

Jihad, Jihadi Organizations and Liberation Struggle

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ABSTRACT

Islamic law does not envisage war against non-Muslims qua non-Muslims. The legal cause triggering the obligatory duty of jihad is aggression against Islam or Muslims. The law of jihad becomes operative when this cause of obligation exists, all the conditions are fulfilled and there is no legal obstacle; so that jihad becomes obligatory only in extreme conditions, when a threat to Islam or Muslims cannot be neutralized except by the use of force.

The general rule of Islamic law is that jihad is to be fought under the authority and control of the government. Simultaneously, however, Islamic law gives the individuals the right to private defense. When many individuals face a common threat, Islamic law encourages them to develop a mechanism for collectively defending each other against oppression. This becomes the *raison d'etre* for jihadi organizations working against occupation and alien domination.

If armed groups provide support to liberation struggles in foreign territories, Islamic law holds the home government of such groups responsible for their activities even if such groups are operating without its express permission. However, the attribution of this responsibility rests on the crucial condition that the group operates from a territory under the effective control of such government.

Introduction

The present paper examines the role of jihadi organizations in liberation struggles from the perspective of Islamic law. It focuses only on legal questions relating to liberation struggles and, without in any sense undermining the work of modern scholars, it explores the classical manuals of Islamic law (*fiqh*) to find answers to these questions so as to bring forth a purely "Muslim perspective" based on the methodology used by the Muslim jurists (*fuqaha'*) for deriving rules and principles from the proper sources of Islamic law.

The paper is divided into two parts: the first focuses on the meaning and scope of jihad, the ratio of war in Islamic law and the nature of relationship between Muslim and non-Muslims; the second part examines the role of jihadi organizations in armed resistance against oppression and responsibility of the home government for the activities of such organizations in foreign territories.

PART ONE: THE DOCTRINE OF JIHAD IN ISLAMIC LAW

In this part, we will first explore the meaning of the term “jihad” in Islamic legal literature after which we will examine the nature of relationship between Muslims and non-Muslims. Following this, we will find out the ratio of war in Islamic law.

1.1 Literal and Technical Meaning of Jihad

The word “jihad” is derived from the basic root of j-h-d, which means struggle or endeavor.¹ Thus, it denotes the meaning of striving hard; forbearing hardships for a great cause. In the legal lexicon of Islam, the term jihad has two meanings, one narrower and the other wider. In its wider sense, jihad covers every kind of effort for the purpose of bringing one’s individual life as well as the collective life of the community in accord with the Divine law.² In its narrower sense, jihad is used in the meaning of qital (war) i.e. war for the purposes allowed, or prescribed, by the Divine law.³ Thus, qital is a specific form of jihad.

In the Qur’an we find both usages of the term. In the chapters (suwar) of the Qur’an which were revealed before the migration of the Prophet (upon him blessings and peace) to Madinah, derivatives of the root j-h-d are used in its wider sense.⁴ In the period after the migration to Madinah, derivatives of the root j-h-d, more often than not, have been used to denote qital.⁵

Muslim scholars through the ages have maintained by consensus that jihad is not confined to armed struggle. There is no notable scholar who denies this. Even scholars who are generally considered ‘radicals’, such as Ibn Taymiyyah, have acknowledged this wider doctrine of jihad. Elaborating the meaning of jihad, Ibn Taymiyyah states:

Jihad is either performed by the heart, such as the intention to offer every sacrifice; or through preaching and calling towards the religion of Islam; or making the Truth clear to the wrongdoers and answering their objections and questions; or planning and devising means for the benefits of Islam and Muslims; or by taking part in actual combat. Thus, jihad is obligatory on different persons in different ways in accordance with their capacity and capability.⁶

It is also evident that Muslims scholars have been using the word jihad and qital interchangeably. For instance, in classical works on hadith and fiqh, we find the chapter that deals with jus ad bellum and jus in bello of Islam titled the ‘Kitab al Jihad’.

1.2 Division of the World into the Domain of Islam and the Domain of

War

It is well known that Muslim jurists divided the world into the Domain of Islam (Dar al-Islam) and the Domain of War (Dar al-Harb). There is no denying the fact that to comprehend the doctrine of jihad as expounded by the jurists, it is important to understand the meaning and implications of this division. Unfortunately, however, the works of the jurists are presently not receiving the attention they deserve, often because they are considered outdated and out of tune with the realities of the time. However, some recent developments in the Muslim world have made it evident that the ideas and concepts of the jurists continue to impact the minds of a very large number of Muslims.⁷

We have demonstrated elsewhere that in the present times the real purport of this division has generally been misunderstood. It is often assumed that there is a direct and necessary link between the division of the world into two domains and the view that the normal relationship between dar al-Islam and dar al-harb is that of hostility. In view of the above, it is often contended that one either has to accept both the doctrines or to reject both of them.⁸ Hence, those modern scholars who believe that the two are inextricably interrelated are of the opinion that this division envisaged by Muslims jurists is of a permanent character.⁹ Those who reject the theory that the normal international relationship between Muslim and non-Muslim political entities is that of war, however, argue that the jurists made this division keeping in view the realities of their time and, hence, it has no permanence.¹⁰ As opposed to these two views, we are of the considered opinion that the division of the world into dar al-Islam and dar al-harb was based on the principle of territorial jurisdiction of the courts of the Islamic state, and that it had no direct and causal link with the so-called “theory of perpetual war” between Muslims and non-Muslims.¹¹ To further substantiate this view, we will analyze the ratio of war in Islamic law.

