Desert Storm: A Just War Analysis

William V. O'Brien

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
DESERT STORM: A JUST WAR ANALYSIS

WILLIAM V. O’BRIEN*

I. INTERNATIONAL LAW AND JUST WAR DOCTRINE: COMPLEMENTS AND ALTERNATIVES

In the contemporary era, awareness in the United States of the need to impose normative restraints on armed conflict has increased markedly. This awareness has been reflected, particularly since the Vietnam War, in the efforts of the U.S. government to comply with existing international law governing recourse to armed force and the conduct of military operations.¹ However, the task of interpreting and applying international law in the contemporary international system has been difficult. One reason for this difficulty is that international law is developed in part by an examination of “the practice of states.”² This examination has become increasingly more difficult as the system of states has grown from about fifty to over 150 heterogeneous states. In the case of the international law of war, an additional difficulty has been to relate the law to the daunting spectrum of possible uses of force ranging from nuclear deterrence to low intensity conflict in revolutionary and/or counterinsurgency wars.

Awareness of the limits of modern international law has helped bring about a revival of just war doctrine. At first the just war literature tended to concentrate on the dilemmas of nuclear deterrence and defense. Soon, however, the Vietnam War attracted just war analysts as the debates over war became increasingly concerned with moral as well as legal issues. By the end of the Vietnam War, it was clear to the American government and military that future military preparations, commitments, and operations

---

* Professor of Government, Georgetown University. Professor O’Brien is the author of The Conduct of Just and Limited War (1981) and Law and Morality in Israel’s War with the PLO (1991).


² JAMES L. BRIERLY, THE LAW OF NATIONS 59 (Humphrey Waldock ed., 6th ed. 1963). “Custom” is an established source of international law; it is found “only by examining the practice of states.” Id.
would have to be justified to the country both in legal and in moral terms.  

The result has been an increasing trend towards recourse to just war analyses of national security measures, either as comple-
ments to or as substitutes for international legal analyses. Al-
though substantial overlaps exist between the international law of 
war and modern just war doctrine, two major differences should be 
recognized. First, international law has traditionally been based on 
the principle of the sovereign equality of states. All states, 
whether they could be judged to be good or bad by some standard, 
had the same rights and duties. Accordingly, the war-decision law 
governing recourse to armed force does not admit distinctions be-
tween states until one breaks the “no first use of force” rule em-
embodied in article 2, paragraph 4 of the U.N. Charter. Similarly, 
international war-decision law tends to insist on an absolute prin-
ciple of non-intervention and resists efforts to justify interventions 
that purport to be morally enjoined. International war-conduct 
law, likewise, emphasizes the equality of all belligerents, however 
apparently good or bad they might be, and purports to govern the 
conduct of war through universal rules applied irrespective of the 
stakes or circumstances of the conflict. Just war doctrine, on the 
other hand, recognizes the need for comprehensive evaluation of 
the ends and means of war in the specific context of each conflict. 
In so doing, just war doctrine goes beyond the “no first use of 
armed force” and “non-intervention” principles of international 
law and provides a much more complex framework for war-deci-
sion law. At the same time, just war doctrine actually imposes po-
tentially greater limits on war-conduct than international law. 
Rather than a sharp separation of war-decision and war-conduct 
law, just war doctrine brings them together in a comprehensive an-
analytical framework. Just war analysis thus requires the reconciliation of war-conduct with the just cause claimed in the war decision. Accordingly, a military action may be legally permissible but not morally permissible if it conflicts substantially with the overall purposes of the just war.

The second important difference between the international law of war and modern just war doctrine lies in the basis of obligation for complying with these two sources of normative regulation. Among the many jurisprudential theories that touch upon the basis of obligation in international law, it is fair to say that in the contemporary era the most cited basis for obligation is the explicit and/or implicit consent of states to obey the principles and prescriptions generally accepted by the majority of states. These principles and prescriptions are found in the primary sources of international law, namely, international conventions and custom and general principles of law held by civilized nations. Also, they may be ascertained to some extent from the decisions of international and national tribunals and the writings of publicists. This basis of obligation, however, is vulnerable. In an international system containing numerous and diverse actors, states may dissent from the apparent general consensus and refuse to submit to widely accepted international legal prescriptions.

Just war doctrine, on the other hand, does not depend upon consensus among states—although it would welcome consensus. Indeed, just war doctrine, particularly those versions produced by official Catholic sources, is at great pains to include and promote international law in its elaboration of restraints on use of force. But the basis of obligation for just war doctrine is moral. Just war doctrine was developed to guide consciences, not only of individuals but indeed of whole sociopolitical entities.

Just war doctrine is intended to guide the consciences of political and military decision-makers, of those who implement decisions, and of ordinary citizens. It is also intended to guide the collective or corporative consciences of nations. Thus, the basis for obligation is not simply consent to international legal norms, but lies in the need of individuals, whatever their stations in life, and of whole sociopolitical entities to square their actions with their

---

*See id. at 49-56 (discussing natural law and positivism).*

*See id. at 50-54 (discussing positivist theory that international law is sum of rules to which states have consented).*

*See id. at 56 (discussing sources of modern international law).*
moral beliefs. If these individuals believe in God, the basis of obligation for just war doctrine is the necessity of justifying recourse to war and the conduct of war to God. For believers, hypocritical exploitation or manipulation of just war doctrine—something that is obviously quite possible—is unthinkable.

