ORDER AND NORMS IN THE CONCEPT OF THE JUST WAR

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Introduction

The war in Iraq raised again a number of questions about the legitimacy of the use of force, many of them occasioned by propaganda needs, others by sincere doubts. That conflict essentially fulfilled two of the conditions identified by Late Scholasticism for *justum bellum*: that it took place between *justi hostes*, although the participation of the Kurdish peshmerga obscured this requirement; and *debitus modus* given that the Anglo-Americans sought to spare the civilian population and, in general, human lives, and, perhaps surprisingly (given the motivation for the war), Saddam himself avoided using the "means of mass destruction"—that is, specifically, gas—which he almost certainly had, given that it does not require particularly sophisticated technology to manufacture such means.

Doubts remain, however, about *justa causa*, while only the future can unravel those about *recta intentio*. The debate is thus marked by a prevalence of (aprioristic) camp choices, the appeal to *idola* (*fori et theatri*)—especially in a Left in search of itself after the collapse of 1989—and by clichés, in addition to the usual forcings and mystifications—distributed between the two camps—of propaganda.

Within this framework of unreasonableness, or false reasonableness (which is prejudice added to hypocrisy), it is useful to revisit the conceptions of Christian thinkers, particularly late Scholasticism and the principles of classical international law that owes so much to their thinking, whose main merit is to have limited and humanized war, as European history of the modern age proves, by combining humanitarian ideals and political realism.

I

War and law are not alternatives—both in the sense that where there is war, there is law, and, in the inverse that in law, both abstractly and concretely understood, there is inherently present the idea (and the real possibility) of war, or at least of conflict. The most varied expressions testify to this relationship: from *justum bellum*, which combines war with justice, to *ne cives ad arma ruant*, to *vim vi repellere licet*, the connection between the two spheres has generated a series of brocards, which constitute the (extreme) synthesis of the reflections of so many thinkers, converging in the view that war is not necessarily unlawful (anti-legal) in its subjects, reasons, purposes, modes and (above all) results, and conversely, that law is not irenic in its assumptions and (above all) consequences, because a legal claim can be polemogenetic.

Indeed, war is usually nomogenetic, perhaps even more so than law is polemogenetic. To St. Augustine we owe the assertion—bordering on the paradoxical—that even a gang of evildoers makes war in order to achieve peace, or rather an order: whereby the end of war is peace (*City of God*, 19.XII and 19.XIII), a judgment, which is approachable to the (most famous) of Clausewitz's definitions of war—of being the continuation of politics by other means, in which, by qualifying it as a means, and of politics, he excludes that it can be an end in itself.

St. Thomas and the theologian-jurists (epigones of Aquinas) of Late Scholasticism are credited with distinguishing *bellum justum* (*et injustum*)—(The distinction is earlier and goes back (at least) to St. Augustine. See, Roberto De Mattei, *Guerra Santa guerra giusta*, pp. 15ff. However, the theory and concept are those of St. Thomas and the Thomists who elaborated and characterized it), and with identifying three conditions or requirements (four according to others, including Saint Robert Bellarmine) for it to be so, thereby limiting (the consequential damage) to war, to the later theorists of international law to have continued on that path, never quite abandoned, though modified by many to a greater or lesser extent.

The contrary thesis, that war and law are incompatible and mutually exclusive, appears to be the result at once of confusion and aspiration (and, often, is only an instrumentalization). Thus, the alternative correctly posed by de Maistre between decision and conflict: "*ou il n'y a pas sentence, il y a combat*" (for war and sovereign decision are alternatives, like civil state and state of nature), has been—erroneously—transposed into that, whereby the real capacity to order society, pertinent to sovereign power, is transferred to law.

The aspiration—traceable to utopian dreams of "exit" from politics—consists in thinking that one has found a peaceful, if not consensual, form of conflict regulation—that there is, but it is the Sovereign (the sentence) and not the law. Instrumentalization, finally, is intrinsic to the consensus aroused in arguing theses pleasing to the audience (with the consideration—in terms of popularity and power—that that entails).

Indeed, it is quite simple to note in this regard that, without an apparatus of coercion and repression, the law remains unenforced, and that, being a practical activity, the real problem lies in enforcing it; that is, in arousing sufficient consent and exercising congruous coercion for it to be respected. An essentially political problem. So much so that certain conceptions, born in the utopia of law, end up, sometimes, in the reality of the Courts (of the winners), as happened often in the last century.

But, in addition to the—innovative—use of Tribunals to try the vanquished, there has also been a correlative "revival" of the just war.

