

Armed Jihad in the Islamic Legal Tradition

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Abstract

Armed jihad in the Islamic legal tradition has been the subject of lengthy discussions, interpretations, and deliberations among Muslim jurists and scholars for over 14 centuries. Different interpretations of the nature of armed jihad as offensive or only defensive armed conflict have been advocated depending on the interpretations of certain incidents of fighting that took place between the Prophet and the enemies of the Muslims after the flight to Medina and the Qur'anic texts addressing these incidents. The Islamic rules developed by the classical Muslim jurists regulating the use of force considerably succeeded in humanizing the primitive war situations of their times. However, the different interpretations of the texts and contexts of these incidents of fighting, on the one hand, and the struggle to put limitations on the use of force in certain primitive war tactics and operations in order not to endanger the lives and property of enemy non-combatants without losing the war, on the other, resulted in advocating contradictory rules by jurists of the different schools of Islamic law. Therefore, the redevelopment of Islamic rules regulating the use of force in the contemporary war situations and in the light of the international treaties becomes a matter of urgent necessity for today's world peace and security.

Introduction

The Islamic concept of “jihad” for both Muslim and western scholars is perhaps the most complex, controversial, misunderstood and religiously, politically, historically, and culturally charged concept in Islamic thought. As the title of this article indicates, it focuses only on the justifications and regulations of “armed jihad,” the lesser jihad, in both the Sunni Islamic and western literature. More specifically, it focuses on the rules of international armed conflict between the Muslim state and its non-Muslim foreign enemies, and therefore, it does not discuss the inter-Muslim fighting or any other form of domestic hostilities treated under the Islamic legal tradition. The “greater jihad,” which is divided into (1) jihad against the self and (2) jihad against the devil will not also fall under the discussion of this article.

International armed jihad is divided into (1) jihad *al-daf'* (defensive war), which is a *fard 'ayn* (personal duty of every capable person) and (2) jihad *al-talab* (a militarized missionary campaign initiated by Muslims in non-Muslim territories in order to preach Islam), which is a *fard kifayah* (collective duty on the Muslims, which may be fulfilled if sufficient numbers perform it). Jihad becomes a *fard 'ayn* when the enemy invades Muslim territory, while it is a *fard kifayah* if it occurs outside Muslim territory. The fact that the Islamic legal heritage was developed by the classical Muslim jurists who lived under a state system for all Muslims, the Caliphate, dictated this designation of international war as war with non-Muslims. This is one of the reasons jihad is sometimes portrayed by some non-Muslims as a war against the *kuffār* “infidels” or a “holy war” to convert non-Muslims to Islam.

Justifications of Armed Jihad

The complexity and controversy surrounding the subject of armed jihad in the Islamic legal tradition arise from the fact that Muslim scholars differed in their interpretations of the scriptural bases, the Qur'an and Hadith, governing particularly the Islamic *jus ad bellum*, the justifications of armed jihad. The *Hijrah* (flight) of the Muslims from the birthplace of Islam, Mecca, to Medina in 622, not only marks the beginning of the Islamic era but also divides the texts of the Qur'an accordingly as Meccan and Medinan texts. A number of Qur'anic verses address the relationship between the Muslims and their enemies in both periods. Over 114 verses attributed to the Meccan era instruct the Muslims to be patient and not to resort to the use of violence in response to the hostility and religious persecution they suffer from at the hands of the Meccan polytheists. The following Medinan verses address the justifications for armed jihad and therefore the incidents of the fighting between the Muslims and their enemies, which constitute the context of these revelations, must be examined in order to partially avoid the confusion surrounding the Islamic justifications for armed jihad: 2:190–194, 216–217; 4:75–76; 8:38–39, 61; 9:5, 29; 22:39–40; and 60:8–9. This attempt to examine the justifications for armed jihad will face many challenges including the following: (1) Some of the reports about these fighting incidents do not address the justifications for, or the attempt to resort to, the use of force. This is beside the fact that some of the accounts given in these reports are dubious and contradictory. (2) These Qur'anic texts scattered throughout several chapters are not arranged chronologically. Since these texts give different commands regarding the resort to armed jihad in different situations and, hence, in the light of the controversial theory of abrogation, which indicates that the latter text abrogates the previous one/s, armed jihad is believed by some to be offensive and for others only defensive, war. (3) The following verses make *fitnah*—religious persecution, according to some exegetes/jurists, or unbelief in God, according to others—the justification for going to armed jihad: 2:191, 92, 217; 8:39. Different interpretations of the concept of *fitnah* makes jihad either a defensive war to stop the religious persecution of the Muslims, according to the first interpretation or an offensive war until (1) unbelievers convert to Islam and (2) the People of the Book either accept Islam or pay the *jizyah* (tax levied to exempt eligible males from conscription), according to the second interpretation.