II. JUST WAR DOCTRINE: AN OVERVIEW

Just war doctrine was essentially a product of Catholic scholarship and practice until the Reformation. Originating with Saint Augustine, it was developed by the Scholastics and canonists, notably Saint Thomas Aquinas, Francisco Vittoria, and Francisco Suarez. As it developed, classic just war doctrine was a blend of Catholic theology, canon law and natural law political and social theory, augmented by the customary practices of belligerents, particularly in the Age of Chivalry. Just war doctrine languished as the modern international system developed and as various positivist philosophies prevailed over natural law approaches. However, the horrors of two World Wars, the Holocaust, the advent of the nuclear age, and the endless revolutionary/counterinsurgency wars of the last half of the twentieth century have led to the revival of just war doctrine. Rooted in both theology and philosophy, this revival has been markedly ecumenical. The leaders in the development of modern just war doctrine have been Protestants such as Paul Ramsey and James Turner Johnson, Catholics such as Father John Courtney Murray, S.J., Father J. Bryan Hehir, and the author, and the Jewish humanist Michael Walzer. In recent years, just war doctrine has been increasingly employed by the Catholic Church, notably in the American Catholic Bishops 1983

10 Alfred Vanderpol, La Doctrine scolastique du droit de guerre (1919).
14 See John C. Murray, We Hold These Truths 249-73 (1960) (chapter entitled "The Uses of a Doctrine on the Uses of Force").
16 See O'Brien, supra note 1; William V. O'Brien, Law and Morality in Israel's War with the PLO (1991).
pastoral, *The Challenge of Peace.* Accordingly, modern just war doctrine can be viewed as having a theological base, or it can recommend itself simply on the basis of its plausibility and practicality as philosophical ethics or as common-sense public policy guidance.

Just war doctrine is based on several assumptions. It assumes that human beings are by nature social and political, and that they thus require political society to lead a good life. It assumes, therefore, that political society is a good in itself, a good worthy of defense. Accordingly, just war recognizes a natural right of self-defense, which is not merely a right to defend the members of the political society but a right to defend the political society itself.

Nonetheless, just war doctrine recognizes that self-defense requires killing, injuring, and destroying. A moral presumption exists against these actions which must be overcome for a war to be deemed just. The requirements of just war doctrine constitute the conditions for overcoming the presumption against war.

Just war doctrine, like the international law of war, is divided into two categories. The first is war-decision law, traditionally known as the *jus ad bellum,* which sets the requirements that must be met to overcome the presumption against recourse to war. The second is war-conduct law, or *jus in bello,* which regulates the conduct of war.

The just war *jus ad bellum* requires that the just belligerent have recourse to war under “competent authority” for a “just cause” and that the just belligerent show “right intention.” For the just belligerent to show “just cause,” several inquiries must be made. First, the substance of the cause must be just. Second, the just belligerent must possess comparative justice *vis à vis* the adversary. Third, in light of the probability of success, the means to be employed and the expected damage must be proportionate to the good to be achieved by the accomplishment of the just cause.

---


Finally, reasonable peaceful alternatives must have been exhausted.

The just war *jus in bello* requires that the just belligerent respect the principles of proportion and discrimination or non-combatant immunity, as well as the positive international laws of war, in the conduct of the war. The meaning of these just war conditions will be explored in my subsequent analysis of Desert Storm.

All of the just war conditions must be substantially satisfied. But no war, however justified, is likely to meet these conditions in every respect. A just war analysis must weigh the extent to which the conditions of *jus ad bellum* and *jus in bello* have been met and must judge the moral permissibility of the war for the putatively just belligerent. It should be emphasized that, contrary to some formulations in classical just war doctrine, modern just war tends not to emphasize that a belligerent is "just" so much as "justified." "Morally permissible war" would be a better rubric, but "just war doctrine" or "tradition" is so firmly established in moral discourse that it remains the dominant term.21

It is important to understand that just war doctrine differs fundamentally from various forms of holy war.22 Holy war, whether in religious versions such as in the Christian religious wars23 or in some applications of Muslim concepts of *jihad*24 or in some contemporary secular versions of the broad concept of wars of national liberation, tends to deprecate or even reject the limitations of any war-conduct law. Holy war doctrinists tend to justify all means in service of the putatively just cause. Moreover, just war doctrine and religious holy war doctrines differ with respect to the relation

21 See O'BRIEN, supra note 1, at 14. "Permissible war conveys the basic thought that recourse to war is an exceptional prerogative that has to be justified, not a right readily available to those who consider themselves just." Id.

22 But see JOHNSON, supra note 11, at 9-11. Johnson believes that classic just war doctrine is consistent with holy war doctrine. A separate holy war doctrine arises where religion is the most just cause to validate a war. Id. at 11. Moreover, holy war doctrine complements modern just war doctrine, which allows only natural law justification for war. Id.


24 See generally Bruce Lawrence, Holy War (Jihad) in Islamic Religion and Nation-State Ideologies, in JUST WAR AND JIHAD, supra note 23, at 141 (discussing examples of jihad); Abdulaziz A. Sachedina, The Development of Jihad in Islamic Revelation and History, in CROSS, CRESCENT AND SWORD, supra note 20, at 35 (discussing development of jihad and its moral and religious justifications).
of the belligerents to God. Holy war doctrines tend to extend divine mandates to the faithful, to treat them as direct instruments of God. Just war doctrine, particularly in its modern formulations, does not claim any divine mandate. It simply holds itself out as a guide to those who would justify their actions before God.

III. DESERT STORM: WAR DECISION LAW (Jus ad Bellum)

A. Competent Authority

The just war condition of competent authority requires that public force be employed under the authority of officials who have the legal right to commit their State to war. (In this case it is unnecessary to grapple with the difficult question of evaluating claims to competent authority by leaders of revolutionary movements.) In the case of Desert Storm, President George Bush had competent authority from two sources: the Constitution of the United States and the Charter of the United Nations as implemented by the Security Council.

