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War, Law, and Global Order

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War, Law, and Global Order

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" ... the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".

1. War and aggression from the doctrine of just war to classic international law

The dominant international doctrine categorises the war of aggression as a "fundamental crime" (1). However, said crime is lacking a recognized definition and thus does not fall under the competence of any international court or tribunal. In this essay I shall attempt to trace the fundamental stages of the process that has led to this paradox. In particular, I will try to trace the history of the concept of aggression and the attempts that have been made at defining it. I shall begin with an examination of the medieval doctrine of *bellum justum*.

The teachings of the Church of Rome played a fundamental role in the development of the concept of war. The irenical paleochristian attitude that had characterized the teachings of Tertullian, Origen and Lactantius, according to which war was the antithesis of the evangelical message was replaced already in the 4th Century by a doctrine which regarded Christians resorting to war as an act that was all but sinful. Once the era of martyrdom was over, Christianity became the religion of the Empire. Within a few years some amongst the key thinkers of the Church (Athanasius of Alexandria of Egypt, Basil of Cesarea and especially Ambrose) began to claim that war - under certain conditions - was not a sin but a necessity. With Augustine Christian theory definitively moved on from ancient concepts and so doing elaborated a model - that of the just war - that would be destined to last for more than a thousand years.

According to the doctrine of *bellum justum*, war is not always a sin. In some cases it is legitimate, morally right, insofar as it is an act of peace, inspired by a *recta intentio bellandi*. In order to be just, wars must have a just cause (*justa causa*). Augustine, Gratian, Thomas and all the great medieval theologians up until Francisco de Vitoria, inserted lists of *justae causae belli* in their own works. Analogous lists were compiled, symmetrically, in order to define the grounds that rendered a war unjust (*injustae causae belli*), such as *libido dominandi*, *aviditas adipiscendae laudis humanae*, *imperii amplificatio*, *diversitas religionis*, *principis gloria propria* and many more. However the just cause we may call "aggression" (2) was missing from amongst these.

The medieval doctrine of just war distinguished between *bellum inter catholicos* and *bellum contra inimicos fidei*. War within the *respublica christiana* could not be allowed unless there was an ethical and legal purpose that could not be achieved other than through war. But with respect to the enemies of faith, be these heretics or those belonging to a different religious persuasion (the "Saracens"), the war of aggression - the *bellum romanum* of Henry of Segusio - was entirely justified (3). The act of defending oneself from the war of aggression of the Christians was an unjust act, contrary to justice: "is qui gladio utitur juste facit, et per consequens is qui defendit se temerarie se defendit" (4). War, even in the form of war of aggression, was therefore not considered an absolutely illegitimate act, and no or a minimal amount of attention was given to the concept of aggression itself by medieval theological doctrine.

With the birth of classical international law, which may be established as coming about towards the end of the 16th Century (5), the concept of war acquired an entirely legal dimension, and all theological medieval connotations disappeared. In the new European system formed by States that

recognised a reciprocal dignity, war was a legitimate prerogative of the sovereign. The problem of *justa causa* was removed at the core. The justness of war was "a pure question of personal conscience" (6). Each State had the right to commence a war, thus war between States was always 'just' (in a formal legal sense), independently from the value of the ethical, political and legal positions of the parties involved. The adversary, no longer being the defender of an unjust cause, could now be considered a "just enemy" *justus hostis*), and not a criminal or an absolute enemy to be exterminated. Thus it became possible to elaborate a system of norms (*jus belli* (7)) rested on a 'non discriminatory' concept of war, which allowed for the limitation of warlike violence (8).

In classical international law therefore, there was no norm that might establish the illegitimacy of war in predetermined cases. To the contrary, there was a norm that recognised the power of each sovereign to legitimately conduct war. The grounds, reasons and aims of the war had no legal relevance. The concept of aggression was totally unrelated to the *jus publicum europaeum*. A declaration of war was not an act of aggression but, to the contrary, it was an act that conformed to the law of war.

Since general international law did not comprise any ban on using force, States would ever more often pose limits through specific treaties. The term "aggression" would frequently appear in these texts, but as a synonym of "attack", "war" or "armed attack", without there being a precise definition or a conceptual dimension to the term.

2. Aggression as a wrongful act and aggression as a crime. The uncertainties of the Treaty of Versailles and the Covenant of the League of Nations

The First World War was the last war of the *jus publicum europaeum* or, more precisely, it began as a war regulated by international modern European law, but was concluded under the heading of an entirely new international legal system (9). As George L. Mosse highlighted, the war that was fought between 1914 and 1918 was "a different kind of war" (10). The use of asphyxiating gases, airships, planes and submarines made the Great War an episode that could not be compared to the wars that had been fought up until then. Thirteen million people died in the course of that war, more than twice as many as the sum of all the dead in the largest armed conflicts fought between 1790 and 1914.

The destructive potential of the new instruments of war left a profound impression on the civilian population whose exposure to the risks of war had been - even though only partially - limited during the course of the last three centuries, and it now felt irrevocably vulnerable. The idea that the "war of the Kaiser" as the greatest crime that had ever been committed quickly became accepted in public opinion in England, France and the United States, also thanks to the attitude of their respective governments (11).

