BAKU DIALOGUES

POLICY PERSPECTIVES ON THE SILK ROAD REGION

Vol. 7 | No. 2 | Winter 2023-2024

Heydar Aliyev, 1923-2003
Assessment His Legacy, Part Two

Heydar Aliyev's Energy and Infrastructure Strategy
Vitaliy Baylarbayov

Statesmanship in the Silk Road Region
Rodrigo Labardini

Karabakh and Azerbaijani Statecraft
Michael M. Gunter

The Emergence & Mainstreaming of Public Diplomacy

What Is Public Diplomacy?
Alan K. Henrikson

Visions for a Shared Future

Time to Dream?
Alpaslan Özerdem

The 3+3 Formula
Vasif Huseynov

A Very Good Question

Can the West Eliminate Armenia's Critical Economic Reliance on Russia?
Orkhan Baghirov

A Philosophical Reflection on a Sempiternal Predicament

War, Peace, and Law
Miguel Ayuso

bakudialogues.ada.edu.az

ADA UNIVERSITY

INSTITUTE for DEVELOPMENT and DIPLOMACY

War, Peace, and Law

Miguel Ayuso

We are going to deal with peace in relation to law in the broad context of the Western philosophic tradition, presented in these pages through a traditional Catholic prism rooted in what one can characterize as Thomistic realism. Naturally, when defining peace, war appears by comparison or opposition. And, naturally, it is therefore also necessary to deal with war in some detail in order to contribute to a better definition of peace.

First of all, some doubt arises about this relationship. For if peace is—in St. Augustine's definition—the tranquillity of order, it is not only the absence of war, but something positive: order, hierarchy, harmony, etc. But if, on the other hand, it is the neutralization of conflict, as Italian academician Danilo Castellano says, that war must somehow make its presence felt again, even if its disappearance is postulated.

We shall deal briefly with both in what follows, concluding with a reminder of "just war" and a conclusion on "just peace."

Modernity and War

Modernity, which wanted to flee from the civil war of the state of nature, has ended up producing and deepening it to the point of opening up a permanent civil war. Modern political thought, in its postmodern evolution, has ended up, in effect, in the "war of all against all," that is to say, in the "state of nature," which is precisely that from which it sought to escape through the establishment of the "social contract"—a kind of fatal circle from which it is only possible to escape by recovering the sense of human community in which political concord and the common good occupy a central position.

***Miguel Ayuso** is Professor of Political Science and Constitutional Law at Comillas Pontifical University, President of the Council for Hispanic Studies Felipe II, and President of the Political Science Research Group of the International Federation of Catholic Universities. In 2009, he was elected President of the International Union of Catholic Jurists, a position he held until 2019. He is the author of more than 30 academic books and 500 articles. The views expressed in this essay are his own.*

There is, indeed, a diamantine link between modernity and war, despite the disguise of "fraternity," updated as "solidarity"—and both in the historical (or existential) and the doctrinal order. In the former, since it is not in vain that its political embodiment, the (modern) state, appeared in the sixteenth century as a reaction to overcome the anarchy provoked in some European peoples by the wars of religion. And in the latter, since Thomas Hobbes founded it on the flight from what he called the fear of violent death.

A curious "heterogenesis of ends" sprung up, whose cause lies in sovereignty and contract—or, rather, in a sovereignty based on the instrument of contract: sovereignty, linked to Jean Bodin's explanation, only finds its true meaning through the construction outlined by Hobbes. Thus, of the two doctrinal roots at the beginning of the great revolution, the first (the French one) only spread through the second (the English one), since sovereignty, before its contractualist instrumentation, appeared too closely linked to Roman law and the political tradition that flowed from it. The reason, as is not difficult to imagine, lies in the emptying of the communal substance produced by the contract, through which a supposedly "pure" power is reaffirmed that, left to its *hybris*, can only become impure in the long run.

Peace must overcome war as silence overcomes words, for to be silent is not the same as being mute.

