

RESTRAINT IN THE CLASSICAL ISLAMIC LAW

Zezen Zaenal Mutaqin*

I.	INTRODUCTION.....	1
II.	BASIC CONCEPTS OF ISLAMIC LAW.....	7
	II.A. Shari‘a and Fiqh.....	7
	II.B. Sources of Islamic law.....	9
	II.C. Jihad.....	10
III.	THE IDEA OF PROTECTION IN THE CLASSICAL ISLAMIC LAW.....	12
	III. A. Key Issues of Islamic <i>Jus ad Bellum</i>	16
	III.A.1. Types of war/jihad.....	16
	III.A.2. Obligation of jihad.....	23
	III.A.3. Muslim territory.....	26
	III.B. Restraint: protection of persons.....	28
	III.B.1. Protection of “noncombatants”.....	29
	III.B.1.a. Women and children.....	30
	III.B.1.b. The Clergy.....	33
	III.B.1.c. Other groups of people.....	36
	III.B.2. Treatment of prisoners.....	42
	III.C. On the protection of properties.....	46
IV.	CONCLUSION.....	50

I. INTRODUCTION.

War kills people, destroys property, causes famine and displacement, uproots society from its culture, takes dreams and hopes of future

* Dr. Zezen Zaenal Mutaqin is the Head of MA Program and a lecturer at the Faculty of Islamic Studies, Indonesian International Islamic University (UIII). He is a former Assistant to the Asia Pacific Global Affairs Advisor of the ICRC and a consultant for Geneva Call. He is also currently a consultant advisor for UNICEF Indonesia. The author thanks Professors Khaled Abou El Fadl, Intisar Rabb and Stephen Gardbaum for their supervision and Professor Mark Cammack for his comments on the first draft. Email of the author: zezen.zaenal@uiii.ac.id

generations as well as creates a cycle of revenge. Despite all the brutalities and devastation caused by armed hostilities, human beings still resort to these means to solve their disputes. Because of the recurrence of war throughout human history, one might rightly ask questions such as: why does war occur? What is good about war? Is it justifiable?

In answering the aforementioned questions, thinkers in this field say that if war happens, it must have a just cause. Moreover, it should be waged by a legitimate authority with the right intention as well as doing no more harm than good. For warring parties, war is simply “a continuation of policy by other means,”¹ something that should be taken, as the last resort, to gain certain political objectives. Since resorting to war is the last chance for warring parties to win the political battle based on a just cause, it is probably justifiable.

However, historically, the just cause or pious end of the war has led to merciless conflicts. The question of what happens in war is as important as why it happens in the first place.² History has told us that war, for whatever reason, has a great impact, directly and indirectly, not only on those who participate in hostilities but also on the larger society and especially civilians. The time when the opposing armies met in the middle of desert or jungle has gone from the practice of modern warfare. Instead, they engage in combat in the middle of cities where civilian populations live. The effort to restrain war is even more challenging now than before. Thus, more than simply based on a just cause, wars must also have just conduct. War shall be limited and restrained, affecting only combatants and sparing non-combatants.

Indeed, attempts to restrain war are as old as war itself. Apart from customary rules, its evolution has culminated in the formulation of the modern law of war which consists of mainly two bodies of law: Geneva law³ and The Hague law.⁴ While the whole purpose of Geneva law is to

1. CARL VON CLAUSEWITZ, ON WAR 28 (Beatrice Heuser ed., Michael Howard & Peter Paret trans., 2006).

2. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 3-5 (1994).

3. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005; III Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 UNTS 85; Geneva Convention for the

protect those who are not, or no longer participating in hostilities, The Hague law's purpose is to limit the method and means of warfare. Both bodies of law, of course, are interrelated since the effort to protect non-combatants is almost impossible to be realized without limiting the machinery and method of war.

This article will dwell on this intellectual discourse on limiting war and violence but from a different perspective and tradition. It will focus on the juridical discourse of restraining violence in armed conflict from an Islamic law perspective. My research will specifically be focused on juristic discourses during the Formative period of Islamic law, from first to fourth century Hijra/seventh to tenth century CE.⁵ This formative period will have a lasting impact on the development and evolution of Islamic law.

Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 UNTS 31 (Geneva law is a body of public international law that is known also as international humanitarian law or international law of armed conflict that consist of series of separated treaties (conventions) concerning the minimum protection and standard minimum human treatment of non-combatant. It consists of four Geneva Conventions and three additional protocols. Geneva Convention I concerns the treatment and protection of Wounded and Sick in armed forces in the field; Geneva Convention II regulates the protection and treatment of wounded armed forces at sea; Geneva Convention III is on the protection and treatment of prisoners of war while Geneva Convention IV is on the protection of civilians during armed conflict. The Additional Protocol I to III are concerning the regulations on the protection of victims of international armed conflict, the protection of victims of non-international armed conflict and the adoption of an additional distinctive emblem, respectively.)

4. For Hague laws, see, e.g., The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907; Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899; Declaration on the Launching of Projectiles and Explosives from Balloons, July 29, 1899; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972 (The Hague law is a body of law that consists of a series of conventions, treaties, and declaration on the limitation the means and method of warfare. Since the machinery and technology of war developed gradually, the development of the law also continuously grows. The law regulates wide-ranging method and means of war like on the settlement of international disputes, adaptation to maritime warfare, prohibition certain projectiles or bullets. The law regulating certain weapons is continuously updated. For example, in 1972 state parties agreed on the prohibition of biological weapons, in 1995 the use of blinding laser weapons was prohibited while cluster munitions were declared illegal in 2008.). See generally THE AVALON PROJECT, THE LAWS OF WAR, available at http://avalon.law.yale.edu/subject_menus/lawwar.asp (accessed Apr. 20, 2021) (containing a complete list of the law on the limitation of the means and method of warfare). See generally THE ICRC, WEAPONS, available at <https://www.icrc.org/en/document/weapons> (accessed on Apr. 20, 2021) (containing the most recent treaties on the prohibition of certain weapons).

5. See 27 Wael B. Hallaq, *Introduction*, in THE FORMATION OF ISLAMIC LAW xx (Wael B. Hallaq & Lawrence I. Conrad eds., 2004); 27 Christopher Melchert, *The Formation of the Sunni Schools of Law*, in THE FORMATION OF ISLAMIC LAW 351 (Wael B. Hallaq & Lawrence I. Conrad

Why have I chosen this path? I have at least two reasons for this question: contextual and intellectual.

In the Western media, the image of Muslim countries is synonymous with conflicts, wars, and primarily terrorism. They resemble the uncivilized barbaric past where fellow human beings are slaughtered, beheaded, enslaved, and civilians randomly killed daily; the place where beheading has become terror entertainment and the chopped head of the enemy is displayed openly in a parade.⁶

Are Muslim countries uniquely more prone to violence? Are they more barbaric and savage as depicted in the Western media?

The answer depends on how we see it. The first bias is clearly in assuming and confusing Muslim countries with the Middle East while the statistic shows that less than 20% of Muslims live in that region, in comparison to 60% of those who live in Asia.⁷ If we take a look at the ten largest Muslim populations, namely Indonesia, Pakistan, India, Bangladesh, Egypt, Nigeria, Iran, Turkey, Algeria, Iraq, only three of them experience violence at the level of civil war, at least in the last ten years. Of course, like other countries, they are not completely free from violence.⁸ However, most of them have escaped the worst situation and some of them, like Indonesia, have a stable democratic system in place.

