

ISLAMIC LAW, JIHAD AND VIOLENCE

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INTRODUCTION

To what extent are justifications of violence in Islamic law based on scriptural prescriptions and commands? The challenge of answering this question, in part, is the sheer breadth of the Islamic experience. The same scriptures at the core of the Islamic faith have inspired everything from the most pacifistic mystical orders to the incomprehensibly violent Assassins. The Islamic historical experience is remarkably rich and nuanced—Muslims did not just wage war; they also invented civilizations. While Muslim core scriptures remained unchanged, the sociological and cultural out-product of Muslims defies most generalizations. The relationship of Islamic scripture to violence is complicated by another frequently overlooked factor. Islamic scriptures were mediated not just through the instruments of theological exegesis or normative abstractions, but through the institutions of a living legal system. Legal systems impose their own logic and imperatives upon any source material; systems of law come to create and perpetuate their own cultures of linguistic practices, symbolism, and methods of determination. Legal systems set their own mechanisms and processes for the production of authoritativeness, structure, consistency, and predictability. Systems of law negotiate source material, such as scripture, to construct institutions not just capable of communicating meaning, but also of resolving conflicts, defending order, creating narratives of justice, and producing standards of

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applicability and relevance. The institutions of a legal system become self-perpetuating as they create cultures of specialized linguistic practice. The linguistic practices of a legal culture become the platform upon which a variety of normative demands are negotiated including the import of source material, and the functions of law.

War poses a formidable challenge to all legal traditions. To a large extent, juristic discourses must assume a certain degree of stability and order. It is the existence of a presumed stability and order that make the articulation of rules of conduct and the prescribing of parameters for the resolution of conflict intelligible. The assumption of a degree of order and stability facilitates a reasonable expectation of compliance with the prescriptions of a legal system. Furthermore, legal systems, which assume the supremacy of law, will also assume that pragmatic political considerations or discretion must be subject to some limits. War poses particular challenges because it is thoroughly political and thoroughly chaotic.¹ If juristic discourses rely on an unrealistic view of war, they risk marginality and irrelevance. In other words, if jurists are oblivious to the particular challenges and demands of war, their discourses appear idealistic and unimportant. At the same time, if jurists do not attempt to set any parameters upon the prosecution of war, they tacitly admit the irrelevance of law in this particular field. If jurists concede to the prosecution of war an unfettered autonomy from any rules, in a sense, the law becomes very pragmatic but also irrelevant. If law becomes a thoroughly legitimating discourse, without any proscriptive aspirations, it risks becoming a merely descriptive discourse, and it risks becoming marginal.²

Muslim juristic discourses strike a balance between conservative legitimation and aspirational prescription. A balance, of course, does not mean that both functions are given equal weight or identical proportions. A balance simply means that legitimation and aspiration are both weighted and considered. This is sometimes a conscious act, but it is often an unconscious response to perceived moral imperatives, social or political demands, cultural assumptions or even simple fidelity to the inherited doctrines or precedents of a juristic culture. Furthermore, a jurist's reading of actual practice or social or political demands could be imperfect and incomplete. Hence, a jurist may believe that he or she is articulating an actual social or political practice, but what is ultimately articulated is, in reality, aspirational in nature. For instance, a Muslim jurist may write that a permanent state of peace may not exist between Muslims and non-Muslims, and that non-Muslims should be fought at least once a year. The jurist might believe that this describes an actual practice or that this

1. There are several works that address the challenges war or political questions pose to legal systems. See Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994); Ron Christenson, *Political Trials: Gordian Knots in the Law*, 2nd ed. (New Brunswick, N.J.: Transaction Publishers, 1999); Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961); Arthur J. Sabian, *In Calmer Times: The Supreme Court and Red Monday* (Philadelphia: University of Pennsylvania Press, 1999); Michael J. Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1990).
2. Muhammad al-Rahmuni, *al-Jihad min al-Hijra ila al-Da'wa* (Beirut: Dar al-Tali'a, 2002) recognized that discourses on warfare in the 4th/10th and 5th/11th centuries negotiated juristic commitments to inherited and established linguistic practices with the fluid and evolving political demands of the age.

responds to a pragmatic concern. Yet, the jurist's imperfect understanding of reality or a change in circumstances might reveal that, more than anything else, this statement is aspirational or prescriptive in nature. For instance, the Shaf'i jurist Abu Ishaq al-Shirazi (d. 476/1083) states that Muslims should wage war against non-Muslims at least once a year. He justifies this prescriptive ruling by stating: "[This is so] because failing to wage war [against non-Muslims] for more than a year will cause the enemy to transgress against Muslims because the enemy might assume that Muslims have become weak (*yatma' al-a'da' fi al-muslimin*)."³ What assumptions inform al-Shirazi's rule?⁴ Although the rule appears prescriptive in nature, it is based on a reading of a context. It is possible that al-Shirazi's statement is a straightforward documentation of a political and social reality of his time. But if al-Shirazi has misread his context or is challenging this context, or if the context once existed but has now changed, his statement becomes aspirational in nature. From a different perspective, to what extent is al-Shirazi stating a functional rule? Furthermore, to what extent is al-Shirazi's rule wedded to the practical utility it is supposed to obtain? If al-Shirazi is stating a functional rule, then the point of the rule is to accomplish a specific result, and if it fails to do so, then there is no justification for the existence of this rule. If non-Muslims will not transgress against Muslims, or if attacking non-Muslims once a year will not produce the desired effect of inspiring fear in non-Muslims, then the rule fails. On the other hand, if al-Shirazi's statement is a moral prescription, then regardless of the consequences or results, the rule remains valid, and non-Muslims, as a matter of principle, should be attacked at least once a year.⁵

Between the reading of reality and the prescribing of rules to affect this reality, juristic discourses balance functionality, and morality. This is particularly true in the case of Islamic juristic discourses. Working within a religious legal system, Muslim jurists were not at liberty to ignore moral and scriptural imperatives. But even a religious legal system, if it aspires to remain relevant, cannot ignore the functional contingencies that surround such a legal system. Muslim juristic discourses on war present a complex narrative because, for the most part, they are not simply moralistic or idealistic nor are they pragmatic and realistic. Furthermore, there is a tension between the articulation of rules that tend to look to ultimate benefits and interests, and the articulation of rules that uphold the supremacy of certain principles regardless of the material benefits or harms that might accrue. Attempting to read

3. Abu Ishaq al-Firuzabadhi al-Shirazi, *al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i* (Cairo: Matba'at Mustafa al-Babi al-Halabi, 1976), vol. 2, 291. In the course of writing this article I had to rely on two different editions of *al-Muhadhdhab*. The second version is: al-Shirazi, *al-Muhadhdhab* (Beirut: Dar al-Kutub al-'Ilmiyya, 1995). To distinguish between the two editions in the citations below, I will mention the date of publication in parentheses.
4. The Assyrians and Romans used to wage a military campaign against someone every year. See Khalid Yahya Blankinship, *The End of the Jihad State: The Reign Hisham Ibn Abd al-Malik and the Collapse of the Umayyads*, (New York: State University of New York Press, 1994), 18.
5. Therefore, Ibn al-Nahhas states that the "once a year rule derived from the customary practices of the time (*hamaluhu 'ala al-'ada al-ghaliba*) . . ." Abu Zakariyya al-Dimashqi Ibn al-Nahhas, *Mashari' al-Ashwaq 'ila Masari' al-'Ushshaq wa Muthir al-Gharam 'ila Dar al-Salam fi al-Jihad wa Fada'ilahu*, eds. Idris Muhammad Ali and Muhammad Khalid al-Istanbuli, (Beirut: Dar al-Basha'ir al-Islamiyya, 1997), vol. 1, 98–9.

Islamic juristic discourses without sufficient attention to the negotiative processes that balance the functions of the Islamic legal system will inevitably produce inadequate results.

It is important to note that legal systems negotiate between the functional, pragmatic, and moral without being entirely one or the other. Often, legal values are asserted as *prima facie* obligations or rights that may be overridden by countervailing considerations. It is erroneous to try to understand or evaluate legal prescriptions or rules without taking into account the impact of the special functions of law, or what may be called the logic of law. In the case of Islamic law, it is deeply flawed to fail to consider the ways that the legal institution affects and shapes the relationship to scripture. Take, for instance, a duty imposed by all legal institutions: the obligation to speak the truth before a court of law. It is difficult to conceive of a situation in which lying to a judge would be considered, from the perspective of the legal institution, as a rightful act. Yet the duty to speak the truth before a court of law is not necessarily solely derived from a particular moral outlook or a scriptural command. One must evaluate the extent to which this rule is based on the practical necessity of administering justice. If individuals are given freedom to exercise their consciences and lie to a judge, this could result in the collapse of the legal institution itself. Consider another example often used in Islamic jurisprudence: some Muslim jurists argued that murder may be justified to save a large number of lives, but rape is never justified.⁶ In both situations, murder and rape, the offender incurs a sin and will be punished in the Hereafter, but as far as the earthly law is concerned, one act ought to be punished (rape) and the other (murder) should not. However, this does not necessarily mean that the jurists who reached this result considered rape to be a more serious crime than murder. Instead, Muslim jurists who defended this position argued that rape is not possible without a degree of demonstrable desire. In most cases, in the presence of overwhelming coercion, we cannot prove whether the defendant to one degree or another desired or approved of the murders. But as an evidentiary matter rape cannot be accomplished without the presence of desire, which means a level of punishable volition.