During the inter-ally summit of the 2nd of December 1918, Clemenceau, Lloyd George and Vittorio Emanuele Orlando agreed to bring the Kaiser to trial. Before the opening of the Conference of peace (12), Lloyd George proposed the establishment of a commission which would have the purpose of examining the question of responsibility in war, which found a large consensus amongst the representatives of the victorious sides. During the preliminary conference of January 25th 1919 - only a week from the opening - the establishment of a body whose task it was to ascertain the responsibility of the instigators of war was decided.

After two months of secret meetings, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, chaired by the American representative Robert Lansing, presented its report on the 29th of March 1919 which was then supplemented on the 4th of April by two *memoranda* containing the reservations expressed by the United States and Japanese representatives (13). The opinion of the Commission showed a clear detachment from the international system of the *jus publicum europaeum*. Germany was considered to be responsible for the war for having violated not only the laws and customs of war, but also "the laws of humanity"

and "the clear dictates of humanity". Thus arose the possibility of attributing responsibility to a single State for having infringed, not an agreement-type or customary norm, but a no better defined "law of humanity", the violation of which did not require the acquirement of the relative probationary elements ("The facts are established. They are so numerous and so vouched for that they admit of no doubt and cry for justice").

The central point of the report was, however, another: the question for the personal criminal liability of the authors of the war. According to the Commission, all persons belonging to enemy States, independently from rank, should be subject to criminal proceedings if they are guilty of having contravened the laws and customs of war and the laws of humanity. An international tribunal was to be established in order to try the guilty. On the question of the competence of the Court, the report distinguished between two possible types of crime: the acts that had caused the war and that had been done at the beginning of the war; the violation of the laws and customs of war and the laws of humanity. Only the latter, essentially termed "war crimes", were to be given attention by the Tribunal. The former denoted a different *genus* of crime: the "crime of the war", or better, the "crime of the aggressive war". But this crime, according to the Commission, was of a different nature than the others, as it belonged to a moral sphere of rather than a legal sphere. In a strictly legal sense, the war of aggression could not be considered to be against international law (14). The Commission formed the following conclusions even though it recognised that Germany had infringed the treaties of neutrality in existence with Belgium and Luxembourg (15)and had violated the borders of France and Serbia before war had been declared: "The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal". The immediate recommended action was a "formal condemnation" of the acts that led to the war by the Conference. But, in a way that is totally incongruent with its conclusions, the Commission also recommended that special measures be taken, such as the setting up of extraordinary enquiry commissions aimed at ascertaining responsibility for the war.

The final text of the Treaty of Versailles moved away from the indications of the Commission. The famous article 227, announcing the incrimination of the Kaiser "for supreme offence against national morality and the sanctity of treaties", affirmed the existence of individual criminal liability in international law for the first time in the history of law of nations. A special tribunal (formed by five judges representing the United States, Great Britain, France, Italy and Japan), was to try Wilhelm II driven "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality". But from a legal point of view, article 227 did not clarify which crime on the basis of which the Kaiser was to be held criminally liable. In particular, no reference was made to the "crime of aggression" as the legal basis of the accusation. Political justice, and not international justice, as the nature of the provision is also expressed by the reference to "international policy" rather than to "international law".

The eighth part of the Treaty however, refers to the concept of aggression. This section is dedicated to redress and collective sanctions. The reparations were certainly not a novelty introduced at Versailles (Germany itself had imposed heavy reparations on France in 1871). But as well as reparation in the real sense, that is to say the request for compensation for losses deriving from actions that were not in conformity with the law of war, the Treaty contained a "war guilt clause" at article 231 (16). The war had begun "because" of Germany. The latter had imposed the war on others through an act of aggression and thus had to accept responsibility for it. Carl Schmitt maintained that the demands made under article 231 were not "reparations of war in the old sense, but formal demands for compensation on the basis of the legal liability of the defeated" (17). Based on the new concept, Germany still had to limitlessly cover all losses insofar as these were derived from an unjust war of aggression (18).

Although the Treaty of Versailles did not mark the definitive overcoming of the concept of non discriminatory war that is characteristic of the *jus publicum europaeum*, it did introduce elements of profound discontinuity with the classical international legal system (the concept of personal criminal liability of international law; the idea of the establishment of a criminal international court). In 1919 the war of aggression was not considered to be an international crime in the criminal sense of the

term. Only a few jurists - particularly Louis Le Fur (19) -went so far as to foresee a criminal-judicial ban on the war of aggression, thereby bringing back the concepts of just war and unjust enemy and applying these to the case of the war against Germany.

The Covenant of the League of Nations did not present any great differences with respect to the Treaty. Article 10 referred to the ban on the members of the League to resort to "external aggression". The text did not supply a manifest definition of "aggression". However, one can assume from the article that the term "aggression" was used to denote a violent action aimed at the violation of the territorial integrity and the political independence of a member State. The qualification of the aggression as "external" indicated that the aggression must be perpetrated by a State in relation to another State (with the express exclusion therefore of internal conflicts). Articles 12, 13 and 15 stated that should a controversy arise, the States would submit the question for arbitration or to the Council of the League, without allowing them to resort to the use of force before three months had passed from the decision (a 'cooling off' mechanism). The use of war was precluded should the adversary put into practice the outcome of the arbitration or if it came into line with the recommendations of the Council. Article 16 stated that the violation of articles 12, 13 and 15 would constitute an *ipso facto* "act of war", committed against all the members of the League of Nations, without using the term "aggression".

