Global Grand-Guignol
Transformations of war and the endless crisis of UNO

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In spite of the imposing attempts to 'neutralize' it, or even substantially remove it from public debate, the problem of war is still today the test of the legitimacy of any legal order and of international law in particular.

War has not disappeared. It has changed. Terms such as "use of force", "peace-building", "humanitarian intervention", "war on terror", "peace operations" and others are sterile exorcisms, or hypocritical disguises of a phenomenon that involves the lives of millions of people. It must not deceive the circumstance that the simplest and most intuitive expression that designates the collective recourse to violence - "war", precisely - is now banned from the contemporary legal and political lexicon.\(^1\)

The consequences of this removal are evident. The possibility of not using the term "war" openly is a formidable resource for those who are able to make use of war itself. If nobody 'declares' war any more, it is because resorting to it is legally prohibited and less and less justifiable before public opinion.

Until 1919 the declaration of war had the sense of 'clarifying' on a legal level the conflictual project that was being elaborated. The formalization of the "state of war" meant that the relations between the belligerents were regulated in different terms than in periods of peace. And this also meant assuming certain responsibilities, first of all connected to the observance of the norms that regulated the war activity.
If war is no longer formally declared, the war condition is less and less definable on the legal level, increasingly chaotic and close to a state of permanent exception. And the rules of war are destined not to be applied at all. All this is relevant both at the level of international law and at the level of national rules.

No longer calling war by its name has led to a radical downsizing of the role of the law in limiting warfare. A brief reflection on the historical evolution of the relationship between war and law is essential to better focus on this issue.

Already in Roman epoch an attempt was made to respond to the problem of war conflict through the elaboration of a specifically legal discipline. In this sense, it may be sufficient to recall how the Roman college of fetiales could be attributed the theoretical elaboration of some institutes that would become real cornerstones of modern international law. I am thinking, for example, of the attempt at conciliation that the members of the fetial college were charged with the task of dealing with the people with whom a dispute had arisen, in order to avoid the immediate recourse to arms; or the time limit that was granted to the opposing party before hostilities were opened; as well as the obligation to formally declare the beginning of the proper war phase of the conflict.

With reference to the Roman legal experience, two considerations can be made on the relationship between war and law. First, it should be noted that Roman war law had as its exclusive object the prodromes of war (and in this sense the famous Ciceronian gnome silent inter arma leges should be interpreted). Secondly, in the perspective of the legal-religious formalism of which the fetial college was an expression, the 'justice' of war was determined by the conformity of the procedures governing indicio belli to the ritual defined by tradition and preserved by the college itself. This formalistic perspective, once stripped of its religious archaisms, became the basis of what we can consider the first attempt
to legally regulate war. In this sense, Roman juridical culture addressed the question of the relationship between war and law from the perspective of the "formal legitimacy" of war conflict.

If we accept this interpretation, it is evident that there is an absolute discontinuity between the Roman concept of *bellum justum* and the Christian doctrine of "just war". And if it is probably wrong to consider the doctrine of the "just war" as a theoretical monolith destined to last for over a millennium, nevertheless it is possible to identify in its various formulations - ranging from Augustine's patristic and in particular from Augustine's theology to Thomas' Summa, up to the Spanish second scholasticism - a persistent element: the absolute centrality of the discourse on the "just causes" of war. In other words, if the concept of war in Rome had been interpreted from the perspective of "formal legitimacy", the medieval doctrine of "just war" instead shifted the focus to the ethical evaluation of *justae causae belli* as an essential requirement of the "justice" of war. In this sense, the medieval doctrines of "just war" adopted the perspective of the "substantial legitimacy" of war conflict.

The paradigm of the doctrine of "just war" was questioned and then put into crisis only from the 16th century onwards. It was in the context marked by humanism, the discovery of the Americas, secularization, the Reformation and the theoretical elaboration of the modern state that the prerequisites for a new interpretation of the relationship between war and law were created. A new interpretation that would find its first coherent formulations a little later - between the end of the sixteenth century and the beginning of the seventeenth century - in the theories of authors such as Alberico Gentili and Hugo Grotius.