Therefore, the justifications of the resort to armed jihad are determined in Islamic thought, on the one hand, according to certain methodological and hermeneutical approaches adopted by the classical Muslim jurists/exegetes that focus on the methodology of abrogation in order to determine what is the last revelation on the resort to the use of force in the Qur'an and/or the interpretations of the concept of *fitnah*. On the other hand, the justifications are determined according to another approach adopted by many modern Muslim scholars that takes into consideration the totality of the message of Islam and the changing nature of the modern world that agrees on the prohibition of religious persecution unlike that of the context of their classical predecessors. Additionally, many modern Muslim scholars criticize the unwarranted excessive and ahistorical use of the theory of abrogation by classical Muslim jurists. In other words, they argue that each ruling included in Qur'anic texts intends to achieve a certain objective in a certain context, and therefore, it is not necessarily always true that a previous ruling is permanently abrogated or has become null and void but merely a different context or a new situation requires a new ruling. Therefore, such unwarranted excessive use of the theory of abrogation resulted in formulating contradictory and controversial Islamic rulings.

Introducing a new approach to the subject in the 20th century that focuses on the Islamic justifications to the resort to armed jihad, modern Muslim scholars unlike their predecessors

who were mainly concerned with the Islamic *jus in bello* (rules regulating the conduct during war), stress that peace is the normal state of relations with non-Muslims. First, they distinguish between the Islamic law of war and the wars waged by Muslim rulers throughout history, which are not necessarily justified according to Islamic law. Some of the wars waged by the Islamic state throughout Islamic history, they argue, were waged for worldly gains and not for the spread of Islam. Second, after the death of the Prophet, the caliphs resorted in the first century of Islam to jihad *al-ṭalab* because, first, preaching Islam in non-Muslim territories at the time was not secured and, second, at present, the Muslim states do not need to resort to jihad *al-ṭalab* since none can prevent the preaching of Islam, and hence, any Muslim can preach Islam via the Internet, TV, and other means of mass communication. Third, these early wars of the Muslim state were not for forcing people to convert to Islam but to liberate oppressed peoples from the injustice of their rulers.

The majority of classical and contemporary Muslim jurists including the Ḥanafīs, Mālikīs, and Ḥanbalīs agree that the Islamic justifications for armed jihad are aggression of the enemies and the religious persecution of the Muslims. These justifications render armed jihad as a defensive war, although they added the prevention of Muslim preachers from calling people to Islam in non-Muslim territories as one of the justifications for going to war. Grounding their opinion on the theory of abrogation that texts 9:5¹ and 9:29² abrogated all previous texts on the subject, a minority of the classical Muslim jurists including al-Shāfi'ī (d. 204/820), the eponymous founder of the Shāfi'ī school, and Ibn azm (d. 456/1064) of the extinct Zāhirī school maintain that armed jihad is justified against non-Muslims until they believe in Islam or pay the *jizyah*. (Afsaruddin 2007, p. 167)