If we see the data of internal war in the whole period after World War II, Muslim countries were not more prone to war. In fact, the number of civil wars during the Cold war era in Muslim countries was less than the general trend. However, if we limit the data to the period after 2000, we see a dramatic increase statistically. For example, in 2011 and 2012, there were six internal armed conflicts, and all of them took place in Muslim countries: Afghanistan, Pakistan, Sudan, Somalia, Syria, and Yemen.⁹ Out of 474 rebel armed groups recorded between 1946 and 2014, around 200 of them were Muslim insurgent groups.¹⁰ The majority of them operated in Muslim

eds., 2004), for discussion refuting the conclusion Joseph Schacht, which latter followed by many orientalist, delineates the year of 850 AD or the third century of Hijri as the zenith of the formative period and arguing that the period where Islamic law contained all its components and marked the end of the formative period were around the middle of the fourth/tenth century.

6. Dave Burke, "Housewife" Iraqi Militia Leader "Beheaded and Cooked" ISIS Fighters, DAILY MAIL (2016), [http://www.dailymail.co.uk/~article-3813316/index.html](http://www.dailymail.co.uk/~/article-3813316/index.html).

7. See PEW RSCH. CTR., MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 6 (2009) (showing Muslims living in the Middle East and North Africa are around 20% of the total population).

8. Nils Petter Gleditsch & Ida Rudolfsen, *Are Muslim Countries More Prone To Violence?*, 3 RSCH. & POLITICS 1-9 (2016).

9. *Id.* at 1.

10. *Id.* at 2.

countries, fighting against fellow Muslim governments, while a minority of them operated in non-Muslim countries like in the Philippines (MILF-Moro Islamic Liberation Front) and Thailand (BRN-National Revolution Front). After 2000, while other parts of the world tend to be more peaceful, Muslim populations are experiencing a spike of violence and war. Thus, despite the fact that these conflicts are influenced by the geopolitical situation especially after 9/11, one may rightly conclude that what happens is basically the war between Muslims against Muslims—and kills mostly Muslims.

With regard to the assumption that Islam theologically teaches violence and therefore the conflicts in Muslim countries are more barbaric and savage, we can easily rebut this by comparing the use of violent discourses in Islam and other religions such as Christianity. Phillip Jenkins, for example, in his comparative study on the use of violence in The Qur'an and Bible, concludes that the biblical narrative is much more violent and barbaric than the Qur'an, to the extent that it recognizes genocide and another indiscriminate savagery as punishment.¹¹

Moreover, some studies have compared the “management of savagery” used by terrorist organizations with drug cartels in Latin America.¹² Due to the similarity in utilizing savagery and violence, even though they differ in their cause, the latter has been labeled “narco-terrorism.” In terms of victims, over seven years, between 2007 and 2014, around 164,000 people

11. PHILIP JENKINS, *LAYING DOWN THE SWORD: WHY WE CAN'T IGNORE THE BIBLE'S VIOLENT VERSES 1* (2011). Despite its controversy, the Qur'anic narrative on violence is far less savage and less violent in comparison to the Biblical narratives. In certain situation such as during hostilities, Qur'an commands to kill, but it always come with mercy and forgiveness. Biblical narratives on violence, in contrast to the Qur'an, marked by indiscriminate savagery. Deuteronomy 20, Joshua 8-9, and Psalm 137, for instance, command indiscriminate violence, command total destruction and extermination of the enemies: men, women and children—even animals. Moses was ordered to totally annihilate Canaan, while Joshua was ordered by God to show no mercy when conquering the city of Ai, killed twelve thousand inhabitants and slaughtered all livestock. God ordered King Saul to strike and kill all people of Amalekite, men, women and children. The Biblical concept of *herem* (ban) in which city under ban must be totally destroyed and killed, is probably similar to the modern conception of genocide. For the study on this topic, see KARI LATVUS, *GOD, ANGER AND IDEOLOGY: THE ANGER OF GOD IN JOSHUA AND JUDGES IN RELATION TO DEUTERONOMY AND THE PRIESTLY WRITINGS 1* (1998); JONNEKE BEKKENKAMP & YVONNE SHERWOOD, *SANCTIFIED AGGRESSION: LEGACIES OF BIBLICAL AND POST-BIBLICAL VOCABULARIES OF VIOLENCE 1* (2004); Athalya Brenner, “*On the Rivers of Babylon*” (*Psalm 137*), or *Between Victim and Perpetrator*, in *SANCTIFIED AGGRESSION LEGACIES OF BIBLICAL AND POST BIBLICAL VOCABULARIES OF VIOLENCE 56, 56-77* (Jonneke Bekkenkamp & Yvonne Sherwood eds., 2003); SUSAN NIDITCH, *WAR IN THE HEBREW BIBLE: A STUDY IN THE ETHICS OF VIOLENCE 1* (1995).

12. For an introduction, see, e.g., Phil Williams, *The Terrorism Debate Over Mexican Drug Trafficking Violence*, 24 *TERRORISM AND POLITICAL VIOLENCE* 259-78 (2012).

were killed in Mexico's drug war, in comparison to 103,000 during the same period in Afghanistan and Iraq put together.¹³ The cartel is also known for their extraordinary dramatic, public, and macabre violence even though to some degree, their violence is ignored by the Western media. Thus, the utilization of savagery in terrorist acts does not uniquely belong to the Muslim terrorist groups. However, it manifests and exists because it is presented by the media, or is intentionally exhibited by the perpetrators to spread anxiety among the general population as part of their strategy of terror.

While it is timely to dig into the intellectual debate on how to restrain and limit the violence of war, academic discourse in the post 9/11 era is relatively one-sided in scrutinizing reason and justification of violence (*jus ad bellum*). The study of jihadism has flooded academic discourse since then, studying it from different perspectives, be it historical, doctrinal, or political. While we may need a separate study on this issue, suffice to say that the other fields of study which deal with the limitation of violence, or the study of the norms, rules, and regulations on how to restrain war/violence in Islam (let us say, the "*Islamic jus in bello*" aspect) is still lagging. Thus, this article will hopefully fill the gap by paying attention primarily to this side by focusing on juristic discourse on the limitation of war in the Islamic law tradition. I hope this research can contribute to the development of this discourse, especially in English scholarly works. In addition, this article will also focus not only on a normative discussion of the topic but rather on the way this normative reference is debated and negotiated by Muslim jurists in a historical locus.

By elaborating legal opinions of the prominent Islamic schools of law (*madhāhib*) such as the Ḥanafīs, Mālikī, and the Shāfi'ī, the main part of this article will argue that the choice of methodological interpretation on the top of the socio-political contingencies has shaped different legal rulings on restraint, especially on the issue of protection. Some jurists use the consequential moral approach in their legal considerations, while others use the deontological moral approach. Muslim jurists must balance between the textual prescription and the socio-political contingencies that often forced them to utilize a purely pragmatical-utilitarian legal approach. In many cases, the Qur'an and the *sunna* moral prescriptions limit the juristic exercise of the utilitarian method. The Quranic and the Prophetic traditions are like a wall or a red line that limits the jurists' playing field. The Qur'anic moral prescriptions always pull jurists back to stay on track and

13. Jason M. Breslow, *The Staggering Death Toll of Mexico's Drug War*, FRONTLINE (July 27, 2015), <https://www.pbs.org/wgbh/frontline/article/the-staggering-death-toll-of-mexicos-drug-war/>.

do not transgress the limit of absolute textual moral imperatives.¹⁴ On the other hand, utilitarian and pragmatic interpretations make textual norms more flexible and less rigid in certain contexts.

