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Barack Obama's 'just war': international law or unilateral action?

Contradiction in terms represents fundamental challenge US president must meet and overcome

By James Rowles

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There is a long "conversation to be had" with President Barack Obama on his "just war" speech in Oslo on December 9 (The Daily Star, December 17 and 24, 2009). A crucial part of the conversation is what Obama says about international law and the use of force.

Obama, who as a Harvard law-school student presided over its prestigious Review, seems to be only now beginning to work through the implications of the issues addressed in his speech. His thinking on these subjects should be best viewed as a work in progress.

Obama is well known for his attempts to reconcile competing views and schools of thought. In Oslo, he attempted to reconcile just war theory, which has recently become popular with political scientists and policy makers in Washington, with the framework and requirements of international law governing the use of force. This is not an easy task.

While noting the leadership of the US in constructing "an architecture to keep the peace," Obama asserts, "… a decade into a new century, this old architecture is buckling under the weight of new threats." These include the spread of nuclear weapons which could produce "catastrophe" and the fact terrorists with modern technology could cause "murder of innocents on a horrific scale." Meeting these challenges, he says, "will require us to think in new ways about the notion of just war … There will be times when nations –acting individually or in concert – will find the use of force not only necessary but morally justified."

Here lies the critical point. Just war theory requires that the use of force be morally justified, whereas the UN Charter and customary international law require that it be legally justified. This goes to the heart of what is involved in the juxtaposition of just war theory and international law. Under the former, the use of force by one or more nations acting in concert might be considered to be acceptable when morally justified, in the view of the acting state(s). Under the latter, the use of force is acceptable only when it meets the requirements of international law.

The essential question is, "who decides?" Under international law, justifications must be stated with precision in legal terms, which permit evaluation and judgment by international lawyers in countries throughout the world, by third-party decision makers, and potentially even by judges of the International Court of Justice or other international tribunals. Precise definitions, rules of recognition of legal norms, and agreed-upon rules of interpretation are employed. Under just war theory, it was traditionally the sovereign who decided. This difference is part of the appeal of just war theory to some policy makers and theorists in Washington, particularly following the World Court's rejection in 1986 of the US self-defense claim in the Nicaragua case, and given the adoption after 2001 by the Bush administration of policies that were highly questionable, to say the least, under international law.

Quoting a reference by President John F. Kennedy to the need for "a gradual evolution of human institutions," Obama asks, "What might this evolution look like? What might these practical steps be?"

First, he states that "all nations – strong and weak alike – must adhere to standards that govern the use of force. I – like any head of state – reserve the right to act unilaterally if necessary to defend my nation."

What are we to make of the coupling of these two sentences? Or the framing of them in terms of "what might this evolution look like?" On the one hand, reservation of a right to act unilaterally is a standard throw-away line from the 2008 campaign, and one used by many politicians in the US. It draws cheers from certain portions of the American electorate. If it means only that the president will not hesitate to act unilaterally to defend his nation in exercise of the right of self-defense, it is unobjectionable in terms of international law.

But if it means – and this appears to be the intended message to his domestic audience – that the president reserves the right to use force unilaterally and outside the framework of the UN Charter whenever he feels the US is threatened, the assertion undercuts the very underpinnings of international law. If every head of state were to take such a position, the entire edifice of international law governing the use of force would collapse. This is certainly not what the drafters of the UN Charter had in mind. They, too, were aware of new threats – having just witnessed the terrible destructive power of nuclear weapons dropped on Hiroshima and Nagasaki. The president would do well to think hard indeed before using this campaign line again.

Second, Obama rightly argues that "America – in fact, no nation – can insist that others follow the rules of the road if we refuse to follow them ourselves." He then supports this affirmation by saying that "when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified." Such legitimacy becomes particularly important, he adds, "when the purpose of military action extends beyond self-defense of one nation against an aggressor." He states that the use of force "can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war." While this is the US view and state practice may be in flux, the question of unilateral humanitarian intervention without the consent of the territorial state remains a serious issue, and one for continuing conversation.

Obama understands the principle of reciprocity on which international law is based, but he has not resolved the contradiction between the unilateralism of proponents of just war theory and the constraints imposed by international law and institutions on the use of force.

This contradiction represents the fundamental challenge Obama must meet and overcome if he is to guide his nation back toward supporting international law and institutions. We were reminded of the urgent nature of this challenge just last week, when Dennis C. Blair, US director of National Intelligence, reportedly told the House Committee on Intelligence that intelligence agencies may use lethal force even against US citizens abroad (without judicial process), if they are involved in terrorist activities and "taking action that threatens Americans." (Washington Post, February 4, 2010). How this policy can be squared with international law or the due process clause of the Fifth Amendment to the US Constitution are important questions that need an urgent discussion.

Serious, practical problems relating to the use of force will need to be addressed if Obama is to steer the American ship of state back toward a course of support for international law and institutions. As he refines his thinking, he will need to revisit the doctrine of pre-emptive use of force adopted by the Bush administration in 2002, the reported adoption of a policy in 2004 authorizing military actions against Al-Qaeda targets in a number of countries without the consent of the territorial state, and issues related to predator strikes (necessity, proportionality, foreseeable collateral damage to innocent civilians). With the crisis in Iran festering, a further pressing application is whether the US views as legal unilateral military action against another state to prevent it from becoming a nuclear weapons or WMD state.

James Rowles is a former lecturer at Harvard Law School, where he received a Doctor of Juridical Science degree in International Law. This is the second in a three-part series on Obama's Nobel speech in the "**Daily Star** conversation to be had" with the US president.