I emphasize the importance of legal culture in understanding Islamic juristic discourses because all too often, in both Muslim and non-Muslim contemporary scholarship, Islamic law is treated as if it is purely a hermeneutic extension of scripture. All too often researchers do not give sufficient attention to the imperatives of legal function, and expect Islamic law to be a platform for understanding ethics, culture, or theology. As a result of this methodological error, there have been numerous mischaracterizations of the nature and role of Islamic law, especially on the issue of violence. In many ways, the Islamic legal system is unique in world history. Of course, the fact that it draws its legitimacy from religious scripture is not what makes it unique. But it is the only major scripturally-based legal system that for centuries represented the law of the land, and the rule of law. Effectively, this

6. See Khaled Abou El Fadl, "The Common and Islamic Law of Duress." *Arab Law Quarterly* 2 (1991): 121–159.

meant that Islamic law could not afford to indulge in abstract explorations of the truth, justice, or other scripturally ordained normative values. But, at the same time, it could not relinquish its claims scripture, which is its ultimate source of legitimacy. The necessity of balancing between scriptural moral norms and functional realities generated a complex interplay between legal obligations and moral obligations, and also, between legal liability and moral liability. Understanding the ways that Islamic legal culture balanced the two forms of obligation and liability is particularly important for evaluating the juristic discourse on violence and warfare.

I. MORAL OBLIGATION AND LEGAL INDETERMINACY IN THE ISLAMIC JURISTIC TRADITION

Classical Muslim jurists did not perform as scholastic ethicists—they were not just theologians or even legal theorists. They acted as legal functionaries working within a living system of law. However, because they were the interpreters of scripture, they could not entirely divorce themselves from questions of morality. Performing the dual roles of legal functionaries and scriptural interpreters in a living system of law meant that Muslim jurists had to be concerned about two set of demands and the consequences of violating them. On the one hand, they had to think in terms of the positive commands of the legal system as an institution that should have the power to enforce compliance by punishing offenders. But, on the other hand, they had to be cognizant of responsibility before the Divine, and the fact that liability in the Hereafter could or could not correlate with positive legal commands and judgments. Not everything commanded by scriptures could be enforced or punished by the legal system, and just because the legal system has the legitimate power to punish a violation of its determinations does not necessarily mean that liability in the Hereafter will follow. While positive legal determinations and judgments are a function of the instrumentalities and processes of the law as a system, liability in the Hereafter is often contingent on subjective considerations such as personal commitment and conscience.

There is a prodigious amount of discourses in the Islamic classical tradition struggling to balance between moral and conscientious imperatives binding upon individual Muslims, and the demands of the rule of law. Because of the critical importance of this point to understanding the Islamic legal discourse on violence and warfare, I will give a number of illustrative examples. Most jurists argued that an established ruler, whether just or not, has the legal right to declare war, and that Muslims can be obligated to fight on the side of such a ruler.⁷ However, the legal obligation to fight and possibly get killed is different from the question of martyrdom.⁸ This issue came up prominently with the early conflicts between the succes-

7. Ibn al-Nahhas, *Mashari' al-Ashwaq* vol. 2, 1022–3.

8. Muslim jurists placed a great deal of emphasis on intentionality or conviction—those who fight and are killed for the sake of the Lord are the true martyrs. By contrast, those who fight and are killed for vengeance, fame, or a desire to attain material wealth are not true martyrs. See Hasan Khalid, *al-Shahid fi al-Islam* (Beirut: Dar al-'ilm li-al-Malayin, 1971), 71–2; Ibrahim bin Umar bin Hasan al-Biqā'iyyi, *al-Istishhad bi Ayat al-Jihad* (Cairo: Dar al-Risala, 2002), 319; Ibn al-Nahhas,

sors of the Prophet, such as the conflicts between Ali, Aisha, and Mu'awiya, and the Umayyads and their 'Alid opponents. The same kinds of issues arose, most recently in the current Arab uprisings in the context of competing claims as to whether those who died supporting the state or its opponents are martyrs (pl. *shuhada'*, sing. *shahid*). No single institution in the Muslim world has the power to grant or revoke the status of martyrdom to any Muslim or non-Muslim. It is readily recognized in both the classical tradition and in modern Muslim theology that only God has the ultimate and absolute right to grant the status of martyrdom. The issue of martyrdom is complicated by the fact that no human claim binds God, and no human institution has the absolute power to speak for God. So although one might be drafted to fight alongside the state in a conflict, there is no guarantee that if killed, such a person will earn the status of martyrdom in the Hereafter. It is also very possible that if a person refuses to obey the draft and is punished with death, such a person dies as a martyr.⁹

Any Shari'ah-based determination attempts to make a well-informed approximation of the Divine will, but it does not, and cannot, embody it. For the sake of illustration, assume that a Muslim kills someone in a war that he/she conscientiously knows, or should have known, to be unjust. Will such a Muslim be held accountable in the Hereafter for killing someone in the course of a war that he/she believes is unjust? For instance, many Muslims sincerely believed that fighting in the Iran/Iraq war was wrong. As can be expected, both sides to the conflict referred to their own dead as martyrs, and refused to accept the possibility that those killed on the side of the enemy could be martyrs. Of course, this is hardly surprising, but the question remains: if one obeys a command that he/she genuinely believes is unlawful or wrongful, what are the obligations of such a person? The point here is that even assuming a legitimate authority with the legal right to declare war, this does not vitiate an individual Muslim's responsibility to refrain from joining an unjust war and to act conscientiously. Conversely, for disobeying a command that a Muslim conscientiously believed to be unjust, a Muslim can expect to be rewarded by God in the Hereafter.

The issue of martyrdom perhaps is inherently controversial and highly politicized, and so indeterminacy is inevitable. However, it would be inaccurate to assume that Shari'ah is indeterminate in all and every case. And I am not making the simplistic argument, often employed by Muslim liberal secularists, that since the role of personal commitment and conscience is central in Islamic theology then that necessarily means that there is no such thing as Islamic law. This type of argument is commonly deployed by Muslim intellectuals who think that it is an effective discursive and polemical strategy in denying Shari'ah any role in public life, but as discussed below, this argument lacks analytic integrity and is persuasive only to people who see little value in the perpetuation of the Islamic legal tradition into the modern age. I will return to this issue later, but for now, I want to emphasize that my point is to

Mashari' al-Ashwaq, vol. 2, 593–635.

9. On the juristic debates on *ahl al-'adl* as opposed to *ahl al-baghy* (the just versus the unjust party), see Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001).

underscore the ever-present role of conscientious convictions and beliefs in Shari'ah discourses, and that Muslim jurists consistently tried to negotiate a balance between moral convictions on the one hand, and the normative role of positive law (or the *ahkam*) on the other. This negotiative balancing act was not always resolved in favor of indeterminacy, but it led to something that is very familiar to the Western legal tradition, and that is the differentiation between procedural, legalistic, or temporal justice, and theological, moral, and celestial justice.¹⁰ Although it is not possible to do full justice to this issue in this short essay, for demonstrative purposes, I will give a few clarifying examples of how the balance was struck in different scenarios debated in the Islamic tradition. A scenario debated in the classical sources of Islamic jurisprudence involved the hypothetical of a person whose grim job is to execute people sentenced to death by the state. What is the moral or religious obligation of such a person if he/she is ordered to execute a person who he/she sincerely believes to be unjustly sentenced? If such an executioner carries out his/her lawful job and enforces the legal sentence, is the executioner accountable before God for doing something that he/she believed to be unjust? Most jurists agreed that the state has the right to fire or otherwise punish the executioner for failing to perform his job, but at the same time, most jurists agreed that obeying orders against his/her conscience means that the executioner has committed a sin for which he/she will be held accountable in the Hereafter. By way of contrast, Muslim jurists found the hypothetical of a judge who is torn or conflicted about the evidence in a legal case and the demands of his/her conscience to be a much harder case. There is no dispute that judges must rule pursuant to the evidence before them in a case. But what if the personal conscience of a judge is at odds with the weight of the legal evidence? If the judge sets his/her personal conscience aside and renders judgment solely on the basis of the legal evidence before him/her, has such a judge committed a sin for which he/she will be held accountable in the Hereafter? It is not possible to summarize accurately the responses of Muslim jurists. But one can say that the responses given varied depending on the school of thought to which a jurist belonged, with the range varying between those who argued that the legal process itself is the ultimate justice, and since a judge is bound by the rule of law, a judge cannot commit a sin by ruling in favor of the evidence; and those who argued that the rules of legal procedure cannot shield a judge from moral responsibility for acting against his/her conscience.

A further example demonstrating the tension between the rule of law and moral liability involves the moral status of a person who dies trying to defend his/her property. In classical Islamic jurisprudence, most jurists agreed that if a person

10. So for instance the juristic tradition differentiates between *al-shahid hukman* (martyr per law) and *al-shahid haqiqatan* (martyr in truth)—the former is an instrumental determination and latter is a status beyond temporal legal categorization. Typically, Muslim scholars also discuss minor as opposed to major martyrdom. Generally, minor martyrdom (*al-shahada al-sughra*) involves losing one's life in the course of a natural disaster or an act of God while major martyrdom (*al-shahada al-kubra*) involves sacrificing one's life defending one's life, loved ones, or property or being killed in cause of God. See, Abu al-Tayyib bin Hasan bin 'Ali al-Hayyiniya al-Qanuji al-Bukhari, *al-'Ibra mimma Ja'a fi al-Ghawz wa al-Shahada wa al-Hijra* (Beirut: Dar al-Kutub al-'Ilmiyya, 1985), 179–214.

dies defending his/her property against criminal assailants, or is killed as a result of refusing to pay unjust or exploitative taxes (*mukus*), such a person dies a martyr. However, Muslim theologians disagreed as to the moral status of a person who dies while defending the seizure of his/her property by the state pursuant to a lawful order or command. Assume for instance that pursuant to a binding legal judgment, a person's property is garnished. However, the defendant sincerely and honestly believes the judgment to be unfair and wrongful, and in the process of trying to non-violently prevent seizure of his property, the defendant is killed. Most classical scholars argued that even if the state actions are legitimate and lawful, this would not deny the status of martyrdom to the deceased as long as he/she honestly and sincerely believed in the wrongfulness of the state's decision, and his/her belief was reasonable (*bi ta'wil muhtamal al-sihha*). Significantly, in cases involving what, to the classical scholars, were considered categorical moral imperatives, few concessions were made to personal beliefs or commitments. So, for instance, no concessions were made to those committing the crime of *hiraba* (banditry, brigandage, or highway robbery), even if they were acting pursuant to a sincerely held belief in the justness of their cause. Therefore, according to most classical scholars, those killed while terrorizing and attacking innocent people indiscriminately cannot be considered martyrs regardless of their beliefs or cause.¹¹