President Bush deployed U.S. forces in the Persian Gulf area on August 7, 1990, following the invasion, conquest, and occupation of Kuwait by Iraq on August 2, 1990. He did so by virtue of his powers as Commander-in-Chief under article II, section 2 of the Constitution. These powers have been broadly interpreted and applied by presidents such as Abraham Lincoln, Franklin Roosevelt, Harry Truman, Lyndon Johnson, Ronald Reagan, and George Bush himself. These broad interpretations of Article II

25 See O'BRIEN, supra note 1, at 158-62.
27 U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States"). But see Michael J. Glennon, The Gulf War and the Constitution, FOREIGN AFFAIRS, Spring 1991, at 84 (arguing that Bush administration, by engaging in Gulf War, circumvented Constitution's mandate for congressional declaration of war).
powers have often evoked congressional protests on the grounds that they infringe on the power of Congress to declare war under Article I, Section 8 of the Constitution.\textsuperscript{29} In 1973, Congress enacted the War Powers Resolution in an attempt to regain control over the commitment of U.S. forces to wars and/or to areas where hostilities threatened.\textsuperscript{30} In practice, presidents since 1973 have generally declined to comply fully with the requirements of the War Powers Resolution, claiming that its constitutionality is questionable in that it encroaches on the president's rights and duties as Commander-in-Chief.\textsuperscript{31} Neither the Congress nor the Executive, however, has seemed anxious for a constitutional confrontation in the courts. As a result, presidents have gone to some lengths to advise the congressional leadership and report to the Congress regarding their decisions to commit U.S. armed forces; moreover, they have elicited congressional support for such decisions without conceding that such support must take the form of formal authorizations, including declarations of war.\textsuperscript{32}

In the 1990-1991 Persian Gulf crisis, President Bush committed U.S. forces for two initial purposes: to enforce a naval blockade against Iraq and to build up a force to defend Saudi Arabia and the Gulf States from further Iraqi aggression.\textsuperscript{33} Bush made these commitments under his powers as Commander-in-Chief. His ac-

\textsuperscript{29} U.S. Const. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War . . . .").


\textsuperscript{31} See Glennon, supra note 30, at 88 n.33-34. Glennon discusses the grounds for President Nixon's veto of the War Powers Resolution, notes the Reagan administration's objections to the resolution, and asserts that the Resolution is, in fact, constitutional. Id; see also Caspar W. Weinberger, Dangerous Constraints on the President's War Power, in The Fettered Presidency 95-101 (Gordon Crowvitz & Jeremy A. Rabkin eds., 1989) (discussing unconstitutionality of Resolution and dangerous effects on United States foreign policy).

\textsuperscript{32} See Turner, supra note 28, at 121-27 (discussing compliance with Resolution by Ford administration in Mayaguez rescue, by Carter Administration in Iran hostage rescue attempt, and by Reagan Administration in Grenada and Libya).

tions appeared to elicit wide Congressional and public support. However, on November 8, 1990, President Bush ordered approximately 200,000 troops to reinforce U.S. forces already in the Gulf area, bringing the American deployment to approximately 430,000 troops—an "offensive military option." Bush's move prompted criticism from congressional Democrats and activated a debate on the wisdom of taking the offensive against Iraq that culminated in the congressional debates on a Joint Resolution supporting the President in January 1991. On January 12, 1991, Congress passed the Authorization for Use of Military Force Against Iraq Resolution. The Resolution took effect on January 14, 1991, when it was signed by the President, and it authorized use of force "pursuant to United Nations Security Council Resolution 678."

Clearly, President Bush's unprecedented success in gaining formal Security Council support for enforcement actions against Iraq, both in terms of legal mandates and commitment of armed forces and vital support, was critical to winning the formal support of the Congress. Under U.S. leadership, the Security Council passed a series of resolutions that constituted the first clear Article 42 enforcement in the history of the United Nations. Security

---

36 Id. (quoting President Bush).
37 See Michael Weiskopf, Democrats Criticize Gulf Policy, Wash. Post, Nov. 12, 1990, at A1 (noting warning by Democratic leaders that congressional approval was necessary to commit American forces to hostilities).
40 Id. § 2(a).
42 See U.N. Charter art. 42. Article 42 provides the following:
Council Resolution 660 of August 2, 1990, the first of these resolutions, condemned Iraq’s invasion of Kuwait and demanded its withdrawal. Resolution 660 was followed by other resolutions that addressed the potential for recourse to armed force. Specifically, Resolution 665 established an economic embargo against Iraq; Resolution 670 expanded the embargo to include air traffic and authorized detention of Iraqi ships used to break the embargo; and Resolution 678 authorized U.N. members to use “all means necessary” to enforce the previous resolutions and set a deadline of January 15, 1991 for Iraq to comply. Accordingly, when Iraq refused to comply, President Bush was able to request congressional support for U.S. leadership in carrying out an article 42 Security Council enforcement action against an aggressor.

I conclude that the combination of the President’s powers as Commander-in-Chief, strengthened by the Authorization for Use of Military Force Against Iraq Resolution, combined with the Security Council's actions, together permitted the U.S. to enforce U.N. resolutions against Iraq.
curity Council resolutions on the Gulf crisis, particularly resolutions 665 and 678, gave President Bush the strongest claim to competent authority to employ armed force of any American president since Franklin Roosevelt.

B. Just Cause

I will include within the broad category of Just Cause the following: the substance of the cause, the comparative justice of the adversaries, the proportionality of contemplated means to the just ends, and the exhaustion of peaceful remedies for the putative just party.