II

The concept of just war, upon its entry into medieval thought, required certain conditions (or requirements). For St. Thomas (*Summa Th*. II, II, q. 40, art. I.) the authority to conduct it (i.e., being *justus hostis*), which belongs only to the "*superiorem non recognoscens*," the *justa causa* (i.e., legitimate motive, such as redressing a wrong); righteous intention (to promote good or avoid evil). All assumed that since there was no authority capable of enforcing the right of (and between) the parties, war was a means to that end.

For Francisco Suarez, the answer to the *quaestio*, "*Utrum bellum sit intrinsece malum*" is that "*bellum simpliciter nec est intrinsece malum, nec christianis prohibitum*." But for "*honeste*" i.e., legitimate war to be promoted, three conditions must be met, two of which coincide with those of Aquinas, and the third of which is the "*debitus modus gerendi bellum*" (*De charitate*, disp. 13, *De bello*). For Saint Robert Bellarmine (conforming in this to the opinion of other theologians) the conditions become four, since he summarizes the "third" conditions of St. Thomas and Suarez (*intentio* and *modus*)—(Suarez, *Scritti politici*, Bologna, 1950, pp. 259ff).

In Scholastic thought, for a war to be just (or at least lawful) all must be observed. However, as Schmitt notes (*The Nomos of the Earth*, pp. 170ff), in the subsequent evolution of international law, the *justus hostis*, that is, the subject to whom the legitimate exercise of the *jus belli* is recognized, takes precedence over the other conditions, particularly the *justa causa*.

Thus *justum bellum* became the conflict between two *justi hostes*: two (legally) equal sovereign states; *justa causa* (and *intentio*) were (entirely or nearly) expunged. The considerations of justice (objective: substantive right or wrong) contained in the concept of *justa causa* were no longer considered, not least because a state that waged war without *justa causa* was still *justus hostis*, and in any case it was only the sovereign state that decided whether or not a *justa causa belli* recurred.

Such systematics presupposed and had a determined and consistent meaning when applied to a system of international relations, centered on states (and the related concept). Not a generic political

unit can be taken as the basis of such an order, but only the State species (thought of and) formed in the 16th and 17th centuries, with the peculiar differences and peculiarities that distinguish it from other types, attributable to the same genus (empires, poleis, tribes and so on). Chief among these are "enclosure," sovereignty (in the modern meaning) and monopoly of legitimate violence.

As for "enclosure" (of an orderly and impenetrable political space)—made possible both by the new organization into sovereign states and by the spread of firearms—it constitutes a character often overlooked, even though it is of fundamental importance, consisting of the distinction between internal and external and the delimitation between these areas, i.e., the border. Interior and exterior, *intra* or *extra moenia*, do not merely constitute a spatial division, nor do they merely determine the scope of exercise of the state's *imperium*, but are the distinction between two different "orders," based on different principles and assumptions. Within, the space of state sovereignty, of *imperium* based on the principle that "the sovereign in the state has toward his subjects only rights and no (coercive) duties," the sovereign will is, by definition, irresistible and not able to be conditioned by legal limits and controls. (This is Kant's definition in *Die Metaphysik der Sitten*, p. II, sec. I).

A corollary of this unlimitedness is that there is no external or different power that can influence, decisively, within (the borders) of the political unit. While externally, international law is based on a society of like and equal states, constituents of the global order, whereby, conversely, no one can dictate law to the other, but relations among them are, in principle, equal in character.

Sovereignty (understood in the classical sense, which it had from Bodin onward, i.e., of irresistible and unenforceable power) was worth excluding any other power (whether temporal or spiritual) within the political unit. The consequence of this was the indifference of the internal order of the state with respect to the vicissitudes of interstate relations; as well as the non-responsibility of individual officials with respect to foreign states, because the only responsible party was the state (the Sovereign) itself, the only one competent to judge its citizens (and officials).

As for the monopoly of entrenched legitimate violence, one with sovereignty, the exclusive international responsibility of the state, a sovereign entity endowed with that monopoly is solely responsible for what happens in the internal space of the political unit.