Before we dwell on the main examination of the issue, primarily because the readers may come from different backgrounds without basic understanding of Islamic law, I feel obliged to start my elaboration on the notion of restraint by briefly discussing basic concepts of Islamic law. Understanding these concepts is a precursor to a proper understanding of the main ideas in the following parts. I have to warn the readers that the basic concept of Islamic law that will be discussed below is a simplification and selective, aimed simply to serve the interest of this article.

II. BASIC CONCEPTS OF ISLAMIC LAW.

II.A. Shari'a and Fiqh

We are dealing here with a very complex and sophisticated value and system of law which include its normativity, institutions, determinations, and practices that has been developed more than fourteen hundred years in a very diverse geographical location (from Spain to Indonesia) by different schools of law in responding to the dynamic of socio-political reality. It is extremely difficult to summarize this complex legal system in brief sentences. Nevertheless, it is essential to set out some basic information on Shari'a, Islamic law, and *fiqh* as well as its sources especially for those who don't have any background in Islamic law.

The term "Shari'a" and "Islamic law" are used most of the time interchangeably both by Muslims and non-Muslims discourses. Although it is not completely misguided, the term Sharia actually has a broader meaning depending on the context. For example, it is common in the classical Arabic term to find an expression like "*shari'a al-masihyya*" or "*shari'a al-yahudiyya*" which means simply Jesus law or the Jewish law respectively. Term *shari'a Muhammadiyah* also sometimes used by classical Muslim scholars to refer to the tradition of Muhammad or Muhammad's way of life—but it's never used to refer to Islamic jurisprudence.¹⁵ Linguistically, the term "*shari'a*" simply means the way or the path to the fountain or sources of nourishment. In this linguistic meaning, one can understand that the way to reach God is by following His

14. Khaled Abou El Fadl, *Islamic Law, Jihad and Violence*, 16 UCLA J. OF ISLAMIC AND NEAR E.L. 1–4 (2017).

15. KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE xxxii (2014).

way or path. In the legal context, Shari'a means the eternal, immutable law from God. As Abou El Fadl says, Shari'a is often used as the "universal, innate, and natural law" of the divine.¹⁶

While Shari'a is a universal absolute divine law, Islamic law, which is called in Arabic "*al-ahkām al-Shar'iyya*," is an outcome of Muslims' understanding of the divine law (Shari'ah). To borrow Abou El Fadl's definition, Islamic law is "a cumulative body of legal determinations and system of jurisprudential thought of numerous interpretative communities and schools of thought, all of which search the divine will and its relation to the public good."¹⁷ In other words, Islamic law is a profane fallible effort of human beings to interpret, understand and implement divine norms in specific socio-political situations throughout history to achieve human well-being (*taḥqīq maṣāliḥ al-ibad*). Thus, the interaction of the sacred and divine with the profane is an essential nature of Islamic law. While Shari'a is sacred, the very purpose of its revelation to the human being is worldly. For example, Muslim jurists agree that the purpose of Shari'a seeks to promote and protect five fundamental values: life, intellect, reputation or dignity, lineage or family, and property (human well-being).

In this regard, the term "Islamic law" connects closely to the term "*fiqh*" which literarily means "deep understanding" or "full comprehension" of the human being. In this literal meaning, any human understanding, not necessarily related to the law, could be understood as *fiqh*. An early book written by Imam Abū Ḥanīfāh (d.150/767) on theology, for example, is titled *fiqh al-akbar*.¹⁸ However, due to the primary role of Islamic law in its history, the term *fiqh* later conflates and is synonymous with the knowledge of Islamic law. Thus, while *fiqh* refers to the human activity of understanding the sacred law, the term *faqīh* or *fuqahā'* (jurists) in Arabic refer to those who possess that knowledge, but primarily of Islamic law.

Because the very nature of *fiqh* is temporal based on human understanding, it is bound by historicity. Through the accumulation of interpretative methods of understanding and reasoning that span more than a millennium, *fiqh* grew into diverse schools of law which was very much influenced by its historicity. As will be seen in our elaboration at the main part below, jurists (*faqīh*) in Medina like Imam Mālik, for instance, have a different opinion on the treatment of prisoners of war on the protection of properties, in comparison to Shaybāni who lived in Kufa and had a close

16. *Id.*

17. *Id.*

18. AL-NU'MĀN ABŪ ḤANĪFAH, AL-FIQH AL-AKBAR (Muhammad bin Yahya Ninowy trans., n.d.).

political connection to Harun al-Rashid, the Abbasid ruler. Throughout history, the interaction between historicity and the use of different interpretative methods and legal reasoning has led to the growth of numerous schools of Islamic law (*madhhab*), reaching more than one hundred schools. Most of them have extinct today except four Sunni schools of law (The Hanafi, Maliki, Shafi'i, and Hambali) and three Shi'i schools (Ja'fari, Zaydi, and Isma'ili).

Based on these reasons, it is proper to translate *fiqh* into English as Islamic jurisprudence. In my elaboration of the topic in the main section below, readers will find disagreement of jurists on certain legal issues such as on the protection of noncombatants and the enemy properties. Thus, this basic understanding of the development of *fiqh*, its numerous legal interpretations and legal reasoning that led to the establishment of legal schools (*madhhab*) is supremely important for our elaboration.

II.B. Sources of Islamic law.

A system of law must refer to an authoritative source of reference to claim its authority and legitimacy. In Islamic law, as argued by Abou El Fadl, there are two categories of sources: the formal and the practical or instrumental sources of law. While the formal sources of law are a substantive ideological construct, the practical sources of law refer to the set of interpretative methods and reasoning utilized in the legal practice to produce positive rules.¹⁹ Concerning the practical sources, it seems that the product of the reasoning is synonymous with the method and interpretative instruments.

It is agreed by the majority of Muslim jurists that there are two formal sources of law that must become a foundation for claiming legal authority and legitimacy. They are the Qur'an (infallible, literal words of God revealed to the Prophet Muhammad), and the Sunna (the cumulative tradition of the Prophet Muhammad and his companions). However, because of the prime role of *ijma'* (consensus and agreement of Muslim jurists) and *qiyas* (analogical or deductive reasoning) in the early formation of Islamic law, these instrumentalities of law have been recognized as the formal sources of law in a way that these tools are utilized as legitimating and foundational sources of law. Shi'i jurisprudence, however, recognized reason as the source of law instead of *qiyas* while agreeing on other sources.²⁰

19. ABOU EL FADL, *supra* note 15, at xxxiv.

20. *Id.*

With regard to the practical sources of law, there are varieties of methods and instruments that expand legal determinations. For example, among the practical sources of the law are the presumption of continuity (*istishāb*), the imperative of following precedent (*taqlīd*), the legal rationalization for breaking with precedent for a new determination (*ijtihād*), application of local practices and tradition (*‘ada and ‘urf*), judgment in equity (*istislāh*), equitable relief (*haja*), and necessity (*darura*), protection of public interest (*masāliḥ al-mursala*) and the prevention of harm (*sad al-dharā‘i*).²¹ Muslim jurists use these methods of legal interpretation to extract law or to examine cases and make legal determinations.

These complex legal methodologies were developed in Islamic jurisprudence to guarantee accountability, predictability, and the principle of the rule of law that ultimately leads to its authority and legitimacy. These sophisticated legal methodologies also represent a continuous tension and effort to balance between upholding normative morality expressed in the Qur’anic text or the Prophetic tradition (*sunna*) with a pragmatic, functional, and temporal legal determination based on socio-historical contexts (*fiqh*).²² The combination of these factors (the socio-political contingencies and the choices of interpretative methods utilized by Muslim jurists) has caused the diversity of opinion in Islamic law.

