

'Indicting the Nation–State for war crimes'

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Dr Tom Frame, Bishop to the Australian Defence Force
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I am not surprised that many couples preparing for marriage ask to have *Jupiter* from the 'Planets Suite' by Gustav Holst played at their wedding. It is a wonderfully stirring piece of music that translates well to a Church organ. But I am surprised that those same couples are prepared to sing the words set to it by Canadian poet Cecil Spring Rice. Let me read the first verse:

*I vow to thee, my country—all earthly things above—
Entire and whole and perfect, the service of my love;
The love that asks no question, the love that stands the test,
That lays upon the altar the dearest and the best;
The love that never falters, the love that pays the price,
The love that makes undaunted the final sacrifice.*

I find the words truly appalling notwithstanding the fact they were sung at Princess Diana's funeral and seem totally irrelevant to a marriage (unless of national convenience). My main objection to them is moral. This hymn echoes the sentiment: my country right or wrong. We remain citizens whether we approve or disapprove of the state's action. But do we really believe that the moral judgement of an individual is set aside or subsumed by the actions of the state? This seems to imply that the state with all its complexities is capable of acting as a moral being able to discern right and wrong, and to act accordingly. If so, can states be indicted for their worst wrongdoing – war – in the same way that individuals are charged with the serious crime of murder? In this lecture, I want to explore the moral status of the state in relation to its fundamental responsibilities and to ask whether and when it is entitled to resort to force in discharging duties arising from those responsibilities.

Let me begin with a very broad definition of the state. It is a discrete group of people ... able physically to defend themselves, their land and their property, from external threats and internal disorder. Thus in my definition, the first duty of the state

becomes the defence of persons and the security of property. Without this underlying capacity, the state will face incursions from without and crime from within.

Such a state is unlikely to survive because there is no reasonable prospect of permanence or prosperity, let alone justice or compassion. Although the number of states without any capacity for self-defence or self-regulation (ie., assertion of sovereignty or authority) is increasing, East Timor and the Solomon Islands being prime examples, we should also note the move towards aggregation of sovereignty elsewhere in the world, pre-eminently in the European Community which has steadily expanded to over 20 nations over the past two decades.

Whether or not a state is viable from an external defence and security perspective, we recognise the need for expectations and rules regulating interactions between individuals within a state. There must be a common law to which all are subject that aims to encourage virtue and discourage vice, to promote good and restrain evil. In Australia, conventions and rules order and regulate much of our everyday living and we are all the better for them. But is it possible to have an analogous set of expectations and rules ordering and regulating the interactions of states? And if the analogy holds good, can personal ethics be expanded to provide ethical principles to guide states in their dealings with their neighbours? If so, can we then apply individual ethics governing resorts to physical force and the application of violence within a community ... to nation-states and the management of international conflict? In effect, can we prohibit armed combat and outlaw war? If not, what are the different ethical constructs applying to international relations and the conduct of warfare? Before answering these questions, we must be very clear about the moral significance and ethical standing of the state ahead of determining whether our expectations of its conduct are reasonable and right.

There are three competing assessments of the state. The first expects the state to act in a morally responsible manner, albeit with some qualifications. According to Robert Goodin, the state is a moral agent on the ground that it is analogous to a natural person in possessing values, and being capable of pursuing moral goals and

ends by means of deliberative action expressed 'through its legislative and executive organs'.¹

This is consistent with former Australian foreign minister Gareth Evans' use of phrase 'good international citizen' to describe a morally responsible state. Such a state, he said:

does not distinguish between internal and external policies, as if the rules of international behaviour are somehow different from the rules governing other human behaviour ... an exercise in enlightened self-interest; and expression of idealistic pragmatism [in which the] balance between idealism and pragmatism in the pursuit of good citizenship will vary from issue to issue.²

John Westlake argues that individuals associated in the state are moral beings, and inasmuch as the action of the state formed by their association is their action, the state must also be a moral being. But as the 'obligation of the state cannot be identified with the obligation of any individual', there are several salient differences. Unlike individuals, states are not accountable to an external authority although it might be said they are accountable to an internal authority – the political constituency – the people. While states have agreed to regulate their dealings with each other through law, convention and custom, the complexity of their internal constituency means the state cannot be expected to observe all or the same standards of morality applying to an individual. States are expected to be moral but conform to a different moral code. What might be moral if performed by an individual might be immoral if performed by the group, and vice versa, such as killing another human person. Therefore, the state is not the sum total of its parts. It is animated by a will and a spirit that is different but not entirely dissimilar from its constituent parts.

Those holding the *cosmopolitan* view contend that states are incapable of moral consistency or accountability but believe collective and international morality is nonetheless possible.