The Covenant deemed a State that did not act in accordance with a determined procedure before taking up arms as a violator of the peace. Article 10 linked the concept of aggression to that of territorial integrity, presenting itself as a clause of guarantee armed with the *status quo* defined in the Treaty of Versailles. It was however immediately made clear that in practice no State would be willing to refer the question of verifying whether an aggression had taken place (and therefore also as to the duty to intervene) to the Council of the League. The tension between State individualism and (asserted) League universality was reconciled in favour of the sovereign prerogatives. As is generally known, neither the Assembly nor the Council of the League of Nations were able to operate as collective bodies, nor did they prevent or sanction the episodes of aggression that repeatedly took place in the years that followed (such as the Italian occupation of Corfu or the Japanese invasion of Manchuria and China). The prudent strategy of peace keeping planned at Versailles turned out a complete failure.

In general, it may be maintained that the 'system of Versailles' was lacking the concept of the criminalization of war as such. However, the concept of aggression brusquely became the centre of political and judicial debates in the west after the end of the First World War. Although the idea of each State having the right to resort to war insofar as that State is sovereign *superiorem non recognoscens* was still too strong to be overcome, there was an increasing tendency to perceive aggression as an international wrongful act.

3. The criminalization of war. The undesirability of a definition

In the years that immediately followed the First World War a number of attempts will be made to resolve the question of aggression. The Treaty of Mutual Assistance of 1923 did not give a positive definition of the term. Arguing *a contrario*, the Treaty established that war led a by a State which, being part of an international trial, had itself accepted the recommendation of the Council of the League of Nations, the verdict of the Permanent Court of International Justice, or an arbitration with the other party in the dispute, was *not* to be considered a war of aggression. Such a proposal was reiterated by the Permanent Advisory Commission of the League of Nations which affirmed that the system of mutual assistance could not have a preventative function aimed at avoiding armed conflicts in that "under the condition of modern warfare it *would seem impossible to decide, even in theory, what constitutes a case of aggression*" (20). Subsequently the Special Committee of the Temporary Mixed Commission confirmed this thesis: it was not possible to identify an act of aggression *a priori* ("it is clear that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised"). In the case of conflict the Council would have had to invite the parties to submit the case to the same Council or to

the Court: the party that would refuse to fulfil such a request would be considered to be the aggressor. These attempts were associated with the idea that it was not possible to define what constituted an act of aggression. The only way to get out of the situation was to confer the power of deciding on a case by case basis which party was to be considered the aggressor to the Council.

The frailty of such a solution was immediately made clear. Notwithstanding the declarations of principle, no State was willing to submit itself to the discretion of the Council. A partial correction was found in the Geneva Protocol of the 2nd of October 1924 (*Protocol for the Pacific Settlement of International Disputes* (21)), which may be considered to be the first internationally renowned act in which war is expressly defined as a crime, and not simply as a wrongful act (22). The Protocol was derived from the initiative of the American international jurist, James Shotwell, whose project, "The Outlawry of Aggressive War", considered the war of aggression as an international crime (art. 1: "The High Contracting Parties solemnly declare that aggressive war is an international crime"), but at the same time, it reaffirmed the responsibility of the individual State for the acts committed (art. 2). From the moment that it is true that *societas delinquere non potest*, the crime to which Shotwell's project made reference could not be understood in a criminal sense. The text of the Protocol confirmed the theoretical uncertainties of the project. Unlike the *Treaty of Mutual Assistance*, the Protocol established a kind of "presumption of aggression" in relation to the parties in the case conflict, unless there was a unanimous decision of the Council to the opposite effect. The Protocol provided for a procedure for the pacific resolution of controversies that could lead to war, but did not define any criteria that could indicate when a State was resorting to war, nor did it propose a definition of "war of aggression". The Protocol also placed the concept of international crime to that of international wrongful act, thereby interpreting the war of aggression as a crime committed by a State. This position was reiterated in the provision requiring the aggressor State to pay economic sanctions that were not meant to cause damage to neither its territorial integrity, nor its political independence (art. 15 of the Protocol, which recalls art. 10 of the Covenant).

Once it had been approved in the fifth meeting of the Assembly of the League of Nations, the Protocol was signed by 19 States but, as it was severely opposed by England, only Czechoslovakia ratified it. Notwithstanding the theoretical ambiguities and its practical failure, the Protocol may be considered as having been a crucial moment in the history of international law insofar as it put the spotlight for the first time on the concept of the "war of aggression", and not only on aggression as an unjust armed attack. However, it did not consider the war of aggression as a crime in the real sense. A few days after the approval of the Geneva Protocol, one of the greatest American legal thinkers, Quincy Wright, maintained that "under the existing international law, wars of aggression between nations are perfectly lawful" (23).

In the presence of the failure of the Shotwell project the League of Nations looked for new solutions. In the meeting of the assembly in 1927 the war of aggression was unanimously reiterated to be an international crime and the Committee of Arbitration and Security was charged with the study of strategies for a general disarmament. But, as was the case of the Protocol of 1924, without the effective collaboration of governments, the declaration was destined to remain "a pious wish" (24).

In the presence of the inability of the League of Nations to solve the problem, many States chose to enter into bilateral or multilateral agreements with which they reciprocally gave up their right to resort to war. The clearest example of this tendency is definitely the *Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy* in 1925, more commonly known as the Locarno Pact (25), which was the first of many "non-aggression pacts".

