

THREE THEORIES OF JUST WAR:
UNDERSTANDING WARFARE AS A SOCIAL TOOL THROUGH
COMPARATIVE ANALYSIS OF WESTERN, CHINESE, AND ISLAMIC
CLASSICAL THEORIES OF WAR

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DEDICATION

To my parents, Ahmet and Nidžara Rahmanović.

To my wife, Majda, who continues to put up with me.

To Professor Keith W. Krasemann, for teaching me to ask the right questions.

And to Professor Martin J. Tracey, for his tireless commitment to my success.

ABSTRACT

The purpose of this analysis was to discover the extent to which dictates of war theory ideals can be considered universal, by comparing the Western (European), Classical Chinese, and Islamic models. It also examined the contextual elements that drove war theory development within each civilization, and the impact of such elements on the differences arising in war theory comparison. These theories were chosen for their differences in major contextual elements, in order to limit the impact of contextual similarities on the war theories.

The results revealed a great degree of similarities in the conception of warfare as a social tool of the state, utilized as a sometimes necessary, albeit tragic, means of establishing peace, justice and harmony. What differences did arise, were relatively minor, and came primarily from the differing conceptions of morality and justice within each civilization – thus indicating a great degree of universality to the conception of warfare.

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INTRODUCTION

War is a common experience of mankind. Each culture, however, has responded to this common experience in different ways, shaped by their varying ethical values, philosophical perspectives, and historical experience. The key point of agreement in traditional conceptions of war is that it is accepted as a part, albeit a tragic one, of human experience, justified only under certain restricted conditions. This analysis of war theories aims to extrapolate the war theory ideals from each of the three civilizations and compare the results, in order to demonstrate the similarities in the core conceptions of warfare, and establish the use of war as a historically universal tool of the state. What is meant by the phrase, “war theory ideals,” is the framework regulating the use of warfare as a social tool, constructed according to the principles of justice and reflecting the full gravity of its implications for legitimate action – as understood in the period of its comprehensive development. The comparative work of this thesis, therefore, is significant for applied ethics and greater understanding of the Chinese, Western (European), and Islamic standard in regards to warfare and justice – topics both relevant and long overdue. This comparative examination will provide a vista from which to consider the implications of theories separated by time, geography, and socio-cultural backgrounds.

The term “war **theory**” will be taken to mean the establishment of rules of war as a social tool for specific cultures, based upon the particular notions of that culture’s notions of justice and statehood. In the same way, the theories of justice and statehood will be taken to reflect the specific cultural ideals. The following analysis will utilize this terminology, rather than phrasing such as “art of war” (typically evoking the idea of military manuals), for the greater degree of precision it provides, as well as the breadth of its scope. Further, this terminology has long been

accepted as standard nomenclature by the Western just War Theory, whose layout will be used as the common comparative feature.

The selection of these particular theories of vastly different cultural, religious, geographical, historical, and social contexts is intended to demonstrate the general similarities in conceptions of war. From within these elements, the analysis will extrapolate the war theories in their **ideal form** – rather than the particular historical instantiations. In this way, the analysis seeks to break free of the misinterpretation and misuse of war theory which has so frequently been utilized for the sake of military expediency and pragmatism. In light of the recent wars throughout the Middle East and the claims of ends justifying the means from the religious and non-religious sources alike, this focus on the ideal theories is all the more necessary to provide a backdrop against which the modern interpretations may later be considered.

The Western theory, unlike its Islamic and Chinese counterparts, will be presented in its modern, as well as historical form. The difference of approach is based on the discontinuity characterizing the Western theory, and the lack of a coherent “classical” theory – a problem absent in both Chinese and Islamic contexts. While the three theories all include similar components, the difference in the cultural approach to their arrangement differs. In order to provide a useful comparative methodology, the analysis will utilize the modern Western conception of war requirements, which provides a clear outline of the various elements of a just war.

Though the theories may have similar rules governing warfare, as will be demonstrated below, the underlying causes governing their application are vastly disparate. The primary reason for the underlying differences lies in their distinctive theories of justice and state, as well as their

differing historical contexts, undergirding the theories of war. Consequently, the analysis will first focus on contextual elements shaping the war theories. It will examine the specific developmental context arising from historical issues, as well as the competing conceptions of state and notions of justice for each theory. Understanding the context of development will allow the war theories to arise holistically. The analysis will then turn to the theories themselves, particularly the right to make war (*Jus ad Bellum*) and the laws of war (*Jus in Bello*). The conclusion will consider the impact of differences in contextual understanding each theory uses to arrive at the various war theory criteria, as well as the implications of these differences on the war theory itself

CHAPTER 1

WESTERN (EUROPEAN) WAR THEORY

The Western war theory, of the Just War Theory as it is commonly known, is an amalgam assortment of Greek, Roman, Catholic, Enlightenment, and modern notions of war, which have built on each other and been molded into a cohesive theory over the span of some 2300 years. Unlike the Chinese and Islamic theories, the Western model has no particular authors or time period where the various concepts were welded into a unified theory.¹ Even the modern theory, established after WWII, utilizes a wide variety of elements adapted from its extensive history.

The problem is further exacerbated by similar, discontinuous developments with the Western theories of justice and state, whose progress is marked by halting steps, frequent backslides, and sporadic application. This discontinuity is characterized by virtual destruction of the very notions of statehood, justice, and a coherent war theory with the fall of the Roman Empire – notions which had gradually taken shape over the preceding centuries, and would remain forgotten for almost a millennium. It is impossible to present the either Just War Theory, or its theories of state and justice, as a project of any single author or era. This reduces the ability of such context to provide definite insight into the basis and development of the war theory. Simply put, there is no such thing as a “classical” Western war theory. As a result, the Western model must be considered in its full historical unfolding, if the analysis is to provide the necessary understanding for further comparison. In practical terms, this means that, unlike the Chinese and Islamic chapters, Western analysis cannot focus on any particular primary sources.

¹ Johnson, James Turner. *Just War Tradition and the Restraint of War*. New Jersey: Princeton University Press, 1981. xxi

Therefore, this analysis will track the historical progress of the theories into their modern manifestations, and focus on the Just War Theory primarily in that context.

In an effort to contain this chapter to manageable size, the analysis will draw on three developments within the broad historical spectrum of the theories of justice, statehood, and warfare. These three are: the works of Augustine, the lead-up to and consequences of the Treaty of Westphalia, and the modern interpretations of the Just War Theory.

HISTORICAL CONTEXT

The Just War Theory traces its roots to Aristotle and Cicero. Its true codification came during the Roman Empire, where war-waging powers were carefully tied to the power of the state, and reflected the Roman values and notions of justice. Military engagements were preceded by the examination of state interests, military calculations, pursuit of diplomatic measures, approval by the Senate, and a public declaration of hostilities.

The early Church, awaiting the imminent Second Coming, had neither sought nor attained any political or military power.² In 300 years of Church existence, the Christian thinkers did not articulate a theory of state, justice, or war.³ Instead, they seem to have considered as legitimate the Roman and, to a lesser extent, Greek notions on the subject. Preceding the integration of Rome and the Church, the Church doctrine was primarily pacifistic. Though there are reports of Christians as soldiers in the Roman army, their example is one of private actions, rather than representative of the Church's views. However, once the integration was begun in

² Johnson, James Turner. *Just War Tradition and the Restraint of War*. Pg. xxviii.

³ *Ibid.*

300 CE by the Emperor Constantine, the Church suddenly found itself with a state, an extensive military apparatus, and a question of reconciling these two with Church doctrine.⁴

Augustine's works sought to provide such reconciliation.⁵ Given the relative Biblical silence on these matters, he utilized the extant Roman concepts and justified them through Christian doctrine. As Brien Hallett argues, this methodology amounted to little more than applying a "Christian veneer" over the Roman ideas,⁶ though the result was not a mere restatement, but rather a synthesis of Roman law and Christian morality. Unfortunately, lacking from Augustine's writings are any explicit accounts of the state or justice, though both concepts are relied upon, particularly in his Just War Theory. However, since his Just War criteria are recast primarily as Christian understanding of the Roman ones,⁷ one is led to conclude that the notions of state and justice are based on the same (Christian-Roman), ideals.

As Augustine wrote, the Roman Empire collapsed under a series of invasions, as well as sackings of Rome, starting in 410 CE. With the Empire dismembered, Augustine's assumed statehood and justice ideals were gone as well. In the subsequent centuries, the Western – European – models of statehood and justice fluctuated wildly, none attaining the centralized rule of their Roman predecessors. Augustine's works, relying as they did on the existence of a just state which was no longer there, remained largely out of use for the better part of the next seven hundred years.

Following the fall of Rome, the emergent kingdoms lacked any legitimate centralized power structure. Instead, the stratification of the society led to a stratification of powers and rights, and

⁴ *Ibid.* Pg. xxv.

⁵ Johnson, James Turner. *The Quest for Peace: Three Moral Traditions in Western Cultural History*, Princeton: Princeton University Press, 1987. Pg. 57.

⁶ Hallett, Brien. "Sources of Western Just War Theory." Interview by author. February 29, 2012.

⁷ Johnson, James Turner. *The Quest for Peace*. Pg. 59.

resulted in a quagmire of uncertain laws under pseudo-rulers with unclear jurisdictions. Adding to the problem were the increasingly numerous mercenaries and bandits.

Beginning in the 10th century, the Church introduced a series of laws known as the “Peace of God” and “Truce of God,” pertaining to warfare and the use of violence. These measures were designed primarily to protect the clergy and Church property from the increasingly present and unaccountable mercenaries and bandits – where the former were historically personal retainers kept at the expense of a lord,⁸ and frequently became the latter in absence of work. These measures included prohibitions on banditry and killing of peasants or clergy, bans on certain weapons, prohibitions on dueling – individual and by militias raised by various nobles, and the limitations on the power to declare war. While these laws were subject to voluntary agreement by the rulers, they were often adopted because of their effect of centralizing power. These laws, however, did relatively little in practice. As Machiavelli’s *The Prince* demonstrates, the use of mercenaries was common practice in 16th century Italy. What laws were adopted, applied exclusively within European Christendom.

With schisms in the Church, into Roman and Orthodox factions, as well as the later Protestant Reformation, came the wars of religion in Europe. Writing in the 16th century, Francisco de Vitoria was among the first authors to challenge religious morality as grounds for waging war. His arguments focused on the pursuit of a just cause for engaging in war, and denying the possibility that both sides can have the same validity of claim for just military engagements. He was succeeded and improved upon by Hugo Grotius, writing in the 17th century. Grotius argued that a just war, where only one side is justified in pursuing war while the other is an unjust aggressor, can only be waged on the grounds of natural law. Inherent to natural

⁸ Johnson, James Turner. *The Quest for Peace*. Pp. 77, 81.

law is the notion of state practice, essentially a type of moral secularism that provides the state with sovereign and autonomous rule – the key components of the modern state.

With the Thirty Years' War, starting in 1618, the religious wars reached their peak. The scale of the war – involvement of more than a dozen nations, longest duration in modern history, extensive population displacements, famine, disease, destruction on tens of thousands of villages, thousands of castles, and the staggering death toll – led to the Treaty of Westphalia in 1648. The treaty, ultimately separating religious and state values, redefined the basis for the ideas of justice and war, and heralded the beginning of the modern state. However, these changes also led to the stripping away of moral values traditionally associated with the Just War Theory, and thus also to the elimination of the concept of just war.

In light of the moral failures of the Westphalian mentality post-WWII – along with the start of the cold war with the looming threat of nuclear annihilation and frequent proxy wars – the need for a moral basis for warfare revived the notion of a Just War Theory. While it underwent a number of changes, both in terms of technical limitations reflecting the technological progress of warfare and of the religious basis of the rules governing the theory, it incorporated almost all historical adaptations to the theory. The global scope of the UN, and its adoptions of Just War rules through ratifications of documents such as the Universal Declaration of Human Rights, enabled a practical and (nearly) global application of just war concepts – at least in theory. However, the ideas of national sovereignty and autonomy remained, making any foreign involvement in the domestic affairs of a nation anathema.

Following the wake of genocidal campaigns in Rwanda and Yugoslavia in the 1990s, new proposals were made to allow foreign intervention in domestic affairs, where the latter are

egregious. The most expansive of these is the “Responsibility to Protect” (2001). The resulting situation, however, was – and remains – a confused one. The UN charter contains laws that prohibit intervention in domestic affairs of a nation, while bills ratified by that same body necessitate such involvement. This leads to problems in intervention, as states take opposing positions for any number of state interests.

THEORY OF JUSTICE

While the Western justice theory traces its roots to Greece and Rome, the analysis will begin with Augustine in the 4th century. The theory of justice, in the works of Christian scholars like Augustine and Aquinas, is an assumed element of the state. While the state in question and its particular laws are not enumerated, it is clear from their writings that the state is the Roman Empire utilizing Roman law – or a close cognate.

The writings of Augustine, in regards to both war and justice, are centered on the notion of *caritas* – charity and love towards others.⁹ His argument for *caritas*-based justice and war theories is premised on the Christian understanding of an absolute morality with explicit consequences, and a loving God who sits in judgment of humanity. In the same way, the state – now with the support of the Church – sits in loving judgment over its citizens. When punishment is carried out in response to an inappropriate act, the goal is to dissuade both the perpetrator and others from committing that act. Where the initial act is considered to be truly harmful, the punishment – in any form – is not a hateful action. Rather, it is one of love and compassion, in response to fear of harm that will result from the “evil” action. If the laws of the state are

⁹ Johnson, James Turner. *The Quest for Peace*. Pg. 61.

intended to guide people towards beneficial acts and away from the harmful ones, then the penal system is a means of *caritas*, and is carried out with the spirit of charity and compassion. As such, *caritas* revolves around the idea of a right (morally correct) intention of the agent who administers that discipline. Augustine's systematic treatment of just war in the context of this theological worldview transformed the Just War Theory in a way that allowed it to persist long after the dissolution of the state upon which it was premised.¹⁰

The Christian scriptural sources were of little use in this endeavor. The Old Testament contains a number of religiously legitimate wars, yet their pursuit and execution was a product of direct divine commandment, not a series of rules that could be extrapolated into a generalized law of war. As an example, in 1 Samuel 15:2-3 Israel is ordered to exterminate the adult men and enslave the rest of Amalekites. However, the order is a divine command with no explanation as to what justifies such military pursuits or whether the same force is legitimate against any other target. The New Testament apparently advocates non-violence, at least in the personal lives of the believers. Consequently, it too is of little direct use to the formation of the Christian war theory.

Despite the scriptural issues, authors like Augustine emphasized the legitimate role of military in protecting the lives of the people, and the Church. This protection is based on his notion of *caritas*, both for the victim and the transgressor. While Augustine added relatively little to the extant Roman war theory in terms of practical requirements, he altered the purpose and intention of waging war with his notion of *caritas*, which became the core principle of just war.

¹⁰ Johnson, James Turner. *Just War Tradition and the Restraint of War*. Pp. xxiv-xxv.

Caritas means charity, particularly as connected to love. Augustine argues that it is *caritas* that legitimizes punishment delivered as a deterrent to actions that cause great harm to the agent. Thus, disciplining a child for their repeated attempts to put their hand in boiling water is an act of love on the part of the parent – though the child may see it only as inflicting pain. Similarly, the punishment exacted by the state, if done with *caritas* towards its citizens, is one seeking not to inflict harm upon them, but rather to prevent a far greater harm resulting from their actions.

Augustine centered his conception of the Just War Theory on *caritas*, and thus found a way to justify the destruction of life and property it brings. A state, out of *caritas* towards its own population, fights against invaders – sacrificing the lives of some citizens in protecting the rest. Though some harm is done, a far greater degree of destruction is prevented. It bears noting that, once the Roman Empire adopted the Church that saw itself as responsible for the guidance of the people and the state both temporally and eternally, destruction of the Church was understood as a grave harm to the people of the state and the world. The same state, acting out of *caritas* towards the enemy, fights against them not with a desire or purpose of killing them, but rather, in order to discipline and dissuade them from further war. Though harm is done to the enemy, the greater harm of destroying the means of their eternal salvation – i.e. the Church – is prevented.

What is the evil in war? Is it the death of some who will soon die in any case, that others may live in peaceful subjection? This is mere cowardly dislike, not any religious feeling. The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars, when they find themselves in such position as regards the conduct of human affairs, that right conduct requires them to act, or to make others act in this way.¹¹

¹¹ Augustine. "Reply to Faustus the Manichean." From *Saint Augustine and the Theory of Just War*, by John Mark Mattox. London: Continuum, 2006. Pg. 47.

To this end, there are a series of requirements, each of which has to be met in order to justly engage in hostilities. Once engaged, there is a series of requirements for acting justly within those hostilities. When both sets of requirements are met, the war can be called just – in that it is righteous, necessary, and brings about justice and peace (ideally). However, with the fall of the Roman Empire, “Augustine’s work on just war was remembered neither in the mind nor in military praxis.”¹² The “Peace of God” and “Truce of God” movements, started in the 10th and 12th centuries respectively, introduced a series of additional limitations to warfare. While it has been noted that these were a means of curbing militia and mercenary activities, their implications are extensive enough to have been adopted into the modern theory.

It is implied in the writings of Augustine that the purpose of the state is to protect the people and the Church, and ensure that justice would be enforced. The details of such justice are not explicitly stated, but given Augustine’s role in recasting Roman ideas in Christian light, it seems clear that the intended form is Roman law, tempered with Christian values. With the destruction of the Roman state, the principles of justice it embodied were also lost – at least in practice.¹³ Although the Church would remain a political force in Europe, the loss of a strong state sponsor meant the loss of direct legal and military power. As a result, the prominent works on justice – and by extension war – found little purchase in the post-Roman world.

As a plethora of kingdoms, city-states, and other political entities rushed in to fill the power vacuum, the unified Roman law disintegrated. It was replaced by a variety of local jurisdictions, whose codes of justice were independent of each other, as well as any external standards. Yet, given the spread of Christianity in Europe, those states were still considered “Christian” and were unified (theoretically) by that faith into a greater “Christendom.” This

¹² Johnson, James Turner. *The Quest for Peace*. Pg. 65.

¹³ *Ibid.* Pg. 77.

connection, though tentative, allowed the Church to exert some influence over the various rulers and necessitated some degree of their acknowledgment of the Church as an authoritative body. The Church wielded this influence to bring rulers into a compliance with its edicts, at least publically.

Starting in the 10th century, these edicts added elements of the Just War Theory, such as necessary discrimination between combatants (knightly persons) and civilians (non-knightly persons).¹⁴ While these war laws sought to limit destruction on the battlefield, they also began centralizing power in the official rulers by limiting the right to engage in war to a select and limited class.¹⁵ It is suspected that this was among the primary reasons for the adoption of such laws by the rulers at the time. Despite the adoption of these laws, Machiavelli notes the use of mercenaries and private armies well into the 16th century.

With first the Great Schism in 1054,¹⁶ and then the Protestant Reformation in the 15th century, the position of the Church was again eroded – further removing it from temporal affairs. Since the right to rule had been conferred by the Church – at least ceremoniously – these same developments led to a power struggle for legitimacy among such temporal rulers. Although the adherence to Church law by rulers was voluntary, it served to provide an underlying common language of morality and values. With Christendom fractured and Church legitimacy and authority called into question, this commonality broke – resulting in the violent pursuit of reunification between “believers” and “heretics.”

These religious wars were premised on the legitimate authority of the rulers to wage wars against infidels, initially authorized by Pope Urban II in 1095 for the purpose of starting the first Crusade, and absolving participants of sin by plenary indulgence. On the other hand, the rulers

¹⁴ *Ibid.* Pg. 81.

¹⁵ *Ibid.* Pp. 70-71.

¹⁶ The Catholic – Orthodox split

defending themselves also acted on the legitimate authority to defend their realms, especially against “infidel” invaders. This problem was first fully addressed by Francisco di Vitoria, who claimed that only one side may have a legitimate claim to war in a just war, and thus the legitimacy cannot be premised religion.¹⁷ Hugo Grotius expanded upon this notion, and called for a separation of religious moral doctrine from justice – particularly in war – with an emphasis on natural law and law of nations, leading to development of the state practice theory.¹⁸

The Thirty Years’ War brought the religious wars to a head, with unprecedented destruction. The Treaty of Westphalia adapted and adopted the works of Grotius and Vitoria, amongst others, in the separation of religious and the moral and justice values. The treaty instituted the concept of state practice, while simultaneously doing away with the moral justification of wars of religion and the basis of the Just War Theory. However, these conclusions extended to include only European Christian powers in their dealings with each other,¹⁹ as their application is in scant evidence in the actions of European powers throughout Asia, Africa, or the Americas.

States, now removed from the power of the Papacy and endowed with Westphalian autonomy and sovereignty arising from the state policies, had no unified code of justice. Instead, each state was free to make whatever laws it wished within its own territory, while the laws of any nation were considered just for its population. While this strongly resembles the results following the fall of Rome, the states were now centralized and autonomous, with a clear power structure – a feature generally absent in the preceding thirteen centuries.

This system developed and persisted until the end of WWII, when it became clear that Westphalian ideologies of statehood and justice were no longer tenable, in light of the gruesome

¹⁷ Lammers, Stephen E. "Approaches to Limits on War in Western Just War Discourse." Pg. 62.

¹⁸ *Ibid.* Pg. 66.

¹⁹ *Ibid.* Pg. 65.

state policies of the Third Reich. The pressure to adapt the 17th century ideologies led to the formation of the UN and reintroduction of morality and justice as universal “absolute” standards, in the form of a respect for human rights. With a legitimate basis reestablished, the notion of just war was later reintroduced, following the nuclear arms race and proxy wars of the Cold War. The modern incarnation of the Just War Theory was adapted to modern warfare and utilized human rights in place of religious morality. However, without a truly universal agreement on what justice is, the modern Just War Theory became constrained solely to defensive wars.²⁰

The Western theory of justice relevant to this analysis began by drawing on the extant practice of the Roman Empire. This practice was recast in Christian values, but soon lost the enforcing power of the state as the Roman Empire collapsed. Following the collapse, the Church sought to preserve some semblance of universal justice by influencing various European rulers. With the Protestant Reformation, the tentative universality of justice based on the Church fractured, as the continent was engulfed in religious wars. Ending the wars of religion, the Treaty of Westphalia divorced justice from its religious and universal basis, instead attaching it to state practice. In the wake of WWII, the need for a universal standard of justice reemerged, and was tentatively established on universal human rights.

THEORY OF STATE

The Western state theory, unlike its Chinese and Islamic counterparts, did not play an integral role in the majority of historical developments of the Western war theory. This fact is due, in part, to the noted discontinuity of the existence of a legitimate state between the 5th and 17th centuries. However, since the theories of state and justice did play a part in shaping the war

²⁰ *Ibid.* Pg. 63.

theory, and continue to shape it presently, it remains an important part of understanding the war theory in its entirety. As with the justice theory, the relevant Western theory of state begins with the integration of the Church into the Roman Empire.

The Church, having had held no prior political aspirations, consequently lacked the premises of what a Christian state should be. The New Testament provided no guidance, and was in fact the very thing that had led to the absence of Christian state theory, as its audience widely expected imminent Second Coming.²¹ The Old Testament was of no more help, as historical Israel was premised on a set of laws that were no longer valid for Christians. However, the Roman Empire had not only developed a robust theory of state, but had also implemented it on a grand scale. Consequently, the Church – or at least early Christian authors – began from the assumption of the Christian state as the Roman state. This assumption is prominent in the works of Augustine, who apparently relies on the presence of the state, yet fails to specify its form.

The role of the assumed Christian state was to establish law and justice, and to protect its people and the Church. The Church, on the other hand was understood as supporting and guiding the state in these endeavors. While the Roman state persisted, these notions were clear and implementable. Once the state collapsed, however, two problems arose. First, the Church no longer had a means by which to influence the governance of the people, nor a means of practically protecting itself. Second, and far more problematic in the long run, the theory of a Christian state – which was hereto dependent on the existence of the Roman state – was left undefined.

The Roman state was characterized by a central government, ultimately resting on the senate – and later on an Emperor. The powers to make and implement laws, conduct foreign affairs, levy taxes, to declare war, and raise and direct armies – among others – were the

²¹ Johnson, James Turner. *Just War Tradition and the Restraint of War*. Pg. xxviii.

province solely of the state and its appointed ruling members. Following the fall of Rome, the fractured remnants of the state became independently governed; led by panoply of self-proclaimed kings, emperors, warlords, city councils, etc. One feature common to all the new fiefdoms²² was the absence of the elements of centralized rule that make a legitimate state.²³

The fiefdoms, whether under control of a king or warlord, were decentralized affairs. Under the ruler were a myriad of nobles and other officials who were independent rulers in their own right. Where a king could make and implement laws, or raise an army and engage in war, so could any baron serving under that king – and generally without the need for authorization. The system, as could be expected, led to confused laws and jurisdictions, with no clear definition of the appropriate role or shape of government.

With the lack of a sponsor state, the Church lost a considerable amount of political influence. What guidance it had relied on the voluntary enforcement by the good will of the ruler. However, the Church had retained the power to anoint rulers. Such anointment lent an increased legitimacy to the ruler's claim on the lands. This claim of legitimacy in rule was considered by Aquinas – writing in the 12th century – a necessary component of waging war.²⁴

With an absence of standing armies, there arose a special class of militias and mercenaries, where the two were synonymous until the 11th century. These were swords for hire, and usually retained by nobles. They were also commonly utilized by fiefdoms at war to supplement, or completely replace, their own levies. However, out-of-work mercenaries often turned to banditry for their survival. The problem was serious enough that, starting in the 10th century with the “Peace of God” movement, the Church passed a series of laws greatly limiting

²² For the sake of clarity, the term ‘state’ will only be used to describe a legitimate state entity with requisite modern or Roman form. The term ‘fief’ will be used for the ruling entities lacking such legitimacy.

²³ Johnson, James Turner. *The Quest for Peace*. Pp. 75-6.

²⁴ Aquinas, Thomas. *On Law, Morality, and Politics*. Edited by William P. Baumgarth. Translated by Richard J. Regan. Indianapolis: Hackett, 2002. Pg. 164.

their use and power. As noted in the preceding section, these laws also served to centralize power²⁵ – first in the aristocratic class, then to the ruler himself. As a result, such laws were often voluntarily adopted by fiefdom rulers, though such laws were not necessarily enforced.

With the rise of Protestantism came competing and conflicting claims to legitimacy of rule over the fiefdoms, as the Papacy exerted no influence over the protestant population. While it would be a gross oversimplification to claim that the wars that engulfed Europe in the following centuries were based solely on religion, it is accurate to say that it did play a major part. With the Thirty Years' War and the Treaty of Westphalia, the system of fiefdoms came to an end. What emerged were states: defined regions of clear jurisdiction, governed by sovereign and autonomous centralized powers with the ability to make and enforce law over their population with impunity. This definition and role of the state has persisted since its inception and encompasses the modern state.

With the conclusion of WWII, and the pressure to adapt the theories of state, justice, and warfare, to the brutal realities of the modern world, theory of state largely managed to escape revisions. Despite the ratification of the Universal Declaration of Human Rights by the full UN assembly, the state remained immune from any direct foreign involvement. As defined in the UN Charter, Article II, it remains an autonomous and sovereign entity that acts with impunity within its borders, and is safe from foreign interference in its internal affairs. These attitudes contributed to the limited involvement, or complete lack thereof, by the global community in more than two score genocides since 1945. Following the events in Rwanda and Yugoslavia in the 1990s, the UN adopted several proposals to help prevent future occurrence of such extensive destruction and genocide, with the Responsibility to Protect (2001) as the most significant of those.

²⁵ Johnson, James Turner. *The Quest for Peace*. Pg. 127.

However, this resulted in competing, equally valid laws – one preventing the foreign interference in domestic affairs, the other mandating such involvement.

The Western theory of state pertinent to this analysis began with the assumed Christian notion that the extant Roman state is a legitimate model, and as such was not extrapolated further. When the Roman state disappeared so did the legitimate state, replaced by a variety of decentralized fiefdoms with questionable power and jurisdiction. The presence of the Church did little to effectively alter this equation, and it was the Protestant Reformation – leading to wars of religion and the Treaty of Westphalia – that ultimately reshaped the fiefdoms into legitimate states. With this change came the sovereignty and autonomy of the state, a concept that still persists. While the Westphalian state theory has remained in use, the problems of genocide within a state have led to new laws regulating foreign involvement in internal affairs of the state. However, these developments remain impotent, as the very same law prohibits such action.

THEORY OF WAR

As the modern theory draws on nearly all historical elements, in addition to introducing new requirements and redefining some of the earlier ones, this section will focus primarily on the modern Just War Theory. The reason for this methodology, absent from the Chinese and Islamic components, is to provide a framework large enough to address all the important issues of war. Whereas the Islamic and Chinese theories contain these elements in their classical traditions – either explicitly or implicitly – the Western tradition was constructed in a more piecemeal fashion, thus requiring a more comprehensive examination.

The Just War Theory, like the state and justice theories, is primarily a product of the Roman Empire.²⁶ As has already been told, it traces its roots to Aristotle and Cicero, and was integrated into the Christian worldview by Augustine – and to a lesser extent his mentor Ambrose – in the 4th century.

When the Just War concept resurfaced, following WWII, it was constructed primarily around the Augustinian categories. Since the theory had lain dormant for some three hundred years, it was adapted to reflect the modern realities of Westphalian states and modern warfare in general. The underpinning Christian religious morality was swapped for the humanistic respect for human rights, in order to provide a globally effective system, rather than an “outdated” Christian, Euro-centric one.