Within what is now commonly called *jus publicum europaeum*, jurists claimed their own expertise, alternative to that of theologians, on the problem
of war. Thus, the prospect of the "formal legitimacy" of war re-emerged, which did not coincide, however, with the mere rediscovery of Roman war law.

*Jus publicum europaenum* resolved at the root the question of the "just causes" of war, recognizing to the States - the absolute heroes of the new European order - a real "right to make war" (commonly referred to as *jus ad bellum*). This result, which might seem at least ambiguous on the moral level, proved to be decisive for the elaboration of modern international law. It was, in fact, thanks to the recognition by sovereign states of the monopoly of the legitimate use of force against other members of the international community, that the doctrine of "just war" was overcome and gave way to a juridical reflection that had as its fundamental objective an effective limitation of war conflict. The enemy was no longer a subject who fought without just cause, and therefore necessarily an "unjust enemy" who had to be annihilated, but - to take up a famous expression of Carl Schmitt's - was an enemy who could also 'be right', and therefore was a "just enemy" to whom certain rights had to be guaranteed. Suffice it to think, in this sense, of the distinction between combatants and non-combatants, the prohibition of the use of certain weapons, or the provisions on the treatment of prisoners, which from the end of the sixteenth century onwards found more and more space in the works dedicated by jurists to the "law of nations".

It is therefore possible to maintain that modern international law has taken up the Roman approach of the "formal legitimacy" of war, integrating it, however, with a new perspective that took into account not only the phase preceding the opening of hostilities but also the subsequent conduct of war operations. A perspective, this one, that we could call the "legality" of the war conflict. It is in this sense that between the 16th and 17th centuries the generative moment of what was first called *jus belli*, then "international law of
armed conflicts", and more recently "international humanitarian law", must be identified.

The limitation of the war assured by international law between the seventeenth and twentieth centuries certainly had a limited effectiveness. Moreover, the legal discipline of war referred exclusively to land conflicts fought by regular armies on European ground. Colonial wars, naval clashes, even land battles fought between European states on continents other than Europe were not included in its regulatory scope. Nevertheless, and in spite of even considerable infringements - just think of the Napoleonic wars - of the rules of conduct of the war it established, modern international law has nevertheless managed to achieve important results, the most remarkable of which can be considered the drastic reduction in the killing of civilians in conflicts fought on European territory.\(^{11}\)

It can be said that this legal limitation of war reached its highest point between the end of the nineteenth century and the beginning of the twentieth century. But its success, officially celebrated with The Hague conferences of 1899 and 1907, was immediately followed by an irreversible crisis. Both the theoretical structure and the practical effectiveness of *jus publicum europaeum* did not survive the First World War.\(^{12}\)

On the eve of the 'Great War' many people thought that the conflict that was about to explode would be 'the war that would end all wars'. The corollary of this orientation was the idea of a "perpetual peace", according to the Kantian expression. In the words of one of the spiritual fathers of the League of Nations - Léon Bourgeois - this peace would be "a peace different from all those of the past, that is, an uncertain and unstable peace, but, on the contrary, peace, true peace, definitive peace".\(^{13}\). These iberian prophecies would soon prove unreliable. Nevertheless, from a specific point of view, the First World War can really be
considered "the last of wars". It was the last war regulated by classical international law (*jus publicum europaenum*), or, more precisely, it began as a war regulated by European public law which then ended under the banner of an entirely new international order: an order born in Paris, where on 18 January 1919 the works of the Peace Conference had begun and on 28 June of the same year the Treaty of Versailles was signed.

The relationship between war and law thus developed into a new stage. If until the beginning of the twentieth century the decision to resort to war had been considered a "natural right" of which every State was the holder, from 1919 an opposite idea had become increasingly strong, according to which the use of force had to be considered an infringement of international law. At the normative level, this change of course had been transposed - albeit still in an approximate manner - in the Statute of the League of Nations. Subsequently, in the Paris Pact (Kellogg-Briand Pact) of 1928, almost all the States of the world had expressed a condemnation of war as a means of resolving international differences and had undertaken to renounce war as an instrument of national policy.

