aggression against another UN member, Kuwait — was authorized by the Security Council, even with significant ambiguities and it was hailed as the reaffirmation on international law and/or, a “just war”. In the subsequent years the “humanitarian interventions” were on focus. Facing with humanitarian crisis, it was argued that the Security Council can authorize military actions derogating the principle of non-intervention in equally sovereign States domestic jurisdiction, let alone “pre-emptive strikes”, which were orphans of any kind of legal justification.

Anyway, the massive airstrikes against the former Yugoslavia in 1999 represented a turning point. NATO began such an action after the refusal by the Slobodan Milosević's government to accept hard conditions in Rambouillet, without any kind of authorization by any organ of the UN. Bridges, infrastructures, the TV Broadcasting Company were intentional targets, the China Embassy a collateral damage. Attempts in legitimating of such a war were based on the humanitarian emergency (genocide, according somebody) in Kosovo, victim of the repression by Serbian army and militias. Eminent lawyers tried to give a legal justification elaborating the category of “instant custom” (Cassese, 1999) but most of Western intellectuals adopted moral or anthropological categories: humanity vs bestiality (Habermas, 1999).

After 9/11 the George W. Bush administration, supported by eminent thinkers, declared the “war on terror”. Afghanistan was the first target, without any justification by the UN (indeed, a kind of justification arrived *ex post*). A justification was searched before the war to Iraq in 2003, but the veto right was not necessary to negate it: the majority of the Security Council was contrary. Anyway, US, UK and their allies launched a huge attack and this time boots were on ground. The West was divided: among the main countries of “Old Europe”, only the Italian and Spanish right-wing governments supported the illegal invasion. An aggression, the “supreme international crime”.

These aggressions have been repeatedly perpetrated in the last two decades, in the context of a “re-militarization of the relationships between states” (Colombo, 2022) paralleled in the intellectual field by a process of rehabilitation of the “just war”. Such a category, traceable in Aristotle and Roman law, was moralized and theologized by

thinkers like Augustine and Aquinas in order to justify participation by Christians in military action, in spite of Evangelical nonviolent maxims. Such a category was abandoned in the post-Westphalian era and a fortiori in the nuclear age with the *ius contra bellum* proclaimed by the UN Charter. Norberto Bobbio's parabola is impressive: in 1966 he declared the war to be "the antithesis of law", "like an earthquake or a storm" (Bobbio, 1979, p. 60); in 1991 he qualified *Desert Storm* as a "just war", inasmuch as legally justified. But just war had been resuscitated as an ethical category. Walzer's "moral argument" sketches an ethics which binds combatants and whose principles — like the legitimate answer to an aggression and the immunity of non-combatants — are universally acknowledged.

The discourse on just war spread out during the US and allies war on Iraq in 1991, even if pro-intervention thinkers such as Massimo Cacciari or Jürgen Habermas shown meta-ethical caution ("just war" is an anachronistic expression in the post-metaphysical epoch) (Habermas, 1991). This caution vanished in 1999, when Habermas declared the NATO war on Yugoslavia having "good ethical justifications" (Habermas, 1999). But after 9/11 the short circuit between supposed universal principles (seen as moral values, even if formulated as rights) and military intervention was shut. Walzer subscribed the statement "What We Are Fighting For", which supports the "War on terror" on the basis that "the idea of a 'just war' is broadly based, with roots in many of the world's diverse religious and secular moral traditions"². In the 2002 *National Security Strategy of the United States of America* the White House affirms that the values of "freedom, democracy, and free enterprise" "are right and true for every person, in every society" and that justifies the use of force to defend them against terrorists and "rogue states" which jeopardize them³.

Walzer reaffirms the idea that what makes a war "just", the *justa causa* which entitles the *ius ad bellum*, is the reaction to an aggression. But he significantly expands the meaning of aggression (e. g. from the 1974 resolution of UN General Assembly): "aggression often begins without shots being fired or borders crossed" (Walzer, 1977). To threaten an aggression is equated to actual aggression and "pre-emptive self-defense" is morally justified. Such an approach is replied by the White House in 2002: "For centuries, international law" conditioned "the legitimacy of preemption [...] on the existence of an imminent threat". But confronting rogue states and terrorists such a concept must

2. "What We're Fighting For: A Letter from America" February 13, 2002 https://avalon.law.yale.edu/sept11/letter_002.asp#:~:text=Your%20human%20dignity%2C%20no%20less,we%20must%20not%20be%20enemies.

3. *The National Security Strategy of the United States of America*, September 2002, <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>

be adapted: “our best defense is a good offense”⁴. The supposed possession of weapons of mass destruction appears to be a sufficient condition for a pre-emptive strike. If it is demonstrated that this is not the case, as after Iraqi invasion, the “intent” to produce them can be sufficient⁵.