1.3 The Ratio of War in Islamic Law

According to the overwhelming majority of the Muslim jurists, Muslims may engage in fighting against non-Muslims who act with belligerency towards them, and not against others. However, there are some texts of the Qur’an and the Sunnah, which refer to a conflict between Islam and disbelief on the ideological plane. These texts dealing with ideological discordance are erroneously taken to signify military confrontation between Muslims and non-Muslims. We will examine this issue in a bit detail.

1.3.1 Ideological Discordance or Military Confrontation between Muslims and Non-Muslims?

One of the oft-quoted verses of the Qur’an for proving a perpetual war between Muslims and non-Muslims is in the sixtieth chapter:

You have a good example in Abraham and his companions: they said to their people: “We totally dissociate ourselves from you, and from the deities that you worship instead of Allah. We renounce you and there has come to be enmity and hatred between us and you forever until you ye believe in Allah, the One True God.” (Qur’an, 60: 4)¹²

However, it is also evident from the Qur’an and the Sunnah that this encounter essentially takes place on the ideological plane and does not necessitate perpetual hostility between Muslims and non-Muslims. Significantly, therefore, we find Muslims being told in the same chapter that they may have different kinds of relationship with different kinds of non-Muslims depending upon their position towards Muslims:

Allah does not forbid that you be kind and just to those who did not fight against you on account of religion, nor drove you out of your homes. Surely Allah loves those who are equitable. Allah only forbids you to be friends with those who have fought against you on account of religion and who have driven you out of your homes and have abetted in your expulsion. And any who makes friends with them, they are the wrong-doers. (Qur’an, 60: 8–9)

Several other verses of the Qur’an and traditions of the Prophet (upon him blessings and peace) also substantiate this contention. For instance, the Qur’an declares that one of the grounds for war with the Makkans was that they persecuted those who embraced Islam: “And fight them until the persecution ends, and the way prescribed by Allah—the whole of it—prevails. But if they give up persecution, then know well that Allah sees what they do.” (Qur’an 8: 39).¹³ Similarly, it is well known that Muslims were allowed to use force only after they had migrated to Madinah, and that too only against the transgressors: “Fight in the way of Allah those who fight you but do not transgress limits; for Allah does not love transgressors.” (Qur’an, 2: 190).

Some Muslim jurists believe that the prohibition “do not transgress limits” (la ta’tadu) in the verse above implies that Muslims should not initiate hostilities. According to other jurists, this prohibition also includes prohibition of mutilation of the dead bodies of enemy soldiers and maltreatment of prisoners of war. Yet another group of Muslim jurists believes that this prohibition also entails that Muslims must refrain from killing those who are not capable of fighting; such as women, children, the aged, monks and other non-combatants.¹⁴

1.3.2 The Ratio of War is Aggression, Not Disbelief.

It is on the basis of these and other similar texts that the majority of the Muslim jurists declared that the ratio of war (‘illatal-qital) in Islamic law is not disbelief but muharabah (waging war against Islam or Muslims).¹⁵ In other

words, Muslims are not allowed to take up arms against all non-Muslims just because of their disbelief in Islam. Rather, they are allowed to use force only against those who wage war against them. Al-Marghinani, the author of the famous Hanafi text *al-Hidayah*, elaborating the cause of war states:

Mere disbelief [in Islam] does not of itself legalize killing. Rather, it is *muharabah* (aggression) that makes it permissible to kill the *muharib* (aggressor). That is why it is not allowed to kill women, children, the aged, the handicapped and others who do not have the capability to fight.¹⁶

Moreover, if disbelief were the cause of *qital*, Islamic law would not have guaranteed protection to non-Muslim citizens of the Islamic state. Above all, the view that disbelief provides reason for war leads to compulsion in matters of religion which violates a fundamental Qur’anic principle.¹⁷ According to the Qur’anic worldview, human beings have been given the liberty of submitting to or rebelling against the law of God as a trial for a temporal existence.¹⁸ This test necessitates free choice, without which it would have no meaning: “There is no compulsion in religion. The Right Way stands clearly distinguished from the wrong. Hence, he who rejects the evil ones and believes in Allah has indeed taken hold of the firm, unbreakable handle. And Allah (Whom he has held for support) is All-Hearing, All-Knowing.” (Qur’an, 2: 256).

The Qur’an also explicitly states that the use of coercive means to resolve differences in matters of religious belief negates the very purpose of granting man the freedom of choice. “Had your Lord so willed, all those who are on earth would have believed. Will you then force people into believing?” (Qur’an., 10: 99).¹⁹ Islam is opposed to religious persecution and requires Muslims to fight against those who persecute and coerce people to accept a certain faith. (Qur’an 8: 39). The Prophet (upon him blessings and peace) was told that he should call people to God’s way “with wisdom and goodly exhortation” and that he should reason with the opponents “in the best manner possible.” If, however, some of them reject his call, he should leave their affair to God: “Surely your Lord is best aware of him who has strayed away from His Path, and He is best aware of those who are guided to the Right Way.” (Qur’an 16: 125–128).²⁰ Thus, the purpose of the obligation of *jihad* according to Sarakhsi, one of the great jurists of all time, is “to enable Muslims to live in accordance with their religion.”²¹

1.3.3 Ratio, Conditions and Obstacles: The Union of Primary and

Secondary Rules

Another point worth considering is that under the well-established principles of Islamic law an act cannot become obligatory unless it is proved that the “cause” (*‘illah*) of obligation is found, all the prerequisites (*shurut*) have been fulfilled and no legal obstacle (*mani‘*) exists.²² For instance, when Muslim

population of a non-Muslim state becomes the target of religious persecution, the cause of obligation is found. However, the existence of a peace treaty is a legal obstacle in the presence of which no act of war can be committed against the parties to such treaty. Similarly, one of the conditions of the obligation of jihad is “capability” (istita’ah).²³ Hence, different situations will attract different rules; and it is by keeping in view the peculiar circumstances of each case that the jurists will decide if the use of force is prohibited, abominable, disapproved, permissible, recommended, obligatory to a degree of likelihood or definitively obligatory.