The tragedy of the Second World War, which had demonstrated the absolute erroneousness of previous predictions, did not stop the further development of this anti-war concept, which was taken up and enshrined in the United Nations Charter. As is well known, the Charter of the United Nations states that its members must resolve international disputes by peaceful means, refraining from the threat or use of force (Article 2), and gives the Security Council responsibility for the maintenance of international peace and security (Article 24), both through measures that do not require the use of force (Article 41), and through actions involving the use of air, naval or land forces (Article 42). In other words, the Charter established the prohibition for each State to
use war autonomously, with the sole - but fundamental - exception of legitimate defense, expressly recognized as a "natural right of individual or collective self-defense", which any member may exercise "in the event of an armed attack against a member of the United Nations, until such time as the Security Council has taken the necessary measures to maintain international peace and security" (Article 51). Moreover, the establishment of the United Nations has affected the relationship between war and law at the *jus in bello* level, through an extensive codification of the rules of conduct of war operations, the most important results of which were the Geneva Conventions of 1949 and The Hague Additional Protocols of 1977.

If we accept this reconstruction, it is possible to argue that since the first post-war period the use of weapons has been considered a legally disciplinable phenomenon, but at the same time war has become an international offence with only two 'founding exceptions': war as a sanction adopted by the Security Council; war as a means of legitimate defense of a State in the face of an ongoing aggression.

It can be said that the relationship between war and law is still formally determined by the United Nations and by the Security Council being given the role of arbiter of war and peace at the international level. Obviously, this does not mean that the structure of the international order has remained unchanged, but it does mean that the extraordinary transformations that have marked the world since 1945 have not produced a rethinking of the legal concept of war.

We are therefore faced with a regulatory impasse. Because of the choice to grant veto power to the five permanent members of the Security Council, the mechanism governing the use of force at international level has proved to be substantially inadequate or ineffective, as no war undertaken by countries such as the United States, the United Kingdom, France, China or Russia can be
considered an international offence. Even today, the five victorious powers of the Second World War still hold the power to decree the legitimacy of a war intervention, and are obviously not willing to give up the privilege granted to them by the Charter, making the United Nations de facto irreformable.

The consequences of this situation are obvious. The most important considerations in theory are essentially two. On the one hand, as far as self-defense is concerned, there has never been a shared definition of the concept of "aggression". The Security Council has thus remained the sole arbiter of the legitimacy of recourse to war by States that believe that they are the object of an act of aggression, while retaining firmly in its own hands the power to interpret the provisions of Article 51 in an extremely restrictive or, on the contrary, absolutely flexible manner, according to the political and strategic convenience of the five permanent members.

On the other hand, with regard to the use of appropriate measures to protect international peace and security, the Security Council - in particular because of the cross vetoes of the USA and the USSR - has for a long time been at a stalemate, which only ended with the end of the Cold War. It was in fact from the last decade of the 20th century that the Security Council began to make extensive use of the instruments provided for in Chapter VII of the United Nations Charter. In some cases, these were measures not explicitly involving the use of force, aimed at ensuring compliance with sanctions already established by the United Nations. In other cases, the Security Council has authorized limited use of force in the context of so-called peacekeeping operations. And sometimes, the Council has gone so far as to authorize the use "of all necessary means and measures" to protect peace.

It is fundamental, in this regard, to note that, due to the failure to establish an international force led by the United Nations (see Chapter VII,
Articles 43-47 of the Charter), regional military organizations, first and foremost NATO, have been authorized to resort to war. But even more significant is that in many cases the Security Council has not authorized the use of war, and yet military operations have been conducted which not only were not considered illegal, but were morally (and in some cases even legally) justified in the name of "human rights doctrine".

