

Just War and Modern Conflict

Kelsay, John, and James Turner Johnson, eds. *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*. Westport, CT: Greenwood, 1991.

Smock, David R. *Religious Perspectives on War: Christian, Muslim and Jewish Attitudes Toward Force After the Gulf War*. Washington, DC: United States Institute of Peace Press, 1992.

O'Brien, William V. *Law and Morality in Israel's War With the PLO*. New York: Routledge, 1991.

Hallett, Brien, ed. *Engulfed in War: Just War and the Persian Gulf*. Honolulu, HI: Spark Matsunaga Institute for Peace, University of Hawaii, 1991.

Just War and Jihad contains essays written by American scholars, some of whom reappear in *Religious Perspectives on War* (a symposium synopsis). *Just War* issues are discussed exceptionally well in these works and by William O'Brien, making his third appearance. *Engulfed in War* suggests a less practiced approach for and against the Gulf War that deserves revision, with the benefit of hindsight. Islamic issues are discussed by Western scholars and American Muslims with insight, understanding and helpful quotations, though one wonders whether they reflect sufficiently the views of non-American, including anti-American, Muslims.

In *Just War and Jihad*, Johnson's essay, "The Historical Roots and Sources of the Just War Tradition in Western Culture," shows Hebraic influence mitigating war's destructiveness, Roman antiquity justifying war (when sanctioned by the gods) as an instrumentality of political sovereignty to protect Rome against barbarism, and the Germanic warrior tradition reflected in the knightly code of chivalry, especially regarding noncombatants. Elegance and erudition characterize James Turner Johnson's writing.

Father John Langan, S.J., in "Christian Theology and Warfare," discusses scriptural and patristic attitudes to war and their relevance nowadays. The pretheoretical experience of the presence of Christian virtues and Christian witness in military personnel is acknowledged in the New Testament and the massive socio-religious fact of military piety has received ecclesial recognition and support throughout the centuries.

Notwithstanding its religious lineage, discussed authoritatively by Johnson, just war tradition since the seventeenth century has rejected religious difference as justification for war. Instead, natural law has constituted the philosophical basis for the just war principles. Although natural law is itself controversial — Hallett calls it "that thinly disguised deity natural law" and O'Brien considers that many thinkers substituted for it the secular concept of "humanity" — its importance, Johnson

explains, is that just wars may be waged only for causes provided in natural law, for only these bind all men equally. As Cicero (106-43 BC) argued:

There is in fact a true law — namely right reason— which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong.¹

On this basis, the just war principles offer conceptually dependable terms of moral reference and, because they constitute a mechanism of both enablement and limitation, provide reassurance against an unjust attack being able to claim their warrant. O'Brien (pp. 278-84), Hallett (pp. 4-7) and Smock (pp. xii-xiii) table their versions of the principles. These comprise both *Ius ad bellum iustum*: the Right to Undertake Just War, and *Ius in Bello Justo*: Right Action in Just War.

Briefly, war may be undertaken only for a just cause (the belligerents' comparative justice being scrutinized); by legitimate authority; with a right intention; as a last resort; weighing proportionality and reasonable hope of a favorable outcome; with all acts of war subject to the principle of discrimination (understood to include the principle of double effect) which forbids direct and intentional attack on noncombatants; and with the grand strategy and tactical means of war subject to the principle of proportion, so that it may reasonably be expected that the good achieved by war, using economy of force, will outweigh the physical evil inflicted or the physical and moral evil that would be suffered if war were not resorted to.

Since 1945, the UN Charter has restricted just cause for war to defence against aggression, as did Pope Pius XII, who excluded punishment and recovery of something taken as just causes for war because no longer "apt and proportionate."² He did not exclude military intervention for compelling humanitarian reasons and France, in particular, has urged its consideration, if necessary in UN Charter amendment. Pius insisted on "an obligation for the nations as a whole, who have a duty not to abandon a nation that is attacked."³

Kelsay emphasizes that essayists sought to avoid assuming the normative superiority of just war tradition to the claims of Islamic thought. Wisely so, for despite their potential for theoretical reassurance, inadequate practical applications of the just war principles and consequent moral failures, such as Serbian and Croatian atrocities against Muslims in Bosnia, feature in the record, along with many instances of just endeavor.