Part Two:

The Role of Jihadi Organizations in Liberation Struggles

Use of force the right of self-determination can be seen from three different, though interrelated, perspectives. Firstly, can a state use force against people striving for self-determination? Secondly, do people have the right to take up arms and use force for vindication of their right to self-determination? Thirdly, can other states provide military support to these people? The first of these issues is beyond the scope of the present paper. Hence, we will concentrate only on the last two issues.

2.1 Islamic Law and Use of Force for the Right of Self-determination

The Muslim jurists analyze the issue of armed liberation struggle from four different perspectives:

- a) Non-Muslims seeking liberation from non-Muslims;
- b) Non-Muslims seeking liberation from Muslims;
- c) Muslims seeking liberation from Muslims; and
- d) Muslims seeking liberation from non-Muslims.

The first of these cases was not of direct concern for the Muslim jurists. Hence, they discuss it only in passing.²⁴ The second case is a situation of revolt by non-Muslim permanent residents of an Islamic territory (dhimmis). The Muslim jurists apply the general law of war on this situation.²⁵ The third case is that of rebellion by Muslims against a Muslim ruler.²⁶ These three cases are beyond the scope of the present paper. We will concentrate only on the last case: Muslims seeking liberation from non-Muslims. Before discussing the role Islamic law which recognizes for jihadi organizations in such a case, it is important to examine the issue of the governmental control of all jihadi ventures.

2.1.1 Jihad and the Authority of the Government

Some contemporary Muslim scholars are of the opinion that jihad is the prerogative of the state and that there is no room in Islamic law for “private jihad”. They argue that the Prophet (upon him blessings and peace) never took up arms in Makkah even when Muslims were bitterly persecuted; and war was allowed only after Muslims migrated to Madinah and established an Islamic

State. Thus, the options available to those facing persecution in non-Muslim states are either to migrate to, or seek the support of, an Islamic State. This approach seems absurd to some and idealistic to others.

In fact, the rules of jihad as derived and elaborated by the jurists are based primarily on the presumption that jihad is to be fought under the authority and command of the government.²⁷ Thus, Abu Yusuf, the disciple of Abu Hanifah, categorically declared:

No troops should go for war except with the permission of the ruler, or of one he has appointed as the commander of the troops. No Muslim soldiers should attack a non-Muslim soldier nor should he challenge him, except with the permission of the commander of the troops.²⁸

Shaybani declared that this principle holds true even for non-Muslims insofar as if their troops attack the Islamic State without the permission of the legitimate authority, it would be considered their personal act and would not be taken as a declaration of war from the non-Muslim state. He emphasized that while the Islamic State would punish these attackers, there would need to be a confirmation from the enemy whether the act was perpetrated by such individuals in their personal capacity.²⁹ The jurists also categorically declare that the ruler alone has the authority to declare war. Ibn Qudamah, the famous Hanbali jurist, writes: “The issue of Jihad is referred to the ruler and his *ijtihad* and the subjects are bound to obey his commands in what he sees in this regard.”³⁰ The jurists further hold that when the ruler appoints someone as the commander, he should be obeyed in all respects and that none should “speak about anything” without his permission.³¹

Many traditions of the Prophet (upon him blessings and peace) clearly establish this rule. For instance, he is reported to have declared:

He who obeys me, obeys Allah, and he who disobeys me, disobeys Allah. He, who obeys the chief, obeys me, and he who disobeys the chief, disobeys me. The ruler is a shield behind whom Muslims fight, and they seek his protection. If the ruler orders people with righteousness and rules justly, he will be rewarded for it, and if he does the opposite, he will be held responsible.³²

It is also mentioned in certain traditions that jihad is to be fought under the command of the ruler even if he is one known for faults as to his character:

Jihad in the path of Allah is incumbent on you along with every ruler, whether he is pious or impious; the prayer is obligatory on you behind every believer, pious or impious; the prayer is incumbent upon every Muslim, pious and impious, even if he commits major sins.³³

Another tradition of the Prophet (upon him blessings and peace) reports: “None will enter Paradise but a Muslim, and Allah may support this religion even through a disobedient man.”³⁴

It must be noted, however, that the jurists, unlike the modern scholars, consider jihad a duty and not a prerogative of the government.³⁵ Similarly, they categorically say that the ruler must always act to secure the interests of the community.³⁶

Moreover, the jurists do not distinguish between the so-called “offensive” and “defensive” jihad. As such, jihad is to be fought under the command of government, regardless of whether it is “offensive” or “defensive”. Ibn Qudamah is explicit on this issue:

When the enemy attacks [the Muslim territory], jihad becomes obligatory upon every individual... Hence, it is not permissible [in such a situation] for any person to sit [in home] avoiding jihad. If this is established, it must also be noted that they should not go [fighting] without the permission of the ruler because he is authorized to decide in matters of war and he better knows about the strength of the enemy as well as about their places and tactics. As such, his opinion should be followed because this is a safer plan.

