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# Islam and International Criminal Law and Justice

Tallyn Gray (editor)

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## Islamic Law and the Limits of Military Aggression

Asma Afsaruddin\*

When discussing Islamic perspectives on warfare, most scholars will refer to the *siyar* literature, which constitutes a distinctive genre within the voluminous Islamic legal corpus. *Siyar* refers to the law of nations<sup>1</sup> or international law. As an integral part of Islamic law, *siyar* deals with the military *jihād* as one of the obligations of the Muslim ruler and his Muslim subjects in the context of external relations with non-Muslim polities and communities. Because Islamic law is conflated with *Shari‘ah* and the *Shari‘ah* is understood to be of divine provenance, it is frequently assumed that *siyar* regulations must of necessity be derived exclusively from the *Qur‘ān* and the *Sunnah* (the practices of the Prophet Muḥammad).

This chapter, however, demonstrates the reverse: that rules governing armed combat as explicated in the *siyar* literature in fact frequently deviated from certain fundamental principles articulated particularly in the *Qur‘ān* about legitimate warfare. Nowhere is this deviation more pro-

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<sup>1</sup> A general definition of ‘law of nations’ is offered in Lassa Oppenheim, *International Law: A Treatise*, vol. 1, Longmans, London, 1955, pp. 4–5: “Law of nations or international law is the name for the body of customary or treaty rules which are considered legally binding by States in their intercourse with each other”.

found than in the area of *jus ad bellum*, that is, justifications for going to war.

To illustrate this point, this chapter will primarily focus on how the principle of non-aggression unambiguously stated in the *Qur'án* was progressively compromised by classical Muslim jurists in their formulation of international law. The Qur'anic text 2:190, which articulates the principle of non-aggression, will provide a point of departure for us. To illustrate the chasm between early exegetical understandings of this critical verse (and related verses) and juridical invocations of such verses, I begin by discussing first how early and late *Qur'án* commentators interpreted this verse. I then proceed to discuss how two prominent classical jurists in their articulation of the *siyar* laws pertaining to the military *jihád* engaged and eventually undermined the principle of non-aggression stated in the *Qur'án*, while at the same time upholding the principle of non-combatant immunity as a remnant of the Qur'anic principle of non-aggression. The principle of non-combatant immunity is a particular strength of pre-modern Islamic law, which militated against the kind of indiscriminate mass killings that have become an all-too common feature of modern warfare, as will become evident below.

The next section provides an overview of some of the critiques that have been levelled at the classical jurists by modern Muslim jurists in their revisitation of *siyar* law. A primary ingredient of their critique is that classical Islamic law on warfare mostly turned its back on the Qur'anic principle of non-aggression by using a variety of hermeneutical stratagems, notably the stratagem of *naskh* or textual abrogation. In the conclusion, I briefly reflect on how these developments point the way forward for recuperating the original élan of Muslim legal-ethical deliberations on the legitimacy of warfare and their ramifications for a revised approach to the *siyar* literature.

#### **4.1. Exegeses of *Qur'án* 2:190**

This verse states: “Fight in the way of God those who fight you and do not commit aggression, for God does not love aggressors”. Our earliest scholars understand the interdiction in the Qur'anic text 2:190 (“do not commit aggression, for God does not love aggressors”) as a clear and general prohibition against initiating hostilities under any circumstance. Thus, the well-known early *Qur'án* exegete Mujáhid Ibn Jabr (d. 104/722) commented that, according to this verse, one should not fight until the

other side commences fighting.<sup>2</sup> According to another early scholar Muqátil Ibn Sulaymán (d. 150/767), this verse is specifically a denunciation of the Meccans who had commenced hostilities at Al-Ḥudaybiyya, leading to a repeal of the prohibition imposed upon Muslims against fighting near the Ka‘ba. Therefore, “Do not commit aggression” and “God does not love aggressors” were understood by him to be a categorical indictment of the Meccans who began to fight during the sacred month in the sacred sanctuary, which was a clear act of aggression (*fa-’innahu ‘ud-wán*). The following verse, the Qur’anic text 2:191,<sup>3</sup> subsequently gives permission to believers to slay the polytheists wherever one may find them on account of their aggression and expel them from Mecca (from where the Muslims were expelled); for *fitnah*, glossed by Muqátil as ‘polytheism’ is a greater offence in the sight of God (*a‘zam ‘inda Alláhi ‘azza wa-jalla jurman*) than killing, as affirmed also in the Qur’anic text 9:49. Permission to engage the pagan Meccans in fighting was clearly contingent, according to Muqátil, upon their having initiated hostilities, which abrogates the earlier, complete prohibition against fighting in the Sanctuary.<sup>4</sup>

In the commentary of the famous exegete Al-Ṭabarí (d. 310/923), we find that a new construal of the non-aggression clause now emerges: that of the immunity of non-combatants. The famed Companion Ibn ‘Abbás is quoted by Al-Ṭabarí as having said: “You should not kill women, children, the elderly, and the one who offers peaceful greetings and restrains his hand. If you do so, you have resorted to aggression”. Furthermore, the pious Umayyad ruler ‘Umar Ibn ‘Abd Al-‘Azíz (d.101/720) is said to have written to one of his military commanders, and interpreted this verse as: “Do not fight those who do not fight you; that is, women, children, and monks”.<sup>5</sup>

On the basis of such evidence, Al-Ṭabarí proceeded to offer his own exegesis of the critical commandment “Do not commit aggression” in the

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<sup>2</sup> Muḥammad Al-Sháfi‘í and Al-Risála, (eds.), *‘Abd al-Latif al-Hamím and Máhir Yásín al-Fahl*, Dár Al-Kutub Al-‘Ilmiyya, Beirut, 2005, p. 23.