Another scenario frequently cited by classical scholars involves the hypothetical of a Muslim who travels or lives in non-Muslim lands in accordance with an agreement of safe conduct (*aqd aman*). According to scholars of the classical tradition, betrayal of the terms of the safe conduct is always sinful regardless of the personal motivations or justifications for such a violation, and also, regardless of whether a Muslim court has the jurisdiction to punish the culprit. Hence, if a Muslim usurps the property, or otherwise harms non-Muslims because of a sincerely held belief that he/she does so only in retaliation against an injustice suffered, the betrayal of trust is never justified and is sinful. The same obligation not to betray applies whether the agreement of safe conduct was pursuant to an individual agreement or pursuant to a treaty between states. Whether the Muslim state has the power to punish the act of betrayal depends on whether a treaty obligates the Muslim state to do so and also on whether the Muslim state ascribes to a theory of territorial jurisdiction or to a theory of universal jurisdiction over certain types of offenses such as the crime of *hiraba* or the crime of treachery (*khiyanat al-ahd*).¹²

If one tries to locate the key to understanding this negotiative interplay, and how Muslim scholars went about striking the appropriate balance between legality and morality, one will find that when it came setting out temporal obligations and determinations, Muslim jurists focused closely on the instrumentalities and mechanics of the law. Moral responsibility and its consequences was analyzed by evaluating and applying specific normative guiding principles such as the maxims: "do no

11. Abou El Fadl, *Rebellion and Violence in Islamic Law*, 247–9.

12. Wahba al-Zuhayli, *Athar al-Harb fi al-Fiqh al-Islami* (Damascus: Dar al-Fikr, 2009), 730–2; Zafir al-Qasmi, *al-Jihad wa al-Huquq al-Dawliyya al-'Ama fi al-Islam* (Beirut: Dar al-'Ilm li'l-Malayin, 1982), 483–511.

harm,” (*la darar wa la dirar*); actions are evaluated per their intentions (*al-a'mal bi'l niyyat*); one wrong does not justify another (*la taziru wazira wizra ukhra*); humans cannot be obeyed if it means disobeying God (*la ta'ata li makhluqin fi ma'siyat al khaliq*); God is sovereign over God's rights but the state is the agent for people's rights (*Allahu awla bi huquqihi wa al-dawla wakilu huquq al-'ibad*); and so on. While the *ahkam* (positive law) is primarily concerned with instrumentalities of law and the deduction of positive commands, as a much broader concept, the Shari'ah incorporates the axioms and principles of justice and morality, and engages positive law making in a never ending dialectical negotiation. The interpretive dialectical process that negotiates the space between the Shari'ah and the *ahkam* is known as *fiqh* (understanding and comprehension). While the *ahkam* are determinative and positivistic, the *fiqh* is a broader and deeper undertaking that is often explorative and non-deterministic. The *fiqh* involves a process of appraising normative Divine-based imperatives in the light of numerous contingencies including customs, equity, and public interest. Critically, the contingencies evaluated and weighed by the classical Muslim jurists were embedded in specific historical contexts. Even the moral and juridical hypotheticals employed by the classical jurists, such as those discussed above, were drawn with particular historical contextual contingencies in mind. Failing to appreciate the role of context and contingency in the Islamic jurisprudential tradition has led to persistent misunderstandings of Islamic law in the contemporary age and especially, the Islamic classical tradition on war.¹³

II. THE MEANING OF JIHAD

Jihad means to strive or exert oneself in a struggle to achieve a morally laudable or just cause. For all the sensationalism that this term raises in our current world, this is the indisputable definition of jihad in Islamic theology and law. The meaning of jihad is this straightforward and simple, but also, this complex and indeterminate. Jihad could be in the form of armed struggle, but as explained below, the use of violence also could be considered as a most serious and grave moral crime, that of causing corruption or ruin on earth (*fasad fi al-ard*). Although the term jihad has been appropriated and coopted in very diverse contextual and historical circumstances, in Islamic theology, there is an inherent and integral relationship between the concept of jihad and the Qur'anically mandated normative obligation to pursue what is good and to avoid what is bad (*al-amr bi'l ma'ruf wa al-nahy 'ann al-munkar*). By definition, moral worthiness or the justness of cause are categorical preconditions for the existence and recognition of jihad, or for a Muslim to be in a state of jihad (*mujahid*). In the classical philosophical and theological discourses, and especially in the apologetics of Kalam, there is a scholastic tradition investigating the definition and nature of moral goodness, just cause, and righteousness. In books of classical Islamic legal theory or jurisprudence (*usul al-fiqh*), as opposed to books on Islamic positive law

13. See Fred Donner, "The Sources of Islamic Conceptions of War," in *Just War and Jihad: Historical and Theoretical perspectives on War and Peace in Western and Islamic Traditions*, eds. John Kelsay and James Turner Johnson (Westport, CT: Greenwood Press, 1991).

(*ahkam*), there is a much more contrite and abridged discourse on what constitutes a legally recognizable just cause, or what may be considered a valid normative obligation as a matter of law. This discourse in most classical Islamic sources falls under the general rubric of *husn* (what is good, praiseworthy, and beautiful) as opposed to *qubh* (ugliness). While theological and philosophical sources focus on questions of ultimate goodness and the nature of the obligation (*taklif*) to do good, for the most part, jurisprudential sources focus on what may be considered valid or binding as a matter of law. Nevertheless, what falls under the category of proper jihad is so encompassing that jihad properly understood can only be seen as covering any ethical good. The following is only a partial list of what could be properly viewed as jihad: fighting one's base desires and striving to come closer to God; seeking knowledge and learning; standing up to injustice and despotism; performing acts that serve the public good and improve social welfare; feeding the poor and destitute and taking charge of orphans; striving to provide for one's family and honoring one's parents; removing harmful objects or filling potholes on the road that might cause injury to humans or animals; defending one's self or property from criminal assailants; or speaking the truth and refuting the falsehoods of what one believes are heretical and whimsical groups. Far from being a concept constrained to the idea of violent struggle and warfare, jihad embodies the very idea of righteous and ethically upright struggle. By definition, jihad cannot be a struggle pursued for unrighteous or ungodly reasons, and a struggle that is immoral or unjust cannot be a jihad. This is precisely what led many contemporary Muslims thinkers to invoke the dogma of jihad in an earnest effort to energize contemporary Muslims into spearheading a civilizational rebirth per which Muslims would contribute to all fields of humanistic endeavors.¹⁴

A. *Peace as a Moral Imperative*

Salam (peace and tranquility) is a central tenet of Islamic theology; it is considered a profound divine blessing to be cherished and vigilantly pursued.¹⁵ The absence of peace is identified in the Qur'an as a negative condition; it is variously described as a trial and tribulation, as a curse or punishment, or sometimes, as a necessarily evil. But the absence of peace is never in and of itself a positive or desirable condition.¹⁶ The Qur'an asserts that if it had not been for divine benevolence, many mosques, churches, synagogues, and homes would have been destroyed through violence, but God mercifully intervenes to put out the fires of war, and save human beings from their follies. It is an evil deed to ignite the flames of warfare, and as acts

14. See al-Sayyid Abd al-Hafiz Abd-Rabbuh, *Falsafat al-Jihad fi al-Islam* (Beirut: Dar al-Kitab al-Libnani, 1982); Muhammad Fathullah Kulan, *I'la' Kalimat Allah aw al-Jihad* (Cairo: Dar al-Nil, 2001); Magdi Ahmad Husayn, *al-Jihad Sina'at al-Umma* (Cairo: n.p. 2003); Muhammad Abd al-Qadir Abu Faris, *Al-Jihad fi al-Kitab wa al-Sunna* (Aman: Dar al-Furqan, 1998). On jihad among the *mutakallimun* and also Sufis see al-Rahmuni, *al-Jihad*, 104–125.

15. Wahba al-Zuhayli, *Athar al-Harb*, 722–3.

16. Consistent with the Qur'anic message, it is reported that the Prophet taught Muslims not to wish or hope for a military confrontation but to be steadfast when war does come. See Ibn al-Nahhas, *Mashari' al-Ashwaq*, vol. 2, 1081–2.

of Divine grace, God frequently intervenes to put out wars started by evil-doers.¹⁷ In the Qur'anic discourse, unjustified and indiscriminate violence is described as *fasad fi al-ard* (spreading ruin and corruption on earth), and it is considered one of the gravest sins possible. Those who corrupt the earth by indiscriminately destroying lives, property, and nature are designated as *mufsidun* (corruptors and evil-doers) who, in effect, wage war against God by dismantling the fabric of creation over, the Qur'an proclaims: "God has made you into many nations and tribes so that you will come to know one another (*ta'arafu*). Those most honored in the eyes of God are those who are most pious." (Q. 49:13) Most classical Muslim scholars reached the reasonable conclusion that war is not the means most conducive to getting "to know one another (*ta'aruf*)." *Ta'aruf* is considered a moral virtue, and also a form of jihad, but like most forms of jihad, it was extensively treated in theological sources and not in legal sources.

In the Islamic classical tradition, most forms of jihad involve levels of moral struggle that are proper subjects for discourses on ethics and moral imperatives, and not legal discourses. The best way to understand the imperative of jihad is on a scale ranging from the most moral worthy to the least. Thus, according to traditions attributed to the Prophet Muhammad, the highest form of jihad (*al-jihad al-akbar*) is to struggle to know oneself and cleanse oneself of moral faults. This is known as *jihad al-nafs* (jihad against the self or spiritual jihad).¹⁸ According to the same traditions, armed struggle or warfare is the lower jihad (*al-jihad al-asghar*). The Prophet is reported to have said: "The highest form of jihad is to speak a word of truth against (or in some versions, before) a tyrant."¹⁹ As mentioned above, in the theological tradition, the pursuit of knowledge (*talab al-'ilm*), speaking against social injustices, striving to end people's suffering or oppression, and supporting the poor, among others, are given as examples of jihad.²⁰ However, the various forms of jihad were treated in books of Islamic law only if positivist or actual worldly rights or duties followed from them. If the forms of jihad implicated rewards or liabilities only in the Hereafter, such forms would be dealt with in books on ethics and virtue (*akhlaq* or *kutub al-mawa'iz*), but would be omitted from legal hornbooks.

