The wars’ legality and legitimacy

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Abstract: War was and still is a much disputed subject on the global landscape, especially when it is fought for humanitarian reasons. International experience shows us this phenomenon is increasing, as well as the interference in the domestic affairs of states, when serious violations of human rights in a given territory (for example genocide, mass murder, abuse etc.) are committed. It is important that all these events develop under a legal framework, so that all the supposed interventions acquire legitimacy. Nowadays, there is an intense debate about the possibility of a war to be morally and legally fought.

Keywords: legality, legitimacy, UN Charter, humanitarian interventions

Introduction: Wars’ necessity

“We make war that we may live in peace”\(^1\).

Could war be considered the perfect dove to bring peace? Is there any possibility to stop a war by starting a new war? Is the international arena a game of domino where every action entails increasingly diverse consequences?

Georg Simmel considers “conflicts as a source of social organization present in all forms of life, from industry to family and church.”\(^2\) The war is perceived in terms of positive facts and not the negative effects produced. It

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becomes a real instrument for ensuring peace, stability and security internationally.

The “just war” concept

The “Just war” theory contains two major parts enabling a better understanding of the concept: the cause of a war and the conduct of a war.

"Western tradition has believed that jus ad bellum (just cause of war) exists in cases where the war is a last resort, declared by legitimate authority, waged in self-defence or to establish/ restore justice and fought to bring about peace”\(^3\).

The second part of the concept, the conduct of war or better said, jus in bello, includes the standard of proportionality, but also the limits of discrimination.

Nicholas Rengger, professor of Political Theory and International Relations, explains that “proportionality means that the amount of force used must be proportionate to the threat. Discrimination means that force must not make non-combatants intentional targets”\(^4\).

A war is legitimate when a force for the just war tradition is used, by an authorized institution or actor. The most important issue is the political community’s acceptance, its proper agreement.

“The idea of undertaking a war because it might be inevitable later on and might then have to be fought under more unfavourable conditions has always remained foreign to me, and I have always fought against it...For I cannot look into Providence’s cards in such a manner that I would know things beforehand”\(^5\).

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There are various cases in which the ‘just war’ theory was accepted and even more cases in which it has been blamed. The ‘just war’ theory is not a new concept. It comes from the Roman Empire, when Christianity became the official religion of the Empire. But religion, especially Christianity, could not justify war. However, St. Augustine, writing at the turn of the fourth to the fifth century, set out the justification for when Christians could go to war and kill their fellow men without committing a sin. “Fighting was permissible, he said, if the war was just – that is, if one fought on the just side of a war”\(^6\).

Defining justice has proved to be a great challenge. This is because the just war theory was “a moral doctrine rather than a legal code, and broad principles were in some respects preferable to fine rules”\(^7\).

It is interesting how the authority instance has evolved: from Roman Church and Holy Roman Emperor, in medieval times, to Security Council nowadays. Also, in those times, the Crusades were considered a genuine proof of just use of force, or better said, for just war.

According to Aquinas, for a war to be just, it must satisfy “the principles of sovereign authority, just cause, and right intention”\(^8\), with an emphasis on the first principle.

In current conflicts, states’ interests, instead of justice, are defining the \textit{jus ad bellum} of war. Arguments in favour of justice “were treated as a kind of moralizing, inappropriate to the anarchic conditions of international society”\(^9\).

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\(^7\) Ibidem.


Morality in international relations

It is shown that morality’s role has diminished throughout the last centuries in international law, being replaced with the issue of ‘legality’. The common interpretation of international law was: “sovereign states have an unqualified right to resort to war”\(^{10}\). In other words, the *jus ad bellum* became unrestricted. The international system was, “in principle as well as in reality, a war system; it was indifferent to the tragedy and the evil of war”\(^{11}\).

The theory of the 19\(^{th}\) century’s conceptions about war is very interesting. For example, Carl von Clausewitz considers that “war, therefore, is an act of policy...War is not a mere act of policy but a true political instrument, a continuation of political activity by other means”\(^{12}\).

Political thinking has changed throughout time, gradually emphasizing the role of morality, respect for the human rights or justice. All these concepts were discussed by U.S. President Woodrow Wilson, who stated, at the end of WWI, that, “this age is an age...which rejects the standards of national selfishness that once governed the counsels of nations and demands that they shall give way to a new order of things in which the only questions will be: ‘Is it right?’ ‘Is it just?’ ‘Is it in the interest of mankind?’”\(^{13}\).

