7

Jihad in Classical Islamic Legal and Moral Thought

Mairaj Syed
Bard College

1. Introduction

The term jihad is amongst a handful of Islamic religious terms that has entered the American lexicon. It is popularly bandied about, especially in charged political contexts, mostly for the overwhelming negative connotations it has come to acquire in American public culture. In this culture, it refers to an irrational crusade on politically contentious issues motivated by fanatical zeal. Despite jihad's roots in Islamic theology, law, and mysticism, the term's dominant meaning for most Americans is thoroughly determined through the prism of an accumulated history of prejudice and contemporary engagements in the various conflicts of the Muslim world. In contemporary usage amongst Muslims, the term can refer to a religiously sanctioned martial conflict, a personal struggle against one's passions to achieve a godly and virtuous character, or a non-violent social struggle for justice and equality. Each of these conceptions of jihad have historical roots in Islamic scholarship. Since the current volume is devoted to norms of warfare, in the present chapter, I will be examining aspects of the pre-modern Islam's legal and moral discourse on warfare.

2. The Authoritative Sources in Islamic Law

Medieval Muslim legal theorists conceive of the enterprise of law making as consisting largely of deriving norms that govern individual and social behavior

from the sacred sources, namely the Qur'an and the hadith. The Qur'an is composed of God's direct revelations to Muhammad. According to the traditional narrative of Muhammad's life, he received these revelations in increments over the course of his twenty-three year prophetic career (609-632) in early seventh century western Arabia. These revelations were codified into a single canonical collection within a couple of decades of Muhammad's death. The traditional narrative holds and many Islamicists agree that the Qur'an published nowadays is the same version of the Qur'an that was revealed to Muhammad. In Islamic theology, while the Qur'an is God's direct revelation to Muhammad, who reproduced the exact words he heard from God (though through the agency of the arch-angel Gabriel), the hadith consists of originally oral accounts of Muhammad's actions and teachings. By the ninth century, the Muslim legal scholars considered the accounts of the Prophet's actions and teachings as recorded in the hadith literature to be as authoritative a source for legal and moral norms as the Qur'an.

The Qur'anic revelations occurred in two different geographical locales. The first twelve years of revelation occurred in the city of Muhammad's birth, Mecca. In Mecca, where Muhammad first started his mission, he had few followers. Because Muhammad often criticized the polytheistic beliefs and social practices of the Meccans, he and his followers were persecuted. The Qur'anic revelations of the Meccan period often urge the Prophet and the Muslim community to be patient towards these non-believers, forgive them, treat them kindly, tolerate them, or preach and argue with them peaceably.[1] Ultimately, the persecution intensified to such an extent that Muhammad and his small community of followers werev forced to immigrate to an oasis-city about 350 miles to the north, Medina. The Medinan revelations tend to focus on matters of social organization, ritual practice, law, re-telling of Biblical stories, and relations with non-Muslims, both the Meccan pagans, and the Jews and Christians of Arabia. Significant for our purposes, it is in this context that most of the verses on warfare were revealed.

3. Attitudes towards the Conflict with the Non-Muslim Meccans in the Qur'an

It is important to note the use of the term jihad in the Qur'an does not in fact refer solely to warfare, nor is warfare referred solely by the term jihad.[2] In fact only ten of the thirty-six uses of jihad refer to warfare.[3] The other twenty-six uses refer to struggle of some sort against someone or something.[4] In its most immediate context, it can be said that the verses that reference jihad and fighting seem to refer to Muhammad's struggles with the Meccan pagans, specifically the many battles between the Muslims and the pagans after the immigration to Medina.

Let us consider some of the Qur'anic verses that deal with instructing Muslims how to deal with those who actively reject Islam:

1. "Do not grieve over the [disbelievers], but lower your wings over the believers and say, 'I am here to give plain warning,' like the [warning] We have sent

down for those who divide themselves into bands and abuse the Qur'an—by your Lord, We will question them all about their deeds. So proclaim openly what you have been commanded [to say], and ignore the idolaters. We are enough for you against all those who ridicule your message, who set up another god beside God—they will come to know. We are well aware that your heart is weighed down by what they say. Celebrate the glory of your Lord and be among those who bow down to Him: worship your Lord until what is certain comes to you." 15:88-99[5]

2. "Fight in God's cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits." 2:190
3. "Permission (to fight) is given to those who are being attacked, because they have been wronged. And surely God measures out help for them." 22:39
4. "They would dearly like you to reject faith, as they themselves have done, to be like them. So do not take them as allies until they migrate [to Medina] for God's cause. If they turn [on you], then seize and kill them wherever you encounter them. Take none of them as an ally or supporter. But as for those who seek refuge with people with whom you have a treaty, or who come over to you because their hearts shrink from fighting against you or against their own people, God could have given them power over you, and they would have fought you. So if they withdraw and do not fight you, and offer you peace, then God gives you no way against them." 4:89-90
5. "When the [four] forbidden months are over, wherever you encounter the idolaters, kill them, seize them, besiege them, wait for them at every lookout post; but if they turn [to God], maintain the prayer, and pay the prescribed alms, let them go on their way, for God is most forgiving and merciful." 9:5

The first passage counsels patience with the pagan rejection and ridicule of Muhammad's religious message. The second verse seems to allow defensive warfare, as does the third verse. The second verse encourages the observations of certain limits even as it permits defensive warfare. The notion of not transgressing limits often accompanies Qur'anic verses dealing with warfare, though the content of these limits is not identified. The fourth set of verses seems to encourage offensive war operations, but also counsels restraint when the enemy seeks peace. The last verse seems to encourage an all-out war against idolaters, unless they observe the fundamental Islamic religious duties. Given the variety of attitudes displayed towards conflict and warfare with non-Muslims in the Qur'an, and ambiguous moral reference purportedly directed at the norms of conduct in war, the classical legal doctrines had a lot of room to cover to develop a systematic doctrine of warfare.[6]

4. The Emergence of a Systematic Doctrine of Jihad in the Eighth Century

This systematic legal doctrine begins to emerge only about a century and half after Muhammad's death. By that time, a lot had changed from the historical

context that evoked the Qur'anic revelations during Muhammad's lifetime. Shortly after Muhammad's death, in one of most astonishing events of world history, the Arabs had established an empire that extended from North Africa, including Spain in the West, to India in the East. In the process, the Muslims had pushed the Byzantines out of Egypt, Syria and Palestine, and destroyed the Sasanian Empire. The scholars of the eighth century who articulated the basic legal and moral doctrines of jihad constructed norms of warfare based on precedents they perceived as stemming from the time of the Prophet and his companions through the prism of a historical memory of victorious conquests that they saw as proof of Divine providence and a validation of their religious mission.[7] It would be no stretch to describe the attitude of entitlement to power and conquest produced by the rapid imperial expansion as a Muslim Manifest Destiny. Put simply, the context in which Sunni religious scholars undertook the systematic elaboration of jihad as a legal doctrine was substantially different from the context that produced the Divine texts on which they relied. The imperial success of the Muslims following Muhammad's death no doubt informed the direction and substance of the construction of a systematic approach to warfare.

5. Law-Making in Classical Islam

But before we delve into some of the features of this doctrine, it will help us to know how legal and moral norms developed in classical Islam. From the perspective of classical Sunni Muslim religious scholars, God's direct involvement in the articulation of norms for public behavior ended with the death of Muhammad. God's will was no longer accessible through a human being who could respond to new religious, legal, and moral issues as the arose. God's will was found only in Divine texts, the Qur'an, and statements attributed to the Prophet, the hadith. These texts are made to speak to new issues in society by fallible human interlocutors. Over the course of the eighth and ninth centuries, Muslims developed practices and institutions that would produce an expert class of these human interpreters. Importantly, legal theorists admit that these religious scholars did not have intrinsic authority. Their authority derived from the ability to expertly interpret sacred texts with the aim of articulating God's will on a range of issues.

While the Qur'an and the hadith serve as the main material sources of Islamic law, it is important to note that they are far from resembling legal rules, are seemingly contradictory, and open to multiple interpretations, as we ourselves saw in relation to the Qur'an. The many verses in the Qur'an and the hadith about Muhammad's teaching on jihad do not amount to a systematic doctrine. The classical legal doctrine of jihad emerges from a generations long process of legal and moral thinking on the issues related to warfare over the course of three or four centuries.

Unlike medieval Catholics, Muslims did not come to not invest religious authority in any given earthly institution, and no single individual spoke for God on

earth, after the death of Muhammad (for Sunnis) and the occultation of the Imam (for Twelver Shi'is). Rather, religious scholars interpreted the sacred texts, the Qur'an and hadith, to justify legal opinions on a variety of issues. Religious authority was diffuse and disagreement on God's law was therefore rampant, yet tolerated, within bounds as wholly legitimate. In this respect the structure of religious authority in classical Islam resembles Rabbinic Judaism. Classical and even modern Islam also shares with Rabbinic Judaism a commitment to legal norms as absolutely central to religious thought and practice. However, classical Islam, unlike Rabbinic Judaism and like Christianity was a missionary religion. Muslims consider the propagation of the faith a duty. Moreover classical theologians held that all human beings were under the obligation, rationally knowable, to adopt Islamic theological beliefs. Classical Muslim legal scholars did not elaborate legal and moral norms as minorities, as was the case of the rabbis. Rather, classical Muslim scholars elaborated the religious law largely from a position of political and cultural confidence, though importantly not as holders of direct political power. Unlike modern Western processes of law making, the law was produced outside of a bureaucratized institutional framework. In other words, the production and articulation of legal norms was not a function of the state. Rather, private religious scholars working outside of the state developed God's law.