Hence, the general rule of Islamic law negates private jihadi ventures. However, like the other general rules, this rule also has some exceptions. Unless we discuss these exceptions, the picture will not be complete.

2.1.2 The Exception of Private Defense

Islamic law gives individuals the right to use force in self-defense. When Muslims were persecuted in Makkah, they were initially asked to be patient and steadfast. At a later stage, even before migration to Madinah, they were allowed to use force in private defense: “If you take retribution, then do so in proportion to the wrong done to you. But if you can bear such conduct with patience, indeed that is best for the steadfast.”(Qur’an, 16:126). The Prophet (upon him blessings and peace) is reported to have said: “If someone’s property is being taken from him unjustly and he fights for it and is killed, he is a martyr.”³⁷ A more detailed version of this tradition is: “He who is killed while guarding his property is a martyr; he who is killed while defending himself is a martyr; he who is killed defending his religion is a martyr, and he who dies protecting his family is a martyr.”³⁸ In yet another version the wording is more general: “He who is killed defending his right is a martyr.”³⁹ In another version, the narrators report a dialogue between the Prophet (upon him blessings and peace) and a companion. The companion asks questions and the Prophet gives answers:

- “What if a person wants to snatch my property?”
- “Do not let him do so.”
- “What if he fights me?”
- “You fight him too.”

- “What if I kill him?”
- “He will be in Hell.”
- “What if he kills me?”
- “You will be in Paradise.”⁴⁰

It is also worth noting that in such a situation, defense not only is a right but also a duty and sometimes this duty becomes *fard ‘ayn* (universal obligation), i.e., the duty is imposed on each individual in his personal capacity, like the duty to offer the five daily prayers, and that is why no individual needs the permission of any other human authority.⁴¹

The jurists also discuss situations where the enemy launches a surprise attack and it is not possible for those being attacked to have recourse to government authorities. In such situations, individuals are allowed to use force in self-defense even if they have not been given permission by the government. Ibn Qudamah says:

Except when the enemy attacks suddenly and it is impossible to take orders from the ruler. In such a case, it is not obligatory to take permission from him because it is definitely established that the interest [of individuals] is protected only by fighting and repelling the enemy, for abstention from fighting them would certainly lead to destruction.⁴²

He, then, gives the example of the companion of the Prophet (upon him blessings and peace), Salamah b. al-Akwa‘ who fought in such a situation without the permission of the Prophet (upon him blessings and peace) who later approved his act.⁴³

2.1.3 Organizing Resistance against Oppressors:

The Genesis of Jihadi Organizations

The right of self-defense being accepted for individuals, in the case of many individual being threatened by a common enemy, it is only reasonable that they should develop a mechanism for collectively defending each other against the common threat? We see that even in Makkah when Muslims were allowed to use force in self-defense, some sort of collectivity was envisaged for the purpose. This is evident by the following verses: “And those who obey their Lord and establish Prayer; who conduct their affairs by consultation, and spend out of what We have bestowed upon them; who, when a wrong is done to them, defend themselves.” (Qur’an, 42: 36-43).

Here, the character of the true believers is described. One of their attributes is that they conduct all their affairs through *shura* (mutual consultation). Then, after describing other characteristics, it is mentioned that they support each other if they are wronged. This implies that they are allowed to collectively

fight any persecutors even though they may not have established “government in a free land.” This is important as Muslims were a small minority in Makkah. They were still allowed the use of force in self-defense at a later stage. One can consider the case where Muslims would have been in considerable numbers and not having the permission to migrate. As Muslims had not yet established a government in any territory which could give asylum to those facing persecution, the only option for those who wanted to defend themselves against persecution was to fight the persecutors.

It is also worth-mentioning that just as the concept of 'state sovereignty' is only an extension of the concept of freedom and liberty of the individual⁴⁴, the concept of a state's right to self-defense is also an extension of the right of self-defense of an individual. When individuals are given the right of self-defense they can, and should, try to establish some sort of mechanism for collectively protecting their rights. This is something similar to what a jihadi organization does.

2.1.4 The Attack of Abu Busayr and His Group on the Makkans

An interesting example is found in the lifetime of the Prophet (upon him blessings and peace). In 6 AH, the Prophet (upon him blessings and peace) concluded a peace treaty with the Makkans in Hdaybiyah. Under this treaty, the Prophet (peace be in him) agreed to extradite Muslims who would migrate to Madinah without the permission of their elders or masters. Abu Busayr was one such person. He fled from Makkah after being severely persecuted by his family. The Makkans sent two persons to the Prophet (upon him blessings and peace) and demanded the extradition of Abu Busayr. The Prophet (upon him blessings and peace) extradited him despite resentment of his companions and the miserable state of Abu Busayr. On the way back, Abu Busayr succeeded in killing one of his captors and then rushed back to Madinah. The other person came after him. Bukhari, the most authentic of the Hadith compilations, reports:

Abu Busayr came and said, ‘O Allah's Apostle, by Allah, Allah has made you fulfill your obligations by your returning me to them, but Allah has saved me from them.’ The Prophet said, ‘Woe to his mother! What excellent war kindler he would be, should he only have supporters.’ When Abu Busayr heard that, he understood that the Prophet would hand him over to them again, so he set off till he reached the seashore.⁴⁵