Hobbes is the true father of modern politics in the West, even if for a time his children were ashamed of him, for the supporters of parliament reproached him for his absolutism, while the defenders of royal power did not accept his ungodly rationalist assumptions. Indeed, on a sensist, materialist, and contractual basis, he had arrived at the thesis apparently most opposed to political liberalism, namely, the justification at all costs of state absolutism as a necessary means for men, free by nature, to avoid their mutual extermination.

In John Locke's wake—although he erased the traces—he also upheld the contractual origin of political power and the need for *consensus* in order to "live better." This expression and concept have a naturalistic, i.e., a "de-sacralized" meaning: the power thus created is not something

like a great and all-powerful living being (as in Hobbes's *Leviathan*), arising from the terror of all in the state of nature, but rather a conditioned and revocable power, always accessible to the will of those governed by it and in no way to be feared by them.

Hence—although less coherent and solid than Hobbes—Locke will be more successful in the future of political science as a representative of the rationalist and liberal current that seeks to understand society as a human artefact resulting from the reason and will of men and by no means natural—at least in the traditional sense of the term that conceives nature as the work and expression of the divine will. According to this theory, writes philosopher Rafael Gambra, by submitting and obeying political power, man only obeys himself, his objectified reason and will. Neither Hobbes's *Great Man* nor *Leviathan*, which annuls the individual will that engendered it, nor the universal fatherhood of kings (Sir Robert Filmer's thesis), which destroys any idea of *consensus* and demands unconditional obedience, are, for Locke, real or acceptable conclusions: a well-balanced social contractualism can lead, on the other hand, to a liberal conception of sovereignty, useful to the public good and to the appropriate limitation of power.

Then came Jean-Jacques Rousseau, who attracted the greatest support at the time of the triumph of the French Revolution. But in the long run, as we see today, the temperate provided by Locke is returning. In any case, the scheme will remain substantially unchanged: between it and that of classical political philosophy, there is an impassable chasm.

Classical political philosophy always thought of human society as a true *community* rather than a mere *coexistence* (or *society*, strictly speaking)—to borrow the distinction coined at the end of the nineteenth century by the German thinker Ferdinand Tönnies—between *Gemeinschaft* and *Gesselschaft* as ways of explaining sociological bonding. Indeed, human society is first and foremost a community, for it recognizes religious and natural (and not merely conventional or covenanted) origins; it possesses not only voluntary-rational, but also emotional and attitudinal internal bonds; it is thus primarily a "society of duties," with a nexus of a very different nature from that of the "society of rights"

that is born of contract and conscious purpose. Communities are, then, realities in a certain sense prior to the individual, who does not constitute them voluntarily, but encounters, accepts, and recognizes them.

Can human coexistence worthy of the name be based on purely legal, voluntary, consensual, and contractual ties?

The contractualists, on the other hand, in contrast to the Aristotelian-Thomistic tradition of man as a "political animal," started from the isolated individual: they separated man from his relations with God, with his fellows, and with the universe around him; they abstracted him, as if he were an asocial being, from all natural community and transferred him to his origins—to an imaginary state of nature; but, not content with that, they dissected him, and, just as they had stripped him of all natural sociability, they disregarded his reason, to choose from among his passions a single one that they considered the most powerful: the "fear of death" (Hobbes), the "right to property" (Locke), or "natural liberty" (Rousseau).

But can human coexistence worthy of the name be based on purely legal, voluntary, consensual, and contractual ties? For a long time, during the phase of construction and affirmation of the modern state (a journey from monarchical "absolutism" to the "social state"), this theoretical explanation, however influential it may have been in practice, did not manage to eliminate the communitarian elements until, that is, the emergence of pluralism in the dissolution phase of statehood as it had been traditionally understood. In the presence of pluralism and its "values," the "American" response is that of neutralizing the conflict that lies at the heart of what were, until very recently, the institutions.

The Paradox of Permanent Civil War in the Realm of Pacifism

In any case, and despite this surprising connection, what is certain is that our times are characterized by the nominal rejection of war and the ideological triumph of pacifism. On this point, it is necessary to refer to the thinking of Álvaro d'Ors, one of the twentieth century's foremost scholars of Roman law.

