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The Concepts of «War» and «Peace» in the Context of Transnational Terrorism

ABSTRACT

“The war is not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers”.

The year is 1762. It took more than 100 years since the establishment of state sovereignty as a principle of international law until one of the central consequences for the classical international public law has been forethought in philosophy: in his *Contrat Social*, Jean-Jacques Rousseau lays—more or less en passant—the foundation for humanizing war. This is part of Rousseau’s reply to Grotius’ thesis that a won war justifies a right to slavery because the victorious ruler can contract with the citizens of the defeated state to spare their lives in exchange for their freedom. War, Rousseau objects, is “not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers”. Thus, war is no longer considered as a condition in
which individuals fight with other individuals or states, but—after the
development of states in modern Europe—it is understood as a violent conflict
between states. Thereby, the concepts of war and peace as they stand until the
end of the 20th century are established, as far as—following Grotius—peace is
considered the contradictory antonym of war. It is only in the light of this
change that claims for humanity in war, especially towards non-combatants,
become understandable; and only in this light it became justifiable to strictly
distinguish between criminal and martial law and thus to reject the idea which
can be found for instance in Hobbes and Locke that a criminal enters into the
state of war with the political community.
The conceptual rejection of the possibility of a private war, however, had not
been common or considered to be necessary until the development of state
sovereignty and classical international public law and its intellectual
reconstruction. Therefore, the question arises, whether and how this conceptual
analysis by Rousseau can still be applied in times of an increasing erosion of the
relevance of statehood and especially in the light of an intentionally
transnational terrorism. In other words: how do our concepts of war and peace
change if we talk about states being at war with terrorist, i.e. private persons?
Which achievements of modernity do we implicitly question thereby? And is the
traditional conception still defendable today? I will address these questions in
the following in three steps: (1) a sketch of the historical development of the
concepts of war and peace, (2) a conceptual analysis with special focus on the
involved agents, on the aims and means of war as well as on the relationship of
the two concepts, and (3) a discussion of the link between the conceptual
analysis and the contemporary phenomenon of transnational terrorism.

The Concepts of War and Peace in the Course of History.

Ever since Antiquity the concept of war has been disputed. In De officiis (I 11, 34) Cicero efficaciously defines war as violent conflict resolution (genus
decertandi per vim). He thus enumerates the aim (conflict resolution) and the
means (violence) of war. As far as can be seen, Francisco de Vitoria (De iure
belli, Quaestio secunda) is the first who brings up the idea of private war as a
war between private persons and not between states or commonwealths. With
this idea and with the development of secular natural law, the concept of war as
such becomes a subject of natural law philosophy, and no longer only as part of
just war theories. The concept of peace is hereby often discussed as an aside. An
independent relevance emerged mainly in theories of perpetual peace which
gained currency since the late medieval times, for instance in Dante Alighieri or
Erasmus of Rotterdam.

Two thinkers of the 17th century deserve special attention: Grotius and Hobbes.
Hugo Grotius takes the private war as the starting point of his considerations. He
conceptualizes public war as so-called “full war” (bellum plenum), i.e. as the
extension of the private war to all subjects (De jure belli ac pacis, I, 1, §§ 1 f.;
III, 2, §2.3). Against this backdrop, he argues for a right to enslave the defeated
(III, 7)—precisely the argumentation, which later leads Rousseau to the rejection
of the idea of private wars. In Grotius peace is simply the absence of war.
Inspired by Cicero, his dictum that there is no medium between war and peace is
the most prominent contradictory definition of the two concepts until today.
However, while Cicero defined war as an action, Grotius thinks that is better
considered a state of fighting or hostility (I, 1 § 2). Private war is conceptualized
even more radically in Hobbes: humans are naturally in a condition of war with
each other which can only be pacified by a strong political power. Here, the
private war is a direct consequence of the human condition, the egoistic striving
for self-preservation. This war is not defined by factual violence, but as a state
of uncertainty with regard to non-violence. “All other time is Peace” (Leviathan,
Chap. 13). There is no medium between war and peace here, either. In Hobbes
the concept of peace is understood as the absence of uncertainty, which is
especially resolved in a legal condition. Thereby, the concept of peace connects
to the idea of political and legal rule. Moreover, Hobbes diverges significantly
from Cicero’s definition of war: in Cicero war is conflict resolution, in Hobbes it
is a social condition. In Cicero it requires the means of violence because an aim
cannot be thought without means; in Hobbes, due to the lack of a defined aim,
there is no need for the means of violence.