III

This coherent whole began to be shaken by the French Revolution, with the La Révellière-Lépeaux decree of the Convention, on the export of revolutionary principles; the "indifference" of wartime affairs to the internal order of the states involved began to be shaken. Likewise, beginning with the anti-revolutionary and anti-Napoleonic uprisings, a new political "type" appeared in modern history—the partisan fighter (and movement). A jurist as sensitive to real data as Santi Romano noted how the legal discipline of relations with the "insurgents" tended to derogate from the rules of domestic law, to take on connotations and institutions of the international one (*Corso di diritto internazionale—Course in International Law,* Padua 1933, p. 73. On the other hand, the question had been posed by Vattel: see, E. di Rienzo "Guerra civile e guerra giusta—Civil War and Just War," in *Political Philosoph*y (3)2002, pp. 380ff), whose reason he indicated "in the impotence of the State in which the insurrection breaks out to dominate with its order the authors of it," which are also reflected on the (possible) relations between insurgents and third States. The Sicilian jurist, it may be summarized, traced the re-emergence within the political unity of the state of institutes and norms of international law to the insufficient enclosure and the loss of the monopoly of violence, the cause and reason for which was in essence, a defect of "power;" that is, a "factual" circumstance to which legal changes were (had) to be traced.

In essence, next to the state is thus configured another "type" of hostis, which, *injustus* in principle, in fact tends to become *justus*, from the moment when, in its favor, norms of international law are taken to apply and domestic law is derogated therefrom, thereby implementing an atypical and "minor" form of "recognition." The circumstance that this practice originates *de facto* does not detract from its juridicality, since "factual" situations are the basis of a good part of the institutions of international law (and not only). The *justus hostis* thus tends to lose the typical and formal (i.e., state) connotations that defined it in the "classical" period; and it is the same Santi Romano who, in describing the characteristics of the revolution (and of the revolutionary movement), emphasizes—conversely—its juridicity, because it still constitutes an order:

"A revolution which is really such, and not a mere disorder, an occasional riot or sedition, is always an organized movement, in a manner and to an extent which naturally vary according to the case. In general, it may be said that it is an organization, which, tending to replace that of the state, consists of authorities, powers, and functions more or less corresponding and analogous to those of the latter: it is a state organization in embryo, which, little by little, if the movement is victorious, develops more and more in that sense. However, it results in a real order, albeit imperfect, fluctuating, provisional;" and he continues: "And it does not matter if this order, by its very nature and insofar as it does not decant later into the new state order that may result from it, has a transitory duration and stability. As long as it lives and operates, it is an order that cannot but be taken as such" (*Frammenti di un dizionario giuridico*,

Milano 1983, p. 224).

Precisely because of its precariousness, however, the revolutionary order does not fully enjoy any of the three (noted) characteristics of the state: not enclosure, not sovereignty, not the monopoly of legitimate violence; in essence, the revolutionary situation is well represented by the expression employed by Trotsky to denote the period between the Russian revolutions of February and October 1917: of the dualism of powers. But where there are two (and conflicting) powers, none of those characteristics can be fully accorded to each of them.

Trotsky held that dualism of powers "is a revolutionary and not a constitutional fact" because "the share of power obtained in such a situation by each of the classes in struggle is determined by the relations of force and the vicissitudes of battle. By its very nature this situation cannot be stable... the fractionation of power is but a herald of civil war... civil war gives dualism of power its most visible expression, that is, a territorial expression," with the establishment of party strongholds and the rest of the territory disputed. For "as always in a civil war, territorial delimitations are extremely unstable." This situation of dualism ends with the victory of one of the parties (or with the *itio in partes* of the territory) since "society needs a concentration of power," and the decision between bourgeois democracy (and bourgeoisie) and the Soviet system (and proletariat) must be resolved in a military way, with the victory of one of the parties. To propose, as Kautski and Max Adler did, to combine democracy with the Soviet system is tantamount to turning civil war into a component of the constitution. It is not possible," Trotsky concludes, "to imagine a more curious utopia"—*History of the Russian Revolution*, pp. 227ff. See also Lenin's article "The Dualism of Power," in *Pravda*, No. 28, April 9(22), 1917).

The state monopoly of the *jus belli* (and the unique being *justus hostis*) was thereby eroded from "below" by movements to the "nascent" state; and, likewise, *justus hostis* tended, to blur, if not lose, those formal connotations that had ensured this "requirement" to be the principal among those of just war—for having lost its formal character, the reason that, according to Schmitt, had made it preferred, is also diminished: to unambiguously and convincingly recognize the "just" war by anchoring it to the statehood of the contending parties. While it is true that it is enormously easier to identify "what" is State than who is right in a dispute, it is also true that if one loosens the "grid" of the form, ultimately the *justus hostis* becomes not the one who has the characters of statehood, but the one who in fact succeeds in waging war (civil or with another state), regardless of (full) possession of those. And so determining the (*justus*) *hostis* becomes as problematic as (or almost as) deciding which side is the *justa causa*.