In the first years of the millennium the US have perceived themselves as the only global iperpower even if astonished and terrified after death and destruction had been taken on its ground. As well known, in the meantime the Empire has been confronted by other rising global powers in the geopolitical and geo-economical space. Different actors do not have bothered to be authorized by the Security Council in their open or covert military interventions. Anyway, the revived just war theory seems to enjoy good health. In the acceptance speech of the Nobel Peace Prize (in 2009: a pre-emptive prize at the beginning of his term) President Barack Obama made wide reference to just war, adding “I — like any head of state — reserve the right to act unilaterally if necessary to defend my nation”⁶. Today Walzer, both in the historical journal of the American left and in the *Wall Street Journal* (Walzer, 2022a; 2022b), celebrates the vitality of his theory. He does not give up to preach European liberals, still hoping to negotiate with Putin, whereas the diplomatic way is precluded and “every way out now passes by military victory” (Mastrolitti, 2022). Walzer’s argument sounds sinister when Russia has 6,000 atomic warheads and its president is diagnosed by Western leaders and newspapers as a psychotic criminal. Even if we do not evoke a *Doctor Strangelove* scenario, Walzer’s words are symptomatic of a widespread attitude in Western policy makers, journalists and liberal intellectuals. While civilians are killed, tortured, raped and displaced, the ideological dimension of war prevails on humanitarian issues, the imperative to avoid death and the sufferance of the people. If one of the sides is “just” (we, of course) one cannot be neutral, and war crimes cannot but be perpetrated by the other side. Appeals to diplomacy and demands to negotiate are assimilated to treason, not to say of the attempts to consider context, reasons and wrongs on both parts. The just war theory allows to moralize that stuff. So, it has played a crucial role in the process of normalization of war as “means of resolving international disputes”⁷.

4. *The National Security Strategy of the United States of America*, <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>

5. “President Bush Discusses Iraq Report”, October 7, 2004, <https://georgewbush-whitehouse.archives.gov/news/releases/2004/10/20041007-6.html>

6. “Remarks by the President at the Acceptance of the Nobel Peace Prize”, December 10, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

7. Costituzione della Repubblica Italiana, art. 11.

Putin and his spin doctors appear to have familiarized with the discourse of just war and humanitarian intervention. In Russian propaganda war is not named, the “special military operation” is presented as a pre-emptive strike against the “genocide” perpetrated by Ukrainians on Russophone population in Donbass, the Kyiv government delegitimized as philo-Nazi and reference to the 1999 war is too easy. If the ideological context tells us “*de te fabula narratur*”, on the other side we have to question if Russia is actually jeopardizing a liberal and stable international order. Unfortunately, this order never existed after Cold War. The winner did not elaborate a strategy to deal with the defeated enemy. The unilateral hegemonic project of the “New World Order” has been working as long as Russia has been crushed by poverty, corruption and criminality consequent at the sudden adoption of “free market” and capitalist economy and for the time necessary to China for rising up as an economical hyperpower. In the meantime, the borders between war and peace blurred more and more

Is there a way out? Even if we acknowledge a role played by the international law it would be illusory thinking that peace, and the limitation of war, could be obtained only through law. War is an elaborated institution whose function is to neutralize the “natural” taboo of infra-specific killing, so effective in non-human animals. There is a deep anthropological level to deal with. And it is rooted in economic, social, and cultural processes which have to be tackled, whereas a legal superstructure is not enough. If we consider the higher expression of legal pacifism, the supposed global government by the United Nations, we cannot but realize there is a constitutive and intrinsic ambivalence in its structure. The declared “sovereign equality” is contradicted by the privilege attributed to the five permanent members of the Security Council, entitled by the veto right and consequently immune by potential censures and interventions. This send the maintenance of peace back to the equilibrium between the main nuclear powers, and designs an “international power by the great powers identical in its constitutional outline to that of the Holy Alliance” (Zolo, 1995, p. 8). In prognosticating the impossibility to reform the United Nations, Danilo Zolo wished for a “weak pacifism” based on the acknowledgment of “diversity, change and differentiation” (Zolo, 1995, p. xv). He hypothesized “a constellation of ‘international legal regimes’ capable of co-ordinating the subjects of international politics according to a systemic logic of diffuse and polycentric normative structures and forms of leadership” (Zolo, 1995, p. 153).

From different perspectives, Walzer ad Habermas sketched pluralistic models of global governance (See Walzer, 2000; Habermas, 2004, pp. 115-93). A key role in such a model would be played by regional organization like the European Union. Actually,

EU and its members States are constantly dealing with the Russia-Ukraine dossier, cooperating in the military support of Ukrainian “resistance”, welcoming the latter membership application, applying though economic sanctions to Russia, discussing the embargo on oil and gas, increasing their military budget. As to agree with Carl Schmitt, it appears that only confronting an enemy makes Europe finally able to find a common identity and to constitute itself as a unitary geopolitical subject. But actually, we are facing the revamping of NATO and a weakening of UE as an independent actor. And, unfortunately, Europe risks to lose its very constitutive principles, starting with pacifist vision and universal protection of rights. The same unitary answer to the humanitarian emergency allows member countries to discriminate (white, possibly fair haired) Ukrainians from Asian and African refugees (with their shades of color). From another point of view, we should ask if the Ukrainian war is a sign, and a step, in a general process of marginalization of Europe: open war is fought only in peripheral areas and this testifies that the barycenter of international relations is moving elsewhere (Colombo, 2022).

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