<sup>3</sup> The *Qur’án* (translation by Arthur J. Arberry), 2:191.

<sup>4</sup> Muḥammad Al-Sháfi‘í, *Kitáb Al-Umm*, Dár Al-Kutub Al-‘Ilmiyya, Beirut, 2002, vol. 1, pp. 167–68.

<sup>5</sup> Tafsír Al-Ṭabarí, *Jámi‘ al-Bayán fi Tafsír al-Qur’án*, Dár Al-Kutub Al-‘Ilmiyya, Beirut, 1997, vol. 2, p. 196.

Qur'anic text 2:190. He said that this categorical prohibition means that one should not kill children or women or those who pay the *jizyah* or poll-tax from among the People of the Book and the Zoroastrians. Those who transgress these limits and hold licit what God has clearly forbidden regarding these groups of people are those who are indicated in the verse "Indeed God does not love those who transgress".<sup>6</sup> Exceeding these limits constitutes aggression.

It should be noted that Al-Ṭabarí's re-construal of the aggression clause in particular became quite influential and pervasive after him. This interpretation became reflected in the classical laws of war and peace formulated by jurists, who also came to understand the non-aggression clause in this verse as primarily setting up a prohibition against fighting non-combatants, and not a categorical prohibition against initiating fighting under any circumstance, as was clearly the view of the earlier exegetes Mujáhid and Muqátíl referenced above.

Other exegetes after the time of Al-Ṭabarí, however, continued to uphold the defensive nature of fighting. Thus, the famous scholar and commentator Fakhr Al-Dín Al-Rázi (d. 606/1210) maintained categorically that the divine imperative in the Qur'anic text 2:190 is directed at actual, not potential, combatants, meaning that the verse allows fighting only against those who have actually commenced fighting, and not against those who are able and prepared to fight but have not yet resorted to violence.<sup>7</sup>

## 4.2. Survey of Juridical Works

The Qur'anic principle of non-aggression in verse 2:190 underwent considerable modification and transformation in juridical works which dealt with *siyar* law. A survey of two key juridical treatises from the *Málikí* and *Sháfi'í* schools of law confirms certain trends, as will now become evident. We begin with a scrutiny of *Al-Mudawwana Al-Kubrá* by Málik Ibn Anas, followed by a look at *Al-Háwí Al-Kabír* by Abú Al-Ḥasan Al-Máwardí, both influential legal treatises that continue to be studied today.

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<sup>6</sup> *Ibid.*, vol. 2, pp. 196–97.

<sup>7</sup> Fakhr Al-Dín Al-Rázi (or Fakhrudín Rázi in Farsi), *At-Tafsír al-Kabír*, Dár Ihyá' Al-Turáth Al-'Arabí, Beirut, 1999, vol. 2, p. 288. For a fuller discussion of these verses, see Asma Afsaruddin, *Striving in the Path of God: Jihad and Martyrdom in Islamic Thought*, Oxford University Press, Oxford, 2013, pp. 43–58.

#### 4.2.1. *Málikí Views on Jihád as Contained in Al-Mudawwana Al-Kubr by Mlik Ibn Anas*

This early legal compendium of the *Mlikí* school contains the juridical teachings of the early Medinan jurist Mlik Ibn Anas (d. 179/795), as transmitted by the Qayrawn jurist ‘Abd Al-Salm Ibn Sa‘d Ibn Hbb Al-Tanukh (d. 240/855), nicknamed ‘Saḥnn’, from the Egyptian jurist ‘Abd Al-Raḥmn Ibn Al-Qsim Al-‘Atak (d. 191/806), who was a prominent disciple of Mlik.

The *Kitb Al-Jihd* (“The Book of *Jihd*”) section of this treatise begins with an emphasis on the importance of issuing a summons to Islam before commencing fighting. According to ‘Abd Al-Raḥmn Ibn Al-Qsim, Mlik was of the opinion that polytheists (*al-mushrikn*) could not be fought until they had been summoned, regardless of which side initiated hostilities. Although Mlik himself had not specified how this summons should be formulated, Ibn Al-Qsim said customarily “we would invite them to God and His Messenger, so that they may either accept Islam or offer *jizyah*”.<sup>8</sup> This, he affirmed, was based on prophetic precedent and on the established practice of early Muslims like ‘Umar Ibn ‘Abd Al-‘Azz.<sup>9</sup>

With regard to non-combatants, Mlik, according to Ibn Al-Qsim, prohibited the killing of women, children, elderly men, and monks and hermits in their cells. Mlik further counselled that the property of monks and hermits be left intact, since that was their sole means of livelihood. Here the *hadth* in which the Prophet forbids his troops to commit treachery and mutilation is cited. Other reports similarly proscribing the killing of non-combatants, particularly women and children, are recorded.<sup>10</sup> Ab Bakr’s detailed report in which he forbids the killing of various non-combatants and of animals, the cutting down of trees and destruction of

<sup>8</sup> This is a reference to the *Qur’n*, 9:29; for a discussion of this verse and its exegeses, see Afsaruddin, 2013, pp. 75–79, see *supra* note 7. This verse is often deployed in juridical works along with the *Qur’n*, 9:5 to make the case that non-Muslims can be fought *qua* non-Muslims; see discussion of the contested exegeses of this verse in Afsaruddin, 2013, pp. 71–75, see *supra* note 7.

