

Faithful Citizenship

Principles and Strategies to Serve the Common Good

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Just War from a Legal Perspective

Response to O'Neill

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[1] Many regard the term “just war” as an oxymoron. How can war ever be just – especially in light of the admonitions in the New Testament to turn the other cheek? Indeed, Gandhi and Martin Luther King successfully proved this point to move their social agendas forward in the face of violent resistance. The most influential leaders of today, like Desmond Tutu and the Dalai Lama, advocate the same approach to transform societies. This approach, however, often comes with the danger of personal peril and cannot be achieved without being accompanied by a saintly dose of patience and determination. We in the 21st century, however, are an impatient world.

[2] Father O'Neill correctly cites the New Testament directives to lay the foundation for what he interweaves with political theory, showing the ultimate futility of just war as a basis for war and a renunciation of peace. From that perspective, he is right. As a professor of international law, I bring a legal perspective to bear on the question of just war. The international legal foundations of just war, which are currently modified and enshrined in the U.N. Charter, have an equally long history – if not longer.

[3] The Old Testament, in fact, is replete with examples of just wars being carried out at the direction of God. Some of these campaigns even amounted to what we would consider today to be genocide.¹ However, because God commanded these actions, they were by definition just. Rulers who then ruled by divine selection inherited this ability to define and carry out just wars. They expected not to be questioned about it. This proclivity survived the admonitions of the New Testament up through the Middle Ages in the West and even the Pope utilized this mechanism to effectuate Church policy. Then, an abrupt transformation happened, from the perspective of international law.

[4] The end of the 30 Years War in 1648 brought about a collection of agreements and acknowledgements known as the Peace of Westphalia. This is commonly regarded as the birthplace of the state system. After Westphalia, divine right began to recede as the underlying justification for rulers to rule their societies. Roots of democratic theory began to spread. “Sovereignty” no longer resided in the person of the ruler, chosen by God, but in the vessel of the state – which was guided by a secular ruler, increasingly with popular support of the people – not God.

[5] Thinkers of the time, like Grotius, recognized this transformation and lodged their strictures of international law in natural law, one step removed from divine law. Indeed, the first serious duel between international legal scholars (Seldon’s *Mare Clausum* versus Grotius’ *Mare Liberum*) wielded these tools effectively and convincingly. The law of war, a distinct subset of public international law, developed within this rubric of customary international law and, accordingly, became divorced from divine direction as well.

[6] Over the ensuing three centuries, the law of war became more highly legalized as new rules of warfare were agreed upon, usually generating a new set of laws after each major conflagration involving European powers. “Just war” came to be equated with “legal war,” and those who departed from engaging in legal war, such as Nazi Germany and Imperial Japan, were fully occupied and punished severely.

[7] The articulation of legal war that the world currently lives under was established after the Second World War. These are enshrined in the United Nations Charter. Article 2(4) prohibits resort to war as a means of resolving disputes between states. However, Article 51 preserves a state’s right of self defense if attacked. The only other method for resort to military force is for the Security Council to invoke its powers under Chapter VII and authorize use of force on a case-by-case basis. Use of force outside those general parameters is illegal and, therefore, unjust.

[8] This simplified approach was problematic on several fronts, not the least of which was the fact that the two major Cold War protagonists (the U.S. and the Soviet Union) could

¹ See Joshua 10:40: “So Joshua defeated the whole land, the hill country and the Negeb and the lowland and the slopes, and all their kings; he left no one remaining, but utterly destroyed all that breathed, as the Lord God of Israel commanded” (New Revised Standard Version). Under God’s direction, the Israelites invaded the land of Canaan and exterminated seven nations: the Hittites, Girgashites, Amorites, Canaanites, Perizzites, Hivites, and Jebusites, laying waste to various cities. See Joshua 6:21 (describing the destruction of Jericho); 8:24 (describing the destruction of Ai); 10:28–39 (describing the destruction of Makkedah, Libnah, Lachish, Gezer, Elgon, Hebron, and Debir); see also Deuteronomy 2:34 (“At that time we captured all his towns, and in each town we utterly destroyed men, women, and children. We left not a single survivor”).

veto each other's attempt to use lawful force through their respective permanent seats on the Security Council. But the biggest challenge emerged after the Cold War. When states began to take military action to defend civilian populations within states ruled by brutal regimes, and did so without U.N. authorization, those operations were technically illegal. But is humanitarian intervention to stop ethnic cleansing unjust, even if it is illegal? Obviously, that could not be the case.

[9] So a new schism between legal war and just war caused a breach of opinion among scholars in the international legal community. It also provided an opening for those with darker ambitions than humanitarian intervention. By 2003, the George W. Bush administration had decided that it would go to war with Iraq. It was clear that the Security Council would not grant authority to do so. It was equally clear, that the U.S. had not been attacked by Iraq. Thus Article 51's self-defense provisions seemed out of reach as well. Nevertheless, for America to go to war illegally would be unthinkable, as America continued to think of itself as the bastion of rule of law.

[10] President Bush, our most outwardly Christian and religiously upright leader in years, pushed even further than the debate on just war and legal war had yet gone. He determined just war to be what he decided it to be – a dynamic that had begun to die at Westphalia, but was resurrected in this 21st century leader, who believed he was elected by divine will. And, he had retained very clever lawyers. They provided a new reading on Article 51's terms and they buttressed this with a new theory of unauthorized intervention.

[11] President Bush's lawyers focused on the term "inherent" in Article 51's assurance that every state's "inherent right of self-defense" to repel an armed attack was secure. "Inherent" was the hook for their argument that the old customary laws of war had survived the Charter. The old laws of war included the theories of anticipatory self-defense (a.k.a. pre-emptive strike) and preventive war – both justifications for initiating military action in anticipation of being militarily struck by another state. "Inherent," the president's lawyers argued, referred back to the pre-Charter rules and, therefore, bootstrapped them into the Charter itself. This remarkable notion was put forth in 2003 to help justify war against Iraq as legal despite the fact that President Reagan's lawyers had condemned an Israeli pre-emptive strike against Iraq in 1981 as illegal.

[12] One roadblock to successfully bringing the old, discarded, pre-emptive strike doctrine into play was the braking mechanism contained within it. There was a high evidentiary threshold to overcome, the need to show that the state to be attacked was an imminent threat to the state invoking the doctrine. No one could plausibly argue that Saddam Hussein was an imminent threat to America. Thus, the president watered down the criterion to a mere "emerging threat" in his 2002 National Security Strategy. Since just about anything can be characterized as an emerging threat, this heavily lawyered and clearly specious argument was deemed good enough by the administration. But they still needed some deeper theory to shore up this very weak argument.

[13] Consequently, the administration contended that two new theories of unauthorized military intervention had arisen alongside humanitarian intervention – which had become accepted by most of the world over time. These included invading *states that harbored terrorists*

or pursued weapons of mass destruction. Both of these justifications, coincidentally, dovetailed with the president's reasons for invading Iraq.

[14] Father O'Neill deftly recognizes Hobbes' restriction of warfare to self-defense as a major Achilles heel in just war theory from the perspective of a biblically-based pacifism. He is correct that this can be, and indeed was, exploited – to devastating effect – in the Iraq war. Nevertheless, Father O'Neill links this theory with an overriding one of greater concern for humanity, which is a road that the world has been striving to take for many decades, but has only made steady progress on in recent years – despite major deviations such as this last one. Thus, the administration's theorists have much more to fear from Father O'Neill's logic than from the terrorists. He reveals their machinations for what they are – empty of integrity, devoid of rational thought, and clearly against the tide of history and law.