1. Substance of the Cause

The substance of the cause of the United States and its coalition partners is authoritatively stated in the Department of Defense's July 1991 Interim Report to Congress, Conduct of the Persian Gulf Conflict:

Stating on August 5th [1990] that "this shall not stand", President Bush framed US national policy objectives:

* Immediate, complete, and unconditional withdrawal of all Iraqi forces from Kuwait;
* Restoration of Kuwait's legitimate government;
* Security and stability of Saudi Arabia and the Persian Gulf; and
* Safety and protection of the lives of American citizens abroad.49

These objectives clearly constituted several just causes: recovery of Kuwait, the victim of unjust and unlawful aggression; defense of Saudi Arabia and the Gulf States against the clear and present danger of further Iraqi aggression; restoration of security and stability to the Gulf area, vital for the world's economy and to peace in the region; and protection of American nationals denied fundamental human rights by the Iraqi regime.50

50 See O'BRIEN, supra note 1, at 20. An adequate basis for evaluating the substance of the cause requires that the it be "sufficiently 'serious and weighty' to overcome the presumption against killing in general and war in particular." Id. (quoting James F. Childress,
2. Comparative Justice

Evaluating the comparative justice of the parties to the conflict is a complex matter. In the long period of the NATO-Warsaw Pact confrontation, it was not difficult to conclude that the comparative justice of the NATO countries far exceeded that of the Warsaw Pact countries. Successful aggression by the Warsaw Pact would have meant subjugation to some of the most democratic, rule-of-law countries by oppressive totalitarian dictatorships. Similarly, Kuwait, Saudi Arabia, and the Gulf States do not compare well with the NATO countries in terms of comparative justice. They are undemocratic, authoritarian states with serious shortcomings insofar as human rights are concerned. Nonetheless, these Middle East countries have been relatively stable, prosperous, and able to maintain large numbers of foreign workers in conditions more favorable than those that foreign workers may have found in their countries of origin. Iraq, on the other hand, has suffered from an extremely violent form of totalitarian regime. Minorities and dissidents have not been merely disadvantaged in Iraq, but persecuted, sometimes by genocidal measures as in the case of the Kurds. Even before the Iraqi conquest of Kuwait, one could have predicted an Iraqi occupation of that or any other country would be extremely harsh and repressive. In the months between the August 1990 invasion and occupation of Kuwait and the beginning of the U.S./U.N. coalition resort to force, there had been abundant evidence that Saddam Hussein's forces were destroying

Just-War Criteria, in War or Peace: The Search for New Answers 39, 46 (Thomas H. Shannon ed., 1980)). Such causes include 1) “to protect the innocent from unjust attack,” 2) “to restore rights wrongfully denied,” [and] 3) to re-establish a just order.” Id.

See O'Brien, supra note 1, at 20-24. Modern analysts often neglect the question of comparative justice. Id. at 21. The analysis of this element requires comparison of the political or political-social systems of the opponents in the war. Id. at 20. “One must ask whether the political-social order of . . . [the putatively just belligerent] is sufficiently valuable to warrant its defense in a war against [the adversary], which, if victorious, would impose its [own] political-social order.” Id.

See id. at 20-22 (analyzing comparative justice between United States and former Soviet Union).

See, e.g., MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ (1990) (reporting human rights violations under regime of Saddam Hussein); Julie Johnson, U.S. Asserts Iraq Used Poison Gas Against Kurds, N.Y. TIMES, Sept. 9, 1988, at Al (detailing State Department allegations of use of chemical weapons by Iraq against Kurdish guerrillas).

Kuwait as a social, political, and economic entity. Comparative justice required that Kuwait be freed from this kind of occupation and that Saudi Arabia and the Gulf States be freed from the specter of suffering Kuwait's fate.

This discussion highlights an important aspect of just war reasoning. Given the fact that the vast majority of states in the international system fall far short of the standards of comparative justice that are realized in the advanced democracies, it will often be the case that victims of aggression and inhuman treatment do not themselves rank high in terms of democratic institutions, the rule of law, and human rights protections. This lack of comparative justice in the victim states should not mean, however, that these countries should be denied protection against aggression. There is a difference in comparative justice between a state like contemporary Iraq—where the ruling regime has displayed utter contempt for human rights and has flouted international conventions against chemical warfare—and states such as Kuwait and Saudi Arabia, which, while susceptible to criticism for human rights violations and other political failings, are recognizably more civilized. This difference is so great that no reasonable effort should be spared to prevent the spread by force and terror of countries such as Iraq.

3. Proportionality

The next issue to be addressed in the just cause analysis is whether, in addition to just causes and comparative justice, the U.S./U.N. coalition operation had a probability of success that warranted the use of the extreme means of war with the prospect of a proportionate cost for the realization of the just ends. This question is the heart of the just war analysis. All of the just war conditions are important and must be met. However, the most difficult is usually the requirement that the probability of success be so substantial as to assure that the cost of the war and the damage done on all sides will be proportionate to the good to be accomplished by the putatively just war. Indeed, it is not sufficiently recognized in the just war literature that this requirement may necessitate repeated judgments about this central point subsequent to

---

the initial decision.\textsuperscript{66} What may look feasible as the proportionate cost at the outset of a war may prove to be too uncertain of success and/or too costly in the course of the war. Once the proportionate cost outweighs the potential good, a war should be terminated on the best achievable terms, irrespective of the apparent justice and desirability of the just cause.

The decisions leading to the initiation of hostilities with Iraq in January 1991 were difficult. The most conspicuous problem was that of judging whether economic and other sanctions falling short of armed conflict offered a reasonable alternative to full-scale war. This problem will be discussed below in connection with the requirement that alternatives to armed force be reasonably exhausted.\textsuperscript{67} However, assuming that full recourse to the military instrument might be necessary, U.S./U.N. coalition decision-makers had to evaluate Iraq’s military capabilities and the chances of overcoming them at an acceptable cost within a reasonable time. This calculation is difficult in most situations where war is contemplated, and it was particularly difficult in the months prior to the January 1991 hostilities.

