

Just War Tradition, *Ahkam al-jihad*, and Political Decision-Making

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Let me begin with thanks to those who made this meeting possible. I appreciate the chance to talk with you today.

I am aware that this opportunity is connected with my participation in the Malta Forum, which is sponsored by the Institute for American Values. I want to say something about that. Following the attacks of September 11, 2001, the director of the Institute, David Blankenhorn, invited me to participate in the drafting of a statement. This statement came to be called *What We're Fighting For*. Eventually, sixty American intellectuals signed this "letter."

What We Are Fighting For focused on the claim that U.S. response to 9/11 should be governed by the just war tradition. For Americans, and for many Europeans, the just war tradition represents the collective wisdom of generations with respect to the norms of honorable combat. In that sense, it is analogous to *ahkam al-jihad*. Our letter argued that those planning and carrying out the attacks of 9/11 violated this noble aspect of Islamic tradition. In our view, however, this fact did not mitigate the claims or value of Islam. In fact, we hoped that Muslims around the world might read our letter and join with us in resisting the claims of the so-called "jihadis" or "Islamists," recognizing that their program is a threat to people everywhere.

Given this, we were and are grateful to those Muslims, and others, who responded to our letter. Even when we do not agree, it is important to talk, to listen, and to learn from one another. As the conversation has continued over the past few years, particularly in the Malta Forum, I find that this conviction grows stronger. We must learn from one another, and try to build bridges of understanding. We must do this, even while we are fighting against those who would use armed force without distinguishing between soldiers and civilians.

Two days ago, I spoke about the way that all people and all nations have gifts to offer to the project of human existence. For theological reasons, I believe that Judaism, Christianity, and Islam each offer a perspective that can benefit human social life. Then, too, I think that both the Bible and the Qur'an indicate that nations have gifts — that the United States, Oman, and other states have historical experiences from which we can learn.

We are living in a time of testing, when there is potential to realize our various gifts as never before. At the same time, there is danger, and the outcome is uncertain. There are obstacles which make recognition and sharing of our diverse gifts very difficult.

Part of the test before us has to do with war, and with the ways we speak about the justification and limitation of war. This is what I want to speak about today. The just war tradition and ahkam al-jihad provide us with frameworks by which we talk about the rights and wrongs of war. Some people want to deny this. They want to say that the just war tradition and ahkam al-jihad are a **cause** of our problems. They view these traditions as ways by which we talk ourselves **into** fighting.

I disagree. I say that the just war tradition and ahkam al-jihad are ways we talk ourselves **through** war. In a world where wars and rumors of war are all around us, we need ways to establish guidelines. It may be that one day war will be eliminated. But until that day, the just war tradition and ahkam al-jihad are part of our solution. They help us to distinguish between the just and the unjust, the good and the evil, the better and the worse. I think we should value and preserve them.

I begin with some comments on the just war tradition. I shall then speak about ahkam al-jihad. I conclude by asking how these historic traditions can serve the process of political decision making in our time.

Just War Tradition

The just war tradition has a long history, with deep roots in the history of Europe and North America. It begins in ancient Greece, with writers like Thucydides and Aristotle. Roman law constitutes an important source for just war tradition, as do the Bible and the writings of early Christians. Ambrose (d. 390) was bishop of Milan in the late fourth century. Ambrose played an important role in the development of just war tradition, not least when he refused to allow the Emperor Theodosius to enter his church. The reason? As Ambrose had it, Theodosius was responsible for the massacre of 7,000 civilians in the city of Thessalonica. Not even the Emperor is above God's law; and God's law forbids unnecessary destruction in war.

One of Ambrose's protégés was Augustine, who became the bishop of Hippo. Augustine (d. 430) is sometimes described as the first just war theorist. In a way, this is true. Augustine discussed war in the context of his account of human societies. Survey history, he says; you will never find a just society. We may imagine a world in which justice is always done, and conflict never occurs. But even our imagination doesn't take us very far in this regard, because the societies we know are always characterized by a mix of justice and injustice. Sometimes, there is a brief moment when justice seems to triumph. But it quickly passes. Augustine wrote in the closing years of the (western) Roman Empire. He seems to have thought that Rome was more fully just when it was a republic. When it became an empire, however, corruption began, and by Augustine's time, the glory of Rome had faded.