By the end of the 13th century, the core of the Just War Theory was divided into two distinct subsets: *Jus ad Bellum* (the right to make war), and *Jus in Bello* (the laws of war). While the issue of *Jus post Bellum* has recently been raised, we will omit its role in the present analysis.

Jus ad Bellum

Jus ad Bellum focuses on the conditions necessary for the pursuit of war. These are intended as limiting factors on engagement in hostilities, and considered as the prerogative of the state, rather than an individual. *Jus ad Bellum*, as will be used for the purposes of this analysis, is composed of six requirements that, theoretically, have to be examined and satisfied before an engagement of hostilities can be justly commenced. While some modern authors have suggested variations of these requirements, the following list is generally considered as containing all the necessary elements of the modern theory. These requirements are: (1) Just Cause; (2) Right

²⁶ *Ibid.* Pg. 60.

Intention; (3) Public Declaration of War by a Proper Authority; (4) Last Resort; (5) Probability of Success; (6) Proportionality.

Just Cause: As a requirement, just cause was a part of Augustine's just war conception, limiting military action to self-defense of a just state²⁷ and redressing of crimes committed.²⁸ The modern requirement, lacking the same religiously absolute notion of justice, has been restricted to wars of self-defense.²⁹ It is founded on the responsibility of the state to protect the rights of that state and its people. Additionally, when in a partnership with another state, the safety of that state becomes the obligation of its allies. Essentially, the duty of defense extends to the allies of the state.³⁰ Thus, though the just cause requirement historically included the punishment of evildoers,³¹ in its modern form it has become limited to international conflicts.

The issue of state sovereignty and autonomy, in the presence of egregious human rights violations, has raised additional questions of foreign involvement in domestic affairs of other nations. While the Responsibility to Protect (2001) and the UN Charter (Article II) are at odds about the legality of such interventions, the just war theorists generally agree that there is a point at which intervention is required. There is, however, no consensus as to what that point is. Michael Walzer argues that, "intervention is not justified just because revolution is."³² LaCroix posits this limitation as the idea that, "there must be serious value threatened that is higher on a

²⁷ *Ibid.* Pg. 62.

²⁸ Lammers, Stephen E. "Approaches to Limits on War in Western Just War Discourse." Pg. 60.

²⁹ *Ibid.*

³⁰ Orend, Brian. *The Morality of War*. Peterborough: Broadview Press, 2006 Pg. 32.

³¹ Johnson, James Turner. *Just War Tradition and the Restraint of War*. Pg. xxii.

³² Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1992. Pg. 89.

public good hierarchy than the disvalues involved in taking military action.³³ Consequently, the only agreed upon just causes of modern warfare remain self-defense and the defense of allies.

Right Intention: Augustine was the first author to introduce this requirement,³⁴ and defined it in terms of *caritas*. It requires that the goals for engaging in hostilities are, “in accord with the other conditions of justice in resort to war,”³⁵ rather than self-interested goals such as gains by occupation or plunder, or revenge. It is the intent of the agent in question, which morally condemns or condones the act; and no act is as morally perilous as pursuing a war.

Without the right intention, just cause turns into an excuse for horrors on the battlefield.³⁶ Where the right intention is present, it automatically limits the pursuit of war to only the necessary elements, and seeks its swift resolution. Where the goal is limited to the reestablishment of peace and justice, the pursuit of war offers no glory or plunder; instead, it promises only destruction and danger, and thus no incentive to join in the hostilities – besides attaining peace. Augustine argues:

For what else is victory than the conquest of those who resist us? and when this is done there is peace. It is therefore with the desire for peace that all wars are waged, even by those who take pleasure in exercising their warlike nature in command and battle. And hence it is obvious that peace is the end sought by war. For every man seeks peace by waging war, but no man seeks war by waging peace.³⁷

This requirement, however, is little attended in the modern theory. Given its basis in religious morality and the ecclesiastical concern with the ultimate outcome of actions carried out with the wrong intention, the right intention requirement was the very core of the medieval Just

³³ LaCroix, W. L. *War and International Ethics: Tradition and Today*. Lanham: University Press of America, 1988. Pg. 147.

³⁴ Johnson, James Turner. *The Quest for Peace*. Pp. 61, 68.

³⁵ *Ibid.* Pg. 61.

³⁶ Orend, Brian. *The Morality of War*. Pp. 46-48.

³⁷ Augustine. "The City of God." From *The Quest for Peace: Three Moral Traditions in Western Cultural History*, by James Turner Johnson. Pg. 63.

War Theory. Since the modern theory is devoid of these elements, “in practice, the *jus ad bellum* criterion of right intention is substantially ignored.”³⁸

Public Declaration of War by the Proper Authority: Though classically given as a single requirement, public declaration of war by the proper authority is a combination of two distinct elements, each with its own considerations.

In its classical form, the requirement of proper authority rested with the assumed state for Augustine. In the later medieval period, emulating the preceding Roman practice,³⁹ “it was an attempt to limit war by insisting that only certain persons, those who had no political superior, had the authority to declare war.”⁴⁰ In the modern context, it is a restriction on the head of state, if he lacks the sole authority to make war. Most importantly, the significance of proper authority in war should be understood as, “...the distinction between killing as a private individual... and killing under the authority of a sovereign, either as a public executioner or as military soldier.”⁴¹ Such procedure has been in use since antiquity, requiring the approval of the state in order to engage in a legitimate war. Any military action not so authorized was illegitimate, illegal, and not representative of the state.

Augustine and Aquinas both insisted on the necessity of legitimate authority in pursuing war.

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war... And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances... so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. [F]or this reason Augustine says (Contra Faust. xxii, 75): “The natural order conducive to peace among

³⁸ Lammers, Stephen E. “Approaches to Limits on War in Western Just War Discourse.” Pg. 59.

³⁹ Johnson, James Turner. *The Quest for Peace*. Pg. 60.

⁴⁰ Lammers, Stephen E. “Approaches to Limits on War in Western Just War Discourse.” Pg. 59.

⁴¹ LaCroix, W. L. *War and International Ethics*. Pg. 142.

mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.”⁴²

Public declaration requirement is the last chance offered to the aggressor (as per just cause requirement) – a chance to resolve the conflict without resorting to war. It is also the means of informing the public of both states that hostilities are about to commence – a warning to the people of the dangers which will arise, and allowing them a chance to find a safe place. The use of public declaration of war is exemplified in the Roman law: “If the Senate voted for war, the party would return to the enemy, read aloud the Senate’s public declaration and then symbolically throw a sharp-pointed javelin into the enemy’s soil.”⁴³

Historically, instead of carrying out diplomatic relations, the state would send emissaries with a provisional declaration of war and terms for negotiations. A major element of this policy was the impossibility of speedy communications between the state and the emissaries. Once a system of roads was established in the 18th century, and swift correspondence became possible over large distances, the range of diplomatic negotiations expanded.

Last Resort: The last resort criterion was present in Roman law, but is absent in Augustine’s writings. The reason may its implication through the previous requirements – particularly just cause – which had already limited warfare to defense.

This requirement is a means of ensuring that diplomacy has, indeed, failed. The notion is not to be taken literally, as the same failed tactics could be tried repeatedly, in hope of a positive outcome. Instead, the criterion is based on the circumstance at hand, and the desire to avoid both injustice – in allowing the aggressor to carry out aggression and oppression, as well as enriching

⁴² Aquinas, Thomas. *On Law, Morality, and Politics*. Pg. 164.

⁴³ Orend, Brian. *The Morality of War*. Pg. 11.

the aggressor state through such means – and premature war.⁴⁴ Winston Churchill, in agreement with Machiavelli's phrasing, posited this concept as: "There is no merit in putting off a war for a year if, when it comes, it is a far worse war or one much harder to win."⁴⁵

Probability of Success: This requirement is a calculation on the side of the non-aggressor state, used to determine whether the defensive war can actually succeed, or if the efforts will conclude in a loss. It is one of Augustine's requirements inherited from Roman law. If resistance will yield results no different than surrender – save the added loss of life on the part of the defender – the state should capitulate. The probability of success is disregarded by a state whose people are facing extermination at the hands of the aggressor, as any war-incurred loss is preferable to utter annihilation.⁴⁶

The calculus of the probability of success seems intended to spare the nation bearing the brunt of the aggression from further losses in a valiant, but ultimately futile, effort. That being said, history notes a great number of victories over a vastly superior foe, which could not have been predicted.⁴⁷ The problem of determining probabilities lies in the fact that key elements of victory are rarely calculable – else there would be no need for war. Caesar's defeat of the Gauls at Alesia, Alexander's destruction of Persians at Issus, and the Mamluk defeat of the Mongols at 'Ayn Jalut – among many others – are examples of improbable victories achieved through superior tactics over an overwhelmingly numerically superior foe.

Proportionality: Present in Augustine and the modern theory, the proportionality requirement is defined in its modern form by LaCroix as the need that, "the good to be achieved

⁴⁴ LaCroix, W. L. *War and International Ethics*. Pg. 151.

⁴⁵ Churchill, Winston. "The Gathering Storm." From *War and International Ethics*, by L. W. LaCroix. Pg. 151.

⁴⁶ LaCroix, W. L. *War and International Ethics*. Pg. 149.

⁴⁷ Orend, Brian. *The Morality of War*. Pp. 58-59.

by war must be proportionate to the physical and social evils that come from going to war."⁴⁸

The issue of proportionality seems to ask whether it is better to allow the aggression and annexation of one state by another – i.e. rewarding injustice – or to oppose it, given the cost of opposition. Orend considers the inaction of the West, as the USSR annexed Czechoslovakia and Hungary, as a calculated loss in order to prevent the far worse consequences of an all-out nuclear war.⁴⁹

The proportionality requirement contains an inherent ambiguity in its cost-benefit analysis, somewhat similar to the hedonistic calculus of utilitarianism. Problems arising from such calculations include the method of balancing losses of state A against the gains of state B, factual determination of the maximum cost a state can bear, and the determination of where the actual costs of war will fall on that scale. Ultimately, this is a calculus that only the state in question can address, and is subjective enough to deny any attempts to quantify into a coherently objective standard.

Peace as the Ultimate Objective: This Augustinian requirement is not a part of the modern conception of Jus ad Bellum rules. It states that the purpose of war must be to bring about peace, by removing those elements harmful to peace. In the modern theory, this element seems to have been folded into other Jus ad Bellum requirements, and no longer needs a category of its own.

Jus ad Bellum can now be summarized. A just war is one that is authorized by legitimate authority (state) and comes from a just cause (defense of self and of the other) mandated by the pursuit of right intentions. It is preceded by the exhaustive use of alternative methods, and

⁴⁸ LaCroix, W. L. *War and International Ethics*. Pg. 156.

⁴⁹ Orend, Brian. *The Morality of War*. Pg. 61.

proceeds only after careful consideration of proportionality and the possibility of success of military engagement, and commencing with a public declaration.

The second subset of the Just War Theory, *Jus in Bello*, assumes that the hostilities have degenerated into open war. However, some modern war theorists argue that it does not necessarily assume that the requirements of *Jus ad Bellum* have been satisfied before the engagements. This alludes to the fact that even in pursuing unjust ends one can act in a just way in the pursuit itself. In this sense, the modern rules of warfare, utilizing agreements such as the Geneva and Hague conventions, strive to guide the methodology of warfare, regardless of its cause. Alternately, even a state pursuing a just war, may do so in an unjust manner. Orend, on the other hand, argues that “Just War Theory insists on a *fundamental consistency between means and ends* with regard to wartime behavior.”⁵⁰ As it stands, satisfaction of *Jus ad Bellum* requirements helps to guide the *Jus in Bello* ones, but is not strictly necessary for their implementation – especially once the religious absolutist morality has been replaced with a far more tentative concept of human rights as the moral underpinning of the Just War Theory.

Jus in Bello

Jus in Bello, like *Jus ad Bellum*, seeks to limit warfare. Where *Jus ad Bellum* falls in the realm of the state, *Jus in Bello* covers the full spectrum of all participants individually. That is to say, while the decision to go to war rests on the governing body of the state, the manner in which the war is executed rests on that governing body, as well as the soldiers following the orders. As the Just War Theory is a normative ethical theory – morality based on the respect for human

⁵⁰*Ibid* .Pg. 105.

rights in its modern instantiation – the rules of wartime justice apply to each participant individually.⁵¹

Jus in Bello, through limitations of means, sought to include in war only those individuals and institutions directly involved in the aggression. The *raison d'être* of modern warfare – as it was for the Augustinian Just War Theory – seems aimed not at destruction of the enemy, but rather at the swift resolution of hostilities while leaving the enemy state in good order – so that it may quickly reestablish peaceful relations with the greater community. Its historical development arose out of a strengthening of knightly values and the code of chivalry.⁵²

Jus in Bello has five stipulations,⁵³ and breaking of any of them is considered a morally reprehensible action. The stipulations are: (1) Discrimination and non-combatant immunity; (2) Proportionality; (3) Prohibited weapons; (4) Prohibition of means "*mala in se*;" (5) Reprisals.

Discrimination: The discrimination requirement encompasses four concepts, in the attempt to strictly define who/what is and is not a legitimate target, as well as the rights of enemy combatants. These are: 1) Discrimination, 2) Non-combatant immunity, 3) Doctrine of double effect, and 4) Treatment of prisoners of war (POWs). This broad requirement, mostly present in Roman law, and was adopted by Augustine whose argument centered on the necessary pursuit of *caritas* in warfare, and thus the impermissibility of intentional targeting of civilians.

Discrimination is the demarcation of military and non-military targets, and requires that forces engaged in combat limit their actions only to the military ones.⁵⁴ These include not only soldiers, but also those elements which directly contribute to the military machinery – such as

⁵¹ This is exemplified by the Nuremberg Trials as well as the establishment of the International Criminal Court.

⁵² Johnson, James Turner. *The Quest for Peace*. Pg. 72.

⁵³ Orend, Brian. *The Morality of War*. Pp. 108-126.

⁵⁴ Lammers, Stephen E. "Approaches to Limits on War in Western Just War Discourse." Pg. 57.

outposts, barracks, headquarters, munitions storage, etc. Intentional destruction of non-military objectives runs contrary to the right intention requirement, and illegitimizes the military endeavor by making the side culpable into aggressors. This element, ultimately, prevents the indiscriminate use of weapons – a factor common throughout the *Jus in Bello* requirements.

Non-combatant immunity further builds on the discrimination element. It posits that any persons not directly engaged in war, or in supporting the war with military necessities, are considered as non-combatants and cannot be directly targeted. This not only exempts civilians, but also those working in jobs that may be necessary to the military – i.e. food and clothing production – yet whose primary purpose is non-military. This element arose from the “Peace of God” movement through the differentiation of who could and could not bear arms.⁵⁵ It prevents the use of military tactics such as carpet-bombing.

However, neither discrimination nor non-combatant immunity can be considered as absolute requirements – especially in light of modern weapons. Their key role lies in strict targeting designed to strike only legitimate targets, not in expecting an unrealistic ability to prevent all non-military death and destruction.⁵⁶ This fact is especially important in modern theory, where battlefields are commonly civilian-populated areas, with military elements dispersed throughout. The other side of discrimination and non-combatant immunity is the doctrine of double effect.

Doctrine of double effect – noting foreseeable civilian casualties in a military strike yet carrying it out – is the source of significant ethical dilemmas in the modern Just War Theory. The fact that civilian deaths are foreseen, yet the attack is carried out, implies a lack of

⁵⁵ Johnson, James Turner. *The Quest for Peace*. Pg. 81.

⁵⁶ Lammers, Stephen E. "Approaches to Limits on War in Western Just War Discourse." Pg. 57.

discrimination by the acting party. In doing so, the acting party may pursue a course in contradiction to the discrimination requirement, thus rendering their participation in the conflict illegitimate and unjust. As with the aforementioned probability of success and proportionality requirements, the calculus of life and death comes into play. Many war theorists, including Vitoria,⁵⁷ have continued to lend their support to such a calculus, at least to some extent. The most basic formulation of the argument is, "If the end is lawful, the necessary means are also lawful."⁵⁸ Orend, on the other hand, contends that the only justifiable use of such a strike is if, and only if, the strike is the final one - i.e. the one that brings the war to an immediate conclusion.⁵⁹ As will be noted in the following requirement, this justification too suffers from the use of ambiguous moral calculus, and all its problems.

The laws regarding prisoners of war were initially conceived by medieval scholars as a chivalrous respect due to the captured noble. In its modern form, the Just War Theory requires that a benevolent quarantine is extended to all POWs. Benevolent quarantine includes food, shelter, and the respect for the basic human rights of POWs. While such prisoners may be questioned, they cannot be tortured for any reason – torture consisting of all treatment impinging on the Universal Declaration of Human Rights.

Proportionality: Proportionality demands that only the necessary force be exercised against the enemy, in order to ensure that the harm done is proportionate to the good achieved.⁶⁰ As with discrimination, Augustine's understanding of this requirement was based on *caritas*. Where the purpose is to discipline the opponent for the purpose of preventing greater harm, the

⁵⁷ *Ibid.* Pg. 65.

⁵⁸ LaCroix, W. L. *War and International Ethics*. Pg. 159.

⁵⁹ Orend, Brian. *The Morality of War*. Pp. 115-18.

⁶⁰ Lammers, Stephen E. "Approaches to Limits on War in Western Just War Discourse." Pg. 57.

use of excessive force on the battlefield is little different than excessive use of violence in common law.

In this limitation, the proportionality requirement closely follows the rules of discrimination. Thus, tactics like carpet bombing, scorched-earth policies, destruction of crops and livestock, destruction of water sources, etc. are prohibited. Additionally such actions run contrary to the requirements of right intention and discrimination, and ultimately seek destruction rather than peace.

For authors like Orend, disproportionate measures may be viable and in compliance with the Just War Theory under particular circumstances. He considers the use of such force as viable, where the use of such measures is decisive and will immediately bring an end to hostilities. In this sense, the disproportionate violence of the moment is less than the perceived total violence necessary to bring the war to conclusion by ordinary means – and is thus an overall reduction in the violence of war.

However, such arguments are based on the aforementioned moral calculus, which is – at best – ambiguous. It also falls back on the use of the doctrine of double effect, which is questionable and without a clear agreement on its legality. A blow perceived by as decisive by one side, may not be seen as such by the other. The fact that Japan did not surrender after the first atomic bomb was dropped on Hiroshima, is evidence enough.

Prohibited Weapons: This requirement arose in the medieval “Peace of God” movement, and was intended to curb the use of mercenaries by prohibiting the use of bows and crossbows – used exclusively by many such groups.⁶¹ In its modern form, it seeks to limit the

⁶¹ Johnson, James Turner. *The Quest for Peace*. Pg. 78.

methods by which one may wage a war by insisting on the use of discriminating weaponry. The Hague conventions are laden with these proscriptions, banning the use of booby-traps, landmines, chemical and biological weapons etc. In essence, the requirement confines the destruction only to legitimate targets, by banning or controlling the use of indiscriminant weapons. It additionally seeks to enforce basic human rights, by outlawing the use of “cruel” weapons – such as bio-chemical weapons – which cause disproportionate suffering to the enemy.

Prohibition on means "mala in se": The term, “*mala in se*” means “evil in themselves.” This requirement prohibits the use of rape, genocide, ethnic cleansing, etc. The prohibition is not the outcome of a cost-benefit analysis of the destructive capabilities of such methods – as is the foregoing proportionality requirement and the prohibition on indiscriminant weapons. Rather, these means are considered intrinsically evil, dehumanizing the victims by stripping them of basic human rights. Given the modern shift from the religious to human rights-based morality, any methods that intrinsically violate human rights are morally abhorrent. As such, they can never be used in a just way.

Augustine and medieval theorists remained silent on this issue, despite the fact that rape, genocide, and other “*mala in se*” tactics were clearly present in their time. However, given Augustine’s emphasis on *caritas* and peace as the ultimate goal of war, it seems that this requirement was subsumed as a part of others Just War elements. The absence of a clear prohibition on such acts may have contributed to the apparent permissibility of such acts, particularly during the crusades, and once the European wars of religion began.

Reprisals: Reprisals are an act of vengeance, exacted in the same or similar method as the harm initially done. The prohibition on their use is a modern addition to the Just War Theory.

The role of reprisals is another cause of disagreement amongst just war theorists. Reprisals are generally prohibited under the Just War Theory, yet much use has been made of them historically. In essence, reprisals are retaliation against the side that has broken the law, by breaking the law yourself in a similar manner. Churchill famously warned the Germans of reprisals, should they seek to use biological weapons on the Allies.⁶² Though fear of reprisals is taken to represent a deterrent to any law-breaking actions by the enemy, historically such reprisals have only served to further exacerbate the conflict. This has led to the vicious cycle of reprising reprisals.

Though Augustine does not specifically address the requirement, the implication is clearly present. The notion of *caritas* toward the enemy clearly indicates that the sole purpose to the use of force must be the chastisement of the enemy, not exact vengeance by unjust means. A state that pursues injustice in war, for any reason, is the illegitimate aggressor against whom the Just War Theory legitimizes the use of force.

Good Faith: Though not present in the modern theory, Augustine's good faith requirement further limits the acceptable military tactics to those not specifically ruled out by any other treaties between the warring states. These treaties, whatever their content, must be honored, and the prosecution of war means the adherence to this agreement. In a way, Augustine anticipates the modern theory and the modern, globalized, apparatus of institutions like the UN. Since the just war requirements are laced throughout the UN Charter and Hague and Geneva conventions, member states and signatories are thus bound by treaty to adhere to the agreed upon methods of war.

⁶²Orend, Brian. *The Morality of War*. Pg. 124.

Jus in Bello may now be summarized. In a war mandated by *Jus ad Bellum* (ideally), *Jus in Bello* rules are utilized to limit destruction by discrimination – used to ensure the greatest possible safety of the civilian population and property – while proportionality determines the least force necessary in accomplishing the task. Enemy prisoners are subject to benevolent quarantine, and no methods understood as “evil in themselves” nor indiscriminate weapons, are allowed. Reprisals for unjust acts are prohibited as such actions are themselves unjust. Whether the doctrine of double effect is justified or not, remains inconclusive.

The modern Just War Theory, though it draws from its historical elements, is generally disconnected from the contextual theories of justice and state. The primary reason lies in the discontinuity of the Western traditions, and the later abandonment of just war, as well as the traditional sources of justice.

Western theories of war, statehood, and justice are characterized by historical discontinuity. They are the remnants of the ancient Greco-Roman theory, given a veneer of Christian doctrine and imperfectly transmitted to the 16th and 17th centuries, where, under the pressure of the wars of religion, a new, modern, and secular theory was developed, starting with the Treaty of Westphalia. In the wake of WWII, the ideas of Westphalian autonomous rule came under pressure, as did the policies of state practice – with a demand for morally-based laws of war; morality now interpreted as respect for “human rights.” These pressures reintroduced a modern and secularized Just War Theory – a work in progress seeking to adjust to the realities of global application and modern warfare.

CHAPTER 2

CHINESE WAR THEORY

Chinese War Theory was developed in the tumultuous period following the decline of influence of the House of Zhou (772 BCE) that ruled over a unified China. The following five hundred years were a field of war, as local rulers vied for supremacy as the sole power over the once-unified area. As a result of the destruction and instability caused by the incessant war, there emerged a series of competing politico-philosophical systems that sought to restore peace and harmony. Alongside these theories emerged a specific class of texts and authors whose primary focus was war theory. While these arose from the realities of warfare, they also embodied many politico-philosophical ideas, making the war theory compatible with the ideals of statecraft.

Given the limited timeframe for the development of the Chinese theories, the present analysis will limit itself to the most prominent theories and authors of the period. The primary texts consist of Xunzi's Confucian writings and Han Feizi's Legalist theory, as representative of the two major politico-philosophical movements; and Sunzi's and Sun Bin's books on the *Art of War* as representative of the war theory. While the former texts and authors are often in opposition to one another, it is important to take account of both these dominant theories, in order to better grasp the context in which the war theory developed, and the sources upon which it drew.

HISTORICAL CONTEXT

With the decline of the Zhou Dynasty in 772 BCE, some 1000 years of unified rule by various dynasties over China, ended.⁶³ As the Eastern barbarians invaded, the last Zhou Emperor – King Yu – fled the capital. This event considerably weakened the central authority necessary to maintain the rule of the empire. This marks the beginning of the Spring and Autumn period (722-481 BCE). Subsequently, various provincial governors seized power over their dominions, and sought to expand their power to that of an emperor, ushering in the 500 years of warfare.

Nearly 200 years later, as the smaller states were consumed, began the Hundred Philosophers period (551-233 BCE). Aptly named, the period produced a great number of politico-philosophical writers, whose aim was the reestablishment of peace and harmony to the war-torn land. Their integration into various warring states as the core principles of government provided a unique theoretical death-match, literally pitting one theory against another in a fight to the proverbial death. The Hundred Philosophers period tentatively began with Confucius, and was home to Laozi, Xunzi, and Han Feizi, amongst others; representing Daoism, Confucianism, and Legalism, respectively.⁶⁴

As the wars wore on, and the scores of states were subsumed into a dozen or so larger ones, it became clear that the situation had become one of victory or destruction.⁶⁵ Besides the politico-philosophical attitudes adopted by the states, emerged a class of war treatises designed

⁶³ Though the earliest archeological evidence begins c. 1300 BCE, the existence of historico-legendary rule of the Xia dynasty, preceded by that of the legendary Sage kings, stretches back to roughly the 28th century BCE.

⁶⁴ Ames, Roger T., and Henry Rosemont. Introduction. In *The Analects of Confucius: A Philosophical Translation*, 1-70. New York: Ballantine Books, 1999. Pg. 2

⁶⁵ Ames, Roger T. Preface. "Sun-tzu: The Art of Warfare." In *The Book of War*, edited by Caleb Carr, 9-69. New York: Modern Library, 2000. Pg. 9.

to achieve the military victory necessary for survival. The best known of these treatises was the *Art of War* penned by Sunzi (d. 496 BCE). While its military tactics play a prominent part of the work, it is also strongly echoed in the sentiments of the *Daodejing* in its attitudes towards war.

The Warring States Period (403-221 BCE) was the endgame of wars for supremacy and unification. The continuous warfare, fueled by its zero-sum ideology, led to great innovation in military technology. Where the earlier battles produced up to 45 thousand dead per battle, the developments of war technology led to a ten-fold increase of casualties, with a recorded 450 thousand dead on one side in a battle in 260 BCE.⁶⁶ By the time Sunzi's successor Sun Bin (d. 316 BCE) penned his *Art of War*, the notion of warfare as battles between fielded armies had changed. The introduction of cavalry, crossbows, siege engines, and of fixed military formation – replacing the loose militia-style approach – forever changed the landscape of battle and required new military strategies. Sun Bin provided a revised and modernized approach to war, yet the strong connection to moral attitudes found in Sunzi, remained as an integral attitude.

In 221 BCE, the Qin Dynasty achieved complete unification of China. The politico-philosophic approach of the Ch'in was one of legalism – a pragmatic and amoral policy that rejected tradition and ritual as such, instead relying on nearly draconian notions of reward and punishment. However, their harsh rule was short-lived. In 207 BCE, the Qin were forcibly ousted by the founders of the Han Dynasty, whose rule was to last until 280 CE. The Han eventually utilized a governing form of Confucianism heavily influenced by Xunzi.

The wars for supremacy and unification were initially won by Legalism. While the amoral and pragmatic ideas may have served the Ch'in in unifying China, the draconian policies

⁶⁶ Ames, Roger T., and Lau D.C. Introduction. In *Sun Bin: The Art of Warfare : A Translation of the Classic Chinese Work of Philosophy and Strategy*. 1-85. Ames. Albany: State University of New York Press, 2003. Pg. 34.

demonstrably failed in their attempt to establish a viable peace-time government. Their swift succession by the Han and their Xunzi-based Confucianism, proved the superiority of Confucian theory – at least when applied in non-war circumstances. Confucianism outlasted the Han, and by adapting to the various developments and changes in circumstances, has continued to play a significant part in the Chinese political and philosophical landscape.

THEORIES OF JUSTICE/HARMONY

The Chinese theory of justice, or rather harmony, differs greatly from both its Western and Islamic counterparts. From a different notion of the world to the absence of absolutist moral distinctions, the systems differ in core concepts. The use of familiar terminology, such as “heaven,” is misleading, as the ideas behind the pertinent Chinese terms do not match their commonly understood meanings in the Western and Islamic contexts. Further, the very nature of understanding Chinese notions of relations differs from the non-Chinese ideas of the analysis. In order to comprehend these differences, and establish a firm basis for this contextual element, the analysis must first turn to the relevant core concepts and terminology of the Chinese authors.

Chinese concept of relations between all elements (agent or otherwise), is a fluid and intrinsic part of their existence – particularly as understood in Confucian thought. To a certain degree, there is no independent existence of any element. “For Confucius, unless there are at least two human beings, there can be no human beings.”⁶⁷ Further, these relations also represent the defining attributes of an element – one is a parent, a child, a sibling, a spouse, etc. In time, these relations change just as the attributes of the thing itself and its relational elements change.

⁶⁷ Ames, Roger T., and Henry Rosemont. Introduction. In *The Analects of Confucius*. Pg. 48.

That is to say, any element is inherently intertwined with others by their relations. As a relation changes, so do the related elements. The conception of such relations in their ideal form, for the Chinese context, arises not out of instantiations of an abstract concept, but rather out of the interaction of the related elements as arising out of their specific circumstances made ideal through harmonious existence – a crucial concept which will be more fully addressed below.