It is barely worth noting, in this regard, that the attributes identified by a military theorist like Sun-Tzu for conducting war victoriously are as many negative connotations for the thinking of an order-oriented jurist pour cause, and therefore form. Not having form allows, in war, surprise and greatly reduces vulnerability; but not having it in a context of order is to bring the possibility of peaceful coexistence to its lowest terms. If only because it makes it impossible to identify with whom to negotiate peace.

Sun-Tzu advises: "O divine art of subtlety and secrecy! Through you we learn to be invisible, through you inaudible; and hence we can hold the enemy's fate in our hands;" and he continues, "We can form a single united body, while the enemy must split up into fractions. Hence there will be a whole pitted against separate parts of a whole, which means that we shall be many to the enemy's few" (*The Art of War*, VI.9; 14)

On the other hand, the emergence of a new *justus hostis*, such as revolutionary movements, indirectly increases the role of *justa causa*, because all (or most) insurgents appeal to a new order, the realization of which constitutes *justa causa belli*. After all, one of the earliest documents testifying to this, in contemporary times, is precisely the Declaration of Independence of the United States. (Which from the very first words—"When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them…"—makes it clear that the subsequent invocation of *justa causa*—the rights of the colonies and the oppression of the motherland—is aimed at legitimizing the nascent revolutionary state as *justus hostis*). Lacking the characteristics of stability, form and duration of states, and unable to claim "legitimacy" on the basis of those, the only legitimizing condition of the insurgents' *bellum justum* was precisely *justa causa*. From having often been successful, the role of this has gradually grown. Thus a "historical" and traditional legitimacy (such as that of pre-existing states) is contrasted with a new "ideal" and project-oriented (i.e., future-oriented) legitimacy justifying the use of war.

Note that this perspective is (partly) different from how the late scholastics considered *seditio* legitimate. Suarez, like Mariana, distinguishes between "*tyrannus quoad dominium et potestatem*" (i.e., the usurper) and that of "*solum quoad regimen*." Against the former (lacking "title" to rule) even war of aggression is permissible; against the latter, no, because *verus est dominus*. And against the same it is therefore necessary to act "*tota respublica quia… tota respublica superior est rege*" (See, Suarez, op. cit., Sectio VIII. On this point, also see, St. Thomas Aquinas, *De regimine principum*, lib. I, ch. 6, where Aquinas posits the *criterium differentiae* in the right of the people to the choice of the king. On the distinction

between the two types of tyranny, see Juan de Mariana, *De Rege et Regis Institutione*, Lib. I, ch. 6). However, when "*tota respublica*" means the secessionist party alone (territorially—mostly—determined) the revolution already consists in the declaration of separation, and not in the grounds that could legitimize it.

What even more distinguishes such *justae causae* from what the scholastics intended is that for the former, *justa causa* was motivated with respect to a concrete order, made up of rights recognized and observed, sometimes *ab immemorabile*, such as "*transitus viarum, commune commercium occupatio res alterius*," and so on (See, Suarez, op. cit., Sectio IV. And de Vitoria argues that war cannot be waged against the Indians because they are not Christians nor because of their, sins, *De indis*, I, 2, 20-21); whereas for modern *justae causae*, it is a matter of rights founded not on history and custom, but, for the most part, on "reason" or "principles." Often legitimate, as are their foundational aspirations, but with the drawback, compared to the former, of being uncertain and less verifiable—and, often, less shared or agreeable.

Likewise, *justa causa* is not equated with the violation of one (or more) norms, according to a normativistic way of thinking. Instead, it is intrinsic to it to be the condition for reacting to the violation of a concrete order, in order to restore it. Suffice it for this purpose to consider that the violation of a norm (or right) is not in itself sufficient to constitute *justa causa belli*: "*Non quamcumque causam esse sufficientem ad bellum, sed gravem, et damnis belli proportionatam*" (Suarez, op. cit., Sectio IV). The concept of *gravis iniuria* excludes that war can be waged over unissued passports or un-arrested illegal immigrants and so on (also because in such cases it is impossible to distinguish between the offended right and the pretext sought). The concept of *intentio*, which Bellarmine specifies in the goal of peace and order, similarly excludes that one can promote it for a purpose other than the reparation of a wrong, or the realization of a right, and within the limits in which these are satisfied and realized, and it is not permissible to instrumentalize a wrong suffered in order to achieve different ends. In these conceptions it is very clear how the Scholastics think of the concrete order and not of any normative violation or disapplication. Inherent to their thinking is a distinction similar to Carl Schmitt's distinction for constitutional law: that between the Constitution (as the concrete order of political unity) and constitutional laws (norms)—(See, *Verfassungslehre*, § 1, Berlin 1970, p. 4 ff. On the distinction, especially § 2.2 p. 13 ff. The distinction is taken up several times by Schmitt in this work, see e.g. § 3.2). The international order stands to the relevant norms (customary or covenantal) in a similar way to the Constitution with respect to constitutional laws.