The Kellogg-Briand Pact (or Pact of Paris) in 1928 was initially created as a bilateral pact between France and the United States, but was immediately opened to the unconditional adherence of all other countries. Unlike the Geneva Protocol, 63 States - almost all States in the world, with the exception of the European micro-States and a few Asian States - ratified the Pact. In the period between the two world wars, no pact had more signatories than the Pact of Paris (26). The reasons for this "success" may be found in a substantial open-endedness of the provisions of the Pact. In article 1 the signatories declare that they condemn the use of war as a solution to international

controversies and that they renounced the use of this national political instrument in their reciprocal relationships. According to article 2, the signatories recognised that the regulation or resolution of all disputes or conflicts should only ever be undertaken by pacific means. On the surface, such provisions seem to qualify war as an illegal act. But the absolute lack of sanctions that condemn the violation of the provision made ratification seem attractive. The signatory States did not run the risk of losing that which had, up until then, their prerogative *par excellence*.

The Pact therefore left open three fundamental questions (27): Firstly, it did not give any definition of "war", nor did it make any reference to the concepts of "aggression" and "legitimate self-defence". As regards the latter of these, Kellogg himself declared that it was not foreseen in the Pact in that it is an implicit principle in international law. The signatory States therefore had the unconditional right to resort to legitimate self-defence in any case they deemed it necessary. Secondly, the Pact did not contain any procedure for the identification of cases in which a State commences an illegal war or defended itself illegally. Finally, article 2 did not contain any indication of the leans of pacific resolution of the controversies. Although the majority of jurists continued to interpret the Kellogg-Briand agreement as a multilateral treaty (28), the elements recalled above induced a number of authors to see the Pact as a declaration with political value rather than a legally binding act (29).

Notwithstanding the very serious incongruities that characterized the Kellogg-Briand Pact, the debate that it gave rise to was unprecedented in quantity and quality of contributions. It had Anglo-American doctrine at its base, particularly American doctrine. Thus, English took on the role of the 'common language' of international law, like and more than French. The Pact became a symbol, the fate of which would be consecrated at the Nuremberg Trials.

The project submitted by Nicolas Politis to the General Commission of the League of Nations within the Conference on disarmament in 1932 had an altogether different fate. Taking up a proposal advanced by the representatives of the Soviet Union (which adopted the definition in the treaties stipulated in 1933 with Afghanistan, Estonia, Latvia, Persia, Poland, Romania, Yugoslavia, Czechoslovakia and Turkey (30)), Politis formulated a definition of aggression which confronted the problem pragmatically in comparison with the previous attempts, without deferring the question *a priori* to an international body. Politis abandoned the strategy of avoiding a 'preventive' definition of aggression and surpassed the generic deferral by traditional doctrine to 'mobilization' and 'frontier violation' as constitutive elements of aggression. A State that committed one of the following actions should be considered an aggressor State: "declaration of war upon another State; invasion by its armed forces, with or without a declaration of war, of the territory of another State; attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State; naval blockade of the coasts or ports of another State; provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection". Politis' definition thus introduced a temporal criterion in order to identify the aggressor ("which *first* commits one of the following acts") and identified a stringent list of cases of aggression. In this way a State was deprived of the right to resort to war, but a number of criteria were introduced that would allow - at least in theory - the easy identification of acts that constituted an aggression, without making it necessary to refer to an *ex post* decision of an international body. Also, the project provided that no political, military, economic or other consideration could be adopted as a justification of the acts mentioned above. No reference was made even to legitimate self-defence: since the aggressor is the first State to resort to violence, legitimate self-defence was implicitly allowed (with the exclusion of preventative legitimate self defence).

Politis' definition could have diverted the danger of a return to the concept of "just cause". The question of liability for war was resolved 'juridically', without reference to political and economic factors, and was not inclined towards the criminal direction of international personal liability of the authors of war of aggression. The subjects of international law will still exclusively the States.

4. Justice at Nuremberg. An unsolved issue

When, after the Second World War, the allies decided to set up an international tribunal for the punishment of the Nazi war criminals, the question of aggression as an international crime came up once again. As is known, the Statute of the Tribunal of Nuremberg established the punishment of crimes committed by the major Nazi war criminals, classified as "crimes against peace", "war crimes" and "crimes against humanity". Aggression came into the first category: "Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" (art. 6, letter a). The Statute of the Tribunal clearly established the personal criminal liability of those on trial, but did not give a definition of aggression.

The Chief of Counsel for the United States, Robert Jackson, in his *Opening Address* (31), put forward a proposal for the introduction of a definition of aggression that repeated Politis' one to the letter, but that could be differentiated from it in two ways. Firstly the shipping block and the support of armed groups formed on the State's territory for the purpose of invading another State were removed from the list of acts of aggression. Secondly, a 'discriminatory clause' was expressly introduced: "exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression". With these amendments, the scope of Politis' definition of 1932 was deeply modified. Jackson declared: "Any resort to war - to any kind of a war - is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes" (32).

The American perspective was accepted. One of the more well-known passages of the Tribunal's decision reads: "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".

The ruling of Nuremberg signalled a turn round of perspective with respect to classical international law. The war was no longer considered to be a right of the State. Those who fought wars that were not purely defensive were criminally liable for the acts committed (an extension of the traditional concept of "war crimes"), and did not have any legal justification for their actions. These principles became the principles at the basis of the new international organization, the United Nations. But, in a way that might seem surprising, they were not included directly in the text of the Charter, but were adopted through a subsequent resolution of the General Assembly (33).

