

## Just War

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### Abstract

*A question may be posed regarding the possible justification for war. There is no need to argue at length against war, given that everyone is aware of the great misery and destruction it causes. More interesting is the question of the possible routes and reasons which make war something excusable. This paper is dedicated to analysing these reasons.*

**Key-words:** War, Justice, Power, Authority, Influence, Iraq.

### 1. General Considerations about Just War

It is first worth differentiating between the ‘law of war’ (*ius in bello*) – that is, the collection of legal norms regulating the conduct of conflicts, to ensure such conflicts conform to the law – and the ‘right to war’ (*ius ad bellum*), as the power to declare and to engage in war. A justification for war would refer to both aspects. Nonetheless, the prevalent aspect would be the second, that is knowing whether it is legitimate to engage in war.<sup>1</sup>

The origins of the ‘law of war’ extend far back in time. Ancient peoples already had institutions such as alliances and truces. But for a long period, war was regulated principally by custom, though some primitive legislation contemplated certain norms relating to war. The central idea was discrimination against the foreigner, the ‘barbarian’, as in Rome. The Romans were also no strangers to laws of honour in war. But one has to wait until the French Revolution, and until the generalisation of the practice of intervening in war, for the first attempted regulation of war on paper, through international Conventions. This movement to codify the rules of war was consolidated following the two World Wars. Here it suffices to cite the Geneva and Hague Conventions regarding the treatment of prisoners of war, the protection of the civil population, the safeguarding of cultural assets in the event of war, and so on.

Examination of whether States have a ‘subjective right’ to declare war is more interesting. The modern era, as in the Spanish school of the 16th and 17th Centuries (such as Francisco de Vitoria), attempts to justify war through its connection with the ‘*ius gentium*’ or ‘*ius inter gentes*’ of the people among themselves, of the global community.

Another element to bear in mind when studying the possible justification for war is the fact that coercion is an essential element in rules of law. A constituent element of law is voluntary compliance or, in its absence, the imposition of a penalty in lieu. But how is this possible in international law, which lacks binding force with respect to its subjects, the States, which maintain their sovereignty and with respect to which little more than recommendations can be made? As there is no international authority and no international institutions similar to those of internal orders – though today we do have the International Criminal Court – it does not seem far-fetched, having exhausted the diplomatic route, to recognise a right (though it may only be in legitimate self-defence) to safeguard violated rights.

Uncompromised pacifism is somewhat unrealistic, beautiful in theory but impossible in practice. Humans are beings in which there is malice, often giving rise to conflicts, injustices, and breaches of human rights. The same thing occurs with populations, where frequently the most powerful and richest subjugate the poorest and most vulnerable.

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<sup>1</sup>María José Falcón y Tella. (2001). Guerra, Moral y Derecho: Sobre la justificación de la guerra. Revista Cooperación Internacional (International Cooperation), 7, 15-23. Id. Consideraciones acerca de la guerra. VariousAuthors. (2007). Cuestiones de Derecho Internacional y Política, edited by Prof. Pedro Francisco Gago Guerrero. Madrid: Servicio de Publicaciones. Facultad de Derecho. Universidad Complutense de Madrid, 29-45. Id. Las generaciones de derechos y la guerra. (2003). Anuario de Derechos Humanos. Nueva Época, 4, 35-55.

This is the case even to the extent that an institution as defensive of peace as the Church did not see incompatibility, in principle, between the office of soldier and the profession of Christian faith.

It is something else if war is then unjust in form and methods of practice. But, as a last resort, at least there would be a right to defend oneself against potential aggressions – a defensive, not offensive, war. One many think of the situation of Cold War on a global scale, maintained for years between the Western bloc, led by the USA, and the Eastern countries, headed by the USSR. The international order permits States to do ‘looking outward’ what ‘looking inward’ they must forcibly prohibit of their nationals. A question different from the legitimisation of defensive war, accepted in international law, is nowadays posed with respect to the justification of a ‘preventive’ war on the part of certain States, waged in anticipation of possible conflicts and terrorist abuses. The opinion of the international community is divided on this point.

