

Loose Talk of Just War

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I congratulate the criminological community of Pakistan on establishing the Pakistan Journal of Criminology. I have been impressed by the early issues and commend the editor in this issue for tackling the difficult and critical issue of terrorism. I loved my visit to Pakistan seven years ago and was impressed by the spirit of the people and the sophistication of the Pakistan debate on connecting ancient traditions of dispute resolution in Pakistan to modern traditions of rights-based restorative justice that include the empowerment of women. The quality and openness of that dialogue, including with those who were strong supporters of Sharia law as the only state law, in that Peshawar conference on restorative justice and peace building, left me with a strong affection for the people of Pakistan. My travels into the tribal territories of the Northwest Frontier Province in 2003 with the police and military also gave me respect for those I met in the difficult situation they were dealing with since the invasion of Afghanistan.

The topic of this brief paper is that invasion. I do not have strong views on contemporary policy for the Afghanistan conflict. Were I a policymaker in one of the regional governments entangled in this war, or in the US, I would struggle to know what to suggest. But I do have a strong view on the initial invasion. I warned against hasty invasion in talks in the US in 2001. I happened to be at New York University between August and December 2001, glimpsing the first plane fly up Fifth Avenue from my office window, the second strike the Twin Towers while I stood in the street, and observing the campaign of the media barons for a strike against Afghanistan persuade the people of New York, who were mostly sad and pacific in their reaction to the tragedy at first.

My view then and now was not that a NATO incursion into Afghanistan would be wrong in principle, but that the US was being far too quick to opt for this course. This was the same analysis I had of the first invasion of Iraq in 1990. It was not wrong in principle to use force to reverse the invasion of a nation. But the options for signalling the inevitability of invasion unless Kuwait was freed were poorly executed in US diplomacy (Braithwaite 1991a, 1991b, 2002).

Both botched invasions of Iraq and the invasion of Afghanistan by the two Bush presidencies have left an horrific legacy in violence and in disrespectful relationships between the Muslim world and the west. What a relief it was to experience the hope of the election of Barack Obama, a leader with palpable respect for Islam, a man with the integrity to stand against the Bush administration and vote against the 2003 invasion of Iraq. From his first campaign speeches, however, I

worried that he sought to temper his policy of withdrawal from Iraq with the “balance” of promising a more robust military approach to Afghanistan. As I have said, I am unsure what is a sensible policy; I simply worried that campaign speeches were glib on Afghanistan.

While continuing to be agnostic on contemporary Afghanistan policy and to be full of hope and admiration for the Obama presidency, I do think the President erred in allowing himself to be nominated for the Nobel Peace Prize. He might have done better to ask for a few years to prove that his peacemaking earned it. Then he compounded that error with an appalling Nobel acceptance speech which argued that Afghanistan was a “just war.”

Whether contemporary US policy in Afghanistan is just or unjust, the initial invasion of Afghanistan clearly did not satisfy the ethical strictures of the just war doctrine. This is a doctrine of ancient origin dating at least to the speeches of Cicero in Rome during the first century before Christ, then given prominence in early Christian philosophy in the thought of Augustine of Hippo and Thomas Aquinas, among others. *The Catechism of the Catholic Church* in paragraph 2309 provides the most authoritative contemporary summary of the doctrine, listing four strict conditions of legitimate defense by military force:

- the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;
- all other means of putting an end to it must have been shown to be impractical or ineffective;
- there must be serious prospects of success;
- the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.

The invasion of Afghanistan so soon after the September 11 2001 attack on New York does not pass the test of this just war doctrine. There is room for argument on all four of the conditions, but I will focus on just the second. The United States did not explore peaceful strategies that might have led to the arrest and trial of those responsible for the attack on New York. This would seem to have been the leadership of Al Qaeda, as opposed to the Taliban leadership of Afghanistan who were offering hospitality to that Al Qaeda leadership. Admittedly, Al Qaeda had a military capability that was deployed to back the incumbency of the Taliban regime that Osama bin Laden supported because of its religious doctrines. The Al Qaeda and Taliban leadership had, moreover, fought together against the Soviet occupation of

Afghanistan. Both were actively supported in that campaign by the US. But during the Clinton years, after the collapse of the Soviet Union, US State Department policy shifted to seeking to persuade the Taliban to break with Al Qaeda (Richard Clarke 2004: 274), as Sudan had done when the Al Qaeda leadership fled from there to Afghanistan.

This aspect of the counterterrorist policy of the State Department seemed well conceived. While the Bush Administration decisively rejected it after 9/11, fusing the Taliban and Al Qaeda into one enemy, evidence that the Clinton policy had made some progress emerged both in the months before and the months after 9/11. This evidence suggests an alternative to invasion that should have been explored, according to just war theory.