By the tenth century, the Sunni religious scholars had organized themselves into distinct traditions of legal scholarship. For most of subsequent Islamic history, this meant, in practice, that the starting point for individual legal scholars' elaboration of the law was not direct interpretation of the sacred scriptural sources (Qur'an and hadith). Rather, Sunni legal scholars began by studying the core body of laws articulated by the founding fathers of legal traditions that emerged in the course of the eighth and ninth century. Four of these legal traditions, named after their respective founding fathers, survive in modern day Sunnism: Ḥanafism, Mâlikism, Shâfi'ism, and Ḥanbalism, and one tradition dominates Shî'ism. Though there is considerable similarity, each of these legal traditions has its own particular set of rules. Throughout the classical period these traditions competed with each other for patronage from rulers and wealthy individuals and positions within the judiciary of different Muslim kingdoms. Competition for material and institutional privileges manifested itself in intellectual debate between the legal traditions, especially on those rules where they differed from each other. Given the acceptance of legal pluralism and competition between scholars of different traditions, the works produced by scholars belonging to these legal traditions fulfilled the following functions:

1. They show how the rules articulated by the founding father of the tradition are fully consistent with the sacred scriptural sources, the Qur'an and hadith
2. They defend the rules of the founding fathers from criticism of scholars working in other traditions

3. They show how the rules of a tradition are internally coherent by attempting to discover legal and moral principles underlying them
4. They consider unprecedented cases and offer novel legal solutions or rules that are maximally consistent with the sacred scriptural sources, the accepted rules of the tradition, and the legal principles developed within the tradition
5. They modify existing rules through a variety of hermeneutical techniques, that have become socially intolerable.
6. They record instances of disagreement within the tradition and attempt to tip the balance in favor of one opinion or another through legal analysis.

Given the diffuse nature of legal and religious authority in Islam, when we talk about the classical legal doctrine of jihad, what we are really talking about is a cluster of legal doctrines that vary in important details from one tradition to the next. We will examine some of the topics discussed in the chapters devoted to jihad in two Sunni legal traditions, Ḥanafism and Shâfi'ism. We will look at texts stemming from the eighth 'till the fifteenth centuries, concentrating on texts of religious law produced by the eleventh century Shâfi'ite from Baghdad, Abû 'l-Ḥasan al-Mâwardî (972-1058), and the twelfth century Syrian Ḥanafite of Central Asian origin, 'Alâ' al-Din al-Kâsânî (d. 1198). We will be looking at how classical scholars in general, and these two scholars specifically tackled the following issues:

1. What are the purposes that orient the duty of jihad?
2. What kind of duty is jihad? Is it an individual obligation or a collective obligation?
3. What specific types of activities fulfill the obligation to undertake a jihad?
4. Whom is it permissible to attack and kill during the course of battle and whom is it not permissible to attack and kill?
5. What are the different ways that the cessation of hostilities can occur?

6. Organized Violence in Islamic Law: Brigandage, Rebellion, and Jihad

Before we look at the medieval legal treatments of jihad, it will be helpful to look at the other types of organized violence addressed by the legal scholars, namely brigandage and rebellion. Brigandage, rebellion, and jihad are three types of such violence. Brigandage (*hirâba*) is organized violence perpetrated by private, non-state actors often for the purpose of illegally taking property. The Spanish Mâlikite legal scholar Ibn 'Abd al-Barr (d. 1070) defines brigandage in the following way:

> Anyone who disturbs free passage in the streets and renders them unsafe to travel, killing people or violating what God has made unlawful to violate is guilty of *ḥirâbah* [brigandage]… be he Muslim or non-Muslim, free or slave, and whether he actually realizes his goal of taking money or not.[8]

Brigandage is a form of private organized violence pursued for financial reasons and defined as a punishable crime by the legal scholars. As noted in Ibn ‘Abd al-Barr’s definition, the religious identity of the perpetrators is immaterial to the definition of the crime of brigandage. The perpetrators and victim can be Muslim or non-Muslim. Rebellion differs from brigandage on two counts. First of all it is not defined as a crime, or necessarily a sinful act. Rebellion is organized corporate violence directed against a standing political ruler, based on some type of Islamic justification (*ta’wîl*) or political grievance. In contrast to brigandage, rebellions are not motivated by financial gains, but by some type of ideological cause. Importantly, religious scholars do not deem the truth of the ideological cause as relevant to whether or not a given form of organized violence qualifies as a rebellion. The important point was that the rebels had some type of cause justifying their action. Given the ideological cast of rebellion, the rules regulating the ruler’s actions towards rebels tend towards leniency. Rebellion is entirely an intra-Muslim affair – one group of Muslims is fighting another over an issue of religious interpretation or substantive material or political grievance. Jihad, in the martial sense, differs from rebellion insofar as it is warfare, offensive or defensive in nature, directed against non-Muslims who have not submitted to the political authority of an Islamic political and legal order. Unlike brigandage, which is a crime classified as corporate violence for financial gain, and rebellion, which, though unlawful, was actually treated leniently by religious scholars, as we will see jihad came to be conceptualized as a collective duty by classical Sunni jurists. This raises the following question: if brigandage is organized violence motivated by the pursuit of plunder and rebellion by an Islamically justifiable cause or grievance, what are purposes that orient jihad as a religious and moral duty?

7. The Purposes of Jihad

The Orientalist E. Tyan summarizes pre-modern scholars’ attitudes towards the purposes of jihad by noting:

> The djihâd is not an end in itself but a means which, in itself, is an evil (*fasâd*), but which becomes legitimate and necessary by reason of the objective towards which it is directed: to rid the world of a greater evil; it is “good” from the fact that its purpose is good (*ḥasan li-ḥusn ghayrih*).[9]

Strictly speaking the classical legal scholars I have investigated do not distinguish between just and unjust wars. When the legal scholars spoke of the purposes for which war is undertaken, they do so in the context of giving reasons for why God made jihad a duty. One such purpose, in the words of the eleventh century Central Asian Ḥanafite, Abû Bakr al-Sarakhsî (d. 1090), is the religious good of “breaking the power of the polytheists and magnifying the religion (*kasru*

shawka-tu 'l-mushrikîn wa i'zâz al-dîn)"[10] or, in the words of the Ḥanafite Kâsânî, "calling to Islam, elevating the true religion and repelling the evil of disbelief (*al-da'wa-tu ilâ'l-islâm wa i'lâ' dîn al-haqq wa daf'u sharr-i kufr*)"[11]. The Shâfi'ite Mâwardî writes that God "made jihad a duty so that [the Muslims] may give victory to His religion (*farada 'l-jihâd li-nuṣra-ti dîni-ḥi*)".[12] Both Ḥanafite and Shâfi'ite scholars see the duty to perform jihad as linked to the more expansive duty to command the good and forbid the evil. Sarakhsî writes:

> The root of goodness is belief in God, the Exalted. Every believer is obliged to command it by calling others to it. The root of evil is polytheism (*shirk*). It is the greatest form of ignorance and obstinacy because it involves an outright denial of the truth without attempting to [Islamically] justify it [as is the case with heretics]. Every believer is therefore obliged to forbid it commensurate with his ability.[13]

Contrary to popular belief, the religious scholars did not take this to imply the conversion of non-Muslims at sword point, but rather the collective obligation to expand the Islamic political and moral order.[14] The religious scholars thought that the expansion of the Islamic political, moral and legal order would naturally make conversion to Islam much more attractive.

The other purpose scholars stipulated as the orienting goal of jihad, is the good of guarding the material and religious welfare of the Muslim community. Mâwardî writes that objective of jihad is to "prevent the enemy from seizing the lands of Islam, so that Muslims may travel therein secure in their persons and property."[15] Sarakhsî writes, in a similar vein, "the goal [of jihad] is to achieve the security of the Muslims; to enable them to sustain the goods (*maṣâliḥ*) of [both] their religious and material [affairs]."[16]

Only wars oriented towards these purposes can be considered a religiously legitimate jihad. Wars fought for objectives other than these do not qualify as proper jihad, and are therefore not religious sanctioned.