Another aspect of private wars can be found in Hobbes and Locke: both
consider the criminal someone who enters into a state of war with the political
community. In Hobbes, this idea emerges only implicitly because the citizens transfer their unlimited right in the natural state of war to the sovereign who can use this martial right to enforce the laws. Locke on the other hand explicitly points out that criminals turn away from reason and degenerate to brutes. They thus enter into a state of war with the community (Second Treatise, §§ 10 f., 16, 172). This line of argument is as old as thinking about war and enmity itself: it already occurs in the Iliad when Achilles denies Hector’s claim to have his dead body treated with honor. He justifies this denial with reference to the state of war between Hector and himself, which can be compared to the relationship of a human to a lion or of a wolf to a sheep (22, 261 ff.).

The politically and legally most formative events for the concepts of war and peace in early modern times certainly were the Thirty Years' War (1618-48) and the ensuing Peace of Westphalia. The establishment of the monopoly on violence means for the concept of war that it can only by applied where no state can enforce the law—thus in wars between states and in civil wars over state power which factually cannot anymore be sanctioned by public authority and the legal system. Rousseau explains this thought:

“Men, from the mere fact that, while they are living in their primitive independence, they have no mutual relations stable enough to constitute either the state of peace or the state of war, cannot be naturally enemies. War is constituted by a relation between things, and not between persons; and, as the state of war cannot arise out of simple personal relations, but only out of real
relations, private war, or war of man with man, can exist neither in the state of nature, where there is no constant property, nor in the social state, where everything is under the authority of the laws. “(Contrat Social, Chap. IV, transl. by Cole)

War thus requires stable, real, not legally regulated or enforceable relations. Consequently, it cannot occur in a functioning state. Private persons do not enter a state of war with the state. They are in a legal one. The enforceable law becomes a negative defining feature of the concept of war and thus a sufficient condition for peace if understood as the contradictory concept. Inside a state war, citizens are—as mentioned above—enemies only as soldiers and soldiers only “while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take.” (Chap. 4) As illustrated above, Rousseau herein gives an early reason for the claim for humanitarian behavior towards non-combatants in war. Simultaneously, he complements Cicero’s definition with a fundamental feature: war is a violent conflict resolution between states—or, in the case of a civil war, a violent conflict resolution over state power.

Aim, means, and possible agents of wars are thus specified. The concept of peace undergoes an important attendance with Kant’s essay Zum ewigen Frieden (Perpetual Peace). Kant’s idea of a league of nations as an instrument to secure peace (Zweiter Definitivartikel) implicitly refers to a notion that we have already seen in Hobbes and Rousseau: war and enforceable law are mutually
exclusive. Where a legal authority can resolve a conflict, war is not possible. But what is peace according to Kant? First of all, we must notice that Kant limits his object of investigation to peace between states. Such a peace is not already achieved with a ceasefire because it requires an enduring end of hostilities and not their mere postponement (Erster Präliminarartikel). Cicero’s and Rousseau’s definition of war therefore does not constitute a contradictory antonym to Kant’s concept of peace. By distinguishing ceasefire from war and peace, Kant thus breaches with Grotius’ assertion that there is no medium between war and peace. According to Kant, peace is the absence of war and enmity.

Kant’s thoughts about peace as the end of enmity in a common league of nations appear modern, however more efficacious in the 19th century became the positive connotations of war in von Clausewitz and Hegel. However, even von Clausewitz’ definition of war follows Cicero and Rousseau, as well as Hegel writes that war brings internal rest and unity and is a necessary means to decide conflicts between states that cannot be resolved peacefully (Grundlinien, §§ 324, 333). Almost simultaneously with the philosophy of Hegel and von Clausewitz, the first efforts to humanize war in international public law take place. Later, after the experiences of the two world wars, international public law is modified: it is no longer restricted to humanitarian regulations, but becomes an international regime of the prevention of and ban on war. With the Kellogg-Briand-Pact (1928) and the foundation of the United Nations (1945) the general prohibition on violence becomes part of international public law. The concept of
war is mostly replaced by the concept of armed conflict. Considering the experiences of the world wars and the technological development, the classical state war becomes increasingly dysfunctional. However, new forms and aims of war arise.