Contrary to what the *Covenant* of the League of Nations had done, the United Nations Charter expressly bans the use of force by the States. In article 1 the Charter addresses the objectives of the UN, amongst these the "suppression of acts of aggression or other breaches of the peace". The term "aggression" is only mentioned twice however (art.s 39 and 53), and in neither of these cases is the term defined. The term "war" appears only once, in the preamble, where it is declared to be an affliction that humanity must rid itself of forever.

Paradoxically, the charter of the international institution that was created in order to maintain universal and stable peace through use of force against aggressors (by means of the instruments listed in Chapter VII, which has mostly not been applied), does not define the concept of aggression and does not provide for any explicit sanction for the violators of the ban on the use of force. In this way, as has already been said in reference to the League of Nations, the decision on the subsistence

of a case of aggression is in fact deferred to a collective body. But the difference between the Council of the League of Nations, which was rendered inoperative by the rule of unanimity, the Security Council of the UN has a great number of powers vested in it as established in art. 39. Due to the decisional mechanisms contained in the Charter (*cross veto policy*), the five powers that were victorious in the Second World War became the absolute arbitrators of the decision of what constituted aggression and who could be classified as an aggressor, and therefore of when force is used legitimately or not. For the same reasons, it is obvious that none of the five States may be considered to be the aggressor.

In this way, the objective of ensuring peace has automatically become unattainable. As history following the Second World War shows, the Security Council has been blocked by the veto, thus giving way to the war-like initiatives of the super powers, or has carried out a legitimating function, in the sense that the aggressions perpetrated by the permanent members has been fully justified.

This set up, that seems inevitably to forecast the failure of the policy to ensure a stable and universal peace, has given rise to numerous amendment proposals. Already in 1950, the General Assembly (resolution 378/B (V) of the 17th of November 1950) assigned the task of examining the problem of the definition of aggression to the International Law Commission. After extenuating debates and bitter disputes, the Commission adopted the point of view of its Special Rapporteur, Jean Spiropoulos, who, taking from the already mentioned views of the Permanent Advisory Commission and of the Special Committee of the Temporary Mixed Commission, declared that "the notion of aggression is a notion *per se*, a primary notion, which, by its very essence, is not susceptible of definition" (34). In particular, defining aggression through a categorization of acts of aggression is considered to be "undesirable", in that no list could be exhaustive. The resolution number 599 (VI) of the 31st of January 1952 ("[it is] possible and desirable to define aggression by reference to the elements which constitutes it"), which would however, receive no comment.

Subsequently, with resolutions 688 (VII) 1952 and 859 (IX) 1954, the General Assembly established two special committees charged with defining aggression, but no accepted proposal emerged from either of these. The same fate was shared by an analogous committee created by the Assembly with resolution no. 1181 (XII) 1957. However, the Special Committee established with resolution no. 2230 (XXII) of the 18th of November 1967 was able to bring its task to term, and on the 14th of December 1974, the General Assembly approved resolution no. 3314 (XXIX).

Resolution 3314 distinguishes itself from the previous attempts through some of the results obtained. Apart from giving a general definition of aggression in article 1 ("Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition"), the resolution indicates a number of cases that must be considered acts of aggression (art. 3). The importance of the resolution must however be reconsidered in light of the following considerations: at article 2 the resolution establishes that, *prima facie*, the aggressor must be considered to be he who uses armed force the first time, but also states that the Security Council has the power to correct this presumption on the basis of the evaluation of other relevant circumstances; finally, at article 4 the resolution states that the list of the cases of aggression contained in article 3 is not exhaustive and that the Security Council may determine which other acts may constitute aggression. Notwithstanding the good intentions, therefore, even resolution 3314 leaves the prerogatives of the Security Council substantially intact. Also, the resolution does not deal with the problem of personal criminal liability in international law, reasoning in terms of the international responsibility of the State.

New material was brought to the discussion by the work that led to the institution of the International Criminal Court. Unlike the Tribunals of Nuremberg and of Tokyo and the *ad hoc* international Tribunals for ex-Yugoslavia and Ruanda, the ICC was not created upon initiative of the world super powers and was not established *ex post*. These positive elements were not however translated into a project of real emancipation from the *cross veto policy* of the Security Council.

The *Rome Statute* of the 17th of July 1998 lists amongst the crimes that are of the competence of the Court the crime of aggression, but the second paragraph of article 5 establishes that the Court "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". This agreed definition has not yet been arrived at yet, and it is improbable that it ever shall be. Moreover, the Statute provides for the possibility of the Security Council of the United Nations to suspend the initiatives of the Court's prosecution service at its own discretion, thus reducing the real autonomy of the ICC.

Conclusions

That aggression is an international crime is something which has been repeated for the whole century. However, international law was not able to identify a clear and agreed definition of the concept. The legal dimension and the political implications of the concept of aggression are so solidly linked that it has been impossible to attain such an objective. However, legal science cannot abandon the search of new solutions of the problem, unless it is to abdicate its own role and leave it to the upholders of the theory that international law does, in fact, not exist.

In a realist vision, international law cannot be defined simply as 'the law of the international community', with reference made exclusively to the subjects whose actions it is aimed at regulating. It is first and foremost a legal system that has as its primary, although not exclusive, function, the control of the use of violence on a large scale. From this prospective, the proof of the existence of international law is its capacity to produce functional normative design in order to limit the more destructive elements of violent warfare.