The capture of the Al Qaeda leadership was not the only justification given for the invasion. Prime Minister Blair of Britain made much of the secondary objective of stemming opium exports to Europe. I do not take this too seriously as a major motivation for the invasion; Blair went in with no strategy for reducing opium exports and in fact they went up dramatically in the years after the invasion.

The just war question is whether negotiation with the Taliban in the shadow of a threatened invasion might have done better by the objective of reducing Al Qaeda terrorism (and reducing opium exports). Another question little asked at the time or since was whether international law required this. The Taliban Foreign Minister Wakil Ahmed Muttawakil warned the US Consul General in Peshawar, David Katz, of an impending attack on the US in July 2001 and had offered to negotiate concerning the possibility of a handover of the Al Qaeda leadership to prevent Al Qaeda from bringing the Taliban government down (Kate Clark 2002). The Taliban Foreign Minister sent an aide to tell the US Consul-General and another US official who was possibly an intelligence officer that bin Laden was planning a 'huge attack' inside the US. The leader in whose safe house the meeting occurred has confirmed the aide's account that the meeting did occur. When the aide reported back that the US had no interest in striking bin Laden or taking the warning seriously in any way, the Foreign Minister instructed him to take the same message to the UN leadership in Afghanistan, which he did. The Taliban Foreign Minister feared bin Laden would provoke a US attack that would bring them all down. 'The guests are going to destroy the guesthouse', he is reported to have told his aide.

The Independent story (Clark 2002) on this also reveals that after September 11 an Afghan religious council had recommended that bin Laden be forced to leave Afghanistan. As early as 1998 Wakil Ahmed Muttawakil was in regular communication with US officials about handing over bin Laden. A US State Department report of 28 November, 1998 says that according to Muttawakil, 'Taliban leaders are caught between "a rock and a hard place" since, if they expel

Bin Laden without cause they will have internal problems and, if they do not, they will have external ones due to the US. Ahmed [Muttawakil] suggests that the Saudis have a key to the solution. Afghan and Saudi religious scholars could convene a joint meeting and issue a ruling that bin Laden had acted illegally...He could then be expelled without this causing internal unrest in Afghanistan' (Cooperative Research History Commons 1998). My colleague and respected Afghanistan scholar, William Maley, does not think this could have been accomplished and it may indeed have been a naïve view. My own thought is that, even if there would have been a 90 per cent probability of failure, these negotiations should have been attempted. Certainly the US can make no claim that this is a just war in the absence of a good faith attempt to explore this option.

Perhaps the greatest reason the NATO invasion of Afghanistan was not a success was that there was a haven on the Northwest frontier of Pakistan from which forces hostile to the new government of President Karzai could pull at any number of strands of the fragile fabric of Afghan democracy to destabilise it. The Taliban and Al Qaeda had adequate contingency plans to retreat there when the US attacked. Commanders of the time tell me if the 2001 campaign had been better resourced and more painstakingly planned, they would have killed and captured many more than they did, but that no amount of military resources was going to prevent a large number of fighters from escaping through the mountains. The successful flight to the mountains of hundreds of prison escapees in June 2008 would seem to affirm this diagnosis. However, this diagnosis also opens up the possibility that a delay in launching the invasion might have enabled more careful planning to maximise the cut-off of escapes across the frontier while secret negotiations went on with the Taliban Foreign Minister and others in the regime sympathetic to a bin Laden handover to the courts of a third nation.

Hence, even if diplomacy failed, the delay during negotiations may have allowed the laying of a better planning foundation for the military alternative. The rushed imperatives in the invasion were about the politics of retribution and the politics of distraction from the intelligence failures that allowed the New York atrocity. They were not about the justice, legality or effectiveness of the war strategy. Negotiation with the Taliban in 2001 was the just and effective strategy, just as it is part of strategy today, and part of any strategy likely to be effective in future.

Conclusion

The mess that war leaves is very costly and very hard to clean up. Preventing wars, solving problems without recourse to them, is generally easier than repairing the harm wars cause, such as the terrorism that is the subject of this issue of the Pakistan Journal of Criminology. Afghanistan is but the latest example of this

lesson. It is a lesson nations will not learn if their leaders suppress an honest history of decisions to invade. The fact is that in Afghanistan, as in both Iraq wars and the war in Vietnam, the US crippled the nations they invaded and enfeebled their own economy by failing to carefully explore all the diplomatic alternatives before they invaded. War as a last resort, just like punishment as a last resort in crime control, is not a glib slogan. It is a doctrine that requires rigour, exhaustive exploration of alternatives, in its application.

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