Thus, it is clear that the main—and differential—character of the thinking of theologians and jurists, such as Vitoria, Suarez, Bellarmine, Ayala, with respect to contemporary "just war" was to be oriented to (and about) concrete order and existence, and to apply principles (and ways of reasoning) that were essentially juridical.

Thus, *justa causa* was—and often is—determinable where, in adjudicating it, one has regard to those assumptions. If one state inhibits another from navigation (outside its territorial waters), it commits a tort, as a violation of a traditionally recognized right. Thus, if the State, offended party, makes war on it, this is, according to the thinking of Suarez and St. Thomas, the only system for restoring that right, in the absence of an authority to appeal to. *Tout se tient*. Linking *justa causa* and *justum bellum* with law ("historical" and concrete) avoids—or reduces—the worst and (most) instrumental consequences. Thus, for example, it is considered legitimate to wage war for one's own rights, not for those of others (See, St. Robert Bellarmine, op. cit., p. 260, Suarez op. cit, Sectio IV: "Unde, quod quidam aiunt, supremos reges habere potestatem ad vindicandas iniurias totius orbis, est omnino falsum, et confundit omnem ordinem, et distinctionem iurisdictionum: talis enim potestas, neque a Deo data est, neque ex ratione colligitur." On this point, see Baget Bozzo's dissent in *Panorama*, 11/4/03, p. 50)—a sovereign has not only the right, but, more, the duty to protect his own and his subjects' *juras*, but not the duty to invest himself as champion of every legal claim, even if well-founded, and similarly to that rule of procedural law whereby no one can act in his own name for the rights of others (Art. 81 c.p.c.).

Even in the case of *seditio* and tyranny, none of those thinkers—to our knowledge—even posed the question of whether it was licit, in general, for a "third" state to wage war against the tyrant, because, to a legal mindset, the answer is obvious and not worth the *quaestio*. Thus, while it is sometimes lawful for subjects to rebel against (and even kill) the tyrant because he violates their rights, it is not lawful to go around the planet dethroning tyrants (due to violation of rights) of others. Legal wisdom advises against this, by the way, because then the causae belli would multiply exponentially.

But, if in place of thinking geared toward protecting concrete political existences and concrete order, which *justa causa* presupposes, we turn to abstract declarations of rights, in effect untethered from legal thinking and mentality, the limitations and drawbacks of the doctrine of *justa causa* are magnified.

This is the case with just war, at least as it may be understood in recent decades. If instead of violations of the rights of the French or Italian state, the casus belli is the "human rights" of Nepalese highlanders or Somali shepherds—who often do not even know what they are, and perhaps do not feel the primary

need for them—the *justae causae* grow in number and vagueness, so that it becomes much more difficult to distinguish between legitimate exercise of right and pretext. And so *justa causa* is dissolved in a thick fog of claims, offenses and penalties divorced from real needs and subjects of the claims. The *justum bellum*, thought of as the lawful remedy to repair the disruption of an order, in function of the restoration of the same, thus becomes, conversely, the picklock to unhinge it. For the problem that arises is not that those rights (often) must be guaranteed and respected, but that in order to do so a state (or an international institution) must wage war, and is entitled to do so.

IV

T0here is, moreover, to be recalled, as mentioned above, that in scholastic thought on *justum bellum* the conditions had to occur all together for it to be such. In the subsequent evolution, for centuries, *justus hostis* annihilated *justa causa*. In the phase we are living through, the inflation of justi hostes (on the one hand) and the renewed importance of *justa causa* (and the expansion of it) is minimizing the space of the classical *justus hostis*, i.e., the state. Indeed, most conflicts since World War II have not been fought between states, but between states and non-states, or between non-states (tribes, ethnicities, parties, religious groups). (According to Herfried Munkler, "Politica e Guerra," in *Filosofia politica*, only 17 percent of wars after 1945 are wars between states in the classical sense). But a Jesuit or a Dominican of the *siglo de oro* would never have qualified as *justum bellum* a conflict promoted by a tribe (lacking *jus belli*), which proceeds to exterminate (or "ethnic cleansing") the enemy tribe (without therefore *modus*), in order to appropriate the pastures of that one (without *recta intentio*), even if for a (perhaps) appreciable motive. Such a multiplication of subjects and grounds for conflict is precisely the opposite of what just war theorists aimed at, with determining their conditions: to limit them both in number and in the damage done.