17. Qur'an 2:251; 5:64; 22:40.

18. See Richard Bonney, *Jihad From Qur'an to Bin Laden* (New York: Palgrave Macmillan, 2004), 91–2; 'Abd al-Razzaq bin 'Abd al-Muhsin al-Badr, *al-Qutuf al-Jiyad min Hikam wa Ahkam al-Jihad* (Riyadh: Dar al-Mughni, 1425 AH), 6–12.

19. See Abu Faris, *al-Jihad fi al-Kitab wa al-Sunna*, 48; Suhayl Zakkar, *Arba'at Kutub fi al-Jihad* (Damascus: Dar al-Takwin, 2007), 305; Ibn Qayyim al-Jawziyya, *al-Jihad fi Sabil Allah* (Cairo: al-Maktaba al-Qayyima, n.d.), 8–10.

20. Those killed because of speaking truth before an unjust ruler or those who die of exertion while pursuing knowledge are martyrs (*shuhada'*). Moreover, someone unjustly incarcerated who dies in prison is a martyr. Even someone deeply in love, who conceals his love, suffers and dies is a martyr. Abu al-Tayyib bin Hasan bin 'Ali al-Hayyinia al-Qanuji al-Bukhari, *al-'Ibra mimma Ja'a fi al-Ghawz wa al-Shahada wa al-Hijra* (Beirut: Dar al-Kutub al-'Ilmiyya, 1985), 198–202, 205, 211.

B. *The Qur'anic Discourse on Jihad*

In Qur'anic usage, the word *jihad*, as such, is rarely utilized. The phrase consistently used in the Qur'an is "strive for the sake of your Lord with your money and selves" (*jahidu fi sabili'llahi bi amwalikum wa anfusikum*). The Qur'an also refers to the *mujahidun* (those who strive for the sake of God). Qur'anic references to those who "strive in the path of God" do not necessarily address armed struggles. Instead, the Qur'an's references to warfare are more specific; the Qur'an uses the word "*qital*" to refer specifically to warfare. This is important because Qur'anic references to those who engage in *jihad* are broad and general exhortations. But references to *qital* or warfare are always qualified and made subject to particular restrictions and limitations. Therefore, early Muslims were not allowed to engage in warfare (*qital*) until God gave them specific permission to do so. "Permission is now given to those who have been attacked to take up arms because they have suffered aggression (*zulimu*), and God has the power to aid them." (Q. 22:39) In various passages, the Qur'an instructs Muslims to fight those who fight them, but not to transgress for God does not approve of aggression. The Qur'an instructs Muslims to fight against persecutors, but if the enemy ceases hostilities and seeks peace, Muslims should seek peace as well. (Q. 2:191–3) The Qur'an also somberly reminds Muslims not to reject peace, and not to insist on fighting those who do not wish to fight them. If God had willed, God would have empowered their foes, and then they would have fought Muslims. God has the power to inspire in the hearts of non-Muslims a desire for peace, and Muslims must treat such a blessing with gratitude and appreciation, not defiance and arrogance. (Q. 4:90–1) In an important passage, the Qur'an addressing the community of early believers explains that God does not forbid Muslims from socializing with and being kind to non-Muslims. Rather, God commands that Muslims fight against those who have persecuted them and aggressively driven Muslims from their lands and homes. (Q. 60:7–9) In one passage that has received considerable attention in the contemporary world, the Qur'an exhorts the believers to fight against the unbelievers until they pay the poll tax (*jizya*) and have been completely subdued. (Q. 9:29)

One of the most overlooked aspects of the Qur'anic discourse on the subject of war is that it places itself within a larger Biblical context. The Qur'an emphasizes that God has repeatedly ordained that believers fight in the support of Abrahamic prophets. Just as Israelites were instructed to fight in support of Moses, David and other prophets, Muslims are now commanded to fight alongside Muhammad (another Abrahamic prophet). The importance of this Qur'anic link to Biblical battles and wars is obvious but critical. On numerous occasions, the Qur'an reminds Muslims that the duty of military *jihad* is the same obligation imposed on earlier biblical prophets and their communities.²¹ Although the Qur'an clearly references the battles and military confrontations narrated in the Bible, the Qur'an's narrative is comparatively less violent than that of the Bible. Many of the rather gruesome details of atrocities purportedly committed by Biblical prophets against their foes at war are

21. Qur'an 2:246–51; 3:146; 9:111; 5:24.

not affirmed or even mentioned in the Qur'an.²² The Qur'anic discourse on waging war is normative but thoroughly historicized and contextual. The Qur'anic discourse, perhaps like the rest of Shari'ah, is highly contingent and non-deterministic. As such, it invites inquiry into its normative principles, and the positive rules that follow from these principles.

C. *The Challenge of War and the Balancing of Moral Imperatives*

Pre-modern Muslim jurists clearly understood that there are competing moral imperatives juxtaposing aggression versus non-aggression, oppression versus lack of oppression, and justice versus injustice. But how they interpreted the implications of these moral imperatives was very much contingent and contextual. In other words, it was a by-product of the historical moment in which they lived, and the prevailing norms of the age. Nowhere is this more evident than in the legal and jurisdictional, but not necessarily moral, territorial divisions invented by the classical jurists. According to the classical tradition, the world was divided into three possible categories: the abode of Islam (*dar al-Islam*), abode of hostilities (*dar al-harb* or *dar al-kufr*), and the abode of non-belligerence (*dar al-'ahd*, *dar al-sulh*, or *dar muwada'a*). These abodes were not necessarily substantive moral categories, but pragmatic divisions that reflected the way Muslim jurists read the geo-political divisions of their age. Moral and theological discussions on the appropriate categories reflected a far more complex and dynamic reality—the abodes multiplied in response to sectarian divisions within the Muslim world as well as in response to ethical assessments of the injustices suffered in particular Muslim kingdoms. Therefore, Muslim ethicists and theologians debated categories such as the abode of justice (*dar al-'adl*), the abode of true belief (*dar al-iman*), the abode of truth (*dar al-haqq*), and many others. When positive legal regulations came into tension with moral imperatives, many classical jurists resolved the tension by inventing a legal fiction. This arose with the question of the legal status of Muslims residing in non-Muslim lands. Some classical jurists argued that non-Muslim territories that permitted Muslim minorities to freely and openly practice their faith should be afforded the treatment due to the abode of Islam. Per some of the constructed legal fictions, a territory could be ruled and controlled by non-Muslims, but afforded the treatment reserved for the abode of Islam.²³

Contrary to what many non-Muslims and some Muslims believe, in the Islamic tradition, the payment of *jizya* (poll tax) by non-Muslims was not raised to the level of a moral imperative. The collection of levies in lieu of warfare is a practice that predates Islam; poll taxes were common practice among the Byzantines, Assyrians, and pre-Islamic Arabs. The Prophet and first generation of Muslims did not always

22. In Philip Jenkins, *Laying Down the Sword: Why We Cannot Ignore the Bible's Violent Verses*. (New York: HarperOne, 2011) the author carefully compares the Biblical and Qur'anic discourses on violence and concludes that on balance, the Bible and Qur'an implicate the same type of ethical questions.

23. See Zakkar, *Arba'at Kutub*, 390. Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries." *Islamic Law and Society* 1, no. 2 (1994): 141–187.

collect poll taxes exempting particular Arabian tribes or nations (such as Nubians and Abyssinians), and all non-combatants, including clergy, churches, and at times, also serfs and peasants, from the *jizya*.²⁴ Especially after the 4th/10th century, various groups of Muslims living under non-Muslim tutelage, and Muslim kingdoms bordering powerful Christian states paid levies to non-Muslim sovereigns in order to avoid hostilities. Indeed, if it is deemed to be in the best interest of Muslims, a ruler may accept a peace settlement that obligates Muslims to pay a *jizya* to non-Muslims.²⁵ Understanding that the issue of poll taxes is an issue of negotiated political interests and exigencies (referred to as *siyasa shar'iyya*), most Muslim jurists deferred to rulers on the question of whether it should be collected. The focus of legal sources was on the obligations and entitlements that followed from the existence of the *jizya*. However, most the juristic discourses concentrated on technical conflict of laws issues such as when *dhimmis* (non-Muslims living in Muslim kingdoms) are entitled to self-governance, and what types of cases and litigation would have to be brought in Muslim courts.

Pre-modern jurists balanced a complex matrix of demands or impulses including perceived pragmatic interests, the established legal precedent within the institutions of law, the ethical and moral imperatives associated with the legacy of the Prophet, his family, his companions, and the generation of early successors who narrated and constructed the memory of the Prophet. The outcome of this balancing process was not necessarily constant or unwavering. A rule that might have been the product of a specific context and intended to respond to this contingency, by serving an identifiable interest, could ascend to the status of an absolute moral imperative. The opposite is also true. A rule could be articulated because of a perceived moral imperative, but eventually, it could become modified and compromised into a rule that was supposed to serve a specific interest. For example, classical jurists originally asserted that, as a matter of principle, non-Muslims must be invited to Islam and warned before being fought. In this context, it was argued that, as a matter of principle, everyone must have a fair opportunity to become Muslim before combat commences. However, this rule was later modified by asserting that non-Muslims should be invited to Islam only if there is a realistic chance that they will respond favorably, but if there is no realistic chance then, provided that there is no pre-existing treaty obligation, non-Muslims could be attacked without first being invited to become Muslims. Some jurists argued that the rule mandating an opportunity to learn about Islam, thus affording belligerents the opportunity to choose to accept or reject the faith, was justified in early Islam because in the first centuries, non-Muslims had heard next to nothing about the religion. However, in their day and age, these jurists argued the invitation to Islam had become subject to manipulation and abuse as belligerents pretended to embrace the faith only to undermine Muslims.²⁶

24. For the policy of neutrality per which early Muslims accepted reciprocal non-aggression without demanding the payment of the *jizya* see, al-Zuhayli, *Athar al-Harb*, 222–6.