<sup>9</sup> Saḥnn Ibn Sa‘d Ibn Hbb Al-Tanukh, *Al-Mudawwana Al-Kubr*, Maktaba Al-‘Asriyya, Beirut, 1999, vol. 2, pp. 581–82.

<sup>10</sup> *Ibid.*; see also Ab Ja‘far Muḥammad Ibn Jarr Al-Ṭabar, *Ikhtilf Al-Fuqah*, Brill, Leiden, 1933, pp. 6–12.

property is cited, as is the report from ‘Umar Ibn Al-Khattāb in which he forbids the killing of the weak and elderly, women, and children.<sup>11</sup>

#### 4.2.2. *Shāfi‘i Views on Jihād*

It is clear, therefore, that the Qur’anic principle of non-aggression leaves its imprint in the legal literature of the third/ninth century primarily in the form of upholding non-combatant immunity and prohibition against the wanton destruction of property and other instances of humane conduct during the waging of armed combat (*jus in bello*). It is also clear from a survey of the most prominent legal works like *Al-Mudawwana Al-Kubrā* (and others discussed below) that exegetes and jurists from after the second/eighth century increasingly began to incline to the view that the refusal of non-Muslims to embrace Islam when invited to do so constituted an act of wrong-doing *in itself* and could merit an attack by the Muslim ruler; in the case of non-scriptuaries (primarily those who were not Jews or Christians), this was expected to lead to their submission to Islam. If this did not occur, fighting is to be continued until submission or death of the non-scriptuaries. In the case of scriptuaries, the payment of *jizyah* was required in the absence of conversion. This position is articulated by Al-Shāfi‘i in his legal treatise titled *Umm*.<sup>12</sup> In his other major treatise *Al-Risāla*, Al-Shāfi‘i describes offensive *jihād* of this sort as a collective duty and not an individual obligation.<sup>13</sup> With regard to the conduct of war, Al-Shāfi‘i stipulates that women, children and young boys may not be put to death.<sup>14</sup> He also forbids the torture or mutilation of enemy combatants in accordance with the Prophet’s prohibition against the gouging of eyes or amputation of limbs and proscribed the killing of birds and higher animals on the basis of a *ḥadīth*.<sup>15</sup>

#### 4.2.3. *Al-Ḥawī Al-Kabīr* by Abú Al-Ḥasan Al-Māwardī

The principle of the offensive *jihād* is fully articulated in the later *Shāfi‘i* legal compendium known as the *Al-Ḥawī Al-Kabīr* by Abú Al-Ḥasan Al-Māwardī (d. 450/1058). A very important question comes to the fore for

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<sup>11</sup> Saḥnún, 1999, see *supra* note 9.

<sup>12</sup> Al-Shāfi‘i, 2002, vol. 4, p. 247, see *supra* note 4.

<sup>13</sup> Al-Shāfi‘i, 2005, p. 337–42, see *supra* note 2.

<sup>14</sup> Al-Shāfi‘i, 2002, vol. 4, p. 248 and vol. 9, p. 490, see *supra* note 4.

<sup>15</sup> *Ibid.*, vol. 9, p. 491.

Al-Máwardí: does the *Qur'án* permit all-out fighting; that is, equally against those who initiate fighting and those who do not? Al-Máwardí documents the view of the early exegete and jurist 'Atá' Ibn Abí Rabáh (d. 115/733) who asserted that it was never permissible to fight those who do not fight. Al-Máwardí, however, takes exception to this view, because he maintains that the Qur'anic articulation of the doctrine of combative *jihád* reaches its final form in the Qur'anic text 2:193, 9:5, and 2:191, which, according to him, encode divine permission *to fight equally those who fight and those who desist from fighting*.<sup>16</sup>

There is disagreement among scholars, however, as to whether this obligation is individual or collective. It is not possible for us to reproduce in full Al-Máwardí's extensive and highly significant discussion here on account of length constraints. In summary, according to Al-Máwardí, the collective nature of *jihád* is established in the Qur'anic text 9:41, which states: "Go forth [to battle], [armed] light and heavy!". The verse continues: "Struggle in God's way with your possessions and your selves". This may be understood, according to Al-Máwardí, as instructing the believer to supply himself or others, when unable to fight, with the provisions of war, such as a riding animal. The Qur'anic text 9:122, which states: "It is not for the believers to go forth [to fight] totally", further establishes the collective obligation of *jihád*. The main purpose of the collective *jihád* is to protect Islamic realms from the incursions of the enemy and to thereby ensure the safety of the lives and property of Muslims. If the enemy were to encroach upon Muslim territory and threaten it, then the collective duty of *jihád* becomes an individual one for all those capable of engaging in combat.<sup>17</sup> To phrase it differently, before the onset of war, the combative *jihád* is a collective duty; after hostilities begin (literally, "when the two armies meet"), it becomes an individual obligation, says Al-Máwardí.<sup>18</sup>

Al-Máwardí's *Al-Háwí Al-Kabír* is without doubt a highly important legal work, which shows the maturation and crystallisation of specific, legal rulings pertaining to conceptualisations of the military *jihád* and its conduct. Much of the earlier equivocation and debates regard-

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<sup>16</sup> Abú Al-Ḥasan Al-Máwardí, *Al-Háwí al-kabír fi fiqh madhhab al-Imám ash-shāfi'i raḍí alláhu 'anhu wa-huwa sharḥ mukhtaṣar al-muzani*, Dār Al-Kutub Al-'Arabiyya, Beirut, 1994, vol. 14, p. 110.