The Western model, which has traditionally focused on an individualistic outlook, considers such elements as separate entities independent of one another, and their relation as a bridge between them connecting them in some particular fashion. With the destruction of that connection, each element remains whole. The Chinese model, on the other hand, considers the elements as intrinsically connected, and the destruction of that connection as destruction of a part of each constituent element. “[N]o-thing or no-body has an *essence*, but can be defined only “correlationally,” at any given time, with differing relations holding at other times...”⁶⁸

These relations are also not considered as absolute; instead, they too are relative and relational. One may be a father, but is also a son; wood is hard when compared with water, but soft when compared to stone. Additionally, relations may be cyclical: as parents are beneficiaries to their children in the latter’s early years, so the children become the beneficiaries of their parents in the latter’s infirmity. This fluidity of relations plays an important element in Chinese theories of justice, statehood, and even warfare.

Further, the Chinese language fluidly shifts between verbs and nouns, simultaneously incorporating the plurality of meanings within the context. It is also a reciprocal language, indicating that the defining relations are themselves contingent on a reciprocity that makes them

⁶⁸ *Ibid.* Pg. 24.

possible – i.e. to “father” is to have been “fathered;” to rule is to have followers and to follow the path of rulership. Consequently, the definitions of terms function on a variety of levels.

Dao is a highly complex term, yet one central to all the authors of this analysis. It represents both the path of understanding and knowledge, as well as the ineffable reality of all things. Ames and Frankel respectively define the usage of *dao*, especially in Confucian context, as:

[T]o lead through, and hence, road, path, way, method, art, teachings; to explain, to tell, doctrines... “road-building,” and by extension to connote a road that has been made, and hence can be traveled... to experience, to interpret, and to influence the world in such a way as to reinforce and extend the way of life inherited from one’s cultural predecessors... *dao* defies Aristotle’s categories, and... has as much to do with subject as object, as much to do with the quality of understanding as the condition of the world understood.⁶⁹

The “Way” is generally understood in two distinct yet interrelated senses: first, as a transcendent force that undergirds all phenomenal reality; and second, as a principle, which when followed harmonizes worldly affairs... ultimate reality is understood as an invisible force or abstract entity, which defies facile definition... Although these terms and concepts are all central to Confucian discourse, in many ways this use of the term *dao* finds its most famous expression in the first lines of the *Daodejing*, which emphasize the ineffability of the Way, describing it as the, “nameless origin of Heaven and Earth.”⁷⁰

Li will be considered as primarily meaning “ritual propriety.” It has commonly been translated as, “‘ritual,’ ‘rites,’ ‘customs,’ ‘etiquette,’ ‘propriety,’ ‘morals,’ ‘rules of proper behavior,’ and ‘worship,’” and comes from the notion of “‘how to serve the spirits to bring about good fortune.’”⁷¹ Unlike the modern idea of ritual, often representing hollow social conventions, the Chinese notion is closely intertwined with what it means to be human. Ritual is the, “social grammar that provides each member with a defined place and status within the family,

⁶⁹ *Ibid.* Pp. 45-6.

⁷⁰ Frankel, James D. *Rectifying God's Name: Liu Zhi's Confucian Translation of Monotheism and Islamic Law*. Honolulu: University of Hawai'i Press, 2011. Pg. 58.

⁷¹ Ames, Roger T., and Henry Rosemont. Introduction. In *The Analects of Confucius*. Pg. 51.

community, and polity.”⁷² Further, ““achieving harmony (*he*) is the most valuable function of observing ritual propriety (*li*).””⁷³

Yi, according to D. C. Lau, is best understood as meaning “right,” “duty,” moral,” and “morality.”⁷⁴ However, in light of the English connotations of those terms, particularly the post-Kantian ethical understanding, the term may be better understood as “appropriateness.”⁷⁵ *Yi* is closely related to *Li*, in that the appropriate behavior is informed by ritual propriety and the ritual is understood by its propriety.

He is perhaps the most important of all pertinent terminology, and means ‘harmony.’ More than that, it represents the center of a complex web of relations, a center that all other encompassed elements are related to, and one that rightly establishes the appropriate attitudes of these relations.⁷⁶ This web extends from each individual alike, and on that scale represents the narrowest scope of relations. On a greater level, the family becomes the center that contains a number of such individuals; then the community containing a number of families; then the region containing the communities; all the way to the emperor, who is at the center of the broadest scope of this network, and to whom relate all things and relations within the land. When this complex web is in good order, all things lie in their proper place. However, if the center of this web is twisted, the whole web becomes tangled. Given this understanding, harmony is clearly the basis of Chinese “justice” theory and the cornerstone of the state theory – and as we shall see, it pervades the war theory.

⁷² *Ibid.*

⁷³ Confucius. *The Analects of Confucius: A Philosophical Translation*. Translated by Roger T. Ames and Henry Rosemont. New York: Ballantine Books, 1999. Pg. 74. [Henceforth referred to as *The Analects*]

⁷⁴ Ames, Roger T., and Henry Rosemont. Introduction. In *The Analects of Confucius*. Pg. 53.

⁷⁵ *Ibid.* 54

⁷⁶ Roger T. Ames. Preface. “Sun-tzu: The Art of Warfare.” In *The Book of War*. Pp. 43-46.

[A]t the core of the Classical Chinese world view is the cultivation of harmony – a specifically “center-seeking” or “centripetal” harmony. This harmony begins from what is most concrete and immediate – that is from the perspective of any particular human being – and draws from the outside in towards its center.⁷⁷

In the Western tradition pertinent to this analysis, justice stems from the Judeo-Christian notion of the divine, which establishes universal laws and defines justice in the absolute terms of “an eye for an eye.”⁷⁸ However, the Chinese notion of harmony carries no such intrinsic or absolute implications. Harmony seems sensitive to the particular circumstance in which it operates, and seeks the path of least societal disruption even at the expense of strict law enforcement – seeking the economy of force in all action. Justice, on the other hand, generally stands in relation only to the absolute notions of right and wrong and seems to view transgressions in a vacuum of these absolute categories. This is not to say that all forms of justice take such a rigid approach. Rather, such standards are most deeply ingrained in the Western, Manichean-based context.

De is a type of virtue or power, reflective of the particular circumstances and potential, rather than absolute notions. It is doing the best with what one has, encompassing both what is had and what one does with it. It also refers to “moral potency,” as an exemplary embodiment of following the *dao*.⁷⁹ Confucianism emphasizes the ruler as a moral exemplar whose actions reflect the *dao*, and inspire his subordinates and people at large to emulate his example – thus guiding all to the *dao*. “ ‘Governing with excellence (*de*) can be compared to being the North Star: the North Star dwells in its place, and the multitude of stars pay it tribute.’ ”⁸⁰

⁷⁷ *Ibid.* 45.

⁷⁸ Even in its earlier conception, namely Egyptian and Roman, the principle was similar – as depicted by justice wearing a blindfold and carrying scales and a sword.

⁷⁹ Ames, Roger T., and Tzu Huai-nan. *The Art of Rulership: A Study in Ancient Chinese Political Thought*. Honolulu: University of Hawaii Press, 1983. Pg. 2.

⁸⁰ *The Analects* Pg. 76.

Shan is commonly understood as “good.” However, like many of the aforementioned terms, it lacks the Western absolutist connotations. Instead, it means the full utilization of one’s potential in given circumstances. It may perhaps best be understood through its antonym *è*, meaning ‘evil,’ or rather the failure to utilize potential and thus base, and ugly. Thus, a burned dinner is ‘evil’ because all the ingredients necessary for a good meal were present, and were wasted; a broken family is ‘evil,’ because it had the potential to be a supportive structure for all its members. Conversely, a good meal and harmonious family are ‘good’ in the sense that they reflect the full utilization of what is at hand.

Shan then, reflects ritual propriety (*li*) and appropriateness in action (*yi*), as one follows the *dao*. When one is able to successfully combine these elements, they become exemplary (*de*) and are the center of harmony (*he*).

It is important to keep in mind when considering Chinese theories of war, state, and justice, that they use what seems to be moral terminology in the Western-equivalent sense. However, to read them as such would be erroneous, with conclusions that may be far removed from their actual intent.

The classical Chinese theory of justice and harmony differs from both its Western and Islamic counterparts, primarily due to the fact that there are a number of such competing theories. As the politico-philosophical authors sought to establish a system that would bring the centuries of war and chaos to a peaceful conclusion, a great many contrary and contradictory theories arose. Unlike Western thought, which remained mostly in its theoretical and academic setting, many Chinese theories were championed by various states, leading to a unique moment where the validity of such theories of governance were put to the test in the most direct way.

As the historical context implies, the notions of state and harmony are closely related, and were presented in the same breath, as a unified theory according to each author. As a result, there is no way to divorce the two concepts entirely, as the subject and object relation uses reciprocity between the two to construct each concept. Instead of imposing an artificial differentiation, we have chosen to focus this justice section around the question of goals of correct governance, and the means of implementing that vision. In this way, we hope to limit the issues of statehood to only the components necessary to intelligently speak of the notions of justice and harmony within various visions of the state.

Given the myriad of Classical Chinese theories, this analysis cannot begin to do justice to their vast variety and complexity. Instead, it will focus on two theories whose impact had the greatest effect on Chinese moral and political thought, namely Confucianism and Legalism. While Daoism certainly served to influence both Legalists and later Confucians, its views on moral doctrines never directly governed a major state. Daoism contributed to other moral, political, philosophical, and even war theories, yet itself was not represented strongly by any of the warring states.

Confucianism was the earliest moral and politico-philosophical theory developed in the post-Zhou era, and became a distinct lineage during the Hundred Philosophers period. It focused on three elements: reflection on the ancient sages as the perceived *dao* masters and models of behavior (*de*); ritual (*li*) as the embodiment of that behavior; and the attainment of the Way (*dao*) through this process. Confucius believed the sages had mastered the *dao* and that, by emulating their example, one could achieve the same. However, this reflection was not a guided by a desire to return to the previous age. Rather, it was a means of understanding the relevant principles, and applying them to the present circumstances. In the same way that virtuous action (*de*) consists of

actions in particular circumstance, so the sages' mastery of the *dao* lies not in abstract understanding, but rather in their application of knowledge to utilize their situations. Therefore, the Confucian ideal is one of reflection on the sages of old, in order to understand and apply their wisdom to the present.⁸¹ As such, it is a progressive model of moral and political thought.

While Confucianism pervaded a great deal of classical Chinese thought, and inspired a number of subsequent authors, this analysis will focus on Xunzi, and his interpretation of Confucian ideals. The primary reason for this selection is that Xunzi is considered to have been a direct influence on the Han understanding and implementation of Confucian thought.⁸² Therefore, it can be said that Xunzi's ideology attained supremacy over all others, through its implementation by the Han.

Xunzi⁸³ (d. 238 BCE) was a Confucian scholar, though his interpretations sometimes differ significantly from those of Confucius and other Confucian scholars. His views on ritual are generally devoid of any notion of the supernatural. Some rituals he condemns, while others he seems willing to tolerate and encourage, provided they are understood through the lens of humanism.⁸⁴ Additionally, the greatest separation of Xunzi's thought from that of Confucius and other scholars, is his view that human nature is inherently "evil" (è) – meaning base or ugly – and can only be corrected by proper education.⁸⁵ To this end, Xunzi disdains and argues against intellectual pursuits which do nothing for moral pursuits.⁸⁶

⁸¹ Ames, Roger T. *The Art of Rulership*. Pg. 4.

⁸² Watson, Burton. Introduction. In *Hsün Tzu: Basic Writings*. 1-14. New York: Colombia University Press, 1996. Pg. 11.

⁸³ Alternate transliteration: Hsün Tzu

⁸⁴ Hsün, Tzu. *Hsün Tzu: Basic Writings*. Translated by Burton Watson. New York: Colombia University Press, 1996. Pg. 8. [Henceforth referred to as *Xunzi*]

⁸⁵ *Ibid.* Pp. 157-8.

⁸⁶ Watson, Burton. Introduction. In *Hsün Tzu: Basic Writings*. Pg. 8.

Xunzi's views on justice and harmony rely on the premise of two immutable concepts: human nature and basic moral principles. Human nature is base, and can only be corrected through proper education, which is the role of sages and rulers – as man is the source of all moral order.⁸⁷ Xunzi considers all human beings to be equal by birth, differences in their moral status arising only from their upbringing and education.⁸⁸ This education, like the Confucian ideal, must build on that of earlier sages.

Hence to reject ritual is to be without law and to reject your teacher is to be without a guide. To deny guide and law and attempt to do everything your own way is to be like blind man trying to distinguish colors or a deaf man, tones. Nothing will come of it but confusion and outrage.⁸⁹

Moral education, as per the Confucian model, is rooted in classical texts, rituals, and ritual principles, drawn from the sages and rulers of the past. The proper function of moral individuals is to govern, and by their exemplary behavior (*de*) provide a model for others to emulate. This leadership role inherently incorporates the notion of following in the path of the wise predecessors, “do not go by what you like, but follow the way of the king; do not go by what you hate, but follow the king's road.”⁹⁰ The role of the ruler is not to micromanage the variety of laws and regulations. Rather, Xunzi draws on Daoist notions of quietism and *wu-wei* (action without effort),⁹¹ to cast the role of the ruler as a passively guiding embodiment of the *dao*.⁹²

The tenets of morality, for Xunzi, rest on a righteous ruler and appropriate laws. When these are in concert, the state naturally grows stronger and flourishes. A righteous ruler is one

⁸⁷ *Ibid.*

⁸⁸ *Xunzi*. Pg. 15.

⁸⁹ *Ibid.* Pg. 30.

⁹⁰ *Ibid.* 32

⁹¹ Those readers not familiar with the *wu-wei* concept may consider Heidegger's notion of *Zurhandensein* (being-ready-at-hand) as correspondent, insofar as one allows the object to be what it is – or to reveal/disclose itself through its use – rather than imposing a definition upon the object.

⁹² Watson, Burton. Introduction. In *Hsün Tzu: Basic Writings*. Pg. 4.

who follows the *dao*, and embodies its principles in his actions. Appropriate laws are pragmatic and applied – whether by their word, spirit, or analogy depends on the particulars of the situation.⁹³ Such laws reward those who better themselves, and punish those who bring about chaos. Xunzi argues:

These are the judgments of a king: no man of virtue shall be left unhonored; no man of ability shall be left unemployed; no man of merit shall be left unrewarded; no man of guilt shall be left unpunished... and each shall be assigned to his appropriate position without oversight. The violent shall be repressed, the evil restrained, and punishments shall be meted out without error. The common people will then clearly understand that, if they do evil in secret, they will suffer punishment in public... This is what is called a state of godlike order.⁹⁴

When a righteous king rules with such appropriate laws, a state of harmony is achieved. Within this harmony, the people are not only governed correctly, but are also brought in line with morality and encouraged to become noble themselves. Consequently, this approach seeks to guide the base human nature towards morality, by establishing just and harmonious circumstances, where human nature reflexively inclines toward self-betterment. Xunzi's faith in such orderly society is all the more impressive, considering his ideas of human nature. He summarizes: "With lofty titles and generous emoluments clearly held out before him, and explicit penalties and deep disgrace unmistakably hovering behind him, though a man might have no wish to reform his ways, how could he help himself?"⁹⁵

Despite the emphasis on rewards and punishments, the tools of the state, the Confucian system seeks to ideally do away with such incentives for moral conduct. Xunzi held that such force was ultimately ineffective in providing long-term harmony, especially in the Warring States context. Where the only glue bonding the people to their ruler was fear, the invader would

⁹³ *Xunzi*. Pg. 35.

⁹⁴ *Ibid*. Pp. 42, 44.

⁹⁵ *Ibid*. Pg. 75.

not find the state difficult to topple, as people sought to escape the tyrant.⁹⁶ Once the state is correctly established and its laws in effect, it ideally comes to rely on the excellence of the ruler (*de*) to guide the people to become noble. In this, the system seeks to emulate ancient rulers who had mastered the *dao*; they were secure without overt defenses, harmonious with little punishment; they made the law clear, demonstrated the punishments and rewards, and the world was ordered.⁹⁷ In this way, moral rule is established by ruler's virtue (*de*) rather than force, and the peoples' subsequent bonding to that state by their own moral excellence. Consequently, not only is the state brought into internal harmony (*he*), it is also secured from foreign threats – as the people of the state will all rise as one against such disorder.⁹⁸

By providing a moral education based on reflection on the ancient *dao* masters and present circumstances, Confucianism sought to elevate the moral status of the general populace to the degree where their actions would be in line with the *dao*. Such a people naturally function harmoniously, and carry out their particular roles in the appropriate manner, leading to an orderly and moral society.

Xunzi's Confucian views on the justice and harmony theory can now be summarized. Human nature is base. A ruler who follows the *dao* stands at the center of the relational web, and by his moral excellence (*de*) – reflected in his ritual propriety (*li*) and appropriate conduct (*yi*) – acts as the moral pivot, educating the state and the people, and bringing them in line with the moral precepts of the *dao* by his example. The laws are accordingly modeled to encourage appropriate behavior (*yi*) by a system of rewards and punishments, whose ultimate goal is to ennoble the population and encourage them to model their lives after the virtuous (*de*) ruler –

⁹⁶ *Ibid.* Pg. 73-4.

⁹⁷ *Ibid.* Pg. 73.

⁹⁸ *Ibid.* Pg. 52.

ultimately arriving at a state where punishment is no longer a necessary tool for ensuring harmony (*he*).

Legalism (*Fajia*) can be rightly identified as Chinese Machiavellianism. It is an utterly pragmatic system of governance, leaving behind the concepts of ancestral wisdom and morality alike, in its pursuit to dominate.

It [legalism] addressed itself exclusively to the rulers, taking no interest in private individuals or their lives except to the extent that they affected the interests of the ruling class... it made no attempt to preserve or restore the customs and moral values of the past; indeed, it professed to have no use for morality whatsoever. Religious beliefs and ceremonies likewise, at least as far as the ruling class was concerned, it regarded as fatuous and distracting, and looked upon the fondness for such ceremonies as the mark of a doomed state. Its only goal was to teach the ruler, in what it regarded as hardheaded and practical terms, how to survive and prosper in the world of the present.⁹⁹

The last, and possibly greatest, of the Legalists was Han Feizi¹⁰⁰ (d. 233 BCE), whose writings and ideas were championed by the Qin in their successful bid for supremacy and unification of China in 221 BCE. Though himself a student of Xunzi,¹⁰¹ Han Feizi became the foremost representative of legalism and produced the most cohesive and comprehensive expositions of its theories. The framework of legalism seeks to do away with humanity from the role of ruler, instead turning the process into mechanical legal calculus backed by draconian justice. Where Confucianism sought to create the ideal state through virtue (*de*), legalism emphasized the law (*fa*), expressed through a severe penal code. Han Feizi insisted on human nature as inherently base and *dao* as enlightened self-interest, and begins his works from that point.

Since human nature is base, one must always be on guard – even from one’s family – as they stand to gain by your death. Charity is a sin, as it punishes the industrious and rewards the

⁹⁹ Watson, Burton. Introduction. In *Han Fei Tzu: Basic Writings*. 1-15. New York: Columbia University Press, 1996. Pg. 7.

¹⁰⁰ Alternate transliteration: Han Fei Tzu

¹⁰¹ Watson, Burton. Introduction. In *Han Fei Tzu: Basic Writings*. Pg. 2.

indolent; education of the people is a waste;¹⁰² as they are like ignorant children, who understand nothing, yet complain much.¹⁰³ “Moreover, the people will bow naturally to authority, but few of them can be moved by righteousness. Confucius was one of the greatest sages of the world...his disciples numbered only seventy.”¹⁰⁴ However, severe and certain punishments will accomplish what love and righteousness cannot, and will bring the whole world into compliance with the law.

Law, particularly a clear legal process devoid of personal bias and backed by force, lies at the core of Legalist thought. Ultimately, it strives to create the perfect machinery of government, whose rulers, ministers, and people are merely interchangeable parts in the vast and self-perpetuating system. In this way, the state remains secure whether governed by a strong or weak ruler. This law consists of two primary components: the art of governance to be utilized by the ruler – represented by the *dao*; and the law of governance over the people – represented by penal code (*fa*). Since *fa* is the product of the ruler’s will, and the ruler is an absolute sovereign, he himself is exempt from it.¹⁰⁵ All others, regardless of birth, sex, wealth, status, or relation to the ruler, stand before the law as equals.¹⁰⁶

The correct way (*dao*) of the ruler is characterized by impersonal decisions, based on long-term plans for the success of the entirety of the state, informed only by facts, and brought about through quietism and *wu-wei* of the ruler.¹⁰⁷ The correct way of enforcing law onto the population is through a clearly defined set of rewards and punishments (*fa*). Absolute control

¹⁰² *Ibid.* Pg. 11.

¹⁰³ Han, Fei Tzu. *Han Fei Tzu: Basic Writings*. Translated by Burton Watson. New York: Columbia University Press, 1996. Pg. 128. [Henceforth referred to as *Han Fei Tzu*]

¹⁰⁴ *Ibid.* Pg. 102.

¹⁰⁵ Watson, Burton. Introduction. In *Han Fei Tzu: Basic Writings*. Pg. 8.

¹⁰⁶ *Han Fei Tzu*. Pg. 28.

¹⁰⁷ *Ibid.* Pp. 29, 51, 128.

over these means, as well as their universal application, is crucial to successful and stable rule.¹⁰⁸ The content of laws defined by *fa* is equivalent to the *dao* of the ruler, represents state interests, and is inimical to the personal interests of the population.

The laws of the penal code, argued Han Feizi, must be simple, clear, immutable, inflexible, universally applicable, appropriate, and above all, enforced. Encouraging and honoring different doctrines (Confucianism, Daoism, eremitism etc.), is equivalent to endorsing contradictory laws and inevitably leads to confusion. Confused or complex laws only ensure that even the wise cannot abide by them, and lead to the destruction of the state.¹⁰⁹ The enforcement of law must be established by the use of bountiful rewards and terrible punishments meted out to all, from the most removed individual to the closest family member, in order to ensure universally correct behavior among the populace. In terms of Western philosophy, such a legal system represents the most austere, impersonal, and amoral understanding of the utilitarian theory.

By providing clear and immutable laws backed by a severe penal system, legalism seeks to force the obedience of the people and bring their actions in line with the *dao* of the ruler. Society ordered by such laws is orderly and obedient. The moral content of the people is irrelevant; they carry out their roles with efficiency in hope of achieving great rewards and in fear of punishments for failure.

Han Feizi's Legalist theory can be summarized as follows. The ruler stands at the center of a vast web of legal governance, his actions informed by the purely pragmatic and utterly amoral concept of the *dao*. Through appropriate (*yi*) means of practical long-term planning –

¹⁰⁸ *Ibid.* Pg. 30.

¹⁰⁹ *Ibid.* Pg. 108.

couched in quietism and *wu-wei* – he utilizes law (*fa*), by reward and punishment, to establish and sustain a harmonious (*he*) state.

Legalism's practical approach to governance, devoid of restraints of the glorified past or moral qualms, rose to prominence with its acceptance by the Qin, who relied on its precepts in their unification of China. However, once its draconian penal code was applied to a unified and peaceful Qin empire, it swiftly led to revolts and the downfall of the Qin dynasty. As the Qin were replaced by the Han, so legalism was replaced by Confucianism, eschewing Han Feizi's notion of Confucius' mere 70 followers. The 400 years of nearly uninterrupted Han rule serves as proof of the viability of Confucian political and moral thought over the amoral, yet far more pragmatic ideas of legalism. Ultimately, it seems that people rejected the view of human being as a meaningless gear in the machine of stable governance; instead opting for the ancestral custom and the humanism of Confucian thought.

THEORIES OF STATE

As noted in the preceding section, classical Chinese theories of state and justice are two sides of the same coin, and thus cannot be divorced from one another. In this section, the analysis will shift focus from the goals and policies of the state to the means and methodology of rule. As with the justice section, the focus will be on Xunzi's Confucianism and Han Feizi's legalism, given their political applications in the conclusion of the Warring States period. Before delving into the competing theories of statehood, two additional terms must be defined.

Tianming is the “mandate of Heaven,” and is understood as the political right to rule. Its presence, or lack thereof, is only known in hindsight, either by victory or defeat. Though *tian* is

often taken to mean “Heaven” or “nature,” it does not exactly match either definition. Instead, “*Tian* is both *what* our world is and *how* it is... There is no apparent distinction between the order itself, and what orders it.”¹¹⁰ Unlike the Western or Islamic models, *tianming* does not connote the unilateral empowerment of an individual by a divine being.¹¹¹ Rather, it is a reciprocal relationship between an individual and his circumstances.¹¹² Just as the *dao* incorporates the notions of following an existing path and thus expanding and extending it into one’s present it, *tianming* consists of acting in accordance with the natural order, and thus following the will of “heaven” and gaining its mandate – as evidenced by one’s success.

These precepts of heaven rest on optimal action – i.e. the maximization of potential in any given circumstance. The individual acting in an optimal manner improves his circumstances, and thus the basis for his future actions. Conversely, wasteful behavior reduces the potential for future actions. “Such a degraded person is not far removed from being a beast.”¹¹³ Thus, *tianming* is a reciprocal relation between the individual and circumstance, whereby actions either gain or lose the favor of “heaven,” which in turn increases or decreases the potential in future circumstances.

Since *tianming* is based on optimal action in given circumstances, the only concrete means of knowing whether one has *tianming* is after the fact. That is to say, the way to be sure the path to be taken leads to the best results, is only after the choice has been made and the consequences become clear. In this way, Chinese scholars have claimed the loss of *tianming* by the last ruler of a state or dynasty, in light of its subsequent destruction. However, *tianming* is

¹¹⁰ Ames, Roger T., and Henry Rosemont. Introduction. In *The Analects of Confucius*. Pg. 47.

¹¹¹ Ames, Roger T., and David Hall. *Anticipating China: Thinking through the Narratives of Chinese and Western Culture*. Albany: State University of New York Press, 1995. Pg. xvi.

¹¹² This concept is perhaps most readily explained to the western audience as Heidegger's “*Dasein*,” and its relation to the world by the nature of the individual “*facticity*.”

¹¹³ Ames, T Roger, Hall, L David. *Anticipating China*. Pg. 193.

also understood as a political mandate, and as such confers authority on the ruler. This principle boils down to the idea that the one who rules, *ipso facto* has the legitimate authority to do so – until he is ousted.

Zhi is knowledge, or rather realization. Whereas the Western philosophical “objective” knowledge of the thing known is suspended in a vacuum, *zhi* encompasses the relational nature of the subject and object of “realization,” and adds the element of “realizing” an action as a result.

In the Chinese model, “knowing” is a communal discourse; it is a combination of rhetoric and action, of saying and doing. To “know” the enemy, then, is to acquire a functional understanding of his particular circumstances while remaining sufficiently indeterminate so that he cannot gain an equal advantage, and to then authenticate this differential in battle.¹¹⁴

The principle of remaining indeterminate to the enemy is utilized in statecraft of both Xunzi and Han Feizi, namely through their emphasis on quietism and *wu-wei* of the ruler seeking to establish harmony through the *dao*. For Xunzi, the ruler’s “withdrawnness” from the daily affairs of government, is a means of ensuring that his function remains seen as that of the moral exemplar (*de*), without revealing any flaws or faults that may endanger his character. For Han Feizi, the indeterminacy of ruler’s inclinations is a requirement for successful government, as revealing such biases inevitably leads to the ministers pandering to those desires to curry favor and promotions.

The element of realizing an action through realization (*zhi*), also introduces a point of application for what it means to know something. Han Feizi notes the practical difference: “Therefore the enlightened ruler works with facts and discards useless theories.”¹¹⁵ This emphasis on the utility of knowledge becomes a core principle in later war theories, as “knowing

¹¹⁴ Ames, Roger T., and Lau D.C. Introduction. In *Sun Bin: The Art of Warfare*. Pg. 53.

¹¹⁵ *Han Fei Tzu*. Pg. 128.

the enemy” takes on the meaning of “knowing how to act with regards to the enemy and all relevant circumstances.”

As noted, Chinese ideas of authority of legitimate rule are based solely on the possession of such rule. The means of attaining the position play no part in its legitimacy. This understanding seems to come from the fact that *tianming* follows good (*shan*) and appropriate (*yi*) actions, which are the utilization of potential. So long as the ruler follows these principles, and thus the *dao*, his rule results in a strong and stable state. Consequently, the person of the ruler is not as important as the adherence to the core principles guiding his actions.

The model of the correct rule rests on different foundations in legalism and Confucianism. For the Legalist, the state is a top-down model with the state at the top controlling the law for everyone else, below. With the role of the ruler diminished to an interchangeable part of the greater machinery of governance, it is not the ruler, but the disembodied state that ultimately rules supreme. As such, the Legalists present a uni-directional, top-down model.

The Confucian model, on the other hand, is both top-down and bottom-up. The ruler is conceived of as not as the source of law, but of excellence. This virtue-based model, embodied by the ruler, relies heavily on the person of the ruler, his mastery of *dao*, and his charismatic presence as the source of inspiration to the people. The Confucian relation between the ruler and his subjects is bidirectional. As the ruler masters the *dao*, acts appropriately, and serves as an exemplar, so the people who emulate his model follow the same path, and harmony of the state is achieved. However, where a ruler fails in his obligations, the people, following his model, bring ruin to the state.