V

The decadence of the state as *justus hostis* is accelerated by the phenomenon, widespread in the 20th century, of states and international institutions claiming to have for a just cause the right to intervene (or otherwise meddle) within other states. With this, the three remembered hallmarks (enclosure, sovereignty, and monopoly of violence) are violated either all together or individually.

Needless to say, such a practice does not fit into the patterns of the *justum bellum* of the Late Scholastics; more than that, it is openly contrary to the system of states and the international order

founded on them. For example, the right of intervention, claimed in this case, injures them all: on the contrary, the rule of non-intervention, with its presuppositions, corollaries and multiple specifications (from the "indifference" of the domestic order to international law—and vice versa to the consequences: *cuius regio ejus religio*, and so on) safeguards them.

To some extent , although on different assumptions and bases, the same aspiration for leagues of states or at any rate international institutions that avert the use of force by replacing it with "legal" (Kantian-inspired), or rather para-judicial, procedures, contributes to blurring the distinction between internal and external, but without much of the benefits envisaged—not least because, on closer inspection, they fail to bring peace except through war, which differs from a "normal" war only because it is (apparently) promoted and conducted by a league of states rather than a single state. The case of Kosovo was the clearest confirmation of this, because the occasion (and motive) for the intervention was not external aggression (as in the war on Iraq over the occupation of Kuwait), but the repression carried out by the Yugoslav state on the ethnic Albanian population residing in its territory. By this it was challenged to exercise the function of "police," connected with that of identifying the internal enemy (the rebel) and also the criminal. The principle of non-intervention in the internal affairs of the state, which is essential to the distinction between those and external affairs, is thus lost. The consequence of this, however, is not to replace the right to war, but to expropriate the state of the relative right, transferring it to an international institution, which in the case at hand also has the power to exercise "legitimate violence" and guarantee peace, not only between states, but also within states. (Among other things, the intervention of "third" power in a situation of "internal" conflict actually constitutes a legitimization of the revolutionary movement. Kant, in defending the principle of non-intervention, admitted it in this situation: "Here the yielding of assistance to one faction could not be reckoned as interference on the part of a foreign state with the constitution of another, for here anarchy prevails." To take away the character of state from the one is, however, tantamount to placing it on the same plane as the other. See, *Perpetual Peace*, Section I.5).

To a similar conception should be traced, *mutatis mutandi*s, other bodies (such as the International Criminal Court under the recent Rome Statute) which, derogating from the rules (admittedly repeatedly violated in the 20th century) of state exclusivity of the exercise of jurisdiction transfer it, in certain cases, to the international institution.

Tribunals—somewhat based on similar conception—constituted to judge vanquished enemies (even if, as in Milosevic's case, vanquished by international "mandate") all have the same fundamental limitation:

that on the judges' bench stand the victors, at the defendants' bar the vanquished. The constancy of such a "trial position" proves how in effect the decision has already taken place, not so much in the sense of certainty of the defendant's conviction, but in the fact that it is victory or defeat in the war that assigns the place in the trial, and not the judgment; which, moreover, in the face of a warlike resolution of the conflict (the actual decision) is always useless (and sometimes Maramaldesque). If a trial (any) has the—very important—function of preventing *ne cives ad arma ruant*, to a trial held after the conclusion of the war not even that merit can be ascribed.

On the other hand, as so many times noted, the practice of trying the vanquished has prevailed in the 20th century and is contrary to the *jus publicum europaeum*, equating the enemy with a criminal (i.e., denying him the quality of *justus hostis*). It appeared to some that it may (be justified or rather) follow, to some extent, from the Kantian conception of the *hostis injustus*. (See on the point Carl Schmitt: "In the final analysis, identification of enemy and criminal also must remove the limits Kant places on the just victor, since he does not allow for the disappearance of a state or for the fact that a people might be robbed of their constituent power"—*The Nomos of the Earth*, p. 171). In some respects, indeed, Kant's thought is almost prophetic of certain solutions of the last century. When he writes, for example, that against the unjust enemy the victors cannot go "so far as to divide among themselves the territory of that state and make, as it were, a state disappear from the earth, for that would be a real injustice to the people who cannot lose their original right to form a community; instead, a new constitution can be imposed on them, which by its nature represses the tendency toward war"—this is very reminiscent of the Constitution of Japan (a "constitution octroyée," it is said, by MacArthur) which both in the preamble and in Art. 9 prescribes the renunciation of war. This is not the only "Kantian"-inspired provision of that charter. The Preamble there states the "laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations").