<sup>17</sup> *Ibid.*, pp. 110–13, 142–51.

<sup>18</sup> *Ibid.*, p. 180.

ing the principle of non-aggression by his time appear to have been resolved. A general consensus on legal positions on these issues had clearly emerged by Al-Máwardí's time, which when compared to multiple, earlier views, can be fairly described as more aggressive and inflexible.

However, it is very important to note that a general immunity for non-combatants continued to be upheld by Al-Máwardí, as it was by later jurists, such as the *Hanafí* scholar Abú Bakr Al-Sarakhsí (d. 490/1096) from the fifth/eleventh century. In his influential *Kitáb Al-Mabsuť*, Al-Sarakhsí affirms this principle<sup>19</sup>, as does the later *Hanbalí* jurist Ibn Qudáma (d. 620/1223) in his *Kitáb Al-Mughní*. Ibn Qudáma bases his position on the topic of granting immunity to non-combatants from attack on the well-known *hadíth* (recorded by Abú Dáwúd in his *Sunan*) in which the Prophet forbids the killing of frail (*fániyan*) elderly men, children, and women, while noting exceptions in the case of women and children being used as human shields, for example.<sup>20</sup>

### 4.3. Modern Scholars and Jurists

These legal developments during the classical period emphasising an overall belligerent perspective have been subjected to severe criticism by a number of modern and contemporary Muslim scholars, including jurists who have parted ways with many of their pre-modern counterparts. Such scholars and jurists include Muḥammad Abduh, Muḥammad 'Imára, Abú Zahra, and Al-Zuhaylí, among others. These scholars have emphasised that the *Qur'án* should be read holistically and that the critical verses which forbid the initiation of war by Muslims and which uphold the principle of non-coercion in religion categorically militate against the conception of an offensive *jihád* to be waged against non-Muslims *qua* non-Muslims.

This is a position forcefully articulated by the great modernist Egyptian scholar and reformer of the late nineteenth century, Muḥammad

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<sup>19</sup> Muḥammad Al-Sarakhsí, *Kitáb Al-Mabsuť*, Dár Al-Kutub Al-'Ilmiyya, Beirut, vol. 10, pp. 3–4.

<sup>20</sup> Ibn Qudáma, *Kitáb Al-Mughní*, Hajar, Cairo, 1990, vol. 13, pp. 177–78. For a fuller discussion of some of these juridical positions, see Asma Afsaruddin, “The *Siyar* Laws of Aggression: Juridical Re-interpretations of Qur'anic *Jihád* and Their Contemporary Implications for International Law”, in Marie-Luisa Frick and Andreas T. Müller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, Brill, Leiden, 2013, pp. 45–63.

‘Abduh (d. 1323/1905). Appointed the Grand Mufti of Egypt in 1317/1899, a position he held until his death, he is counted as one of the greatest reformers of the modern Islamic world, whose thought is still considered highly influential in liberal, modernist circles.<sup>21</sup> Although ‘Abduh did not write specifically on *jihád* itself, his views (as partially refracted through his disciple Rashíd Riḍá) may be reconstructed from his *Qur’án* commentary *Tafsír Al-manár*. ‘Abduh’s recorded commentary on the critical verses of the *Qur’án*, 2:190 and 9:5, allow us to gain a sufficiently comprehensive window into his perspectives on the purview of the combative *jihád*, as discussed below.

Like the early *Qur’án* exegetes discussed above, ‘Abduh emphasises that the Qur’anic text 2:190 allowed fighting as “defence in the path of God so as to allow unimpeded worship of Him in His house” and as a warning against those who break their oaths and seek to entice Muslims away from their faith. The Arabic command ‘*wa-lá ta’tadú*’ (‘do not commit aggression’) is interpreted by him to contain both a proscription against initiation of hostilities by Muslims and attacking traditional non-combatants such as women, children, the elderly, the infirm, and “those who proffer you peace”; additionally, it prohibits causing destruction to crops and property.<sup>22</sup>

The next verse (that is, the Qur’anic text 2:191) is understood to be a specific reference to the pagan Meccans who had driven the Prophet Muḥammad and his companions out of their homes in Mecca and prevented their subsequent attempt to peacefully perform the pilgrimage in the year of Al-Ḥudaybiyya. The right granted to Muslims to defend themselves in the face of Meccan hostility and faithlessness was therefore a divine act of mercy towards them in their hour of helplessness, comments ‘Abduh. He says that the right to fight in self-defence, as is clearly the case here, undermines the assertions of those who maintain out of wilful ignorance that Islam was spread by the sword.<sup>23</sup> *Fitnah* in the Qur’anic text 2:190 is specifically glossed as the torments visited upon the Muslims

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<sup>21</sup> For a recent monograph-length study of ‘Abduh’s thought, see Mark Sedgwick, *Muhammad Abduh*, Oneworld Publications, Oxford, 2009.