In order to allow the international legal system to carry out an effective containment of the use of force, it is however necessary that no subject of the system consider itself to be *legibus solutus*. But the current structure of the highest international institution, the UN, seems to be unable to prevent a similar *extra ordinem* occurrence, and in fact seems to function in a way that conforms to the hegemonic expectations of some international players.

The pathway to a reform of the United Nations seems to be blocked, due to the fact that the only subjects that could give life to an effective reform of the organization are also the most loyal protectors of the *status quo*. And also the experience of an institution like the ICC, that seemed to be destined to mark a new era of international law, is showing itself to be a failure.

It is not possible to find a theoretical solution to escape from the *empasse* that has been created by the world order planned at Dumbarton Oaks in 1944. However, it is possible to imagine new scenarios, before which international law could and would give final answers.

Classical international law, forgotten too soon after the First World War, had managed to elaborate a system of limitation of war which, although extremely problematic, had obtained some excellent results that cannot be ignored. The ban on resorting to certain types of arms, the obligation to respect a number of fundamental rights of prisoners, the ban on turning armed conflict towards the civilian population, are only a few principles established by classical international law. The First World War eliminated the all-too-fragile enthusiasm of the Hague Conference of 1899 and 1907, and led jurists to concentrate their attention on the problem of prevention of war rather than on that of the implementation of the law of war. The horrors of the new technological war, of shrapnel and mustard gas, of tanks and air combat, seemed so intolerable as to indicate that there was no other way of escape other than banning war altogether, resulting in the criminalization of war of aggression.

Some, such as Joseph Kunz (35), did not overlook the fact that 'forgetting' the so-called *jus in bello* would lead to dire consequences. Heading in the same direction, Carl Schmitt diagnosed that all attempts to abolish war, legally banning it, "would result in giving life to new types of war, possibly worse types, such as civil war or other types of war of annihilation" (36).

The system of the United Nations banned war only in the context of legal lexicon. The clear distinction between war and peace, characteristic of classical international law, was thus lost. Terms like "cold war", "humanitarian war", "war on terrorism", "humanitarian intervention", "peace-keeping operation" are the sign of a deep mutation in the concept of war. These denote large-scale military interventions that involve the killing of persons, yet they are not "wars". The failure of the international institutions in reaching the objective of ensuring a stable and universal peace has had the perverse effect of globally legitimating the use of force in the name of humanity, of freedom and democracy. Thus the notion of just war re-emerged with a moralistic and 'para-theological' connotation, in which the contenders are not on the same level. In modern discriminatory war enemies are absolute enemies, are considered to be reciprocally barbaric or disloyal, and they are assigned no rights.

Due to the removal of the concept of war, it became possible to interpret acts of warfare as acts of justice or of international policing. The universal prospective of post-classical international law allows us to consider the enemy as a criminal, an enemy of humanity against which the use of any means is justifiable. As Carl Schmitt maintained, in this war that becomes merely a punitive act in character, "the enemy becomes simply a criminal and the subsequent step - that is to say depriving the adversary of his rights and his depredation, as in the destruction of the formal concept of the enemy which based itself on the idea of *justus hostis* - is practically accomplished by itself" (37).

The only figure that in classical international law was considered to be *hostis generis humani* was that of the pirate. In the undefined space that was the open sea, the pirate carried out his own predatory intentions indifferently like any State. For this reason it was thought that all States should combat pirating. Action taken against pirates was not a "war", but a punitive act of justice or a measure put in place by the international maritime police. The latter was "apolitical" in that it did not consider the pirate as a *justus hostis*, but as an absolute enemy. Instead in "universal international law" each *hostis* is an 'enemy of humanity'. In the name of universal peace and faith in humanity, the limitation of war is sacrificed. The enemy is an inhuman monster that must not simply be defeated, but must be destroyed. Each war that is fought in the name of humanity is a war in which one contender tries to appropriate for himself a universal concept in order to be able to identify himself with it, at the expense of the enemy, with the awful pretence that the enemy must lose his qualification of man, that he must be declared *hors-la-loi* and *hors l'humanité* and therefore the war must be brought to the pinnacle of inhumanity (38). But "humanity as such cannot carry out any war, since it has no enemies, at least not on this planet" (39). Even the worst enemy does not cease to be a man due to the fact that he is the worst enemy.

The objective of international law should be today that of unshackling itself from the moral, political and theological problem of elimination of war, and recover the legal dimension of the problem of war, that is to say the problem of its limitation. It is urgent to take up the discussion that was cut short, that of the procedural guarantees with which international law had attempted to reduce the more devastating consequences of armed conflict. In this direction, the problem of aggression remains central. Such a question must be examined in light of the net distinction between "war of aggression" and "aggression". Rather than "defining evil", international law should aim to define acts of aggression, picking up where Nikolas Politis left off, trying at the same time to break free from the management and control of the Security Council. In this way, what could be called the international law of armed conflicts or humanitarian international law could be re-launched necessarily based on a concept of non discriminatory war, and avoid the difficult concept of *justa causa*, or of just war in substance and of the responsibilities of war. The question of aggression as armed attack is more easily solvable than that of the justness of war, being an attack a substantial case which differs from the abstract problem of culpability (40). As much as it may seem questionable on a moral level, the definition of "legal war" would serve peace much better than the legal abolition of war. A *bellum legale* that attempts to define the illegality of resorting to war on the basis of the violation of a formal requirement is preferable to a *bellum justum* which has the same objective whilst resorting to the concept of intrinsic injustice in aggression (41).