8. The Intention of Individual Fighters in a Jihad

Islamic law, in addition to consisting of legal directives, contains moral and ethical guidance, often addressed purely to the conscience of believers. Classical Islamic legal works therefore often address not only the broad social and ideological objectives that define the conditions of the duty of jihad, but also the intention that ought to motivate the fighters. Sarakhsî, in the process of interpreting the meaning of the phrase, "in the path of God (*fî sabîl-i 'l-lâh*)", often affixed to references to jihad in the Qur'an and hadith literature, writes:

> "In the path of God" means that your going out [to war] ought to be for obtaining God's, the Exalted, pleasure (*marḍât Allah*), and not for the acquisition of wealth (*mâl*). The fighter gains [Divine] profit for his

> acts[17] only when he expends his self and wealth while intending to obtain God's pleasure. If he intends the acquisition of wealth, [the intention] would redound as an [ignominious] loss [in the hereafter][18] (*fa-huwa kurratun khâsira*).[19]

Classical religious scholars assume that individuals partaking in warfare ought to be motivated solely by the desire to please God.[20] God will reward them in the hereafter for the hardships they suffer and the effort they expend while participating in war with the right intention. If they die with this intention, then they are considered martyrs. One, who dies fighting with an intention other than God's pleasure, does not die the death of martyr. Sarakhsî notes explicitly that it is not permitted for Muslims to pursue fighting non-Muslims with the intent of acquiring their wealth.[21]

The classical Muslim legal scholars thought that engaging in warfare that is oriented towards the right social purpose with the right individual intention is a meritorious religious act. Only performances that meet these conditions fulfill the obligation of jihad. Sarakhsî goes so far as to say that it is impermissible for fighters to engage in fighting for intentions other than God's pleasure, the implication being that one who engages in fighting with these other intentions sins.

9. The Collective Obligation of Jihad

One of the first questions that the classical legal scholars pose in their works of law is: what is the nature of the obligation to engage in jihad? The settled classical doctrine across all four of the Sunni legal traditions considered jihad to be a collective duty.[22] The idea of considering the duty to perform jihad a collective obligation seems, in some sense, a compromise solution. It is not merely a religious praiseworthy act, something that is good to do but optional, nor is it an individual duty, such that every Muslim who does not engage in it is somehow committing a sin. Collective obligations lie somewhere in between merely praiseworthy action and individual duties.

In Islamic law, individual obligations are duties on every capable Muslim who has reached the age of legal majority. Examples of individual obligations include the five times daily ritual prayer, or fasting in the month of Ramadan, or the payment of the yearly charity tax. Every individual Muslim must perform these duties. Failure to perform these individual obligations is sinful. God can hold one responsible for these failures on the Day of Judgment. In contrast, duties could be collective obligations. The way that moral responsibility functioned in collective obligations is different from the way it functioned in individual obligations. Similar to an individual obligation, a collective obligation rests on each individual Muslim. However, a collective obligation is not one that every individual Muslim must perform. If some individuals within a local community of Muslims do the acts necessary to satisfy the collective duty, then the collective obligation is counted as

fulfilled for all of the individual Muslims within that community. If however either no individual Muslims undertake to perform the collective obligation, nor enough of them to satisfy the objectives of the duty, then every individual Muslim in the community sins for omitting the duty. Each individual Muslim is liable to be held responsible by God for the failure.

Let me demonstrate by way of an example. In contrast to the daily five times ritual prayer, which is an individual obligation, Muslim jurists considered the specific prayer performed for a person who has died as a collective obligation. As long as some Muslims perform the funeral prayer and take care of the obligation, the duty is considered as fulfilled on behalf of all individual Muslims. If however no Muslim performs the funeral prayer, then every individual Muslim is considered as having sinned for omitting it. God on the Day of Judgment may hold them individually responsible for failing to perform the duty.

Kâsânî defends the collective duty interpretation of jihad in one of two ways: by way of an interpretation of a key Qur'anic verse, and by citing the practice of the Prophet Muhammad. Let us start with the Qur'anic verse:

> God has conferred on those who commit themselves and their possessions in jihad a rank higher than those who stay at home. Yet for both has God promised a good reward.[23]

Based on this scriptural citation, Kâsânî reasons that had jihad been an individual obligation at all times, then God would not have promised reward to those who stay at home. In fact staying at home and not engaging in jihad would have been forbidden.[24] He also notes that the objectives, for which the obligation of jihad is instituted, such as inviting non-Muslims to Islam, elevating the true religion and subverting the evil and power of the disbelievers, can be accomplished through the actions of a group of people. It is not necessary that all Muslims engage in martial activity to accomplish these goals. Sarakhsî adds that in fact if all Muslims engage in martial activity, then there would be no one left to engage in those other activities that ensure the welfare of the community, one of the objectives for which collective duty of jihad was instituted.[25] As long the goals of the duty of jihad are accomplished through the actions of some, the duty is counted as fulfilled on the part of the others.[26]

Kâsânî points to the way that the Prophet himself conducted military expeditions as evidence of the collective nature of jihad. Though Kâsânî does not explicitly say so, the Prophet would often send out military expeditions without mobilizing the whole community. The argument by implication is that this would not have been licit, had jihad been an unconditional individual duty.

The Shâfi'ite Mâwardî similarly considers the jihad to be a collective duty, but relies only on interpretation of Qur'anic verses combined with reports about the Prophet to argue against the individual conception.[27] Neither he, nor any of the other classical Shâfi'ites that I looked at make what seems to have been a

uniquely Hanafî way of understanding the collective nature of the duty of jihad – that the objectives jihad is supposed to achieve govern the nature and sufficiency of performances demanded of the community to count it as fulfilled.

To describe jihad as a collective obligation is still not to say much about the specific types of actions that count as fulfilling the duty. For the classical period, there are two types of actions that constitute a fulfillment of the collective duty of jihad: martial activities of a defensive nature intended to repel enemy encroachment and offensive forays into enemy territory, either with the intent of conquering territory and thereby enlarging Muslim political and moral order or with the intent of dissuading the enemy of attacking Muslim lands. Let us start with defensive jihad. Kâsânî writes: "Insofar as [jihad] is a collective duty, the ruler must not leave the border posts (*thugr*) empty of fighters and supplies sufficient to [successfully] fight the enemy."[28]

Similar to what is implicit in Kâsânî's discussion of jihad, Mâwardî explicitly notes that the collective duty of jihad requires two different types of acts: defensive and offensive actions. Both types of activities can be counted as successful performances of the duty when "the ruler officially takes charge of and fully fulfills the duty's requirements, the obligation falls from the rest of the community because of the direct actions of the ruler and his officials".[29] It seems to be that for Mâwardî, in the best case scenario, as long as the ruler is competently taking charge of the necessary defensive and offensive requirements of the duty, it is counted as performed, and the rest of the community will not be held morally responsible for the failure. Mâwardî implies, that in the absence of such a ruler, the community is still responsible for ensuring the border forts are sufficiently filled with soldiers capable of repelling enemy attacks.[30] If it does so, the collective duty of jihad is counted as fulfilled. The structure of his discussion implies that the Muslim community cannot, from a moral perspective, rely solely on the agency of the ruler in the case of defensive jihad. Mâwardî seems to be saying that if the ruler fails to competently and sufficiently man the defensive forts then the collective duty of jihad remains unfulfilled and each individual member of the community risks God's displeasure on the Day of Judgment. The buck, in Mâwardî's conception, does not stop with the ruler. The community is still on the hook if the ruler fails to fulfill the collective obligation of defensive jihad.

In the case of offensive jihad, Mâwardî notes that the enemy should be fought until they either convert to Islam or, if they do not convert, pay the yearly poll-tax (*jizya*), and submit to Muslim political authority. This involves offensive forays into non-Muslim territory for the purpose of conquest. He notes that many religious scholars hold that one offensive raid per year is the minimum performance required to fulfill the duty of offensive jihad.[31] Importantly, unlike defensive jihad, Mâwardî explicitly notes that offensive jihad is never an individual obligation; it is only a collective obligation.[32]

Mâwardî gives the following directions on how an offensive foray by non-professional soldiers that would count as a fulfillment of the collective duty, ought

to be conducted: he notes that if there is a duly appointed military leader in, presumably the closest defensive fort to the area, it becomes his individual duty to manage an offensive expedition of the contingency of non-professional soldiers. He notes that the leader ought to manage the time of the expedition so as to minimize risks of harm or the experience of extreme heat or cold. Mâwardî further counsels the leader to take easy routes with plentiful access to water and pasture. Mâwardî notes that this type of foray ought to take place once a year.[33] Mâwardî's detailed prescriptions on how the offensive foray ought to be conducted are a far cry from the ideological purposes that are supposed to orient offensive jihad.[34] Why is this the case? By the time Mâwardî was writing, it seems that the one raid per year standard had become the dominant norm for fulfilling the offensive jihad requirement amongst the legal scholars.[35] In contrast to the largely non-professionalized troops that made-up the conquering Muslim armies of the seventh century,[36] lionized in later Sunni historical imagination, most of the militaries of subsequent centuries became increasingly professionalized.[37] Mâwardî thus was caught between two opposing values. On the one hand, he was bound by previous legal scholarship, which had come to accept the one raid per year as the minimum requirement for offensive jihad and a conception of jihad as potentially a collective obligation incumbent upon all individual Muslims, regardless of whether they were part of a professional military or not. On the other hand, he was faced with the empirical reality that only a professional military had the training to successfully conduct and persevere effective raids into treacherous territories. As is often the case with legal discourses, or legally informed ethical discourses, the solution often involves open deference to received precedent and the authority that the precedent represents, while mitigating the harmful consequences of following the precedent in its actual application.