Xunzi's Confucian model of state seeks to establish a harmonious state, through a process of "moral" education of the population. In this process, the morality of the ruler is a primary attribute which fuels his role as the exemplar of virtue to be emulated by the rest of the population.¹¹⁶ Just as proper (*li*) familial relations are based on the hierarchical standings between family members, so too the state is ordered in a hierarchy that leads to harmony.¹¹⁷ When the role of each person is clearly defined, their circumstances become clear, and they can act to best utilize them. This hierarchy additionally helped to support the existing aristocracy, though Xunzi argued that all government posts should be filled on the basis of merit, rather than birth.¹¹⁸

The safety and security of the state and its officials rests upon a population that feels safe – i.e. on the support of the population. Where the people are frightened, the ruler and state are in jeopardy.¹¹⁹ Popular support cannot be gained through strength and force, as this method inevitably leads to resentment by the populace.¹²⁰ The truth of this principle was later demonstrated by the downfall of Qin. Support of the people can only come as a result of the ruler's excellence and appropriate conduct. "Therefore, if the gentleman desires safety, the best thing for him to do is to govern fairly and to love the people."¹²¹ When the ruler governs with virtue and gains support of the people, and when the ruler's virtuous conduct is emulated by the people and they draw closer to it, and when the appropriate hierarchy of all things is established in the state, then – and only then - does the state becomes harmonious, well organized, and secure from internal upheavals.

¹¹⁶ Watson, Burton. Introduction. In *Hsün Tzu: Basic Writings*. Pg. 8

¹¹⁷ *Xunzi*. Pp. 45-6.

¹¹⁸ *Ibid.* Pg. 33.

¹¹⁹ *Ibid.* Pp. 36-7.

¹²⁰ *Ibid.* Pg. 39.

¹²¹ *Ibid.* Pg. 37.

In dealing with external threats, the same principles are utilized as with internal stability. These are the strengthening of the state by proper conduct and virtue, as a means of both becoming unassailable and being able to strike, should the need arise.

If he [the ruler] regulates the teachings of his government properly, examines carefully the rules and proposals of his officials, and encourages and educates his people, then the day will come when his armies can stand up against the strongest forces in the world. If he practices benevolence and righteousness, honors the highest principles, makes his laws upright, selects worthy and good men for his government, and looks after the needs of his people, then the day will come when his reputation may match in fairness that of any ruler in the world.¹²²

The power of virtue, for Xunzi, is not simply a high-minded ideal. Instead, the virtuously guided state wields considerable power directly – through a unified population – and indirectly by the means of influence wielded standing as a counterpoint to the tyrannical state whose very populace is fractured and oppressed. This idea is further supported by Xunzi’s reflection on ancient rulers who, “began as rulers of a single state and ended by becoming rulers of the world, but it was not because they went about making conquests. They conducted their government in such way as to make all men wish to become their subjects...”¹²³

Xunzi’s Confucian theory of the state can now be summarized. The state is a means by which harmony and order are achieved, based on the virtuous example (*de*) and guidance of the ruler and passed onto the people by education. Harmony leads not only to order and best utilization of circumstances, but also a cohesive unity of the state as a whole. Through its virtuous guidance and unified strength, it is protected from internal strife and external threats. In its role as an exemplary state, it wields virtue to prevent the need for open hostilities, as well as power to bring the world under its power peacefully.

¹²² *Ibid.* Pp. 51-2.

¹²³ *Ibid.* Pg. 53.

The Legalist state understands itself as the pragmatic method of attaining order and stability crucial to its existence in the Warring States period. The state is ordered by laws established through the ruler's knowledge (*zhi*) of circumstances and the best ways to deal with them.¹²⁴ The state is centralized in the person of the ruler, who alone wields supreme power over all elements of the state. This hold on power, according to Han Feizi, must be absolute. Power is utilized as a means to ensure right actions in subordinates and rests in the "two handles of government," namely rewards and punishments.¹²⁵ Where such power becomes shared, either by assigning some aspects to certain offices or by delegating its use to ministers, the state will fail.¹²⁶ Therefore, the attempt to wrest any modicum of power away from the ruler must be destroyed mercilessly.¹²⁷ To help safeguard against any usurpation, as well as establishing meritocracy in government, the Legalist theory also sought to eradicate the status of aristocracy. In this way, the state was to be protected from internal instability.

However, given the violent dispositions of surrounding states and the war for survival, a viable state model must address the issues of security from external threats as well. Han Feizi argues:

A true king is one who is in a position to attack others, and a ruler whose state is secure cannot be attacked. But a powerful ruler can also attack others, and a ruler whose state is well ordered likewise cannot be attacked. Neither power nor order, however, can be sought abroad – they are wholly a matter of internal government. Now if the ruler does not apply the proper laws and procedures within his state, but stakes all on the wisdom of his foreign policy, his state will never become powerful and well ordered.¹²⁸

It is clear that his concept of a strong and secure state arises solely from the internal order of the state. Just as the use of rewards and punishments is the power of the ruler within the state, so too foreign relations are the extension of that power beyond its borders – and properly belong

¹²⁴ *Ibid.* Pg. 93.

¹²⁵ *Han Fei Tzu.* Pp. 30, 35.

¹²⁶ *Ibid.* Pg. 30.

¹²⁷ *Ibid.* Pg. 18.

¹²⁸ *Ibid.* Pp. 113-14.

only to the ruler. The result of a well ordered state is the best utilization of available resources (*shan*), and hence the greatest strength that may be achieved. Where the state is in disarray, its size and resources hardly matter – as they remain unused. Where the state is ordered, even if it were small, “the ruler of a state of ten thousand war chariots would have been unwilling to wear out his armies before their strong walls...”¹²⁹ This view of an ordered state as a bulwark against foreign threats is common not only to Legalist and Confucian values, but also Daoism. As shall be noted in the war theory section, such sentiments echo Sunzi’s advice, “Invincibility depends on oneself; vulnerability lies with the enemy.”¹³⁰

The Legalist state theory can be summarized thus: The state is a means by which order is established, based on the laws (*fa*) of the ruler and enforced through power of rewards and punishment exclusive to his position. Order leads to the greatest utilization of all resources – both man and nature. Thus, the ordered state is secured from internal upheavals, and thus it is secured from foreign threats.

In considering the two theories in their entirety, it seems understandable that legalism was the political theory that served to unify China’s Warring States. The emphasis on clear laws and their forceful application, coupled with the pragmatic approach to problems of state, are well situated to exploit all avenues of victory. The restraints of ritual, morality, and ancestral culture – willingly adopted by the other states – served only to hobble their efforts at survival and domination. By comparison, Legalist amoral practicality, freed from any concerns besides success, led the Qin to establish the first empire in the 550 years following the decline of Zhou.

¹²⁹ *Ibid.* Pg. 115.

¹³⁰ Sunzi. "Sun-tzu: The Art of Warfare." 1993. Translated by Roger T. Ames. In *The Book of War*, edited by Caleb Carr, 1-248. New York: Modern Library, 2000. Pg. 83. [Henceforth referred to as *Sunzi*]

However, the same amoral and irreverent attitudes, in conjunction with the draconian sense of justice, generated hostile resentment once peace was established. While Han Feizi's state could forcibly unify war-torn China, it could not hold it together in peace. Xunzi's warning against forcibly controlling the population materialized a mere 14 years after the Qin attained supreme victory. With the Han embracing Xunzi's Confucianism, his was the first political theory to successfully rule over a unified China.

Both legalism and Confucianism played an important role in establishing the theories of justice and state. In both, the use of war was a state instrument, controlled by the ruler. Despite their apparent differences, Chinese war theorists combined certain aspects of both, in addition to some Daoist principles, to create an ultimately just war theory.

THEORY OF WAR

The classical Chinese war theory developed during the period following the decline in political power of the House of Zhou. As the various states faced the brutal reality of a "conquer or perish" system, they competed in the development of military technology and tactics. However, the war theory that developed under such brutal circumstances is more than a mere collection of tactical maneuvers. Instead, it is also an extension of the competing politico-philosophical theories, embodying ideas of justice, exemplary rule, and quietism amongst others. Of the various military treatises, this analysis will use the two best known authors, Sunzi and Sun Bin, whose works – separated by nearly two centuries – are both entitled *The Art of Warfare*.

We must first make a preliminary note that within works of Sunzi and Sun Bin, both stages of the Western Just War Theory are considered. However, they are dispersed throughout

the text and in brief statements, rather than an organized account. This is not a deficiency of the texts; rather, it demonstrates the differences of interests and conceptualization of the Chinese authors. Further, owing perhaps to the brevity of the texts or their incompleteness, many of these notions are not exhaustively expounded. Statements offered, provide instead an insight into general concepts and policies, from which a general series of rules can be further inferred. As such, the elaboration on these statements by the following analysis is not – in my opinion – an attempt to read Western ideas and morality into the text, but only to follow the statements within their context to their final and logical conclusion.

Unlike the Western and Islamic contexts, the Chinese theory of war was developed by generals, made legendary by their success, strictly as a military guide to matters of warfare. Further, given the authors, these theories had undergone extensive “field-testing” against rival states, and draw on the experience and reports of a great many more military experts – both ancient and contemporary with the authors. As such, the Chinese war theory approaches the question of war from a perspective of a person whose purpose is war – a perspective that differs from that of the Western and Islamic theories.

The two war manuals also embody a number of philosophical precepts, especially those of Daoism – though Confucian and to a lesser degree Legalist notions are present as well. It seems rather strange that a war theory compiled by the greatest generals of the age should voluntarily impose restrictions on military action, given the grave nature of warfare and the price of defeat. However, these manuals are more than mere guides to military victory; they are practical guides for achieving stability, peace, and harmony not only through, but in spite of, the use of war. The analysis will consider such similarities to the political and moral theories, following the presentation of the war theory.

Before turning to the discussion of the war theories, the analysis must introduce two additional terms, whose frequent use by Sunzi and Sun Bin ties them not only to the Chinese politico-philosophical theories but also to the narrative of the Just War Theory. Additionally, the analysis will use the term “legitimate,” to denote issues both approved and recommended by the authors in question. This term, used for the ease of understanding, should not be confused with its abstract and objective Western notions of divine authority or secular appointment, nor the Chinese sense of legitimacy through *tianming*. Where applied to states, it connotes the state functioning by precepts noted above, as well as those posited by the war theories.

Shi plays an important concept for both authors. It represents a strategic advantage though the manipulation of circumstances, and stands in opposition to mere brute force. As with other terms, it is relational, encompassing both sides of the conflict and embodying the tension of the deadly contest as forces vie for the leverage needed to prevail over their opponents. “*Shi* is not a given; it must be created and carefully cultivated.”¹³¹ In this sense, it is related to *shan*, in its ‘utilization of potential in a given circumstance to bring about the most favorable outcome.’ Failure to “create and cultivate” *shi* places the military in grave peril, as even the best troops will flee in the worst of circumstances.

Quan sheng is the supreme goal, the “complete victory.” *Quan sheng* is not the result of the annihilation of the enemy; rather, it is a victory without the need for war. “It is to have one’s way in the situation, while at the same time, avoiding loss.”¹³² This attitude is reflective of the commitment to harmony and the goal of incorporating the enemy state into one’s own. Where war inevitably leads to loss of life and destruction of property and thus weakens the state, the

¹³¹ Ames, Roger T., and Lau D.C. Introduction. In *Sun Bin: The Art of Warfare*. Pg. 63

¹³² *Ibid.* Pg. 83

ability to capture a state whole - with no need for war and no losses - is the pinnacle of good (*shan*) strategy and utilization of circumstance.

Sunzi (d. 496 BCE) is considered as the author of *The Art of War*. While scholarly debate continues on whether the text was written by a single individual or a number of generals, the issue is of little practical importance for the purposes of this analysis. By the point of its writing, the wars of unification had been raging for over 200 years, and had devolved into battlefield butchery, with the dead numbering into tens of thousands per battle. Technological progress, however, had been slow. Warfare still revolved primarily around pitched battle between armies in the field. The lack of advanced siege equipment made sieges tenuous affairs at best. The work, as far as can be understood, is the first “modern” Chinese military treatise, bringing a new perspective on the ancient accounts of great generals, as well as a progressive implementation of old principles.

Sun Bin (d. 316 BCE), writing nearly two centuries later, is the author of a treatise by the same name. His account, though standing on its own, is also a revised and updated version of Sunzi’s work, and accounts for the rapid technological and military developments in the time span separating the two authors. By the time Sun Bin penned his treatise, the introduction of crossbows, cavalry, advanced siege engines, and fixed military formations had changed the face of warfare in China. which grew to revolve around sieges, rather than open battle.

Despite the differences on the ground, the two works share a great many similarities. Both generals saw warfare as the means of protecting the state from destruction,¹³³ both defined the purpose of the general to master the *dao* of warfare by applied knowledge and understanding

¹³³ Sunzi. Pg. 74. and Sun, Bin. *Sun Bin: The Art of Warfare : A Translation of the Classic Chinese Work of Philosophy and Strategy*. Translated by D. C. Lau and Roger T. Ames. Albany: State University of New York Press, 2003. Pg. 94. [Henceforth referred to as *Sun Bin*]

(*zhi*),¹³⁴ and the best method of military deployment as one free from political interference, once given the order to engage.¹³⁵ Additionally, both Sunzi and Sun Bin understood that warfare brings about destruction and instability,¹³⁶ and consequently that the only appropriate purpose of war – if it is to serve the state – is in pursuit of establishing harmony (*he*) by dealing with threats greater than the disruption of harmony the war would cause.¹³⁷

Given this view of war, "...warfare is neither celebrated nor glorified, and... military heroism is a rather undeveloped idea."¹³⁸ This understanding is explicitly stated by Sunzi in reply to King of Wu, when the latter notes a personal fondness of using the military: "Master Sun replied: 'Using the military is to gain the advantage; it is not a matter of being fond of it. Using the military... is not a matter of sport. If your majesty wants to ask about war in terms of fondness and sport, I dare not reply.'¹³⁹ In this light, the concept of a complete victory (*quan sheng*) gains higher status, as it allows for the desired outcome with no threat of destructiveness accompanying war.

Perhaps the best summation of this apprehension towards warfare in the Chinese context comes from the *Daodejing*, resonates in the writings of both Sunzi and Sun Bin:

Fine weapons are instruments of evil. They are hated by men. Therefore those who possess Tao turn away from them... Weapons are instruments of evil, not the instruments of a good ruler. When he [a good ruler] uses them unavoidably, he regards calm restraint as the best principle. Even when he is victorious, he does not regard it as praiseworthy, for to praise victory is to delight in the slaughter of men. He who delights in the slaughter of men will not succeed in the empire...For the slaughter of the multitude, let us weep with sorrow and grief. For a victory, let us observe the occasion with funeral ceremonies.¹⁴⁰

¹³⁴ Sunzi. Pg. 125. and Sun Bin. Pg. 153.

¹³⁵ Sunzi. Pg. 77. and Sun Bin. Pg. 122.

¹³⁶ Sunzi. Pg. 75. and Sun Bin. Pg. 95

¹³⁷ Sunzi. Pg. 142.

¹³⁸ Roger T. Ames. Preface. "Sun-tzu: The Art of Warfare." In *The Book of War*. Pg. 31.

¹³⁹ Sunzi. Pg. 142.

¹⁴⁰ Lao, Tzu. "Tao-Te-Ching." 1963. Translated by Wing-tsit Chan. In *Masters of Chinese Political Thought; from the Beginnings to the Han Dynasty.*, edited by Sebastian De Grazia. New York: Viking Press, 1973. Pp. 261-2.

Jus ad Bellum

Sunzi, echoed by Sun Bin, opens *The Art of War* with a definition of warfare and its purpose. "War is a vital matter of state. It is the field on which life or death is determined... and must be examined with the greatest of care."¹⁴¹ In the context of the period, this sentiment was as much a descriptive as normative. In its simplicity, it sets the stage for all *Jus ad Bellum* elements.

Just Cause: The notion of a just cause is implied in the prescribed use of military might only in necessity, coupled with admonitions against any desire for war. The necessity of war arises from the theory of state and justice and the impetus to protect its order and stability. Thus, the state must necessarily protect itself. However, where state allies pursue the same path – i.e. govern according to what the state perceives as the correct principles – then the safety of the ally represents the same desired order. Hence, the state should protect its allies. Xunzi argues, as does Sun Bin, that a proper state should never involve itself in war as such. Rather, it should seek only to carry out punitive actions against transgressing parties.¹⁴²

An argument can be made for extending the use of war against states whose political systems are not considered legitimate and pose a long-term danger. Such an argument was made by Han Feizi, in using warfare to expand borders,¹⁴³ though he regarded foreign wars as ultimately injurious to the state.¹⁴⁴ However, such claims seem absent in the war treatises. Pursuit of open war in the absence of immediate necessity would make such a maneuver a subpar decision, costing resources and lives and eliminating any hope for *quan sheng*. Therefore, only the use of war for self-defense and defense of allies is considered just or justified, insofar as such

¹⁴¹ Sunzi. Pg. 73. and Sun Bin. Pg. 94.

¹⁴² Xunzi. Pg. 68 and Sun Bin. Pg. 78.

¹⁴³ Watson, Burton. Introduction. In *Han Fei Tzu: Basic Writings*. Pg. 7.

¹⁴⁴ *Han Fei Tzu*. Pg. 115.

war is considered to protect the immediately endangered vital existential interests of the state. That being said, the Chinese context assumes that the victorious state will annex the loser.

Right Intention: Both Sunzi and Sun Bin are quite explicit in the proper motivations for war. “War is not something to be enjoyed, and victory is not something to profit from,”¹⁴⁵ and “Using the military is to gain the advantage; it is not a matter of being fond of it.”¹⁴⁶ It is clear that war cannot be legitimately utilized for personal desires.

To this end, the rulers and generals are warned to act only out of the appropriate intentions: “A ruler cannot mobilize his armies in rage; a commander cannot incite a battle in the heat of the moment... A person in a fit of rage can be restored to good humor... but a state that has perished cannot be revived, and the dead cannot be brought back to life.”¹⁴⁷ Han Feizi’s works also point to the need for all action of the ruler to spring only from knowledge (*zhi*), and never from desire and, “To regard the two [public and private interests] as being identical in interest is a disaster which comes from lack of consideration.”¹⁴⁸ These sentiments all reflect the ideology of the *Daodejing* and reserve the use of war only for unavoidable situations for the purposes of protecting the vital existential interests of the state, as stipulated in the just cause requirement.

Public Declaration by a Proper Authority: As discussed in the state section, only the state – personified by the ruler – holds the authority to declare war. Both Sunzi and Sun Bin hold this view. Sun Bin’s crossbowman analogy makes this point explicit, as he considers the role of the ruler to be that of the soldier who aims and fires the weapon (the general) at the enemy of his

¹⁴⁵ *Sun Bin*. Pg. 95.

¹⁴⁶ *Sunzi*. Pg. 142.

¹⁴⁷ *Ibid*. Pg. 122.

¹⁴⁸ *Han Fei Tzu*. Pp. 93, 106.

choice.¹⁴⁹ Han Feizi notes war authorization as one of the key powers of the ruler, which cannot be relinquished to anyone, for any reason.¹⁵⁰

In terms of a public declaration of war, only Sunzi seems to expound on the subject. In discussing how the state should make its final preparations of engaging the enemy, Sunzi notes that a declaration of war must be made, because the change in attitudes towards the state that is now an open enemy. Certain new laws affecting the citizenry of the state, such as a ban on enemy emissary contact, must be made public.¹⁵¹ The apparent failure to inform the enemy, present by omission of its contrary position in other authors, may be viewed in light of the just cause and right intention requirements – demanding the use of war be restricted to necessity. As such, the need to utilize other means in hopes of achieving *quan sheng* and preventing needless harm, indicates that both sides are aware of the imminent threat. Once the diplomatic means cease, it is viewed as an *ipso facto* declaration of war.

Last Resort: The use of military strikes is considered as the last resort by political and war theorists alike. The analysis has already noted some reasons for this reluctance to engage in open hostilities, namely the destructive nature of war. Additionally, the resort to war is considered as inherently suboptimal, precisely because of the ensuing destruction of both one's forces and the state to be brought under "legitimate" rule.

It is best to keep one's own state intact; to crush the enemy state is only a second best... So to win a hundred victories in a hundred battles is not the highest excellence; the highest excellence is to subdue the enemy's army without fighting at all. Therefore, the best military policy is to attack strategies; the next to attack alliances; the next to attack soldiers; and the worst to assault walled cities... Therefore, the expert in using the military subdues the enemy's forces without going to battle, takes the enemy's walled cities without launching an attack, and crushes the enemy's state without a protracted war.¹⁵²

¹⁴⁹ *Sun Bin*. Pg. 122.

¹⁵⁰ *Han Fei Tzu*. Pp. 17-18.

¹⁵¹ *Sunzi*. Pg. 118.

¹⁵² *Ibid*. Pg. 79.

Similar sentiments have already been noted in Xunzi's "power of virtue" considerations. Just as with Sunzi, these considerations are premised on the superiority of *quan sheng*, and regard a victory "without lifting a blade" as the supreme achievement.¹⁵³ Sun Bin frames this requirement in more direct terms, "You must go to war only when there is no other alternative."¹⁵⁴

Probability of Success: As may be expected of war treatises penned in a period where military defeat may well spell the annihilation of the state, this requirement is paramount to the decision to engage in war. The requisite calculation is the result of knowledge (*zhi*) of the enemy: "Intelligence is of the very essence in warfare – it is what the armies depend upon in their every move."¹⁵⁵ As with the Western and Islamic theories, this requirement carries little weight when the failure to engage in war leads to one's utter destruction – i.e. in self-defense. Xunzi and Han Feizi agree that ruler's undertakings must spring only from knowledge and careful planning (*zhi*), rather than desire – otherwise the state will fall.¹⁵⁶

Both Sunzi and Sun Bin stress *zhi* as the supreme element in committing forces to war. Failure to gain the appropriate understanding of the enemy and circumstances can ultimately lead to nothing but disaster, even if victory is somehow attained.¹⁵⁷ Once *zhi* is established, if one cannot find the appropriate advantage (*shi*) one should avoid engagement at any cost. To engage in such actions is a waste of lives and future potential. It is no different than blindly charging at

¹⁵³ Xunzi. Pp. 41, 68, 77.

¹⁵⁴ Sun Bin. Pg. 112.

¹⁵⁵ Sunzi. Pg. 125.

¹⁵⁶ Cf.

¹⁵⁷ Sun Bin Pg. 112.

the enemy. While the authors repeat this notion often, it can be summarized as, "Move if it is to your advantage, bide your time if it is not."¹⁵⁸

Proportionality: That the Chinese war theory carefully weighs the potential harm and benefit of engaging in war has already been demonstrated in several preceding requirements. Just cause and right intention conceived of warfare as legitimate only when necessary to the existence of the state. The last resort requirement offered the reasons for avoiding open conflict in stark terms. Probability of success casts the legitimacy of military engagement in terms of understanding (*zhi*) of circumstances and the ability to derive advantage (*shi*) as the means of overcoming the destructive consequences of war. In further considering this requirement, all authors agree that the key element to minimizing harm rests on an internally strong state – which can ensure at least its own safety.¹⁵⁹ Consequently, the purpose of this requirement, ensuring that the harm to be prevented by engaging in warfare is less than simply capitulating, has already been clearly defined. It carefully balances the order and harmony of the state and its military capabilities against the inevitable destruction and threat of war.

The *Jus ad Bellum* notions within the two military treatises are clearly outlined. War is an inherently destructive activity, and is to be avoided unless the circumstances require it for the survival of the state. Its use belongs solely to the state, and its undertaking must be carefully weighed against the circumstances and the ability to gain the necessary advantage to succeed. Ultimately, the failure to prevent the outbreak of war is a failure to achieve true victory.

¹⁵⁸ *Sunzi*. Pg. 122.

¹⁵⁹ *Cf.* as well as *Sun Bin* Pg. 152. and *Sunzi*. Pp. 80-81, 83.

Jus in Bello

In considering the *Jus in Bello* requirements, two concepts will play a central role: harmony and order as the purpose of the state, and the aforementioned supremacy of *quan sheng*. When combined, these models seek the minimization of destruction of the enemy state, and the incorporation of that state and its people into the harmonious and greater legitimate state. As Sunzi notes, “the best military policy is to attack strategies; the next to attack alliances; the next to attack soldiers; and the worst to assault walled cities.”¹⁶⁰

Discrimination and Non-Combatant Immunity: In seeking to effect harmony and order and make the people of all states as a single unified people, Chinese political and war theorists distinguish between the common people and the threat. Xunzi defines the regulations of the ruler’s army as encompassing the military discrimination between the illegitimate rulers and their military (both legitimate targets) on one hand, and the people of the state (non-combatants and illegitimate targets) on the other. He further supports such discrimination by the example of the Zhou who, by their treatment and care for the conquered populace as for their own people, garnered support of all the people of China.¹⁶¹

All authors acknowledge the distinction between the legitimate and illegitimate targets, even if only by considering culpability under penal law (*fa*), as Han Feizi. The goal of establishing harmony and order protects all elements of society not directly involved in warfare against the legitimate state, as these non-combatants are to be the future citizens of that state. Further, any needless destruction, as the killing of civilians represents, is an unnecessary addition to the evils of war, and must be avoided.

¹⁶⁰ Sunzi. Pg. 79.

¹⁶¹ Xunzi. Pp. 67-8.

The doctrine of double effect is never addressed as such by any of the authors. However, since the stipulation lies in attaining a benefit that outweighs the harm, and given the connotations of the noted *Jus ad Bellum* proportionality requirement, it is safe to assume that the war authors would condone such action.

The status of the prisoners of war is explicitly stipulated by Sunzi and Xunzi. For Sunzi, benevolent quarantine is advised with the captured soldiers, and offers the sense of ultimate pursuit of harmony, rather than a quest to obliterate the enemy. "[P]rovide for the captured soldiers and treat them well. This is called increasing our strength in the process of defeating the army."¹⁶² Xunzi offers blank amnesty to all enemy soldiers who either desert or surrender, and supports such benevolence by the noted example of the Zhou.¹⁶³

It is hard to support the view that warfare, in this context, is anything but the pursuit of harmony by other means - to paraphrase Clausewitz. The idea that treating well the captured enemy soldiers increases the moral strength of those holding them prisoner, again reinforces the idea that the goal is to integrate the populace of the other state by winning the hearts and minds – rather than by violent subjugation.

Proportionality: As the requirement that seeks to limit the destructive course of war to only the necessary targets, proportionality is clearly echoed in the noted Chinese notions of *shan* and *quan sheng*. As mentioned above, the purpose of war in the Chinese context is the preservation of harmony and order of the legitimate state. As such, any unnecessary destruction of the enemy is viewed not only as wasteful (*é*) of the resources the legitimate state is to gain

¹⁶² Sunzi. Pg. 7.

¹⁶³ Xunzi. Pp. 67-8.

with the addition of new lands and people, but also as a sign of the ineptitude of its ruler and generals – signifying a lack of *tianming*.

Thus far, both the political and war authors have stressed the destructive nature of war and the need to limit it to necessary situations and targets. They've argued that, if the state is to remain stable and harmonious after absorbing new lands and people, their preservation is of utmost importance. Such preservation delivers a useful addition to the victorious state, allowing it to assume control with minimal disruption of the lives of the ordinary people. It also limits the possible grievances of the conquered, reducing the chances of resentment leading to an uprising.

For these reasons, Sunzi stresses the preferred order of attacking first the enemy plans, then their alliances, then their military, and finally their walled cities (i.e. the people). "Resort to assaulting walled cities only where there is no other choice."¹⁶⁴ Xunzi also expresses such sentiments explicitly in discussing the regulation of the king's army. He warns against such actions as destroying crops or wholesale slaughter of city defenders, and generally against the destruction of any aspect of the enemy that is not absolutely necessary. In this, he considers the problems of such victories breeding rebellion in the conquered lands, and setting the other states and peoples against such a ruler.¹⁶⁵ This argument echoes Sun Bin's notion of a defeat in victory.

Additionally, both Sunzi and Sun Bin admonish the rulers and generals not to press the cornered or fleeing enemy in order to destroy them. This is in part because men whose options are victory or death will fight all the harder. However, it is also because these soldiers are to be

¹⁶⁴ Sunzi. Pg. 79.

¹⁶⁵ Xunzi. Pp. 67-70.

incorporated into the legitimate state once the fighting is over – and thus, killing them needlessly is the same as slaughtering your own men.¹⁶⁶

To the classical Chinese authors, disproportionate destruction is an act of barbaric violence, unsuitable to a legitimate state. It is an act of a ruler and general who do not understand the *dao* of warfare, have not grasped the meaning of strategic advantage (*shi*), cannot properly utilize the circumstances (*shan*), nor hope to attain harmony (*he*). In short, such rulers and generals represent everything the authors warn against as improper rule leading to the destruction of the state.

Prohibited Weapons: Neither Sunzi nor Sun Bin explicitly considers the issue of prohibited weapons – possibly because the weapons at the time required direct targeting at particular enemies. Nevertheless, the preceding discussions on discrimination and proportionality clearly indicate indiscriminate and disproportionately destructive weapons to be beyond the scope of legitimate use.

Prohibition of Means “*Mala in Se*” As with the prohibited weapons requirement, prohibition on means “evil in themselves” is never explicitly considered in the war manuals. However, since the problems arising from the two requirements are effectively the same, the same logic can be applied. While there are no prescriptive laws governing the use of such tactics, the previously cited prohibition on entering or pursuing war under emotional duress, indicates that inflicting unnecessary suffering, especially against non-military targets, is similarly prohibited. Finally, one can hardly call for a genocidal campaign, or psychological warfare by

¹⁶⁶ Sunzi. Pp. 96, 115. and Sun Bin. Pg. 100.

the use of mass rape, whilst seeking to unite the people to be conquered with one's own in order and harmony.

Reprisals: Reprisals, as retaliation for the enemy's breaking of the law by breaking the law yourself, is an incongruous notion in Chinese political and war theories. As has been demonstrated, the "law" represents the ability to act effectively and bring the world under order and harmony. Failure to act accordingly signifies one's incompetence, and thus a lack of *tianming*. Therefore, to react to such actions by emulating them, would be a sign of utter ignorance and ineptitude.