Nowadays, the morality of actions in international politics has been replaced by legality. ”The justness of a state’s actions could now be determined through the legal principles rather than moral principles”\(^{14}\).

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\(^{10}\) L. Claude Jr. Inus, *op. cit.*, p. 87- 88.
\(^{11}\) *Ibidem*, p. 89.
Regarding law’s enforcement, there are several issues to be considered as ethical, legal or political justification. Those who support legal-positivist theory believe the rule of law is a moral duty. According to Article 38 (1) of the Statute of the International Court of Justice, the international standards are mandatory if they are included in “international conventions whether general or particular, establishing rules expressly recognized by the contesting states; or international custom as evidence of a general practice accepted as law”\(^\text{15}\).

**International legitimacy**

There is a real problem in the international system in terms of defining the international legitimacy of foreign policy actions initiated by a member state within a group or an organization, especially when such entities decided to use force against another state.

*International legitimacy* is a concept that involves various methodological purchases from multiple research areas. As a general definition, it refers to a state, a group of states or an organization’s approval, received from the international community, usually regarding the use of military force in foreign policy actions.

As the dynamics of international relations have evolved over time, with a series of steps within certain historical moments, international legitimacy has also evolved in the same direction. This analysis of international legitimacy is a reflection of contemporary international politics. Thus, the identification of sources of contemporary international legitimacy is not just a simple approach in which account should be taken of a number of trends that began to emerge and manifest explicitly and irreversibly so far, in the political context determined as historical moment from the Cold War.

There is a certain consensus in the contemporary international system, whereby the main source of international legitimacy when it comes to resort to military force on the international stage, represented, at least in theory, by the United Nations, due to the authorizations and limitations imposed by the Security Council, under international law contained in the UN Charter. But not all international system’s actors seem to share this view and the appeal to international legitimacy conferred by the UN system is usually invoked only when it is in the specific interest of states.

The appropriate consensus is the fact that sovereign states appeal to legitimacy provided by the UN to oppose interventionism practiced by a State or a group of states, without really believing in this aspect when it comes to justifying their own intervention.

Thus, we can talk about a dual perspective of the international legitimacy: international legitimacy is not just a matter of canons of international law contained in the UN Charter, but it is also a political issue related to multilateralism, by virtue of the collective action, just as it happened with multinational coalition intervention in Kosovo in 1999, in the absence of authorization from the Security Council, thus creating a precedent in redefining the concept of international legitimacy.

The international legal framework governing the use of armed force in the international community is the United Nations Charter.

The United Nations Charter, Article 2, paragraph 4 stated that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” and in paragraph 7 of the same article we find the idea that: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic
jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”

It is clear that the UN Charter prohibits the possibility to violate the sovereignty of any state and the use of armed force against other states. From the point of view of theorists who oppose humanitarian intervention, these articles concluded the great dilemma of military intervention for humanitarian purposes in other territories. The UN Charter message seems clear and it doesn’t allow many other interpretations.

Should the international community remain passive, accepting the crimes against humanity, genocide and other gross violations and ignoring them?

The founding fathers of the Charter intended to build a legal framework that will govern, in future, the use of armed force by adopting the principles of all states sovereignty, the prohibition of interference in domestic affairs or their use of force or offensive purposes only and only with the Council security consent, starting from the desire to “save the next generations from the scourge of war”.

With the advent of deepening tensions in the Cold War, a conflict period in which wars between great powers seemed to be frozen, but always ready to transform into a new world war, it appeared certain limitations of UN capabilities to implement the principles of international law.

For example, the use of the veto power in the Security Council was more in accordance with Member States own interests, thus creating a genuine balance of the power system.

But, what really “saves” the situation when in an area there are specific forms of violence from another state, genocide or massive violations of human rights, even by their own state, are Articles 42 (concerning about collective security authorized by Security Council) and Article 51 (right to self-defence), which stipulating peoples’ right to self-defence.

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\(^{17}\) Ibidem.
Furthermore, the Charter outlines both the principle of prohibition for the use of force, which affirms “the faith in fundamental human rights”\(^{18}\) in its preamble, as well as the possibility of using force when the state is subjected to external aggression. The Security Council shall decide whether “the coercive measures will be implemented by all UN members or only by some of them”\(^{19}\).