We ought to note one important caveat to the conception of defensive action as satisfying the collective duty. If the enemy successfully invades Muslim territory, then the collective duty transforms into an individual duty. Kâsânî notes that if the level of fear of enemy conquest becomes widespread, because, if for example the enemy has attacked Muslim lands then the duty of jihad transforms into "an individual obligation upon every single physically capable Muslim."[38] He adds:

> The obligation of jihad rests on all even before there is widespread fear, because it only drops from the rest of the community when some Muslims successfully perform it. When there is widespread fear of conquest, a successful performance can only take place through everyone's agency. For this reason it remains as an individual duty on everyone, on the same level as the obligation to fast and pray five times a day.[39]

In other words a collective duty is intimately tied to the purposes for which God instituted it. As long as the purposes for which it is enacted are sufficiently

satisfied through the actions of some people, then the obligation falls from the rest. If however, the purposes are not satisfied through the actions of some, then it remains in force upon everyone. In the case of the collective obligation of jihad, one of the purposes is defense of Muslim lands against enemy conquest. When either there is fear that the enemy will conquer Muslim lands or has successfully penetrated Muslim territory, then it is obvious the purpose of the collective jihad have not been sufficiently met, therefore the duty transforms into an individual obligation, until such time as the enemy is successfully thwarted and the widespread fear of conquest dissipates.

The transformation of jihad from a collective to individual obligation has normative consequences. For example, Kâsânî notes that as long as jihad is a collective duty (which is ordinarily the case), a man must seek the permission of both of his parents before he can participate, as must a wife seek her husband's permission, and a slave his master's. But, when there is general fear of non-Muslim conquest, and the duty becomes individual, then the requirement of seeking permission also ceases to exist. A man, wife, and slave can engage in jihad to thwart the enemy without seeking the permission of their respective superiors.[40]

In contrast to Kâsânî, Mâwardî relies less on the general sense of impending attack to describe the transformation of defensive jihad from a collective to individual duty. Rather, his discussion of the transformation of the duty correlates with two factors: proximity of the enemy army to Muslim lands, and the intent of that army. If it seems that the intent of the army is to attack and conquer Muslim lands and is within a day's travel, then the collective duty transforms into an individual duty, though only on the male inhabitants to the closest defensive forts. At this point, women, children, and the sick are still exempt from the duty. Male fighters of age who have debts, who would ordinarily need the permission of their creditors to participate, do not need such permission before engaging in the fight. Similarly, the male fighters do not need the permission of their parents to fight.

If the invading army's numbers are two thirds or more than the number of fighters occupying the defensive fort, then, according to one opinion, the duty of jihad becomes individual upon every single Muslim in the vicinity of the incursion. If an enemy army successfully invades, then the defensive jihad obligation becomes immediately individual upon every one in the vicinity of the invasion and by concentric degrees envelopes individuals until there is a sufficient number to successfully repel the enemy invasion.[41]

There is one thing we ought to note about classical Islamic discussions of offensive and defensive jihad. There was disagreement in the period before the establishment of the Sunni legal traditions in the ninth century on the legitimacy of offensive jihad as a duty. For example, the eighth century Iraqi scholar, Sufyân al-Thawrî (d. 778) held that the duty of jihad becomes incumbent only in the case of enemy attack.[42] For this reason fighting is a duty only for defensive purposes. Al-Thawrî interprets the following Qur'anic verses as justifying his view: "If they

fight you, then fight them!"[43] and "Fight the polytheists all together just as they fight you all together"[44]. Both verses make fighting contingent upon enemy attack, i.e. legitimate only in cases of defense. The implication of this view is that fighting for offensive purposes is not a religiously legitimate jihad. It seems that this line of thinking, or something similar to it, survived even after the proliferation of the legal traditions, without ever gaining majority traction. The eleventh century Spanish Mâlikite, Ibn ʻAbd al-Barr (978-1070) held that the collective duty of jihad becomes incumbent only in the presence of fear (*khawf*). In conditions of security (*amn*), it is only a praiseworthy action (*nâfila*), and not a duty.[45] As such, in Ibn ʻAbd al-Barr's conception, the omission of jihad in conditions of peace and security is not sinful. The sixteenth century Hanafite, Ibn Nujaym seems to articulate an interpretation of jihad, as motivated solely by defensive considerations, that comes close to the view propounded by al-Thawrî. He writes: "in our doctrine, the cause of jihad (*sabab al-jihâd*) is their being in a state of war against us (*harban ʻalaynâ*), while for Shâfiʻite it is their disbelief." This view seems to take the state of war between Muslims and enemy non-Muslims states as an empirical presumption, no doubt reinforced by historical reality. Yet, it also implies that the duty of jihad could cease in case non-Muslims are no longer engaged in war with Muslims.[46]

10. Rules Governing Conduct of War

10.1 Non-Combatants

We have talked thus far about the how classical Muslim jurists thought about the purposes of religiously sanctioned warfare, its nature as a duty, and the specific types of activities that satisfactorily fulfill the duty. We have not yet talked about the rules governing conduct in warfare.[47] For Kâsânî this consists mostly of a discussion of who may and may not be legally killed during the course of fighting. He notes that there are two general states in which killing in warfare could take place: either during the actual course of a battle or after the battle when dealing with prisoners of war.

He begins by noting that it is not permissible to kill the following during the course of a battle: women, children, the elderly, invalids, the blind, amputees, mentally disabled, monks in monasteries, itinerant ascetics in the mountains who do not mix with people, or people in a house or church who are frightened and have locked the door blocking entry. The basis of the prohibition against killing these classes of people are ḥadîth, which record Muhammad as forbidding departing raiding parties from killing these types of non-combatants.[48] With that said, though, according to Kâsânî, if women or children incite battle against the Muslims, or give away their hiding places, or occupy social roles where they are obeyed and benefit the non-Muslim army with their good judgment, they may be fought and killed.[49] The general principle that Kâsânî enunciates is that those who possess the general competence to fight, mostly adult non-Muslim men, may be fought and

killed, regardless of whether they actually fight in battle or not. Those who do not posses the competence to fight (e.g. women, children, disabled), may not be fought and killed unless they physically engage in fighting or benefit the non-Muslim army in some other way that effectively amounts to fighting.[50] The Ḥanafites from very early on in the history of the tradition developed the general principle that the reason it is permissible to fight and kill non-Muslim combatants in battle is not because of the fact of their being non-Muslim, but rather because they are engaged in battle with Muslims. This is the underlying reason that explains why only combatants are lawful targets of lethal force and why the Muslim army may not kill women, children, and other categories of non-combatants.[51]

10.2 POWs

One of the biggest ways in which classical Islamic legal doctrine on warfare departs from modern just war norms is in the treatment of POWs. Kâsânî, consistent with the opinions of other legal scholars from other Sunni traditions, holds that POWs may be killed even after the cessation of hostilities.[52] The scholar of Islamic law, Khaled Abou El Fadl notes that classical Sunni legal scholars left the decision about what exactly is to be done with POWs to the discretion of the political rulers. The political ruler had one of three options: kill the POWs, enslave them, pardon them, or he could hold on to them in the hopes of a POW exchange with the non-Muslim enemy. Abou El Fadl also notes that some jurists stipulated that "if the enemy offers to exchange prisoners with the Muslims, the ruler is duty-bound to accept the exchange, and not to do anything which would endanger the well-being of Muslims held by the enemy."[53]

10.3 Pre-Hostilities Invitation to Islam

One component of the legal doctrine of jihad that is somewhat directly linked to the purposes that religiously sanctify it, is the positive duty upon an attacking Muslim army to offer the non-Muslim city or army a series of options before commencing hostilities: convert to Islam, or, refusing that, submit to Muslim political and legal authority and pay the yearly poll-tax (*jizya*), or fight. Kâsânî notes that if the invitation to Islam had not reached the enemy then it is not permissible for the Muslim army to commence hostilities before verbally delivering it.[54]

Why is it a duty? Kâsânî cites the following Qur'anic verse as proof: "call [people] to the way of your Lord with wisdom and good teaching."[55] He also notes that the Prophet did not use to fight the non-Muslims until he invited them to Islam.[56] If however, the invitation to Islam has already reached them, it is permissible to commence hostilities without renewing the invitation.

By converting to Islam, enemy combatants acquire legal and moral protection for their lives and their property; both become inviolable. At the risk of

being anachronistic, they become equal citizens of the Muslim polity. If they refuse the offer to convert but do not want to fight, they effectively enter into contract of protection. They submit to Muslim political and legal suzerainty. In return they acquire moral and legal protection for their lives and property and may continue to practice their religion. They must also pay a special tax as non-Muslim subjects of the Muslim polity. At the risk of sounding anachronistic, they become, in effect, second-class citizens of the Muslim polity, yet citizens nonetheless. If they refuse both options, then the Muslims are permitted to commence hostilities.