It must be said, however, that the philosopher of Königsberg appears opposed to bringing the logic inherent in the concept of the unjust enemy to what might be its consequences: neither trials of the vanquished (in §58 of the Methaphisik der Sitten, he writes “it already results from the concept of a peace treaty, that amnesty must be included in it”), nor *debellatio* with extinction of the vanquished state (see passage quoted above). Practices, however, invalidated in the 20th century (examples of the latter was the partition of Poland or the annexation of the Baltic States in 1939, this one without war).

Moreover, the limitation of the Kantian conception appears to be twofold: on the one hand for the

rejection of the state of nature, to be overcome in a new international order: “the state of nature of peoples as of isolated men, is a state from which one must leave in order to enter a legal state” (*Methaphisik der Sitten*, § 61), which distinguishes him from (virtually all) "natural law" thinkers of the 16th—18th centuries. On the other hand, the normativistic—and abstract—(almost categorical imperative) character of that criterion (and definition) of *hostis injustus*.

Moreover, defining it as such, by deriving the norm of its acting from the statements of the same, can even legitimize preemptive war to intentions—which, in an image- and media-driven politics, and with several Captains Fracasse (militarily bumbling) governing states on the planet, would run the risk of provoking wars at every turn.

As for the first aspect, the whole thing tends to underestimate the (realistic) employment of means to safeguard peace (possible) in a pluralistic context (the pluriverse of states): alliances, balance of power, military preparedness.

Even if these (traditional) means have the drawback of impermanence, as Kant writes, it is not necessarily the case that they are less effective, because they are less polemical, than the "legal state" (i.e., the union of states), nor especially that the union envisioned does not end up resembling the innkeeper's sign, recalled by the philosopher, which under the inscription "for perpetual peace" depicted a cemetery. On the other hand, impermanence is inherent in politics, in foreign and international politics no less than in domestic politics—to the point that several jurists (and others) have seen in wars and revolutions the dynamic moment (and element), which tends to bring the legal order back to the actual power relationship (All this would confirm the intuition underlying the innkeeper's sign: that absolute peace, undisturbed by wars, is only that of death). This is because Kant's conception starts from moral (and legal) and not political assumptions—and politics has to do with power far more than with morality; with the widespread and deep convictions of men more than with legally enforced norms.

Rather, Kant's conception of *hostis injustus* appears acceptable, if (corrected and) related not to (legal or moral) norms but to the concrete order; that is, taking a step "back" to St. Augustine. In fact, if instead of "maxim" one substitutes order and peace, in the sense that the unjust enemy is the one with whom there is no possibility of (concrete) peace, i.e., international order, the thesis has a real and positive value. In fact, it is necessary to take up precisely the thesis of the Bishop of Hippo, who, of course, did not speak of an unjust enemy, but determined very clearly the human aspiration for (and the

connotations of) peace: this is, essentially, "the tranquility of order." And order is "the arrangement of equal and unequal beings that assigns to each the place that suits them," as, earlier, he states that peace cannot exist without a leader (*City of God*, 19.XII and 19.XIII).

In St. Augustine, as in the scholastics, thought is oriented (and determined) by the concrete (and real) order rather than by "normativistic" conceptions. From this assumption, it follows that the unjust enemy is one with whom it is not possible to achieve (and coexist in) an order, however "provisional," i.e., to conclude peace; it is not the violation of the norm that makes the enemy unjust, but the impossibility of peaceful coexistence, and this is determinable only on the basis of the possibility (of duration) of an ordered and peaceful situation. That is to say, the *justus hostis* is, from an objective standpoint, the political subject whose features of form are such as to be able to guarantee an order, different from that which pre-existed the war, but nevertheless such an order. This brings us back to Santi Romano's concept of order and the elements of "statehood" that, in the Sicilian jurist's thought, make even the revolutionary movement "an embryonic state order." In fact, if the enemy lacks those elements—so that it cannot be considered insertable in a context of international order and security—with it dealing and making peace is not just or unjust—it is simply useless (if not impossible). An international order presupposes and requires ordered subjects in itself. If there is no internal order in the subject-components, there can be no international (overall) order, either.