Moreover, the Chinese understanding of the world and its people as ultimately a singular whole rejects the differentiation into "us and them." This worldview further discourages reprisals, as the targets of such destruction revisited upon the enemy are indiscriminate; thus reprisals are seen as detrimental to the goal of harmonious unification of all lands and peoples.

The rules of engagement presented in Chinese political thought, as well as in *The Art of War* writings of Sunzi and Sun Bin, seek the attainment of harmony through limitation of the destruction of war. They prioritize the legitimate targets first to the government or state, then to the soldiers of the state, and finally – in absolute necessity and if all other options have failed – to the citizens themselves. As in *Jus ad Bellum*, the failure to contain the destruction to the state and/or military level indicates a failure of the ruler and the general. An all-out war is the consequence of poor planning and limited foresight, counterproductively increasing chaos and base (*é*).

The limitations of war engagement represent the ruler and general's mastery of the *dao* in pursuit of harmony. As such, their appropriate utilization indicates the possession of *tianming*,

and strengthens their stability in future prospects. Failure to master the *dao*, as copiously noted by all the authors, leads to the swift downfall and destruction of the state.

CHAPTER 3

ISLAMIC WAR THEORY

The Islamic War Theory is a direct outgrowth of the Islamic theories of justice and state, both of which are based on the primary religious sources. While these theories have developed significantly over the 14 centuries of the existence of Islam, and a great many competing conceptions of them exist, all these rely on the same primary sources for the authority of their claims. Rather than attempt to address the various and competing ideas, the analysis will instead focus on the narrow time frame where the primary sources arose (610-632/3 CE), and will focus almost exclusively upon them.

While this approach eliminates much, if not all, historical progress made to these theories, it does have the distinct advantage of presenting the core upon which all subsequent development hinges without the constant interruption of a point-counterpoint analysis – thus providing an elegant presentation of the prime principles. This approach also fits into the purpose of this analysis – namely to provide the war theory ideals of a civilization, and subsequently a vista from which the later developments can be intelligently considered.

It must be further noted that, as a living religion, the interpretation of Islamic principles – particularly of the aforementioned primary sources – remains an ongoing project. As such, it should be understood that certain elements of the following presentation represent one of a number of competing viewpoints. The Author's decision to utilize this specific perspective arises from the study of primary and secondary sources, together with the works of some of the greatest contemporary scholars.

The following presentation of the Islamic War Theory will concern itself only with the precepts stipulated in, or extrapolated from, the primary Islamic texts. This limits the potential sources to the Qur'an, Sunnah, the Sīra, and works of authors seeking to offer an explanation or commentary of these sources. Consequently, the analysis will be limited to a 23 year period of the Qur'anic revelation, and the life of the Islamic messenger qua messenger. Additionally, the analysis will restrict itself to Sunni sources, given their historical representation the grand majority of the Muslim population in general, and scholars in particular.

While the questions of state and war in Islam have received much attention from hundreds of scholars over the past 14 centuries, Muhammad Asad points out that the body of legal work such scholarship has produced does not belong in Canon Law (*shari'a*) – as it can neither supplant the primary sources of Islamic law (Qur'an and Sunnah), nor is there any warrant from these primary sources to indicate the validity of such laws beyond their immediate location and circumstance.¹⁶⁷

A distinction must be drawn between Canon Law (*shari'a*) – as drawn from primary sources – and jurisprudence (*fiqh*) – which is the result of the work by legal scholars dealing with the problems of their times.¹⁶⁸ Such a distinction is anchored in the notion of divine revelation as perfect and everlasting, as well as in the historical application by Muhammad and the earliest Muslim rulers.¹⁶⁹ Consequently, Canon Law is considered as the immutable framework of law, while the jurisprudence represents the human effort to apply the concepts of that framework to the particular circumstance where law is called upon. The idea is perhaps best explained by analogy.

¹⁶⁷ Asad, Muhammad. *The Principle of State and Government in Islam*. Gibraltar: Dar Al-Andalus, 1980. Pp. 10-17.

¹⁶⁸ *Ibid.* Pp. 3-17.

¹⁶⁹ *Ibid.* Pg. 25.

The Constitution of the United States provides the framework by which the government and the laws are constrained. Each state within the union is free to develop their own laws in order to best deal with their own particular situations and serve their residents. However, all state laws are subject to the federal laws – drawn from the Constitution – and must remain within the boundaries created by the Constitutional framework, or else be overturned. In the same way, the Canon Law (*shari‘a*) functions as the Constitution by providing the general framework of law – though unlike the Constitution, the framework itself is considered as sacred and thus inviolate.¹⁷⁰ This enables legal scholars and the courts to establish through jurisprudence (*fiqh*), any laws they deem useful or necessary for their particular circumstances, so long as they remain within the boundaries of the legal framework posited by the Canon Law (*shari‘a*).¹⁷¹ Such laws are developed by the particular understanding each scholar brings to his reading of the framework, thus allowing for the development of a hermeneutics of law by jurisprudence (*fiqh*). This concept of legal framework drawn from primary sources will be used again when discussing the Islamic theory of state.

The avoidance of using historical scholarly works, outside of analysis and commentary on the primary sources, is also influenced by several important elements. Firstly, the later introduction of certain legal opinions may have been legitimate only for particular historical circumstances, and cannot be taken as a universally binding. One such case is the 8th century division of the world into the “abode of war” and the “abode of peace,” whereby all lands outside of Islamic rule (abode of peace) were considered legitimate military targets. As noted by the

¹⁷⁰ *Ibid.* Pg. 12. Also Asad, Muhammad. “This Law of Ours.” In *This Law of Ours and Other Essays*. Gibraltar: Dar Al-Andalus, 1987. Pg. 69.

¹⁷¹ Asad, Muhammad. “This Law of Ours.” Pp. 63-8. Also Asad, Muhammad. *The Principle of State and Government in Islam*. Pp. 14, 26, 34-5.

European Council for Fatwa and Research,¹⁷² this division *was* legitimate – insofar as it was descriptive of the historical period and circumstances. However, it is illegitimate if considered as a normative prescription extending indefinitely. Secondly, certain opinions contradict not only those of other scholars, but also the primary sources. Possible reasons for such rulings may have been the perceived circumstantial necessity, pressure from the ruler to find legal grounds to pursue certain ends, or just a matter of personal opinion. Examples of such rulings are present in the justifications to wage war against another Muslim state, amongst others – despite the religious prohibition for doing so.¹⁷³ Finally, with respect to this limitation, the present attempt is effectively no different than previous attempts of modern scholars to extricate core regulations within Islam from the subsequent historical scholarship, which may be seen as inadequate and not representative of the core texts. One such effort was made by Fazlur Rahman, in his Law and Ethics in Islam.¹⁷⁴

The Qur'an is Islam's divine word, considered by Muslims to have been revealed by God (Allah) to Muhammad, over the aforementioned 23 year period, and to have remained unchanged since that time. Considered by Muslims to be a universal book of guidance, and proclaiming itself as such,¹⁷⁵ it provides a framework for action on both the individual and communal levels. The Qur'an takes the primary place in all Islamic thought, as it may be supplemented by other sources, but may never be supplanted by them. Therefore, if the Qur'an stands in contradiction to any other source, then the other source must be disregarded.

¹⁷² Ibn Yusuf al Judai, Abdullah. *World Classification in Islamic Jurisprudence and its Relevance to Reality*. Dublin: European Council for Fatwa and Research, 2007. Pp. 171-5.

¹⁷³ Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Edited by James Turner. Johnson and John Kelsay. In *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, 35-50. New York: Greenwood Press, 1990. Pg. 35-6.

¹⁷⁴ Rahman, Fazlur. *Law and Ethics in Islam*. In *Ethics in Islam*, edited by Richard G. Hovannisian. Malibu: Undena Publications, 1983. 3-16.

¹⁷⁵ Qur'an. 2:2, 38:87, 39:42, etc.

Given the complexity of the Qur’anic text – the context of revelation, particularity of certain proprietary language, and the vastly complex grammatical structure of the language, which may entirely alter the translation – the analysis will use commentaries of the Qur’an to provide insight into these issues. The two commentaries to be utilized come from a contemporary and a companion of Muhammad - Ibn ‘Abbas (d. 687), and Ibn Kathir (d. 1373), considered two of the most eminent scholars on the subject.

In dealing with the Qur’anic injunctions, the analysis will limit itself, as far as possible, to the *nuṣūṣ* – the injunctions “[N]ot subject to conflicting interpretations... absolutely self-contained and unambiguous in their wording.”¹⁷⁶ From this category of regulations comes Islamic law. It must be noted that the full comprehensive list of such injunctions has differed among the various legal school, though the majority of terms are universally accepted. The concentration on such unambiguous injunctions provides a clear direction, which also serves to guide the understanding of the analysis for the non- *nuṣūṣ* elements.

For the purpose of the analysis, the standard translations of the Qur’an are often imprecise in their wording. In order to ensure both precision and clarity, the analysis will supplement the translations – where necessary – by appropriately altering their wording to reflect both the complexities of language, as well as the pertinent commentaries. To make any such alterations clear to the reader, they will be inserted into square brackets and set in bold font – not to be confused with the italicized font in or out of parentheses indicating the original translator’s interjection of additional language for the purpose of coherent translation. The source of the alteration will be designated by a capital letter set into curly brackets, following the alteration. Where the source of alteration is terminology (for clarity) or the translation of a specific word,

¹⁷⁶ Asad, Muhammad. *Principles of State and Government in Islam*. Pg. 12

the symbol used will be {L}; while the commentaries of Ibn ‘Abbas and Ibn Kathir will be designated by symbols {A} and {K}, respectively. Where multiple sources are present, multiple symbols will follow the alteration.

In order to demonstrate both the necessity of such methodology, and ensure reader clarity, the following example will contrast the difference between an altered and unaltered translation of a single verse.

“But mischief is worse than killing.” (Unaltered)

“But [**fitna; severe oppression, arising out of disregard for justice** {L}{K}] is worse than [**murder** {K}{A}].” (Altered by commentary of Ibn Kathir)

The analysis will utilize the English translation of the Qur’an by Muhammad Farooq-i-Azam Malik as the base translation, into which alterations may be added. The choice of this particular translation was made on the basis of its clarity and use of modern English language. Where the analysis does not require a full citation, the referenced verses have been judged as sufficiently clear and precise in their base translation. For the purposes of legibility, all citations will be noted simply as “Qur’an,” followed by the particular chapter and verse numbers.

The Sunnah¹⁷⁷ represents the full range of actions and behaviors (active or passive) taken by Muhammad – primarily during the period of revelation. Where the Qur’an can often be considered as a theoretical guide, the Sunnah provides interpretation and application of the Qur’anic principles. Hadith, which are the written and codified accounts of the Sunnah, were assembled into collections by various scholars. Given that these collections came about mostly

¹⁷⁷ The term means “a well-trodden path,” and is used exclusively for the traditions of Muhammad, including actions, words, habits, etc. - in the Islamic context. *Hadith* are the particular instantiations and basic building blocks of this tradition.

after the death of Muhammad, the authors relied on chains of narration, leading from themselves back to him. The collected hadith were organized by a myriad of factors into different spheres of validity. For the purpose of this analysis, we will focus on the most widely accepted “sound” collections of Hadith by Bukhari and Muslim, compiled in the 9th century. This choice is made due to the renown of the authors, the near-universal acceptance of their scholarship, and the availability of the translated texts.

The final primary source element is that of the Sīra. While the term literally means “the path,” in the Islamic context it refers to the biography of Muhammad, particularly in regards to the affairs of the state and warfare. Though most writings of Muhammad’s contemporaries have been lost, the analysis will use the works of Ibn Hishām and Afzalur Rahman, considered to be the most accurate accounts of Muhammad’s life. What differentiates the Sīra from the Hadith, is the heavy emphasis on the art of governance and warfare, and the use of Hadith and the Qur’an in establishing the underlying reasoning for actions.

For Muslims, the Qur’an and Hadith represent a complete way of life – inseparable from any activity undertaken. The reason for the interconnectedness is that Islam separates all acts into the general groups that are morally mandated, desirable, neutral, or forbidden. The Qur’an orders Muslims to make all their decisions in accordance with the Qur’an and Hadith. It states, “Whatever the subject of your dispute, its Judgment belongs to Allah...”¹⁷⁸ and “It is not fitting for a believing man or a believing woman to have an opinion in their affairs when a matter has been decided by Allah and his [Messenger {L}]...”¹⁷⁹

¹⁷⁸ Qur’an. 42:10.

¹⁷⁹ *Ibid.* 32:34.

Secondary sources to be considered are the writings of authors who strive to present the material in terms of the primary ideals, rather than the practical realities of their particular circumstances. Where an author combines the two styles, the analysis shall endeavor to utilize only the former. This means that the analysis will use only select parts of certain works of authors such as Muhammad Asad, Majid Kahdduri, John Kelsay, Shaybānī, and others. This limited selection is an important aspect of the limiting factors, as it bypasses 14 centuries of particular judicial rulings, and instead focuses on the primary material from which the rulings were ultimately derived.

As with the preceding chapters, the importance of contextual elements depends on the significance these elements play in the war theory. The *raison d'être* of Islam, as well as the Islamic theories of justice, state, and warfare, is the universal establishment of justice and harmony – arising from the correct relation of the individual to the divine, and expanding to every relation, whether by the individual or community – with the corollary element of the elimination of injustice. As such, the context of justice in Islam will be analyzed to a greater degree than the preceding chapters.

HISTORICAL CONTEXT

Islam arose in the Arabian Peninsula, early in the 7th century. The pre-Islamic social setting emphasized tribalism, tribal and personal idolatry, and codified norms of conduct. Within the peninsula's city-states, power and rule was held on an oligarchical basis. Resources were permanently concentrated in the hands of a few families of the most powerful tribes, and it was the familial connection to those tribes that primarily determined the social status of an individual.

Such tribal and economic stratification of society led to oppression of those without powerful connections. Women were considered as objects – inherited after the owner’s death – and were often buried alive as infants, having no value to the family. Tyrannical slavery was widespread. Before the appearance of Islam, even the “old” norms of conduct had severely deteriorated, with respect to the treatment of the traditionally helpless members of society; namely a certain degree of magnanimity to be shown to those under one’s power.

Within the Arabian Peninsula, the city of Mecca was considered sacred by the various tribes, due to the house of gods – the Ka’ba¹⁸⁰ – in its center. The Ka’ba housed a variety of tribal idols – 360 idols according to most sources – and was the site of tribal pilgrimage each year. This pilgrimage brought both wealth and prestige for Mecca, and granted its ruling tribe – the Quraysh – a special status as the protectors and caretakers of the house of gods. Though Muhammad came from the Quraysh tribe,¹⁸¹ he was orphaned at an early age, was subsequently adopted by his grandfather, but later passed into the care of an uncle after the former’s death. This left Muhammad in a precarious position, with little direct connection to, and thus protection from, the tribe.

As he grew, Muhammad attained a solid reputation amongst the Meccans, by his deeds. Through a variety of reports, Muhammad was exemplary in his behavior. His honor, honesty, and intelligence were recognized in the traditional Arabic fashion; namely by awarding him a series of titles, including *al-Amin* (lit. trustworthy).¹⁸² However, the social inequalities seem to have driven him towards the pursuit of different interests, such as contemplation and fasting in a

¹⁸⁰ Lit. “Cube.” A cubical building that housed the idols of various pre-Islamic Arabian tribes, Muslims believe it was first constructed by Abraham and Ishmael. Today, it is the direction Muslims face in prayer.

¹⁸¹ He was a part of the lesser-ranked Banu Hashim tribe within the larger Quraysh tribe.

¹⁸² Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. London: Seerah Foundation, 1981. 18-21.

cave above Mecca. According to Islamic theology, it was in this state that the Qur'an was first revealed to him, at the age of forty.

In its early stages, Islam focused primarily on social ills, as found in the local setting at the time. It emphasized the rights of all and their inherent equality, particularly orphans, the poor, weak, slaves, and women. The basis of this development was the proclamation of the *tawhīd* (singularity of God), the call for establishment of the law of God, and the establishment of the notion of ultimate justice for acts committed. As could be expected, given that the message sought both the dismantling of the lucrative patronage of idolatry, as well as establishing rights for individuals who were otherwise at the mercy of the powerful, the message met with resistance. In the beginning, Muhammad was ignored.

As his message began to resonate, particularly with the oppressed population, the tribal leaders attempted to compromise with Muhammad, by offering him wealth, status, and even a form of religious compromise. Failing to achieve a compromise, they began a campaign of threats, intimidation, sanctions, violence, torture, murder, and even plots to assassinate Muhammad himself.¹⁸³ The persecution in Mecca was met with Qur'anic revelation emphasizing social justice and patience, while distinctly failing to authorize violence – even for purposes of self-defense. Justice was called for, but only on an individual level.

The city of Medina (*Yathrib*),¹⁸⁴ some 250 miles north of Mecca, was a religiously diverse community,¹⁸⁵ caught up in their own tribal disputes. As was the custom among Arabs as well as the local Jewish population, they sought a neutral arbitrator, agreed upon by the pertinent tribal leaders, to resolve their issues. Meanwhile, some of these leaders of Medina had met

¹⁸³ *Ibid.* Pp. 22-23.

¹⁸⁴ Later renamed *Medinatu en-Nebi* - "the city of the Messenger" – or Medina for short.

¹⁸⁵ *Yathrib* had 7 distinct Jewish tribes within its immediate area, in addition to Arab pagans.

Muhammad while on their annual pilgrimage to the Ka'ba. Upon learning of his reputation as an honorable and trustworthy individual, in addition to – or in spite of – his difficulties in Mecca, they invited him to Medina as an arbitrator; allowing for the migration of the Muslim population of Mecca.¹⁸⁶ This migration of the Muslim community, 13 years after the start of the revelation, was later accepted as the year zero of the Islamic calendar.

With the migration to Medina, the Muslim community and the message of Islam experienced a paradigm shift. No longer under the oppressive regime of the Quraysh, and with many Medina pagans¹⁸⁷ and Jews converting to Islam, the message of the revelation shifted towards application of the principles of justice on a state level. With the migration also came the separation of Muslims from the authority of the Meccan pagans. Once the Islamic state was established, Muslims could no longer be treated as mere local outcasts, but only as a legitimate power – i.e. by diplomacy or war.

With the creation of the state, the Islamic message took on additional characteristics, with respect to the state. Whereas the Meccan revelation focused on social justice, patience, and endurance under the oppressive regime of tribalism, the Medinese revelation focused on building and protection of the state – i.e. communal justice. It was only after the Muslims began to operate under their own authority that the first religious injunction on war was revealed.¹⁸⁸ After a series of battles between Mecca and the Islamic state over a four-year period, a ten-year truce was signed, allowing Muslims to enter Mecca for the purposes of the annual pilgrimage – *Hajj*. When the Meccans broke the treaty two years later, the state of war resumed. In a surprise military maneuver, Muslims marched on Mecca and entered unopposed, and with no loss of life,

¹⁸⁶ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 23.

¹⁸⁷ The term “pagan” is here used to differentiate between the majority idolatrous pre-Islamic Arabs, as opposed to the monotheistic – mostly Jewish – residents of Arabia.

¹⁸⁸ Qur'an. 2:190

besides the execution of several war criminals.¹⁸⁹ With their former persecutors in hand, Muhammad proclaimed that no reprisals were allowed, and that the lives and possessions of Meccans were safe.¹⁹⁰ Two years later, the revelation of the Qur'an was completed, and the Messenger died several months thereafter.

Following his death, the political leaders held a council, electing Abu Bakr al-Siddiq as their leader and Muhammad's successor – *khalīf*.¹⁹¹ Abu Bakr's reign lasted two years. Before his death, he appointed 'Umar ibn al-Khattab as his successor. 'Umar was subsequently approved by the other political leaders. In regard to his successor, 'Umar is quoted as saying that, if he appointed a successor, he would be following a good example of Abu Bakr; but if he did not, he would be following the good example of the Messenger.¹⁹² He was followed by 'Uthman ibn Affan and 'Ali ibn Abi-Talib – both of which were named as successors and subsequently approved by other political leaders. Under pressure and wavering political support, 'Ali eventually resigned the post in 661, to be succeeded by Mu'awiyah ibn Abi Sufyān – the founder of the Umayyad Dynasty. Following Mu'awiyah's ascension to the rule, the Islamic state became a hereditary monarchy, ending the period of the "Rightly Guided" rulers or *rāshidūn*.¹⁹³

THEORY OF JUSTICE

As noted in the historical context, the message of Islam began with a call for justice. The migration to Medina precipitated a shift to full communal justice, and finally statehood, as an

¹⁸⁹ Ibn, Hišam. *Ibn Hišam: Poslanikov životopis*. Edited by 'Abd Al-Salām Muḥammad. Hārūn. Translated by Mustafa Prljača. Sarajevo: Bemust, 1998. Pg. 225. [Henceforth referred to as *Ibn Hišam*]

¹⁹⁰ *Ibid*. Pg. 227.

¹⁹¹ Khalif/ pl. Khalifa – lit. vicegerent.

¹⁹² El-Munziri, Zekijjudin Abdu-l-Azim Ed-Dimiški., comp. *Muslimova Zbirka Hadisa: Izbor*. 3 Vols. Translated by Šefik Kurdić. Zenica: Kuća Mudrosti, 2004. Vol. 2. #1147. Pg. 230. [Henceforth referred to as *Muslim*]

¹⁹³ Rāshid/pl. Rāshidūn – lit. the righteous.

extension of that model. The wars that followed the migration were continuations of the justice model on a grand scale. In order to understand the Islamic theory of statehood, and subsequently war, attention must first be turned to the theory of justice – first its scriptural basis, and then the full model.

On the scriptural basis, justice is one of two primary concepts of Islam, along with *tawhīd*. Islamically, justice is ultimately based on the concept of life-after-death, with God (Allah) standing in judgment. The standard of that judgment is personal responsibility for one's actions, and the justice of such. Where *tawhīd*, or rather belief thereof, is a purely private and internal matter, justice is the external factor that ought to accompany that belief. The Qur'an proclaims, "Surely, the noblest of you in the sight of Allah, is he who is most righteous,"¹⁹⁴ while the Hadith say, "He does not believe... whose neighbor is not free from their harm."¹⁹⁵

Justice is the primary component of all Islamic aspects of life – in this world and the hereafter; and in private and public spheres. While justice is Islamically the goal for human beings and the ultimate promise of God, the specific meaning of justice depends on the particular context. As an example, while the private sphere of justice encourages people towards forgiveness and forbearance of wrongs suffered,¹⁹⁶ the communal sphere demands defense of the community, by the community.¹⁹⁷ In other words, the role of justice on the personal level is not the same as on the communal level, as the matter extends beyond the rights and responsibilities of a single individual.

¹⁹⁴ Qur'an 49:13

¹⁹⁵ Ez-Zubejdi, Abdullatif, comp. *Buharijina Zbirka Hadisa: Sažetak*. Translated by Mehmedalija Hadžić. Sarajevo: El-Kalem, 2008. # 2022. Pg. 914. [Henceforth referred to as *Bukhari*]

¹⁹⁶ Qur'an. 16:126

¹⁹⁷ *Ibid.* 6:151

Islam, though it arose in Arabia, considers itself universal in terms of its message and prescriptions. Allah is described as the Creator and Sovereign of the universe, whose laws extend to everything and everyone alike.¹⁹⁸ The reasons for this universality become clear in light of the Qur’anic notion, similar to the biblical one, that all people arose from two individuals, and that any distinction among them is based purely on piety. The Qur’an comments on its universality: “We have sent you [Muhammad {L}], to the entire mankind...”¹⁹⁹ and, “We have revealed to you [Muhammad {L}] the Book for the instruction of mankind.”²⁰⁰

The full model of justice begins with the scriptural principles, and builds on them. From a religious standpoint, Islam advocates ultimate justice, delivered in the hereafter. The Qur’an repeatedly stresses the concept of such justice in two ways. First, it unequivocally states that no injustice shall be done on that day – i.e. through the judgment of God.²⁰¹ Second, the actions of each individual shall be the measure by which the judgment occurs.²⁰² On the latter point, the Qur’an often states that, by their own wrongful actions, people commit injustice against *themselves*.²⁰³ It is important to note that the establishment of justice is based solely on individual responsibility,²⁰⁴ as no one can take either the sins or rewards of another.²⁰⁵ However, there are some stipulations as to the capacity for responsibility. A person is responsible for their acts if, they are an adult, sane, and have access to some means of finding the correct answer.²⁰⁶ Lacking any of these prerequisites makes one inculpable by default. This factor plays a part in the later war theory, especially in the *Jus in Bello* concerns.

¹⁹⁸ *Ibid.* 1:1, 16:52, etc.

¹⁹⁹ *Ibid.* 34:28.

²⁰⁰ *Ibid.* 39:41.

²⁰¹ *Ibid.* 23:62, 10:44.

²⁰² *Ibid.* 99:7-8.

²⁰³ *Ibid.* 10:44.

²⁰⁴ *Ibid.* 53:39.

²⁰⁵ *Ibid.* 35:18.

²⁰⁶ *Ibid.* 16:119.

Just conduct in Islam is divided into two general spheres: the personal and interpersonal.²⁰⁷ The personal sphere is limited to one's relationship with God; the adherence to injunctions pertaining to one's connection with the divine, such as prayer, fasting, etc. Justice in this sphere can be classified as *doing justice to one self*. This sphere forms an important part of Muslim religious life, and may serve as an indicator of piety and adherence to the divine law. Beyond this role, however, it is of little practical importance to this analysis.

The interpersonal sphere of justice is the key element in constituting the Islamic state, and the prosecution of war. The interpersonal sphere includes everything that does not belong to the personal one – i.e. all that is not a matter exclusively between the individual and God. Justice in this sphere can be classified as *doing justice to/toward the other*. Given that communal life, the establishment and maintenance of the state, and the functioning of a society all fall under this heading, the importance of justice on the interpersonal level cannot be overstated. Moreover, while Islam notes that God may forgive one's personal sins – i.e. sins against God – divine justice demands that the sins against others be fully redressed, without divine forgiveness.²⁰⁸ That is to say, only the wronged party holds the right to forgive the offender. Consequently, no degree of justice in the personal sphere can make up for interpersonal deficiency,²⁰⁹ as the following Hadith makes clear.

He [Muhammad] said: The bankrupt among my followers, is the one who will arrive on the day of Judgment with [obligatory] prayers, fasting, and alms, but he insulted one person, lied against another, ate [misappropriated] the possessions of a third, spilled the blood of a fourth, and harmed yet another. Then, his good deeds will be distributed to the wronged parties. And when his good deeds are gone, and he has not returned what he owes [them as their right], their bad deeds will be taken, and heaped onto him; and he will be thrown into the fire."²¹⁰

²⁰⁷ Al-Ghazali. *Ghazālī's Book of Counsel for Kings*. Translated by F. R. C. Bagley. Oxford: Oxford University Press, 1964. Pg. 13.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Muslim*. Vol. 3. #1836. Pg. 292.

The basis of interpersonal justice rests on the Qur’anic and Hadith injunctions to, “enjoin good, and forbid evil.”²¹¹ In order to understand the full extent of this, the core concept of Islamic justice,²¹² we turn briefly to a linguistic analysis of the terms.

The term used for the particular phrasing of “forbid/prohibit evil,” is *munkar*. The lexicographer Edward William Lane notes in his *Arabic-English Lexicon*, *munkar* is defined as:

Any action *disapproved*, or *disallowed*, by sound intellects; or *deemed*, or *declared*, thereby, to be bad, evil, [*hated*], *abominable*, *foul*, *unseemly*, *ugly*, or *hideous*; or *pronounced to be so by the law because the mind deliberates respecting the regarding it as such*: and thus it is used in the Qur, ix. 113 [and other places]: or anything *pronounced to be bad, evil, hateful, abominable, or foul, and forbidden, and disapproved, disliked, or hated, by the law*: a saying, or an action, *unapproved, is not approved, unaccepted, or not accepted*, by God.²¹³

Munkar is the umbrella term, under which more concrete terms are subsumed. An important aspect of the above definition is the appeal to rational deliberation classifying an act as *munkar*, as well as the fact that it occurs in conjunction with the divine disapproval. Thus, the appeal is made both to divine injunction and human reason and/or decency.

The Qur’an offers almost a score of terms for evil or injustice. The most often used term is “*zulm*.” In standard translations, such as Pickthall, the term is translated as “oppression,” “injustice,” “tyranny,” etc. While these interpretations are fairly expressive, in the most concrete sense, *zulm* translates as: “To put a thing in a place other than its rightful place.”²¹⁴ Thus, the term covers a wide range of injustice, in personal and interpersonal spheres. To steal is to put a possession in a place where it does not belong; to have an affair is, quite literally, to put one’s private parts where they do not belong; to oppress people, is to displace the rights of those people; to submit to other than God is, from an Islamic perspective, to misplace the gratitude and

²¹¹ Qur’an. 3:104.

²¹² Asad, Muhammad. *The Principle of State and Government in Islam*. Pg. 33.

²¹³ Lane, Edward William. *An Arabic-English Lexicon*. Beirut: Librarie du Liban, 1968. Pg. 2850.

²¹⁴ *Ibid*. Pg. 1920.

obedience one is due to their creator and sustainer. Where *munkar* is an umbrella term, *zulm* is the primary subsidiary thereof.