As for the case of western literature, James Turner Johnson rightly points out that “between western and Islamic culture there is possibly no other single issue at the same time as divisive or as poorly understood as that of jihad.” (Johnson 1997, p. 19) He relates this situation to the fact that western “Scholarship on Islamic normative tradition on war is considerably less well developed.” (Johnson 1997, p. 22) This poor understanding is a consequence of what Fred Donner describes as the lack of “preliminary work” on the subject of jihad in western literature (Donner 1991, p. 57). As can be partly seen from the discussion above, the treatment of the subject of armed jihad is highly technical and complicated because highly specialized, archaic and controversial disciplines and methodologies are used by Muslim exegetes and jurists in interpreting the scriptural bases for the subject and, accordingly, formulating the Islamic laws of armed jihad. The attempt to achieve this target necessitates training in a number of Islamic sciences and disciplines including Arabic linguistics, historiography, Qur'ānic studies, Islamic law, and Islamic legal methods and methodologies.

In fact, three different explanations of the aims of armed jihad have been given in western literature. First, armed jihad has been portrayed in western literature as a holy war to convert non-Muslims to Islam. This description echoes the concept of the “Crusade” bearing in mind the prevalent belief in western literature that the religion of Islam is heavily influenced by Judaism and Christianity. This classical understanding of jihad in western literature has long gone nearly unchallenged and was in fact reinforced in the strongly influential book of Majid Khadduri titled *War and Peace in the Law of Islam* (1955). The influence of Khadduri's ideas can be easily noticed in the writings of subsequent generations in the west. The same line of thought that portrays jihad as a holy war is repeated, for example, in Reuven Firestone's *Jihād: The Origin of Holy War in Islam* (1999). Although Firestone makes an attempt to study the primary sources, his attempt to study the prophetic biographical literature stops with the first incident of fighting, the Battle of Badr in March 624. And based on a mistaken reading of this battle only, he concludes that armed jihad against non-Muslims became

“required virtually without restriction.” (Firestone 1999, p. 114) His study of the Qur’anic texts yields the same conclusion.

However, two other influential authors have challenged this stereotypical presentation of armed jihad as a holy war: W. Montgomery Watt (d. 2006) and Rudolph Peters. Watt’s authoritative works on the subject include *Muhammad at Mecca* and *Muhammad at Medina* and their abridgement in his *Muhammad: Prophet and Statesman*, as well as his *Islamic Political Thought: Basic Concepts*. The great contribution Watt’s writings made to the study of the subject is his careful examination in his *Muhammad at Medina* of the incidents of hostility between the Muslims and their enemies during the Prophet’s lifetime in Medina. The point here is that, based on these incidents of hostility and the Qur’anic texts, which address them, Muslim jurists formulated the Islamic law of armed jihad. Watt advocates that the aim of “Most of the participants in the [early Islamic jihad] expeditions probably thought of nothing more than booty... There was no thought of spreading the religion of Islam.” (Watt 1980, p. 18) Hence, Watt here clearly rejects the claim that armed jihad is a holy war and concludes that participants in early offensive jihad incidents were motivated by the pursuit of economic resources.

Among his other writings, Peters’ PhD thesis on the subject, which is published under the title *Islam and Colonialism: The Doctrine of Jihad in Modern History* (1979), is also very authoritative because he, unlike Khadduri, studies many classical and modern Islamic legal sources. The aim of jihad, Peters concludes, is “the expansion—and also defense—of the Islamic state.” (Peters 1977, p. 3) Therefore, second, according to Watt and Peters, the aims of offensive armed jihad are political and economic and, thus, not religious. Furthermore, third, it was even bizarrely suggested that the pursuit of sex was one of the motives of those who participated in the early armed jihad incidents so that they can capture female slaves. (Fregosi 1998, pp. 66, 68).