Thus, he succeeded in fleeing to a place on the highway to Syria which lay outside the jurisdiction of the Madinan State. Afterwards, several other Muslims fled from Makkah to join him. They formed a group⁴⁶ and started attacking the caravans of the Makkans. Finally, the Makkans felt compelled to waive the extradition clause from the Pact of Hdaybiyah.⁴⁷

2.2 Jihadi Organizations and the Responsibility of the Government

The example of Abu Busayr and his group is an important precedent for the activities of the jihadi organizations against oppressors. However, it must not be overlooked that Abu Busayr and his friends were beyond the jurisdiction of the government of Madinah and as such the Prophet (upon him blessings and peace) was under no legal obligation to put a stop to their activities against the Makkans. This brings us to the issue of state responsibility for the acts of individuals and organizations.

2.2.1 The Attack of Khalid b. al-Walid on Banu Jadhimah

The biographers of the Prophet (upon him blessings and peace) narrate an event where the Prophet accepted the responsibility of an attack launched by a group of Muslims led by Khalid b. al-Walid, the famed military genius. The Prophet (upon him blessings and peace) had sent a group of Muslims to invite the tribe of Banu Jadhimah to Islam. Because of a misunderstanding, the two sides started fighting in which some men of the Banu Jadhimah were wounded and a few were killed. When the Prophet (upon him blessings and peace) got the news, he was displeased and openly declared his disapproval of what the Muslims had done. He then made arrangements for compensation to be paid to Banu Jadhimah out of the resources of the government. Ibn Qayyim al-Jawziyah, the disciple of Ibn Taymiyyah, has the following to say about distinguishing this incident from that of Abu Busayr:

When any of these men [who fled from Makkah] killed someone from among the Makkans, or usurped their property, he neither prohibited them (from doing so) nor gave compensation for the act (to the heirs of the slain) if the perpetrator was not under his control ... This is because such person was not under the Prophet's (The Muslim state's) jurisdiction; nor had he (the Prophet, upon him blessings and peace) ordered him to do what was done; whereas, under the peace treaty, the Prophet (upon him blessings and peace) was responsible for damage to life and property only if it was caused by the acts of those living under his (the Muslim state's) jurisdiction. Thus, he compensated the damage Khalid had caused to Banu Jadhimah and showed displeasure of the act."⁴⁸

The Hanafi jurists have given much more details about the issue of jurisdiction and have linked it with the responsibility of the government. Their analysis is quite relevant to the present case.

2.2.2 Four Principles for Determining the Responsibility of the

Government

Muhammad b. al-Hasan al-Shaybani, the disciple of Abu Hanifah and the father of Muslim international law, in his peculiar legalist way, says that those

entering another state and then using force there may either be a few individuals or a group having *mana'ah* (capability to cause great damage to the enemy). In both cases, they would have entered the other state with or without the permission of their government. Thus, as explained by Sarakhsi, there are four possibilities:⁴⁹

- a) When those who enter the enemy territory have *mana'ah* and they have entered with the permission of the government, they are like different battalions of troops (each operating separately) and the government will be responsible for their activities.
- b) When they do not have *mana'ah*, but they have entered with the permission of the government, they are like spies or individual soldiers on a special mission and the government will be responsible for their activities.
- c) When they do not have *mana'ah* and they have entered without the permission of their government, the government will not be responsible for their activities.
- d) When they have *mana'ah* but they have entered without the explicit permission of their government. In such a case, the government will still be responsible for their activities. This is because “they, normally, cannot go for war without the knowledge of their government”. In other words, they are deemed to have the implied permission of the government.⁵⁰

In our view, this analysis of Shaybani and Sarakhsi accurately lays down the principles for determining the responsibility of the home government for the activities of armed groups in foreign territories. When the government lets people make such organizations, allows them to train people, cross borders, attack the target, come back and take refuge, explicit permission is just a formality which must be overlooked and the government must be held responsible for the activities of these groups.⁵¹

References & Notes

- ¹ Muhammad b. Mukarram Ibn Manzur al-Ifriqi, *Lisan al-‘Arab* (Cairo: Dar al Hadith, 2003), 2: 240-41; Hans Wehr, *A Dictionary of Modern Written Arabic* (London: Macdonald and Evens Ltd., 1974), 233.
- ² Khudrawi Deeb, *A Dictionary of Islamic Terms* (Beirut: Al-Yamanah Publishing, 1995), 74-75.
- ³ *Ibid.*
- ⁴ See, for instance, Qur’an, 29: 69; 25: 52.
- ⁵ Qur’an, 9: 86
- ⁶ The famous Hanbali jurist Mansur b. Yunus al-Bahuti ascribes this definition to Ibn Taymiyyah. (*Kashshaf al-Qina’ ‘an Matn al-Iqna’* (Cairo: Dar al-Fikr, 1968), 3:36). A similar definition can be found in the compilation of the legal verdicts