There is a big discussion about the definition of aggression and the aggressor’s state. Military interventions that actually violate the sovereignty of a state can become legitimate if there is a confirmed accusation according to which that particular State is “a real international danger through some acts they committed on their own territory”\(^{20}\).

In this case, the actors of the international community may be entitled to intervene, under international law, but also for the safety of states and for citizens directly affected. The most important thing is the approval of the Security Council to intervene in conflict state territory. If this is not achieved, the intervention is illegitimate and the interventionist states are, in turn, aggressors.

For a long time, the use of force in order to protect the population in cases of humanitarian crises by the international community did not have the necessary legal support. The International Court of Justice rejected the possibility that the right intervention within a state by force could be consistent with international law. The International Court stated that “whatever these flaws in international organizations, the right to intervene in force cannot take place in international law”\(^{21}\).

The interventions during the Cold War are described as “undertaken in an unhindered way to promote strategic goals, as opposed to the

\(^{18}\) Ibidem.
\(^{19}\) Ibidem.
\(^{21}\) *ICJ Reports 1949*, International Court of Justice, Corfu Channel, United Kingdom of Great Britain and Northen Ireland- Albania.
humanitarian’s ones”. This statement is based on the analysis of interventions during the period between 1945 and 1990, revealing the idea that the humanitarian justifications were stronger in cases where purely humanitarian reasons were weaker. The concept of “humanitarian intervention” was not as supportive as it was desired during that period. It has gone from being an inherent right, that there was no doubt in the years before the Second World War, to a non-entity in the years that followed.

UN Charter’s aspects

By analysing the text of the UN Charter one can notice certain formulations are ambiguous, the terms are not clearly stated and certain phrases can be interpreted according to the interests and abilities of those concerned. For example, Article 2.7 of the Charter clearly prevents the UN to intervene in matters pertaining to domestic jurisdiction of any state. It is quite uncertain what exactly defines the term “domestic jurisdiction… “During the Cold War, a number of decisions taken by UN bodies have shown that the reserved area to the internal administration is gradually decreasing”.

The Article 2.4 does not prohibit the threat or use of force authoritatively. It forbids only when “it is targeted on the territorial integrity or political independence of any state”.

Thus, if a “real humanitarian intervention does not lead to territorial conquest or to a political subjugation [...] it is a distortion to say that is prohibited by Article 2.4”.

Usually, the Articles 2.4 and 2.7 of the Charter were interpreted according to 2625 General Assembly Resolution “Declaration on principles of international law concerning Friendly Relations and Cooperation among States”, adopted in 1970 and regarded as a widespread development of the provisions enclosed in the Charter. Thus, “no State or group of States has the right to intervene, directly or indirectly, for any reason in the internal affairs of any other state or foreign. Consequently, armed intervention or any other form of interference or threat against the personality of a State or its political, economic or cultural elements represents a violation of international law [...]. Every State has the inalienable right to choose their political, economic and social without interference in any form to any other State.”

While Article 2.7 was continuously repeated and “weighed” and it is no longer seen as a barrier of control from the international community to “everything related to the borders of sovereignty” it is clearly the failure of the UN Charter to require of its Members, the legal responsibility to protect human rights, but it obviously exposes to its members to refrain from intervention in the domestic affairs.

By the Helsinki Final Act of 1975, the non-intervention principle was reinforced: „The States Parties shall refrain from direct or indirect, individual or collective intervention in domestic problems related to internal jurisdiction of any other participating State, regardless of their mutual relationship.” Those principles became binding for participating states, although the Final Act is not a treaty that engages in legal terms, being more an agreement between Member States.

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“The written rules of international law and custom on the strictly and inflexible principle of non-intervention, have represented the legal regulation that prevailed until the 1990s”

Then it was found that certain interventions, despite not having been recognized in the international law, in the end, they have found their justification. Therefore, it can be seen that the development of international human rights law was one of the most important aspects of the international order after 1945 “with decolonization and the independence gained by some new states”.

The principle of non-intervention

The principle of non-intervention was based on both firm actions of the Security Council in order to prevent situations of genocide, humanitarian crimes or peace reestablishment in internal conflict cases, which required the intervention of an external actor to stop the conflicts and restore peace.