11. Making Peace

Our discussion on the classical legal doctrine of jihad would be incomplete if we did not look at the jurists' examination of the various ways in which Muslims could make peace with the enemy. On this issue we will look at Mâwardî's succinct discussion. Mâwardî notes that there are three different ways in which non-Muslims may acquire legal protection for their lives through a general agreement to cease hostilities. The political ruler may decide to negotiate a general cessation of hostilities. Mâwardî stipulates certain conditions for this type of negotiated settlement. First, the term of the peace treaty may not exceed ten years. Second, only the ruler or his representative may negotiate this type of peace. The ruler must base his calculation on whether to negotiate peace on what is in the best interests of the Muslim community. Mâwardî notes that it is permissible for non-Muslims to pay tribute or nothing at all to the Muslim ruler as part of the peace agreement. Only in cases of dire necessity may the ruler agree to a peace agreement that required the Muslim polity to pay the non-Muslim enemy in exchange for the cessation of hostilities. According to Mâwardî, the legitimacy of this type of peace agreement is based on a precedent of the Prophet.[57]

The second way in which non-Muslim combatants may gain legal protection from being attacked is if they receive a temporary guarantee of safe passage through Muslim lands. The ruler may grant such guarantees and they can range anywhere from four months to no more than a year. It is better, Mâwardî stipulates, that the guarantee be granted in exchange for money, but it is permissible for it to be given freely. The ruler, however, may not pay the enemy combatants for granting the guarantee. Again the guiding consideration for whether the ruler ought to grant such a guarantee is if it is in the best interests of the polity.[58] Mâwardî notes that such a guarantee of safe passage requires that the non-Muslim enemy polity reciprocate a similar grant. Interestingly, there exists a type of guarantee of safe passage that does not have to be issued by the ruler. Any Muslim may issue a guarantee of safe passage to an enemy combatant, thereby granting the non-Muslim enemy legal protection to his life and property. This individual guarantee does not require a reciprocal action by enemy combatants.[59]

12. Conclusion

There are two features of the classical doctrine of jihad that most stand in contrast to modern just war thinking: the prima facie legitimacy of offensive operations for the purpose of ideological conquest and relative independence of the operation of jihad from a centralized political authority. Let us start with the first feature.

It has become commonplace to discard offensive war for the purposes of conquest as wholly illegitimate and a contravention of core moral principle in international law. The classical Sunni view that saw offensive jihad as legitimate seems to stand in stark contrast to this rule. It is useful to ask why the conception of jihad as purely defensively oriented did not have much success, until, that is the modern post-colonial period. There are probably a number of factors that sustained the offensive jihad position in Islamic history. It is probably the case that for most of Islamic history, the spectacular conquests of the seventh century, undertaken initially by the companions of the Prophet, were perceived as the result of offensive operations. Given the stature of this early community in Sunni thought, to hold that duty of jihad does not include offensive operations would have been to call into question the legitimacy of the actions of the companions, something that would have struck Sunnis as well nigh blasphemous. But there are other reasons, not related doctrinal tendencies within Sunnism that may also explain the persistence of the view. Behnam Sadeghi, a scholar of religion, notes that once a set of doctrines or rules has been accepted into a legal tradition as canonical, the doctrines tend to persist over the history of the tradition, a tendency found in all legal systems. It is this legal inertia, and not dependence on scripture, that explains why laws persist over time, in the absence, that is, of social intolerability. Sadeghi argues that laws change when they become intolerable, and the job of the religious scholars in these instances is to justify the change as fully consistent with scripture and other rules of the tradition to which they belong.[60] Given this view of why doctrines do not change, once offensive activities came to be seen as a legitimate performance of the duty of jihad in the eighth century, legal inertia ensured the stability of the doctrine, as long as it did not become socially intolerable. But more than the absence of intolerability, there were features of the pre-modern Near Eastern historical processes that made the doctrine of offensive jihad a good natural fit with its environment.

Much of Near Eastern political history after the Islamic conquests was determined by the dynamic of the relationship between nomads on the fringes of the Near East and the settled populations in the interior. This history is marked by successive waves of different nomadic groups, often of polytheistic religious identity invading the Near East, pillaging and conquering in one generation, only to convert, rule, protect and attempt to expand the legal and moral order of the self-same civilization in the succeeding generations.[61] One of the ways in which the descendants of conquerors sought to bolster their legitimacy with existing populations of Muslims

was by portraying themselves as warriors of the faith, often engaging in frontier raids to expand the Muslim polity. Offensive jihad, therefore, was perhaps doctrinally sustained by the important social role it played in legitimating and domesticating nomadic warrior hordes on the frontiers of the near east.[62] Importantly, the historian Hugh Kennedy points out, that it was only in the sixteenth century, with the introduction of gun technology, that settled populations could effectively defend themselves from the depredations of the nomads, and it was not until the nineteenth century, due to developments in transportation, that nomadic territories began to be brought under the suzerainty of one urban center or another.[63] We ought also to remember that thinking about borders between states as representing inviolable moral markers of state sovereignty is recent development in history. Given the absence of a conception of borders in these terms it is natural that offensive forays into enemy territories for the purpose of conquest made offensive jihad morally unproblematic, until recently. In fact Ahmad Atif Ahmad, a scholar of Islamic law, argues that the Ḥanafites specifically codified the assumption that lands will trade hands between Muslim and non-Muslim rulers by explicitly recognizing that, under certain conditions, Muslim territories are legally transformed into non-Muslim territory. He writes:

> This juristic position stands on the idea that *shifts* of sovereignty in the world of politics may be just as normal as continuity of sovereignty, and this normality cuts through different political systems no matter what their religious (or irreligious) basis may be.[64]

In modern thinking about just war, it is often assumed that the main decision maker on issues related to war is the state. Only political authorities working within a highly centralized bureaucracy decide when and how to pursue war. What Weber intended as a description of the conditions under which modern states arise, the centralization and monopolization of legitimate use of coercive force and violence, seems to have largely become a normative principle in how we ought to discriminate between legitimate and illegitimate uses of violence. The classical doctrine of jihad shares some resemblance to this way of thinking, yet it is also recognizes, in crucial respects, the agency of non-state actors in the deployment of coercive force.[65] The similarity is most crucially represented in the delegation, for the most part, of decisions to engage in offensive warfare to the ruler or his agents. Though neither Kâsânî nor Mâwardî explicitly forbid non-state actors from undertaking offensive military operations without the permission of the ruler, when they do talk about offensive raids, they seem to assume the agency of the ruler. This combined with the fact that classical Sunni legal scholars gave the ruler the authority to make discretionary judgments about when and under what conditions a cessation of hostilities may be agreed to with the non-Muslim enemy implies, at a minimum, a desire on the part of jurists to centralize offensive war-making decisions in the hands of the ruler. This much is mostly consistent with modern thinking about the

relationship between rulers and decisions to make war. The case is different when it came to defensive war. Both Kâsânî and Mâwardî held the community generally responsible for defensive war when the agency of the ruler failed to competently discharge the duty.[66] In fact, depending on the severity of the non-Muslim enemy incursion into Muslim lands, ever widening concentric circles of individual Muslims may become individually obligated to repel the enemy attack. In Islamic legal thought defensive jihad is an obligation upon Muslim society as a whole. The ruler received attention in juristic writings about defensive jihad only because of the pragmatic consideration that usually he and his government had the greatest ability to mobilize social resources to defend Muslim lands.

What explains the relative lack of statism in Muslim legal and moral thinking about warfare? Contrary to modern processes of law-making, in which organs of the state actively craft law, often reflecting the prejudices of state-centric ruling elites, law-making in pre-modern Islam was largely in the hands of private religious scholars who gained authority to interpret Divine law through decentralized social processes of legitimation. As such, Islamic law tends not to give as much attention to rulers and political authorities. Historians of Islamic law have often pointed out how the decentralized private character of Islamic law making had the constitutional effect of limiting what was seen as the arbitrary power of state elites.[67]

There are also historical reasons that may explain the relative lack of statism in Islamic thinking about war. As an empirical matter, it is generally accepted that the pre-modern states were simply not as powerful as their modern counterparts. Pre-modern states were nowhere near as efficient in the distribution and deployment of social resources as modern states or as intrusive in society, hence the lack of attention of pre-modern religious scholars paid to the state. Another factor has to do with the relationship between warfare and the frontiers between Muslim and non-Muslim lands in pre-modern history. As we mentioned in explaining the persistence of the offensive jihad position in Islamic legal thought, much of frontier warfare and hence expansion, especially from the tenth till the sixteenth centuries in the Near East, was actually the result of a complex social process of nomadic tribes attempting to establish their social function and legitimacy with citied elites. Much of this process, prior to rise of the Ottoman empire, unfolded outside the control and direction of centralized rulers based in the large metropolitan areas of the Middle East.