Iraq had a large army that possessed large numbers of modern Soviet-made tanks, artillery, and other equipment.\textsuperscript{58} It was an army that had fought a long war with Iran. Although the offensive potential of the Iraqi army was considered limited, it seemed to present a formidable defensive posture. The Iraqi forces were dug in, in Kuwait, and their considerable engineering capabilities had constructed impressive defense fortifications.\textsuperscript{59} To be sure, it was apparent that the Iraqi air force would be unable to compete for long with the U.S./U.N. coalition air power. But, casting an ominous pall over the whole situation was the threat of Iraqi chemical warfare. The Iraqis had used chemical warfare against the Iranians and against their own Kurds.\textsuperscript{60} The chemical warfare threat affected virtually all aspects of U.S./U.N. coalition planning and op-

\begin{footnotes}
\item See O'Brien, supra note 1, at 27.
\item See infra notes 71-76 and accompanying text.
\item See R. Jeffrey Smith, Some Nations Now Condemning Saddam Had Helped Arm Him, WASH. POST, Aug. 7, 1990, at A14 (characterizing Iraq as world’s largest importer of arms, with over 5500 tanks, 3500 artillery pieces, and 513 combat aircraft).
\item See supra note 53.
\end{footnotes}
erations. Use of gas masks, protective clothing, and medication hindered the troops in all echelons. Iraq's capabilities to employ SCUD missiles, particularly against civilian targets, and the possibility that chemical warfare agents might be delivered by these missiles caused great apprehension and led to the Israeli ordeal in Tel Aviv and Haifa, which were eventual targets of indiscriminate Iraqi missile attacks.61

There was never any question whether the U.S./U.N. coalition forces could eventually defeat Iraqi forces. Rather, the question turned on whether victory could be achieved at an acceptable cost within a reasonable time. It is important to recall that reasonable people differed over whether a war with Iraq could be won at proportionate cost. Prominent military figures and politicians, competent in security questions, argued against war.62 The issue was debated throughout the fall of 1990 and in the congressional debates in January 1991.63 In the end, President Bush received a congressional mandate to join with his U.N. Security Council warrant to pursue the just causes with armed force.64

Clearly, the key to this decision was the trust placed in air superiority. The air war, launched on January 16-17, 1991, completely eliminated the Iraqi air force and wrecked the infrastructure of Iraq's armed forces and military-industrial complex.65 The air war accomplished two vital objectives: it devastated the Iraqi forces and their defenses, and it left them blind. When the ground war began, the defenses that had looked so formidable fell rapidly, and the Iraqis' inability to see the enemy until it was too late led to unprecedented strategic and tactical ground successes by the U.S./U.N. coalition forces.

It should be noted that the air war gave the U.S./U.N. coalition forces opportunities to reassess periodically the overall

63 See supra note 39.
64 See supra note 40 and accompanying text.
65 See supra note 54.
probability of success and the specific probability of success of a
ground war. Political and military decision-makers could judge
"how much was enough" of the air war before a ground war with
good prospects for success at proportionate cost should be
launched. In the event, the timing of the air and ground wars
proved to be incredibly good, and the cost to the U.S./U.N. coali-
tion forces far less than anticipated. Whether the cost to the Iraqis
was proportionate is another question to be addressed in the dis-
cussion of war-conduct.66

Beyond the calculus of proportionality in the light of
probability of success in terms of the immediate effects of the war
in the combat zone there loomed still another issue. This was the
question of the possible effects on the Islamic world of a war
against Iraq, led by the United States and erstwhile colonial pow-
ers such as Britain and France, and possibly involving Israel at
some point. Throughout the period from August 1990 to January
1991, some predicted that war with Iraq would be seen as an imper-
ialist war fought by the United States, its European allies, and, in
effect, Arab "stooges." It was also said that Saddam Hussein would
be seen, whatever the outcome of such a war, as a heroic Arab
Muslim standing up against the imperialists and the Arab regimes
that had betrayed both Islam and the Arab masses.67 Such senti-
ments were particularly heard in Jordan, where they were featured
on American television.68 American and other Arabist scholars
warned that war with Iraq might ignite Muslim revolts in Arab
states siding with the U.S./U.N. coalition.69

If taken seriously, these predictions presented a no-win situa-
tion to Bush and his allies. If Saddam Hussein were left unchal-
lenged, palpable threats to the peace and security of the Middle
East and to the world's oil supply would remain and perhaps grow
worse. However, if Saddam were effectively defeated and thwarted,
the repercussions in the Muslim world, particularly in states friendly to the United States and the West, might be severe.

Although in retrospect the issue of Muslim extremist reactions to a war with Iraq appears to have been exaggerated, it was an all too real problem for those attempting to determine the probability of success (What would constitute a "success?") and proportionality of such a war, even if the causes were just. Moreover, concern over reactions in the Muslim world appear to have affected the decision to terminate hostilities. This will be discussed in connection with the requirement of right intention.  

4. Exhaustion of Peaceful Remedies

Was there a reasonable exhaustion of peaceful remedies before resort to war in the Gulf? Before addressing this question it is important to emphasize the difference between this formulation of a just war requirement and the more frequently employed term "last resort." The interpretation of this requirement offered in this Article eschews the term "last resort," which implies a desperate, at-the-last-possible-moment use of force in immediate self-defense. However, aggression and subsequent subjugation may not take forms comparable to, for example, the kind of clear and present threat to life that warrants the use of deadly force in self-defense in domestic law. If Saddam Hussein's forces had continued on from Kuwait and invaded Saudi Arabia and the Gulf States, resort to war by the U.S./U.N. coalition forces would clearly have been a "last resort." But in international relations threats to peace and human rights can take place over a temporal continuum. During the passage of time, such threats can be identified as substantial, engendering rights and duties of deterrence and defense against them. A better term than "last resort" is "reasonable exhaustion of peaceful remedies."

Two interrelated courses of action taken against Iraq's aggression might be examined under the rubric "reasonable exhaustion of peaceful remedies." However, only one of these actions was entirely "peaceful." Diplomatic efforts to achieve the just ends sought by the U.S./U.N. coalition were entirely peaceful. These included diplomatic efforts to resolve the situation as well as coercive

---

70 See infra notes 77-79 and accompanying text.
71 See, e.g., JOHNSON, MODERN WAR, supra note 13, at 24-25; NATIONAL CONFERENCE, supra note 18, at 30.
diplomatic efforts to pressure Iraq by U.N. Security Council resolutions and by interruption of political and economic relations with that country. The other action taken, economic sanctions, was not entirely peaceful. In part these sanctions, freezing of assets and economic non-intercourse, were peaceful. However, the sea and air blockades established under Security Council Resolutions 665 and 670 involved the use of armed force to interdict traffic to and from Iraq. Had Iraq or others resisted the blockades, acts of war would have followed. Accordingly, those who argued for prolonged reliance on sanctions in lieu of all-out war were arguing for limited war, not "peaceful" means.