It should be added here that Sherman A. Jackson’s “Jihad and the Modern World” (2002) gave an expert legal treatment of the classical and modern Islamic *jus ad bellum*. Jackson’s analysis of the Islamic legal system and the Qur’anic texts on the subject, on the one hand, and the comparison between the contexts of these texts and that of the modern world, on the other leads him to conclude “that a prevailing ‘state of war,’ rather than difference of religion, was the *raison d’être* of jihad and that this ‘state of war’ has given way in modern times to a global ‘state of peace’ that rejects the unwarranted violation of the territorial sovereignty of all nations.” (Jackson 2002, p. 25)

Regulations of Armed Jihad

Fortunately, studying the Islamic *jus in bello* can clarify the confusion and misunderstanding surrounding the Islamic justifications for the resort to armed jihad. The study of classical Islamic law books indicates that Muslim jurists were mainly concerned with regulating the conduct of Muslim combatants during war and not expounding the Islamic justifications for going to war. Perhaps this is because they were responding to a situation where, as Jackson describes above, “a prevailing ‘state of war’” was the norm in international relations in the absence of peace treaties. In fact, they extensively formulated the rules that regulate the context of the primitive war operations of their time.

Although classical Muslim jurists of the four Sunni schools of Islamic law developed many contradictory rulings regulating the conduct of Muslim combatants during war, they largely succeeded in humanizing armed jihad. Apart from regulating the division of the spoils, the treatment of classical Muslim jurists of the rules of armed jihad demonstrates that their primary concerns are, first, not endangering the lives of non-combatants and, second, not causing damage to enemy property unless dictated by military necessity or as collateral damage.

There are a number of issues treated by the classical Muslim jurists that satisfy these two concerns, such as non-combatant immunity, the permissibility of the use of certain primitive indiscriminate weapons, attacking the enemy by night, shooting at human shields, and quarter and safe conduct. Based on the Prophetic tradition, classical Muslim jurists developed a full-blown doctrine of non-combatant immunity. The Prophet prohibited targeting five categories of non-combatants in war: women, children, the aged, the clergy, and *al-‘asīf* (any hired person). The list mentioned by name in the classical Islamic law books of those granted non-combatant immunity is extended to include the blind, the sick, the incapacitated, the insane, farmers, traders, and craftsmen. The guiding principle here for all those enjoying non-combatant immunity is that they do not involve in the hostilities, otherwise they forfeit the right to immunity. Thus, classical Muslim jurists made a clear distinction between what they called *al-muqātilah/ahl al-qitāl/al-muḥāribah* (combatants, fighters/warriors) and *ghayr al-muqātilah/ghayr al-muḥāribah* (non-combatants, non-fighters/non-warriors). Fighting in armed jihad is therefore justified only against enemy combatants, not against unbelievers *per se*. The confusion regarding the place of unbelief in the discussion of the subject here is that it did happen that the enemy of the early Muslims were polytheists who did not only disbelieve in the religion of Islam but also were hostile towards it since its advent. The prohibition of targeting non-combatants in war including clergy shows that the claim that armed jihad is a “holy war” to convert non-Muslims is groundless; otherwise, non-Muslims—whether combatants or not—would be left with no choice but to accept Islam or be put to death.

Concerning the permissibility of the use of certain primitive indiscriminate weapons, Muslim jurists disagreed over the permissibility of the use of poison-tipped arrows, while some totally prohibited it, others merely disliked it partly because of the fear that the enemy could shoot them back at the Muslims. However, the renowned *anafi* jurist al-Shaybani (d. 189/804–5) permitted the use of such weapons because of their effectiveness in securing victory in war. The point here is that, as can be seen also from the discussion below, classical Muslim jurists pronounced contradictory rulings because while some give priority to the limitation on the use of force in order not to endanger the lives of non-combatants, others give priority to the military necessity of winning wars.

Discussions of *al-bayāt* (night attack) indicate also the fear that the lives of enemy non-combatants could be endangered if they were attacked during the night, particularly, because in this situation, indiscriminate weapons such as mangonels and fire would be shot at them. The majority of the jurists permitted *bayāt* on the grounds that any casualties among non-combatants would be justified as collateral damage, while the minority of jurists maintained that it would still be reprehensible. Al-Shāfi‘ī was of the view that discussions of the permissibility of *bayāt* were driven by the fear that Muslim soldiers could be ambushed by the enemy or hit by friendly fire. (Al-Shāfi‘ī 1973, Vol. 4, p. 252)