II.C. Jihad

War or armed conflict is one of the bloodiest human endeavors. Yet, despite its destructive effect, war has been part of the practice of human history. When Islam was born in Arabia, war, whether among tribes or between empires in its neighboring region, was part of a normal-survival mechanism.²³ Qur’anic injunctions on war in part were adaptive and responsive to the development of Islamic mission brought about by the Prophet Muhammad in the milieu of Arabic tribal society. Islamic jurisprudence later uses several terminologies that connect to other terms like *jihād*, *qitāl*, and *ḥarb* based on different Qur’anic injunctions.

The terms *jihād*, *qitāl*, and *ḥarb* in both the Qur’an and Sunna have relatively similar meaning. While jihad in the Western imagination has a distorted connotation of illegal use of violence by terrorist organizations, its

21. *Id.* at xxxiv–v.

22. Khaled Abou El Fadl, *Between Functionalism and Morality: The Juristic Debates on the Conduct of War*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 103-28 (Jonathan E. Brockopp ed., 2003).

23. See, e.g., MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE 5–8 (2008); ‘ABD AL-RAḤMĀN IBN KHALDUN, MUQADDIMA 458–60 (2004).

basic term *j-h-d* in Arabic means “endeavor,” “exert oneself in anything,” “striving” or “struggling” toward a praiseworthy aim. The word *jihād* is quite often used in conjunction with the word *fi sabīl allāh*, which means “in the path of God.” While “qitāl” means “fighting,” or “battle” and the term “*ḥarb*” refers to war in general, these three words are similarly referring to an activity of struggling or fighting against the enemy. However, conceptually, only the word *jihād* encompasses a broader sense covering both physical and spiritual striving or struggling against the enemy. According to Muslim scholars, jihad is fighting against two types of enemy: the physical like in the war against enemies, and the spiritual which include the evil (*shayṭān*) and the self (*nafs*).²⁴ Thus, in this frame of meaning we understand that according to Muslim scholars, based on a narrated report from the Prophet, there are two types of jihad which include *jihād al-asghar* (lesser jihad), refers to a physical fight against enemy-unbelievers and *jihād al-akbar* (higher jihad), refers to the struggle against one’s self evil inclination. In addition to these three related terminologies, Muslim jurists in the classical books also use other terms such as *ghazw* (riding or military campaign) and *sarāyā* (military expedition sent by the Prophet) to describe the military activity of the Prophet.²⁵

Juristic discussions on the issue of jihad in the classical books were an outcome of a dynamic interaction between normative references found in the Qur’an and Sunna with the actual socio-political needs, facilitated by the use of interpretative tools and the method of legal reasoning, as we briefly discussed above. As indicated previously, jurists in Islamic history were challenged to balance the consideration of legitimating (or delegitimizing) practical acts in a certain social-cultural situation (functionalism) with the aspirational prescription of the text (morality). In other words, in the context of war, jurists should formulate a law that is neither too idealistic nor too realistic. The law should contain, to some degree, a realistic view of war while maintaining normative prescriptions.²⁶

This dynamic has led to the growth of diverse opinion on almost every issue under Islamic law, including jihad. This happens partly because, on the one hand, different choice of interpretative method and legal reasoning are used by jurists, and on the other hand, the contradiction of both the Qur’anic verses and the narrative of the Sunna (*al-ḥadīth*) on a certain

24. WAHBAH AL-ZUHĪLĪ, *ATHĀR AL-ḤARB FĪ AL-FIQH AL-ISLAMĀMĪ DIRĀSAH MUQĀRANAHAH* 32 (1998); ASMA AFSARUDDIN, *STRIVING IN THE PATH OF GOD: JIHAD AND MARTYRDOM IN ISLAMIC THOUGHT* (2013).

25. *See generally* AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 19-41 (2011).

26. ABOU EL FADL, *supra* note 15, at 103; BEST, *supra* note 2, at 2–6.

issue. For example, some verses indicate that the nature of war against unbelievers is defensive while on other occasions the Qur'an indicates to wage war offensively. While the Quranic verses do not mention the execution of the prisoner of war (Q 47:4 mention only grace and ransom), several hadiths reported the Prophet Muhammad executed Al-Naḍr ibn al-Hārith and 'Uqba b. Abū Mu'aīth of the Quraysh, two prisoners of the Badr war, one of the biggest battles against the Meccan during the Prophet time.²⁷

For this paper, I would like to refer to some of the most influential classical books of Islamic jurisprudence mainly in the Sunni school such as *al-Mudawwana al-Kubra* (Maliki school), *Siyar al-Kabir al-Shaybani* (Hanafi), *Al-Umm* (Shafi'i), *al-Mughni Ibd Qudama* (Hambali), *Bidāyah al-Mujtahid* (Ibn Rushd), *Ikhtilāf al-Fuqahā'* (Imam al-Ṭabarī) as a representative sample to show the dynamics of the juristic opinion. In addition, without any pretention to be an expert on Shi'i law, I also include in the discussion below some references to the Shi'i books both from the classical and contemporary periods like *al-Kāfi*, *al-Nihāyah*, *Musnad Zayd bin Ali* and *Bihār al-Anwār*. Based on my preliminary research, the juristic debate on jihad issues among Shi'i jurists is less sophisticated than the Sunni tradition. The reason for that is quite apparent: jihad is closely connected to how political authority preserve, manage, regulate and adjudicate power and territorial domination. Blankinship further argues that jihad used to be an imperial ideology for the survival and expansion of both the Umayyads and Abbasid dynasties in early Islamic history.²⁸ Shi'i Islam, for most of the time, especially in the classical period, was not part of or close to the dominant political power. And probably because of that, jihad topics are not their main priority.

III. THE IDEA OF PROTECTION IN THE CLASSICAL ISLAMIC LAW

If you engage in armed hostility and must subjugate your adversary, why should you spare some of them? Why does the law command you to protect and treat them well in some circumstances? Doesn't it contradict the objective of subjugating the enemy? Answering these questions will be more difficult if one believes that he/she engages in a holy war for a just

27. The reason behind their execution, whether their status as prisoners or because of other grave crimes against the prophet in Mecca, is debatable. See e.g., Lena Salaymeh, *Early Islamic Legal-Historical Precedents: Prisoners of War*, 26 L. & HIST. REV. 521, 521-44, 552-54 (2008) for a discussion of the debate over the reason behind their execution being their status as prisoners or because of other grave crimes against the prophet in Mecca.

28. KHALID YAHYA BLANKINSHIP, *THE END OF THE JIHAD STATE: THE REIGN OF HISHAM IBN 'ABD AL-MALIK AND THE COLLAPSE OF THE Umayyads* (1994).

cause against the enemy who is evil and unjust. Philosophers, thinkers, and jurists have dealt with these moral questions, and their answers could be simplified into several approaches.