25. Zakkar, *Arb'at Kutub*, 352–3.

26. Zakkar, *Arba'at Kutub*, 333.

Significantly, not all moral constraints were negotiable in the discourses of Muslim jurists. There were moral imperatives or constraints asserted as absolutes regardless of the possible negative material consequences upon Muslims. For instance, Muslim jurists argued that if a Muslim entered the territory of war under a safe conduct agreement (*aman*), he or she is bound to fulfill all contractual obligations towards his or her non-Muslim counterparts. If a Muslim violates any such obligations, for example, fails to pay back a debt to a non-Muslim and escapes to Muslim territory, the Muslim government must compel the Muslim offender to fulfill his financial commitments. In fact, the government must collect the money from the offender and either hand it over to a representative from the non-Muslim territory or send it by means of an emissary to the non-Muslim polity. This rule is advocated regardless of its potential impact on Muslims—it is a moral constraint regardless of whether it hurts or benefits Muslims. Nevertheless, if a war breaks out between the Muslim and non-Muslim polities and the Muslim polity has reason to believe that the money will be used to further the war effort against Muslims, it may defer payment of the financial obligations of its subjects until the war ends, which could be an indefinite period of time. Importantly, whether Muslims lose or win the war does not affect the obligation of payment; only the persistence of the state of war is relevant. Furthermore, in all circumstances, the Muslim offender carries the sin of treachery until the money is paid to the non-Muslims. If the state of war continues for a long span of time and there is no reasonable expectation that it will end in the foreseeable future, the Muslim offender should donate the money to charity to clear his or her conscience before God. Significantly, Muslim jurists argued that these ethical obligations against treachery are not affected by whether non-Muslims afford Muslims reciprocity or not. Any possible treachery by non-Muslims does not justify treachery by Muslims.²⁷

III. *JUS AD BELLUM* IN THE ISLAMIC TRADITION

Muslim jurists do equate a just war with a military jihad. By definition, if the war is unjust, it is not a jihad, and Muslims killed in the course of such a war are not *shuhada'* or martyrs.²⁸ However, the assertion of this universalistic principle does

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27. Mansur al-Buhuti, *Kashshaf al-Qina'*, ed. Hilal Mustafa Hilal (Beirut: Dar al-Fikr, 1982), vol. 5, 108; Abu Muhammad bin Muhammad Ibn Qudama, *al-Mughni* (Beirut: Dar al-Kutub al-'Ilmiyya, n.d.), vol. 10, 515–6; al-Shirazi, *al-Muhadhdhab* (1976), vol. 2, 338; Abu Zakariyya al-Nawawi, *al-Majmu' Sharh al-Muhadhdhab* (Beirut: Dar al-Fikr, n.d.), vol. 19, 453; Abu al-Qasim al-Muh-aqqiq al-Hilli, *Shara' i' al-Islam fi Masa'il al-Halal wa al-Haram* (Beirut: Dar al-Adwa', 1983), vol. 1, 308; Fakhr al-Muhaqqiqin al-Hilli, *Idah al-Fawa'id* (Qum: Mu'assasat Isma'iliyyan, 1387 A.H.), vol. 1, 352; Abd al-Aziz b. al-Barraj al-Tarabulsi, *al-Muhadhdhab* (Tehran: Mu'assasat al-Nashr al-Islami, 1406 A.H.), vol. 1, 311.
28. See Taqi al-Din Ibn Taymiyya, *al-Siyassa al-Shar'iyya fi Islah al-Ra'i wa al-Ra'iyya* (Beirut: Dar al-'Afaq, 1983), 102–106. Also see Mohammad Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), 165–180; Khad-duri, *War and Peace*, 59–66, 75–76; Rudolph Peters, *Jihad: In Classical and Modern Islam* (Princeton: Markus Wiener, 1996), 43–4. Some Western scholars have equated between jihad and religious war. I have reservations about translating jihad as holy war or treating the jihad tradition as the

not mean that any particular conflict is in practice a just war. Classical Muslim jurists would often state what they believed the historical practice had been among the generations of early Muslims while noting the prominent exceptions. So, for instance, Ibn Rushd (d. 595/ 1198) asserts that all polytheists could be fought, but he excepts the Turks and Ethiopians. Hence, according to Ibn Rushd, it was not permissible to attack either the Turks or Ethiopians. Other than citing a hadith attributed to the Prophet in support of this assertion, Ibn Rushd does not elaborate on the logic behind this purported historical exception.²⁹ In essence, Ibn Rushd, like other classical Muslim jurists, assumes that the material interests of Islam should be served, and that Muslims should not be placed into a subservient or compromising position. Muslim jurists conceded a considerable amount of discretion to rulers over issues involving interactions with foreign powers or foreign affairs. Therefore, their discourses reveal a great amount of deference to the ruler as to when a ruler may or may not enter into a peace treaty or wage war against non-Muslims. This could be a result of a tacit recognition of the political realities of the age—ultimately a ruler will do what a ruler deems fit. More importantly, however, classical Muslim jurists seemed to recognize that the world order of their day was one of open warfare. Before the modern world, other than the pragmatism dictated by the practice of reciprocity, there was precious little to restrain wars of aggression. Wars could be fought with or without cause with little justification except that which was offered internally for the purposes of domestic consumption so as to intensify recruitment efforts and marshal internal support.

Classical Muslim jurists, however, were challenged by repeated Qur'anic exhortations calling upon Muslims not to transgress and not to commit acts of aggression. Per this Qur'anic discourse, wars of aggression could not lawfully be a jihad and Muslims who are killed in it are not martyrs. This Qur'anic discourse forced Muslim jurists to think about the defining elements of a just war. The first question confronting the classical jurists of Islam was whether it is permissible to fight non-Muslims simply for their disbelief in Islam? Assuming that an enemy has had notice of Islam and also an opportunity to embrace Islam but refused to do so, was this by itself sufficient cause to fight such a party?

Contrary to what many contemporary non-Muslims and Muslims believe, the response given by most classical Muslim jurists was not in the affirmative. For instance, al-Sarakhsi (d. 483/1090-1) argues that while failure to adopt Islam is a serious moral crime (*al-kufr min a'zam al-jinayat*), this is not why non-Muslims are fought. Disbelief, al-Sarakhsi argues, is a matter that is between a person and his or her God (*al-kufr bayn al-'abd wa rabbih*). Non-Muslims, however, he argues, are fought in order to avert the danger that they pose to Muslims (*li daf'i sharrihim*).³⁰

epistemological equivalent of a crusade or religious war in the West. The idea of a holy war (*al-harb al-muqaddasa*) does not exist in Shari'ah. Furthermore, in Shari'ah there is no notion of a religious as opposed to a secular war. If a war is waged to defend Islam or Muslims, or to protect one's honor or property, it is a jihad. The classical Muslim discourse rests on very different epistemological foundations than the holy war tradition in Christianity.

29. Abu al-Walid Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (Cairo: Dar al-Fikr, n.d.), vol. 1, 279.
30. Muhammad Ahmad al-Sarakhsi, *Sharh Kitab al-Siyar al-Kabir* (Beirut: Dar al-Kutub al-'Ilmiyya,

Other classical jurists added that God created human beings knowing that there would be unbelievers, and God did not create people just so they may be killed. God did not make the place to punish the act of unbelief life on this earth but only in the Hereafter will people be held accountable for failure to believe. Hence, the only reason license was given to fight unbelievers is because of a potential intervening cause and that is the harm that unbelievers may inflict upon Muslims (*li 'arid darar wujida minhum*). This view, however, has not gone unopposed. A minority of classical jurists believed that the unwillingness to become Muslim is sufficient cause to make a group the target of a possible attack. Ibn Rushd explains that there is disagreement among Muslim jurists on this issue because Muslim jurists disagree on the legal cause (*al-'illa*) for fighting unbelievers. Ibn Rushd stated:

The source of their disagreement on the matter is that they [the jurists] disagree on the legal cause (*'illa*) for killing the unbelievers. The jurists who claimed that the legal cause for killing the unbelievers is their disbelief do not exempt [from killing] any of the unbelievers. Those who claim that the legal cause is the capacity [of the unbelievers] to fight . . . exempt from killing those who are unable to fight or who are usually not inclined to fight such as peasants and serfs.³¹

Ibn Taymiyya (d. 738/1327-8) presents a somewhat different emphasis on the same theme. He asserts:

Since the basis for permissible fighting is *jihad* which strives to uphold religion, and make the word of God supreme, whoever obstructs [these purposes] must be fought. Those who normally do not fight or obstruct such as women, children, the hermit, the elderly, the blind, the crippled and anyone of a similar status, according to the majority of jurists, may not be killed unless they fight [Muslims] by word or act. Nonetheless, some have argued that the status of unbelief, in itself, merits execution, but they exempted women and children because they may be useful for Muslims. The first opinion, however, is more correct because we fight those who fight us when we seek to spread the word of God.³²

As is clear from these passages, there were competing trends within Islam that battled for acceptance. The first trend believed that the failure to adopt Islam is a sufficient cause for warfare but in war and after victory women, children and others are not killed only because they are of potential use for Muslims. The second trend considered unbelief to be a grave moral infraction, but it is not sufficient or relevant cause for warfare. During warfare and after victory, unbelievers may only be killed because of the actual threat they pose to Muslims whether they be men, women, children, hermits, peasants or any other category. After the 4th/10th century, it is clear that the second trend becomes the predominant view.³³ Nevertheless, since classical Muslim jurists are often accused of focusing on *jus in bello* considerations while

1997), vol. 4, 186. On disbelief being an insufficient cause for jihad, see al-Badr, *al-Qunuf al-Jiyad*, 44–49.

31. Ibn Rushd, *Bidaya*, vol. 1, 281.

32. Ibn Taymiyya, *al-Siyasa*, 106.

33. For a detailed study of the classical and modern jurists see al-Qasbi, *al-Jihad*, 172–218. Also see, al-Zuhayli, *Athar al-Harb*, 101–113; Zakkar, *Arba'at Kutub*, 400.

ignoring *jus ad bellum*,³⁴ it might be helpful to discuss a range of hard and easy case scenarios in which a just war would be either admitted or denied.