In recent years, the tension between two of the fundamental principles of the United Nations Charter has been increasingly resolved in the sense that the protection of human rights prevails over the principle of the territorial integrity of a sovereign state. To many this has seemed a success, but it is worth noting that it has increasingly been achieved in total disregard of the rules established by international law on the use of force. On the other hand, the five permanent members of the Security Council (and the USA in particular), if on the one hand have claimed the right to intervene in defense of human rights even at the cost of violating the sovereignty of other sovereign countries, on the other hand they have constantly claimed their own intangibility in the face of possible accusations that they themselves are violating these rights. It does not therefore seem excessive to speak of a substantial "hyper-sovereignty" of these actors on the international scene.

This is the context in which war - regardless of the name by which it is called - in the last twenty years has become a "global war": global because it is despatialized in a geopolitical sense and indefinite in time (Infinite Justice was the original name of the operation Enduring Freedom, realized after the tragedy of 11 September 2001), but global also because it is unlimited in legal terms.

Contrary to the prevailing doctrine, it is fair to say that the event that sanctioned this turning point was not the terrorist attack of 11 September, but rather the Gulf War of 1991. The military intervention in defense of Kuwait, of
course, was authorized by the Security Council and therefore the war was justified as an instrument of protection of international peace and security against a state responsible for a serious international crime. However, that is not its primary characteristic. The most important thing is that the Gulf War was a war that could not be classified in the classic pattern of war between sovereign states. It was therefore a war of a new kind in several respects.

Firstly, the war against Iraq was conducted without any respect for the rules of *jus in bello*. Suffice it to think, in this sense, of the sacrifice of the civilian population (subjected both to bombardments and particularly heavy embargo measures), the use of weapons such as depleted uranium bullets, cluster bombs and fuel-air explosives, the annihilation of civilian infrastructure as well as the very serious compromise of the environmental conditions of Iraqi territory. Moreover, the 1991 Gulf War was an "asymmetric war", characterized by an exceptional military and technological gap and the resulting disproportion between the human casualties of the warring parties. It was therefore an unlimited war which caused very serious repercussions for the civilian population.

Secondly, the intervention was carried out on the ground not by an international force strategically led by the UN Charter Staff Committee, but by a military contingent of troops from 27 different countries under the de facto leadership of the US armed forces. With its intervention in Iraq in 1991, the United States finally overcame the impasse of the Cold War and presented itself as the lonely superpower legitimized to defend the values of democracy and freedom on a global scale. So, the Gulf War can be interpreted as the first piece of a broad hegemonic strategy aimed at establishing direct control over areas of the world considered crucial to US interests. It is in this perspective that it must be underlined that the 1991 conflict ended not with the simple restoration of
the territorial integrity and political independence of an attacked sovereign state, nor with a war occupation in the proper sense, but with the establishment of stable contingents of the US armed forces in the conflict area.

The Gulf War can therefore be considered the first expression of a type of warlike conflict that in the last twenty years has crossed the hottest parts of the globe, from the Balkans to Africa and the Middle East. The fundamental element of this escalation in the use of force at international level must be identified in the constant erosion of the United Nations' ability to regulate this phenomenon. The widespread use of war has in fact progressively moved away from the regulatory framework established by the Charter.

Since the early 1990s there have been numerous cases in which the United Nations has claimed its function of protecting or restoring international peace and security. In this sense, it is enough to think of the peace-keeping operations in the strict sense or post-conflict peace-building in which the so-called blue helmets have intervened in areas such as El Salvador, Cambodia, Mozambique and Angola, under the mandate of the Security Council (or in some cases of the General Assembly), under the direction of the Secretary General and with the consent of the territorial State concerned by the operations. While these interventions were certainly attributable to the Charter, some doubts concern the so-called peace-enforcement operations carried out in 1992 in the former Yugoslavia and Rwanda, as well as in 1993 in Somalia, where the United Nations used force for so-called 'humanitarian' purposes without the consent of the countries concerned. But while interventions of this kind could still be brought within the scope of Article 42, it is much more complex to identify the basis for the legitimacy of those operations which the United Nations has limited itself to authorizing, entrusting the task to individual States or coalitions of States (or to 'regional organizations’ in non-compliance
with the provisions of Chapter VIII of the Charter). These are operations authorized by the Security Council, but which have been managed without the direct control of the United Nations. One thinks, in this sense, of the Air Strikes and Deliberate Force missions conducted by NATO in the former Yugoslavia between 1994 and 1995.