<sup>22</sup> Muḥammad Rashíd Riḍá, *Tafsír al-Qur’án al-karím al-mashhúr bi-tafsír al-manár*, Dár Al-Kutub Al-‘Ilmiyya, Beirut, 1999, vol. 2, pp. 169–70.

<sup>23</sup> This sharp rejoinder is clearly directed at a number of Orientalist scholars and Christian missionaries of his day who were prone to making such statements.

as a consequence of their beliefs – expulsion from their homes and confiscation of their property, for example. ‘Abduh cross-references here the Qur’anic text 29:2<sup>24</sup> to underscore the meaning of *fitnah* as ‘tribulations’ and the Qur’anic text 22:39<sup>25</sup> to establish the reasons (oppression, eviction from home, and so on) which render fighting in self-defence permissible.<sup>26</sup>

If the polytheist were to desist from fighting and violence, then hostility against him also ceases, because aggression against him is carried out only to make him renounce his violent, oppressive ways and for no other reason, he stresses.<sup>27</sup>

‘Abduh rejects the interpretation that the so-called sword verse<sup>28</sup> had abrogated the more numerous verses in the *Qur’án* which call for forgiveness and peaceful relations with non-Muslims. ‘Abduh argues that, in the specific historical situation with which the verse is concerned – with its internal reference to the passage of the four sacred months and to the pagan Meccans – other verses in the *Qur’án* advocating forgiveness and non-violence were not abrogated but rather in (temporary) abeyance or suspension (*laysa naskhan bal huwa min qism al-mansí*). *Naskh* implies the abrogation of a command, which is not the case here. Rather, the command contained in the Qur’anic text 9:5 was in response to a specific situation at a specific time in order to achieve a specific objective and has no effect on the injunction contained in, for example, the Qur’anic text 2:109, which states, “pardon and be forgiving, till God brings His command”, which is in regard to a different set of circumstances and objec-

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<sup>24</sup> See the *Qur’án*, 29:2, *supra* note 3. It states: “Do the people reckon that they will be left to say ‘We believe,’ and will not be tried?”.

<sup>25</sup> See *ibid.*, 22:39–40. It states: “Leave is given to those who fight because they were wronged – surely God is able to help them – who were expelled from their habitations without right, except that they say ‘Our Lord is God’”.

<sup>26</sup> Ridá, 1999, vol. 2, pp. 170–71, see *supra* note 22.

<sup>27</sup> *Ibid.*, pp. 171–72. Similar views are expressed by the Lebanese *Shí’í* scholar Muḥammad Husayn Faḍl Alláh (d. 2010). With regard to *Qur’án* 2:193 in particular, he comments that the verse is not concerned with the cessation of unbelief, but with wrong-doing and hostility (*aẓ-ẓulm wa-’l-’udwán*), and pointedly adds that interpretation of Qur’anic verses may generate meanings not previously mentioned by classical commentators, see Muḥammad Husayn Faḍl Alláh, *Min wahy al-Qur’án*, Dár Al-Malak, Beirut, 1998, vol. 4, pp. 74–83.

<sup>28</sup> The *Qur’án*, 9:5; alternatively, 8:38. See *supra* note 3.

tives.<sup>29</sup> ‘Abduh therefore is appealing to the principle of *takhṣīṣ* which restricts the applicability of certain Qur’ānic verses to the historical context of their revelation, with no general applicability beyond it.<sup>30</sup>

‘Abduh is critical of those who would see the injunction contained in the Qur’ānic text 9:5 with its clear reference to Arab polytheists applicable in any way to non-Arab polytheists or to the People of the Book. The latter are referred to very differently in the *Qur’ān*, as in the Qur’ānic text 5:82,<sup>31</sup> and in *ḥadīths*, such as the one which counsels leaving the Ethiopians (as well as Turks) alone as long as they leave the Muslims alone. He bemoans the fact that if jurists had not read these verses and *ḥadīths* “from behind the veil of their juridical schools”, then they would not have so egregiously missed the fundamental point made throughout the *Qur’ān* and in sound *ḥadīths* that “the security to be obtained through fighting the Arab polytheists according to these verses is contingent upon their initiating attacks against Muslims and violating their treaties [...]”.<sup>32</sup> ‘Abduh goes on to point out that the very next verse, the Qur’ānic text 9:6, offers protection and safe-conduct to those among the polytheists who wish to listen to the *Qur’ān*.<sup>33</sup> The implication is clear – polytheists and non-Muslims in general who do not wish Muslims harm and display no aggression towards them are to be left alone and allowed to continue their ways of life.

These proof-texts (and others beside them) belie the arguments made by Orientalist scholars and those who follow them that *jihād* is reducible to fighting against non-Muslims in order to forcibly effect their conversion.<sup>34</sup> ‘Abduh points to the Qur’ānic text 2:256 (“No compulsion

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<sup>29</sup> Ridá, 1999, vol. 10, pp. 161–62, see *supra* note 22.

<sup>30</sup> For a helpful discussion of the concepts of *naṣṣ* and *takhṣīṣ*, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, 2005, pp. 149 ff.

<sup>31</sup> This verse states: “[T]hou wilt surely find the nearest of them in love to the believers are those who say ‘We are Christians’”. See *supra* note 3.

<sup>32</sup> Ridá, 1999, vol. 10, pp. 162–63, see *supra* note 22.