Wars in self-defense or liberation of occupied Muslim territory are considered to be just wars and thus proper jihads. A less clear case would be that of frontier territory in which Muslim sovereignty is disputed and in which Muslims are not a clear majority. This would be a hard case because the analysis turns on *ghalaba* (effective control) or whether Muslims have settled and rooted to an extent that the frontier territory could be considered a part of *dar al-Islam*. If Muslims are in effective control of the territory, then defending the territory against invasion or liberating it would be a just war and a proper jihad. Attacking a territory with which Muslims have a peace treaty (*'ahd*) clearly would be considered aggression unless the non-Muslim party receives notice of revocation of the treaty (*nabdh*) with a list of reasons (*asbab*) for the revocation. There is a considerable amount of disagreement as to what may constitute valid reasons for revoking a peace treaty and the rules for giving notice of revocation. Other than the case of particular territories that have enjoyed custom-based privileged status such as Nubia, Abyssinia, and arguably, Turkish tribes among others, there is considerable debate as whether non-Muslims who refuse to sign a binding treaty, but promise neutrality and “no harm” are entitled to protection from attack. The majority view among classical jurists is that as long as the Muslim ruler trusts the promise of neutrality and non-aggression, it is unjust to attack the non-Muslim territory unless there is a concrete evidence of betrayal. The question that is often raised in this context is: what about *ahl al-dhimma* or the group of people who are forced to pay the poll tax known as the *jizya*? I will have more to say about this category below, but in early Islam, *ahl al-dhimma* was a category that applied primarily to Jews and Christians who would be allowed permanent resident status among Muslims. In return for the payment of a poll tax and recognition of Muslim tutelage and sovereignty they would be entitled to Muslim protection.³⁵ Although only the people of the book (largely Christians and Jews) initially qualified for the status of *ahl al-dhimma*, in historical practice, Muslim jurists extended this category to Sabians, Zoroastrians, Nestorians, Hindus, Buddhists, and others.³⁶ But the question is, what if *ahl al-dhimma* refuse to accept this status and decline to pay the poll tax? Technically, the answer should be clear enough: either they are fought until submission or they are allowed to reside in *dar al-Islam* with the status of *al-muharib al-musta'man* (a belligerent with safe conduct)—something akin to the status of a temporary resident. While Muslim jurists deferred to the discretion of the executive authority in choosing between these two options, the question of the *jizya* does raise challenging just war theory issues. The majority of classical jurists treated the *ahl al-dhimma* status as a form of *'aqd sulh* (peace settlement) per which non-Muslim

34. For instance, see John Kelsay, *Islam and War* (Louisville, Kentucky: John Knox Press, 1993), 36.

35. Ab' al-Hasan al-Marghinani, *al-Hidaya Sharh al-Bidaya* (Cairo: Mustafa al-Babi, n.d.), vol. 2, 136; al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 273; Sahnun b. Sa'id, *al-Mudawwana al-Kubra* (Beirut: Dar al-Kutub al-'Ilmiyya, 1994), vol. 1, 496; Ibn Rushd, *Bidaya*, vol. 1, 282, 284.

36. See al-Zuhayli, *Athar al-Harb*, 697–715; al-Qasimi, *al-Jihad*, 532–542; al-Qanuji al-Bukhari, *al-Ibra*, 30.

residents were protected from external or internal harm in exchange for paying an agreed upon tax. For many jurists, refusal to pay the tax (as opposed to inability to pay) was considered a breach of the peace settlement and a return to belligerency. In contrast, there are jurists such as Sufyan al-Thawri (d. 161/778) who purportedly believed that a just war can only be in response to an imminent threat or defensive in nature (known as *jihad al-daf'*), and if a group refuses to pay *jizya* while giving assurances of its peaceful intentions, a jihad would not be permissible.³⁷ Relying on a number of historical precedents in which in lieu of a poll tax non-Muslims agreed to enter into a treaty of mutual defense with Muslims, a number of jurists argued that if *dhimmis* accept Muslim sovereignty and agree to serve with the Muslim military, the *jizya* should be waived. Alternatively, non-Muslims could reject Muslim sovereignty and negotiate a *sulh* (peace treaty) per which non-Muslim territory would become a *dar sulh* (land of treaty status). The point worth emphasizing is that while the Muslim executive is given considerable discretion in negotiating the terms of a peace settlement, a military jihad is always the last option after other peaceful arrangements are exhausted.³⁸

Reflecting the common practice of their age, most classical Muslim jurists asserted that as a matter of principle, peace treaties with non-Muslims should not be indefinite in duration. A peace accord should be premised upon an expiration date that could be renewed with the express agreement of the parties. Some jurists argued that since Muslims are supposed to be in a perpetual state of spreading the word of God, it is preferable that a peace treaty not exceed four months. The maximum possible duration for a peace treaty, however, is ten years.³⁹ Nonetheless, the practice of Muslim states has not necessarily been consistent with this stated principle. Some peace treaties have had a perpetual status.⁴⁰ Importantly, many late jurists writing after the 6th/12th century have omitted the discourse specifying a ten-year limit on peace treaties.⁴¹ Ibn Taymiyya goes further and argues that those who attempt to set limits on the duration of peace treaties have violated the Qur'an and Sunna of the Prophet. Both the Qur'an and Sunna, Ibn Taymiyya argues, have not required any time limit, and, in fact, the Prophet entered into several perpetual peace treaties with non-Muslims.⁴²

Before moving on to issues related to the conduct of war, it bears emphasis to recall that in the Islamic tradition, no central authority can rightly monopolize the power to declare jihad or indeed to challenge a call to jihad. In the final analysis, at the moral and ethical level, all calls to jihad appeal to the conscience of the individual

37. Ahmed Mohsen Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave Macmillan, 2011), 80; Al-Qasimi, *al-Jihad*, 175.

38. Muhammad bin Isma'il bin Salah al-San'ani, *Subul al-Islam* (Cairo: Matba'at al-Halabi, 1950), vol. 4, 49–50; Muhammad bin Ahmad Ibn Hazm, *al-Muhalla* (Cairo: Munir al-Dimashqi, 1352 AH), vol. 7, 234; Al-Zuhayli, *Athar al-Harb*, 687–8.

39. Khadduri, *War and Peace*, 219–220; al-Shirazi, *al-Muhadhdhab* (1976), vol. 2, 333.

40. See Hamidullah, *Muslim Conduct*, 265–266.

41. For example, al-Qarañi, *al-Dhakhira*, vol. 3, 449.

42. Abu al-'Abbas Taqi al-Din Ahmad Ibn Taymiyya, *al-Fatawa al-Kubra*, ed. Muhammad 'Abd al-Qawi 'Ata and Mustafa 'Abd al-Qawi 'Ata (Cairo: Dar al-Turath, 1988), vol. 29, 140–141.

Muslim to be persuaded that a particular military conflict is just and thus, could lead to God's pleasure and grace. In practice, this meant that after the passing away of the early generation closely associated with the Prophet, no power had the authority to sanctify or render war holy. In many ways, historically, jihad has remained an enterprise anchored in populism. This is why texts composed on the virtues of military jihad increased dramatically in response to the Crusade invasions. Increasingly after the 11th century, there was a concerted effort by Muslim jurists to persuade the populace of the critical importance of resisting and defeating the foreign invaders.⁴³ Moreover, the *jus ad bellum* aspect of jihad discourses remained far more fluid and negotiable than any stereotypical understanding of jihad would admit. For instance, in the 16th century, Shaykh Zainuddin Makhdum al-Malibari wrote the highly influential epistle on jihad, *Tuhfat al-Mujahidin*, in which he argued that it is the solemn duty of Muslims, as well as native Hindus, Christians, and Jews, to fight in support of the Hindu ruler of Malabar against the Portuguese invaders, who he argued are treacherous and foreign to the culture. The essence of the obligation of jihad is to resist oppression and injustice, and the Portuguese, al-Malibari argued, come as exploiters and not as liberators. Hence, it is an Islamic obligation upon every Muslim to help the ruler of Malabar defeat the foreign invaders.⁴⁴

IV. *JUS IN BELLO* IN THE ISLAMIC TRADITION

In the classical Islamic tradition, a proper or rightful military jihad must be fought for a just cause. The means pursued in such a jihad, however, are no less important than the ends. Many classical jurists treated certain kinds of conduct as too dishonorable and repugnant for a legitimate jihad. The commission of such acts would condemn the offender to the lowly moral status of a common criminal and indeed a *mufsid fi al-ard* (a corrupter of the earth) or enemy of humankind. According to many classical jurists, piracy, highway robbery, and banditry are not proper instruments of warfare.⁴⁵

It is important to recognize that much of the classical discourses on the conduct of warfare does not focus on abstract normative standards of fairness or justice in dealing with non-Muslims. The classical discourses tend to balance what the jurists perceived as the normative impulses inherited from the Prophet and his Companions, against the discretionary leverage conceded to the ruler in promoting the interests of Muslims. This is why, save for some notable exceptions, many of the prescriptions regarding the conduct of war are written in the style of "advice to princes" instead

43. See for instance the four texts on jihad edited and published by Suhayl Zakkar, *Arba'at Kutub fi al-Jihad Min Asr al-Hurub al-Salibiyya* (Damascus: Dar al-Takwin, 2007); see also, Suleiman Mourad and James Lindsay, *The Intensification and Reorientation of Sunni Jihad Ideology in the Crusader Period* (Leiden: Brill Publishers, 2012) and Bonney, *Jihad*, 111–118.

44. Zainuddin Makhdum, *Tuhfat al-Mujahidin*, Muhammad Husayn Nainar (trans.) (Kuala Lumpur: Islamic Book Trust, n.d.). On the reconstruction of jihad in the colonial period see, Bonney, *Jihad*, 172–194.