The word offered in opposition of *munkar*, is *ma'rūf*. While the literal meaning of the word is “*known: and particularly well, or commonly, known,*”²¹⁵ Dr. Toshihiko Izutsu offers a more concise and contextual analysis in his Ethico-Religious Concepts in the Qur'an. *Ma'rūf* is described as standing in opposition to *munkar*; bearing the definition of any act arising from, and in consonance with true belief.²¹⁶ Considering that *munkar* is a conscious and deliberate act, made repugnant by human decency, deliberation of reason, and divine injunction, *ma'rūf* is then a conscious act made desirable by the same means. This trilateral approach in the application of these terms allows for the simultaneous and harmonious existence of the definite set of divine prohibitions and requirements, as well as the malleable human judgment and ingenuity, in the determination of right and wrong. Just as *munkar* is an umbrella term for evil and injustice, so too *ma'rūf* is an umbrella term for justice and goodness.

The importance of this injunction must be appreciated in both its concrete and fluid sense. In the concrete sense, *munkar* and *ma'rūf* provide clear guidance with regard to certain acts, as noted in the primary sources. However, while the number of acts clearly defined in these terms are few, the injunction serves as a framework (as per the earlier noted distinction) for understanding all acts. In this sense, the immutable nature of the injunction is established. In terms of its fluidity (as with the earlier noted *fiqh*), particular circumstances and general progress allows for an evolving process of understanding just what acts fall under which category. The core concept in this understanding is the term *'adl*, which has played a major part in understanding of justice by Islamic philosophers and legal scholars alike.

²¹⁵ *Ibid.* Pg. 2017.

²¹⁶ Izutsu, Toshihiko. *Ethico-religious Concepts in the Qur'an*. Montreal: McGill University, Institute of Islamic Studies, McGill University Press, 1966. Pg. 215.

‘*Adl* is the primary subsidiary of *ma‘rūf*, and is defined by Lane as “*equity, justice, rectitude.*”²¹⁷ Further, the term also applies to a moderation in action, so that, “It is *the mean between excess and falling short.*”²¹⁸ This term carries along additional connotations, primarily those that connect the notions of justice and harmony, and allow for the broader, circumstance-based understanding of right and wrong. With the sense of balance while seeking justice, ‘*adl* represents a marked difference from the Biblical notions of justice mandating strict recompense of “an eye for an eye.” Such balance allows for the consideration of circumstances particular to the situation. As Tariq Ramadan points out, legally prescribed punishment in accordance with the Islamic Canon Law (*shari‘a*), is ultimately up to the judicial system, which may choose to implement any lesser sentence, where the circumstances warrant such a decision and justice is satisfied in recompensing the injured parties.”²¹⁹

Whereas justice seems implacably rigid, ‘*adl* not only allows for flexibility, it actively seeks to utilize justice for the purpose of harmony. The Qur’an demonstrates this flexibility in the following verses:

Allah commands justice [**‘*adl*; in recompensing - if good, with good, and if evil, with evil. However, those who return good with an excess of good; or those who forgive, or return in lesser measure than the initial harm done, are the better for it. Acting with ‘*adl*, is here understood as a form of bearing witness to the singularity of God.** {A}{K}]²²⁰

We ordained *in [the Torah {L}]* for them: “A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for a wound an equal retribution.” But if anyone remits the retaliation by way of charity, it will be an act of atonement for him; those who do not judge by the law which Allah has revealed, are indeed the wrongdoers.²²¹

²¹⁷ Lane, Edward William. *An Arabic-English Lexicon*. Pg. 1974.

²¹⁸ *Ibid.*

²¹⁹ Ramadan, Tariq. *An International call for Moratorium on corporal punishment, stoning and the death penalty in the Islamic World*. March 30, 2005. < <http://www.tariqramadan.com/An-International-call-for,264.html?lang=fr>>

²²⁰ Qur’an. 16:90.

²²¹ *Ibid.* 5:45.

Clearly, the notion of justice, as given in these verses, differs from the direct ‘eye for an eye’ approach – which the Qur’an does allow - by advising the believers that forgiveness is a better option. Thus, in understanding the concept of justice in Islam, it is imperative that the relation of justice to harmony be understood as an integral part of that justice.

The injunctions to enjoin *ma‘rūf*, and forbid *munkar*, can now be viewed in a better light. They are the basis of personal, interpersonal, and communal existence of a society. Every society, insofar as the term is applicable, has developed a series of such notions, in order to protect and regulate its very existence. Contributing to the society in positive ways is *ma‘rūf*, and detracting from the society is *munkar*.

As previously noted, the justice segment of the Islamic theory is divided into two primary spheres of personal and interpersonal justice. The interpersonal sphere is further subdivided into three spheres we shall refer to as the “Immediate,” “Proximal,” and “Distal,” (see Fig. 1). The spheres are concentric, and thus every higher sphere contains all the lower ones, which remain active despite the presence or absence of a greater sphere. At every stage, the injunction to “enjoin *ma‘rūf* and prohibit *munkar*,” is the primary goal, but the means of establishing and enforcing the injunction may differ.

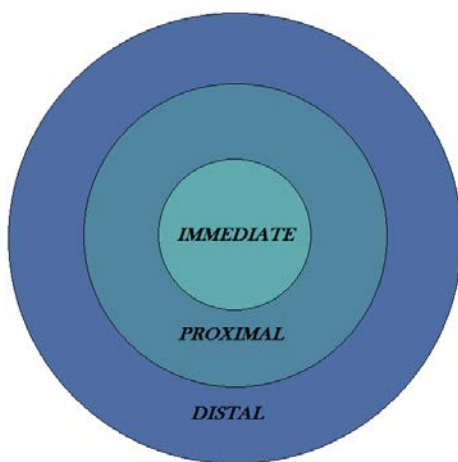


Fig. 1

The immediate sphere of justice takes place within one's family and close community. It is the methodology adopted in all interactions between individuals *qua* individuals. In one Hadith, Muhammad defined that close community as a radius of forty homes surrounding one's residence (roughly 5000 homes).²²² The justice of the immediate sphere includes monetary and other mandatory support for one's family, and charitable support for the neighbors. Additionally, Muslims are to visit the sick and the infirm, to attend their funerals, and generally be available to help in any manner necessary.

The immediate sphere, given its emphasis on the individual, focuses on the establishment of localized justice by individuals. It may be considered as a grassroots movement for a just society. Thus, every individual strives to be just individually – i.e. to promote *ma'rūf* and forbid, or rather work against, *munkar*. Historically, this was the state of Meccan Islam; more than a decade-long struggle for justice under the oppressive regime of the Quraysh. The Muslims strove to establish some modicum of justice on an individual basis. At this stage, the obligation to promote justice is considered individual, or *farḍ al-'ayn*.²²³ When the collection of such individuals reaches critical mass, it is no longer merely the individuals that are just, but the community as a whole. If such a community is independent and self-governed, they attain the proximal sphere of justice. Thus, though the Muslim community in Mecca grew, they could not reach the proximal sphere of a just community as such, given their inability to self-govern.

The proximal sphere represents state-level justice. The methods of proximal sphere justice are utilized whenever the agents in question are the state and its citizens. Whereas the immediate sphere depended entirely on the individual choice of action, the proximal sphere is

²²² Asqalani, Ibn Hajr. *Fath al-Bari*. (Vol.10) Cairo: Mustafa Al-Babi Al-Halabi, 1959. Pg. 447.

²²³ Obligation incumbent on every individual alike, within their particular means.

one of laws, and their enforcement. Having brought about a just state through a self-governing just community, that community is responsible for supporting the state; on the other hand, the state, as an outgrowth of the just community, is responsible for protecting the community and the notions of justice which gave it birth. Consequently, the particulars of state-level justice are more complex.

Historically, this sphere of justice was attained once the migration to Medina was complete, particularly once the Constitution of Medina was established. What the constitution presents is a series of binding rules on individual and communal rights and obligations. These included the right to life, property, freedom of religion, and equality before the law, as well as obligations to communal defense and consolidation of foreign relations to the state – amongst others.

The state can be considered just, once it achieves a degree of stability. It achieves this stability by creating a just constitution and reinforcing it with a set of institutions and protective measures, designed to promote that justice for every citizen. At this stage, certain issues of justice are no longer mandatory for each individual person, but pass into a collective duty – *farḍ al-kifāyah* – satisfied through their completion by some segment of the population. The title of a just state, however, is not one bestowed only upon the ideal state. As a state is composed of people, and people inevitably err, it is understood that mistakes will be made.²²⁴ The key component is the presence of a legitimate constitution and the full effort expended in the enforcement thereof.

²²⁴ *Muslim*. Vol. 2. #1051. Pg. 139.

The furthest reach of justice, in Islamic thought, falls under the concept of the distal sphere, and can be characterized as foreign policy of an internally just state, now seeking to enjoin *ma'rūf* and prohibit *munkar* beyond its own borders. Once the requisite degree of intrastate justice is achieved, the state can begin to look without for justice and harmony. Where the proximal sphere protects the immediate one, so the distal sphere facilitates and enables the proximal sphere; by providing it with the security from foreign threats, as well as a connection to other communities.

At the distal sphere, the methodology applied is only between states *qua* states. Given that all forms of foreign relations, including warfare, are Islamically considered as state activity – as per the Constitution of Medina - the process is necessarily constrained to state actors only.

As noted, the Islamic perspective views the expansion of justice as a primary aim, both of individuals and the state. Therefore, it is incumbent upon the just society to seek ways of expanding the principles of justice beyond their own borders and peoples. In this way, the just state seeks to enjoin *ma'rūf* and forbid *munkar* in a universal way. It is important to note that the expansion of justice and harmony by the Islamic state is not an effort towards the expansion of the Islamic empire or Islam as a religion – though a number of empires have historically done exactly that. The goal is to establish a universal basis for law, and thus bring about universal justice and harmony.

If a non-Islamic state can be dealt with in a peaceful manner – by means of treaties, positive economic and other leverage, or any other means, only such measures are legitimate. However, where the state is unwilling to deal in a peaceful manner, and prohibits attempts to enjoin justice, even at the immediate sphere, then the state must be dealt with by other means.

Measures in this category may include economic and other sanctions, threats, and finally even war. The justification for such violent action, used only as the last resort, is that an unjust state is more than merely harmful to its own citizens. In fact, an unjust state will necessarily be unjust to its neighbors as soon as the opportunity should arise. Therefore, by bringing such a state into justice and harmony, the just state ensures the long-term harmony of that state, as well as its neighbors. This basis for hostile involvement closely matches the modern notion of the Responsibility to Protect, in both its goals and methods.

The Islamic theory of justice is rooted in the religious notion of a just God, and the connection of justice to a pious life. From the Islamic perspective, justice begins on a personal level, where belief and piety create a just relation between the individual and God. Acting on that relation and religious prescriptions, the believer then applies justice to his immediate surroundings – starting with his family and neighbors. When the initial community becomes just and is able to administer itself, it fulfills its proximal duties by establishing a communal covenant – based on the same religious sources of justice. The covenant both defines and seeks to protect the rights of all participants – while assigning to them a set of communal obligations. When the community has been ordered and functions in a just manner, it turns its attention outward, seeking to affect distal justice and harmony by interactions with its neighbors. Just as the step between the personal and immediate, the beliefs of the just state now seek to affect a positive change in its surroundings. Where the neighbors prove amicable to peaceful methods, the just state utilizes such means. Where the neighbors prove hostile, the just state seeks to influence them otherwise.

While this account begins with the personal piety, such need not necessarily be the case for every member of the just society. Any person who assents to the understanding of justice

shared by the society – as was the case with the Jews and pagan Arabs of Medina at the time of the signing of the Constitution – is able to participate in the state.

THEORY OF STATE

For nearly 14 centuries, the exact precepts of the Islamic state have been hotly debated by Islamic scholars. Historically, the majority of Islamic states have been hereditary kingdoms and empires. It is interesting to note that the issue did not seem quite as problematic during the period of revelation, nor in the immediate period following Muhammad's death.²²⁵ Rather, the issue grew exponentially following the abdication of 'Ali ibn Abu-Talib – the last of the *rāshidūn* – in 661 CE. Insofar as the historical form of various Islamic states is concerned, Asad notes that a truly Islamic state has not existed since that abdication – the subsequent states all lacking key components that would have made them truly “Islamic.”

The following analysis will present the theory of the state, as drawn from the primary documents – Qur'an, Hadith, and the Sīra – and supplemented by authors like Muhammad Asad and Majid Khadduri. We do not claim to solve the issue of Islamic statehood in the following pages. Rather, what will be presented is the best approximation thereof, using the best sources available on the primary documents.

The purpose of the Islamic state is the protection and administration of that justice, first to its own citizens, and then beyond; without these elements the state cannot be said to be Islamic – in the same way that a state whose primary purpose is other than upholding and adhering to the democratic ideals cannot be said to be democratic.

²²⁵ *Ibn Hišam*. Pp. 293-4.

The purpose of the Islamic state is provided by the Qur'an in addressing the Muslim state, "You are the best community which has ever been raised for the *guidance of* mankind. You enjoin good [*ma'rūf* {L}] and forbid evil [*munkar* {L}]; [**and believe in God** {K}{A}]."²²⁶ This verse is not a blank check for some supposed inherent supremacy of the Islamic state; rather, the described status of the state is contingent on the implementation of the three listed elements. The first two arising as the necessary result of the presence and implementation of the third, as the understanding of morality – by Islamic standards – hinges upon the divine decree. Consequently, Islamic state can be defined as communal effort to enjoin *ma'rūf* and prohibit *munkar* by means of education, law-making, and the implementation of those laws.²²⁷

As discussed in the justice section, the state is the expansion of a just community to self-governance. The rule of that governance is predicated on the same theory of justice, and seeks to protect its continued operation.²²⁸ Any individual that willingly submits to the laws of the state is, by default, a citizen of the state and is granted all the rights and obligations thereof. It is worth repeating that the submission required for citizenship need not be religious submission to Islam, but only the practical submission to the law of the state.²²⁹ The Islamic state, arising from the theory of justice premised on religious sources, is itself governed by those same sources, and is consequently considered as inherently just.

The first issue, when discussing an Islamic state, is the nature of that state. To understand the nature of the state, the type of social contract involved must first be established. Islam, as a religion, does not posit any particular state structure, or any specific system of government as a 'correct' one. Instead, the primary sources provide the general framework necessary for the

²²⁶ Qur'an. 3:110.

²²⁷ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 725.

²²⁸ Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Pg. 36.

²²⁹ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 730.

creation and administration of a just state, and leave the particulars up to the circumstances of the state. Therefore, the system of the Islamic state is limited only by the capacity of any particular governmental form to embody the necessary elements. To further understand the relevant principles of the Islamic state, we turn to four terms of authority used in the primary sources.

- I. Khalīf: (vice-agent, vice-gerent) Qur'an uses the term for righteous human rule only.
- II. Rabb: (lord, ruler) Qur'an uses the term for God. Other common usage also applies to human beings – i.e. the head of a household is the “rabb” of the household –but without the definite article preceding the title.
- III. Mālik: (king) Qur'anic use for God, also for rulers appointed on Earth – those given power to rule over others.
- IV. Ṣultān: (lit. sovereign, authority) Qur'anic use exclusive to God.

This terminology indicates the Islamic understanding of God as the overarching power and the ultimate ruler. The term *sultan*, used to denote sovereign authority, cites Allah as its sole possessor. Sovereignty is defined as supreme independent authority, unrestrained by external factors. Given that Islam quite literally means submission to the will of God, and further that its very notions of morality hinge upon divine revelation, the state is always beholden to divine decree, and thus never sovereign.²³⁰

Human power is significantly limited in its scope, by terminology and its context than in the Western and Chinese contexts. The term primarily associated with human rule is that of *khalīf*. The term means “vice-agent,” according to Edward Lane, but the more apt translation for the purposes of the analysis is, “vice-gerent.” The usage of the term is clear from the Qur'anic context, particularly verses such as, “O [David {L}], We have made you a vicegerent [*khalīf* {L}] in the earth, so rule among the people with justice and do not follow your own desires lest they mislead you from the Way of Allah.”²³¹ As the terminology connotes, the extent of human

²³⁰ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pp. 718-20, 723-4.

²³¹ Qur'an. 38:26.

rule is limited by the divine authority. Man and state play the role of the vice-gerent, and are thus removed from absolute, or rather sovereign, power, which is inherent in both the Western and Chinese conceptions of the state.²³² Just as an individual believer is bound in action by religious injunctions, the state too is limited with respect to its power.

This limitation consists of the religiously provided constitutional framework. The concept of a framework connotes general guidelines, set to cover a broad spectrum of possibilities, with relatively few directly prescriptive or constraining elements. An analogy to the US constitution is apt, in that such framework is not intended to provide all the answers ahead of time, but rather to provide the guiding principles. Such principles allow the state to develop organically within its ever-changing circumstances, by providing the ability to create laws designed to deal specifically with the particular context the state finds itself in – while at the same time constraining the creation of any new laws within the general principles of the constitutional framework. Islamic state is based on a constitution established from religious texts.²³³ As the primary sources of the constitution are considered to be just, a constitution that is true to these sources is necessarily itself just.

From its basic constitutional framework, the state adopts general guidelines for the creation of specific laws. Such laws are understood as temporary solutions, and may later be overturned.²³⁴ In the legal sense, this principle functions like its modern counterpart, where a previous legal ruling may serve as precedent, though it may also be found to be lacking in utility or justice and thus removed or replaced.

²³² Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 709.

²³³ *Ibid*. Pg. 707.

²³⁴ Asad, Muhammad. *The Principle of State and Government in Islam*. Pg. 14.

As a higher level embodiment of the just community, the state has the responsibility to act in accordance with those principles. Any laws made by the state, insofar as they are contained within the constitutional framework, are inherently just. We note the term, ‘inherently,’ because the concept of the forbidden, in Islam, is considered as such precisely due to the injustice of such acts.²³⁵ On the other hand, the mandatory acts are mandatory not only because they just, but are also cornerstones of a just individual, a just community, and a just society. Consequently, if the law-making process of the state remains within the proper framework, the consequence is that any new law is just.

The Islamic state is free to make laws, by any effective process that does not violate the rights of the citizens and is constitutionally sound. This allows the state to adapt to new circumstances as they arise, without compromising the guiding principles of the state. New laws may be more restrictive than the constitutional ones, as long as they do not infringe on constitutional freedoms. Thus, the taxation rate may be raised or lowered by necessity, but is limited by the injunction against oppression.

The state further has the right to be obeyed in its edicts. This is a crucial element, as it applies directly to the state’s capacity to wage war, as well as the control over its military. The Qur’an states, “The response of true believers, when they are called to Allah and His [Messenger{L}] to judge between them, is only to say: ‘We hear and we obey.’”²³⁶ The hadith note, “Whoever is obedient to me [Muhammad] is obedient to Allah... Whoever is obedient to their ruler is obedient to me,”²³⁷ and, “It is mandatory to “hear and obey” until sin is ordered. If sin is ordered,

²³⁵ Qur’an. 10:44.

²³⁶ *Ibid.* 24:51.

²³⁷ *Bukhari.* # 1270. Pp. 562-3.

then neither hear, nor obey.”²³⁸ This concept sets into motion two pertinent aspects of the Islamic state. The first of these is that the Islamic state cannot be a dictatorship, or even a theocracy, as the populace is clearly given not only the right, but also an obligation to refuse to follow orders not in line with justice.²³⁹ The second aspect of interest is individual responsibility. Each person, insofar as they are able, is responsible for knowing and understanding the law and its source, and acting on state edicts from that knowledge.

Just as the individuals have the responsibility to obey the state, where the latter issues valid laws, the individual has the obligation to support such a state to the best of their abilities. That is to say, regardless of who rules the state – so long as they rule in accordance to the law – the citizens are obligated to ensure that the individual remains in power until the conclusion of their term. Thus, the citizen cannot work against the state, despite any personal objections to the ruler or government, so long as the rule itself is just.²⁴⁰

This responsibility plays a crucial role in warfare, establishing individual responsibility for participating in hostilities, as well as one’s behavior in those hostilities. This may be likened to modern ideas of conscientious objection and refusing to follow inhumane orders.

To understand the notion of an Islamic constitutional framework, the analysis turns to the pertinent elements of the Constitution of Medina.

The Constitution of Medina, written within the first two years of the Muslim migration,²⁴¹ is considered to be the world’s first written constitution.²⁴² It differs from earlier social contracts, in

²³⁸ *Ibid.* # 1269. Pg. 562.

²³⁹ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah.* Pg. 736.

²⁴⁰ *Bukhari.* # 1269. Pg. 562.

²⁴¹ Scholars are unsure as to the precise date. Some argue that it was established immediately upon the completion of Muslim immigration, while others contest that the powers assigned to Muhammad would be

that it is neither advice to the ruler nor vague guidelines, but is rather a legally binding document for all signatories – including the ruler. Further, the document unifies the different tribes and religious communities into a singular community, and renders them equal in rights and responsibilities. There were a total of 9 signatories to the constitution; seven of which were various Jewish tribes in and around Medina, the eighth was an outlying Jewish tribe, and the ninth the sum total of all Muslims – immigrant and local. All signatories willingly placed themselves under the contract.

The constitution delineates the rights and responsibilities of all signatories. The rights pertinent to this analysis are: life, equality (of all citizens), justice, religion, and communal protection against infringements on these rights (from domestic and foreign sources). In return for these rights, there are responsibilities incumbent on all able individuals. The pertinent responsibilities are: communal solidarity in opposition of any form of injustice against any perpetrator, aiding any wronged party, treatment of Medina (the state) as a place of sanctuary, sharing the costs of war (where involved), defending Medina from any form of attack, abiding by treaties, and appointment of Muhammad as the ruler – so that any disputes or disagreements are referred to God and Muhammad as the final source of arbitration.²⁴³

Establishing the signatories as a single community and centralizing state power, the Constitution further limits international relations – including warfare and peace treaties – to the office of the state. The application of justice, especially where capital punishment is involved, is also regulated by the central authority – a measure that replaces personal vengeance with justice.

strange unless the battle of Badr (the first military confrontation with Meccans) had taken place. The exact date is largely irrelevant for the present purposes. Further, the original constitution has been lost to time, and the extant copy has been reconstructed from fragmentary evidence by the Sīra authors, such as Ibn Hishām.

²⁴² Hamidullah, Muhammad. *The World's First Written Constitution*. Lahore: Sh. Muhammad Ashraf, 1975. Pg. 1.

²⁴³ *Ibn Hišam*. Pp. 106-9. Also Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 644.

These stipulations are further applicable to each constitutional signatory as a group, as well as individuals, and a breach is equivalent to treason, as in several cases of Jewish signatories to the Constitution of Medina. We will briefly note the most infamous of these instances.

In the 5th year of the migration to Medina, some leaders of the Jewish Banu Qurayza tribe worked with Meccan pagans and other hostile tribes, in orchestrating a massive attack on the city of Medina.²⁴⁴ Despite being heavily outnumbered, the city's defenders were able to repel the invaders by the use of a tactic otherwise unknown in Arabia at the time – a ring of trenches about the city preventing a direct assault. Following the retreat of the invading forces, the Muslims laid siege to the Banu Qurayza – located outside of the city proper.²⁴⁵ After a 25-day siege, the Banu Qurayza surrendered, on the condition that their fate would be decided by a leader of an allied tribe. All sides agreed on Sa'd ibn Mu'adh,²⁴⁶ of the outlying Jewish tribe and a signatory to the Constitution. He decreed their fate in accordance with the Torah - execution of all adult males, appropriation of their wealth, and the enslavement of the rest of the population.²⁴⁷ Several other tribes acted against the state, though primarily before the destruction of the Banu Qurayza. Most were exiled.

As the purpose of the state is to establish justice, and the mission of Islam is universal justice, that mission must eventually extend beyond its own borders to the neighboring states. Just as the theory of justice is built on concentric spheres where the attainment of each sphere demands the fulfillment of the previous one, the extension of justice from the Islamic state to its neighbors hinges on the premise that the Islamic state itself is just. This element is crucial for

²⁴⁴ *Ibn Hišam*. Pg. 166.

²⁴⁵ *Ibid*. Pg. 175.

²⁴⁶ *Ibid*. Pg. 177.

²⁴⁷ *Ibid*. Pg. 178.

external state involvement, as the state would otherwise spread unjust values by its expansion – causing injustice to a further group of people. Once this requirement is met, the state turns outward, seeking to affect justice beyond its immediate borders.

The first responsibility of the Islamic state – in advancing justice beyond its borders – is informing neighboring states and peoples of the source of their just state, i.e. the primary religious texts and their understanding, and demonstrating by example the effects of their application. Where the people or governments are amicable, a dialogue develops, along with positive relations. These relations have historically led to a change in laws, policies, and even religion and political structure of such states. Some examples of a peaceful transition towards an Islamic state are Indonesia, Malaysia, and North Africa (the Berber tribes).

A number of treaties concluded by Muhammad with various tribes have been preserved. Such treaties consist of promise of protection against foreign invaders, protection of the tribe's places of worship and clergy, the tribe's right to their previously owned possessions, and the right to acquire wealth.²⁴⁸ Further, there are prohibitions on certain practices – such as usury or blood-debts – and enforcement of new laws in support of justice established by the treaties, “They shall not be wronged, nor shall they (be allowed to) do any wrong.”²⁴⁹ Finally, there are clauses of taxation and the allied nation supplying the state with necessary arms and armaments, in case of war. The treaties conclude with the promise to adhere to the treaty so long as the allied people adhere to its precepts.

In cases where the government and people are less amicable to a dialogue, the state seeks to affect the changes by other means – such as applying economic pressure. The constitution of

²⁴⁸ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pp. 815-28.

²⁴⁹ *Ibid.* Pg. 820.

Medina, for example, stipulates trade prohibition with the Quraysh as a means of bringing pressure to bear on the hostile city.²⁵⁰ Depending on the degree of hostility, this pressure can lead to open warfare. This element will be discussed in more detail in the theory of war section.

The Islamic theory of state can now be summarized in the context of the theory of justice, providing a vista from which to understand the Islamic theory of war. The Islamic state is taken as the supreme embodiment of the principles of justice mandated by Islam. Having arisen from the immediate and proximal interpersonal spheres of justice, the state represents a higher degree of the same notions. The principles of justice mandate their universal application, and both the protection of the state's citizens, as well as the protection of people beyond state borders, is the responsibility of the Islamic state.

Historically, the option for armed struggle arose only when the just community could govern itself. The Muslims endured more than a decade of harsh treatment in Mecca, without the prescription of self-defense. Following the immigration to Medina, self-defense and defense of others were made mandatory on the community. Consequently, the state is understood as the instrument of justice that can act beyond its own borders, and may eventually seek to establish that justice on a global level.

In acting beyond its borders, the state's interaction with other states may be positive or negative. In positive interactions, the states engage in dialogue; in negative interactions, the states engage in hostilities. Hostile force may take the form of either pressure or armed conflict, or both. Pressure tactics include economic and other sanctions, and may include threats. Armed conflict is the unfortunate result of a completely failed attempt to effect change by all other

²⁵⁰ *Ibn Hišam*. Pg. 108.

means. War is the last resort, utilizing violence in order to prevent greater harm.

THEORY OF WAR

As has been demonstrated in the above sections, justice is the cornerstone of the rules prescribed by Islam, beginning with an individual and expanding to the state. The state, if it is to be a legitimate one, must be based on the principles of justice, and actively work to implement those principles. Warfare, as the final means of implementing justice in foreign relations, belongs solely to the state. It is only within the just state's implementation of justice that war may arise, and only if all other means have failed.

Historically, the use of armed hostilities was permitted to Muslims only after the migration to Medina. Despite the permission to engage in war, and the cruel treatment suffered under the Meccan rulers against whom the war was directed, the Qur'an constantly warns Muslims not to begin hostilities nor transgress the bounds of justice when engaged in hostilities. In war, as in peace, justice must always be the ultimate goal. In this sense, the Islamic War Theory resembles the Augustinian notions.

In order to adequately navigate the precepts of the Islamic War Theory, we must first turn our attention to the issues of terminology, the presentation of war principles in the primary sources, and several key injunctions that serve as a backdrop for justice and war. The Qur'an utilizes a great deal of specific, often proprietary, terminology. A simple translation of terms yields, at best, a partial picture, often skewing the implications of the words used. In an attempt to combat this problem, the most important terms are explained in more depth below.

Jihād [j-h-d]²⁵¹, according to Lane's Lexicon, stems from the root *j-h-d*, and translates into, "Power; ability... labor exertion, effort... the utmost of one's power or ability or efforts or endeavors or energy."²⁵² Islamically, this effort is undertaken solely in order to enjoin the good, and prohibit evil.²⁵³ Under certain circumstances, the effort may include armed combat; however, it does not necessitate, or even suggest it as a primary means of that effort. Of the four types of *jihād* enumerated in the hadith – namely by heart, mouth, hand, and sword – the first three were described by Muhammad as the "greater" *jihād*, while only the last can be described as a military endeavor, and was described as the "lesser" *jihād*.²⁵⁴

Jihād represents an utter effort to establish justice: personal insofar as it relates to one's relation to God; interpersonal in one's relation to their family and immediate community; communal in a state's relation to its citizens; and global in the state's foreign relations. In these efforts, the community is involved in a struggle (*jihād*) to affect such change.²⁵⁵ However, when all the meaningful methods of establishing justice through peaceful means have failed, the only resort left is that of war. In a similar manner, the UN seeks to affect justice, peace, and harmony, by utilizing a system of rewards and punishments – distributing funds and inflicting sanctions. If these methods should fail, the condemnation of the UN Security Council may lead to military measures to correct the situation – at least in theory.

²⁵¹ As with all translations, the accuracy of terminology decreases the further it is removed from the original source and connotations. In order to provide the most accurate interpretation of those sources, as well as the terminology, the Arabic trilateral root of the specific term will be presented in brackets, following the cited usage. In this way, the reader will be aware of the more complete meaning and implications of each term, as provided by the primary sources.

