

Commentary  
on  
William V. O'Brien's  
"Just War Doctrine's Complementary Role  
in the International Law of War"

by  
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**W**hen I first read Professor O'Brien's work over ten years ago, I immediately noted an unusual blending of "just war" and "law." Not only were these two disciplines commingled, but Professor O'Brien used unique language of his own creation to continually remind the reader of their strange cohabitation.

In March of 1983 in a symposium on "The Role of Special Operations in US Strategy for the 1980s," Professor O'Brien delivered a paper entitled, "Special Operations in the 1980s: American Moral, Legal, Political, and Cultural Constraints."<sup>1</sup> For many years, Army War College students in their formal critiques have indicated that this paper is the most important article that they read while at the Army War College. Its thesis adds practicality to an appropriate integration of "just war theory" and "law."

The thesis of this 1983 paper is central to our discussion. Professor O'Brien stressed the linkage between political and cultural constraints and moral and legal terminology when he argued: ". . . it is clear that in a free society such as the United States, legal and moral issues, both real and spurious, are central to the successful conduct of war."<sup>2</sup> After discussing in the most practical of terms such matters as the nature of supported regimes, intervention, and war conduct, he went on to conclude: "The best rule simply stated: observe the highest practicable standard of just war and international law irrespective of the legal status of participants in or victims of the conflict. That is good morality and law, good policy and public relations."<sup>3</sup>

Army War College students restate and build upon these themes. To them, the Vietnam War demonstrated that the Clausewitzian center of gravity for a democracy is sustaining political support for the difficult decision to use force. When the government communicates with its people regarding the use of force, it necessarily does so in moral and legal language.<sup>4</sup> Such language and concepts come to us from an ancient just war tradition and from a respect for the wisdom of the rule of law. Not only do military officers in a democratic polity need to

understand and comply with legal, moral, and cultural constraints on the use of force, they must also internalize this moral and legal language so that they will be able to appropriately communicate with the citizens that they serve. Recent events have demonstrated in a powerful way the practicality of Professor O'Brien's theory.

Military operations involve planning, training and execution. More recently, they have begun to require justification. This phenomenon became discernible in the speech by President Reagan following the Libyan raid.<sup>5</sup> In every major operation since, uniformed officers have participated in televised public briefings reporting on current military operations. Indeed, our most talented "operators," because of their expertise and current knowledge, may well be required to become our public spokesmen. This prospect adds direction and urgency in the development of curricula for the education of senior officers. It also further reinforces Professor O'Brien's practical thesis.

The education of senior officers requires a theoretical, interdisciplinary approach. Stressing fundamental truths, underlining principles, and tracing the historic development of ideas are far more important than the teaching of current issues or rules. In this interdisciplinary approach, each discipline has its own unique contribution. Experience has taught me that an analysis of operational problems that combines just war theory, domestic and international law, history and management information insures sound public policy. The best example, in my judgment, of such writing can be found in Guenter Lewy's Book, *America in Vietnam*, in Chapter 7, "American Military Tactics and The Law of War."<sup>6</sup> This chapter is vital reading for military officers who wish to extract professional lessons from the Vietnam War. Such a rigorous, interdisciplinary, historical analysis seems to be at the heart of Professor O'Brien's plea.

In the paper before us, Professor O'Brien goes beyond an interdisciplinary approach to national security problems by advocating that just war theory "complements" international law. He thus seems to be moving beyond comingling to intermarriage. Historically, he notes that legal positivism displaced just war theory in the 19th and early 20th centuries. However, the "collapse of the positive international law of war in the total wars of World War I and II, the nuclear balance of terror, the multitude of revolutionary/counterinsurgency wars complicated by multiple interventions and counterinterventions, and the increase in terrorism"<sup>7</sup> has produced a need to "shore up" legal "weak points" with the disciplined, rigorous analysis required by the just war tradition.

Personally, I am both repulsed, attracted, and intrigued by this approach. The advantage of law is certainty, and many would argue that nebulous just war theory detracts from it. In our secular society, instinct tells us that one should be very careful not to let "religious ideas" intrude into the law. Will we selectively use just war theory only if the law is not on our side and we need to bolster our

argument? Simplistically, self-defense under the UN Charter is our only “just cause,” so why talk about just war anymore?

Practical experience attracts me to Professor O’Brien’s approach. I am persuaded by his comparison of the strong and weak points of just war tradition and international law. Practically, the integration he advocates of just war theory and law will occur in war-decision law where international law is at its weakest, or, in Professor O’Brien’s words—“somewhat limited and rather mechanical.”<sup>8</sup> He seeks to deal with the difficult decision to use armed force and to help us conduct ourselves so as to sustain support for that decision. As noted above, this is *the* Clausewitzian center of gravity in our democracy. His plea is to surmount a limited, mechanical, checklist, legalistic approach to decision making with a comprehensive, realistic analysis balancing means and consequences against probable outcomes.<sup>9</sup>