From a realist point of view, the indispensable condition in order for this itinerary to be followed is the overcoming of the current world order by the new multi-polar model. International law may be able to do little to aid such a process. But it can contribute to the creation of that which Hedley Bull defined a "minimal political order", in which the States give up part of their sovereignty in favour of a 'polycentric regionalization' of international law, which is less violent and more 'humane' than the current universal unipolarism.

Notes

1. A. Cassese, *Lineamenti di diritto internazionale penal*e, I. *Diritto sostanziale*, il Mulino, Bologna, 2005, p. 145 and following.

2. On the subject please refer to F. Buzzi, *Il tema de iure belli nella Seconda Scolastica*, "Scuola Cattolica", 133 (2005), pp. 77-132.

3. On this point please see P. Bellini, *Il gladio bellico. Il tema della guerra nella riflessione canonistica della età classica*, Giappichelli, Torino, 1989.

4. Henricus de Segusio cardinalis Hostiensis, *Summa aurea*, tit. *De tregua et pace*, par.3 *Quid sit justum bellum*, Damiano Zenaro, Venezia, 1574, p. 356.

5. Here I adopt the breakdown of the epochs of international law as proposed by W.G. Grewe, in *Epochen der Völkerrechtsgeschichte*, Nomos, Baden-Baden, 1984; eng. tr. *The Epochs of International Law*, de Gruyter, Berlin-New York, 2000. Grewe States that it is correct to speak of an "antique international law" and a "medieval international law", but concentrates on modern international law which he subdivides into classical international law and post-classical international law. Within the category of classical international law - which corresponds to the epoch of *jus publicum europaeum* - Grewe further distinguishes between *jus inter gentes* (1494/1648), *droit public de l'Europe* (1648/1815) and *International Law* (1815/1919). After 1919, according to the proposed scheme, post-classical modern international law began.

6. "Une pure question de conscience personnelle", writes Antoine Pillet in *Les conventions de La Haye du 29 juillet 1899 et du 18 octobre 1907. Etude juridique et critique*, Pedone, Paris, 1918, p. 1.

7. Commonly, today we distinguish between *jus ad bellum* - the law (in a subjective sense) that legitimates a subject to conduct a war - and *jus in bello* - the law (in an objective sense) that regulates the use of force in warfare. These two terms may be useful for didactic purposes but one must highlight the fact that these are entirely unrelated to the tradition of classical international law. Unlike what is usually supposed, the concepts of *jus in bello* and *jus ad bellum* (which are not a pair of terms that are affirmed as being conceptually at the centre of roman law) are not connected to medieval theology and philosophy. These terms only became a part of international legal jargon in the nineteen hundreds.

8. Notwithstanding the fact that the little data we have effectively seems to confirm this reconstruction, it must be remembered that such a limitation of war was applicable only to wars between European States fought on a sole European territory, thereby excluding colonial and maritime wars (Cf., D. Singer, M. Small, *The Wages of War. A statistical handbook*, Wiley, New York, 1972).

9. On this point please see C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Duncker & Humblot, Berlin, 1950, pp. 232-255.

10. G.L. Mosse, *Fallen Soldiers: Reshaping the Memory of the World Wars*, Oxford University Press, New York, 1990.

11. Humoured in satirical publications in France and England, object of ridicule in popular songs (like the famous song *We're Going to Hang the Kaiser Under the Linden Tree*, Kendis & Brockman Music Co., New York 1917), renamed "The Berlin Butcher" and "Guillaume le Ravageur", Wilhelm II of Hohenzollern was quickly identified as the main person responsible for the conflict. The

English and the Americans - obviously not the French - likened the Kaiser to Napoleon. But if in 1815 Napoleon had been defined as "an enemy of the tranquility of the world", one century later the Kaiser was something more: a criminal, an enemy of the whole of mankind. Thus, the cry "William to Saint Helena!" soon changed into the more macabre "Hang the Kaiser!".

12. The Conference of Paris was officially opened on the 18th of January 1919 and ended on the 21st of January 1920.

13. Cf., *Violation of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919*, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Clarendon Press, Oxford, 1919 (here I quote from the reprint in the "American Journal of International Law", 14, 1 (Jan.-Apr., 1920), pp. 95-154. Composed of 15 members (some of which were or were to become judges of the Permanent Court of International Justice - Adatci and Rolin-Jaequemins - or members of the Institut de Droit International - Rolin-Jaequemins, Scott, de Lapradelle), representing ten States (in their capacity of " great Powers", United States, the British Empire, France, Italy and Japan had two members each; the States with "special interests", Belgium, Greece, Poland, Romania and Serbia had one each), the Commission was conferred the task of deciding the following points: The liability of the authors of war; the violations of the laws and customs of war committed by the German forces during the conflict; the degree of responsibility of a number of persons in the enemy forces, including those with high ranks in the army and those who were "highly placed"; the establishment and the process of a special court for such violations.

14. *Violation of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*, cit., p. 118, infra.

15. More precisely, Germany and Austria were accused of violating the Treaty of London of the 19th of April 1839, in which Belgium was recognised as a "perpetually neutral State", and in the Treaty of London of the 11th of May 1867, with which Prussia and the Austro-Hungarian Empire had undertaken to guarantee the neutrality of Luxembourg.

16. Art. 231: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies".

17. "Es handelt sich um finanzielle und wirtschaftliche Forderungen der Sieger, die nicht Kriegesentschädigungen im alten Stil, sondern Schadenersatzansprüche sind, d. h. rechtliche Forderungen, die aus einer rechtlichen Verantwortung des Besiegten abgeleitet werden" (C. Schmitt, *Der Nomos der Erde*, cit., p. 241).