The diplomatic "peaceful means" were exhausted. Iraq had the opportunities to argue its case in the Security Council. A last-ditch effort by U.S. Secretary of State Baker in Geneva, encompassing talks with Iraqi Foreign Minister Tariq Aziz, ended on January 9, 1991 with Baker reporting: "Regrettably . . . I heard nothing that suggested to me any Iraqi flexibility whatever." Aziz had attempted to demand that the Kuwait issue be joined with the Arab-Israeli conflict and threatened that Iraq would "absolutely" attack Israel if the multinational forces attacked Iraq. U.N. Secretary-General Javier Perez de Cuellar’s attempts to negotiate with Saddam Hussein in Baghdad ended on January 13, 1991 with De Cuellar’s statement, "only God knows" if there will be war and with Saddam Hussein’s reaffirmation of his determination to hold on to Kuwait, which Iraq had designated an Iraqi province.

These two last-minute efforts to discover even a hint that the just objectives of the United States and the United Nations might be achieved by peaceful means should be viewed in the light of the underlying fact of Iraqi intransigence from August 2, 1990 to January 15, 1991. A period of more than five months, during which Kuwait was being ravaged in every sense by the Iraqi occupation, was certainly a "reasonable" time in which to obtain by peaceful means

---


13 See supra notes 44-46 and accompanying text.


15 Id.

some glimmer of hope that the U.S./U.N. objectives might be achieved.

With respect to the position that these objectives might have been achieved by maintenance of the blockade and other sanctions, it appears clear by now that only overt armed force was sufficient to remove Iraq from Kuwait and to extinguish the broader threat to the entire region. Despite the continuation of the sanctions even after the termination of the fighting, Saddam Hussein still retains power and defies the world. He apparently places no limit on the suffering that his people must bear because of his policies, and they seem unable to influence, much less displace him. It hardly needs to be added that long-term sanctions are difficult to maintain, particularly those of the scale placed on Iraq. In retrospect, the argument for relying on sanctions appears to have been more an argument to avoid full-scale war at any price rather than an argument for the efficacy of sanctions. I conclude that there was a reasonable exhaustion of peaceful remedies as well as of coercive political-economic remedies in the Gulf crisis.

5. Right Intention

Finally, the just war doctrine requires that the just belligerent have right intention. Right intention includes several elements:

(1) restriction of the pursuit of the war to operations clearly necessary to achieve the just cause;

(2) avoidance of a spirit of hatred and vengeance; and

(3) pursuit of war policies conducive to the ultimate realization of a just and lasting peace.

The U.S./U.N. coalition forces met all of the requirements of right intention, except in the case of Kuwaiti behavior after liberation of Kuwait.77 Conformity with the first element of right intention is underscored by continuing criticism of President Bush for "not finishing the job," specifically, not subjugating Iraq entirely and deposing Saddam Hussein. However, that objective was never "the job" that had been mandated by the U.S. Congress and the U.N. Security Council. "The job" was to liberate Kuwait and re-

77 See Don Oberdorfer, U.S. Rights Report Assails China's Practices; State Department, Citing Collapse of Communism, Sees Improvement in Global Conditions, WASH. POST, Feb. 1, 1992, at A17. "Nonetheless, 'serious problems remained' in post-war Kuwait, including mistreatment of prisoners, restrictions on freedom of assembly and speech and curbs on the right of citizens to change their government. Women's rights were described as 'significantly limited.'" Id.
store security and order in the region. The just objective was not to conquer and occupy all of Iraq, to resolve all the complex issues of self-determination of Kurdish and Iraqi Shi'a minorities, and to depose and replace Saddam Hussein. Pursuit of these objectives would have probably led to a quagmire of open-ended duration. It would have meant a new war that would have required new legal and moral warrants. Bush and his colleagues chose not to embark on such a war. They stopped the fighting promptly when the just objectives were achieved.

The second requirement of right intention was also well met. To be sure, there was criticism of Bush for "demonizing" Saddam Hussein. However, anyone following Saddam's actions and statements would rightly "demonize" the dictator without any prompting from President Bush. Official U.S./U.N. coalition statements emphasized that the enemy was not the Iraqi people but the regime of Saddam Hussein. It may be argued, and it will be discussed under war-conduct, that U.S./U.N. coalition forces inflicted too much collateral damage on Iraqi society. Whatever the validity of such claims, no evidence exists that such damage was the result of a spirit of hatred or vengeance; rather, it was the by-product of the military means employed.

Finally, the right intention objective of establishing a just and lasting peace was promoted by the removal of the Iraqi security threat to the region while permitting Iraq to remain sufficiently united and strong to balance to some extent the power of Iran, another major source of regional instability. In addition, the United States took the lead in working for the resolution of the Arab-Israeli conflict. Finally, the U.S./U.N. coalition forces provided humanitarian assistance and security to the Kurds, making possible at least a minimal continued coexistence between them and the regime of Saddam Hussein. That the obstacles to peace in the Gulf area and in the Arab-Israeli conflict remain formidable, if

---


We have no argument with the people of Iraq; indeed, for the innocents caught in this conflict, I pray for their safety. Our goal is not the conquest of Iraq; it is the liberation of Kuwait. It is my hope that somehow the Iraqi people can even now convince their dictator that he must lay down his arms, leave Kuwait and let Iraq itself rejoin the family of peace-loving nations.

Id.

78 See infra notes 93-101 and accompanying text.
not intractable, is not due to lack of right intention by the U.S./U.N. coalition forces in the Gulf War.