<sup>33</sup> *Ibid.*, vol. 10, pp. 171–75.

<sup>34</sup> See, for example, Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Weiner, Princeton, 1996, p. 3: “[T]he ultimate aim [of the military jihad] is to bring the whole earth under the sway of Islam and to extirpate unbelief”. After September 11, 2001, some of these views have mutated into extremist statements of wholesale denunciation of Islam itself and its alleged exclusive penchant for violence; see, for example, Patrick Sookhdeo,

is there in religion”) and other verses which allow fighting only against those who initiate fighting and which command Muslims to incline to peace when the adversary inclines to peace,<sup>35</sup> as proof-texts – all of them establish the falsity of imputing such a reductive meaning to *jihād*.<sup>36</sup>

The well-known Egyptian jurist and intellectual Muḥammad makes many similar points in his refutation of the militant screed titled *Al-Farīdah Al-Ghā’ibah* (‘The Lapsed or Neglected Duty’) penned by the militant Abd Al-Salām Faraj, who murdered Egyptian president Anwar Sadat in 1981.<sup>37</sup> In this refutation, ‘Imāra takes strong exception to a number of positions adopted by Faraj and his cohort.

For example, ‘Imāra criticises Faraj and his supporters’ invocation of the Qur’ānic text 9:5<sup>38</sup> as a verse that abrogates all other verses of ‘forbearance’ (*al-ṣabr*), ‘forgiveness’ (*al-‘afu*), ‘pardon’ (*al-ṣafh*); and ‘turning away’ (*al-i-rād*). They ignore the fact that the verse was revealed specifically concerning the polytheists (*al-mushrikūn*) and that it has nothing to do with “those who believe in some [parts of] the Book and disbelieve in other [parts]”, a description which may be understood to refer to the People of the Book. They also erroneously liken today’s rulers to the *Khawārij* and those tribes who refused to pay *zakāh* to Abū Bakr in order to justify their militant campaign against governments in Muslim-majority societies. On all counts, they are guilty of deliberately distorting the meaning of the Qur’ānic text 9:5, which, ‘Imāra stresses once again, references only the polytheists and no other group. He points out that the well-known pre-modern scholar Al-Suyūṭī unambiguously stated that the

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*Understanding Islamic Terrorism: The Islamic Doctrine of War*, Isaac Publishing, Pewsey, 2004; and a myriad of polemical essays found on the Internet in particular. For a critique and exposé of a number of these positions, see Afsaruddin, 2013, *supra* note 7.

<sup>35</sup> The Qur’ān, 8:61, see *supra* note 3.

<sup>36</sup> Many of these points are also made strenuously by other modern Muslim scholars. See, for example, Muḥammad Abū Zahra, *Al-‘Alaqaq ad-dawliyya fī ‘l-Islam*, Matba‘at Al-Azhar, Cairo, 1964; Sobhi Mahmassani, “The Principles of International Law in the Light of Islamic Doctrine”, in *Recueil des Cours*, 1966, vol. 117, pp. 249–79.

<sup>37</sup> For a translation of Muḥammad Abd Al-Salām Faraj’s text, *Al-Farīdah Al-Ghā’iba*, see Johannes J.G. Jansen, *The Neglected Duty: The Creed of Sadat’s Assassins and Islamic Resurgence in the Middle East*, Macmillan, New York, 1986.

<sup>38</sup> This verse states: “Then, when the sacred months are drawn away, slay the idolators wherever you find them, and take them, and confine them, and lie in wait for them at every place of ambush. But if they repent, and perform the prayer, and pay the alms, then let them go their way, God is All-forgiving, All-compassionate”. See *supra* note 3.

Qur'anic text 9:5 did not abrogate, for example, the Qur'anic text 2:109, which runs, "pardon and be forgiving, till God brings His command", a verse revealed in connection with the People of the Book as its Qur'anic context clearly shows.<sup>39</sup>

To correct such fundamental misunderstandings of the purposes of *jihād*, 'Imára reviews the early historical circumstances which gradually allowed for the articulation of the combative *jihād* and its purview. In brief, he remarks that for thirteen years before the *Hijrah*, the Muslims in their weak state could not and did not fight; instead they were exhorted by the *Qur'án* to ward off evil with goodness<sup>40</sup> and other non-violent means of repelling aggression.<sup>41</sup> This state of affairs continued into the early Medinan period, even as Muslims became organised as a polity and finally achieved the freedom to practice and propagate Islam. Despite continuing persecution by the pagan Meccans and the growing treachery of certain Jewish tribes, the *Qur'án* still counselled showing forbearance with the former group<sup>42</sup> and forgiveness and pardon for the latter.<sup>43</sup> With the revelation of the Qur'anic text 22:38–40, permission was finally granted to Muslims to fight back; these verses outlined the specific reasons (expulsion from their homes; defence of houses of worship) for the justification of physical retaliation. Exegetes commenting on these verses have pointed to the defensive nature of this combative phase of *jihād* permitted by God. The roughly twenty military encounters, which occurred in the seven years following the revelation of these verses, were all battles of self-defence intended to repel the wrong-doers who had expelled the Muslims from their homes.<sup>44</sup>

'Imára then deals with the cluster of verses in *Súrat Al-Baqara*<sup>45</sup> revealed after the signing of the Treaty of Al-Ḥudaybiyya. On the one hand, he comments, the directives in these verses were a response to the aggression of the polytheists and contain a reprimand for their violation of the

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<sup>39</sup> Muḥammad 'Imára, *Al-Farídá al-ghá'iba: 'arḍ wa-ḥiwár wa-taqým*, Dár Al-Wahda, Cairo, 1982, pp. 34–35.