After the Second World War, the debate about the concepts of war and peace change: first, the idea of peace experiences a renaissance. Peace and conflict research becomes an independent academic discipline. One of its founding fathers, Johan Galtung, defines: peace is not only the absence of war as violent conflict resolution, but at the same time an order which allows for alternative ways of conflict resolution (Peace by Peaceful Means, 1.1). Second, also the concept of war and its relationship to the concept of peace undergo a different appraisal due to the new dimensions of nuclear deterrence: as mentioned above, open war becomes dysfunctional. But even the dysfunctionality is no final point of the development of war: the “new wars” are characterized by transnationality (i.e. the transcending of national contexts and acting monopolies), asymmetry (i.e. the difference of war parties with regard to strategy and weapon technology), and perpetuation (i.e. the desire of particular war parties not to arrive at a decision of the war).

A Brief Conceptual Analysis

What can we derive from this conceptual history? What does it tell us about the
concepts of war and peace? First, the analysis of the concept of war must distinguish between war as a condition and war as an action. As an action it can, secondly, be defined by the elements of means, aims, and agents. In Cicero’s definition, which was similarly used for instance by Rousseau and von Clausewitz, war is an action, namely conflict resolution. In Grotius, Hobbes, and Schmitt on the other hand, war is considered a condition: there must not be factual acts of violence, but only a situation of enmity or uncertainty. This definition is closely connected to the differentiation to the concept of peace: peace is more or less unanimously understood as a condition, in particular often as the absence of war. However, there are non-violent conditions that are badly described as peace. While Kant introduces a medium concept, namely ceasefire, and Plato (Nomoi, I, 628b ff.) distinguishes two different kinds of peace, these cases lead Grotius and Hobbes to an extension of the concept of war. According to them, the concept of war denotes the non-peaceful condition. However, this is not convincing. The conception as conflict resolution which is widely accepted for two thousand years should not be ignored merely because of a stipulative diction of a *nihil medium*, a lack of a medium concept. This cannot be a sufficient justification to extend a widely accepted concept contrary to its ordinary use in language. Hence, war should be understood as an action (in a broader sense). The aim of this action, i.e. to decide a conflict in one’s own favor, is pursued by the means of violence. Since Rousseau, the possible agents or parties of such a war have been restricted to states. It is therefore convincing
to understand war as violent conflict resolution which has since modern times been restricted to relations between states. The concept of peace consequently has the necessary feature of the absence of such violent conflict resolutions. Moreover, it needs a certain stability, if it is not a mere ceasefire. This means that additionally the absence of enmity respectively the possibility of non-violent conflict resolution is required. This stability as well as the absence of war is closely connected to the existence of a legal order: a common, enforceable legal order is a sufficient condition for the absence of war because it allows for alternative ways of conflict resolution. It is a sufficient condition for peace according to Galtung’s definition, and it provides a stable order which does not only suspend war, but also the enmity of persons by mutual recognition.

*The Problem of a War against Transnational Terrorism*

In the last part of the lecture I will discuss how the phenomenon of transnational terrorism has an impact on the previous analysis of the concepts of war and peace. Different conceptual features of terrorism have been proposed in literature like force against innocent people/non-combatants, the aim of psychological influence of other persons than the victims, and the pursuing of long-term political aims. It is not necessary for the line of argumentation here to give a precise definition. Such terrorism is *transnational* if it is neither
performed by a state nor primarily within a single state. Well-known current examples can be seen in the terrorism of groups like Al-Qaeda or the IS, whereas other terrorist groups do and did not act equally transnationally, like the Tamil Tigers, Hamas, the Red Army Faction, ETA, Boko Haram, or the IRA. It is acknowledged that this distinction does not completely do justice to the complexity of the phenomenon of transnational terrorism. However, it is common to transnational terrorism that it uses terrorist means beyond the territoriality of a specific state. This rather sketchy description of the phenomenon is sufficient for the conceptual analytic purposes of this paper.