Firstly, the reason soldiers restrain their behavior in the battle is rooted in the notion of honor. The chivalric traditions guide warriors to follow ideal, heroic, noble, and honorable conduct in war. Morally, these notions would make warriors in the battle different, for instance, from a serial killer or a murderer. If both murderers and warriors engage in killing, they shall be differentiated by their ethical motives, moral conduct, and virtue. The sense of honor and moral traditions on warfare would limit warriors' possibility of turning themselves into a killing machine. Presumably, when a community, a polity, or a political authority gives their warriors the license to kill, it must come with some sort of ethical guide to restrain. Authorization to kill is a potent tool, and it must come with strict ethical and legal limits. For a warrior, transgressing the limit of restraint means a breach of honor to his community that trusts him with a license to kill virtuously. Thus, soldiers or warriors follow the laws of war because they think it is their honor to do so. If they kill, they do so under strictly restrained conditions and on behalf of their community, not for their interests.²⁹

Secondly, warriors' behaviors of sparing some enemy's persons and properties or treating humanely captured enemy soldiers are motivated by a mutual expectation that the opposing party would do similarly to them. Reciprocal behaviors (*muqābala bi al-mithl*) are still considered one of conflicts' most realistically observed principles. This approach, however, necessitates that all parties respect similar rules and ethics. It also necessitates the compliance of all parties. Breach of rules and noncompliance of one party may lead to a cycle and reciprocal violation of the law. For these reasons, modern laws of war, for example, emphasizes that compliance with the law shall not depend on reciprocity. Nevertheless, this "golden rule" is still considered an element that practically influences the soldiers' behavior in war.³⁰

Thirdly, restraint may be motivated by functional and pragmatic considerations. For instance, in pre-modern times, warriors treated the prisoners humanly because it was considered an asset they owned. Buildings, vegetation, and cattle belonging to the enemy were spared because the warriors expected their groups would own those properties after the subjugation. If you think that you will own something in the future,

29. LARRY MAY, WAR CRIME AND JUST WAR 30-35 (2007).

30. Eric A. Posner, *Rights and Reciprocity: Human Rights, the Laws of War, and Reciprocity*, in 6 LAW & ETHICS OF HUMAN RIGHTS 148-71 (2012).

through conquest, for example, it is not in your best interest to destroy them indiscriminately.

Last but not least, when warriors join the battle as part of religious duty, their restraint may be motivated by their compliance with a religious doctrine that regulates the conduct of war. They commit to restrain their behavior in battle, not because of expected future consequences but because their moral prescriptions demand that they do so. Thus, from this perspective, restraining behaviors is motivated simply by their conformity with the moral norms and not by other external factors.

From the perspective of moral theory, the above four points can be classified into three moral paradigms: consequentialism, deontology, and virtue ethics.³¹ The second and third points can be categorized under consequentialism. The first and fourth approaches can be classified under the virtue ethics and deontological moral paradigm, respectively.

The most prominent paradigm within consequentialism is utilitarianism. This paradigm sees good and bad by considering the possible outcome of a specific action. If it brings a more significant benefit and welfare or lesser harm, that action could be the right one. Deontological ethics, conversely, say that human actions shall not be dictated by their consequences or outcomes but rather by categorical moral imperatives derived either from God's will or from nature (natural law). Virtue ethics

31. See Larry Alexander & Michael Moore, *Deontological Ethics*, in STAN. ENCYCLOPEDIA OF PHIL. (2020); Walter Sinnott-Armstrong, *Consequentialism*, in STAN. ENCYCLOPEDIA OF PHIL. (2019); Rosalind Hursthouse & Glen Pettigrove, *Virtue Ethics*, in STAN. ENCYCLOPEDIA OF PHIL. (2022) (discussing summary on how consequentialism sees that there is no standard for rights and wrongs, good and bad beyond the practical values of the future outcome. As opposed to consequentialism, deontology maintains that there is an absolute standard for right and wrong or good and bad beyond practical consideration of the outcome. The standard can be derived from the natural law or from the will of God. Meanwhile, the virtue ethics focus on developing good and positive moral character (*akhlāq* in Islamic tradition) through habituation that will guide the behavior of human being. While consequentialism emphasizes on the consequence and deontology emphasizes on the rules, virtue ethics emphasize internal traits such as courage, wisdom, and justice. In other words, both consequentialism and deontology emphasize actions of human being while the virtue ethics focus on agency: how to create a virtuous agent from whom flows virtuous conducts. We must note that this categorization does not mean that each paradigm completely ignores one to each other. All these three paradigms constantly guide human behaviors. Consequentialists would consider other paradigms, but with a lesser portion. Thus, the categorization is not absolute and it is simply a matter of the centrality of approach for each paradigm). See also Gary Watson, *On the Primacy of Character*, in IDENTITY, CHARACTER, AND MORALITY: ESSAYS IN MORAL PSYCHOLOGY (Owen Flanagan & Amelie Oksenberg Rorty eds., 1997); THE HANDBOOK OF VIRTUE ETHICS (Stan van Hoof ed., 2014); Jason Kawall, *In Defense of the Primacy of the Virtues*, 3 J. OF ETHICS & SOC. PHIL. (2009); Elizabeth M. Bucar, *Islamic Virtue Ethics*, in THE OXFORD HANDBOOK OF VIRTUE (Nacy E. Snow ed., 2018); Khaled Abou El Fadl, *Qur'anic Ethics and Islamic Law*, 1 J. OF ISLAMIC ETHICS 7-28 (2017).

focus on the characters and traits of a human being to which good conduct is anchored.

On many occasions, utilitarianism is appealing, simple, and sensible. However, it might become perilous in some situations. For instance, using the consequentialist paradigm, one may consider torturing captives as permissible if the outcome is to prevent greater risks or disasters. Even in a large number, killing civilians intentionally to induce the enemy to surrender and destroy their morale seems justifiable and acceptable, especially if the stakes are very high. We see this justification, for example, in the case of the atomic bombing of Hiroshima and Nagasaki.³² In this regard, deontological moral virtues, or the so-called absolutist paradigm, shall limit utilitarianism's potential damage.³³

It is beyond the purpose of this article to elaborate on this moral debate further. However, this short elaboration is necessary to discuss the notion of protection in the classical Islamic juristic discourse. As we will see, when formulating and debating several legal issues in war, Muslim jurists, like modern thinkers, engaged continuously in considering these moral paradigms. In this part, I will argue that while historical and socio-political contingencies often guide jurists to use the consequential moral approach in their legal considerations, the Qur'an and the *sunna* moral prescriptions limit their exercise of the utilitarian method. The Quranic and the Prophetic traditions are like a wall or a red line that limits the jurists' playing field. The Qur'anic moral prescriptions always pull jurists back to stay on track and not transgress the limit of absolute textual moral imperatives.³⁴ On the other hand, utilitarian and pragmatic interpretation is utilized to make textual norms more flexible and less rigid in certain contexts.

I would like to divide this section into two parts. The first part will discuss the category of persons that shall be protected and shall not be targeted intentionally in the battle. The second part will deal with the issue of the protection of the property. However, dwelling into the elaboration on the notion of protection which falls under the issue of *jus in bello* (the law governing the conduct of hostilities) in the modern international humanitarian law (IHL), it is necessary to touch upon several topics under *jus ad bellum* (the law governing the use of force) that would lead us to a proper understanding of the topic. The reason for that is because, for the pre-modern jurists, both *jus in bello* and *jus ad bellum* are inseparable.

32. Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFFAIRS 123, 127 (1972).

33. *Id.* at 128.

