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War and Law (A Lecture for ELPIS)

1.- In the Western cultural tradition war has been seen both in a civil-secular perspective and in a sacral-religious one.

From the first perspective, war is essentially conceived as a technical fact. It is not the heroes, the natural gifts, the number of soldiers or their physical prowess that win, but the technique, the artifice. The greatest writer of war art in antiquity, Publius Flavius Vegetius Renatus, commonly known simply as Vegetius, had it clear: the Romans had defeated the gigantic Ghermani, the brave Hispanics, the rich and treacherous Carthaginians, the refined and educated Greeks only through technique, knowledge of the art of war and training. Against *ars* (that is: art) and *exercitium* (that is: training) the *virtus indocta* (that is: the value and courage of the ignorant) can nothing.

From the second perspective, war is an event of which God is the protagonist. In the Old Testament war was an event that interested the human beings, but God determined its outcome, assuring victory to the chosen people when they were respectful of divine commandments or condemning them to defeat when they sinned. In the New Testament, war (although it is marginally mentioned as a matter of men's interest) becomes essentially the final clash between Good (that is: God) and Evil (that is: Satan), which they also fight – of course – through human beings, but that has nothing to do with their ambitions of domination and conquest, because the stakes are not territories or riches, but eternal salvation.

This second perspective is the one that has ended up dominating the philosophical and political discussion, feeding the doctrines of just war and unjust war, which I intend to talk about in my conversation.

2.- Although it has been developed mainly in the perspective that I called sacral-religious of Jewish-Christian thought, the doctrine of just war seems to have had a form of anticipation in Latin legal-political thought, particularly with Cicero. In two passages of the *De re publica* that we know only thanks to Isidore of Seville, Cicero states that "wars are unjust if they are called without cause. In fact, no war can be considered just except that which is waged for revenge or to drive out enemies". In another passage of the same work, however, Cicero himself recalls that already one of the first kings of Rome, Tullus Ostilius, had established, according to the principles of the rite of the Fetiales (who, as is well known, were a sort of priests with very important tasks in the matter of relations with other people and especially war), that "any war which had not been announced and declared should be considered unjust and impious".

Bellum iustum, the just war, is therefore essentially the formally correct war, that is the war which is declared according to the rules. Originally, indeed, the declaration of war was made with a statement that we can define performative in the sense of John Austin. The Fetiales, in fact, used the formula "*bellum indico facioque*" (that is "I declare and make the war"), which makes it clear how the very act of declaring the war was itself an act of war.

As a matter of fact, then, in Cicero, the war, to be just, must have its own reason, but this reason is not moral, but legal. To be just, in fact, war must satisfy some substantive and formal conditions that

are eminently legal: on the substantive level, it must be motivated by the need to take revenge, to claim stolen goods or to repel enemies; on the formal level, it must be announced and declared. It is obvious that the formal requirements are eminently legal, but so are the substantive ones, because a war is "just" when it serves to make up for an injustice (the same revenge is only a form of reaction to an anti-legal act), arising from the violation of rights or legally recognized prerogatives. It is therefore the law, not the moral, that counts in the Latin legal-political tradition.

Things change with the advent of Christianity.

Saint Augustine knew well that the Gospel rejects violence and imposes to hold the other cheek to those who have offended us, but he also knew that if this evangelical message was taken to its extreme consequences the Christians would have appeared as destroyers of the political community: How can we imagine following such a precept at a moment when the Roman empire was attacked by barbarians and ran the risk of being destroyed? For this reason, Augustine – developing a refined reasoning that we cannot retrace here – ends up admitting violence, yes, but affirming with determination that war cannot be fought "*sine benevolentia*" (that is, "without benevolence"). In any case, war is admitted when it is called because God wants it: "*divinae voluntatis causa*" (that is, "because of the will of God"), writes Augustine. In this way, however, there was a twofold departure: from the Latin tradition that we have seen established by Cicero; from the message of peace of Christ, which in its radicality did not admit at all any hypothesis of this type. It was connected, in that way, to the idea of the Old Testament war, not to the message of the New Testament, which knew only the war of the highest Good against the highest Evil, not the war of men among themselves.

The discussion among Christian authors on the just war remains for centuries always very intense. Of extraordinary importance, as always, is the thought of Saint Thomas Aquinas, in which strongly returns the classical approach, according to which – as we have seen –the just war coincides with the legally correct war, in the sense of a war declared according to the rules. Thomas takes up in several points the position of Cicero, although he departs from it by adding, as a condition of the just war, the "*intentio bellantium recta*" (that is, the "right intention of the fighters"), which ends up mixing a moral element with criteria that are – instead – essentially legal.

Thus, even in Thomas, the question of just war was not entirely replaced by that of legitimate war, and it continued to be investigated by philosophers and lawyers. Moreover, there was also a practical interest in solving it, because it was to understand whether the war against the Turks, the main enemies of Christianity, was really justified as – precisely – "right". In this case, too, moral arguments ended up prevailing over the legal ones.

This was a serious problem, because a unanimous consensus on moral precepts is always difficult to reach, so that the doctrine of just war proved to be a source of uncertainties and continuous conflicts (the very question of justification for the war against the Turks was only defined by the intervention of Pope Leo X in the Bull *Exsurge Domine* of June, 15th, 1520).

Controversial, then, was not only the question of "whether" it was justified to make a war, but also that of "how" to make a war considered as justly declared. It was mainly the Spanish school of Salamanca that developed the most refined reflections, with the fundamental contributions of Francisco de Vitoria and Francisco Suárez. Here too, the attempt was to move the question of just war away from morality and theology in order to bring it closer to law.