- (fatawa) of Ibn Taymiyah. See Taqi al-Din Ahmad b. ‘Abd al-Halim Ibn Taymiyyah, *Majmu‘at Fatawa Ibn Taymiyyah* (Beirut: Dar al-Fikr, 1980), 5: 38.
- ⁷ As early as in 1988, Montgomery Watt predicted that the traditional notions of Islamic Law would be frequently used in the future encounters. “The division of the world into the sphere of Islam and the sphere of war is by no means a thing of the past. In so far as traditional Islam grows in strength it could come into the forefront of world politics.” Montgomery Watt, *Islamic Fundamentalism and Modernity* (London: Routledge, 1988), 4.
- ⁸ Cf. Muhammad Munir: “A thorough study of the relevant Qur’anic verses, ahadith, the conduct of the Prophet (pbuh) and his rightly guided successors in their relations with other nations, communities, and tribes reveals that permanent relations between Islamic and non-Islamic territories are peaceful and not hostile. To uphold the opposite view, that permanent relations are hostile, is to seek acceptance of a parallel theory. The theory is that the cause of war in Islam is the elimination of infidelity and the subjugation of non-Muslims. The two theories (of hostile relations and elimination of infidelity) give birth to a third theory that is the division of the world into two domains: *Dar al-Islam*, and *Dar al-Harb*... These three theories are inseparable from each other and must either be accepted together or rejected together and cannot be accepted or rejected independently.” Muhammad Munir, “Public International Law and Islamic International Law: Identical Expressions of World Order,” *Islamabad Law Review*, 1: 3 & 4 (2003), 372.
- ⁹ For instance, according to Bernard Lewis: The basis of the obligation of jihad is the universality of the Muslim revelation. God’s word and God’s message are for all mankind; it is the duty of those who have accepted them to strive (*jahada*) unceasingly to convert or at least to subjugate those who have not. This obligation is without limit of time or space. It must continue until the whole of the world has either accepted the Islamic faith or submitted to the power of the Islamic state. Until that happens, the world is divided into two: the House of Islam (*dar al-Islam*), where Muslims rule and the law of Islam prevails; and the House of War (*dar al-Harb*) ... comprising the rest of the world. Between the two there is a morally necessary, legally and religiously obligatory state of war, until the final and inevitable triumph of Islam over unbelief. Bernard Lewis, *The Political Language of Islam* (Karachi: Oxford University Press, 2004), 73. (Emphasis added). See also, Majid Khadduri, ed. and tr., *Kitab al-Siyar wa al-Kharaj wa al-Ushr min Kitab al-Asl li al-Shaybani* (Karachi: Idaratal-Qur’an, 1996), 22–30.
- ¹⁰ Tariq Ramadan, a contemporary scholar, says: “*Dar al-Islam* and *dar al-harb* are two concepts which cannot be found either in the Qur’an or in the Sunna. They actually do not pertain to the fundamental sources of Islam whose principles are presented for the whole world (*lil-‘alamin*), over all time and beyond any geographical limitation. It was the ‘ulama’ who, during the first three centuries of Islam, by considering the state of the world — its geographical divisions, the powers in place through religious belonging and influence as well as the moving game of alliances — started to classify and define the different spaces in and around them.” Tariq Ramadan, *To be A European Muslim: A Study of Islamic Sources in the European Context* (Leicester: The Islamic Foundation, 1999), 23. See also, Wahbahal-Zuhayli, *Athar al-Harb fi ‘l- Fiqh al-Islami* (Damascus: Dar al-Fikr, 1981), 192–96.

- ¹¹ Ibid.
- ¹² Translation of all the verses are from the abridged version of Tafhīm al-Qurʿān of Sayyid Abu ʿAla Mawdudi translated and edited by Zafar Ishaq Ansari. Towards Understanding the Qurʿān (Leicester: The Islamic Foundation, 2006). Minor changes have been made on the basis of my understanding of the original
- ¹³ This verse uses the word *fitnah* to denote religious persecution. See also *ibid.*, 85: 10. Mawdudi says: “*Fitnah* is a wider term, which encompasses several moral crimes... Figuratively, it means anything that tests human beings, and that is why wealth and offsprings have been called *fitnah*. Ups and downs in the life of a nation are also termed as *fitnah* because it is tested by them... It follows that *fitnah* actually means test, be it through the things that a person likes or through fear of damage and troubles. If this test is from God, then it is perfectly justified because He is the Creator of human beings and He has the right to test His creatures. The purpose of this test is to spiritually develop them (the people) However, if this test is by a human being it is absolutely unjust because ... the purpose of this test is to put restrictions on the freedom of conscience. In this last sense of the word *fitnah* is almost a synonym of the English word “persecution,” although the former is much wider in its scope.” Mawdudi, *al- Jihad fi ʿl-Islam* (Lahore: Idara-e-Tarjuman al-Qurʿān, 1974), 105–06.
- ¹⁴ See, for the details regarding these interpretations of the verse: Abu Jaʿfar Muhammad b. Jarir al-Tabari, *Jamiʿ al-Bayan* (Cairo: Dar al-Fikr, 1963), 2: 110–11. See, for further details, Munir, “The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsay,” *Hamdard Islamicus*, 25: 3 (2002), 69–82.
- ¹⁵ Kamal al-Din Ibn al-Humam al-Iskandari, *Fath al-Qadir ʿala ʿl-Hidayah Sharh Bidayat al-Mubtadi* (Cairo: Dar al-Kutub al-ʿArabiyyah, 1970), 4: 291; Sahnun ʿAbd al-Salam b. Saʿid ibn Habib al-Tanukhi, *al-Mudawwanah al-Kubra* (Cairo: Dar al-Baz, 1323 AH), 2: 6. According to some of the Shafiʿi and Hanbali jurists, the cause of *jihad* is *kufr* (disbelief). See for example, Muhammad al-Khatib al-Shirbini, *Mughni ʿl-Muhtajila Sharh al-Minhaj* (Beirut: Matbaʿat al-Halabi, 1933), 4: 223; Abu ʿl-Walid Muhammad b. Ahmad Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (Riyadh: Maktabat Mustafa al-Baz, 1995), 1: 714–16. It is noteworthy that Ibn Taymiyyah has attempted a detailed analysis of this issue in his *Qaʿidah fi Qital al-Kuffar* and has strongly argued that the ratio of war is *muharabah* and not *kufr*. See, Taqi ʿl-Din Ahmad b. ʿAbd al-Halim Ibn Taymiyyah, *Ajwibat al-Masaʿil* (Cairo: Matbaʿat al-Sunnah al-Muhammadiyah, 1949), 116–54.
- ¹⁶ Burhan al-Din ʿAli b. Abi Bakr al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar al-Fikr, n.d.), 2: 380.
- ¹⁷ Qurʿān 2: 256 See, for a scholarly analysis of this issue, Munir, “Public International Law and Islamic International Law,” 399–402.
- ¹⁸ “Blessed is He in Whose hand is the Dominion of the Universe, and Who has power over everything; Who created death and life that He might try you as to which of you is better in deed; He is the Most Mighty, Most Forgiving.” (Qurʿān, 67:1–2) For details see, Ibn Taymiyyah, *Ajwibat al-Masaʿil*, 123–25 and Abu ʿl-Aʿla Mawdudi, *Islamic Law and Constitution*, tr. and ed. Khurshid Ahmad (Lahore: Islamic Publications, 1992), 45–49 and 124–64.