34. Khaled Abou El Fadl, *Islamic Law, Jihad and Violence*, 16 UCLA J. OF ISLAMIC & NEAR E. L., 1, 1-4 (2017).

Furthermore, from the restraint's perspective, the limitation imposed by Islamic law on the warriors started even before the battle started. For instance, most jurists agree that the enemy shall not be harmed until the invitation to accept Islam and warning are delivered up to three times. If they refuse to accept Islam, protection is granted if they accept to pay *jizya* (poll tax). Last but not least, the elaboration on the issue of protection would not be sufficient without knowing certain types of war and types of enemy persons elaborated by jurists. Thus, it is unavoidable to briefly discuss several key issues under Islamic "*jus ad bellum*" as a precursor to our central elaboration.

III. A. Key Issues of Islamic *Jus ad Bellum*

War is a state of conflict where hostility among adversaries is manifested in extreme violence. By its nature, human beings are reluctant to be involved in such types of hostility. Thus, the parties involved in such conflict would typically resort to war only as a last option. Thinkers and scholars across centuries reflect on the nature of war's "necessary evil" by formulating a just-war moral theory. If parties must engage in war, it should be triggered by just causes and waged according to just conduct as a last resort. Importantly, *jus ad bellum* theory also necessitates the presence of a proper authority that can authorize war. War must also be pursued with the right intention. While these two aspects are separated into two distinct bodies of law, in its modern elaboration, pre-modern jurists did not recognize this separation.

Within Islamic legal tradition, we can confidently say that Muslim jurists have elaborated and debated jihad doctrines within the same parameter of defining the justness or unjustness of war. Unjust war, by definition, cannot be considered as a jihad. While there are many issues elaborated by Muslim jurists concerning the use of forces, I will only focus on three main relevant topics as follows:

III.A.1. *Types of war/jihad*

Islamic jurisprudence differentiates four types of war: the war against non-Muslims or unbelievers (*jihad*), the war against the apostates (*ridda*), the war against rebels (*bughāt*), and the war against the brigands/organized crimes (*hirābah*).³⁵ While the first category indicates the external nature of

35. Despite the fact that the earliest books of jurisprudence discussed legal issues concerning non-Muslim subjects or "the others" such as the People of the Books, the polytheists/idolators, the apostates and the rebel, this typology of conflict is defined more clearly by later jurists. Their discussion of non-Muslim subjects can be found not only under the chapter of jihad but also in

war, the last three categories are part of the internal armed fights. It might be fair to say that this typology is similar to the modern types of war, including international war/armed conflict and the non-international conflicts.³⁶ This differentiation is crucial from the Islamic legal perspective because Islamic law assigns specific rules and legal norms for each type of adversary and conflict.

Firstly, concerning the war (or military jihad) against non-Muslims, Islamic law differentiates between jihad against idolators/polytheists (*al-mushrikūn*) and jihad against the people of the book/scripturaries (*ahl al-kitāb*).³⁷ When waging war against idolators/polytheists, Islamic law

other legal issues such as when jurists talk about marriage, commerce, and contract. Regarding the law of war, the typology used here refers to al-Māwardī in his *al-Aḥkām al-Sultāniyyah*. See ABŪ AL-ḤASAN AL-MĀWARDĪ, *KITĀB AL-AḤKĀM AL-SULTĀNIYYAH WA AL-WILĀYĀT AL-DINIYYAH* 47, 84 (Ahmad Mubārak al-Baghdādī ed., 1989); MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 74 (1955).

36. KHADDURI, *supra* note 35, at 74–82; AL-DAWOODY, *supra* note 25, at 76–78.

37. It is important to note here that jurists disagree over which groups of people should be categorized as idolators as opposed to the scripturaries, especially as Islam expanded beyond Arabia. Other than the Jews and the Christians, Qur'an in 22:17 mentions the Sabians (*al-Ṣābi'ūn*) as well as *al-Majūs* (Magian or the Zoroastrians). With regards to the Sabians, some jurists argue that they are part of the Christian sects while some argue that they are part of the Judaic traditions. Mujāhid argues that *al-Ṣābi'ūn* is a religion in between Christianity and Judaism. Nevertheless, most jurists argue that they are considered as part of the people of the book. See, e.g., 13 ABĪ MUḤAMMAD IBN QUDĀMA, *AL-MUGHNĪ* 203–04 ('Abdullah ibn Abd al-Muhsin Al-Turkī ed., 1997).

Other issues debated by jurists are regarding the timing of their adherence to their religions and the coming of Islam as well as the issue of ethnicity. If someone adhered to a Christian faith after the prophecy of Muhammad, or the Jews who was born after the revelation of Qur'an, would they be considered as the scripturaries? Were the non-Arab idolators considered as part of the scripturaries or the polytheists? The first question regarding this issue arose when Muslim political authority during the Rightly Guided Caliph encountered Zoroastrian and the native Berber (West African) religion. The authority must decide their legal status: whether they were considered the People of the Books or the idolators like the Arab polytheists (*mushrikūn*) of the Prophet time. Based on the prophetic tradition conveyed to him by 'Abd al-Raḥmān ibn 'Awf, the Caliph 'Umar decided that the Zoroastrian would be treated like the scripturaries, especially on the issue of *jizya*. 'Uthmān ibn Affān, based on this precedent, treated the Berber religion similarly. At the later period, when Islam met Hinduism in India, the Muslim authority during the Caliph of 'Abd al-Mālik (the Umayyad) decided also that Hindu would be treated like Zoroastrians, following this precedent, at least for *jizya* purposes. See, e.g., AHMAD IBN YAḤYĀ AL-BALĀDHURĪ, *FUTŪḤ AL-BULDĀN* 617–19 ('Abd al-Allāh al-Anīs al-Ṭabbā' ed., 1987); YOHANAN FRIEDMANN, *TOLERANCE AND COERCION IN ISLAM: INTERFAITH RELATIONS IN THE MUSLIM TRADITION* 85–86 (2003).

These practices would shape the juristic debates regarding the enforcement of *jizya* (and the protection) to non-Muslim. In summary, al-Shāfi'ī and Ḥanbalī School of law seems to argue that *jizya* may only be accepted from the Jews, the Christians, and the Zoroastrians. However, al-Shāfi'ī was reluctant to expand the case by analogy to other groups of religions other than the Zoroastrian. Furthermore, for al-Shāfi'ī, *jizya* is only valid for the followers of those religions who adhered to those religions before or during the prophet time. After the prophecy of Muhammad, it seems that the status of the scripturaries was no longer valid. And thus, if this reading is correct,

regulates that Muslims must offer the idolators the option to accept Islam before fighting can justly be pursued. The “sword verses” that stipulate, “fight the polytheists whenever you find them” (Q 9: 5) indicate that Islam cannot exist together with polytheism.³⁸ Concerning the scripturaries/the people of the book, Islamic jurisprudence regulates that Muslims must offer two options before fighting can begin: accepting Islam and paying *jizya* (poll tax) in return for protection (*al-dhimma*).³⁹ If the enemy fails to accept one of those options, Muslims may legitimately fight them.⁴⁰

for al-Shāfi‘ī, non-Muslims or unbelievers who adhere to their religion after the completion of the prophecy would be considered as idolators. For him, the ethnicity (Arab or non-Arab) was not a factor in deciding the status of the idolatry/scripturaries.