As to points of comparison between what Cardinal Martini calls "the great conquering religions — especially Christianity and Islam,"⁴ the Islamic conception of legitimate war (*jihad*) originally justified war both for the defence and the geographical extension of the community of believers (*dar al-islam*). Christian responses to it from Charlemagne and throughout the Crusades were similarly motivated. Divisions have caused wars between Muslims and between Christians. Fred Donner points out that Islamic early juristic literature contains injunctions against killing women, children and other noncombatants. He and Richard Martin

separately state that most recent Muslim commentators restricted *jihad* (the only justifiable war) as it applies to modern Muslim-nation states to defence against outside attack and/or internal subversion. Martin does, however, add that the minority view is that *jihad* is a religious and moral obligation to Islamize all of humankind, even with force, and is not restricted to the defence of Islamic states. Bruce Lawrence, moreover, says that most Shi'ite Muslims consider that the enemy against whom *jihad* must be waged is also Muslim (i.e. Sunnis) who have not accepted true Islam. However, Ayatollah Murtaza Mutahari (d. 1979), a colleague of Ayatollah Khomeini, proclaimed the holiest form of *jihad* to be that fought in defence of humanity and humanity's rights. He cited a group of (apparently non-Muslim) Europeans assisting the Algerians' war of independence against France and characterized their *jihad* as holier than that of the Algerians because of their altruism. Lawrence notes, though, that Shayk Fadlallah, spokesman for the Shi'i community of southern Lebanon, declares that the legalization of *jihad* emanates from the need of Islam for power.

Ann Elizabeth Mayer relates, however, that after freeing themselves from European domination, Muslim states did not revert to using premodern rules on war and peace but recognized the authority of public international law by joining the UN and reaffirming their commitment to the UN Charter in the preamble to the Charter of the Organization of the Islamic Conference. Nevertheless, Mayer admits that contemporary Muslims differ on so many points that one cannot ascertain a single recognizable cultural consensus on resort to war, acknowledging, as a consequence, possible uncertainty about the binding force of treaties that would permanently obstruct *jihad*, unless it was redefined as a war fought exclusively for defensive reasons. Even this, if it included repelling oppression and persecution of Muslim communities resident outside Islamic countries, in the *dar al-harb* (abode of war), in Bosnia for example, would need, legally speaking, UN approval.

Palestinians dwelling in, and dispersed from, what Muslims regard as an especially holy part of the Islamic world are a case in point. UN resolutions and widespread diplomatic recognition on their behalf and the fact that Palestinians comprise both Muslims and Christians have not achieved a just settlement of their claims. Part of the difficulty is in establishing the full extent of those claims and what would be necessary to satisfy them. But the major problem is their dispute with Israel over the occupation and control of the West Bank of the River Jordan (Judea and Samaria), Gaza, parts of Jerusalem (especially the Holy Places) and, although this is recently more controversial, the land on which the State of Israel exists according to international law.

Historically, difficulties in the region pre-date both Christianity and Islam, as in Egypt between Moses and Pharaoh and, subsequently, in the wars that the Israelites led by Joshua waged against the Canaanites. Even if the view that these wars were commanded by God is accepted, two issues complicate matters. The Israelites did not expel all those conquered left alive and two and a half of Israel's twelve tribes received land east of the River Jordan in what is today the Hashemite

Kingdom of Jordan. Without seeking to create obstacles but rather because some Israelis regard Judea and Samaria as theirs by divine right, and therefore as non-negotiable, it needs to be ascertained whether their binoculars are also focused on parts of the Kingdom of Jordan, even if any irredentist aspirations are presently *sotto voce*.

Although the authors understandably avoid these particular historical issues, David Novak, in *Religious Perspectives on War*, explains that formulating moral principles regarding war has been more difficult for Jews than for Christians and Muslims because until recently Jews lacked armies and political power of their own, and he mentions the intense debate within Israel about the extent to which Judaic tradition should inform or govern decisions of state.