¹. Robert, Goodin, 'The State as Moral Agent', in A. Hamlin and P. Pettit (eds), *The Good Polity: Normative Analysis of the State*, Basil Blackwell, Oxford, 1989, p. 129.

². Gareth Evans, 'Australian Foreign Policy: Priorities in a Changing World', *Australian Outlook*, vol. 43, no. 2, August 1989, p. 7.

The cosmopolitan vision of a greater global community of humankind ... envisages the eventual demise of the system of sovereign states and the appearance of stronger bonds between the individual and the rest of humanity ... if the central idea of the 'morality' of states is that states should be desensitised to each other's domestic wrong-doings in the interests of order among them, the central idea of cosmopolitanist morality is to heighten the sensitivity of people in one place to wrongs done in another in the interest of the achievement of global justice.³

This presumes the existence, recognition and acknowledgement and implementation of a kind of ethical universalism. The notion that it is possible to discern certain principles of conduct that everyone recognises and respects. The cosmopolitan dream is already partly realised in the UN Charter, the Universal Declaration on Human Rights and in the raft of extant international laws and covenants.

The third view, the so-called *realist* position, holds that morality is incompatible with the conduct of international relations. Jervis asserts that government exists to promote the interests of the state and that 'national security is more fundamental than moral considerations'.⁴ He differentiates the individual from the state in arguing that morality applies only to individuals within domestic society. 'It neither has nor should have ... a [decisive] role in relations' between states. But he wonders whether international relations are in fact so bad that they do not reflect some moral principles. In his observation, such principles frequently inform if not directly influence international relations. Those who would not normally talk about ethics often explain state policies and decisions in the language of ethics. But there are limits.

Hans Morgenthau contends that international relations are neither amoral nor immoral:

³. Andrew Linklater, *Men and Citizens in the Theory of International Relations*, Macmillan, London, 1990.

⁴. R. Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Armageddon*, Cornell University Press, Ithaca, 1989, p. 108

'A discussion of international morality must guard against the two extremes of over-rating the influence of ethics upon international politics or under-estimating it by denying that statesmen and diplomats are moved by anything but considerations of material power'.⁵ Highlighting the realist concern with political context and resisting the appeal of universalism, Gerard Elfstrom observes that the: 'Standards of conduct which are feasible in an established society with common values and effective means of enforcement cannot be directly applied to the international arena. Ethical analysis of international relations must take its special conditions into account if it is to avoid futility and irrelevance'.

I am personally inclined to an amalgam of all three views. The state's conduct must reflect the values and virtues of its people. These are expressed and manifested in the manifestos of democratically elected governments. The conduct of states must be broadly consistent with the behaviour expected of individuals within the state and reflect widely acknowledged, if not universally shared, moral norms. As states indeed have wider responsibilities than individuals, governments have certain prerogatives not granted to citizens. This is nowhere more apparent than in resolving conflict. Individuals are not entitled to use violence to pursue or protect their private interests whereas, I want to argue, the state is obliged to employ force to preserve and promote the public good. This arises from a theological conviction that the state and secular authority is part of the divine ordering of this world. Consequently, it is given responsibility for maintaining order and preserving peace while having certain moral responsibilities.

Because emperors, monarchs or chiefs capable of moral and immoral behaviour ruled most ancient states personally and directly, there are contrasting depictions of the state and its role in the Christian Scriptures. The *positive* view is found in the 13th chapter of St Paul's letter to the Church at Rome. The citizen should regard force as necessary to maintain order as being ordained by God, even if wielded by a secular government. Consequently, if the state calls legitimately on its citizens to contribute to the maintenance of the order they enjoy, Christians are not entitled to avoid participation. Obedience to the state is a non-negotiable duty.

⁵. Hans Morgenthau, *Politics Among Nations: The Struggle for Peace and Power*, 5th revised edition, Knopf, New York, 1973, p. 236

But significantly, Paul does not address the question of whether the sword can be employed by the State in relation to neighbouring states. The most that can be concluded from Romans 12 is that force can be used in the regulation of domestic affairs. Paul does not talk about the waging of wars across jurisdictional or territorial boundaries because he lives under Roman hegemony. But this text does not preclude or prohibit a collection of states joining together to promote peace and to secure order. Plainly, some questions remain unanswered.

The *negative* view of the state is contained in the 13th chapter of the Revelations of St John. In his vision of the final apocalypse recorded around 93CE, John describes the battle between God and the forces of evil, in this instance a beast (a veiled description of Roman imperial power), that symbolises an attempt at divinity through world domination. John is adamant that secular authority, as manifested in the Roman Empire, was an evil to be resisted because it aspired to divinity. In this context, John calls his readers to patient endurance and faithfulness to Christ because the forces at work are neither divine nor eternal; they are human and finite. Like St Paul, John lives under the tyranny of Roman hegemony and his experience is not of inter-state rivalry but of totalitarian government. The community to which he speaks is enveloped by oppressive violence and they cannot see a genuine rival to the Emperor or an alternative government to Rome. As rebellion would be futile, the apostle counsels caution and restraint. Had he been able to appeal to another state for liberation and freedom, he might have unleashed a wave of violence that he then might have sought to condone or justify. But as this does not happen, it is only speculation. However, we should note from the Revelations that the final victory of God and good over Satan and evil involves terrible violence waged on a cosmic scale.