Many aspects of the classical jihad doctrine clash with the normative values of the international order. In contrast to the context that produced pre-modern Muslim thinking about war, states are strong, centralized, and intrusive. Law making is now commonly seen by both Muslims and non-Muslims as an essential function of states. Borders between states are, in a sense, morally inviolable. Offensive military operations, for the bald purposes of conquest are seen as illegitimate. Perhaps, more important than anything else, Muslims, for the most part, no longer feel themselves to be part of an autonomous, self-sufficient civilization. Given these

vast changes in the values that drive the moral and legal discourse on warfare and the structural transformations in the social and political order of the world, it should not be surprising that ***some*** aspects of the classical inheritance are an ill fit with the modern world. This is not to say that ***all*** aspects of the classical legacy of thinking on warfare contrast with Western norms of warfare, nor is it to say that we can learn nothing from classical Muslim legal discourses on war. With respect to the latter claim, I think the collective/individual obligation distinction in Islamic legal thought is an ingenious solution to the problem of balancing individual with collective responsibility for actions needed to achieve a social good. It is one way of thinking about how we may hold individuals responsible for duties that are necessary in achieving the common good, that to my mind, has not been conceptualized in Western ethical and legal thought, modern or otherwise.

We can also see that there are aspects of the classical doctrine that mesh quite well with Western thinking on warfare. The rule on the inviolability of non-combatants is similar to international legal rules governing who can and cannot be targeted for military action. Even certain interpretations of offensive jihad for the defensive purposes, as suggested by an interpretation of the Ḥanafite Ibn Nujaym's conception of the cause of jihad, have similarities with the way some Western thinkers and pundits justify certain types of offensive strikes. Though justifying warfare in order to expand the Islamic legal and moral order may sound unreasonable to Western ears, I would say that warfare justified for the expansion of one ideology or another has a long history in Western thinking and practice. Liberal hawks to this day justify regime change for the purposes of expanding democracy or liberalism or both.

Muslims, not unlike adherents to other moral, religious, and legal traditions, are thus faced with decisions about how they ought to approach this classical legacy. The debate about this legacy has been and will be contentious. This, at least, is consistent with much of Islamic history and unsurprising, given the diffuse nature of authority in Islam. Despite the professed loyalty to the singular will of a monotheistic God, who manifests that will through largely agreed upon textual sources, more often then not, Islamic law comprises not one doctrine, but multiple doctrines, reflecting the social, ideological and political diversity of the communities that make up the Muslim world.

Bibliography

Abdel Haleem, M.A.S. "Qur'anic 'jihâd': a linguistic and contextual analysis." *Journal of Qur'anic Studies* 12 (2010): 147-66.

Abou El Fadl, Khaled. *Rebellion and violence in Islamic law*. Cambridge: Cambridge University Press, 2001.

———. "The Rules of Killing at War: an Inquiry into the Classical Sources." *Muslim World* 89, no. 2 (1999): 144-57.

Ahmad, Ahmad Atif. *Islam, modernity, violence, and everyday life*. 1st ed. New York: Palgrave Macmillan, 2009.

al-Dabûsî, Abû Zayd 'Abd Allâh b. 'Umar. "al-Asrâr fî al-Usûl wa al-Furû'." PhD Dissertation, Erciyes Üniversitesi, 1997.

al-Ghazâlî, Abû Ḥâmid Muḥammad b. Muḥammad. *al-Wasîṭ fî al-madhhab*. Edited by Abû 'Amr al-Ḥusaynî b. 'Umar b. 'Abd al-Rahîm. 1st ed. 4 vols. Beirut: Dâr al-Kutub al-'Ilmiyya, 2001.

al-Juwaynî, 'Abd al-Malik b. 'Abdallâh. *Nihâyat al-maṭlab fî dirâyat al-madhhab*. Edited by 'Abd al-'Aẓîm Maḥmûd al-Dîb. 1st ed. 21 vols. Jeddah: Dâr al-Minhâj lil-Nashr wa-al-Tawzî', 2007.

al-Kâsânî, Abû Bakr b. Mas'ûd. *Badâ'i' al-ṣanâ'i' fî tartîb al-sharâ'i'*. Edited by 'Alî Muḥammad Mu'awwaḍ and 'Âdil Aḥmad 'Abd al-Mawjûd. 2nd ed. 10 vols. Beirut: Dâr al-Kutub al-'Ilmiyyaa, 2002.

al-Mâwardî, 'Alî b. Muḥammad. *al-Hâwî al-kabîr fî fiqh madhhab al-Imâm al-Shâfi'î raḍiya Allâh'anh: wa-huwa sharḥ Mukhtasaṛ al-Muzanî*. Edited by 'Alî Muḥammad Mu'awwaḍ and 'Âdil Aḥmad 'Abd al-Mawjûd. 1st ed. 19 vols. Beirut: Dâr al-Kutub al-'Ilmiyya, 1994.

al-Sarakhsî, Abû Bakr Muḥammad b. Aḥmad. *Kitâb al-Mabṣûṭ*. 30 vols. Beirut: Dâr al-Ma'rifa, 1993.

al-Shaybânî, Muḥammad b. al-Ḥasan, and Abû Bakr Muḥammad b. Aḥmad al-Sarakhsî. *Sharḥ kitâb al-siyar al-kabîr*. Edited by Abî 'Abdallâh Muḥammad Ḥasan Muḥammad Ḥasan Ismâ'îl al-Shâfi'î. 1st ed. 5 in 3 vols. Beirut: Dâr al-Kutub al-'Ilmiyya, 1997.

Bonner, Michael David. *Jihad in Islamic history: doctrines and practice*. Princeton: Princeton University Press, 2006.

Cook, Michael. *Commanding right and forbidding wrong in Islamic thought*. Cambridge: Cambridge University Press, 2000.

Crone, Patricia. *God's rule: government and Islam*. New York: Columbia University Press, 2004.

Heck, Paul L. ""Jihad" Revisited." *The Journal of Religious Ethics* 32, no. 1 (2004): 95-128.

Ibn al-Humâm, Muḥammad b. 'Abd al-Wâḥid. *Sharḥ fatḥ al-qadîr*. Cairo: al-Maktaba al-Tijârîya al-Kubrâ, 1316.

Ibn Nujaym, Zayn al-Dîn b. Ibrâhîm. *al-Baḥr al-râ'iq sharḥ kanz al-daqâ'iq*. 8 vols. Cairo: Dâr al-Kutub al-'Arabiyya al-Kubrâ, 1334.

Jackson, Sherman A. *Islamic law and the state: the constitutional jurisprudence of Shihâb al-Dîn al-Qarâfî*. Leiden: Brill, 1996.

Kennedy, Hugh. *The armies of the caliphs: military and society in the early Islamic state*. London: Routledge, 2001.

———. *Mongols, Huns and Vikings: nomads at war*. Edited by John Keegan, Cassell's history of warfare. London: Cassell, 2002.

Landau-Tasseron, Ella. "Jihâd." In *Encyclopedia of the Qur'ân*, edited by Jane Dammen McAuliffe, 35. Leiden: Brill, 2001-2006.

Peters, Rudolph. "Introduction." In *Jihad in mediaeval and modern Islam*. Leiden: Brill, 1977.

The Qur'an. Translated by M. A. Abdel Haleem. Oxford: Oxford University Press, 2004.

Sadeghi, Behnam. *Women and Prayer in the Islamic Legal Tradition: the Logic of Law Making*. Cambridge: Cambridge University Press, 2012.

Sherman, Jackson A. "Domestic terrorism in the Islamic legal tradition." *Muslim World* 91, no. 3-4 (2001): 293-310.

Tyan, Émile. "Djihâd." In *Encyclopedia of Islam, Second Edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs, 538-40. Leiden: Brill, 1980-2004.

Wizâra al-Awqâf wa al-Shu'ûn al-Islâmiyya. "Jihâd." In *al-Mawsû'a al-Fiqhiyya*, 124-64. Kuwait: Wizâra al-Awqâf wa al-Shu'ûn al-Islâmiyya, 1987-2006.