45. Abou El Fadl, *Rebellion and Violence in Islamic Law*, 234–294; Al-Dawoody, *The Islamic Law of War*, 170–183.

of precise positive commandments. Often, texts on this subject will offer an array of policy determinations ranging from practices that most aligned with the precedents of the Prophet to what are at outer limits of what is Islamically acceptable.

Consistent with a Qur'anic prescription, Muslim jurists assert that combat can only commence after a declaration of hostilities, and this is to be undertaken regardless of the conduct of the enemy. According to a report attributed to the Prophet, the Prophet instructed Mu'adh bin Jabal, the commander of Muslim forces in Yemen: "Do not fight them until you invite them (to Islam); and do not commence combat until they initiate it; and if they initiate, do not respond (violently) until they have killed one of our soldiers; and when this happens confront them and ask them, 'Is there not a better recourse than this?' . . ."46 Many jurists claim that the Prophet never fought a people without giving them fair warning.⁴⁷ The classical jurists, however, warn that this applied to foes with which there were no ongoing hostilities. Therefore, if there are ongoing and continuing hostilities, a *ghara* (surprise military raids) is permissible if the ruler deems such raids necessary. However, if a peace treaty exists between Muslims and their opponents, a formal notice of revocation of the treaty **for cause** is necessary (known as *nabth*). If, however, the Muslim ruler believes the treaty has been repeatedly violated by the enemy and that for all practical purposes it has been voided by persistent breaches, Muslim jurists disagree as to whether a formal *nabth* is called for or if Muslims could launch an attack without warning. Classical jurists repeatedly warn against treachery or outright betrayal as strictly at odds with God's law. Some jurists struggled to pose hypotheticals or allegorical tales distinguishing between lawful military maneuvers involving camouflage and trickery as opposed to unlawful deceit and treachery. However, most classical jurists were not military commanders and did not possess a great deal of military experience. I am not sure of the objective merits of these hypotheticals or allegories except that it puts rulers and commanders on notice that the closer one gets to lying and gaining trust under false pretenses only to betray an opponent, the closer one gets to earning God's wrath and condemnation.⁴⁸

Classical jurists proclaimed that once hostilities commence, Muslim armies must raise visible banners and insignia that clearly distinguish Muslim forces from their opponents.⁴⁹ Any destruction that occurs in the course of combat must have a defensible reason or cause, and so if one destroys even a bird or bees without cause, such a person is liable before God.⁵⁰ Muslim jurists often note that the Prophet com-

46. Quoted in al-Zuhayli, *Athar al-Harb*, 156.

47. Zakkar, *Arba'at Kutub fi al-Jihad*, 84.

48. Muhammad bin Ali al-Shawkani, *Nayl al-Awtar Sharh Muntaqa al-Akhbar* (Cairo: al-Matba'a al-Uthmaniyya al-Misriyya, 1957), vol. 7, 231; al-Kamal bin al-Hummam, *Fath al-Qadir Sharh al-Hidaya* (Cairo: Matba'at Mustafa al-Halabi, n.d.), vol.4, 285; al-Qasim bin Salam Abu Ubayd, *Kitab al-Amwal* (Cairo: n.p., 1353 A.H.), 136; Yihya bin Adam, *al-Kharaj*, ed. Ahmad Shakir (Cairo; al-Matba'a al-Salafiyya, 1347 A.H.), 191.

49. Suhayl Zakkar, *Arba'at Kutub fi al-Jihad*, 341.

50. Al-Shirazi, *al-Muhadhdhab*, vol.3, 290-1; Ibn Qudama, *al-Mughni*, vol. 10, 506. For Prophetic reports see, al-Qarafī, *al-Dhakhira*, vol. 3, 398 and 409; al-Shirazi, *al-Muhadhdhab* (1976), vol. 2, 301.

manded his troops, “[n]ot to kill women, children, or the elderly, not to cut down ripe trees, burn buildings, or kill cattle or sheep except to eat.” The Prophet also said: “Do not burn palm trees and do not flood vegetation. Do not pillage or betray.”⁵¹ Many jurists asserted that livestock, cattle, or any other being cannot be killed even if the purpose of the killing is to weaken or frustrate the enemy. Furthermore, even if Muslims will not be able to take possession of the animals, destroying the animals is not permissible. Ibn Qudama (d. 620/1223), the Hanbali jurist, asserts that the intentional destruction of any creature not involved in combat is a form of corruption on the earth (*fasad fi al-ard*).⁵² Many jurists warn and condemn the use of weapons of mass destruction such as fire, flooding, or mangonels, and allow for their use only for dire necessity or self-defense. Other jurists express a distinct distaste for the use of fire as a weapon at war, and assert that fire is particularly inhumane and brutal, and therefore, unacceptable.⁵³

The majority of the classical jurists emphasize that the ruler may pardon, enslave, ransom or execute male prisoners of war in accordance with the exigencies of war.⁵⁴ The ruler is granted discretion over the execution of male prisoners of a fighting age because of the risk that such males pose. Arguably, people who are capable of fighting pose a continuing threat to Muslims, and the ruler is entrusted to evaluate that risk and act on it.⁵⁵ Importantly, this largely functional logic is somewhat mitigated by certain priorities. Therefore, for instance, if the execution of the able-bodied men will lead to the execution of Muslim prisoners held by the enemy, then execution is, at a minimum, reprehensible. If the enemy offers to exchange prisoners with Muslims, the ruler is duty-bound to accept the exchange, and not to do anything that would endanger the wellbeing of Muslims held by the enemy. In these circumstances, the discretion of the ruler is limited by the priority of liberating Muslim prisoners from captivity. However, if an unbelieving prisoner of war converts to Islam, then under no circumstances may such a person be exchanged or returned to the enemy. The interests of one Muslim may not be sacrificed for the sake of another.⁵⁶

A minority view among the classical jurists maintained that under no circumstances could a prisoner of war be executed. In fact, the proponents of this view

51. This report is also attributed to Abu Bakr, the first Caliph. Ibn Qudama, *al-Mughni*, vol. 10, 507.

52. Ibn Qudama, *al-Mughni*, vol. 10, 506.

53. Ibn Rushd, *Bidaya*, vol. 1, 281–2. On the use of weapons of indiscriminate destruction see al-Marginani, *Hidaya*, vol. 2, 136–7; Sahnun, *al-Mudawwana*, vol. 1, 501; al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 278–9; Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Muhammad Ashraf, 7th ed., 1977), 205–208. Ibn Qudama, the Hanbali jurist, states that prisoners of war may not be executed with fire. He mentions a report alleging that the first Caliph Abu Bakr ordered his military commander Khalid b. al-Walid in the wars of apostasy to execute some prisoners by burning them. But Ibn Qudama gives this report little legal weight intimating that it has no historical value and comments, “[b]ut today, I know of no disagreement [regarding the prohibition against execution by fire].” Ibn Qudama, *al-Mughni*, vol. 10, 502.

54. See al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 281–2.

55. See, for instance, al-Sarakhsi, *Sharh*, vol. 3, 125, 128, 200, 205; Sahnun, *al-Mudawwana*, vol. 1, 501.

56. Al-Sarakhsi, *Sharh*, vol. 4, 297–303.

argued that there is a consensus among the companions of the Prophet on this point, and that the only options open to the ruler is either to pardon or ransom. This rule applied whether the prisoners were men, women, or any other category.⁵⁷ One can only speculate as to why this minority view did not become the predominant jurisprudential position in pre-modern Islam. This is all the more so that the Qur'an emphasizes the benevolent treatment of prisoners of war. Describing the pious, the Qur'an states: "And for the love of God, they feed the needy, the orphans, and the captives of war. And they say, we feed you for God's sake, we desire no recompense nor gratitude." (Q. 76:8–9) Addressing the captives themselves, the Qur'an states: "Oh Prophet, tell the captives that you have taken, 'if God finds good in your hearts, God will bring you what is good and reward you with better than what God has taken away from you and forgive your sins for God is forgiving and merciful.'" (Q. 8:70) In the Qur'anic discourse, taking care of the destitute, orphaned, and captives of war are treated as equally virtuous acts. This is bolstered by a number of reports attributed to the Prophet.⁵⁸ However, in all likelihood from a purely functional perspective, a strict prohibition against dispatching war captives was problematic because it was largely inconsistent with the war practices of the age.⁵⁹ As noted earlier, on a number of issues, the majority of the classical jurists tended to gravitate towards a functional approach in which they gave the ruler considerable discretion to take the course of action that best served Muslims at war.

The existence of this functional tendency in the classical Islamic discourses has prompted some contemporary scholars to conclude that the Muslim juristic discourses are overwhelmingly functional in nature. These scholars argue that the rules placing limits on the way non-Muslims may be treated are not induced by notions of justice, but by a desire to preserve the potential value that may accrue to Muslims. By not killing women, children or peasants, or needlessly destroying crops and vegetation, Muslim jurists were protecting the rights of Muslims to profit from these resources. In the words of James Johnson, "[t]he reason given in the text is not that these [people] have rights of their own to be spared harm, rights derived either from nature or from considerations of fairness or justice, but rather, that they are potentially of value to the Muslims."⁶⁰ This, however, grossly overstates the case.

It is true that classical juridical sources, particularly from the Hanafi school of jurisprudence, emphasized the proprietary rights that Muslims have in the spoils of war, including women and children. For instance, some Hanafi jurists have argued that once the ruler makes the decision to enslave war captives, the proprietary rights

57. See Ibn Rushd, *Bidaya*, vol. 1, 279.

58. Rabih Zirwani, *Akhlawqiyat al-Harb fi al-Sira al-Nabawiyya* (Beirut: Dar Ibn Hazm, 2010), 197–200; 'Abd al-Latif 'Amir, *Ahkam al-Asra wa al-Sabaya fi al-Harb al-Islamiyya* (Cairo: Dar al-Kitab al-Misri, 1986), 147–150.

59. See James Johnson, "Historical Roots and Sources of the Just War Tradition in Western Culture," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, eds. John Kelsay and James Johnson (Westport, CT: Greenwood Press, 1991), 3–30.