He begins by pointing out the relationship between peace and

war. Peace, as we all know, is a great good, but it presupposes the possibility of war, for it consists precisely in overcoming war. Just as the holy counsel to love one's enemy cannot be practiced if there is no enemy, so, too, if we exclude the reality of war, we cannot count on the joy of peace. Peace must overcome war as silence overcomes words, for to be silent is not the same as being mute. And therein lies the difference between the peacemaker who refrains from or ceases to make war possible and the pacifist who denies any possibility of it: the pacifist is not the one who knows how to keep silent but the one who reduces silence to dumbness.

If pacifism, on the one hand, promotes the ideological complex that leads to war (as we have already said), it is incapable, on the other hand, of excluding the reality of war, because—although it may be undesirable—it is absolutely ineliminable as a last resort in case of necessity, as a legitimate collective defense of a people. In fact—continues d'Ors—all the universal and solemn proclamations of pacifism (such as those that abounded after 1945), have not prevented wars from continuing unceasingly, and wars were maintained in practice more or less directly by the very preachers of pacifism (who are often at the same time the manufacturers and sellers of arms).

The reality of war is absolutely ineliminable as a last resort in case of necessity, as a legitimate collective defense of a people.

May the reader forgive me for recalling an anecdote that illustrates this last point, which I think is worth mentioning. After the Spanish Constitution was adopted in 1978, the military criminal and procedural laws, which had previously been included—together with the disciplinary laws—in a comprehensive code, such as the 1945 Code of Military Justice, had to be modified. The reason was none other than the provisions of Article 117.5 of the aforementioned Constitution: "The law shall regulate the exercise of military jurisdiction in the strictly military sphere and in cases of state of siege, in accordance with the principles of the Constitution." When it came to revising the criminal laws, another problem was added, also derived from another constitutional provision: "The death penalty is abolished, except as may be provided for in the military criminal laws for times of war" (Article 15).

Initially, in the drafting of the 1984 Military Criminal Code, which replaced the criminal part of the 1945 Code, the death penalty was retained, although never as the only penalty, but as an alternative for some particularly serious offenses and, always, of course, in wartime. As long as the procedural rules on the execution of sentences of the old Code were in force until 1988, when they were replaced by the Military Procedure Act, there would have been no problem with the possible imposition of the death penalty. From the entry into force of the latter, however, things changed because it did not foresee any procedure for its execution and because the principle of criminal legality (enshrined in Article 25 of the Constitution) integrates the guarantee of execution together with criminal, penal, and judicial guarantees. In other words, sentences must be executed in accordance with the legally established procedure.

But how can this be done in the absence of such a procedure? The fact is that its omission from the Military Procedural Law was not due to a defect in legislative technique; it was, rather, done deliberately. Within the committee set up in the Ministry of Defense to prepare the draft bill—which was partly made up of officers from the Military Legal Corps, some of whom were competent—the problem was pointed out by some of them, who received the mocking reply from the then Deputy Secretary of Defense that "the time of war had passed."

Thus, since 1988, it would not have been possible to impose a penalty that had a constitutional and legal basis. Logic led to the removal of the penalty from the Code when it was reformed in 1995. However, a greater step had been taken before that, when Spain ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights in 1991, which aimed to abolish the death penalty, having been adopted by the UN General Assembly on 15 December 1989. This would prevent, despite constitutional authorization, the reintroduction of the death penalty in military criminal legislation.

We have dwelt on the above because it is evidence, on the one hand, of an ideology that denies the reality of war, while on the other hand, it is evidence too of the consequences of pacifism, which leads to the abolition of the death penalty, and which fundamentally weakens the basis for the imposition of any penalty.

Let us continue, then, with pacifism. In another text, Professor d'Ors himself asks: "What is pacifism? Pacifism is the negation of the right to war, but what is peace? Peace is the abstention from war. And refraining from something is not the same as denying its existence. It is not the same to abstain prudently from too much wine as to try to exterminate the vineyards. It is not the same thing to keep silent when silence should be kept as to impose absolute silence; it is not the same thing not to look as to be blinded."