²⁵² Lane, Edward William. *An Arabic-English Lexicon*. Pg. 474.

²⁵³ Martin, Richard C. "The Religious Foundations of War, Peace, and Statecraft in Islam." In *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, edited by John Kelsay and James Turner. Johnson, 91-117. New York: Greenwood Press, 1991. Pg. 93. Also, Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Pp. 38-9.

²⁵⁴ Khadduri, Majid. *War and Peace in the Law of Islam*. Baltimore: Johns Hopkins Press, 1955. Pp. 56-57.

²⁵⁵ Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Pg. 38.

A common misconception about the use of the term *jihād*, as a purely military one, arises from two translation issues, as it is commonly translated as “fight.” The first of these misconceptions comes from the fact that the term “fight” has a myriad of meanings. It is correct to say that women fought for their rights (understood as non-violent struggle), India fought for its independence (here understood as a pacifist struggle), and that America fought for its independence (here understood as the war against the British Empire). Consequently, the context must be taken into account to understand whether the “fight” in question is an armed struggle or simply a great exertion of effort. The second translation issue comes from the limited view of the phrasing where the term is used. Thus, to “fight/strive [j-h-d] in the path of God with your lives and possessions,” as the Qur’an often prescribes, is commonly taken to represent an armed struggle where violent death may occur. However, the fact that one can “strive” with one’s life and possessions in more ways than merely on a battlefield, suggest otherwise. Colloquially, we say that a person has “poured their life into,” or “given their life over to,” some goal they have sought to achieve. Therefore, given the aforementioned meaning of *jihād* and the obviously non-violent colloquial use, it should be understood that the use of the term is never restricted only to the military methods. Finally, the injunctions to engage in *jihād* are commonly prescribed as an individual obligation, while **war** can only be waged by a state; thus indicating that *jihād* is not a war injunction in its primary meaning, but may include that element under specific circumstances.

Qatal [q-t-l] is the proper term for armed conflict, which translates roughly into “battle.” However, the complex conjugation schemes and context of the term can further alter the meaning to “kill” or “murder.” Lane notes the various grammatical uses to mean: “*He fought, or combated, him; contended with him in fight or battle...murderous, slaughterous, very*

deadly...”²⁵⁶ The Qur’an makes a clear distinction between *jihād* and *qatal*, thus elucidating the difference between the means of attaining justice; one by an “effort” – whatever the means – and the other by armed conflict.²⁵⁷ Armed conflict is subsumed under the general notion of an extreme effort for the cause of justice, as the final means of affecting the outcome. Further, as we have noted in the state section, the option of armed conflict is available only to the state. Additionally, returning to the question of fighting/striving “in the path of God,” the Qur’an offers only a handful of such phrases where the term q-t-l is used. On the other hand, Qur’an is replete with the term j-h-d in the same phrasing. This discrepancy in term usage indicates far greater emphasis on “striving,” rather than “fighting.”

Harb [h-r-b] is the term for “warfare,” and is used to indicate a prolonged state of *qatal* – as in a military campaign. Lane notes its meaning as, “war, battle, fight, or conflict.”²⁵⁸ The difference between the two is that *qatal* may conclude the hostilities upon its conclusion in a day or two; whereas *harb* contains multiple instances of *qatal*, and may take years. Additionally, in order to engage in a *qatal*, the state must already be engaged in a *harb*.

The Qur’an, as noted, orders the believers to enjoin goodness (*ma‘ruf*), and prohibit evil (*munkar*). It further warns them to, “Stand firm for justice and bear true witness... even against yourselves, your parents, or your relatives.”²⁵⁹ The Qur’an is also rather explicit in its views on killing and murder, “whoever [**intentionally** {K}{A}] kills a person, except as a punishment for murder or for [**fitna; chaos, severe oppression or tyranny, actively fighting against justice** {L}{K}{A}] in the land, it will be *written in his book of deeds* as if he had killed all the human beings [**because such a person makes no distinction between the guilty and the innocent**

²⁵⁶ Lane, Edward William. *An Arabic-English Lexicon*. Pg. 2984.

²⁵⁷ Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Pg. 37.

²⁵⁸ Lane, Edward William. *An Arabic-English Lexicon*. Pg. 540.

²⁵⁹ Qur’an. 4:135.

{K}]...”²⁶⁰ Given the dire consequence of an unjust and unjustified taking of life, it is interesting that the Qur’an also notes, “But [**fitna; chaos, severe oppression or tyranny, actively fighting against justice** {L}{K}{A}] is worse than murder.”²⁶¹ This combination of directives is important to note, as it will be used throughout the war theory comparison.

On a final note, the Qur’an does not follow the clear outline presented in manuals of war, nor are the pertinent verses commonly concerned solely with war. Therefore, this presentation of the Islamic War Theory will draw on verses throughout the Qur’an. This should not be taken to mean that the quotes are out of context, but rather that war theory is discussed throughout a wide variety of contexts in the Qur’an. In order to offer a sensible analysis, quotes will be reassembled in a way that corresponds to the presentation style of this analysis.

Jus ad Bellum:

Jus ad Bellum stands as the core of Islamic War Theory, seeking to provide legitimacy to warfare, by limiting the lawful reasons for engaging in armed hostilities. The limitation, in general terms, is the pursuit of supremacy of justice, based on enjoining *ma‘rūf* and forbidding *munkar*.²⁶² All warfare occurring outside of these limitations is without the religious sanction, and is thus unlawful, morally evil, and should be opposed by the Islamic state.

Just Cause: The Islamic theory posits self-defense and the defense of allies as just causes for engaging in warfare.²⁶³ The Qur’an advises, “Fight [q-t-l]... those who fight [q-t-l] against you...”²⁶⁴ and “Permission to *fight back* [q-t-l] is hereby granted *to the believers* against whom

²⁶⁰ *Ibid.* 5:32.

²⁶¹ *Ibid.* 2:191, 2:217.

²⁶² *Bukhari.* #1218. Pg. 545.

²⁶³ Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Pg. 39. And Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah.* Pp. 671-2.

²⁶⁴ Qur’an. 2:190.

war is waged and because they are oppressed.”²⁶⁵ These two causes are common to nearly all war theories.

In addition to these causes common to all three theories, Islam provides a third just cause to wage war – in protection of the oppressed and weak, namely those under tyrannical, severely oppressive, and unjust rule.²⁶⁶ “[**What is wrong with you – believers – that you would not fight** [q-t-l] {K}{A}]... to rescue the helpless oppressed men, women, and children who are crying: Our [**Lord** {L}]! Deliver us from this town whose people are oppressors...”²⁶⁷ This just cause stems from the aforementioned injunction on the criminal severity of oppression, and, as will be shown later, the necessity of opposing severely unjust regimes. Further, given the imperatives of justice and defense, as well as the equality of all people, those who are oppressed (even within their own nation) are to be considered as a people under attack. Consequently, the Islamic state is under obligation to help protect such groups, in the same way that it is obligated to protect its allies.²⁶⁸

Right Intention: The right intention in pursuit of armed conflict, plays a significant part of the Islamic War Theory. The purpose of any military engagement must be only to establish peace and harmony by the implementation of just law – namely one with the *ma‘rūf/ munkar* distinction.²⁶⁹ If this objective can be met without resorting to war, such measures are incumbent on the Islamic state.²⁷⁰ If war is necessary however, the engagement should seek to both defeat

²⁶⁵ *Ibid.* 22:39.

²⁶⁶ Sachedina, Abdulaziz A. "The Development of Jihad in Islamic Revelation and History." Pp. 38-9. And Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah.* Pp. 671-2.

²⁶⁷ Qur’an. 4:75.

²⁶⁸ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah.* Pg. 505.

²⁶⁹ *Bukhari.* # 1218. Pg. 545.

²⁷⁰ Qur’an. 2:192-3, 4:90, 8:61.

the enemy, as well as to serve as a warning to any other parties which seek to either prolong the war at hand or begin a new one.²⁷¹

The guidelines for the right intention begin with a warning to proceed cautiously and ensure that the intention is not out of desire for any sort of worldly enrichment, including fame or honor.²⁷² The next step is to ascertain the validity of information upon which the state is to act.²⁷³ In this vein, those who would present an accusation or argument against another party – for any reason – are reminded that to do so without proof, witnesses, or first-hand knowledge is strictly forbidden.²⁷⁴

The notion of Islamic proselytizing by warfare – i.e. religious conversion by military force – is prohibited by no fewer than five Qur’anic injunctions.²⁷⁵ This is further made apparent by considering terminology in question. The term ‘Islam’ means “to submit,” which is a free act of an individual. To remove the free choice from such an act and bring it about by force, is to subjugate. Considering the terminology, it seems clear that the idea of forcing “submission” is a misnomer for subjugation, which is Islamically prohibited.²⁷⁶ Consequently, though there may have been historical instances of forced conversions, they would have been contrary to the rule of Islam.

Public Declaration by the Appropriate Authority: The Islamic War Theory asserts this requirement in two clearly defined elements – appropriate authority and public declaration – historically and legally. Historically, while under the power Mecca whose rulers were their oppressors, Muslims were not given the ability to wage war, even in self-defense. However, once

²⁷¹ *Ibid.* 8:57.

²⁷² *Ibid.* 4:94.

²⁷³ *Ibid.* 49:6. And Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah.* Pp. 659-60.

²⁷⁴ Qur’an. 24:13, 15, 17.

²⁷⁵ *Ibid.* 2:256, 10:99, 11:28, 42:8, 50:45.

²⁷⁶ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah.* Pg. 794.

the migration to Medina was complete, and the state was established, the right to wage was religiously granted – and then only to the state.

Legally, the Constitution of Medina clearly designated foreign affairs – diplomacy and warfare – to be the province of the state, and beyond any group or person not entrusted with the appropriate office. Thus, by Islamic historic and legal precedent, warfare involvement is predicated on the existence of a legitimate autonomous rule.²⁷⁷

The declaration of war constitutes a necessary element in Islamic War Theory, particularly given that the primary goal is the establishment of justice and harmony.²⁷⁸ Where a foreign state engaged in armed hostilities with the Islamic state or its allies, no declaration was necessary – as war was already present. However, where peace or truce was established, the state has an obligation of publically terminating the treaty, even where the cosignatories were engaged in violating its terms by any acts other than open war.²⁷⁹ Such a declaration also served a dual purpose; first to inform the enemy that diplomacy and deliberation are at an end, second to call upon the Muslims to join the military.²⁸⁰

Last Resort: Armed hostilities are regarded by the Islamic theory as the last resort, an unfortunate necessity in establishing peace and harmony. Bukhari notes, “The most hated person in sight of Allah... is the one who seeks to spill the blood of another without a valid reason.”²⁸¹ The variety of methods for dealing with recalcitrant people, tribes, or states, includes a series of rewards and punishments; historically utilizing diplomacy, economic incentives, and threats, in

²⁷⁷ Khadduri, Majid. *War and Peace in the Law of Islam*. Pp. 60-61.

²⁷⁸ Tibi, Bisam. "War and Peace in Islam." In *The Ethics of War and Peace: Religious and Secular Perspectives*, edited by Terry Nardin, 128-45. Princeton, NJ: Princeton University Press, 1996. Pg. 133.

²⁷⁹ Qur'an. 8:58. Also Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pp. 1. 666-7, 795-6.

²⁸⁰ Shaybānī. *The Islamic Law of Nations: Shaybānī's Siyar*. Translated by Mağīd Ḳaddūrī. Baltimore, MD: Johns Hopkins Press, 2002. Pp. 75-7.

²⁸¹ *Bukhari*. #2173. Pg. 970.

an effort to avoid armed hostilities.²⁸² When these methods failed the final resort was war. Such was also Muhammad's attitude, as noted in Muslim, "O people, do not seek conflict with the enemy. Instead, seek Allah's protection. If a battle comes, be patient; know that Heaven is beneath the shadow of the swords."²⁸³ Finally, the aforementioned criminal severity of unjustified killing serves to underscore that warfare is to be used only as the last resort.

Probability of Success: The Islamic War Theory mandates self-defense, regardless of the probable outcome, at least while the enemy is engaged in hostilities.²⁸⁴ Once the fighting begins, those engaged must see it through to the end, retreating only to regroup or to take up a strategic position.²⁸⁵ However, there is no particular injunction mandating the defense of others – provided that the Islamic state is incapable of providing that help. A prime example of this principle is provided by the second *khalīf*, 'Umar ibn al-Khattab. As the Byzantine Empire began gathering vast forces on the northern frontier of Muslim-controlled lands, 'Umar ordered that the taxes levied for military protection be returned to the province of *Sham*,²⁸⁶ a protectorate of the Islamic state, citing the temporary inability of Muslim armies to provide adequate protection to their lands given the size of the approaching threat.

Proportionality: According to the Islamic theory, no proportionality calculus ought to exist, as the goal in question is the establishment of justice and harmony, as well as the opposition of injustice and tyranny. That is to say, there can be no compromise between justice and injustice.²⁸⁷ Though a stark distinction, the same was noted by Winston Churchill, "There is no merit in putting off a war for a year if, when it comes, it is a far worse war or one much

²⁸² Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 659.

²⁸³ *Muslim*. Vol. 2. #1126. Pg. 208.

²⁸⁴ Qur'an. 2:216, 9:41.

²⁸⁵ *Ibid*. 8:15-16.

²⁸⁶ *Sham* is located in modern-day Syria/Lebanon/Palestine region.

²⁸⁷ Qur'an. 25:52.

harder to win." Such an attitude is one of understanding that injustice – if left unchecked – will inevitably spread and cause far greater damage, than would be the cost of stopping it as it arises.

Islamic War Theory presents its *Jus ad Bellum* as follows: only in an attempt to establish justice and harmony through the implementation of the *ma'rūf/munkar* distinction, may a legitimate government engage in armed conflict in order to protect itself, its allies, or an oppressed people – but only if all other diplomatic measures have been exhausted and after a declaration of hostilities. The probability of success plays a factor, insofar as the engagement is not one of self-defense. However, if there is any chance of success – i.e. if an appropriate army can be fielded – the costs of war play no part in the decision.

Jus in Bello:

Muhammad once noted that “Warfare [h-r-b] is deception,”²⁸⁸ indicating the permissibility of secrecy, surprise, and covert tactics in carrying out military maneuvers. The realistic outlook on warfare found in the primary sources, alongside idealistic goals of global justice, sets the Islamic War Theory apart from both the Western and classical Chinese theories. Where the latter two attempted to present a just and harmonious pursuit of war by developing theories in-line with the extant primary justice and statehood sources, the Islamic approach presents all three elements together, granting them the same degree of importance and legitimacy.

The rules of military engagement, according to the Islamic War Theory, are fairly strict. The aim of the regulations is to allow practical flexibility in military operations, while limiting the scope of destruction to the battlefield. Unlike its Western counterpart, the Islamic War Theory insists on the conjunction of the *Jus ad Bellum* and *Jus in Bello* components, if the

²⁸⁸ *Muslim*. Vol. 2. #1128. Pg. 210.

warfare is to be legitimate. To this end, the Qur'an provides numerous injunctions mandating the immediate cessation of hostilities as soon as the enemy asks for a truce.²⁸⁹

War prosecution, as it is the responsibility both of the state and every engaged individual alike, draws simultaneously from all three spheres of justice. In the immediate sphere, each soldier has a duty to govern his acts in accordance to justice. Further, all orders coming from the state, or rather those appointed by the state, must be filtered through that understanding of justice – in line with the Hadith to “neither hear nor obey” any orders in contradiction with the Islamic law. The state itself, as the proximal sphere, must ensure that its decisions and orders are just, by following the religiously provided framework of justice. Finally, the relation with the enemy is a matter of a state's foreign affairs, which belong to the distal sphere. As such, the state's outward looking policies must also reflect the framework of justice, to ensure that the state participation in war – whether on enemy soil or one's own, is legitimate from beginning to end. Through this close connection, the principles of justice play a significant role in considering all the components of the *Jus in Bello* elements of the war theory.

To ensure their proper connection, several earlier injunctions and points should be noted again. The first of these is the term *zulm* – a subsidiary of evil (*munkar*), which means “to put a thing out of its rightful place,” which will play a prominent role. Second is that willful murder of any innocent person is tantamount to the eradication of the human race, yet that oppression is worse even than murder. The third and final one is that, other than for the purposes of defense, war is only justified as a means of combating oppression.

Discrimination and Non-Combatant Immunity: As noted in the criminal severity of murder, Islam makes a strong point in distinguishing the guilty from the innocent. This point carries over into the *Jus in Bello* theory, where it sets the groundwork for the subsequent rules.

²⁸⁹ Qur'an. 4:89-91, 8:60-61 etc.

From the Qur'an and Hadith, the following extrapolation can be made: the only legitimate targets are those directly involved in battle, as well as those which directly contribute to elements involved in battle.²⁹⁰ This limits legitimate targets to soldiers, military leaders, and those supplying them with military means – but not with basic provisions such as sustenance. As a corollary, targeting can be said to be limited to segments that clearly represented the enemy's ability to wage war, while targeting of any segment of the civilian population is strictly prohibited.²⁹¹ Couching discrimination in terms of justice, intentionally targeting civilians is *Zulm* – applying force where it does not belong and will bring about the required result - and thus prohibited.²⁹²

In terms of targeting fortified locations, such as a town with civilian presence, the use of less discriminate weapons is deemed permissible if necessary.²⁹³ However, care should be exercised to target only the militarily relevant areas. This flexible approach is similar to the modern notion of intentional targeting; that discrimination is mandated where it is possible, but collateral damage is not criminal where all precautions in targeting have been exercised, or where targeting is not possible, yet the strike is necessary.²⁹⁴

The doctrine of double effect plays a part in the Islamic theory, but is presented in terms far more clear than those of its Western counterpart. Situations where civilians are placed at serious risk should be avoided where possible; but if such a situation is unavoidable, the guilt of civilian deaths rests on those who willingly placed the civilians at such risk - by either refusing purely military engagement on a battlefield or insidious placement of military institutions in

²⁹⁰ Asad, Muhammad. *The Principle of State and Government in Islam*. Pg. 75. Also, Aboul-Enein, Youssef H., and Sherifa Zuhur. *Islamic Rulings on Warfare*. Carlisle Barracks: Strategic Studies Institute, U.S. Army War College, 2004. Pg. 22.

²⁹¹ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 659.

²⁹² *Bukhari*. # 1195. Pg. 571.

²⁹³ *Ibid*. # 1292. Pg. 570

²⁹⁴ *Muslim*. Vol. 2. # 1134. Pg. 214.

direct proximity with the civilian ones.²⁹⁵ Shaybānī cites Abu Hanifa’s response to this issue (drawing on Hadith) noting that, since it is not possible to eliminate all risk of civilian casualties in city fighting, the presence of such a risk does not preclude the use of warfare against cities, as such would prohibit all warfare.²⁹⁶

As an example of the application of extreme discrimination in historical practice, we may look to the invasion of Pelusium, Egypt; by Cambyses II of Persia in 525 BCE. In the attack, the Persians carried before themselves animals considered sacred by the Egyptians – such as cats. The Egyptians, fearing to injure or offend the sacred animals, could not fight, and were slaughtered.²⁹⁷ Similarly, while the life of an innocent individual is considered sacred, their use by the aggressors as human shields does not prevent the defenders from fighting back. If such were the case, then every invading force would be preceded by human shields. Rather, such (ab)use of the innocents by the aggressors is an act of most severe oppression, and only serves to stress the need for opposing them.

Prisoners of war are Islamically considered inviolate, and cannot be killed if surrendering in battle, or if captured alive.²⁹⁸ The status of POW’s is clearly outlined in the primary sources. The Qur’an notes, “Thereafter, *you have the choice* whether you show them favor (release them without ransom) or accept ransom [**holding them until they pay {K}**], until the war [h-r-b] lays down its burdens [**the enemy ceases in their war efforts {A}**].”²⁹⁹ Further, the believers are characterized as those, “who feed the poor, the orphan, and the captive... *saying* ‘We feed you for

²⁹⁵ *Buhkari*. #1232. Pg. 570.

²⁹⁶ Shaybānī. *The Islamic Law of Nations: Shaybānī’s Siyar*. Pg. 102.

²⁹⁷ Polyaeus, and R. Shepherd. "Polyaeus: Stratagems." Attalus. Accessed April 10, 2012. <http://www.attalus.org/translate/polyaeus.html>.

²⁹⁸ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pp. 660, 667, 796, 806.

²⁹⁹ Qur’an. 47:4. Additionally, the ransom could be paid off by the service of the POW; essentially establishing forced servitude as a possible option for working off the debt of a ransom.

the sake of Allah Alone; we seek from you neither reward nor thanks.’’³⁰⁰ Ransom could be extracted through indentured servitude of the POW, particularly where the enemy state failed to pay the required fee. In the latter quote, the position of the POW is made equal to that of the orphan and the destitute, both of whom are held in highest regard by the Qur’an³⁰¹ - a status that also extends to those in indentured servitude. This distinction is in part due to the fact that a captive is utterly helpless and dependent on their captor for their very survival. Thus, to treat a captive with any cruelty is equivalent to striking out against the helpless – the very thing fought against from the earliest message of Islam.

As a general rule, an enemy combatant is not considered a criminal, insofar as he carried out his duty as a soldier, with respect to his convictions.³⁰² However, particularly heinous acts can be tried and prosecuted, once the individual is in custody. In that regard, the enemy combatant can be tried and executed not for opposing the Islamic state or as a member of the enemy military, but rather for particularly egregious acts committed, similar to the modern process involving crimes against humanity.

Proportionality: Islamic War Theory approaches the question of proportionality from two sides. First, Muhammad used the full extent of his armed forces in order to swiftly resolve conflicts. Biographical and Hadith sources note that, surprising the enemy with vast numbers had occasionally brought about their immediate surrender, and avoided bloodshed³⁰³ - the conquest of Mecca being a prime example of such tactics. On the other hand, the destructive use of that

³⁰⁰ *Ibid.* 76:8-9.

³⁰¹ *Ibid.* 107:1-2.

³⁰² Ullah, Hamid. *Muslim Conduct of State*. Edited by Syed Mahmud-un-Nasir. Lahore: Mansoor Book House, 1973. Pp. 74-5.

³⁰³ Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pp. 521, 549-50.

force, beyond what is strictly necessary, is forbidden outright, as Islamically-mandated human rights cannot be suspended or abrogated.³⁰⁴

Additionally, intentional destruction of enemy land and resources is prohibited, except the elements necessitated by war, as a transgression of limits.³⁰⁵ These limits, according to Ibn Kathir's commentary, are noted as follows:

Transgressing the limits includes all prohibited actions, such as: abuse, reprisals, killing of women, children, elderly of no consequence (i.e. generals and such) and beyond fighting age, clergy, monks... or wanton destruction of trees or livestock.³⁰⁶

Thus, an army may avail themselves of the local food insofar as they need sustenance, but cannot destroy or carry it off.³⁰⁷ The purpose of the limitations, besides the prohibition of injustice, is the fact that the Islamically justified war seeks to restore justice and harmony – not to exact collective punishment.³⁰⁸ Further, the use of destructive force against the land – and its inhabitants without discrimination – is *ẓulm* – as the force is turned on targets other than those causing injustice. As such, it is a type of oppression against any survivors left in the destroyed area and the Islamic state which takes possession of the land.

Prohibited Weapons: The prohibition on weapon types is a topic generally unspecified within the Islamic War Theory. The only clearly prohibited means of waging war is fire, because it is noted as the punishment of the hereafter, and as such its use is appropriate only for God.³⁰⁹ However, as the prohibited weapons requirement seeks to ensure discrimination and limit destruction to necessary and legitimate targets, the particular prohibitions are incidental. To this

³⁰⁴ Qur'an. 5:2. And Rahman, Afzalur. *Muhammad: Encyclopaedia of Seerah*. Pg. 768.

³⁰⁵ Aboul-Enein, Youssef H., and Sherifa Zuhur. *Islamic Rulings on Warfare*. Pg. 22.

³⁰⁶ Ibn-Kesir. *Tefsir Ibn-Kesir, Skraćena Verzija*. Edited by Muhammed Nesir Er-Rifa'i. Translated by Group. 2nd ed. Sarajevo: Visoki Saudijski Komitet Za Pomoc BiH, 2002. Pp. 125-6. (Commentary on 2:190)

³⁰⁷ Ullah, Hamid. *Muslim Conduct of State*. Pg. 73-73.

³⁰⁸ *Bukhari*. #1295. Pg. 571.

³⁰⁹ *Ibid*. # 1268. Pg. 562. Also, # 1336. Pg. 590.

end, the discrimination and proportionality requirements above, as well as issues of *zulm*, provide the necessary limitation on weaponry, particularly those of indiscriminate nature.

Prohibition of Means “Mala in Se:” As with the prohibited weapons requirement, the *mala in se* prohibition is subsumed under the general provisions of discrimination and proportionality. The ‘*mala in se*’ means are generally communal – such as genocide or ethnic cleansing – and the Qur’an provides clear prohibition against collective punishment.³¹⁰ More importantly, committing such acts - even where not indiscriminate - is a means of oppression against the populace, transgressing the bounds of righteousness (noted in proportionality requirement), and is thus condemned in the most severe way.³¹¹

In considering the prohibition of ethnic cleansing, a note must be made on the Jewish tribes exiled from Medina. What should be stressed is that the alternative to their exile, as per the law of the Constitution the tribes had willingly agreed to, was the virtual destruction of the tribe. Viewed in context, the exile of the tribes guilty of treason was a far lesser sentence than the one they had agreed upon. Further, their exile was not a military tactic used by the state, but rather a lessening of a sentence for the crime they had committed. In the case of the Banu Qurayza, scholars speculate that the imposition of the full sentence was a means of discouraging further treason from other tribes, and may be viewed as in line with the Qur’anic injunction to strike hard at the enemy leaders, so as to discourage further problems. Additionally, the judge passing the sentence on the Banu Qurayza was one they had agreed to, and had willingly accepted any decision he made, *ex ante*. Therefore, the historical expulsion of select Jewish tribes from Medina was not an act of ethnic cleansing. It was, instead, a preventative measure taken against treasonous elements working directly towards the destruction of the state.

³¹⁰ Qur’an. 34:25, 35:18. Also, Ullah, Hamid. *Muslim Conduct of State*. Pp. 72-73.

³¹¹ *Bukhari*. # 1128. Pg. 488.

Reprisals: Reprisals, in the context-specific meaning of the term, are forbidden by primary Islamic sources. However, the nature of reprisals under the Islamic War Theory is one that can easily be misconstrued, especially with a partial reading of the primary texts. In a number of places, the Qur'an permits a direct return for the harm suffered – whether by recalling the notion of “eye for an eye,”³¹² or allowing for injustice to be “responded to in kind.”³¹³ However, two additional conditions apply: one posited at the ends of such verses, and the other by the Qur'anic universal ruling on injustice.

The first of the conditions is contained within the verses themselves, such that, following the permission (not an order) to return injustice in kind, the Qur'an notes, “... but if you endure with patience, the best *reward* indeed is for those who endure with patience.”³¹⁴ The second condition is the oft-repeated Qur'anic injunction that justice should be sought, even at one's own expense; and that injustice and oppression against anyone is a transgression, on equal footing with murder.³¹⁵ These two conditions must be taken into account, along with the elements iterated at the beginning of the *Jus in Bello* section, in order to attain a valid understanding of the principles of reprisals. Therefore, the notion of returning an injustice in kind is not a permission to engage in reprisals. Rather, it represents the permission for the Islamic state to defend itself by general means used by the enemy – so long as these means are legal. Thus, if the enemy uses economic sanctions, the Islamic state can reply only by similar measures – e.g. no war is permitted against sanctions.

Finally, given the very purpose of war in Islam – namely the establishment of justice and harmony – the notion of reprisals is considered repulsive. A reprisal massacre of enemy civilians

³¹² Qur'an. 5:45.

³¹³ *Ibid.* 16:126, 9:36.

³¹⁴ *Ibid.* 16:126, 5:45, etc.

³¹⁵ *Ibid.* 2:190, 4:135, 16:90.

can never serve to establish neither justice nor harmony, regardless of the destruction initially wreaked by the enemy, because it is just as indiscriminant and destructive as the act of the enemy. It further punishes people other than those responsible, and thus perpetrates *Zulm*. The correct response, according to the war and justice theories, is to pursue the party responsible, and prosecute them. In this way, the state exemplifies the *ma'rūf/munkar* distinction, which ought to govern its every act.

Islamic War Theory presents its *Jus in Bello* primarily as the extension of the *Jus ad Bellum* and theory of justice requirements – in that the entire process seeks to establish justice. The procedure can be summed up as follows: The just state, acting only on the legitimate satisfaction of the *Jus ad Bellum* requirements, seeks to engage only with those elements that represent the enemy threat, and ensure that all non-combatants are safe from harm – insofar as that is possible. POW's are not culpable for general participation in the hostilities, and as such should be treated kindly and courteously; either released or ransomed following the conclusion of hostilities - although atrocities are to be prosecuted. The methodology of warfare, seeking to engage only with relevant military targets and conclude with justice, limits the use of force to only the strictly necessary degree, prohibits the use of indiscriminate weaponry, as well as indiscriminate and unjust punishment. The same notion of justice prohibits reprisals, insofar as they are directed at illegitimate targets, are indiscriminate, or unjust.

As a final note, we will address one of the more controversial issues, especially in the modern context. Of the Qur'anic verses dealing with warfare, the ones that have gained the greatest notoriety in the West are the several injunctions commonly quoted as, “kill non-believers wherever you find them.” These verses have been used by scholars and terrorists alike, the former to argue for the militancy of Islam, the latter to justify terrorist attacks. However, the

citations are not only partial, but also use selective translations and interpretations of the parts cited. In order to address the issue comprehensively, the analysis will first offer the complete quotation, and then examine its injunctions in light of the defined war theory.