The Muslim jurists’ deliberations regarding the permissibility of *tatarrus*, shooting at human shields, produced similar results where both the permissibility and impermissibility were advocated in different situations by various jurists of the different schools of Islamic law (see, for example, Al-Dawoody, pp. 116–118). The conflicting rulings advocated here by the jurists were due to their different interpretations of certain Islamic texts, on the one hand, and their weighing the likelihood of endangering the lives of innocent non-combatants against the military necessity of winning the war against the enemy, on the other. Such contradictory rulings advocated by classical Muslim jurists regarding the permissibility of attacking the enemy by night and shooting at human shields could be, and have already been, misused to justify terrorist attacks against innocent civilians under the pretext of collateral damage by making analogy to the cases of *bayāt* and *tatarrus*.

Concerning the permissibility of the destruction of enemy property during the course of acts of hostility, the jurists based their treatment on this issue on, first, certain incident in one of the Prophet's encounters with the enemy, which is addressed in the Qur'ān 59:5 and, second, the ten commands given by the first caliph Abū Bakr (r. 632–634) to one of his army leaders, which include the following: “do not cut down fruit-bearing trees, do not destroy buildings, do not slaughter a sheep or a camel except for food, and do not burn or drown palm trees”. (see, for example, Bennoune 1994, p. 626; Bassiouni 2000, p. 9) Once more, the jurists attempted to reconcile between these authoritative Islamic texts, on the one hand, and the dictates of the military necessity of winning wars, on the other. Notwithstanding of the typical disagreements among jurists, their lengthy deliberations regarding the permissibility of damaging enemy property, such as moveable and immovable property, religious sites, horses, crops, bees, pigs, wine, and books, show the sanctity of enemy property and that wanton destruction of enemy property is prohibited during acts of hostility. Furthermore, at the pragmatic level, Muslim soldiers would generally be dissuaded from causing wanton destruction because seized enemy property becomes spoils of war after the cessation of hostilities. Generally speaking, the jurists argue that damage of enemy property is permissible only in cases of military necessity or in proportionate reciprocity.

In light of the classical Muslim jurists' deliberations regulating the use of force in the context of their primitive war situations, it is lamentable that, first, contemporary Muslim scholars have not yet given adequate attention to the discussion of the Islamic legal position on the acquisition/use of Weapons of Mass Destruction. Sohail H. Hashmi, however, raises the discussion in his “Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation” (2004). Second, western scholars have not also adequately studied the Islamic *jus in bello* rules, which, as shown above, would have disproved the claim that armed jihad is an all-out war against anyone who refuses to accept Islam. However, few works are worthy of praise here, namely, Abou El Fadl, “The Rules of Killing at War: An Inquiry into Classical Sources” (1999), Hashmi, “Saving and Taking Life in War: Three Modern Muslim Views” (1999), Kelsay, *Islam and War: A Study in Comparative Ethics* (1993, pp. 57–76), Johnson, *The Holy War Idea in Western and Islamic Traditions* (1997, pp. 115–127) and his *Morality and Contemporary Warfare* (1999, pp. 180–186), and Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (2011).

It is worth adding here that the classical Islamic rules of armed conflict prohibit mutilation and show a high degree of respect to the bodies of the enemy, and thus, it can be safely said here that these rules are in harmony with Article 17 of the First Geneva Convention (1949). Nonetheless, this did not prevent a minority of jurists from permitting mutilation in cases of military necessity and reciprocity. The same can be said in the case of the treatment of prisoners of war. A number of Muslim jurists argue that prisoners of war must be graciously set free or exchanged for Muslim prisoners of war or for ransom. This ruling is grounding in the Qur'ānic text commanding the Muslims to “set them [prisoners of war] free either graciously or by ransom”³, which they argue abrogated other texts on the subjects and the precedents set by the Prophet before the revelation of the text. However, the majority of jurists maintained that the ruling on the prisoners of war must fulfill the public interest of the Muslims and is left to the discretion of the Muslim ruler who is required to choose from the following four options: execution, enslavement, graciously setting them free, or exchanging them for Muslim prisoners of war or for ransom. However, Abū anīfah (d. 150/767) limits the Muslim ruler's choice here to only execution or enslavement because the other two choices would strengthen the enemy. (see, for example, Thomas, pp. 78–101; Salaymeh, pp. 521–544; Al-Dawoody, pp. 136–141)