These two texts were, of course, written at different times, for different people in vastly different social, political and religious contexts. But once the significant hermeneutical and exegetical challenges are overcome, it is nonetheless possible to distil a view of civil authority. The State is part of God's present ordering of temporal affairs despite its imperfections. It is authorised and empowered to exercise power by God to whom it remains responsible.

Individuals are to acknowledge its authority while realising that God will bring to nothing any State or ruler that claims ultimate authority or demands absolute obedience. When standing in correct relation to God, governments have 'divine' authority for restraining evil and promoting justice. They are implored to use their power – and sometimes this includes coercive power – to reflect the divine purpose for humanity – that people should enjoy the fruits of the earth fairly and equitably and that the powerful should not exploit the weak. Without the application of coercive power, human experience suggests there is no peace or justice.

This essentially realist element in Christian theology led to the evolution of the 'just war' tradition after the Church assumed a responsibility for social order after Emperor Constantine's conversion to Christianity in 313. The tradition began with the judgment that rightly constituted publicly authority is under a strict moral *obligation* to defend the security of those for whom it has assumed responsibility. In *The City of God* written in the early 4th century, St Augustine depicts 'peace' as a *public* and therefore political issue. In this context, 'peace' is not a function of an individual's right-relationship with God, nor is it a matter of seeking a world without conflict. The former is a question of interior conversion (which by definition has nothing to do with politics), and the latter is impossible in a world forever marked, even after its redemption, by the consequences of sin. In the appropriate *political* sense of the term, peace is *tranquillitas ordinis*: the tranquillity of order created by political community and mediated through law. This is, admittedly, a humbler sort of peace. It coexists with broken hearts and wounded souls. It is to be built in a world in which swords have not yet been beaten into ploughshares. They remain sheathed but ready to be unsheathed in the defence of innocents. This is the form of peace that can be built through political processes. It is not the eerily quiet and sullen "peace" of a well-run authoritarian regime; it is a peace built on foundations of constitutional, commutative, and social justice. It is a peace in which freedom, especially religious freedom, flourishes. When public authorities defend this order against internal disruption or restore the minimum conditions of international order, theirs is a politically just end and one that may even be obligatory.

Of course, good ends do not justify bad means. They are, however, connected. What “justifies” the resort to proportionate and discriminate armed force — what makes moral sense of war — is precisely the morally worthy political ends being defended and/or advanced by the use of armed force. The priority of ends is reflected in the first responsibility allocated to the UN in its charter:

To maintain international peace and security, and to that end: to take effective measures for the prevention and removal of threats to peace, and or the suppression of acts of aggression and other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The just war tradition is a theory of statecraft. To reduce it, as many want to do, to a means test that begins with a “presumption against violence” is to begin at the wrong place. The just war tradition *begins somewhere else*. It begins by defining the moral responsibilities of governments, continues with the definition of morally appropriate political ends, and then takes up the question of means. By reversing the analysis of means and ends, the “presumption against violence” starting-point collapse public duty into private dispute and ends up conflating the ideas of “violence” and “war.” The net result is that warfare is stripped of its distinctive moral texture. Indeed, among many Australian political and religious leaders today, the very notion of warfare as having a “moral texture” seems to have been forgotten. We need only look at Australian history for evidence of its diversity.

For the first 70 years of European occupation, the British government exercised sole responsibility for defence and foreign policy in the colony. This was shared and delegated when London granted limited colonial self-government after 1856. In the ensuing period to 1910, most of the colonies contributed men and equipment for Imperial campaigns, initially in New Zealand (1850s and 1860s) and later in the Sudan (1885), South Africa (1899-1902) and China (1900-01). None of these operations had any direct bearing on Australia’s continental defence or the security of colonial trade.

It could not be said that the Maori, the Mahdi, the Boers or the Boxers posed any direct (or even indirect) threat to the Australian colonies other than the possibility that they might have aligned themselves with Britain's European rivals. Only by an extraordinary act of imagination could any of these campaigns be described as embodying morally acceptable ends. In each instance the aim of these campaigns was clearly to extend or defend the British Empire. So why were Australians involved?