Having reached this point, it must be stated that justified war is not the same as just war understood in its strict sense, as a historical demonstration of war. The former would be the genre within which the latter is found as a species. Not all justifiable or even justified war belongs to the category of just war. The doctrine of just war is propounded by a series of thinkers and doctrines that have developed the premises and requirements therefor. Taking a brief retrospective glance, just war was historically understood as a doctrine emanating from the classics – Aristotle, Cicero – continued in the Middle Ages – Saint Augustine, Saint Thomas Aquinas – and from there moving to the modern era, basically to the Spanish school of the 16th and 17th Centuries – Vitoria, Suárez, Molina.

The norms traditionally used in the doctrine of just war are the following: (1) the cause must be just; (2) war must be the last resort; (3) war must be declared by a competent public authority; (4) there must be a reasonable hope of victory; (5) the intention of the government engaging in war must not be grounded in hate, cruelty, or desire for revenge; (6) there must be proportionality between the good sought and the negative consequences that will arise; (7) the war must be properly waged, through the appropriate means.

Both for just war and in the broader case of justified war, we are faced with figures contrary to justice in the abstract, which absolutely defends peace and opposes any form of violence, but close to equity, as justice in the specific case, which in a specific international situation may make advisable the use of force. It would be necessary to study the specific situation in detail to see whether such justification existed<sup>2</sup>.

There is a classical distinction between ‘*auctoritas*’ and ‘*potestas*’. Someone has *authority* on the plane of values, while *power* is found on the empirical plane. When stating that a reputed thinker or Nobel Prize winner has great moral authority regarding public opinion on a particular matter in which they have expertise, with an accredited scientific or moral track record, we are alluding to voluntary obedience and an unconditional adherence to the opinion of such thinker or expert, derived from concepts such as prestige and respectability. It is to moral authority that we should all aspire.

In contrast, when contemplating a dictator who has subjugated a population under a tyrannical regime, the grounds for obedience do not lie in the love and respect of the people, in the dictator’s moral authority, but rather in the fear the dictator inspires in fact that force may be used against them. Out of necessity and risk to their lives, the subjects – rather than citizens – submit to the dictator’s orders. Here, adherence does not arise at the outset from the will of the obeying party, but at the last stage, before executing or acting upon the order. This is the phenomenon of *power*.

Together with the two previous concepts, authority (with moral connotations) and power (more compulsive), and between the two, we find the notion of *influence*. When stating that a minister or the dean of a faculty have influence, independently of whether they also, due to personal prestige or otherwise, have authority, we say they have the capacity to ‘impact on’ the will of others, achieving obedience. In this case the subjects acts as they wish, but not autonomously, because they are convinced, and nor because they are *de facto* obliged by force to act in this manner, but ultimately because, at an intermediate moment between autonomous formation of the will and its factual execution, a force outside of their initial will has ‘influenced’ and moved it in a different direction.

These three concepts – authority, power, and influence – may help us to attempt a proposed solution, which though admittedly somewhat utopian allows for the problem of the right to peace to be guided through an attempt to convert brute force into legitimate authority. As Talleyrand said, at least reputedly, to Napoleon: “The only thing you cannot do with a bayonet is sit on it”.

<sup>2</sup>María José Falcón y Tella.(2001).La desobediencia civil. Madrid: Marcial Pons, 110-116.

Coercion must result in recognition if one wishes to achieve obedience in the medium and long term<sup>3</sup>. In war, as in so many other real-life situations, the strongest do not need to use the toughest methods as they enjoy the ability to convince. At this point one thinks of the role of global superpowers, which lead the rules of play for war at a worldwide level and hold the strings of the lives of so many ordinary human beings, for whom a recognition of first and second generation human rights is of no use if war impacts on their lives and deprives them of the most basic of rights: the right to existence itself. This is hence a plea for the ‘masters of war’ to realise that, despite the threats of international terrorism and the need for international security, basic rights such as the right to freedom of information or the right to accurate information must not be violated, however much a ‘hypothetical potential future threat’ may lurk.