The system of *amān* (quarter and safe conduct) reinforces the nature of armed jihad explained above. *Amān* in the sense of quarter is a contract that guarantees the protection of the person and property of enemy combatants during acts of hostilities, while in the sense of safe conduct *amān* guarantees the protection of the person and property of any citizens of an enemy state during their stay in the Muslim state whether for business, education, tourism, etc. The interesting point here is that classical Muslim jurists were extremely generous in granting *amān* to the extent that it can be said that it is granted automatically to any enemy belligerent who is not actually fighting or to any citizen of an enemy state who wants to enter the Muslim state. The objective of *amān* in the words of some classical Muslim jurists is *ḥaḥn al-dam* (prevention of bloodshed and protection of life). (see, for example, al-Shirbīnī, *Mughnī*, Vol. 4, p. 237; al-Ṣāwī, 1995, Vol. 2, p. 185). The *amān* system shows that there is no ground for targeting an enemy belligerent unless he is actually fighting and that even during the state of armed jihad, the Muslim state is obliged to protect the rights of the citizens of an enemy state to pursue education, business, or any non-hostile act inside the Muslim state. However, the jurists agreed that trading with the citizens of an enemy state in commodities that will strengthen the enemy is prohibited in order not to cause any detriment to the Muslim state/army.

Conclusion

The Islamic law of armed jihad is the product of certain historical precedents, texts, and interpretations and reinterpretations of Muslim scholars throughout history. This continued process of interpretations and the legal methodologies applied in it as well as the changing world and war situations have produced different justifications for going to armed jihad and, more importantly now, contradictory rules regulating the conduct of Muslim soldiers during war. In spite of these contradictory rules, which resulted from the disagreements in the interpretations of the texts, the above brief discussion of the justifications and regulations for going to armed jihad demonstrates that classical Muslim jurists developed a just war tradition that succeeded considerably in humanizing the primitive war situations of their time. However, some of the opinions referenced above by individual classical jurists, such as those permitting shooting at human shields and attacking the enemy by night, must be addressed and clarified by modern Muslim legal bodies in light of the contemporary war situations if the misuse of such Islamic rules by terrorists to justify the indiscriminate killing of innocent civilians is to be avoided. The fact that Muslim perpetrators of acts of terrorism resort to the works written by classical Muslims jurists and exegetes over several centuries ago to justify acts of indiscriminate killing of innocent civilians indicates the significant role Islamic law still plays in the lives of many Muslims today, and this will likely continue to be the case because Islamic law, in many of its areas, is a self-binding legal system. Consequently, in conclusion, revisiting and developing Islamic rules regulating the recourse to the use of force in the war situations of our world today becomes not only a matter of scholarly necessity but also a matter of urgent necessity for the peace and security of today's world, of which Muslims constitute about one fourth of the population—and a large number of conflicts today involve Muslims. To give an example, the participation of the Muslim states in the international society's military intervention to rescue oppressed religious or ethnic minorities or to put an end to massacres, crimes against humanity, and genocides is a religious obligation according to the dictates of the texts of the Qur'an (4:75–76).

Short Biography

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Notes

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¹ “When the Sacred Months have passed, kill the polytheists wherever you find them and capture them and besiege them and wait for them in every place of ambush; but if they repent and perform prayer and give the poor- due, then leave them their way; surely God is Oft- Forgiving, Oft- Merciful” (Qur’ān 9:5) All translations of the Qur’ānic texts are mine.

² “Fight those who do not believe in God, nor the Last Day, nor prohibit what God and His messenger prohibited, nor follow the religion of the truth, from among those who were given the scripture until they pay the *jizyah ‘an yad* (willingly) and they are *sāghirūn* (submissive to the Islamic rule)” (Qur’ān 9:29)

³ Qur’ān 47:4.

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