Colonial participation was part of a protracted bargaining game with the Imperial government. London was striving to minimise its outlays on local defence while the fearful colonials wanted to see expenditure maximised. The colonists believed their cause would be advanced by showing themselves unquestionably loyal to Britain and the Empire, and to create a sense of obligation on London's part. After Federation in 1901, the Commonwealth Government steadily assumed more responsibility for the defence of Australia and for regional stability. But other than during the first three months of the Great War (of 1914-18) when German armed raiders threatened coastal and international shipping; the first seven months of Pacific War (1941-42) when the Japanese attacked the Australian mainland and sought to control the northern waters; and, the first year of Confrontation (1964-65) when Indonesia attempted to deny international access to shipping routes through the archipelagic straits, Australian participation in a series of wars and armed conflicts was not in response to any direct threat to our sovereign territory, offshore islands, contiguous waters or foreign trade. [I will not deal here with armed interventions or peacekeeping operations as they will be the subjects of my lecture on Thursday night].

But the argument that security and freedom are indivisible, the notion that tyranny and totalitarianism has to be resisted at some time and some where, has led Australia into theatres of warfare and military campaigns in support of the Empire, the Commonwealth and the Western world. This mindset was, in part, responsible for Australian involvement in fighting in France, North Africa, Palestine, the Balkans and Turkey between 1915-18, in the European theatre between 1939-45, on the Korean Peninsula between 1950-53, the Malay Peninsula between 1948-60, South Vietnam between 1962-72, Kuwait in 1990-91, Afghanistan in 2001 and Iraq earlier this year.

Although I cannot critique each campaign now, I would simply conclude that some were justified; others were not. Making a judgement is difficult because Australian participation in these campaigns emanates from a collective approach to defence and security and hopes of reciprocal assistance. In effect, the Australian approach is not unlike an insurance policy underwritten by alliances and joint operations.

I would argue that the responsibility for establishing the peace of order, the peace of *tranquillitas ordinis*, within a state must be pursued concurrently with the quest for ordered liberty in an evolving structure of international public life capable of advancing the classic goals of politics — justice, freedom, order, the general welfare, and peace. To take a recent example, terrorism is a direct assault on international order by individuals and groups who are neither elected nor accountable to anyone. But are they soldiers or criminals? They are both. They wish to overthrow by violent means the governments of states they oppose while defying international law and the laws of the particular states in which they operate. Eradicating global terrorism is part of a justifiable campaign to prevent global *dis*-order. But the means used must also be moral. In this context, the just war tradition retains both its moral appeal and practical efficacy.

The just war tradition presumes that the state is incapable of moral conduct. This is my view although I would point to certain conditions and caveats, and note that states, like individuals, are capable of inconsistency, betrayal and hypocrisy. Resorts to force in the conduct of international relations are inevitably a mixture of moral and immoral, good and bad, necessary and unnecessary motivations and aspirations. A decision to fight for principles, people or property is rarely completely right and never comprehensively wrong because we are dealing with perceptions and policies. Of course, the extent to which a nation *feels* threatened by internal disorder or believes itself to be vulnerable to external aggression is not really an ethical judgement. It has to do with diplomatic imperatives, strategic assessments and military intelligence. International relations are characterised by appearances and bluff. Lord Salisbury said that naval officers would try to persuade the British Government that it needed to acquire Venus in order to protect London from Mars. Middle Eastern regimes are not as capable as they appear to be while the US has the capacity to take on the combined military power of Europe and win.

But Iraq was considered a threat to Britain whereas the US was not. And there is no sharp or obvious divide between security and insecurity. This is why there is so much debate about whether resorting to force is justified or even necessary.

You would imagine an island nation would feel free relatively safe and secure. It does not share a common land border with its neighbours while the surrounding waters serve as a formidable moat a would-be aggressor needs to overcome. The last time the English Channel was crossed by an invading force was 1066! The British military historian Michael Howard remarked more than 30 years ago that Australia's biggest defence problem is that it doesn't have a defence problem.

But can I suggest that this particular island nation has felt consistently fearful and insecure? Why? Because of its location at the foot of Asia and adjacent the south Pacific, its proximity to the largest Muslim nation in the world with a volatile and undisciplined military, and the distance its friends and allies need to traverse in offering any assistance. Our generation cannot imagine the effect the fall of Singapore to the Japanese in February 1942 had on the Australian psyche for decades. But this is not an excuse for paranoia or xenophobia. Whether it is Asian hordes or boatloads of refugees from the Middle East, Australians is an anxious nation in a region of failing or failed states. Australians regard as threats what other nations would see as mere irritants, at worst, and challenges, at best. Notwithstanding the many mitigating circumstances, I am left to conclude that Australia has willingly and unwittingly participated in unjust wars in pursuit of immoral ends. But then, we are not alone.

Let me leave you with an irony: for a nation that tends to exaggerate threats to its safety and security, Australia leads the world in recognising conscientious objection to military service. This will be the subject of my lecture tomorrow. I do hope you might consider joining us.