Fight [q-t-l] in the cause of Allah those who fight [q-t-l] against you, but do not exceed the limits **[transgress the limits, by instigating battle or as listed in the proportionality requirement {K}]**. Allah does not like transgressors. Kill **[q-t-l; such as them]** wherever they confront you *in combat* and drive them out of the places from which they have driven you. *Though killing is bad*, creating **[fitna; chaos, severe oppression or tyranny, actively fighting against justice {L}{K}{A}]** is worse than killing [q-t-l]. Do not fight [q-t-l] them within the precincts of the **[Ka'ba {L}]** unless they attack [q-t-l] you there; but if they attack [q-t-l] you, **[permission is granted to fight back against them so as to repel their attack {K}{A}]**; that is the punishment for such unbelievers. If they cease hostility, then surely Allah is Forgiving, Merciful. Fight [q-t-l] against them until there is no more disorder **[f-t-n – as noted above {L}{K}{A}]** and **[the supremacy of Allah's *dīn*³¹⁶ {K}{L}]** is established. If they desist, let there be no hostility **[such hostility is itself injustice {K}]** except against the oppressors **[which is the meaning of the idea that there is no fight except against aggressors; and once they desist and there is no injustice left in their actions (nor do they reject justice), no fighting is allowed afterwards {K}{A}]**.³¹⁷

The verses directly address four distinct points, and establish nearly the entirety of the just war criteria. The first point established is the role of the aggressor as those who attack the Islamic state, and is noted twice. Further, the aggressors are defined as those who propagate corruption and oppression, and those who are the worst habitual oppressors, committing z-l-m. The second point is on the role of the defenders, as those who fight back against such aggression. Their role is to fight the aggressors, remove them from the places they have occupied, and continue to fight until the oppression of the aggressors is gone and God's *dīn* is established (see footnote). The third point places limitations upon the defenders. These are the prohibition on

³¹⁶ The term *dīn*, holds several meanings interchangeably and sometimes simultaneously. The meaning ranges from 'submission' and 'obedience,' to 'religion' and 'exacting owed debts.' Its use in this verse is commonly misconstrued as meaning only 'faith' or 'religion.' However, such a reading is contradictory to the immediate cessation of hostilities when the aggressor calls for a truce – as the condition of the truce is not their conversion to Islam, nor would such a condition be valid, given the prohibition of coercion into the faith (2:256). Further, such a verse would invalidate the Constitutional agreement with the non-Muslims of Medina, which was written after the revelation of these verses. Therefore, we are forced to conclude that the term is properly understood primarily as the law of God – i.e. the moral injunctions of justice.

³¹⁷ Qur'an. 2:190-93.

instigating war, the sanctity of certain locations, and a warning to conduct themselves justly - as oppression is worse than murder. The final point concerns the prosecution and goals of war, and the conclusion of the hostilities. The purpose is clearly identified as resistance against aggression and, as soon as the enemy ceases such activities– i.e. is willing to compromise – the cause of war ceases as well.

From the standpoint of *Jus ad Bellum*, these verses provide the just cause of self-defense, as well as the defense of all against oppressors. The purpose of fighting as eradication of oppression and chaos, establishing the *dīn* of God (justice), and the prohibition on continued hostilities when the enemy halts, combine to create a strong just intention requirement. Proper authority is provided by the fact that the Muslims are addressed in the full plural – indicating all Muslims as a single unit under some form of leadership. Probability of success is, as previously noted, neglected in self-defense. Proportionality is addressed in the prohibition of overstepping bounds, and the note that oppression is worse than murder.

From the standpoint of *Jus in Bello*, the requirement of discrimination is noted in the very first verse, namely to fight against those who fight against Muslims. This is reinforced in the subsequent definition of the aggressors and those engaged in oppression, rather than those they happen to rule over. Proportionality of *Jus in Bello* is derived from the same source as that of *Jus ad Bellum* – namely the severe criminality of oppression. The same verse holds for prohibited weapons and means considered “*mala in se*,” as both are a means of inflicting wanton destruction. The role of reprisals is clearly delegitimized by the immediate cessation of all enmity, upon the cessation of hostilities. This point is further emphasized by the Qur’anic warning not to let enmity produce injustice.³¹⁸

³¹⁸ *ibid.* 5:2.

What should emerge from this brief analysis of the verses is the illegitimate presentation of their reading offered by the variety of terrorist groups and some Western pundits and scholars. The Qur'an orders the Muslims to fight not "non-believers," but rather "such as them" - the pronoun clearly indicating "them" to be those defined in the previous verse - i.e. those who are engaged in hostilities against Muslims. The fact that the aggressors are left ambiguous, encompasses any and all - Muslim and otherwise - who seek to commit aggression against the state. In fact, if a group of Muslims attacked another, refusing all diplomatic solutions, the same judgment ought to be passed on them - a point the Qur'an itself makes.³¹⁹ The notion of killing the aggressors wherever they are found is equivalent to refusing to grant them safe haven while they remain engaged in hostilities. Driving them out from the places they drove the defenders from, is not, as some have suggested, a call for ethnic cleansing or genocide. Rather, it is an order for the state to reclaim that the territory annexed by military force. Further, those to be driven out are still, as in the beginning, the aggressors engaged in armed hostilities against the state.

Ultimately, the erroneous readings of such verses can occur as two possibilities: either the reading is intentionally misconstrued for political means (as with terrorists), or it is a reading taken completely out of the context of the rest of the Qur'an and its message in general (as with some academics). When the Islamic War Theory is presented in its full scope, such readings are clearly exposed as contradictory to the rest of the word and spirit of Islam.

³¹⁹ *ibid.* 49:9.

CHAPTER 4

COMPARATIVE THEORY ANALYSIS

In the preceding chapters, we have outlined the three war theories, as arising holistically from the contextual elements. In this section, we will offer a comparison first of the contextual issues, and then the war theory elements, together with brief reflections on the sources for any differences. The tables that follow these sections will provide an overview of the comparative elements.

Contextual Elements:

The modern Western war theory arose out of more than 2000 years of sporadic alterations undertaken by a great multitude of scholars. The destruction of Roman systems of state and justice, beginning in the 4th century, created a gap in these contextual aspects of the war theory until the 17th century. Given the sporadic development, there is no core period or core-texts for the Western sources.

Western justice concepts, as they apply to war theory, were mostly absent in the period between the Treaty of Westphalia and the contemporary incarnation of the Just War Theory – following WWII, the Universal Declaration of Human Rights, Hague and Geneva Conventions, and the establishment of the UN. This absence most probably stems from the eradication of the Roman state, and its principles of state and justice. The consequent ruling elements sought to define what their rule meant, both in terms of statehood and the responsibilities of that state. The modern Western notion of state is a reinvented and redefined version of the Roman concept - out of use between the 5th and 17th centuries, until the Treaty of Westphalia. In the interim, various regions were ruled with little to no central authority. The reestablishment of the state came at the

expense of Christian notions of morality, at least insofar as these were considered as objective. The state became secular and sovereign, as well as the sole authority over all within its borders, thus centralizing the rule. This further meant that the ruler is sovereign (whether directly in a kingdom, or indirectly in a democracy), and above the law.

Chinese theories arose from the decline of the Zhou dynasty, and developed over a 550 year period. This development came in response to the extensive wars for supremacy, following that dynastic collapse, and sought to reestablish peace and harmony. Within this time-frame, the primary moral, political, and war theories arose. Though they would be further built upon, this period provides the summary of the classical Chinese theory through primary texts and authors.

The Chinese justice model takes two primary forms within the classical thought. From the Confucian element, justice was a form of virtue of excellence to be embodied by the ruler, and emulated by the people. However, the model focuses primarily on harmony, the means of which can be subjective. The Legalist element disregarded morality as useless, and instead focused on pragmatism as the ruling strategy. As such, the Legalist model sought to provide an objective standard for pragmatic rule. Consequently, justice in the Chinese setting is somewhat subjective, and is at best an afterthought to harmony. The notion of a unified Chinese state, having survived the decline of the Zhou Dynasty - at least in theory - represented the central point of authority. However, unlike its Western counterpart, the Chinese state was only considered legitimate where reciprocity existed between the ruler and the governed – at least theoretically. Like the Western theory, the classical Chinese political thought held the state, through the role of the ruler, as sovereign and above any external law.

The Islamic theory, in its core concepts, was completed within a 23 year period – with respect to the primary sources. Islamic theories came about from the introduction of the religion of Islam. As Islam sought to establish peace and justice in universal terms, the pertinent theories were posited in the primary sources.

The Islamic justice model is based on religiously concrete notions of right and wrong, applied universally. Its principles were laid out in the Qur'an, and embodied in the actions of Muhammad. While the ideas of right and wrong were posited in stark terms, the response to such was given a degree of latitude, thus indicating the importance of attaining harmony through the use of justice. As justice lies at the center of all activity, including personal piety, it is the foundation of all aspects of the theories of state and war. The Islamic state is both historically present, and defined, as the outgrowth of justice within a just community, to include self-governance. Like the Chinese model, the legitimate rule depends on reciprocity between the ruler and the governed. Unlike the Chinese model, however, the basis of rule is divorced from the persona of the ruler, and anchored in inviolate law. This is achieved by the fact that the state is never sovereign, but rather takes the role of a vice-gerent, thus always falling under external law, considered as supreme.

Theories and Primary Sources

The Western war theory, as drawn from the religious (Christian) context, offers little guidance in the primary religious sources (i.e. the Old and New Testaments). Consequently, the war theory was initially drawn from the extant Roman concepts and grafted onto Christian ideas, to match the Church views and support their interests. This methodology is present throughout the pattern of the pre-Westphalian establishment of war theory principles over time. Further, the

notion of tactics and generalship were developed outside of the theory and its religious base, and were only later made to fit – or became justified by – the later just war principles.

The Chinese context developed the military and strategic elements either as a consequence of, or alongside the politico-philosophical theories. The development of political theories drove the direction in which the war theory progressed, as it was adopted by various states fighting for supremacy. The war authors seem to have drawn on politico-philosophical authors and texts to suggest the appropriate relations of the military to the state and the practical military applications to war. Consequently, the war authors themselves seem to have participated in crafting the elements of state theory. Additionally, they used the language and terms of statecraft for warfare, suggesting at least a perceived similarity of concepts. Ultimately, the war theory was modeled by its authors to fit the existing politico-philosophical notions.

The Islamic war theory developed within the rest of the religion, where the role and methods of warfare were directly discussed within the primary sources. Just as important as the Qur'anic injunctions are the actions of Muhammad, as embodied theory presenting the Islamic War Theory not as one molded to the preexisting religious elements or subsequently justified by them, but rather as developed within the religion itself. Consequently, the Islamic conception of the war theory is presented on equal footing with the justice and state theories, is explained by the same primary sources, and is fully integrated into a holistic worldview.

Where the modern Western war theory was developed independently of the primary state and justice sources and followed after their creation, and Chinese theory reflects some connection between the texts of the politico-philosophical and war authors, Islamic theory arose directly from the primary texts. Additionally, the very discussion of *Justum Bellum* in the

Chinese and Islamic theories necessarily includes not only the theoretical limits, but also the very real implementation of that theory in actual warfare. This difference stems from the fact that these two theories were either developed or explained by military leaders and generals, and as such reflect the realities of warfare. On the other hand, the Western war theory pertinent to this analysis, was primarily developed by clergy and academics.

Contextual Summary:

The modern Western war theory is centered primarily on the notion of state sovereignty and autonomy, and to a lesser extent the modern interpretation of morality as respect for human rights. Consequently, the primary concern of the Western theory is the protection of state rights, compromising a degree of human rights where their pursuit would impinge on state rights – though the protection of human rights may legitimately be considered where the internal state matters become egregious enough. As such, the focus of the modern Western war theory is on the preservation not only of the state as a political entity, but of the sovereign and autonomous status the state theory bestows on the state.

The classical Chinese war theory is centered on the harmonious state and its continued existence. As conceived by classical authors, the harmonious state is a force for expanding harmony, and by its very existence leads to eventual globalized harmonious state. As a result, the survival of the state is the sole pertinent element in classical Chinese consideration of theories of justice and warfare.

The Islamic war theory is focused on the establishment and protection of justice. Consequently, justice is the primary concern of every individual, community, and state;

overriding all other concerns. As such, the Islamic theory views justice as the sole pertinent factor in consideration of theories of state and warfare.

Contextual Elements	Western	Chinese	Islamic
Justice Theory Connection	Direct (Augustine) None (Historical) Partial (Modern)	Partial	Direct
State Theory Connection	Direct (Augustine/Modern) None (Historical)	Partial	Direct
War Theory	Built to Match Moral Code	Built Through Moral Code	Built into Moral Code
Primary Concern	- Survival of Christian State (Augustine) - Sovereignty and Autonomy of the State (Modern)	Survival of the State	Justice

Jus ad Bellum

Just cause: All three theories consider self-defense and defense of allies to be a just cause for engaging in warfare. However, the Islamic theory goes a step beyond to include the protection of the oppressed people, including those who are not citizens of the Islamic state. The reasoning behind these criteria differs.

Western just cause considerations stem primarily from the historical defense of the Church, in its role as the representative of God on Earth – a perspective clearly laid down by Ambrose and Augustine. Further, Augustine’s notion of *caritas* as the motivation behind just war indicates that it is not only the protection of the “righteous” state that is important, but also the compassion towards those who in their ignorance would do harm both to the just state and themselves. Modern developments also note such causes as just by protection of sovereignty and autonomy of the state, and of the state allies.

The Chinese theory utilizes the notion of harmony, and thus the welfare of the state and its people, in opposing the aggressor as a disharmonious and universally damaging element. Against such a destructive force, the use of armed hostilities is justified to reestablish harmony, despite the evils of war. While such harmony considerations may lead us to consider war against an oppressive (disharmonious) state as falling under the legitimate category, such is not the stated case. Instead, the lack of *tianming* in a state – which we have noted is a retrospective tool – justifies its annexation by the state possessing *tianming*. The success, or lack thereof, of such an attempt is the indicator of “righteousness” of state claims to harmony. However, since the primary goal is harmony, the defense of allies may be sacrificed to the “greater good” of limiting warfare, especially where the state’s resources may be depleted in such an attempt.

In terms of self-defense and defense of allies, the Islamic theory draws on the establishment and preservation of justice as the key purpose in waging war. Unlike the Chinese and Western models, the theory arises directly from the justice theory, and includes the defense of the oppressed as a valid just cause element. This understanding comes from two main aspects. First, oppression is of the highest forms of injustice, and the purpose of the just state is to stand in opposition to injustice. Second, such an oppressive state, by its refusal to participate in the core elements of just behavior, presents an immediate threat to the welfare of the Islamic state and its allies. Consequently, the justice basis of war-theory expands the just cause criterion.

Just Intention: In all three theories, right intention plays a pivotal role in distinguishing just and unjust military involvements. All three theories seek to reestablish peace, justice, or harmony, and thus confine the reasons for war to this goal.

For the modern Western theory, given that the just causes are self-defense and defense of allies, the reestablishment of peace and justice is the only possible goal – a sort of returning to the status quo, excepting the primary elements that led to the aggression. Thus, if a nation becomes aggressive as a result of external elements which impinged on their very ability to survive, the core problem must be resolved; otherwise the conflict will necessarily reemerge. The state thus seeks to defend itself and bring the aggressor state to change its aggressive course, resuming its rightful role in the international community.

While the Chinese philosophers differ on specifics, they do agree on the general guidelines of just intention. The Daoist notion that war should not be celebrated, war champions not praised, and victory treated as mourning, is perhaps the most concise and informative view. Where warfare takes such a low position, and harmony is considered the highest virtue, the cause of war must arise out of absolute necessity – as indicated by the war theory authors. While the Chinese theory aims for reestablishing peace and harmony, it goes beyond its Western counterpart in seeking to introduce these elements to the enemy state, by annexation.

The Islamic theory, based on justice and its propagation, directly prohibits war for any purpose other than the establishment of justice. As with the Western and Chinese theories, this requirement clearly restricts the reasons for the use of violence, in order to stay in line with the just cause requirement. Like the Chinese theory, the introduction of justice may be achieved by state annexation, though the aggressor state may also remain partially autonomous by becoming a protectorate.

Public declaration by Proper Authority: All three theories consider this requirement in two parts, and crucial to the legitimacy of warfare.

The Western, Islamic, and Chinese theories all consider public declaration as a means of protecting the non-combatant population, by alerting them to the danger of imminent hostilities. This purpose has only gained greater importance in the modern context – given the greater destruction capacities of modern weapons. Islamically, the declaration also historically served as a call to arms – particularly in the periods preceding professional militaries.

In the western context, the use of proper authority arose from the attempt to limit war-waging capacity and exclude non-ruling militant elements – such as mercenary groups and nobles – from legitimately resorting to violence. These limitations eventually became centralized state powers with the Treaty of Westphalia, enabling only the state – i.e. the legitimate state rulers – to declare war. The Chinese and Islamic contexts also confine such power only to the state. Consequently, it is only the state that can legitimately initiate foreign relations in any form, including military hostilities.

Last Resort: All three theories consider open warfare – i.e. military hostilities – as the last resort; and either discourage or prohibit such engagement except as the last resort.

The theories utilize not only diplomatic measures aimed at resolution of problems leading to hostilities, but also soft power such as sanctions, boycotts, and threats. Soft power, while lacking the direct hostilities of armed conflict, is still a form of hostilities aimed toward reestablishing peace and justice. For the Islamic theory, the consequences of unnecessary killing further stress the need for warfare as the last resort.

The Chinese war theorists consider open warfare as the failure to utilize state potential in resolving the causes for war. Sunzi notes that a state forced to resort to war is inferior to one that achieves victory without the need for such deadly measures. In fact, the very term *quan sheng*,

which is the goal of a state in hostile dealings, means complete victory over all elements of the enemy – i.e. without resorting to armed hostilities, given that such developments mean the failure of the state to attain victory by more practical and non-destructive means. Sunzi also clearly demonstrates that the use of military is only the final means of hostile involvement with an enemy, noting that the greatest success comes from attacking the enemy plans. Thus, as with the Western and Islamic theories, use of sanctions, boycotts, and other non-military means is considered the primary means of attaining the goal.

Probability of Success: The three theories all consider probability of success, but in different ways. All agree that in defense from an aggression aimed at an utter annihilation of a people, no calculus is necessary, as any losses are preferable to complete destruction.

By the modern Western theory, this requirement is anchored in moral calculus, much as the proportionality requirement. In considering the probability of success, the state that foresees either a clear defeat, or too-costly a victory, is not obligated to engage in war, as such would result in needless loss of life and severe destruction of the state. In the Chinese context, theorists like Sunzi advise acting only where advantage is to be had. The Islamic theory offers a similar notion, though indirectly, though mandating only that which is within one's power. Consequently, the obligation to protect another is considered in light of the perceived capacity to offer that help. As noted, however, this requirement is rather imperfect, as a number of improbable victories have been achieved throughout history.

Proportionality: Proportionality plays a part in the Western and Chinese theories, but is disregarded in the Islamic primary sources.

The Western war theory utilizes a pragmatic sort of moral calculus – as per utilitarianism – present in other Western war considerations. This pragmatism reflects the two just cause criteria of defensive war. Where the harm of acting outweighs that of inaction, the aggression should be considered as a necessary evil, and not deterred. The Chinese theory functions much like its Western counterpart. In all matter of war, Sunzi stresses knowledge and understanding, and acting only where it is to one’s advantage. In this sense, the primary consideration is a pragmatic one.

Islamic sources disregard proportionality as a part of a just war analysis. This development seems to be tied to viewing the threat consequences in the long-term, rather than only the immediate consequences. Much like Churchill’s idea, a threat must be faced immediately lest it grows worse with inaction. Additionally, the failure to act against unjust aggression means the destruction of a just rule where it already exists – which the Qur’an considers worse than killing.

<i>Jus ad Bellum</i>	Western	Chinese	Islamic
Just Causes	Self-defense	Self-defense	Self-defense
	Defense of Ally	Defense of Ally	Defense of Ally
			Defense of the Oppressed
Right Intention	Reestablish Peace	Establish Harmony	(Re)establish Justice
Public Declaration Purpose	Civilian Protection	Civilian Protection	Civilian Protection
		Additional Laws	Call to Arms
Proper Authority	The State	The State	The State
Last Resort Purpose	To Ensure Necessity	To Ensure Necessity	To Ensure Necessity
Probability of Success Calculation Based On	Utilitarian Calculus	Ability to Gain Advantage	Ability to Raise an Army
Proportionality	Utilitarian Calculus	Ability to Gain Advantage	None

Jus in Bello

Discrimination and non-combatant immunity: This requirement, made up of four distinct elements, is present in all three theories, and is somewhat similar therein. The requirements are: 1) immunity of non-combatants, 2) targeting discrimination, 3) doctrine of double effect, 4) status of prisoners of war. Where the theories differ is in their respective reasons for these limitations.

Western concept of non-combatant immunity, targeting, and POW treatment arose first in the 10th to 12th centuries, as a legal doctrines intended to preserve the life and property of the clergy, as well as the civilian population. The methodology sought to influence warfare towards duel-like conduct, and thus a degree of chivalry and respect for the opponent, which necessarily excluded the intentional targeting of anyone other than the opponent, and the relatively good treatment of a captured noble enemy, while awaiting his ransom. In the post WWII period, this basis was replaced by the Universal Declaration of Human Rights, which extended the treatment of nobles to the “commoners” (as with POW status), and provided a degree of inherent value to all human life – strengthening the notions of non-combatant immunity. By the later treaties, the POWs could be tried for their actions in war, where those actions are judged to fall outside of mere military duty and cross into war crimes. The doctrine of double effect remains much confused, with the relative importance of the military targets and the decisiveness with which its destruction can bring a close to the war – weighed against civilian casualties. The primary problem remains the objective foreknowledge of the consequences.

The Chinese conceptions of discrimination rest on harmony, and the preference for gaining control of the state intact, rather than its destruction. The doctrine of double effect is indirectly considered as valid, where such action presents the best option. The POW treatment

clause is emphasized by Sunzi and Xunzi for several reasons – the most important being the incentive for enemy surrender and the harmonious integration of the new lands and people.

The Islamic context frames this requirement in purely moral terms, though, much like Sunzi, it also reflects the realities of war. Discrimination is stressed through the criminality of murder and worse status of oppression – such as introducing the terror of possible wholesale slaughter. Islamic theory allows for the doctrine of double effect, which may be utilized where necessary – but under strong warning to exercise all power to limit destruction only to the military elements. As with the Chinese theory, the primary reason is the establishment of justice. The POWs are granted a somewhat higher status than in the Western and Chinese theories, partially due to their being completely under the power of those who captured them. As the POW status is, by default, one of innocence for military engagement against the Islamic state – with the exception of war crimes – their status is essentially equal to that of orphans or the indigent, and mandates equivalent treatment.

Proportionality: Where the three contexts offer proportionality for the sake of limiting destruction, the Chinese and Islamic theories further rely on the notions of harmony and justice, respectively, to serve as the guiding principle for what kinds of destruction are permissible, and to what extent. To this end these two theories heavily favor destruction of plans, morale, and enemy leaders; while emphasizing the protection of the land, livestock, and innocents. The Western and Chinese theories additionally have a principle of decisive strike – though not universally agreed upon – where momentarily disproportionate damage may be caused, if the strike is perceived as decisively ending the conflict – and thus eliminating further harm.

Prohibited Weapons: The prohibited weapons requirement is directly stipulated in the Western theory, inferred from the Chinese context, and is in the Islamic case both specified and inferred. Some differences exist in the purpose of this requirement in each of the three theories.

The Western theory initially based a weapons prohibition requirement in defense of the noble class – i.e. the ruling class - came in form of protecting the knights from bows and crossbows – weapons much in use by various militias, which served to negate the power of knights by minimizing duel-like combat and allowing for their destruction from afar by men with specialty skills. In the modern context, the prohibitions (reflected in the Geneva Convention) stem from two roots: 1) discrimination and 2) cruelty. Thus, even if bio-chemical warfare could be specifically targeted, the cruelty of death by such weapons makes their use “immoral.”

The Chinese context provides an inference of this principle on the grounds of harmony and state preservation. In that, its primary focus is discrimination. There is little or no presence of cruelty as a concern in the texts. Consequently, this requirement is somewhat flexible, depending on circumstances.

The Islamic theory provides a single direct prohibition, namely the use of fire. The discrimination and cruelty concerns are addressed as the prohibition on transgression of limits – as noted earlier. As demonstrated in the discrimination requirement, the use of weapons designed to act indiscriminately (such as bio-chemical weapons) is prohibited. “Cruel” weapons, whose use produces unnecessary damage and harm, are clearly prohibited as a transgression of limits of righteous behavior.

Prohibition of Means “*mala in se*”: As with the prohibited weapons requirement, the three theories agree on the principle, though the specifics may vary.

The Western prohibition of such means is a modern one – at least in reference to a truly international war. The precepts of these prohibitions are spelled out in the Geneva Convention, and rest on human rights, and a degree of “morality.” The Chinese context provides this requirement in terms of harmony-based thinking, and is thus inferred, as in the prohibited weapons requirement. The Islamic context follows the rules of non-combatant immunity and the reasoning for the prohibited weapons. It ultimately relies on justice, the prohibitions on transgressing righteous bounds, and the notion of oppression as worse than murder, as a primary pivot to clarify these ideas.

Reprisals: Reprisals are prohibited by the Western and Islamic theories, whereas they are inferred in the Chinese context.

With the modern Western theory there is a clear understanding that a state that breaches the rules of just war is the aggressor state, and as such it legitimizes military action against itself. Since the rules are universal, a breach of rules - even when otherwise engaged in a just war – invalidates the just war status of a state, and makes its actions equivalent to that of the aggressor. Consequently, reprisals are prohibited, as their use turns the defenders into aggressors. However, Augustine’s conception, like the Chinese, allowed for war as a punitive measure, and consequently may stretch the bounds of this prohibitive requirement to allow for certain forms of reprisals. The Chinese theory relies on harmony to supply the reasoning for frowning on the use of reprisals, though the textual reference to war as a punitive measure leaves some room for its use.

The Islamic context, built on attaining and protecting justice through just means, outright prohibits reprisals outright. As such actions initially provided the just cause to engage in war,

and war is only permitted against injustice, revisiting such an act upon the enemy would grant them a righteous reason to fight the Islamic state. Ergo, the use of such means is inherently invalid.

<i>Jus in Bello</i>	Western	Chinese	Islamic
Discrimination			
- Targeting Discrimination	Mandatory	Mandatory	Mandatory
- Non-combatant Immunity	Mandatory	Mandatory	Mandatory
- Doctrine of Double Effect	Unclear/Allowed (As Decisive Strike)	Allowed (Where Optimal)	Allowed (Where Necessary)
- Prisoner of War Treatment	- Benevolent Quarantine - Released After War	- As Own Citizens - Released After War	- As "Vulnerable" Own Citizens - Released or Ransomed After War
Proportionality Limitation to	Necessary Degree	Necessary Degree	Necessary Degree
- Disregarded for	Unclear/Allowed (As Decisive Strike)	Decisive Strike	Never
Prohibited Weapon Types	Indiscriminate	Indiscriminate	Indiscriminate
	Cruel		Cruel
Means "<i>Mala in Se</i>" Prohibited By	Human Rights	Harmony	Justice
Reprisals	- Partially Allowed (Augustine) - Prohibited (Modern)	- Frowned Upon - Partially Allowed	- Prohibited

CONCLUSIONS

War has been a universal experience of mankind. The preceding analysis has demonstrated the overwhelming similarities of three war theories arising in vastly different backgrounds. In most respects, the theories are a close match, supporting the notion of historically-universal utilization of warfare as a social tool of the state intended for certain circumstances. What differences do arise, are primarily brought on by considerations of certain elements as subsumed within the theory as a whole, and thus not requiring a separate set of governing laws.

The most significant differences between the theories lie not in the rules of war, but in their contextual derivations. These three theories developed independently, in vastly different geographic locations, within different cultural and religious contexts, as well as differing social and economic circumstances. Though the contextual differences are great, all rely on their conceptions of justice and statehood as the basis for understanding the limits of war to some extent. Further, despite all the differences, the three contexts do have a unifying theme of their conceptions of warfare.

The distinguishing mark that runs through all this development, though, is that violence was conceived as a tool – a sometimes necessary tool, but one that should be subjected, when used, to control by overriding concerns having to do with the health and good order of society as a whole.³²⁰

All three theories divide war regulations broadly into legitimate reasons for war, and the legitimate methods of waging war, and further seek to limit the reasons for war to necessity, and the methodology to that least destructive. They consider the ultimate ends as peace, harmony, and justice through removal of destructive elements and the integration of the offending state into a just whole. Ultimately, a just war is a legitimately justified war, and such justification

³²⁰ Johnson, James Turner. *The Quest for Peace*. Pg. 68.

requires a form of morality understood to be universal. That the Western notion of just war was effectively eliminated, once the Treaty of Westphalia replaced the universal notion of religious morality with the secular state and state practice, bears witness to this need for a “universal” morality as the basis of just war.

Any incongruence in the three tradition’s concepts of morality and justice indicates not only that warfare has been the common experience of mankind, but rather that a specific type of warfare – characterized by the pursuit of justice and moral justification as limiting factors of its ideal legitimacy – has been a core element of that common experience. It is my hope that this project will serve as a springboard for further analysis and adaptation of modern war theory in light of the demonstrated historically-universal ideals.

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