IV. DESERT STORM: WAR-CONDUCT LAW (*Jus in Bello*)

The just war doctrine emphasizes two principles in its war-conduct law: proportion and discrimination. Additionally, it enjoins adherence to the positive international law of war.

A. Proportion

In the preceding discussion, it was stated that a war-decision (*jus ad bellum*) principle of proportion requires an overall proportionality between the ends and means and the costs and benefits of a war. This requirement might be termed "grand strategic" proportionality or, in classical political theory terminology, "raison d'état." The war-conduct principle of proportion, however, applies to the military ends and means, or what might be called the "strategic" and "tactical" levels. In classical political theory and international legal terminology, this kind of proportion is the core of "raison de guerre" or "military necessity."

War-conduct proportionality, expressed in the principle of military necessity, requires that a belligerent employ only those kinds and degrees of armed coercion necessary to accomplish the military missions. In addition, the principles of proportion in the two parts of just war doctrine, war-decision and war-conduct law, are related. Interpretations of proportionality at the strategic or tactical level should not lead to actions at cross-purposes with the calculus of proportionality at the grand strategic level of war-decision law. Even actions that can be justified in the field as necessary and proportionate might contribute to patterns of belligerent behavior that ultimately frustrate efforts to keep the overall conduct of the war proportionate to the just cause. This can easily be the case in modern war wherein extremes of destructive firepower and mobility may lead to excesses not desired or anticipated in the war-decision calculus of overall proportionality of ends and means.

Much of the criticisms of U.S./U.N. coalition actions in the Gulf War as disproportionate are intertwined with charges of excessive collateral damage in violation of the principle of discrimination or non-combatant immunity from direct intentional attack. Because I interpret the principle of discrimination as prohibiting *disproportionate* collateral damage, I will address this criticism in
the discussion of discrimination. In the discussion of proportionality that follows, I will consider the claim that some of the U.S./U.N. coalition actions were not truly required by military necessity. This claim includes two forms of belligerent conduct: (1) the air war generally and (2) the tactical air attacks on retreating Iraqi troops at the end of the war.

Middle East Watch has published a volume criticizing conduct of the Gulf War, *Needless Deaths in the Gulf War*. This report emphasizes, inter alia, the requirement that an attack causing collateral damage—damage to non-combatants and/or to civilian targets—must be proportionate to the "'concrete and direct' military advantage" anticipated, language borrowed from article 51, paragraph (5)(b) of the 1977 Geneva Protocol I ("Protocol I"). Protocol I was signed by the United States but not submitted to the Senate for advice on ratification. The Reagan and Bush administrations have supported the view of the Joint Chiefs of Staff that Protocol I contains provisions unacceptable to the United States. Nevertheless, it is fair to refer to the articles of Protocol I concerning proportionality, namely articles 51, paragraph (5)(b) and article 57, paragraph (2)(a)(iii) and (2)(b). Generally, these articles are not at variance with the understanding of the customary principle of proportion as presented in U.S. military manuals and other materials. Moreover, the Middle East Watch report is justified in employing the most authoritative treatise interpreting Protocol I,

---

80 See infra notes 93-101 and accompanying text.
82 Id. at 42.
85 Protocol I, supra note 83, art. 51, ¶ 5(b).
86 Id. at 57, ¶ 2(a)(iii), reprinted in 16 INT'L LEGAL MATERIALS 1391, 1416 (1990). Article 57, paragraph 2 requires those planning attacks to refrain from launching attacks that might be expected to cause excessive civilian in relation to the military advantage anticipated. Id.
Bothe, Partsch, and Solf's *New Rules for Victims of Armed Conflicts.* These evidences of the positive international law of war are consonant with the just war principle of proportion. However, I do not share the conclusions of Middle East Watch concerning the proportionality of U.S./U.N. coalition actions.

The essence of the Middle East Watch's claim that U.S./U.N. coalition air attacks lacked proportionality is that too many of them inflicted general, indirect, long-term damage on Iraq's infrastructure rather than damage producing "the concrete and direct military advantage anticipated." Middle East Watch criticized targeting of food, agricultural, and water-treatment facilities, the crippling of the electrical system, and attacks on civilian vehicles on highways as well as on Bedouin tents. A detailed point-by-point analysis of these criticisms is beyond the scope of this article. However, two comments may be made. First, Iraq was a nation mobilized for war. Civilian rights and needs had been and continued to be completely subordinated to the requirements of Saddam Hussein's government and armed forces. The U.S./U.N. coalition forces aimed at a quick, massive destruction of everything that made it possible for Saddam Hussein to wage war, without targeting civilians and civilian targets as such. This war-conduct strategy was proportionate to the political-military goal of defeating Iraq decisively and quickly. Second, there should be a practical presumption that belligerents such as the United States and its U.N. coalition partners, which do not pursue deliberate countervalue strategies against civilian targets as such, "anticipated" that "concrete and direct military damage" would result from the kinds of attacks criticized by Middle East Watch.

This issue requires a more detailed analysis which should include substantial input from people with military experience. Such expertise appears to be missing from the Middle East Watch's report on the Gulf War.

A second issue of proportionality has been raised with respect to air attacks on retreating Iraqi troops on February 26-27, 1991. With the war clearly won, was it necessary to continue these attacks? The U.S./U.N. coalition spokesman, General Richard I. Neal, answered, "The war is not over . . . and we're going to con-

---


89 Middle East Watch, supra note 81, at 43 (emphasis omitted); see also id. at 8-14 (summarizing report's conclusions regarding proportionality of air attacks).

90 See id. at 149-230 (discussing report's criticisms on these points).
 Critics of these attacks raise an issue seldom discussed by experts on the law of war, namely, "What is the standard of proportionality for strictly counterforce attacks on enemy forces?" I concur with the position of General Neal, that as long as armed enemies are at large and capable of causing damage, they are fair targets. An additional dimension of this issue was raised by the fact that the Iraqi soldiers fleeing Kuwait were burdened with pillaged loot. They were not "withdrawing," they were "retreating" with their loot. Moreover, some of the retreating Iraqi soldiers subsequently demonstrated their continued ability to cause damage by their brutal suppression of the Iraqi Shi'a and Kurds. I conclude that the U.S./U.N. coalition forces met just war requirements of proportionality in their conduct of the war.