How does one practically achieve a more central role for just war tradition in shaping government policy on the use of force? Professor O’Brien’s approach clearly requires more effective communication among the members of the Clausewitzian trinity—the people, the military and the government. The distinguished writer on military affairs, Colonel Harry G. Summers, has also noted that there is a requirement to engage the national will, to gain public support, and to obtain and sustain national and international consensus.<sup>10</sup>

These necessities seem to have been reflected in then-Secretary of Defense Caspar Weinberger’s tests for going to war articulated in his November 1984 National Press Club address — “The Uses of Military Power” — which have become known as the Weinberger Doctrine.<sup>11</sup> Articulated at a time when there was a general disenchantment with the relevance of international law to foreign policy, Secretary Weinberger’s text does not mention the United Nations, does not mention international law, and does not acknowledge any legal prohibition against the non-defensive use of force. When the law was in danger of fracturing and was not representing a working international consensus, Secretary Weinberger revived the just war tradition in an attempt to place intellectual “bench marks” for public discussion in a search of consensus.<sup>12</sup> Is not this approach similar to that proposed by Professor O’Brien? Our countrymen are not unprepared for such a debate. In the Gulf War debate, as noted recently by George Weigel in his portion of *Just War and the Gulf War*: “there has rarely been such a sustained (and in many respects, impressive) public grappling with the moral criteria and political logic of the just war tradition.”<sup>13</sup> In the context of the “revived” respect for the United Nations Charter, is such a discussion not the plea of Professor O’Brien? The practical importance of our discussion cannot be overstated. Professor O’Brien’s intermingling of just war tradition and international law is an important step toward a more rigorous, interdisciplinary approach to use of force issues.

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### Notes

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1. O'Brien, *Special Operations in the 1980s: American Moral, Legal, Political, and Cultural Constraints. Special Operations in US Strategy* 53-84 (Barnett, Tovar, and Shultz, eds. 1984).

2. *Id.* at 55-56.

3. *Id.* at 71.

4. See GOLD, *EVASIONS: THE AMERICAN WAY OF MILITARY SERVICE* 5-6 (1986); Philip Gold provides a succinct articulation of the usefulness of the just war tradition. The just war heritage, then, is far more than some philosophical tinker toy, designed for the amusement of pedants and obscurantists far removed from the battlefield. It is also more than a simple ethical checklist whose mechanical use guarantees either moral decision making or prudent policy. Rather, the just war heritage provides a conceptual framework within which the individual must evaluate his or her responses to armed conflict, and then communicate those responses to the larger society, and to society's agent, the State. And the just war heritage also provides the conceptual framework by which society and State must justify any recourse to arms, and the standard by which that recourse must be judged.

5. President's Address to the Nation, United States Air Strike Against Libya, 1986 Pub. Paper 499 (April 16, 1986); To make a practical teaching point, I often provide my students with a copy of this address and with the just war criteria requesting that they outline President Reagan's remarks from a just war point of view. This exercise underscores immediately the relevance of the just war study that follows.

6. LEWY, *AMERICA IN VIETNAM* 223-270 (1978).

7. O'Brien, *supra* at 181.

8. *Id.* at 191.

9. Philip Gold articulates the fallacies in thinking that international law is the answer for determining whether a country should go to war.

... reasoning upholds a basic premise of contemporary international law: that nations may resort to arms only in individual or collective self-defense, and then only in response to a prior and clearly defined act of territorial aggression. In effect, this formulation ... declares that response to physical invasion constitutes the only legitimate *casus belli*, adding to the implicit corollary that if everyone is forbidden to shoot first, no one will shoot at all.

On the surface, this seems an eminently logical piece of reductionism, and quite in keeping with allegedly traditional American values. First shot equals aggression; aggression equates to international crime; defense thus automatically acquires both legitimacy and limitation—the limitation of repelling the aggressor, but no more. All in all, a tidy little formulation in which the only relevant question becomes, 'Who started it?'

... it ignores the existence of a continuum of conflict, especially the exceedingly complex twentieth century continuum. Few modern conflicts ever exhibit such an unambiguous character. 'Who started it?' is rarely as simple a question as 'Who fired first?' Further, most contemporary conflicts exhibit a 'mixed' character: part civil war, part ideological struggle, part international (or proxy) war. In such cases, the question of who fired first may prove not only irrelevant, but also impossible to determine.

See GOLD, *EVASION: THE AMERICAN WAY OF MILITARY SERVICE* 15-17 (1986).

10. SUMMERS, JR., *ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR* 5-59 (1992); See also, SUMMERS, JR., *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* 33-70 (1982).

11. WEINBERGER, *FIGHTING FOR PEACE: SEVEN CRITICAL YEARS IN THE PENTAGON* 433-445 (1990).

12. ECKHARDT, 'WE THE PEOPLE' GO TO WAR IN THE RECOURSE TO WAR: AN APPRAISAL OF THE "WEINBERGER DOCTRINE" 69-74 (Sabrosky and Sioane eds. 1988).

13. JOHNSON AND WEIGEL, *JUST WAR AND THE GULF WAR* 48-49 (1991).