18. In this sense, it seems significant that the German government contested the injustice of the reparations demanded, with the exception of the provisions at article 232 regarding the damage inflicted on Belgium. Germany thus admitted its own international responsibility, but in a limited fashion when it came to the violation of the Treaty of London 1839, with which it had undertaken to respect and defend the neutrality of Belgium.

19. See, for example, L. Le Fur, *Guerre juste et juste paix*, "Revue générale de droit international public", 24 (1919), pp. 9-75, 268-309, 349-405.

20. Cf. the text of the opinion quoted in J. Spiropoulos, *The Possibility and Desirability of a Definition of Aggression*, in the "Yearbook of the International Law Commission", 1951, vol. II, p. 63.

21. The text is contained in the *Protocol for the Pacific Settlement of International Disputes*, "American Journal of International Law", Vol. 19, No. 1, Supplement: Official Documents. (Jan., 1925), pp. 9-17.

22. On the subject, cf. J.W. Garner, *The Geneva Protocol for the Pacific Settlement of International Disputes*, "American Journal of International Law", Vol. 19, No. 1. (Jan., 1925), pp. 123-132; J.F. Williams, *The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes*, "Journal of the British Institute of International Affairs", Vol. 3, No. 6. (Nov., 1924), pp. 288-304.

23. Quincy Wright, *Changes in the Conception of War*, "American Journal of International Law", Vol. 18, No.4 (Oct., 1924), p.755.

24. J. W. Garner, *Arbitration and Outlawry of War at the Eighth Assembly of the League of Nations*, "American Journal of International Law", Vol. 22, No. 1. (Jan., 1928), p. 134.

25. Article 2 of the Pact referred to a problem that was destined to become of central importance, that of legitimate self-defence, which I may not discuss here. The parties to the agreement agreed not to attack each other, to not invade each other and not to engage in wars with each other. Such a norm was subject, however, to three exceptions: in the case of legitimate self defence; in the case of action taken under art. 16 of the Covenant; in the case of action being taken under a decision of the Assembly or the Council of the League of Nations. On the subject see W.R. Bisschop, *The Locarno Pact*. *October 15-December 1, 1925*, "Transactions of the Grotius Society", Vol. 11, (1925), pp. 79-115.

26. The only exception was probably the Universal Postal Union, which could however count on the adhesion of colonies as separate members from their mother States.

27. On this point see B. Roscher, *The "Renunciation of War as an Instrument of National Policy"*, "Journal of the History of International Law", 4, 2 (2002), pp. 293-309.

28. See, for example, M. Gonsiorowski, *The Legal Meaning of the Pact for the Renunciation of War*, "American Political Science Review", Vol. 30, No. 4. (Aug., 1936), pp. 653-680.

29. Amongst these, albeit for opposing reasons, we find Carl Schmitt and Hans Kelsen. Schmitt saw the removal of the right of each State to engage in war as an attack on the limitation of war introduced by the *jus publicum europaeum*, with the consequent risk that a new concept of discriminatory war would be devised. Kelsen, on the other hand, advocated the inexistence of such a law and the existence of a ban on the State to resort to war, but went so far as to denounce the illegitimacy of the Pact insofar as it did not provide for any sanction in the case of violation of such a ban (except for mention in the preamble of the possible loss of the benefits originating from the Pact itself).

30. The text of the treaties, which include Politis' definition at art. 2, is quoted in *Convention Defining Aggression*, "American Journal of International Law", Vol. 27, No. 4, Supplement: Official Documents. (Oct., 1933), pp. 192-195.

31. The text may be found in *Nazy Conspiracy and Aggression*, Office of the United States Chief Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington 1946, Vol. I, Ch. VII, pp. 115-174.

32. Ivi, p. 164.

33. Resolution of the General Assembly 95(I) of the 11th of December 1946, Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.

34. J. Spiropoulos, *The Possibility and Desirability of a Definition of Aggression*, op. cit., p. 69.

35. J. Kunz, *Plus de lois de la guerre?*, "Revue générale de droit international public", vol. 41, 1934, p. 22 and following.

36. Cf. C. Schmitt, *Der Nomos der Erde*, op. cit., p. 219 ("[...] eine Abschaffung des Krieges ohne echte Hegung nur neue, wahrscheinlich schlimmere Arten des Krieges, Rückfälle in den Bürgerkrieg und andere Arten des Vernichtungskrieges zur Folge hat").

37. C. Schmitt, *Der Nomos der Erde*, op. cit., p. 93 ("[...] der Feind wird einfach Verbrecher, und das Weitere, nämlich die Entrechtung und die Plünderung des Gegners, d. h. die Zerstörung des formal immer noch einen *justus hostis* voraussetzenden Feindbegriffes, ergibt sich dann praktisch von selbst").

38. *Ibid*.

39. C. Schmitt, *Der Begriff des Politischen*, Archiv für Sozialwissenschaft und Sozialpolitik, LVIII (1927), 1.

40. On this point see, cf. C. Schmitt, *Der Nomos der Erde*, pp. 248-255.

41. Here I have borrowed some observations of J.L. Kunz, *Bellum Justum and Bellum Legale*, "American Journal of International Law", Vol. 45, No. 3. (Jul., 1951), pp. 528-534.