The Hanafī and Maliki schools have a different opinion. For them, all non-Muslims in general may enjoy the protection and retain their religion if paying *jizya*, except the Arabs idolators and the apostates. Importantly, for these two schools of law, the expansion of the status (scripturaries-like status) was only agreed upon the issue of *jizya*. When discussing other legal matters such as on the marriage and the food’s consumption, they would revert to the notion of limited definition of the people of the book/scripturaries that only include the Jews and the Christians. Thus, because of this debate, some scholars argue that the legal discussion on the status of non-Muslims particularly on *jizya* may be dictated partly by the fiscal and economic interests. See, e.g., YA‘QUB IBN IBRĀHĪM ABŪ YŪSUF, KITĀB AL-KHARĀJ 128–29 (1979); 1 MALIK IBN ANAS, AL-MUWAṬṬĀ (RIWĀYAH YAḤYĀ AL-LAYITHĪ) 374–77 (Bashār ‘Awād Ma’rūf ed., 1997); 5 MUHAMMAD IBN IDRIS AL-SHĀFI‘Ī, AL-UMM 399–423 (Rif‘at Fawzī ‘Abd al-Muṭalib ed., 2001); 13 IBN QUDĀMA, *supra* note 37, at 203–07; ABĪ JA‘FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ, KITĀB AL-JIHĀD WA KITĀB AL-JIZYA WA AḤKĀM AL-MUḤĀRIBĪN MIN KITĀB IKHTILĀF AL-FUQAḤĀ’ 199–202 (Joseph Schacht ed., 1933).

38. KHADDURI, *supra* note 35. This verse would later be interpreted by some scholars as an instruction to wage ‘offensive war’ not only against the polytheists but also against the scripturaries, despite the fact that Qur’anic texts mention only the polytheists.

39. Banū Taghlib, a powerful tribe of the Christian Monophysite who lived in a strategic area between the Byzantine and the Muslim empire, was an interesting and exceptional case in this regard. Due to geo-political reasons, instead of imposing *jiza* on them, after a stern negotiation, Muslim authority during the Caliph of ‘Umar imposed *ṣadaqa/zakā*, the term that normally refers only to the Muslim’s obligation of paying charity or almsgiving. Banū Taghlib refused to pay poll tax under the term “*jizya*” because they saw it as a humiliation for their pride. This strategic move was purely based upon ‘Umar’s policy for securing alliance with a powerful Christian tribe in the fights against the Byzantine. At a glance, his policy seems to contradict the Qur’anic texts and the traditions. To differentiate it from the *ṣadaqa* for Muslims, ‘Umar doubled the amount of payment to the extent that it is similar to the amount of *jizya*. Unlike *jizya* which can only be imposed upon the male-abled body individuals, all Banū Taghlib persons, without exceptions, must pay the *ṣadaqa*. Under these conditions, Banū Taghlib shall give two sheep for every five camels, a one-dinar tax for every 20 dinars, 10 dirhams tax for every 200 dirhams. Because this was agreed by almost all Companions, Ibn Qudāma says that this policy was considered as *Ijma’* or consensus among them. Only during the caliphate of ‘Umar Ibn ‘Abd al-‘Azīz (‘Umar II) these terms were renegotiated. ‘Umar Ibn ‘Abd al-‘Azīz argues that Banū Taghlib had violated the conditions agreed with the Caliph ‘Umar, including the prohibition of baptizing their children. Other reason, obviously, was because during ‘Umar Ibn ‘Abd al-‘Azīz, Muslims had confidence that they could confront the Byzantine, even without the help of Banū Taghlib.

In my opinion, this was a smart policy of the Caliph ‘Umar because not only did he secure the strategic alliance, but he also secured and even doubled the fiscal interests. This precedent is also

It is essential to mention here the reasoning on the permissibility of fighting against unbelievers (the legality on the use of force). Al-Qur'an has contradictory accounts on this: on the one hand, it indicates that war or fighting against unbelievers (whether polytheists or the people of the book) are allowed only in the case where Muslims are persecuted and attacked (for example Q 22: 39-41).⁴¹ However, even if Muslims must fight against the aggressor, they are obliged to constrain their actions and not transgress the "boundary" (Q 2: 190-191).⁴² Having said this, Qur'an urges Muslims to use armed fighting only as self-defense to stop the aggression against

an example of how legal norms are negotiated to facilitate conflicting interests in achieving a higher objective (in this regard, it seems that for 'Umar, protecting Muslim land was much more important than simply establishing a legal term/norm). Banū Taghlib remained a Christian until around the ninth century. They gradually converted to Islam, especially after they were integrated into the politics of empire under the Umayyad and the Abbasid.

Based on this precedent, al-Shīrāzī (d.476/1083) argue that in the situation when non-Muslims are reluctant to pay poll tax under the name of *jizya*, and Muslim authority consider it reasonable to accept their request, it is then permissible to impose "*ṣadaqa*" instead of "*jizya*" to them under a condition that the amount deducted from them are equal to the *jizya*. For the discussion on *ṣadaqa* of Banū Taghlib, see, e.g., AL-BALĀDHURĪ, *supra* note 37, at 249–252; 4 ABĪ JA'FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ, TĀRĪKH AL-ṬABARĪ: TĀRĪKH AL-RUSUL WA AL-MULŪK 40–41 (n.d); ABŪ YŪSUF, *supra* note 37, at 121; 1 SAHNŪN IBN SA'ĪD AL-TANŪKHĪ, AL-MUDAWWANAH AL-KUBRĀ 333–34 (1994); 13 IBN QUDĀMA, *supra* note 37, at 223–26; 5 ABĪ ISHĀQ AL-SHRĀZĪ, AL-MUHADHDHAB FĪ FIQH AL-IMĀM AL-SHĀF'Ī 314–15 (Muḥammad Al-Zuhīlī ed., 1996).

40. After the second and the third century Hijra, the issue of invitation (*al-da'wa*) to Islam and warning to the enemy before fighting was a subject of disagreement. The reason for that is because jurists at that period examined that the invitation to follow Islam had been sufficiently conveyed to the enemy. Thus, by assuming that the Roman (the main adversary at that time) had been invited, some jurists from the Ḥanafī School argue that attacking the enemy is permissible without invitation to Islam (It means invitation is no longer necessary). Al-Shāfi'ī, however argue that it is an obligation to convey the invitation to Islam before fighting, if the enemy have not received it. Imām Malik simply says that the invitation to Islam before war is simply favorable, not an obligation. Like the Ḥanafī, Ibn Qudama of the Ḥanbali School also examines that invitation to follow Islam is no longer necessary, especially with regard to the Turk and the Roman. See AL-ṬABARĪ, *supra* note 37, at 2–3; 13 IBN QUDĀMA, *supra* note 37, at 29.

41. "Those who have been attacked are permitted to take up arms because they have been wronged—God has the power to help them (39) and those who have been driven unjustly from their homes only for saying, 'Our Lord is God.' If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause— God is strong and mighty (40)." Qur'an 22: 39-40.

42. To make it more accessible, I quote again here the translation of the verses: "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 (190) Kill them wherever you encounter them and drive them out from where they drove you out, for persecution is more serious than killing. Do not fight them at the Sacred Mosque unless they fight you there. If they do fight you, kill them— this is what such disbelievers deserve." Qur'an 2: 190-191.

them.⁴³ The Hijāzī scholars such as Ibn Jurayj (d. 150/768), ‘Aṭā’ ibn Abī Rabbāh (d.115/733), and Imām Mālik, who lived geographically far from the frontier, were inclined to have a defensive approach to jihad.⁴⁴ Thus, for this group of jurists, aggressions and persecutions against Muslims are just causes for war.