60. James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (University Park, PA: The Pennsylvania State University Press, 1997), 122.

of Muslims become vested. Therefore, if a non-Muslim prisoner of war converts to Islam after the proprietary right has vested, he or she will still be enslaved despite his conversion to Islam.⁶¹ But this does not mean that the classical discourses are devoid of moral insights or even that the overwhelming attention of the jurists was focused on issues of value. Rather, Muslim jurists negotiated and balanced issues of value and interest within certain moral parameters. As Johnson, himself, recognizes, certain rules adopted by the classical jurists seem to be “pure” acts “of moderation outside considerations of benefit.”⁶² As noted above, Muslim jurists asserted that women, children, the elderly, the blind or crippled, the insane, hermits, and according to some jurists, peasants, craftsmen, and serfs, may not be executed unless they take an active part in the fighting. Contrary to what John Kelsay and Johnson argue, this is not due to the fact that such categories of individuals are presumed to be of diminished capacity, and thus, less guilty in failing to adopt Islam.⁶³ Rather, Muslim jurists argue that such individuals usually do not fight and, hence, there is no justification for killing them.⁶⁴ In fact, Muslim jurists claim that the Prophet expressly stated that women should not be killed because, normally, they do not take part in the fighting. In other words, the operative cause (*'illa*) for not killing women is that they are presumed not to be a danger.⁶⁵ Some sources add that peasants, craftsmen, and hermits typically are preoccupied with work or worship, and thus pose no danger. Therefore, these individuals should be left unmolested.⁶⁶ The presumption is in favor of the inviolability of such individuals unless there is an actual threat. Importantly, in terms of a value analysis, the insane, crippled or hermit are presumed to be of no value for the purposes of enslavement. Nevertheless, that does not affect their protected status. Furthermore, Muslim jurists often express wariness about the ideological risk posed by hermits and clergymen.⁶⁷ Regardless, Muslim jurists argue that hermits may not be killed or enslaved, and, in the opinion of certain schools, enough property and money should be left for their sustenance and care.⁶⁸

Furthermore, Muslim jurists assert that as to those who may not be executed, if the Muslim army is unable to transport them back to the territory of Islam, they must be set free. In other words, having captured, for example, women, children and elderly individuals, if it is not possible to take them to Muslim territory where they may be enslaved, ransomed or set free, the Muslim army is obligated to release them.⁶⁹

61. Al-Sarakhsi, *Sharh*, vol. 3, 126, vol. 5, 368. This tendency is not exclusively Hanafi. For instance, some Shafi'is argued that the reason children and women are protected is because they are of potential use to Muslims. See the discussion in al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 282.

62. Johnson, *Holy War Idea*, 123.

63. Johnson, *Holy War Idea*, 119; Kelsay, *Islam and War*, 62–3.

64. Al-Marghinani, *Hidaya*, vol. 2, 137; al-Sarakhsi, *Sharh*, vol. 4, 186–8, 196; al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 277–8.

65. Ibn Qudama, *al-Mughni*, vol. 10, 542.

66. For example, see al-Qarafi, *al-Dhakhira*, vol. 3, 399.

67. For instance, see al-Sarakhsi, *Sharh*, vol. 4, 196–7, who reports that some have argued that if hermits are socially active, and if they provide ideological support to the unbelievers, they may be killed.

68. Ibn Rushd, *Bidaya*, vol. 1, 279; Sahnun, *al-Mudawwana*, vol. 1, 499; al-Qarafi, *al-Dhakhira*, vol. 3, 399.

69. Al-Sarakhsi, *Sharh*, vol. 4, 198.

Vindictive or precautionary executions are not permitted. Here, direct material value or benefit is missing, yet that does not relieve Muslims of their moral obligations. In fact, a purely interest-based analysis would suggest that women and children, in this context, should be killed. If released, they will still provide substantial aid to non-Muslims. Nevertheless, Muslim jurists did not believe that such an indirect risk or that the absence of material benefit to Muslims justifies the elimination of these individuals. Additionally, one of the rather interesting laws in Muslim discourses is that the same individuals who may not be killed, do not have to pay the *jizya*. This, of course, is applicable only if the non-Muslims in question had accepted paying a tribute rather than war. However, the correlation between the protected categories and the obligation of *jizya* is interesting. Al-Marghinani (d. 593/1196-7) explains this rule by stating: “This is because the *jizya* is demanded as a substitute to killing. Therefore, it [the *jizya*] is not obligatory upon those who may not be killed.”⁷⁰ This seems to indicate that the prohibition against the killing of certain categories of individuals is a broad and principled imperative.⁷¹

Muslim jurists frequently assert other broad moral injunctions in the context of conducting warfare against non-Muslims. Torture, mutilation, and treachery are strictly prohibited. This prohibition is often asserted in the context of commenting on a widely cited report attributed to the Prophet that prohibits *mithla*—a word that can mean abusing a corpse or mutilating and tormenting a living being.⁷² In this context, Muslim jurists emphasize that severing heads and displaying them, or transporting heads back to Muslim territory is strictly prohibited.⁷³ Pursuant to the prohibition against treachery (often described as the prohibition against *ghadr*), if male or female fighters are promised safety in return for a surrender, these terms must be complied with, and the prisoners may not be executed.⁷⁴ This creates a moral obligation higher than the value inherent in the discretion granted to the ruler over the treatment of prisoners. This also implicitly recognizes the legality of negotiating a treaty guaranteeing the safety of prisoners of war. Under the rubric of the prohibition against torture or mutilation, Muslim jurists state that the beating or starving of prisoners is impermissible.⁷⁵

CONCLUSION

Jihad is a core theological and legal concept in the Islamic tradition. As a normative tenet of the faith, it serves as the very foundation for liberation, whether this liberation is from human weakness, frailties, whims, temptations or other evils. But

70. Al-Marghinani, *Hidaya*, vol. 2, 159. See also Ibn Rushd, *Bidaya*, vol. 1, 295; al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 310.

71. See al-Marghinani, *Hidaya*, vol. 2, 160–1.

72. Al-Sarakhsi, *Sharh*, vol. 3, 127; al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 282; al-Marghinani, *Hidaya*, vol. 2, 137; Al-Badr, *al-Qutuf al-Jiyad*, 41–2.

73. Al-Qarafi, *al-Dhakhira*, vol. 3, 408.

74. See Ibn Rushd, *Bidaya*, vol. 279–80; al-Badr, *al-Qutuf al-Jiyad*, 42–3.

75. Al-Sarakhsi, *Sharh*, vol. 3, 127; al-Shirazi, *al-Muhadhdhab* (1995), vol. 3, 282; al-Marghinani, *Hidaya*, vol. 2, 137.

among those evils rejected and resisted through the ethic of jihad is oppression and subservience. Beyond this basic dogma, it is a real challenge to make sweeping generalizations about the relationship of jihad to warfare or violence in the Islamic tradition. What I find rather remarkable is that starting in the 9th century, Muslim jurists adopt a functional approach, and attempted to influence the conduct of war rather than the commencement of war. In this context, Muslim jurists balanced practical interests against various imperatives. Importantly, however, one clearly discerns various trends and attempts to create moral absolutist parameters within which the balancing and negotiative process may take place. One suspects that the various moral trends correlated with specific socio-historical contexts as Muslim jurists continued to creatively negotiate their realities. Importantly, Muslim juristic discourses were neither purely functional nor purely moral. Even more, they were far from dogmatic or essentialist in nature.

In order to better understand the processes and nature of the juristic discourses, it is important to study the details of the juristic linguistic practice within various historical contexts. By linguistic practice, I mean the details and particulars of juristic expressions as it relates to the prevailing precedents in a certain legal culture, socio-political practices of society at large, and the normative demands placed upon and made by the jurists. If one focuses on the detailed modes of expression of the juristic debates, one can start to understand the negotiative and balancing processes engaged in by the legal system. It is clear from what has been presented in this article that essentialist positions on the nature of Islamic international law are without foundation. Muslim jurists did not focus only on promoting the interests of Muslims during the conduct of war. While it is fair to assume that Muslim jurists considered the welfare of Muslims to be a compelling good, this did not necessarily mean that such a good could be pursued without normative constraints. Muslim jurists attempted to balance between moral imperatives and functional concerns, even if this meant that the material good of Muslims would not always be given first order priority. The fact that under certain extreme circumstances, the material welfare of Muslims might ascend to the status of a first order priority, and might sacrifice particular moral constraints, does not mean that Muslim jurists were not interested in moral standards. It only meant that for Muslim jurists, negotiating morality also meant bargaining with reality. Every moral constraint, like every generalization, could founder on some very hard facts. This essay, however, has not attempted to delineate the exact boundaries that separate the moral from the functional in Muslim juristic discourses. For the most part, this essay has challenged the simplistic generalizations about Islamic law and its treatments on war. In order to understand the exact nature of the negotiative process, and the balance struck between functionality and morality, more scholars need to turn their attention to the particulars of the juristic linguistic practice.

Critically, inspired by their understanding of Islamic ethos, the classical jurists negotiated ethical values against pragmatic concerns within the epistemological constraints of their age. None of the determinations or the specific ways that they struck the balance between principles and realism or between abstract values and values

as applied to contingent realities are sacrosanct or sacred. They were all historically contingent determinations navigated by the epistemological parameters of the jurists' time and place. The reality is that terrorist organizations such as ISIS do nothing less than eviscerate and mutilate the nuanced and highly textured Islamic jurisprudential tradition.⁷⁶ The violence that terrorist groups like ISIS commit against the Islamic tradition is as morally and intellectually irresponsible as the offenses inflicted by bigoted and racist groups (the so-called Islamophobes) who portray this tradition as if spawned by vile demons instead of rational human beings. It cannot be overlooked that the subtle discourses and linguistic practices of classical Muslim jurists are part of the very building blocks of the humanitarian law of the world today.⁷⁷

76. See, al-Badr, *al-Qutuf al-Jiyad*, 51–62.

77. M. Cherif Bassiouni, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace* (Cambridge: Cambridge University Press, 2013); C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: Palgrave Macmillan Press, 1988); Marcel Boisard, *Humanism in Islam* (Baltimore, MD: American Trust Publications, 1987).