There is a correlation between pacifism and the negation, not of war, but of the right to war. Pacifism does not eliminate war; it debases it.

There is thus a correlation between pacifism and the negation, not of war, but of the right to war. Pacifism does not eliminate war; it debases it. There is a correlation between pacifism and the negation, not of war, but of the right to war. Pacifism does not eliminate war; it debases it. It has thus devalued the traditional law of war, starting with the distinction (classic among theologians, jurists, and theologian-jurists of yesteryear) between just war and unjust war. Where "just" did not refer to a vague adaptation to moral sentiments (which can and often are very subjective) but to the objective principles of the law of war. That is why one could speak of a "just enemy," who is the one who can wage war according to the rules of public international law (which is the law of war and peace), supplemented by other rules of moral theology.

The consequence of the (theoretical) elimination of war and the law of war has been that wars (not governed by law and morality) are now much more cruel and inhumane than before, and, moreover, that dirty wars, waged by unjust enemies, such as partisanship or terrorism—a typical product (says d'Ors) of the ruin of the law of war—have proliferated.

Hence it is often said that terrorism is the normal price of democracy. But that is not all. For pacifism, after causing (or at least enabling) terrorism, disturbs the correct understanding of it, relegating it to the realm of criminality, handing its repression over to the police and judges, when the terrorist is a (non-just) enemy rather than a criminal and should therefore be treated militarily like any other enemy.

Just War?

In the face of pacifism, which does not conceive of just war, this was one of the great themes that Hispanic theologians dealt with extensively, following in the footsteps of St. Thomas Aquinas, the Common Doctor of all the Schools. It is a subject that continues to arouse the interest of scholars to this day.

The synthesis of St. Thomas Aquinas is, as always, extraordinary, and revolves around three conditions.

The first is the "authority of the prince under whose command war is made." For, "it is not for the private individual to declare war, since he can assert his right in a higher court; nor is the private individual competent to summon the community, which is necessary to wage war." Now, "since the care of the republic has been entrusted to the princes, it is up to them to defend the public good of the city, kingdom, or province under their authority." Well then, "just as they lawfully defend it with the material sword against internal disturbers, punishing evildoers, so it is incumbent on them to defend the public good with the sword of war against external enemies." This is followed by "just cause," that is, "that those who are attacked deserve it for some cause." Finally, it is required that the "intention of the disputants is right"—that is, Aquinas specifies, "an intention to promote good or to prevent evil." It may happen, however, that, although the authority of the one who declares war is legitimate and the cause is just, "it is nevertheless unlawful because of the evil intention."

This doctrine is the one that Spanish Scholasticists (Francisco de Vitoria and Francisco Suárez in the first place) elaborated in response to the new circumstances produced in the context of the discovery, conquest, and evangelisation of the Americas. And it is the one that has become the most recent doctrine of the Catholic Church.

In order to show its continuity up to the present day, despite the gravitation of the pacifism we have dealt with above, let us look at a text from the Second Vatican Council:

> War has not, of course, been uprooted from humanity. As long as the risk of war exists and there is no competent international power equipped with effective means, once all the peaceful resources of diplomacy have been exhausted, governments cannot be denied the right

> of legitimate self-defense. It is the duty of the Heads of State and of all those who hold the office of government to protect the security of the peoples entrusted to their care by acting with the utmost responsibility in so grave a matter.

Closer still to us is the Catechism of the Catholic Church, where the traditional doctrine on the conditions of just war (and of civil war, in particular) is collected in different numbers. Although the reason for this dislocation is not apparent, and although the reference to self-defense only appears clearly in the former, both modalities (international and civil war) are covered by this concept.

In the first (n. 2309) we read:

> The strict conditions for *legitimate defense by military force* must be rigorously considered. The gravity of such a decision subjects it to rigorous conditions of moral legitimacy. It is necessary at the same time (1) that the damage caused by the aggressor to the nation or community of nations is lasting, serious, and certain; (2) that all other means of ending the aggression have proved impracticable or ineffective; (3) that serious conditions for success are met; (4) that the use of arms does not involve evils and disorders more serious than the evil it is intended to eliminate. The power of modern means of destruction requires extreme caution in assessing this condition. These are the traditional elements listed in the so-called "just war" doctrine. The appreciation of these conditions of moral legitimacy belongs to the prudent judgment of those in charge of the common good.