Corruption, pride, selfishness — these are characteristics of injustice, and they disturb the peace of human social life. When this happens, wars occur. And, oddly enough, the only remedy for injustice seems to involve military force. Otherwise, we allow the strong to oppress the weak.

Thus, Augustine says that war is to be expected. It is the result of injustice. It is also the remedy for injustice. The wise person will take care — he must fight to resist injustice, but doesn't want

to become unjust himself. The real dangers of war have to do with its ability to corrupt us. In seeking justice, we may ourselves become unjust.

To that end, Augustine makes several points on which later writers would build. For example, he writes that war should never be a matter of private vengeance. It is an affair of state, and thus connected with public welfare. Further, those who fight just wars avoid unnecessary destruction. Here, no doubt, Augustine had in mind Ambrose's encounter with the Emperor. The terms "just war" and "massacre" simply do not go together.

These ideas from Augustine set the context for more systematic statements about the criteria for a just war. Thomas Aquinas (1225-1274) provides one of the most succinct, and we should spend a few moments on it.

For war to be just, three things are necessary: first, the command of a legitimate authority; second, a just cause; and third, the presence of right intention.

Each of these (legitimate authority, just cause, and right intention) is highly significant.

By legitimate authority, Thomas meant publicly constituted authority. This means that, like Augustine, Thomas taught that war is an affair of state. Private citizens do not initiate wars. Only heads of state, or governing bodies (for example, consultative assemblies) can do so.

But Thomas added something to Augustine. The authority commanding war must be legitimate. This means the ruler or consultative assembly governs in accord with the common good. Power is a kind of "trust". It is not an occasion for personal gain. Rulers are to protect the weak, not to exploit them. They are supposed to administer the state in ways that benefit the many, rather than the few. In terms of internal or domestic policy, a legitimate government seeks justice between its citizens. In terms of external or foreign policy, rulers try to protect the interests of their community. Sometimes this involves war. Here, the ruler must take care. War between states is **not** a contest to see which ruler is greatest. It is an affair of state, and must serve broader interests. Indeed, rulers who use their power for personal gain are not really legitimate. They are tyrants, and in some cases they must be removed from power. In some cases, that is, a legitimate ruler or group of rulers may consider that the impact of a neighboring tyrant requires that they band together to remove him.

Just causes are also tied to the common good. Thomas spoke about three types of just causes: defense against injury, recovery of things wrongly taken, and punishment of injustice. The first seems clear: A legitimate ruler defends his state against invasion. Similarly, the second seems almost self-evident: A legitimate ruler may fight to restore territory or goods taken by means of aggression. The third cause is bit trickier, but only a little: To punish injustice means, among other things, to fight to remove a tyrant, or at least to limit the tyrant's ability to do harm. If the ruler of a state sees that the behavior of a neighboring ruler — a tyrant — threatens the common good, then the first may order fighting to tame or remove the second.

Right intention means that one's actions accord with the common good. For convenience, we may divide this into two sets of concerns. First, the ruler acts in a manner consistent with the

virtue of prudence or wisdom in practical decision-making. Second, the ruler acts in accord with standards of justice in war. With respect to the first, one might envision the ruler asking several questions. Upon reflection, these are obviously connected to any reasonable account of good governance.

The first question has to do with proportionality: Will war, in the case at hand, yield benefits that justify its costs? This is not strictly a matter of finance, though that is a consideration. After all, bankruptcy is not usually considered to be consistent with the common good of a state! However, the question of proportionality requires consideration of costs in terms of lives lost, injuries sustained, impact on relationships between states — in other words, right intention requires a serious estimate of overall costs and benefits, and not only to the ruler's state, but to all concerned.

The second question focuses on success: In the case at hand, is there a reasonable chance that war will succeed? This suggests an estimate of military and other resources, in relation to the task at hand.

The third question has to do with whether war is the best option: In the case at hand, are there other means available, and are those more likely to succeed than war?

The fourth question focuses on long-term effectiveness: In the case at hand, will war serve the goal of restoring or building peace?

Right intention thus requires the ruler or governing body to consider whether war is prudent, in the case at hand. I have stressed this last phrase because decisions about war require determinations of fact, as well as principle.