<sup>40</sup> The *Qur'án*, 23:96, see *supra* note 3.

<sup>41</sup> For example, *ibid.*, 41:33–35; 88:21–22.

<sup>42</sup> *Ibid.*, 73:10–11.

<sup>43</sup> *Ibid.*, 5:13.

<sup>44</sup> 'Imára, 1982, pp. 35–37, see *supra* note 39.

<sup>45</sup> *Ibid.*, 2:190–94.

terms of the Treaty and of the sanctity of the Sacred Mosque and its precincts. On the other hand, these verses offer assurance to the Muslims that they have the right to fight back under such circumstances while forbidding them from initiating aggression and from exceeding the original extent of harm done to them. Similar restrictions on the initiation of fighting and conduct during the waging of war are also clearly stipulated in regard to the Qur'anic text 9:5, which is mistakenly understood by some to permit the propagation of Islam "by the sword". 'Imára stresses that the rest of the ninth chapter (*Al-Tawba*) unambiguously upholds these fundamental Qur'anic principles:<sup>46</sup>

- Recourse to armed combat on the part of Muslims is contingent on prior aggression by the polytheists (and this is the only group referenced in this chapter); and
- It is a response to their hostile violation of their pacts with Muslims. Violence, our author affirms, cannot be justified otherwise; the propagation of religion is not a Qur'anic-sanctioned reason for initiating hostilities.

He comments, "Islamic[ally sanctioned] fighting (*al-qitál al-islámi*) is not the objective of Islam nor of Muslims". It is rather the means to cripple the power of the oppressor against the weak, who suffer from the persecution of the polytheists". This is clearly stated in the Qur'anic text 4:75–76:

How is it with you, that you do not fight in the way of God, and for the the men, women, and children who, being abased, say, 'Our Lord, bring us forth from this city whose people are evildoers, and appoint to us a protector from Thee, and appoint to us from Thee a helper'? The believers fight in the way of God and the unbelievers fight in the idol's way [*al-tághút*]. Fight you therefore against the friends of Satan; surely the guile of Satan is ever feeble.

'Imára is anxious to drive this point home, and thus repeats for emphasis that this is the true purpose of "fighting in the path of God" – for the deliverance of the weak and to resist *al-tághút*, which refers to tyranny, aggression, arrogance, and extremism on the part of the polytheists. The Qur'anic text 9:5 must be understood contextually as referring only to these polytheists specifically; to derive a broader and more general ap-

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<sup>46</sup> 'Imára, 1982, pp. 30–40, see *supra* note 39.

plicability of this verse violates the rules of logic and proper understanding of the revelations of God.<sup>47</sup>

‘Imára then turns his attention to explication of the term *jihád* and its multiple meanings, challenging those who would assert that it essentially means ‘fighting’ (*qitál*). He says that the term’s basic meaning is the exertion of one’s utmost ability and effort in order to defend oneself against enemies in the different spheres in which humans exert their ability and effort. It refers to various kinds of enemies, from thoughts to material acquisitiveness. It also refers to the different spheres of physical combat and its purview ranges from warding off external enemies to combating the lower self and attempting to conquer evil instincts. All of these are arenas for carrying out different kinds of *jihád*. In the revealed law, it possesses a general meaning, more general than war, fighting, and armed combat.<sup>48</sup>

In his influential work *Athár Al-Ḥarb Fí Al-Fiqh Al-Islámí*, the well-known Syrian scholar of Islamic law and legal theory Al-Zuhaylí has similarly stated that all the Qur’anic verses on fighting were revealed to allow Muslims to defend themselves against persecution and attack by their enemies.<sup>49</sup> As far as legitimate war is concerned in the Islamic context, Al-Zuhaylí identifies three specific types:

1. War against those who forcibly prevent the preaching of Islam and who foment internal disorder and strife;
2. War in defence of individuals and communities that are persecuted; and
3. War to repel a physical attack against oneself and one’s country.<sup>50</sup>

Al-Zuhaylí points out that, types 2 and 3 are fully compatible with current principles of international law, which allow for self-defence against prior aggression and humanitarian intervention in conflict-ridden regions.<sup>51</sup>

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<sup>47</sup> *Ibid.*, pp. 40–41.

<sup>48</sup> *Ibid.*, pp. 43–44.

<sup>49</sup> Wahba Al-Zuhaylí, *Athár Al-Ḥarb Fí Al-Fiqh Al-Islámí: Dirása Muqáraná*, Dár Al-Fikr, Beirut, 1981, pp. 106–20.

<sup>50</sup> *Ibid.*, pp. 93–94.