While the second (n. 2243) reads:

> *Resistance* to the oppression of those who govern cannot legitimately resort to arms except when the following conditions are met: (1) in case of certain, serious, and prolonged violations of fundamental rights; (2) after all other remedies have been exhausted; (3) without provoking worse disorders; (4) if there is well-founded hope of success; (5) if it is impossible to reasonably foresee better solutions.

If the above applies to the *ius ad bellum*, the Catechism does not fail to incorporate some considerations regarding the *ius in bello*. Thus, the following limitations appear, which must be extended to civil wars: respect for prisoners, including the wounded (n. 2313); respect for human groups as such, i.e., the condemnation of genocide (n. 2313); and the indiscriminate destruction of populations (n. 2314).

Thus, it seems that in principle, just war is defensive war, as a modality of legitimate defense—an institution of divine-natural law—that can be exercised by individuals when they are unjustly attacked, but also collectively by peoples. Álvaro d'Ors writes that the relationship between this natural principle and war is so inseparable that, as war has been discredited by pacifist propaganda, the legitimate self-defense of individuals has also been forgotten, and it is a regrettable fact that the courts of justice today condemn those who defend themselves legitimately with much greater severity than they do the aggressor. To such an extent has the notion of legitimate self-defense been lost today—another clear symptom of the legal crisis of our times—that it has come to be confused with the state of necessity, and therefore the horrendous crime of abortion has been justified as legitimate self-defense, when the case of necessity that can serve as a pretext for this crime never justifies killing anyone, but only property damage; forgetting also that the innocent human being to be born can in no way be considered the aggressor.

The Catholic Church's doctrine, however, does not limit itself to recognizing defensive war as legitimate, but imposes such defense as a moral duty on the ruler, who has the obligation to defend his people against aggression and incurs responsibility if he fails to do so. One might then ask, taking a further step, whether a war of aggression can be lawful and, beforehand, how to clearly differentiate defense from aggression. This naturally leads us to the field of preventive self-defense. For in some cases, preventive self-defense can be just. In this case, as Professor Castellano has cautiously written, the offensive measures taken by one state against another must be suitable for the annihilation of a people and must be current from the point of view of the threat. And the preventive defense must relate to the very existence of the people or to some of its vital interests, i.e., indispensable to its life.

Another problem—connected to the previous ones—that we cannot address in these lines but which should at least be noted, is that of intervention in the conflict of a third party. Modern international law was based on the dogma of the sovereignty and equality of states and, consequently, affirmed the doctrine of "non-intervention" in the internal affairs of another country. The Catholic Church, on the other hand, clearly rejected this, as shown by the 62nd proposition of Pope Pius IX's 1864 *Pertiosa societatis, seditiosa, iuris publici et*

gentium destructiva. The reason, it seems to us, lies in the fact that it is the expression of liberalism in the international order.

However, the metamorphoses of modernity have nowadays led to a radical change in this question, to the point of affirming a "duty to interfere." Can we therefore speak of a rapprochement in this area between the proponents of liberalism in international order with the position of the Catholic Church?

If we may be allowed a nod to diplomatic language, we could answer with a "yes" and a "no" simultaneously. Because, despite appearances, it is not a question of upholding the moral law as the indispensable and immutable foundation of the new international order or the return to a true Christianity in the state and between states. No, on the contrary, there is a radicalization of liberalism from abstentionism to interventionism. But the motives, rationale, or authority—among other things—behind the interference are none other than those of a liberalism that has shed some of its restraints and hence has become more unrestrained.

Just Peace

When dealing with peace, it is difficult not to look at it from the counterpoint of war. However, if we are to deal with the latter, it may be convenient to conclude by also looking at it in terms of the former. Indeed, if we consider peace as a "problem," it must first of all be made clear that peace presupposes war and that, without an order of war, it is difficult to aspire to true peace.