- ¹⁹ See also: Qur'an, 11: 118–19.
- ²⁰ See also, Qur'an, 27: 76–81.
- ²¹ Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, al-Mabsut, ed. Hasan Isma'il al-Shafi'i (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 10: 28.
- ²² John Austin, the famous English jurist of the nineteenth century and a disciple of Jeremy Bentham, defined law as “the command of a sovereign”. In the opinion of H. L. A. Hart, a great English jurist of the twentieth century, a legal system based only on obligation creating rules is primitive and inefficient. He, rather, conceived law as the union of primary and secondary rules where primary rules are obligation-creating rules and secondary rules are “right-conferring” rules. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961). The secondary rules identified by Hart are ‘rules of recognition’, ‘rules of change’ and ‘rules of adjudication’. Professor Imran Ahsan Khan Nyazee, an authority on Islamic law and jurisprudence, sees something similar in Islamic law. He says that *ahkam taklifiyyah* (obligation-creating rules), including *wujub* (obligation), *nadb* (recommendation), *karahah* (disapproval) and *tahrim* (prohibition) are primary rules; *Ibahah* (permissibility) is a right-conferring rule; and *ahkam wad'iyyah* (declaratory rules), including *shart* (condition), *sabab* (cause) and *mani'* (obstacle) are secondary rules that facilitate the working of *ahkam taklifiyyah*. Law about an obligation can only be understood if these primary and secondary rules are considered together. (Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 103-08). For instance, it is well-known that *zakah* is obligatory in Islamic law. However, it is interesting to see how the text of the *Hidayah* explains this obligation: “*Zakah* is obligatory for each free, sane and major Muslim when he owns the minimum scale (*nisab*) through complete ownership and a year has passed over such ownership.” (*Al-Hidayah*, 1: 95). This statement mentions the cause, conditions and obstacles of the obligation. The general statement that *zakah* is obligatory is, thus, qualified. The same is the case with other acts, including *jihad*.
- ²³ At another place we have given a detailed analysis of the condition of capability for the obligation of *jihad*. Muhammad Mushtaq Ahmad, *Jihad, Muzahamat awr Baghawat Islami Shari'at awr Bayn al-Aqwami Qanun ki Roshni men* (Gujranwala: Al-Shari'ah Academy, 2008), 257–69.
- ²⁴ See for a brief analysis of the principles of Islamic law on this issue: *Jihad, Muzahamat awr Baghawat*, 552-553.
- ²⁵ *Ibid.*, 531-552.
- ²⁶ *Ibid.*, 516-530. See also: Sadia Tabassum, “Recognition of the Right to Rebellion in Islamic Law with Special Reference to the Hanafi School,” *Hamdard Islamicus*, 34: 4 (2011), 55-91; *idem*, “Combatants, Not Bandits: The Status of Rebels in Islamic Law,” *International Review of the Red Cross*, 93: 881 (2011), 121-139.
- ²⁷ We have deliberately used the word “government” instead of “state” because “state” is a fictitious person, a “corporation aggregate”, and Islamic law as developed by the jurists did not recognize the concept of fictitious personality or corporation aggregate. For a scholarly and thorough analysis of this issue, see: Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization: Corporations* (Islamabad: Islamic Research Institute, 1998). It is worth noting that the contemporary international legal regime – particularly in the fields of international humanitarian law, human rights law

and international criminal law – is gradually lifting up the corporate veil of the state so as to hold individuals responsible for the violations of obligations under international law. For instance, the Rome Statute of the International Criminal Court, 1998, does not accept the notion of immunity for heads of state and instead upholds the principle of individual criminal responsibility. (See particularly Articles 25 and 27 of the Statute.).