<sup>51</sup> Compare with Article 51 and Chapter VII of the Charter of the United Nations, which refer to the principles of self-defence and humanitarian intervention, respectively; see Charter of

Type 1, however, has no clear parallel in international law since it is not confined to the boundaries of the modern nation-state; it is rather deployed as a moral instrument to ensure religious freedom and contain social instability in general. Such a justified war that may be waged on primarily moral grounds has its parallel in Christian notions of just war and is not based on positive international law.<sup>52</sup>

These three *casus belli* are widely accepted by modern Muslim jurists. The influential but controversial Egyptian-born scholar based in Qatar, Yúsuf Al-Qarađáwí, similarly states that “moderate” Muslims (*al-mu‘tadilún*) are peaceful towards those who are peaceful towards them, and do not fight except those who fight them, prevent the peaceful propagation of the Islamic message, and persecute believers on account of their faith.<sup>53</sup> This position represents a significant departure from the classical juridical view that the Muslim ruler was obligated to carry out a military foray once a year as expansionist *jihád* in order to expand the territorial realms of Islam. Modern mainstream scholars largely reject this position as untenable because first, it violates the *Qur‘án*’s prohibition against fighting except in self-defence, and, second, it reflects legal accommodation to a world predicated on *a priori* non-Muslim hostility to Muslims and in which war was the default situation between nations.

#### 4.4. Conclusion

The discussion above makes it clear that, due to the concessions made by the classical Muslim jurists to *Realpolitik*, the *Qur‘án*’s absolute prohibition on initiating military aggression was considerably watered down over time within the *siyar* literature. The gradual attenuation in later exegetical and legal literature of the categorical *Qur‘ánic* prohibition against initiating aggression by Muslims is revelatory of the triumph of political realism over scriptural fidelity. Our survey reveals that early exegetes and jurists like ‘Atá’ Ibn Abí Rabáh, Mujáhid Ibn Jabr, and Muqátíl Ibn Sulaymán and later scholars like Fakhr Al-Dín Al-Rází firmly maintained that the

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the United Nations, 26 June 1945, in force 24 October 1945 (<http://www.legal-tools.org/doc/6b3cd5/>). There is also much debate on the ‘responsibility to protect’.

<sup>52</sup> See, for example, Neil Biggar, *In Defense of War*, Oxford University Press, Oxford, 2013, p. 310: “that military action can sometimes be morally justified in the absence of, and even in spite of, statutory or customary international law”.

<sup>53</sup> Yúsuf Al-Qarađáwí, *Fiqh Al-Jihád*, Maktabat Wahba, Cairo, 2009, vol. 1, p. 244.

Qur'anic text 2:190 unambiguously forbade the initiation of military hostilities and that military activity could be launched only against actual, not potential, aggressors. Other scholars and jurists from the third/ninth century onwards like Al-Ṭabarī, Al-Shāfi'ī, Al-Māwardī and others who were close to the ruling elites served the cause of empire by articulating the principle of offensive *jihād*. By going back to our earliest sources and by undertaking a diachronic comparison of key exegetical and juridical works, it is possible to excavate an earlier and prominent layer of principled adherence to the Qur'anic principle of non-aggression and trace its progressive transformation into primarily the legal principle of non-combatant immunity during the course of war, as we have shown.

Recuperation of this earlier strand of juridical thinking should goad contemporary Muslim jurists and scholars into re-examining the classical juridical views on the parameters of the combative *jihād* and laying bare their historically contingent nature. Modern Muslim jurists increasingly invoke the *Qur'ān*'s pronouncements on military ethics to question some of the legal provisions that developed concerning warfare after the first century of Islam.

In doing so, a larger area of commonality with contemporary international law on the conduct of war becomes apparent.<sup>54</sup> On one significant point, however, we notice a strong continuity between classical and modern jurists – their insistence that civilian life and property be protected during warfare and that non-combatant immunity is a principle that may not be violated, except in severely circumscribed circumstances. This categorical proscription is meant to prevent the crime of mass killings and of genocide, commissions of which are declared to be beyond the moral limits of Islamic ethics and law. In a vastly altered world in which mutually binding international treaties exist positing peace rather than war as the default situation, the classical legal rules of war and peace both invite revisiting as well as endorsement of their key provisions that uphold the sanctity of human life and seek to protect defenceless civilians from senseless violence.

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<sup>54</sup> Afsaruddin, 2013, pp. 71–75, see *supra* note 20.

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## Islam and International Criminal Law and Justice

Tallyn Gray (editor)

Mindful of alleged and proven core international crimes committed within the mainly-Muslim world, this book explores international criminal law and justice in Islamic legal, social, philosophical and political contexts. Discussing how law and justice can operate across cultural and legal plurality, leading Muslim jurists and scholars emphasize parallels between civilizations and legal traditions, demonstrating how the Islamic 'legal family' finds common ground with international criminal law. The book analyses questions such as: How do Islamic legal traditions impact on state practice? What constitutes authority and legitimacy? Is international criminal law truly universal, or too Western to render this claim sustainable? Which challenges does mass violence in the Islamic world present to the theory and practice of Islamic law and international criminal law? What can be done to encourage mainly-Muslim states to join the International Criminal Court? Offering a way to contemplate law and justice in context, this volume shows that scholarship across 'legal families' is a two-way street that can enrich both traditions. The book is a rare resource for practitioners dealing with accountability for atrocity crimes, and academics interested in opening debates in legal scholarship across the Muslim and non-Muslim worlds.

The book contains chapters by the editor, Onder Bakircioglu, Mashood A. Baderin, Asma Afsaruddin, Abdelrahman Afifi, Ahmed Al-Dawoody, Siraj Khan, Shaheen Sardar Ali and Satwant Kaur Heer, and Mohamed Elewa Badar, in that order.

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