O'Brien's *Law and Morality in Israel's War with the PLO* is a major work, written with courage and humanity, which is a profoundly original application of the just war principles and international law to the Arab-Israeli disputes. Since both Palestinians and Israelis are noted for their intellectual abilities, it is to be hoped that they will, eventually, publish similar works from their own perspectives. O'Brien takes the story up until March 1991, so readers will need to continue their chronology in the way O'Brien pioneered, by reference to press reports and subsequent publications.

The bulk of the book discusses the international law of war in Israel's war with the PLO and O'Brien, long-acquainted with the subject, is honest and thorough. The fact that he received the cooperation of the Israeli government does not in the slightest inhibit what he considers to be necessary criticism of Israeli wrongdoing and he finds much to criticize in PLO wrongdoing also. But these criticisms are made precisely because he applies the same principles to both sides, thereby entirely avoiding any suggestion of double-standards. This is, however, a tough-minded book. O'Brien is no pacifist and he speaks forthrightly on military matters that, in the view of Aquinas, are not suitable (*conveniens*) for the clergy to advocate to the same extent.

Reflecting that the book would have been less difficult to write if written entirely from the perspectives of just war doctrine, O'Brien states that he writes from the natural law tradition which gave birth to international law. However, he explains that he reverses the order of relative importance of the three main sources of international law so that general principles of comparative law, international law and natural law come first, then customary international law, the actual behavior and expectations of states, followed by conventional international law, valuable to the extent that it is in conformity with the two prior sources. In his view, Security Council practice has been based on a faulty model of the international political and legal system and unpersuasive legal arguments. He admits that his view contradicts the general opinion of those who interpret modern international war decision law. For O'Brien, Security Council practice has been unfair in that it has consistently refused to condemn PLO terrorism explicitly and has regarded the conflict as a series of violent episodes to be judged individually (thereby ensuring Israel's

condemnation according to the restrictive UN policy on reprisals) rather than as a continuing war of national liberation, which is the *raison d'être* of the PLO to fight against Israel, which is why Israel was at war with the PLO, in O'Brien's view. Indeed, Mayer, remarking on the PLO's nonsectarian policy reflecting its Muslim and Christian membership, states that the rector of al-Azhar in 1973 declared *jihad* against Israel obligatory for both Muslim and Christian Egyptians. (Later, al-Azhar ruled that the Egyptian-Israeli peace treaty did not violate Islamic law; Sadat's assassins disagreed.)

O'Brien faults the PLO for using terror as its principal, though not sole, method of armed struggle. He detests equally the throwing of Israeli children out of windows to their deaths at Kiryat Shemona in 1974 and the *laissez-faire* Israeli dereliction of duty (others might suppose complicity) in allowing massacres at Sabra and Shatilla Palestinian refugee camps in Beirut in 1982. The sections on Israel's invasion of Lebanon are among the most vivid modern commentary from a just war perspective. Throughout the book, despite necessary attention to complex legal issues, O'Brien seeks to provide a dependable way of assessing matters that is not vitiated by the moral unreliability of the UN at risk from self-serving vetoes and votes.

Although Western military power was decisive in the Gulf War, it was used partly for Western purposes but no less for vital Arab goals. *Engulfed in War* and *Religious Perspectives on War* both contain criticism of DESERT STORM in concept and execution and support for it, using the same terms of moral reference — the just war principles — to make their points, with criticism of the principles accompanied by suggestions on how to refine and improve them. Nevertheless, as Langan warns, not all criticisms of the Gulf War are of the kind that can properly be dealt with within the framework of just war theory. This is important lest moral discourse be lost if citizens talk past each other to the detriment of necessary joint action based on shared purpose.