The concept of international security has been extended more and more, starting with different authorizations for States’ or international organizations’ missions that take place in a conflict area.

For example, an important step was made by various resolutions of the Security Council. One of them, the 688 resolution condemns “repression of civilians in Iraq, including the Kurdish populated areas.”

Of course, not all states agree, regarding the most appropriate measures, or the principle of intervention in the affected territory. Thus, there were countries that abstained, such as India and China or those who voted against (Cuba, Yemen and Zimbabwe). The resolution was adopted because the

Security Council considered that there were some “consequences that threaten the peace and security of a region”\textsuperscript{32}.

Further involvement of the supreme decision-making body in international aspects or, more specifically, the Security Council, was in the conflicts from Sierra Leone, Kosovo, Bosnia and Herzegovina, where many attacks were carried out against civilians.

With the establishment of international tribunals with criminal jurisdiction, and also the negotiation of the Rome Statute of the International Criminal Court, they drew the attention to “the atrocities against human beings by their own governments, including war crimes, crimes against humanity and genocide can rely on the status of sovereignty in the Charter”\textsuperscript{33}.

Although the topic of humanitarian intervention, of massive violation of human rights was treated in various legal acts, resolutions, international treaties, but also in the works of specialists in this field, there is no unanimous agreement regarding the actors responsibility, the right to intervene, or legal obligation by which a State or an international organization is constrained by law to intervene. Some interpretable formulations of documents prepared so far, led to an increase of disputes among classics (or positivists, as they are called) and realists.

Even though “until now there is no legislation of humanitarian intervention comparable to the traditional rights of states, international consensus is growing wider about the restrictiveness of the Westphalian system. [...] However, the reluctance of states to continue risking forces for other than national security’s objectives is still a strong limiter, as it had demonstrated the US withdrawal from Somalia in 1992”\textsuperscript{34}.

\textsuperscript{32} Ibidem.
In his study “Legitimacy in International Society”\textsuperscript{35} Ian Clark believes that international legitimacy has its origins in the Westphalian order established in 1648 by the major European powers, which is based on the doctrine of non-interference in the domestic affairs of other states. The doctrine of non-interference in internal affairs of another State was considered a basis for international peace and security and “has been developed from the opposite reason for that is set aside today. It was the slogan of human rights in that period: its purpose was the restoration of peace and quiet, not the legitimacy”\textsuperscript{36}.

In the study “The End of history and the last man”, Francis Fukuyama foresees a clear perspective on the future of international legitimacy, more precisely, the fact that the two sides of the Atlantic, being both democratic and given the end of the Cold War, the states will not find another reason to challenge the legitimacy. The Euro-Atlantic partners will contest the legitimacy of the actions of other international actors in the international system, but never the legitimacy of the actions of members of the Euro-Atlantic partnership. But the situation was not as Fukuyama predicted in spite of the fact that, throughout the early '90s, Euro-Atlantic cooperation’s prospects showed this result\textsuperscript{37}.

It was only after the end of the Cold War that the real crisis began in defining the international legitimacy of foreign policy actions, because of the international situation that enabled the undermining of the Westphalian system from now on. The virtue of Westphalian system derives from the fact that it managed to bring relative order into the political area in the last three hundred years.

This disruption was possible because the intervention in some area could not be regarded as offensive by the opposing camp in the bipolar

\textsuperscript{35} Ian Clark, „Westphalia: The Origins of International Legitimacy?” in Legitimacy in International Society, Oxford Scholarship Online, January 2008, p. 36.
\textsuperscript{36} Henry Kissinger, Does America Need a Foreign Policy? The XXI century diplomacy, Incitatus Publisher, Bucharest, 2002, p. 202;
system. However, the principle of intervention in the domestic affairs of a certain state is in search of legitimacy, moreover when some permanent members of the Security Council (particularly China and Russia, and European partners such as France or Germany) oppose.

The principle of non-intervention’s undermining the internal affairs of a state, had transformed international legitimacy into a malleable and elusive concept that failed to be defined and theorized. Henry Kissinger warned that “so sudden the abandonment of the concept of national sovereignty brings with it the risk of disturbance to any notions of order in the international system, whether legitimate or illegitimate, good or bad”\(^{38}\).

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