Perhaps in the confrontation between East and West underpinning the problem of terrorism and the crusade against it which is today underway, the thoughts of the German thinker Jürgen Habermas should be recalled<sup>4</sup> regarding dialogue, consensus, and communication as means of helping power to achieve authority and in turn peace, instead of seeking a solution via the route of conceding victories already won, the freedom of the first generation rights. Otherwise we will face a situation of involution, rather than evolution, in the fight for human rights. The rights generation cannot throw away such hard-won and significant victories as those which gave rise to the classical declarations – the French and the North American – of civil and political rights. Law is a victory that must be re-won, a constant fight to maintain against the dangers that may arise. But the fight is not an end in itself, rather a means to serve a greater end: peace.

Often, the most appropriate solution to a wrong is not another wrong in the opposing direction. As Gandhi proposed and made reality in India, a peaceful solution to conflict is often possible and, more importantly, is efficacious. Measures such as boycott, non-cooperation, and strike, advocated and employed by Mahatma, removed the British Empire – one of the great colonial empires of the time – from India. This does not mean that one can always conquer through good, but at least one cannot discard that in a large number of real-life situations, the peaceful route to resolution of hostilities would be an appropriate strategy.

We may consider a metaphor: a car travelling at high speed that crashes and comes off the road. If, in the first case, it hits another car travelling in the opposite direction, the impact will be great, being the exponential result of the opposing forces of both vehicles. But if, in the second case, we consider the car crashing into a wall, the impact for the passengers will be smaller, as the opposing forces will not multiply and the force in one direction, against the wall, will offer less resistance. Finally, we may go further and imagine – the third possibility – that in reality the vehicle hits something that does not offer resistance, such as a clothesline near to the hard shoulder. In this latter situation, the impact of the collision would be minimal, the car losing speed and force with no obstacle in its path.

The same as in the previous example may frequently be observed in everyday life, both in the individual experiences of any person and at international level in relations between States such as Palestine-Israel. If every blow from one party is met by an equivalent counter-blow, hate will become entrenched and conflict resolution will become very difficult if not impossible. The Bible teachings of the Sermon on the Mount should be recalled at this point, recommending ‘turning the other cheek’ when faced with an affront, urging us to offer our coat too when asked for our shirt, and if forced to walk a mile, calling us to walk two.

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<sup>3</sup>María José Fariñas Dulce. (1991).El problema de la validez jurídica. Preface by Gregorio Peces-Barba. Madrid: Civitas, 108-121. José María Rodríguez Paniagua. (1975). La validez del Derecho desde un punto de vista jurídico, socio-psicológico y filosófico. *Sociología y Psicología Jurídicas*, 2, 49-61, esp. 54 ff. María José Falcón y Tella. (1994). Concepto y fundamento de la validez del Derecho. Preface by François Ost. Madrid: Civitas, 259-293. There is a translation into Portuguese by Stefani Borba de Rose Trunfo – *Conceito e Fundamento da Validade do Direito*. Brazil: Livraria do Advogado, 1st. ed., 1998. 2<sup>nd</sup>. ed., 2000- and into English by Peter Muckley – (2000). *The Validity of Law: Concept and Foundation*. Brazil: Livraria do Advogado.

<sup>4</sup>Jürgen Habermas. (1986). *Moralität und Sittlichkeit. Treffen Hegels Einwände gegen Kant auch auf die Diskursethik zu?*. *Moralität und Sittlichkeit*. Frankfurt: Suhrkamp, 16-37. Id. (1975). Problemas de legitimación en el capitalismo tardío. Buenos Aires: Ed. Amorrortu. Id. (1981). Problemas de legitimación en el Estado Moderno. La reconstrucción del materialismo histórico. Madrid: Taurus. Juan Antonio García Amado. (1992). Justicia, Democracia y validez del Derecho en Jürgen Habermas. *Sistema*, 107 ff. Robert Alexy. (1989). *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*. Oxford: Clarendon Press, 131-138. Id. (1989). *On Necessary Relations between Law and Morality*. *Ratio Juris*, 2, 167-183. José Manuel Aroso Linhares. (1991-1992). Habermas y la argumentación jurídica. *Revista de la Facultad de Derecho de la Universidad Complutense de Madrid*, 79, 27-55. André Berten. (1980). *Légalité et Légitimité*. A propos de J. Habermas. *Revue Interdisciplinaire d'Etudes Juridiques*, 4, 1-29. Innerary. (1986). La teoría discursiva de la legitimidad de Jürgen Habermas. *Persona y Derecho*, 14, 233 ff.