The real progress was possible, however, only thanks to John of Legnano – Giovanni da Legnano (who had already indicated this way in the fourteenth century) and especially (in the sixteenth century)

thanks to Alberico Gentili, who is the true founder of the new secularized international law. It is Gentili (much more than Grotius, still bound to the moral doctrine of just war) that strips the doctrine of war from all its moral or theological connotations and allows the law, in this way, to take over the regulation of war, giving a shape to something that appears to be completely shapeless.

We can't forget, obviously, that already Cicero, in the *Pro Milone* oration, had said that "*silent leges inter arma*" (that is, "laws are silent between weapons"), but in the same Roman legal thought we find the principle "*lex semper loquitur*" (that is, "the law always speaks"), so that we can say that the noise of weapons makes it difficult to hear the voice of law, but it cannot silence it completely.

Shifting the focus from morality or theology to law means moving from a doctrine of just war to a doctrine of *legitimate* or, still better, *legal* war, that is of a war corresponding to specific legal norms. Saying "just war" or "legitimate war" or even more "legal war" is not the same thing. In the same legal language "just", "legitimate" and "legal" mean very different things (that is, correspondence to an ideal model; existence of a foundation for the power exercised; respect for the law) and only on the concept of legal war, in the sense of a war permitted by specific legal norms, whatever moral appreciation each one wishes to give, it is possible to understand each other.

3.- This is why the recent revival of the idea of morally just war, which has been promoted by a part of the Anglo-Saxon doctrine, gives rise to great concern. The most well-known author is undoubtedly Michael Walzer, but we must not forget scholars such as Brian Orend or – confirming the influence exerted outside the English-speaking world – Alessandro Ferrara.

Walzer acknowledges that he owes a debt to the religious doctrine of just war (quote: "It is a good theory; we remain indebted to the Catholic theologians who invented it centuries ago") and openly criticizes the lawyers (quote: "The lawyers have constructed a paper world"). In doing so, he tries to reintroduce into the modern world concepts and philosophical principles clearly pre-modern, with the consequence that the concepts and definitions to be used to establish a minimum of norms by which to regulate war remain completely uncertain.

The thesis is very dangerous and excessively justifies the recourse to war: Walzer, in fact, reevaluates both the doctrine of preventive defence, legitimizing it not only in the case of "imminent attack", but also in that of "sufficient threat", and the doctrine of the just intervention of individual states or of groups of states in the internal affairs of other states in order to safeguard human rights, at least "when the violation of human rights [...] is [...] terrible". "Sufficent" threat; "terrible" violation: as you can see, these are completely vague and undetermined concepts, which do not allow to have clear ideas about what is permitted and what is not. A not surprising outcome, precisely because the doctrine of just war is heavily conditioned by assumptions of moral nature, as always subject to discussion and dissent.

Such an opinion legitimates interventions to protect human rights with measures that sacrifice the human right *par excellence* (that is, life) in the name of moral precepts that are totally subjective. And it makes even more difficult to discuss about the problems which international law is called upon to solve. Moreover, Walzer and the others who support this position poorly consider international law, assuming a clearly anti-legalistic perspective.

The risks produced by the doctrines that resurrect pre-modern categories makes actual again the need that Alberico Gentili seemed to have satisfied once and for all at the end of the sixteenth century: replace the theological-moral pretensions with the legal neutralization of the conflicts. In a world that

after the end of the World War II has tried to eradicate the *ius ad bellum* (that is, the right to wage war), the doctrine of just war (particularly that of the "humanitarian" war) produces exactly the opposite effect: "Where injustice is everywhere, the reason to use force to oppose it are not hard to find," wrote Nicholas Rengger. And he was perfectly right. Theorizing the just war simply means opening the door to a more permissive use of force, far beyond what the UN Charter allows. And it means not understanding that every conflict, even the seemingly most irrelevant, can lead to nuclear war, which certainly can never be qualified "just", since it leads to the destruction of humanity. Admit a conflict because it's "just" is therefore always wrong.

4.- Contrary to what the theory of just war holds, it is more in the United Nations Charter and more generally in international law that the solution of the serious problems posed by war must be found.

The rules of the Charter are unambiguous. Art. 2 of the Statute, as everybody knows, states that "*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*" (par. 3) and that "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*" (par. 4); Articles from 41 to 50 regulate the use of force by the United Nations; Art. 51, first period, establishes that "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*".

It is evident that in this way the states are almost entirely dispossessed of the *ius ad bellum*, which is transferred to the United Nations, while only the legitimacy of self-defence is confirmed. However, two problems remain unresolved. First: that there are no means to apply these rules when a conflict is triggered by one of the great powers. Second: that the right understanding of the formal concept of "war" is sometimes contested, so that the boundaries between international police operations and real military operations are not always clear. The fact that some wars were not so qualified just because they were "humanitarian" or the fact that in his speech of February, 24th, 2022, the Russian President gave the name of "special military operation" to the conflict in Ukraine are very significant.

We could therefore speak of a limited efficacy of the international law. Nevertheless, law still has a role of enormous importance, because at least in many cases it prevents risks and conflicts, and can promote the right balance between the different interests. Legal scholars should engage themselves in maintaining the more classical conception of war and not giving in to the temptation to admit military interventions in other countries just because they are "humanitarian" or "democratic" or because they are formally called "special military operations". War is war whatever its purpose. And if it is not only defensive, it is forbidden by international law. Nothing less and nothing more.

Thank you very much for your kind attention.