B. Discrimination

Just war doctrine prohibits direct intentional attacks on non-combatants and civilian targets. The majority of modern just war scholars tend to treat this prohibition as an absolute. Because it is difficult if not impossible to reconcile most forms of modern warfare fought in mixed military-civilian contexts with an absolute principle of discrimination, the dilemma is usually resolved by recourse to the principle of double effect. Reliance on the principle of double effect as a means of mitigating the rigor of an absolute principle of discrimination is, however, unpersuasive. Instead, I contend that the principle of discrimination is an important, but not absolute, principle of just war doctrine. In order to interpret this principle reasonably, it is necessary to evaluate the propor-

---

83 See NATIONAL CONFERENCE, supra note 18, at 34 (discussing problem of distinguishing non-combatants and non-military targets from military targets); WALZER, supra note 17, at 151-52.
84 See RAMSEY, supra note 12, at 152-57; WALZER, supra note 17, at 151-52; see also O'BRIEN, supra note 1, at 44-45 (discussing different positions taken on principle of discrimination).
85 See WALZER, supra note 17, at 151-59. In perhaps the most influential contemporary just war work, Michael Walzer relies heavily on the principle of double effect, which he defines as follows: "The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself." Id. at 155.
tionality of civilian, countervalue damage to the military damage and advantage required by legitimate military necessity. In practice, there may not be much difference between the double effect approach of Walzer and the majority of just war scholars and my proportionality approach. Both viewpoints recognize that civilian, countervalue damage is virtually inevitable in most forms and circumstances of modern warfare and that the practical normative requirement is for belligerents to make every reasonable effort to minimize that damage.

The close relation, then, of the war-conduct principles of proportion and discrimination is apparent. Belligerent action must meet the requirement of true military necessity while satisfying the requirement of discrimination that military measures not inflict disproportionate damage on civilians and civilian targets.

Throughout Desert Storm and in the Defense Department's *Interim Report*, the U.S. Government and military emphasized the intention to respect the principle of discrimination. Indeed, this emphasis was in conspicuous contrast to official statements in earlier wars, notably World War II. In the event, most U.S./U.N. coalition actions were discriminatory. This was partly the result of the fact that most of the ground war fighting took place in the desert without the complication of civilians in the combat areas. Adherence to discrimination was also enhanced by complete air superiority and the capabilities of modern air-craft and ordinance. Indeed, the critical report of Middle East Watch acknowledges that "in many if not most respects the allies' conduct was consistent with their stated intent to take all feasible precautions to avoid civilian casualties." Middle East Watch was reacting to the United States’ claim of "a near perfect war, with as little harm to civilian life and property as humanly possible."

It is not possible within the scope of this Article to review Middle East Watch's criticisms of U.S./U.N. coalition conduct of the war as it affected civilians and civilian targets. However, if Middle East Watch's report may be taken as a starting point for just war analysis, it can be concluded that the U.S./U.N. coalition forces did meet the overall requirement of discrimination. Obviously, there will always be violations of the principle of discriminat-

---

96 See DOD *INTERIM REPORT*, supra note 49, at i-2, 1-4, 2-6 to 2-7, 12-1 to 12-4.
97 See O'BRIEN, supra note 1, at 78-87 (analyzing war conduct during World War II).
98 *MIDDLE EAST WATCH*, supra note 81, at 4.
99 Id. at 1.
tion in a war, unless it is conducted entirely in a remote arena bare of civilians and civilian targets. The issue for just war analysis is whether the general pattern of belligerent behavior conforms to the principle of discrimination. This analysis involves the evaluation of belligerent policy statements, preparations, strategies, rules of engagement, explicit invocation of the laws of war, and the actual conduct of operations. Based on available evidence, it is clear that the U.S./U.N. coalition forces intended to and did observe the principle of discrimination to a greater degree than any belligerents in major contemporary wars. That they may not and should have tried to do even better may be conceded without vitiating this judgment. Moreover, it should be remembered that there were no purely countervalue attacks on civilian targets as such despite Iraq's provocative and indiscriminate attacks on Israel and Saudi Arabia.

Otherwise, U.S./U.N. coalition observance of the positive laws of war was outstanding. Treatment of prisoners of war and humanitarian assistance to civilians fully met the requirements of the law.\(^{100}\) Of particular note is the fact that even before the start of hostilities, the United States renounced the use of chemical and biological and nuclear "weapons of mass destruction," even in retaliation for their use by Iraq.\(^{101}\)

V. Conclusion

A just war analysis must weigh the record of observance to all of the just war conditions. Often this is a difficult task because observance may be uneven. For example, the justice of the cause may be clear, but the proportionality of the means in the light of probability of success may be unclear. Even if all of the war-decision (\textit{jus ad bellum}) conditions appear to be met satisfactorily, egregious violations of the war-conduct (\textit{jus in bello}) principles and rules may render an otherwise just war unjust.

In the case of Desert Storm, all of the just war requirements were clearly met. There was competent authority based on an un-
preceded collective security enforcement mandate of the U.N. Security Council. The cause of liberation of Kuwait and removal of an extreme threat to the peace was just. Comparative justice was on the U.S./U.N. coalition side. There was a probability of success and prospects for proportionality between achievement of the just causes and the cost of the war. There was a reasonable exhaustion of peaceful remedies both through diplomacy and unprecedented virtually world-wide applications of political and economic sanctions. Right intention was demonstrated by the prompt termination of hostilities and the efforts to establish a new peace process in the region. The principles of proportion and discrimination were honored in the conduct of the war to an exceptional degree. The laws of war and the injunctions of humanitarian law were observed. Desert Storm was a just war.