But it's not enough. Still others are clear signs of the progressive erosion of the UN's ability to ensure international peace and security. Think of the wars that have been waged outside the UN decision-making system. In some cases, they have been interventions where the use of armed force has been justified for humanitarian purposes. The first and most significant example of such "humanitarian wars" is the Kosovo conflict in 1999. In other cases, they were justified interventions of war in the name of the "war on terror" called for immediately after 11 September 2001 by George W. Bush. The invasions of Afghanistan and Iraq by the so-called "coalition of the willing" are the most striking expressions of the war against the "canon countries" which has been conducted in absolute violation of the United Nations Charter over the last decade.

The United Nations seems to have abdicated its function of controlling and reducing the violence of war in some way. And this is an absolute capitulation at least in the areas of the planet where the political and economic interests of the five permanent members of the Security Council are strongest. It is easy to predict that the latest product of humanitarian rhetoric – the "responsibility to protect" -- will never be invoked to justify an intervention in Palestine, Chechnya or Tibet, but will only be a further means of justifying the next 'humanitarian' wars.

In this scenario, the United Nations sometimes impose silence on itself; sometimes they take the floor when the conflict is now deflagrated, but without
denouncing its illegality and on the contrary somehow legitimizing it ex post; in other cases, they still raise their voices, except to be mocked by the very States acting on their behalf. The recent case of Libya is exemplary: The Security Council had authorized the establishment of a no-fly zone and areas of protection for the Libyan population, specifying that foreign occupation in any form and of any part of Libyan territory was in any case excluded. But the concrete results were quite different. And also in the case of Mali, after having committed itself to deploy an international force in response to the Malian government's request for help, the United Nations entrusted the fate of the conflict to the unilateral intervention of France, whose obvious interests in the Sahel have awakened the spectres of the colonial war. As far as the extremely serious situation in Syria is concerned, everything suggests that if unilateral military intervention by the United States and its allies is avoided, it will only be because of the logic that evokes the Cold War scenario, confirming the impasse produced by the lack of convergence of the interests of the holders of hyper-sovereignty.

In brief, contemporary international politics seems to offer a very rich menu: interventions with or without the direct use of force, peace missions, humanitarian operations, legitimate preventive defense and so on. But behind this apparent variety, the dish that is offered is always the same, and it is called war. It is up to the United Nations and the guardians of international law to try to be something other than helpful waiters serving in livery at the global Grand-Guignol banquet.
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<td>Paradoxical (or perhaps not) is that in the United Nations Charter the term &quot;war&quot; occurs only once, and in the preamble.</td>
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<td>12</td>
<td>On this point J.L. Kunz has written fundamental pages; I point out at least Plus de lois de la guerre?, in &quot;Revue générale de droit international public&quot;, 41, 1934, pp. 22-57.</td>
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<td>14</td>
<td>The concepts of <em>jus ad bellum</em> and <em>jus in bello</em>, in the generally accepted meaning, despite their formulation in Latin and the widespread opinion for which they would be medieval categories, are recent. On this point I would like to refer to <em>jus ad bellum</em> e <em>jus in bello</em>. Genealogia di una grande dicotomia del diritto internazionale, in “Quaderni fiorentini per la storia del pensiero juridico moderno”, 38, 2009, pp. 1169-1213.</td>
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<td>21</td>
<td>And this despite the attempts of various commissions, such as the Permanent Advisory Commission, the Special Committee of the Temporary Mixed Commission and those established by the General Assembly with Resolutions 378/B (V) of 1950, 688 (VII) of 1952, 859 (IX) of 1954 and 1181 (XII) of 1957. The resolution of the General Assembly 3314 (XXIX) of 1974, which also attempts a rough definition of the concept of aggression, has left the prerogatives of the Security Council on the matter ex article 51 completely intact, thus not resolving the question.</td>
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