So, finally, just peace has been envisaged. We ruled out above that peace was merely a neutralization of conflict. Still less, we can now add, that that peace is that which masks injustice or disorder. Peace is neither merely a neutralization of conflict nor that which masks injustice or disorder. It should be noted—to begin with—that we have not opposed the latter two terms, in the way that Goethe said he preferred injustice to order. The foregoing is a mistaken thesis because injustice is already disorder. But the fact is that destruction or death has been called peace on more than a few occasions. This is what Tacitus, summing up classical wisdom,

Peace is neither merely a neutralization of conflict nor that which masks injustice or disorder.

sentenced in an unappealable way: "They create deserts and call it peace." And what the Bible, on the other hand, also expresses in a lapidary manner: "And they call such great evils peace."

Christians believe that there is true peace only in the Kingdom of Christ, as was the motto of the pontificate of Pius XI, completing the intention of Pauline origin of his predecessor (close, though not immediate), St. Pius X, to "establish all things in Christ." There can be no peace outside the Kingdom of Christ, which in turn elevates and perfects the natural order.

Peace is the subject of Pope Pius XII's Christmas address to the Curia in 1940. In it we find listed the indispensable presuppositions for a new order after the war:

One: victory over hatred, which divides peoples, with the renunciation, therefore, of systems and practices from which hatred receives ever new nourishment. To this end, the Pope denounced the fact that in some countries there was, in fact, an unbridled propaganda that did not shrink from manifest distortions of the truth, showing, day by day and even hour by hour, to public opinion the opposing nations in a distorted and outrageous light. But—he goes on—whoever truly desires the welfare of the people, whoever wishes to contribute to the preservation from incalculable harm of the spiritual and moral foundations of the future collaboration of peoples, must consider it a sacred duty and a high mission not to let the natural ideals of truthfulness, justice, courtesy, and cooperation for good, and, above all, the sublime supernatural ideal of brotherly love brought by Christ into the world, be lost in the minds of men.

Two: victory over distrust, which oppresses international law, making all true intelligence unrealizable. With a return, therefore, to the principle of *justitiae soror incorrupta fides* (Horace), to that fidelity in the observance of covenants without which no peaceful coexistence of peoples is possible, and above all, no coexistence of powerful peoples and weak peoples: "*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*" (Cicero).

Three: victory over the principle that utility is the basis and rule of law, that force creates law—a disastrous principle that renders all international relations inconsistent, with great harm coming especially to those states that, either because of their traditional loyalty to peaceful

methods or because of their lesser war potential, are unwilling or unable to fight with others. With the return, therefore, to a serious and profound morality in the rules of the consortium between nations, which obviously does not exclude either the search for an honest utility or an opportune and legitimate use of force to protect peaceful rights when they are violently challenged, or to repair injuries to them.

Four: victory over the seeds of conflict, which consist in excessive differences in the field of world economy. Therefore, progressive action, balanced by corresponding guarantees, to arrive at an organization that will give the means to all states to ensure to their own fellow citizens—of whatever class they may be—a suitable standard of living.

Five: victory over the spirit of cold selfishness, which, proud of its strength, easily ends up violating no less the honor and sovereignty of states than the just, healthy, and disciplined freedom of citizens. Instead, a sincere juridical and economic solidarity, a fraternal collaboration, according to the precepts of divine law, must be introduced between peoples, once they are assured of their autonomy and independence. As long as the harsh necessities of war speak in the language of arms, it is difficult to expect any definitive action in the direction of restoring moral and legally imprescriptible rights.

What we have just transcribed offers some clues for the reconstruction of peace after the wound of war. It is true that, even at that time, Pope Pius XII was giving in to modern language with terms such as "state" (instead of "political community") or "sovereignty" (instead of "kingship"). It is relevant to underline that the original language of that speech was Italian, and not Latin. Perhaps this is the reason that those words have been aggravated subsequently, to the point of going so far—in a document as important as the Catechism—as to speak of the "state" instead of referring to something like "legitimate public authority," or of "human rights" (which Pius XII had translated in this case backwards by *humana iura*), amidst many other unfortunate turns of phrase. BD