An enemy that lacks a connection to territory and population, but has only a leader and followers (i.e., an embryo of an organization), as is the case, apparently, with Al Qaeda and other terrorist groups, is "unjust" because it does not appear determinable who it represents and in what bounded or delimited "space," as opposed to other movements that have largely resorted to partisan warfare and terrorism (from the IRA to the Zionist movement, from the Algerian FLN to the Viet-Cong); but nevertheless constituted states embedded in the international order and preserved peace within the realm of the possible. This situation can be likened to that of so-called "failed states," in which "statehood" is only a simulacrum masking a state of endemic civil war between groups (ethnically, religiously or economically based), whereby a legal state form is not matched by effective enclosure, secure sovereignty, or even a monopoly on legitimate violence. Which, however, requires *justa causa*, as appeared to be the case for Afghanistan (while still obscure for Iraq), given the Taliban's hosting of al-Qaeda.

VI

This brings us back to the problem of the state. If it is true that the epoch of states, as it seems, is probably in its twilight, we are witnessing the twilight of a historical period that gave long cycles of (possible) peace, having succeeded, to a large extent, in the attempt to put in "form" not only political unity (all of which, however, have a form, even if not as carefully fashioned as that of the state) but even war. War in "form," the *justum bellum* of the nascent era of states (and before that, sketched out in the earlier era, with its limitations on feudal and inter-Christian wars), with its *justi hostes*, *justae causae*, *intentiones* and *modi gerendi* was the most articulate and elaborate system of limiting and humanizing conflicts and building, even for that, states of peace possible. But such an outcome was achieved because war in "form" was the "duel on a large scale" between subjects equally in "form." If the elements that constitute and characterize them are subtracted from these, it does not appear possible for war, or even peace, to be "shaped."

A political subject without territory, even in the Trotskyist image of strongholds, without ties to the population and with a "mobile" (and labile) command structure is, to follow Sun Tzu, the ideal combatant, but the worst contractor of peace. In a system of international law that would be better called interstate, since it presupposes states as subjects of the political order of sedentary communities (Hauriou), the "formless" enemy with whom peace cannot be negotiated and preserved is the only possible "unjust" enemy.

It will be said that, on the basis of St. Augustine's thought, such an enemy is not easy to find (so much so that the saint resorts to the example of Cacus, taken from mythology); but if one relates the concept of an unjust enemy to what is—concretely—a given international order (or rather its fundamental outlines), the incompatibility with this is not merely hypothetical or unreal. It should be noted that St. Augustine makes Cacus' "wickedness" descend from his total asociality: "So that, had he been willing to make with other men the same peace which he made with himself in his own cave, he would neither have been called bad, nor a monster." But a completely unsocial man has never been seen, so the saint continues: "It is better, then, to believe that such a man or semi-man never existed, and that this, in common with many other fancies of the poets" (*City of God*, 19. XII).

On the other hand, Clausewitz in distinguishing between "absolute" war (i.e., the ideal-type of war), with its logic of "ascent to the extreme" (*On War*, Chpt. I. 5ff) and real war (i.e., concrete, and oriented by political purpose) and the relative "moderation" of the latter with respect to the former, describes, in essence, real war as conducted(and relativized) in the 17th—19th centuries by European states: if instead of those the protagonists are others it becomes likely-as it was, for example, on 9/11-that the

act of war is much closer to the ideal type of "absolute war," without boundaries or rules. That is, without any legal limitations.

Which brings us back to the initial assertion that in war—particularly in those that are real, i.e., actually fought—law is present, both as a rule of conduct (international law of war) and (and most importantly) as an aspiration for an order, for the resolution of conflicting interests that does not destroy the overall "picture" of several coexisting peoples, and, often, linked by a common civilization.

The *bellum justum* of the scholastics moved precisely from this conception (and aspiration), realistic in its assumptions as ideal in its intentions—to make war limited in its modes, subjects and purposes the—exceptional—means for the implementation of law and the preservation of order in a system of *superiorem non recognoscentes* states. The objective difficulty of determining right or wrong does not tarnish its achievements, nor especially the assumptions and validity of those realistically oriented conceptions of concrete order, about which there is still reflection and learning to be done, in the context of a political situation so changed since the period in which it was formulated.

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Featured: *Turbes (Tubae) silent et gladii recunduntur in vaginis* ("The crowds/trumpts are silent and swords put back in the sheaths"), folio 31 verso, from *Prudentius' Psychomachia*, Corpus Christi College, Ms. 23, ca. 1000 AD.