Right intention also requires avoidance of wanton violence. By Thomas' time, this concern took two forms. First, there were lists of people who were not to be targets of direct attack. In a just war, soldiers fight soldiers. They do not directly and intentionally target children, women, the very old, and others who are presumed "noncombatants," meaning that they do not function as military personnel. It is (and was, in Thomas' time) true that an attack on a legitimate target may have side effects, and that noncombatants may be harmed. The damage to such persons must not be intentional, however.

Second, there were lists of weapons that should not be used. In Thomas' time, the crossbow presented an issue. So did hurling machines. So did siege warfare. The point is to avoid massacre. As indicated earlier, the terms "just war" and "massacre" do not go together.

When the Institute for American values called for U.S. response to 9/11 to be in accord with just war tradition, it invoked these ideas from Ambrose, Augustine, and Thomas Aquinas. Of course, much has changed since their day. But much is still the same. The just war tradition gives legitimacy to war, under certain conditions. It also places limits on war. Most of all, it provides a framework for discussion, by which we may argue about the rights and wrongs of war in particular cases.

In the aftermath of 9/11, those signing the Institute's letter agreed that fighting to prevent further attacks by al-Qa`ida would be just. The letter did not go to the details of such fighting. That is, it did not address a question like "Should fighting be strictly aimed at al-Qa`ida's training camps in Afghanistan; or should it involve a wider effort at regime change in that country?" At the time of publication, I am sure that one could have found disagreement on that point. Similarly, if one had asked "Which kinds of weapons and tactics are preferable?" one would have found disagreement. The one thing to which all agreed was that American response should be governed by just war tradition.

The tradition does not guarantee agreement. It is a framework for argument. I suppose the best illustration of this is the Institute's attempt to follow up with a statement on Iraq in late 2002 and early 2003. At that time, Americans were debating the advisability of military action aimed at regime change in Iraq. Several of us collaborated on a statement arguing that a conscientious application of just war criteria suggested two things: first, that there were many good reasons in support of military action that would delimit or even dissolve Saddam's power; and second, that there were serious questions as to whether war would be prudent, in this case. We counseled trying every means short of war, before taking further action.

Remember that sixty intellectuals signed the letter "What We're Fighting For." Only nine signed the Iraq statement. Some said the statement gave too much support for war, while others said it gave too little. I believe disagreement in this case resulted from different readings of the facts. Iraq was and remains a hard case. In such cases, disagreements occur, and that's not necessarily a bad thing. Of course, disagreements with respect to war trouble us, because the stakes are very high. But it may be that the best we can hope for in political decision making is conscientiousness. In that respect, the just war tradition is very useful. It fosters deliberation about the rights and wrongs, the costs and benefits, of war.

Ahkam al-Jihad

The Institute for American Values's letter focused on just war tradition. But it alluded to ahkam al-jihad as an analogous tradition in Islam, and suggested that the shared concerns of ahkam al-jihad and the just war tradition might help in talking through the issues posed by 9/11.

Ahkam al-jihad is, of course, a repository of precedents for thinking about the rights and wrongs of military action. As with just war tradition, we are dealing with a long history, and with many sources. Military traditions from pre-Islamic Arabia had an impact on the tradition, as did notions of wise rule common to Byzantine and Sassanian societies. Similarly, Roman law provided some material, as did Greek wisdom.

The primary sources for ahkam al-jihad were, however, the Qur'an and reports of the sunna or exemplary practice of the Prophet, particularly as these were related to specific cases by the great *fuqaha* (jurists). Malik (d. 795) has a chapter on jihad in his great work; Abu Yusuf (d. 795) and al-Shaybani (d. 804) wrote longer works. Al-Shafi`i (d. 820) rendered opinions on the matter. Indeed, by the time of al-Tabari (d. 923) there was sufficient material to fill a book describing the differences of opinion among the fuqaha concerning jihad.

These early jurists rendered opinions on numerous questions regarding the conduct of war and of statecraft. They established precedents, which were developed in turn by scholars like al-Sarakhsi (d. 1096), al-Mawardi (d. 1058), Ibn Taymiyya (d. 1328), and a host of others. We cannot go into detail here, but if one were to generalize, I think one could say something like the following. For fighting to qualify as jihad, in the sense of a just or legitimate war, there must be:

1. the command of a legitimate authority;
2. a just cause;
3. and right intention.