Particularly with regard to islamistic terrorism which has been in the focus of public interest in recent years, it is referred to a “war on terror”. Considering the previous analysis, there are however some conceptual reservations to this phrase or to its implicit consequences: we go back to the doctrine of private war if we ascribe the quality of war to terrorism. A restriction of the conceptually possible agents to states is, as shown, indeed not necessary. There have, however, been historical reasons for this differentiation. On the one hand, these reasons may have been power political ones—it is a fact that wars follow the essential power factors in the world, and for a long time these have been states—, but, on the other hand, there may also have been well justified ethical reasons. These ethical reasons are two:

First, the justification for the claim for human rights in war bases to some degree on the fact that we do not apply the concept of war to private persons. Hitherto,
the basic idea is that not humans, but states can be in war with each other. One can deduce from this that humans are enemies in war only insofar as they fight against the enemy state. This indirect status of enmity of opponent soldiers cannot justify the denial of all human rights. This is even truer for non-combatants who do not even have an indirect status on enmity—and this analysis does not depend on a specific (conventionalist or revisionist) theory of rights in war. If however we extend the concept of war to private wars, then this conceptual argument is not valid anymore. According to the doctrine of private war, it is easily imaginable to have opponent soldiers and even—in the meaning of a total war—an entire people as one’s direct enemies. If we do not want to give up the claim for humanity in war as a central claim of human rights, we have to give other reasons than a restriction of the concepts of war and enmity. Second, the clear distinction between martial law and penal law is a direct consequence of the fact that we do not consider private persons as possible parties to a war. The acceptance of the possibility of a private war would make forms of argumentation in favor of special criminal laws for enemies more plausible. This idea has been popular not only since Günther Jakobs (Bürgerstrafrecht und Feindstrafrecht), but it appeared also in Hobbes, Locke, and Schmitt. Who is at war with the community, is a combatant and not a citizen. Thus, different legal provisions can apply to them. Historically, one might think of the shocking application of a special criminal law for Polish people under the rule of National Socialism. More current examples with a
direct reference to the subject of this paper are the detention camp at Guantanamo Bay and the extrajudicial killings by means of drones. However, I do not want to talk down the existing problem, namely the transnationality of terrorist activities: even though an application of national criminal law to transnational issues is legally unproblematic, the enforcement of this criminal law seems to be more or less impossible in many cases. But as long as we neither fundamentally question the idea of sovereign statehood nor do the terrorist groups the compliment to ascribe to them the status of a sovereign state, the solution of cases like this is still to be found on the level of international public law, i.e. in negotiations with the sovereign states on which territory the terrorist groups operate. These states can fight the terrorists or ask for support. This however happens within a national and international legal framework and not as a special criminal law for enemies. Or these states might refuse to cooperate in which case they must take responsibility for the terrorist crimes on the basis of international public law. Thus, it is not possible to maintain the principle of sovereign statehood and to extend the concept of war to private wars at the same time. Who wants to defend sovereignty, must contest this extension.

Regarding the concept of peace, we have already seen that it should not be understood as the contradictory concept to war. With regard to terrorism this means that–even if we accept the extension of agents for the concept of war–a mere situation of uncertainty, threat, or enmity is not enough for a war, but only real terrorist acts. Such attacks can clearly be found against many states and the
NATO system of collective defense. However, I want to propose a different concept of peace as it has been indicated above. This concept essentially grounds on Rousseau’s thoughts about the stability of an order. Contrary to the discussed conceptual tradition, I think that the concept of enmity is not expedient for a philosophical and human rights discourse. Instead, following Galtung, we might talk of an order of alternative conflict resolution to distinguish peace from war and a third concept like ceasefire: this means that peace exists only where still exists—despite possible strains, threats, and violent acts—a stable, for instance a legal or diplomatic, order in which conflicts can be resolved non-violently. This definition is close to the distinction of friendship and enmity, but it does not use the non-gradual and always conflict oriented terminology of enmity; rather, with the possibility of non-violent conflict resolution, it implies a principally peace and reason oriented feature. This definition can also clarify and systematically grasp the differentiation between peace, war, and ceasefire: whereas conflicts are violently resolved in war, and non-violently in peace, ceasefire is the state in which conflicts rest and are not resolved at all.