As yet, no book on the Gulf War emulates O'Brien's magisterial work discussed above. The just war principles require application to a solid and dependable basis of factual occurrence, which itself needs establishing more fully and frankly. Here, only the briefest and most incomplete sketch of even a preliminary outline can be indicated. *Just Cause*: liberation of Kuwait, protection of Gulf Arab states and world access to their oil at a fair price without blackmail. *Legitimate Authority*: provided by Kuwait, coalition governments and unprecedented UN Security Council resolutions. *Right Intention*: liberation of Kuwait and regional security. *Last Resort*: Iraqi rejection of UN demands, approaching hot weather and Islamic fasting and pilgrimage seasons, military readiness and troop rotation difficulties prevented delay in launching DESERT STORM. In 1993, the inadequacy of sole reliance on sanctions is long since evident. *Prospect of Success and Proportionality of Resort to Force*: if defined as Kuwait's liberation and destruction of Iraqi capability for international aggression, including denial to it of nuclear weapons capability, was highly probable, with allied casualties expected to

be higher than occurred. *Discrimination*: aircrew risked their lives in compliance but whether sufficient understanding of the interaction of the military and civilian electricity, water and sewage facilities was available to target planners (despite officially stated attempts to put out of action only certain parts of individual facilities), and whether legitimate military necessity could have reasonably foregone any, even some, such attacks, so as to avoid causing death and disease to noncombatants, awaits official disclosure of classified information. *Proportion*: world order required reversal of Iraqi aggression, prevention of future Iraqi aggression, removal of the implicit threat to Gulf states and their oil, and destruction of Iraqi weapons of mass destruction and excessive conventional military equipment. Arguably, a premature ceasefire, based partly on an overestimate of destroyed Iraqi military equipment and partly on a moral miscalculation as to correct procedure toward armed Iraqi troops in flight, permitted escape of armed Iraqi troops and their subsequent use against popular uprisings. Verbal encouragement of anti-Saddam actions, unsupported by coalition assistance to Iraqis engaged in just rebellion, even when facing massacre in defeat, has meant that moral weighing of proportionality tends to merge overall assessment of DESERT STORM into that of the subsequent civil war.

The late Paul Ramsey regarded proportion as finally controlling, so as to avoid an outcome with more harm than good. Langan warns that proportion is a very slippery category and regards the Gulf War as "an imperfectly just war,"⁵ as he makes clear in *Religious Perspectives on War*. Langan is concerned both about civilian suffering and whether battlefield preparation by aerial bombing inflicted excessive casualties on Iraqi soldiers, and considers that fuller opportunities for them to surrender on the road to Basra at war's end were required. Langan recognizes that there is no question that troops in Kuwait and on the Iraq-Saudi border constituted a legitimate military target, nor that fleeing troops who have not surrendered are a legitimate military target. It is the necessity for such actions upon which their moral justification depends for Langan (and Aquinas) and which moral inquiry needs to ascertain. Moreover, the abrupt ceasefire, in Langan's view, constituted a decision to forego the removal of a brutal, repressive and aggressive dictatorship; protection of minorities inside Iraq; speedy and efficient provision of humanitarian relief to Iraqi noncombatants, which might have significantly lowered their death toll; and a more reliable removal of weapons of mass destruction from Iraq's arsenal than ceasefire provisions have achieved. Langan warns, finally, that proportionality can be violated both by excessive force and by failing to be steadfast in attaining the goods that can be realized.

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Endnotes

1. Cicero, *On the Commonwealth*, G.H. Sabine and S.B. Smith, eds., (Columbus, Ohio, 1929), Book 3, Ch. 22, pp. 215-16.
2. *Vatican Radio*, 24 December 1944.

3. Ibid., 24 December 1948.
4. John Cornwell, "The Next Pope?" *The Sunday Times Magazine*, 25 April 1993.
5. John Langan, S.J., "An Imperfectly Just War," *Commonweal*, 1 June 1991, pp. 361-65; "The Just War Theory After the Gulf War," *Theological Studies*, (March 1992), pp. 95-112; *Was The Gulf War a Good Thing?* A paper prepared for presentation at a symposium conducted by the U.S. Institute of Peace, Washington, DC, March 1992; *General Sherman, General Schwarzkopf and the Ethics of War*, Third Annual Jesuit Lecture in Human Values, (Milwaukee, WI: Center for Ethics Studies, Marquette University, 28 October 1992).