If you notice a similarity to Thomas Aquinas' criteria for a just war, that is of course deliberate on my part. I admit that the terminology of the fuqaha is a bit different than this. Where Thomas says "legitimate authority," the fuqaha say "the khalifa or his delegate." Where Thomas says "just cause," the jurists say "in the path of God." Where Thomas says "right intention," the jurists stipulate specific behaviors, for example, issuing an invitation to the enemy to accept Islamic government, or not directly targeting women, children, and other noncombatants. I think, however, that we have at least a functional equivalence between the language of the jurists and that of Thomas Aquinas. In fact, I am inclined to think they agree on a lot of the substance, as well.

Thus, legitimate authority or the *khalifa* is publicly constituted, and rules by the *Shari`a*, in the sense of that way of life which makes for happiness in this world and the next. Those who would take up the sword apart from the command of publicly constituted authority may be apostates, or criminals, or they may be rebels. Each of these is a distinct category, and to be treated differently, but the point is that none of these has a clear authority when it comes to war.

At the same time, a ruler who treats power as a means for personal gain may be illegitimate. In some circumstances, it may be right for other officials or rulers to use armed force to remove the tyrant from office.

As to just cause, the goal of fighting is to establish, defend, or maintain a well-ordered society. And right intention, in the sense of Thomas' questions of prudence and the concern to avoid wanton destruction are also present. Even as with just war, the terms jihad and "massacre" do not go together.

Ahkam al-jihad, like just war tradition, is a living tradition. That means it must be developed to deal with new circumstances, including diverse forms of political organization, developments in the technology of war, and so on. But there can be no doubt that it establishes a framework by which we can discuss the rights and wrongs of war in particular cases of fighting.

For example, let us consider the issues posed by al-Qa`ida. Here, we have a group whose leaders issue declarations, arguing that their program of fighting is consistent with ahkam al-jihad. The 1998 "Declaration on Armed Struggle against Jews and Crusaders" is perhaps the best known example. The text cites Qur'an and sunna on fighting, then gives an account of the current situation. It argues that Muslims are in a particular crisis; one might even call this a state of emergency. The authors then make the claim that, in times like this one, the opinions of the great

fuqaha are in agreement: Fighting becomes a duty for each and every Muslim. Thus, the conclusion: It is the obligation of every individual to fight the Americans and their allies, civilians and soldiers, in any country where that is possible.

Now, it's certainly possible simply to rule the Declaration "out of bounds," in the sense that none of the authors is adequately learned. Many have said this, and I do not say it is wrong to argue in this way. However, I want us to think for a moment about the ways *ahkam al-jihad* helps us think through the Declaration.

First, there is the question of legitimate authority. The authors of the Declaration do not represent any established government. On the face of it, that is a serious problem. Legally, one would say they lack *competence de guerre*.

Of course, for the authors of the Declaration, this is a point of pride. They believe they are the vanguard of Islam, destined to defend and restore Muslim rights. In support of this claim, they cite facts or circumstances that are supposed to demonstrate the corruption or impotence of existing governments. One way of arguing thus has to do with the facts. Are the authors' claims right, or not?

Any way one looks at it, the Declaration is on difficult grounds, when it comes to legitimate authority. For example, consider their claim that all fuqaha agree that, in a time of crisis, fighting becomes an individual duty. The Declaration appears to call for a kind of mass uprising. This does not seem to be the position of Ibn Taymiyya or the other jurists cited in the text, however. On my reading, these jurists meant that, in a time of emergency, when the ruler of a particular region proved unable to secure order, then other, neighboring rulers should send military help. This means that, even when fighting is an individual duty, the idea is not a mass uprising. It is rather a matter of response by neighboring rulers.

As already noted, I think the Declaration is on controversial grounds. In my view, the authors know this, and this knowledge is one of the reasons for Usama bin Ladin's remarks in a speech given in the summer of 2003. At that point, bin Ladin spoke at some length about the "tragedy" (as he put it) of al-Qa`ida's removal from Afghanistan. To be consistent with *ahkam al-jihad*, the authors of the Declaration need a connection to some publicly established authority.

The difficulties of the Declaration become more extensive when we consider its call to fight Americans and their allies, civilians and soldiers. Here, I think that everyone acknowledges a serious problem. Even bin Ladin, in several interviews, acknowledges that claims about the problem of indiscriminate war have force. As you know, his response is to cite two exceptions to the rule of noncombatant immunity. The first involves cases where an army targets military personnel, but unavoidably (and thus, unintentionally) harms civilians. The second has to do with a situation where enemy forces kill Muslim civilians, and in which reciprocal justice demands that Muslims forces kill an equal number of enemy civilians.