ENDNOTES

[1] See *Encyclopedia of the Qur'ân*, art. 'Jihâd' (Ella Landau-Tasseron).
[2] In fact most of the verses that refer to fighting in a military sense use the term *qitâl*, which occurs 60 times in the Qur'an. See M.A.S. Abdel Haleem, "Qur'anic 'jihâd': a linguistic and contextual analysis," *Journal of Qur'anic Studies* 12(2010): 148.
[3] See Landau-Tasseron, "Jihâd."
[4] For a grammatical and linguistic analysis challenging the interpretation of jihad in the Qur'ân as legitimating offensive warfare for the purposes of conquest, see Abdel Haleem, "Qur'anic 'jihâd': a linguistic and contextual analysis".
[5] For all of the Qur'anic verses used in this article, I used *The Qur'an*, trans. M. A. Abdel Haleem, (Oxford: Oxford University Press, 2004). I modified some of translations of these verses.
[6] Other scholars have similarly noted the absence of a systematic doctrine of jihad in the Qur'an. See Michael David Bonner, *Jihad in Islamic history: doctrines and practice*, (Princeton: Princeton University Press, 2006), 20 and 22 and Ahmad Atif Ahmad, *Islam, modernity, violence, and everyday life*, 1st ed., (New York: Palgrave Macmillan, 2009), 119. Bonner on page 22 writes that the Qur'anic passages on jihad "include exhortations to take up arms; outright commands to fight or to desist from fighting; the distribution of military duties and of exemptions from these duties; rulings on the distributions of spoils of war and the treatment of non-combatants and prisoners of war; and other matters. Strictly speaking, they do not seem to constitute—and most likely were not meant to constitute—a coherent doctrine in and of themselves." Atif extends the observation to the Sunna.
[7] Bonner writes the following: "Before long, however, the expansionist empire broke down and with it, the conquest society that would henceforth exist only as a fantasy or ideal. It was in the period of adjustment to these new circumstances, in the later eighth century, that the jihad emerged as a recognizable doctrine and set of practices." See Bonner, *Jihad in Islamic history: doctrines and practice*, 168.
[8] This translation of the definition is found in Jackson A. Sherman, "Domestic terrorism in the Islamic legal tradition," *Muslim World* 91, no. 3-4 (2001): 295. For the authoritative monograph on brigandage in Islamic law generally, see Khaled Abou El Fadl, *Rebellion and violence in Islamic law*, (Cambridge: Cambridge University Press, 2001).
[9] See *Encyclopedia of Islam, Second Edition*, art. 'Djihâd' (Émile Tyan). For a post-classical source on the derivative nature of jihad's goodness see the work of the fifteenth century Egyptian Ḥanafite, Muḥammad b. 'Abd al-Wâhid Ibn al-Humâm, *Sharḥ fatḥ al-qadîr*, (Cairo: al-Maktaba al-Tijârîya al-Kubrâ, 1316), 4:276-7.
[10] See the late eleventh century Ḥanafite scholar, see Abû Bakr Muḥammad b. Aḥmad al-Sarakhsî, *Kitâb al-Mabṣût*, 30 vols., (Beirut: Dâr al-Ma'rifa, 1993), 10:2. See also Kâsânî Abû Bakr b. Mas'ûd al-Kâsânî, *Badâ'i' al-ṣanâ'i' fî tartîb al-sharâ'i'*, ed.•'Alî Muḥammad Mu'awwaḍ and 'Âdil Aḥmad 'Abd al-Mawjûd, 2nd ed., 10 vols., (Beirut: Dâr al-Kutub al-'Ilmiyya, 2002), 9:380-1.
[11] See ———, *Badâ'i'*, 9:381.
[12] See 'Alî b. Muḥammad al-Mâwardî, *al-Ḥâwî al-kabîr fî fiqh madhhab al-Imâm al-Shâfi''î• raḍiya Allîh 'anh: wa-huwa sharḥ Mukhtaṣar al-Muzanî*, ed. •Alî Muḥammad Mu'awwaḍ• and 'Âdil Aḥmad 'Abd al-Mawjûd, 1st ed., 19 vols., (Beirut: Dâr al-Kutub al-'Ilmiyya, 1994), 14:113.

[13] See al-Sarakhsî, *Mabṣûṭ*, 2. See also, both Juwaynî and following him, Ghazâlî, who differ from Sarakhsî's conceptualization of the relationship between jihad and commanding the good. Juwaynî and Ghazâlî divide collective obligations into three different categories: those that are related to purely religious goods, those related to purely material goods, and those that are a mixture of both. In this schema of collective goods, both jihad and commanding the good are collective duties oriented towards purely religious goals. The religious goal of jihad, as well as religious scholarship consists of calling non-Muslims to Islam. Whereas religious scholarship uses argument to accomplish this aim, jihad uses force. Whereas jihad is instrumentally linked to the essence of faith, commanding the good is instrumentally linked to the detailed duties and prohibitions that follow from accepting the theological beliefs of Islam. See 'Abd al-Malik b. 'Abdallâh al-Juwaynî, *Nihâyat al-maṭlab fî dirâyat al-madhhab*, ed. 'Abd al-'Aẓîm Maḥmûd al-Dîb, 1st ed., 21 vols., (Jeddah: Dâr al-Minhâj lil-Nashr wa-al-Tawzî', 2007), 17:392-94 and 97; Abû Ḥâmid Muḥammad b. Muḥammad al-Ghazâlî, *al-Waṣît fî al-madhhab*, ed. Abû 'Amr al-Ḥusaynî b. 'Umar b. 'Abd al-Raḥîm, 1st ed., 4 vols., (Beirut: Dâr al-Kutub al-'Ilmiyya, 2001), 7:5-7. On the relationship between jihad and commanding the good more generally in pre-modern Islamic scholastic culture, see Michael Cook, *Commanding right and forbidding wrong in Islamic thought*, (Cambridge: Cambridge University Press, 2000), 490-1.

[14] See Rudolph Peters, "Introduction," in *Jihad in mediaeval and modern Islam* (Leiden: Brill, 1977), 3. See also Patricia Crone, *God's rule: government and Islam*, (New York: Columbia University Press, 2004), 369-70.

[15] See al-Mâwardî, *al-Ḥâwî*, 14:112-13. Mâwardî links offensive jihad with the religious/ideological purpose, and defensive jihad with the protection purpose.

[16] See al-Sarakhsî, *Mabṣûṭ*, 10:3.

[17] Sarakhsî's metaphorical use of the commercial term 'profit (*rubḥ*)' is probably intentional. The Qur'an metaphorically uses the commercial term 'trade (*tijîra*)' in reference to jihad in the following verses (61:10-12): "You who believe, shall I show you a trade that will save you from painful torment? Have faith in God and His Messenger and undertake jihâd in the path of God with your possessions and your persons—that is better for you, if only you knew—and He will forgive your sins, admit you into Gardens graced with flowing streams, into pleasant dwellings in the Gardens of Eternity. That is the supreme triumph."

[18] The last phrase used by Sarakhsî also has a Qur'anic parallel. The "redound as loss" phrase occurs in 79:12, where the Qur'an quotes disbelievers as mocking the existence of a resurrection and impending judgment after death as "That would be a losing return (*kurratun khâsira*)!".

[19] See al-Sarakhsî, *Mabṣûṭ*, 5.

[20] See Bonner, *Jihad in Islamic history: doctrines and practice*, 77, who writes: "[t]he general consensus was that since only God has full knowledge of the fighter's intention, the slain in battle must be buried in the fashion of martyrs. If they went to war without true intention—for the sake of booty or without true belief—they will be deprived of the status of martyrs in the next world."

[21] See Muhammad b. al-Ḥasan al-Shaybânî and Abû Bakr Muḥammad b. Aḥmad al-Sarakhsî, *Sharḥ kitâb al-siyar al-kabîr*, ed. Abû 'Abdallâh Muḥammad Ḥasan Muḥammad Ḥasan Ismâ'îl al-Shâfi'î, 1st ed., 5 in 3 vols., (Beirut: Dâr al-Kutub al-'Ilmiyya, 1997), 1:134. Another indication of the suspicion of the corrosive influence of fighting with the intent of acquiring wealth is the early disagreement on the legitimacy of salaried monetary payments for military service. Bonner interprets the early debate on the legitimacy of monetary payments

for military service as indicative of "deep opposition among most Islamic jurists to any commodification whatsoever of military service." See Bonner, *Jihad in Islamic history: doctrines and practice*, 52-3. Where Bonner and I see the religious scholars grappling with the tension between fighting for God and fighting for material reward, Crone does not think the scholars saw a conflict. But if Crone is right, then why does Sarakhsî make it a point to call fighting with the intention of acquiring non-Muslim property as impermissible and why does he contrast fighting for God's pleasure with fighting for non-Muslim property? For Crone's thoughts, see Crone, *God's rule: government and Islam*, 374-5.

[22] The fact that legal discussion of jihad begins with a consideration of this topic probably has something to do with debates in early Islamic history about the relative importance of jihad in religious thought and practice. Some religious authorities considered jihad to be an essential component of a religiously virtuous life; a fundamental duty of every Muslim, akin to the five pillars of Islam. For example the early eighth century Syrian religious scholar Makhûl (d. 731) held that jihad obligation to be individual. For this, see Bonner, *Jihad in Islamic history: doctrines and practice*, 98-99.

[23] See Qur'ân 4:95. I have modified the Abdel Haleem's translation of this verse: "Those believers who stay at home, apart from those with an incapacity, are not equal to those who commit themselves and their possessions to striving in God's way. God has conferred on those who commit themselves and possession in jihad a rank higher than those who stay at home. Yet for both has God promised a good reward — those who engage in jihad are favored with a tremendous reward above those who stay at home.".

[24] See al-Kâsânî, *Badâ'i'*, 9:380.

[25] See al-Sarakhsî, *Mabṣût*, 10:3.

[26] This idea is a staple of Ḥanafîte thinking, going back to one of the founding fathers of the school, Shaybânî, see al-Shaybânî and al-Sarakhsî, *Sharḥ kitâb al-siyar al-kabîr*, 1:132. See also al-Sarakhsî, *Mabṣût*, 10:3. For an example of a post-classical Ḥanafite making the same argument see Ibn al-Humâm, *Sharḥ fatḥ al-qadîr*, 4:280.

