

The UN and the Legalization of War

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It is now generally accepted that the legal right of a state to take military action against state and non-state organized enemies is determined by the precepts of the United Nations Charter, and specifically by Chapter Seven (articles 39 – 51). This chapter allows military action in case of defence or upon approval by the UN Security Council.

Since the founding of the UN in 1945, only three military operations have taken place in accordance with the provisions of Chapter Seven: The Korean War in 1950, the first Gulf War (1990-91) and the intervention in Libya in 2011. The remaining interventions by forces under the UN flag have been peacekeeping in nature, that is, the creation and supervision of neutral zones separating belligerents.

However, the second half of the 20th century and the first quarter of the 21st were characterized by many military operations, the most recent being Russia's attack on Ukraine and the US and Israel's attack on Iran, where the aggressors either did not seek approval or bypassed the Security Council, which makes them formal violators of the requirements of the UN Charter, since the belligerent parties were and are members of this organization and have accepted the Charter as a binding text of so-called International Law.

Does this mean that all wars without Security Council authorization, which are formally violations of International Law, are also unjust and therefore morally criminal? Does the seventh chapter of the UN Charter define a concept of “just war” and “right to war” (*ius ad bellum*), which goes beyond the traditional idea of this right as formulated between the 13th and 16th centuries by thinkers such as Thomas Aquinas (1225-1274), Francisco Vittoria (1483-1546) and Hugo Grotius (1583-1645)?

According to these three classics the right to war is founded on the following main premises:

- a. existence of a legitimate authority (*auctoritas principis*): a war cannot be declared by individual persons or groups of persons – even if organized in some way –, but only by the legitimate ruler, that is, the person or authority charged with the duty of protecting the inhabitants of a state. Conflicts between “private individuals” – persons, groups, gangs, crews of ships under the flag of a state (important for the time when these principles were formulated) – are not considered wars, but armed violations of the law. Clashes in a state of lawlessness, e.g. in uninhabited areas of the planet or between pirates, are also not considered wars.

- b. just cause (*causa iusta*): the reason that urges a legitimate authority to war must be just, at least according to the so-called natural law. Just causes include defence, the recovery of property that has been forcibly taken, or the punishment of a state or people who have committed crimes.
- c. right intention (*intentio recta*): the purpose of the war must be to restore justice, achieve good, and avoid evil. In other words, the motive must not include hatred, a thirst for revenge, or the desire to exterminate the opposing people.
- d. proportionality of means: the harm that the legitimate aggressor's acts of war will cause must not be greater than the harm they seek to eliminate.
- e. reasonable probability of success: waging a war without a reasonable probability of success is a criminal act.
- f. non-targeting of civilians: targeting civilians must not be the intention of the belligerents.
- g. last resort: resorting to acts of war is permitted only when all attempts at peaceful resolution of the conflict have failed.

In contrast to the requirements of Chapter Seven, the classical theory of “just war” does not require the approval of a supreme authority but places the decision to declare war in the judgment and conscience of the legitimate ruler in question. Furthermore, a formal act of declaring war is not required, as this is purely ceremonial and is covered by the requirement of trying to achieve a peaceful resolution.

We can say that in comparison with Chapter Seven, the classical theory formulates “material” or “substantial” conditions, while the modern concept makes the right to war dependent on the purely “formal” conditions of confronting an attack regardless of the motives of the aggressor and of approval by a conventionally recognized supreme body. Apparently, Chapter Seven tacitly admits some assumptions of the classical theory, as it accepts the provisions of the Hague Convention (1899/1907) and Geneva Convention (1925) which established specific rules for the conduct of military operations and defined the acts considered war crimes, as part of already existing International Law.

One could object that the classical theory is also based on a purely formal premise – the arbitrary decision of the legitimate ruler, who can hold power for purely formal reasons. But this argument overlooks the fact that for the political philosophers and jurists of the Middle Ages and the Renaissance, the legitimate ruler is in a relationship of trust and care towards his subjects and not in a merely procedural relationship (Machiavelli perhaps formulates this view, but he too requires the ruler to at least pretend to care for the subjects he governs).

For Aquinas, Vittoria, Grotius and their contemporaries, the question of whether the reason for waging a war is truly just concerned the self-constitution of the ruler

and his obligation to realize the common good. Something similar today is the principle of the state's monopoly of violence. It is not only a formal feature but is based on the constitutionally founded obligation of state authorities to impose peace on the territory as part of the realization of the common good and the protection of human dignity.

The Security Council in its current form does not correspond to the institution of the legitimate ruler of the classical theory because its members, not only the permanent ones who have the right of veto but also the non-permanent ones, can *ex officio* use their position to promote their own agenda and support their "favoured" side in a dispute (or to harm the side that they consider to be most opposed to their agenda). Furthermore, the legitimacy of the Security Council is irreparably damaged by the fact that a permanent member can exercise military force unhindered as it is able to prevent a condemnatory decision against it. In other words, the Security Council has two "structural errors": That each of its members can be a judge in his own case, which contradicts the principle "*nemo iudex in causa sua*" (no one can be a judge in his own case), and that the veto power of the permanent members institutionalizes a conflict of interest.

The current structure of the Security Council is therefore not only politically imperfect, but also structurally without moral legitimacy as a judge of just war – not because it is only formal, but because it does not even meet the material conditions that would justify its formal legitimacy as an authority. It claims the rights of the princeps without accepting its obligations.

This explains why judging such acts of war as Russia's attack on Ukraine and the US and Israel's attack on Iran seem so dead-end: The international community senses that there is a moral criterion that condemns the former and legitimizes the latter, but it cannot articulate it within the existing institutional framework, because this framework has tacitly abandoned the substantial basis that would give it the necessary and required authority.