- ²⁸ Abu Yusuf Ya‘qub b. Ibrahim, *Kitab al-Kharaj* (Cairo: al-Matba‘ah al-Salfiyyah, 1396 AH), 215
- ²⁹ ‘Ala’ al-Din Abu Bakr . Mas‘ud al-Kasani, *Bada’i‘ al-Sana’i‘ fi Tartib al-Shara’i‘* (Quetta: al-Maktabah al-Rashidiyyah, 1997), 6: 77.
- ³⁰ Muwaffaq al-Din Ibn Qudamah al-Maqdisi, *al-Mughni ‘ala Mukhtasar al-Khiraqi* (Cairo: Dar al-Manar, 1367 AH), 8: 352.
- ³¹ *Ibid.*, 353.
- ³² *Sahih al-Bukhari*, *Kitab al-Jihad wa al-Siyar*, Bab Yuqatal min Wara’ al-Imam; *Sahih Muslim*, *Kitab al-Imarah*, Bab al-Imam Junnah.
- ³³ Sunan Abi Dawud, *Kitab al-Jihad*, Bab al-Ghazw ma‘ A’immat al-Jawr.
- ³⁴ *Sahih Al-Bukhari*, *Kitab al-Jihad wa al-Siyar*, Bab Inn Allah Yu‘ayyidu al-Din bi ‘l-Rajul al-Fajir; *Sahih Muslim*, *Kitab al-Iman*, Bab Ghilz Tahrim Qatl al-Insan.
- ³⁵ *Al-Mabsut*, 10: 3-4.
- ³⁶ To quote again Sarakhsi: “The ruler is bound to act in accordance with the interests of Muslims” *Ibid.*, 20. “Our scholars (May Allah have mercy on them) say that the validity of the acts of the ruler is based on whether he acted in the interests of Muslims for this is the purpose of his appointment.” *Ibid.*, 40.
- ³⁷ Sunan al-Tirmidhi, *Kitab al-Diyat*, Bab Ma Ja’ fi-Man Qutila Duna Malihi f-Huwa Sahhid.
- ³⁸ *Ibid.*
- ³⁹ Sunan al-Nasa’i, *Kitab Tahrim al-Dam*, Bab Man Qutila Duna Malihi.
- ⁴⁰ *Sahih Muslim*, *Kitab al-Iman*, Bab al-Dalil ‘ala Ann Man Qasada Akhdh Mala Gharihi bi-Ghayri Haqq.
- ⁴¹ *Bada’i‘ al-Sana’i‘*, 6: 58.
- ⁴² *Al-Mughni*, 8: 353.
- ⁴³ *Ibid.* See also: *Sahih al-Bukhari*, *Kitab al-Jihad wa al-Siyar*, Bab Man Ra’a al-‘Aduww.
- ⁴⁴ Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf, 1945), 71.
- ⁴⁵ *Sahih al-Bukhari*, *Kitab al-Shurut*, Bab al-Shurut fi ‘l-Jihad wa Musalahat Ahl-Harb.
- ⁴⁶ *Ibid.*
- ⁴⁷ *Ibid.*
- ⁴⁸ Muhammad b. Abi Bakr Ibn Qayyim al-Jawziyah, *Zad al-Ma‘ad fi Hady Khayr al-‘Ibad* (Cairo: Matba‘at al-Halbi, 1928), 1: 913. Mawdudi also finds a ground in this incident for the doctrine of territorial jurisdiction: “The Shari‘ah does not admit of a situation in which the Muslim people may be deemed to be absolved of the moral responsibility of the treaty entered into by their state. But the moral responsibility of the treaties of the Islamic State will devolve only on the Muslims who are citizens of the Islamic State. It will not extend or apply to those Muslims who are not citizens of the State binding itself by a treaty. That is why the Treaty of Hudaibiyah was not

deemed to be binding on those Muslims of Mecca (e.g., Abu Basir and Abu Jandal) who had not yet become the citizens of the Islamic State.” (Islamic Law and Constitution, 187).

⁴⁹ Sarakhsi dictated a detailed thirty-volume commentary on al-Kafi which is an abridged version of Shaybani’s six books. This commentary of Sarakhsi is titled al-Mabsut. Sarakhsi also dictated a detailed five-volume commentary on Shaybani’s magnum opus on Muslim international law, al-Siyar al-Kabir.

⁵⁰ Al-Mabsut, 10: 73-74.

⁵¹ It is worth noting that the same principles are upheld by the contemporary international legal regime. In *Curfo Channel Case*, the International Court of Justice held Albania responsible for the damage caused by mines at sea because it had the “knowledge” of their presence. (ICJ 1949 Rep 4 at 155). In *Nicaragua Case*, the ICJ held that the United States of America would be deemed responsible for the activities of the insurgents if these activities were under its “control”. (ICJ 1986 Rep 14 at 64-65). In *Tadic Case*, the International Criminal Tribunal for Yugoslavia held that there was no specific standard for ascertaining “control” and that different activities would require different standards of control. (38 IL 1999, 1518 at 1541). In *Namibia Case*, the ICJ held that if the activities take place from a territory under the “physical” control of a state, that would be enough to hold that state responsible and that legal title to that territory was not essential for this purpose. (ICJ 1971 Rep 17 at 54). In *Caire Case*, the Court held that state officials would be responsible even if they acted *ultra vires*, provided they used the official position and state resources for this purpose. 5 RIAA 516 at 530. See for further details on the notion of “state responsibility”: Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2003), 694-752.