It is the theme of non-resistance in the face of evil, as present in pacifist doctrines from all eras and places. We are not talking here of a magical, infallible solution allowing us to bring an automatic end to all conflict. We are instead offering a utopia, a vision or a dream from some minds that historically demonstrated the viability of this alternative. We may consider the cases of Socrates,<sup>5</sup> Jesus Christ, or Martin Luther King, Jr., which have passed into posterity by providing an example of acceptance of an unjust punishment, fraternal love, or non-discrimination.

This does not mean that the established power must always be obeyed. Sometimes it is necessary, as with Thoreau in North America, to raise one's voice and protest against an unjust law. It is in fact often easier to follow the trend and maintain the dictates of majority opinion than to push against the system and attempt to improve it. Fromm warned against the risks of 'fear of freedom' and that in order to disobey, one must be prepared to lose the security offered by society's protection. It is the theme of civil disobedience as a 'paralegal' alternative that permits us, without completely severing ties with the system, to nonetheless criticise certain unjust laws that may be obstructing democratic channels and imposing unjust majority decrees upon particular minorities, who, precisely due to their condition as minorities, will never be heard – even in democratic systems.

In other words, war must be the last resort, once peaceful avenues for conflict resolution such as civil disobedience, non-violent resistance, demonstration, and diplomacy have been exhausted. In addition, war has its 'user guide' as does any human product. Put simply, not everything goes. There are forms and rules of war, certain things that must be avoided in all circumstances, with no excuse to be found in the refrain that 'we are at war'. These forms and rules have naturally changed and evolved over time.

The same maxims cannot apply nowadays when technological advances at all levels have implied situations unthinkable in other times such as the Middle Ages. But one must be careful. It must again be warned that not everything goes, that we cannot replace traditional requirements developed by classical international law over the course of centuries as the only situations in which a war would be considered just and, hence, legitimate, however much the pace of the times and the new requirements of international security appear to lead us in other directions. It is again necessary to ask: who rules the ruler? No country, however much of a superpower it may be on a military, economic, or political level, can make us forget the existence of tenets such as respect for human rights and the civil and political liberties that absolutely everyone, without exception, must respect.

## **2. Was the War in Iraq a Just War?**

We now consider whether the traditional requirements to be met in order to describe a war as just were met in a case that, as with Vietnam but more recently, aroused public opinion in a series of debates and protests regarding military intervention: the Iraq war following the strikes on the Twin Towers that marked a new era in the matter.

Such requirements are:

**1. There must be a just cause.** In this regard, the 'cause' must not be confused with the motive, the 'reason'; nor must the official cause be confused with the true causes, such as economic or strategic interests. Causes are often not entirely clear, or are not open to public opinion due to the manipulation the media may exert. In the case of Iraq, it appears that below the pretext – safeguarding international security – were underlying causes and economic and strategic motives driving the action.

**2. War must be the last resort.** With respect to this second aspect it should be noted that diplomatic routes to seek a peaceful resolution to the conflict must be exhausted. In the case of Iraq, it is very possible that the diplomatic route was not exhausted.

**3. War must be declared by a competent public authority.** This is the previously mentioned *ius ad bellum*. On this point, there are wars such as Vietnam in which the Congress of the USA included no formal cause in its declaration of war, a requirement 'left aside' because 'waiting' was not desirable, taking military action that 'unilaterally advanced' events. In the case of Iraq, intervention also occurred without waiting for the decision of UN, certain forces insisting on an initiation that was later strongly questioned.