I do not think that either of these exceptions fit. In the first, the 9/11 attacks in New York, and the presence of children on the hijacked planes, seems a problem. In the second, there is an important difference between particular incidents in which civilians are killed, and the kind of

settled policy of indiscriminate war envisioned by the Declaration. As I have followed Muslim discussion of this issue, the problems with the Declaration seem more and more clear.

There is more to be said, but perhaps this is enough to show how *ahkam al-jihad*, as just war tradition, works to organize a conversation about the rights and wrongs of warfare. Now, how might contemporary political leaders make use of these historic, yet still powerful, traditions?

Conclusions

The history of just war tradition presents us with some powerful stories regarding political leaders. Many put politicians in a bad light, as with Ambrose's encounter with Theodosius. In that story, a political leader receives a rebuke, and a call to repentance. It may surprise some that Theodosius actually listened and asked for forgiveness!

More common in just war tradition is a kind of consultation between religious and political leaders. Thus, Augustine wrote letters to his provincial governor, advising him of his duty. Martin Luther (d. 1546) wrote to the German nobles to encourage them during the Peasants' Rebellion — though in retrospect, Luther wished he had been more cautious.

Similarly, *ahkam al-jihad* envisions a consultation between religious and political leaders. You may know the story of Harun al-Rashid (d. 809), who called in three jurists to speak with him about a particular situation. It seems his troops captured a rebel leader, and that Harun offered him release from prison and a writ of safe passage, if the rebel leader would renounce violence. Of course, once he was back home, the rebellion began anew. Harun then sought advice from the *fuyaha*: Is the writ of safe passage binding? Or does the rebel leader's alleged behavior render it null and void?

Two of the jurists argued that the writ was binding, and that Harun would have to forego ordering his troops to bring the rebel back in. The third jurist gave a different opinion, to the effect that Harun's troops should capture the scoundrel and bring him in, dead or alive. Harun liked the third scholar's opinion. Of course, no one remembers that man's name, but the two giving the rejected opinion were Abu Yusuf and al-Shaybani, two of the more noteworthy jurists in the history of Islam!

There is no guarantee of agreement when people refer to the just war tradition or to *ahkam al-jihad*, and there is also no guarantee that people will reach the right opinion. There is, however, a consensus in both traditions — when it comes to political decisions, consultation and discussion are good. All of us, powerful or not, gain wisdom when we consult with others. We all know that human beings have, at best, a partial perspective when it comes to the facts of any given case. We know that, when the Qur'an speaks of the way the human creature has proven tyrannical and foolish, or when the Bible speaks about the sin of pride, these ancient scriptures tell the truth. We need consultation. We need checks and balances on our power, in order to help us deal with the fact of human shortcoming. *Ahkam al-jihad* envisioned a consultation between political officials and members of the learned class. The just war tradition envisioned conversations between representatives of the Church and the State, along with military officials.

Nowadays, it is possible to broaden the process of consultation, so that many more people play a part. The result is sometimes messy, and I do not say that all contributions are of equal value. Political judgment is a skill, learned over time and by much trial and error; and in the end, there is no substitute for the decision-making of wise statesmen and stateswomen.

Nevertheless, I think just war tradition and ahkam al-jihad work best when we allow for consultation. And I would conclude with this suggestion: It is time to broaden consultation, not just in terms of numbers of participants, but in ways that cross cultural lines. We are past the time when just war tradition and ahkam al-jihad should be viewed as the distinctive prerogatives of very particular cultures. We are now able to talk across cultural and geographic boundaries, in ways our ancestors would not have imagined. There is nothing to keep Omanis, or Muslims in general, from speaking about the wisdom of just war tradition or of its implications for specific cases. Similarly, there is nothing to keep Americans, or Christians and Jews in general, from discussing cases in terms of ahkam al-jihad. In fact, I think it would be a good thing for more of us to do so.

For this to happen, we need forums for discussion. The Malta Forum sponsored by the Institute for American Values is one small effort in this regard. Our meeting today is another. I thank you for this opportunity to converse about the just war tradition and ahkam al-jihad.