[27] For reasons of space I will not discuss the nature of Mâwardî's textual reasoning. Suffice it to say that it resembles Kâsânî's textual reasoning to establish the collective nature of the duty of jihad. See al-Mâwardî, *al-Ḥâwî*, 4:110-13.

[28] See al-Kâsânî, *Badâ'i'*, 9:381.

[29] See al-Mâwardî, *al-Ḥâwî*, 14:112.

[30] See ibid., 14:113.

[31] See al-Juwaynî, *Nihâyat*, 17:396-7, who says that most scholars of positive law hold that making offensive forays into enemy territory at least once a year is a strict requirement, whereas the legal theorists hold that it is not. The basis of the once per year raid rule is considerations of what the Muslim polity is capable of doing. Presumably if the polity is capable of doing more, it ought to do more, and if it can not raid even once per year, then it ought not to do that.

[32] al-Mâwardî, *al-Ḥâwî*, 14:112 and 42.

[33] See ibid., 14:143.

[34] In fact Paul Heck notes that by the late eighth century the troops of the Abbasid caliphs were carrying out raids into Byzantine territory "according to a bureaucratic timetable." Paul L. Heck, ""Jihad" Revisited," *The Journal of Religious Ethics* 32, no. 1 (2004): 109.

[35] Though, this was not universally accepted. In the generation following Mâwardî, the Iranian Shâfi'ite Juwaynî, notes that the one raid per year rule ought to be considered a general rule of thumb and not a specific requirement.

[36] On this see Hugh Kennedy, *The armies of the caliphs: military and society in the early Islamic state*, (London: Routledge, 2001), 22, who writes: "The military forces lacked any system of remuneration, fighting as they did for booty, honour or self-defence. Nor did they have any structure of command with coercive powers. There were certainly tribal nobles, the ashrâf (sing., sharîf), who owed their status to descent and their own abilities, but they were obeyed only voluntarily. The individual bedouin tent preserved its own autonomy, just as it provided its own subsistence and the warrior his own weapons. Social identity, formal training, provided equipment and payment, all characteristics of a true army, were foreign to this society."
[37] On the professionalization of Muslim armies, see Bonner, *Jihad in Islamic history: doctrines and practice*, 130.
[38] al-Kâsânî, *Badâ'i'*, 9:382.
[39] Ibid.
[40] Ibid.
[41] See al-Mâwardî, *al-Hâwî*, 14:144.
[42] Shaybânî, a relative contemporary of al-Thawrî records this view. See al-Shaybânî and al-Sarakhsî, *Sharh kitâb al-siyar al-kabîr*, 1:131-2.
[43] Qur'an 2:191.
[44] Qur'an 9:36.
[45] See *al-Mawsû'a al-Fiqhiyya*, art. 'Jihâd' (Wizâra al-Awqâf wa al-Shu'ûn al-Islâmiyya).
[46] It is entirely unclear to what extent Ibn Nujaym was offering an authoritative interpretation of Hanafite doctrine and to what extent he is attempting to re-articulate past doctrine in a new way. There is no doubt that he is drawing upon aspects of previous Hanafite thinking on the issue. In fact Shaybânî himself says that the reason for the permission to kill non-Muslims is not the fact of their disbelief, but rather their being engaged in fighting against Muslims. Though, the context of Shaybânî's remarks indicate that he is talking not about what legitimates undertaking a war, but about why it is permissible to kill enemy combatants when engaged in battle. Sarakhsî's comments on Shaybânî's remarks indicate the same thing. For this, see al-Shaybânî and al-Sarakhsî, *Sharh kitâb al-siyar al-kabîr*, 4:186-7. The eleventh century Hanafite Dâbûsî comes closer to the way Ibn Nujaym articulated the doctrine, by noting that the "cause of the permissibility to fight with enemy combatants (*ahl al-harb*) is their being in a war with us, whereas the al-Shâfi'î held that it was the fact of disbelief." For Dâbûsî, see Abû Zayd 'Abd Allâh ibn 'Umar al-Dâbûsî, "al-Asrâr fî al-Usûl wa al-Furû'" (PhD Dissertation, Erciyes Üniversitesi, 1997), 484. But even here, Dâbûsî is talking about the cause of permission to fight, whereas Ibn Nujaym implies that the duty of jihad itself is contingent upon the fact of a state of war with a non-Muslim enemy. It could also be possible that Shaybânî, Dâbûsî, and Sarakhsî's are applying the principle, articulated in the most general way by Ibn Nujaym, in the specific context of explaining the rules governing who can and cannot be killed. I thank Behnam Sadeghi for alerting me to this possibility. Regardless, this issue requires more research than I am capable of doing for the purposes of this paper.
[47] For discussion and conceptual analysis of classical Sunni jurists discussion of conduct of war, see Khaled Abou El Fadl, "The Rules of Killing at War: an Inquiry into the Classical Sources," *Muslim World* 89, no. 2 (1999): 150-7.
[48] al-Kâsânî, *Badâ'i'*, 9:401. Khaled Abou El Fadl notes that apart from the scriptural injunction against killing these non-combatants, classical Sunni jurists note that the reason they are not to be killed is because they typically do not engage in fighting. See Abou El Fadl, "Rules," 155.

[49] al-Kâsânî, *Badâ'i'*, 9:399.
[50] Ibid., 9:400. If a Muslim fighter does kill a non-combatant, he is not prosecuted for committing the crime of homicide. However he should repent and seek forgiveness from God for committing a sin.
[51] Shaybânî, the founding father of the tradition, explains the hadîth where the Prophet commands fighters to "not kill children or slaves" in the following way: because disbelief, even if it is one of the greatest transgressions, is between a human being and his God, the Exalted. Recompense for this type of transgression is delayed till the Day of Judgment. As for what is hastened to this world, it is legislated for the benefit of the Muslims, which consists in repelling the trial of fighting [during battle], a feature missing in the case of those who do not fight." See al-Shaybânî and al-Sarakhsî, *Sharh kitâb al-siyar al-kabîr*, 4:186. For Sarakhsî's commentary on this passage see ibid., 4:187. This passage was originally cited in Abou El Fadl, "Rules," 152. For the reproduction of this line of thinking in later Ḥanafite authors see the following sources: al-Dâbûsî, "Asrâr," 484; Zayn al-Dîn b. Ibrâhîm Ibn Nujaym, *al-Bahr al-râ'iq sharh kanz al-daqâ'iq*, 8 vols., (Cairo: Dâr al-Kutub al-'Arabiyya al-Kubrâ, 1334), 5:76. This line of thinking in Ḥanafism, combined with Ḥanafite legal thought on the effects of Muslim vs. non-Muslim legal jurisdiction seem to stand in sharp contrast to Crone's characterization of how non-Muslims were perceived in Islamic religious thought. For Crone's comments, see Crone, *God's rule: government and Islam*, 358.
[52] al-Kâsânî, *Badâ'i'*, 9:400.
[53] Abou El Fadl, "Rules," 153.
[54] al-Kâsânî, *Badâ'i'*, 9:391.
[55] *The Qur'an*, 174.
[56] Kâsânî, *Badâ'i'*, 9:392-3.
[57] al-Mâwardî, *al-Hâwî*, 14:296.
[58] Ibid., 14:296-7.
[59] Ibid., 14:297.
[60] See Behnam Sadeghi, *Women and Prayer in the Islamic Legal Tradition: the Logic of Law Making*, (Cambridge: Cambridge University Press, 2012), Chapter 1, Sections 1.2.2 and 1.2.3; Chapter 7, Section 7.2.
[61] The fourteenth century North African scholar, Ibn Khaldûn (1332-1382) makes this type of cyclical interaction between nomads and settled populations a central causal explanation in the rise and decline civilization. The major examples of this phenomenon are the Arab conquests of the seventh century, the Ghazz Turks lead by the Seljuk family of the eleventh century, and the Mongols of the thirteenth century.
[62] For a fuller treatment of how the jihad doctrine met the ideological needs of pre-modern Muslim societies, see Bonner, *Jihad in Islamic history: doctrines and practice*, chapter 8.
[63] See Hugh Kennedy, *Mongols, Huns and Vikings: nomads at war*, ed. John Keegan, (London: Cassell, 2002), 211-13.
[64] See Ahmad, *Islam, modernity, violence, and everyday life*, 132. This conflicts sharply with Crone's description of how Muslim land conquered by non-Muslims was perceived by Muslim scholars, especially Ḥanafites. I think Ahmad's characterization is right. See Crone, *God's rule: government and Islam*, 361-2.
[65] See generally ———, *God's rule: government and Islam*, 296-9.
[66] See also ibid., 297 and the additional sources cited therein.

[67] On this see Sherman A. Jackson, *Islamic law and the state: the constitutional jurisprudence of Shihâb al-Dîn al-Qarâfî*, (Leiden: Brill, 1996), chapter 3.