**4. The intention of the government declaring war must not be grounded in hate, cruelty, or the desire for revenge.**

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<sup>5</sup>José Iturmendi Morales. (1997). Proceso y muerte de Sócrates. Un sabio ante la justicia de su tiempo. Grandes abogados, grandes procesos que hicieron historia. Pamplona: Aranzadi, 155-159.

Here, though it must be acknowledged that the situation in the country under attack, insofar as poverty and respect for human rights are concerned, may be described as calamitous, it is no less certain that the episodes precipitating and pressuring the armed intervention were at the forefront of the minds of all the population, and were not entirely removed from the desire for revenge. In the minds of no few Americans, the deaths caused by the terrorist attacks of September 11 remained very present.

**5. There must be a reasonable hope of victory.** Again, reality often confounds predictions of how certain wars will unfold: quick offensives, given the military supremacy of the attacking forces. But it is clear that the death toll, on both sides, often reaches proportions difficult to imagine, and not only during the conflict but principally at its end, when managing the peace and the reconstruction of the country. It is thus not certain whether the hope of victory is, *a posteriori*, as reasonable as it may at first glance appear. This was the case in Iraq.

**6. The good sought must not be disproportionate to the collateral damage.** The statements of point 5 are equally applicable here. It is true that military interventions can sometimes be justified because the country under attack was living under tyranny and the government was abusing an enormous civil population, but is the new situation much better for those inhabitants? Was war the best of remedies? Could other approaches have been attempted? What has the outcome been? These are questions that must be weighed up prior to embarking on a war, and Iraq is a good example of this.

**7. The means used during the war must be appropriate.** This alludes to *ius in bello*. On this point, it is necessary to highlight that the current tendency is to attempt surgical wars, but beyond the inevitable damage in any armed conflict – the unintended death of women, children, and a large number of non-combatants – which must, at least to an extent, be considered inevitable, what could and should be avoided in any case are violations of human rights, which are an affront to the conscience of a civilised world. Also worthy of being denounced are certain acts which, despite being contrary to the ‘uses of war’, are used as a means of placing pressure on the enemy, in breach of the provisions of the Geneva Conventions on the treatment of prisoners of war. To offer examples from Iraq in this regard, the principle of not photographing prisoners of war was violated when images emerged on mainstream North American channels of prisoners of war taken hostage as well as very graphic images of torture supposedly inflicted by the American army upon the captured local population.

### ***3. Evolution of the Concept of Just War after September 11 Terrorist Attacks***

Just as a wrongful action, such as killing, may be justified on a personal level when committed in legitimate self-defence, classical international law justifies “defensive” war, such as when a third State invades the territory of another. Modern international law is faced with the problems of international terrorism and especially in the eye of the storm following the notorious events of September 11 that brought to the ground – figuratively and literally – one of the great symbols of North American power, the Twin Towers. Its great challenge consists of evaluating the legitimacy of a ‘preventive’, not classically defensive, war when faced with potential episodes of this kind. This debate is the burning question underpinning such controversial interventions as the Iraq war.

Another change experienced in the classical concept of war following the fall of the Berlin Wall and the end of the bipolar split of the world into blocs led by the USA and the former USSR consists of the movement from an ‘armed peace’, which through the proliferation of nuclear armament made good the saying ‘if you wish for peace, prepare for war’, to the opposite situation of ‘pacifist war’, in which, for example, humanitarian aid is not subsequent to the conflict as occurred in the Marshall Plan and on other occasions, but prior and simultaneous to it.

Additionally – this being the third difference compared with how war was understood – there has been a movement from the threat of atomic, ‘total’ war, which would not distinguish between civil and military targets, to wars planned as short conflicts with the minimum collateral damage. This is possible to an extent thanks to the advance of the machinery and technology of war, to which substantial parts of superpower budgets are dedicated.

As a fourth difference, there is also a new figure, the ‘human shield’, against the classical figure of the hostage. These are members of the State at war, of a third State, or of the invading State, used in an involuntary fashion – though voluntary shields may also exist – to impede and obstruct, with their own bodies, the possibility of enemy attack.