However, on other occasions, Qur’an also urges Muslims to establish just public order. For this, Muslims use jihad to spread Islam in their endeavor to establish a world order based on Islamic values (see, for example, Q 2: 194, 217 and the famous of the ‘sword verse’ Q 9: 5, 29).⁴⁵ The ‘opening’ or liberation (*futh*), otherwise seen as conquest by some historians, of the neighboring lands, took place in an unprecedented velocity. Within two hundred years, Islam had become a hegemonic power from India to France. One might see it as “preemptive” self-defense because without actively raiding against the neighboring empires at that time, Islamic land would be in jeopardy. Spreading just order or exercising preemptive self-defense might be categorized as “offensive war.” The Syrian and Iraqi scholars like al-Shaybāni (d.189/805) and al-Shāfi’ī (d.204/802) who lived in the center of Muslim political power and faced a perpetual threat from the Byzantine Empire were inclined to approve of offensive jihad.⁴⁶ For this group of jurists, jihad may be pursued to spread Islam and eradicate disbelievers; it is not only for defense.

Secondly, the war against the apostates (*al-ridda*) is a fight against those who abandon Islam with hostile intention and become the enemy.⁴⁷

43. For a detailed study on this, see e.g., REUVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 47–67 (1999); BONNER, *supra* note 23, at 20–27.

44. 4 ‘ABD AL-RAZZĀQ AL-ṢON’ĀNĪ, *AL-MUṢANNAF* 479–81 (2015); J. Chabbi, *Ribāṭ*, 8 *THE ENCYCLOPAEDIA OF ISLAM NEW EDITION* 495–96 (1995); Roy P Mottahedeh & Ridwan al-Sayyid, *The Idea of the Jihād in Islam before the Crusades*, in *THE CRUSADES FROM THE PERSPECTIVE OF BYZANTIUM AND THE MUSLIM WORLD* 23, 27–28 (Angeliki E. Laiou & Roy P Mottahedeh eds., 2001); Ridwan al-Sayyid, *Dār al-Ḥarb and Dār al-Islām: Traditions and Interpretation*, in *RELIGION BETWEEN VIOLENCE AND RECONCILIATION* 123, 146–47 (Thomas Scheffler ed., 2002).

45. “And so, when the sacred months are over, slay those who ascribe divinity to aught beside God wherever you may come upon them, and take them captive, and besiege them, and lie in wait for them at every conceivable place. Yet if they repent, and take to prayer, and render the purifying dues, let them go their way: for, behold, God is much-forgiving, a dispenser of grace.” Qur’an 9:5.

46. Chabbi, *supra* note 44; Mottahedeh & al-Sayyid, *supra* note 44; al-Sayyid, *supra* note 44, at 123–25.

47. The nomad tribes of the Arabian Peninsula were very loyal to their customs and tradition. And due to this reason as well, the nomads/Bedouin (the *ʿAʿrāb*) were considered as one of the bitterest enemies by Qur’an (9:97). When the Prophet died, they considered no longer bound by their loyalty to Islam because their loyalty was to the Prophet. It is also important to consider the occasion of the revelation of the “sword verses” in which the leaders of the pagans Arabia were furious when ‘Alī declared, under the authorization of the Prophet, that after that day (after the

In my opinion, we have to differentiate between apostasy as political acts and apostasy as merely theological choices (leaving Islam and converting to other religions).⁴⁸ Even though apostasy as a theological choice is punishable by death in Islamic law,⁴⁹ the war against the apostates historically was fighting against those who revolted against Medina's Muslim authority. In the early Islamic history, especially during the Abū Bakr period, immediately after the Prophet Muhammad passed away, many Arab tribes such as Banū Ḥanīfa, Gatafān, Asad, and Tamīm reverted to their pagan religion, refused to pay almsgiving/tax (*zakah*) and denied the authority of Muslims in Medina. The *al-ridda* revolts also challenged the religion of Islam and Muhammad's prophecy, as shown by the rise of the "false prophets" such as Maslamah ibn al-Ḥabīb (d. 11/633), also known as Musaylama al-Kadhdhāb.⁵⁰ Thus, the newly established Muslim community had to face both political and spiritual crises, immediately after the passing of the Prophet. Under the leadership of Abū Bakr, the first Caliph, the revolts could be subjugated in around one year (in 11/633). This victory also marked the beginning of Muslim expansion and conquest. Those tribes who revolted against Medina were re-integrated into the *umma*. Many of their warriors even took part in the conquests beyond Arabia.⁵¹

From a juridical perspective, regarding the apostates, most Muslim jurists argue that if the apostates are numerous and powerful enough to

revelation of the "sword verses") the pagans/idolators were barred from entering the holy sanctuary and the sacred mosque. They threatened to break the treaty with Medina. *See, e.g.*, 15 MUHAMMAD FAKHR AL-DĪN AL-RĀZĪ, *TAFSĪR AL-FAKHR AL-RĀZĪ (MAFĀTĪḤ AL-GHAYB)* 226–27 (1981); 5 IBN ḤAYYĀN AL-GHARNAṬĪ, *TAFSĪR AL-BAḤR AL-MUḤĪṬ* 9 ('Abd al-Razzāq Al-Mahrī ed., n.d).

48. I concur mainly with the elaboration of al-Alwānī in his book on Apostasy in Islam. *See* TAHA JABIR ALALWANI, *APOSTASY IN ISLAM: A HISTORICAL AND SCRIPTURAL ANALYSIS* 98 (2011).

49. *See, e.g.*, 12 ABĪ MUḤAMMAD IBN QUDĀMA, *AL-MUGHNĪ* 264 ('Abdullah ibn Abd al-Muhsin Al-Turkī ed., 1997).

50. According to Imām al-Shāfi'ī, there are two categories of apostates: those who abandon Islam and revert to their paganism and those who still adhere to the religion of Islam but refuse to pay almsgiving/tax (*al-ṣadaqā*). *See* 5 AL-SHĀFI'Ī, *supra* note 37, at 516.

51. It is beyond the objective of this part to elaborate in detail both legal and historical aspects of the apostasy in Islam. For this discussion, *see, e.g.*, ABĪ JA'FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ, *THE HISTORY OF AL-ṬABARĪ, VOL X THE CONQUEST OF ARABIA* (Fred M. Donner trans., 1993); Elias Shukri Shoufani, *Al-Riddah and the Muslim Conquest of Arabia: A Re-Evaluation* (Jan. 1968) (Ph.D. dissertation, Princeton University) (ProQuest); Frank Griffel, *Toleration and exclusion: al-Shāfi'ī and al-Ghazālī on the treatment of apostates*, 64 *BULL. OF THE SCH. OF ORIENTAL & AFRICAN STUDIES* 339, 339 (2001); Michael Lecker, *Al-Ridda*, 12 *THE ENCYCLOPEDIA OF ISLAM: NEW EDITION* 692 (2004); FRIEDMANN, *supra* note 37; Ahmad Atif Ahmad, *Al-Ghazālī's Contribution to the Sunnī Juristic Discourses on Apostasy*, 7 *J. OF ARABIC & ISLAMIC STUD.* 50 (2007).

challenge the authority, jihad against them is unavoidable. However, Islamic law recommends that Muslim rulers negotiate and urge them to repent and return to Islam (up to three times and should wait for three days) before fighting.⁵² In my opinion, it is fair to say that war against apostates (*ridda*) is similar to the fight against those who commit high treasons and secession in the modern context.⁵³

Third, the war against rebellion or insurrection (*bughā*) is a complicated subject in Islamic law.⁵⁴ Nevertheless, to simplify, while the war of *ridda* resembles a fight against secessionists, *bughā* is a fight against rebels or dissenters who challenge and aim at toppling the authority. In principle, presumably, Muslims are not allowed to fight one another. They are considered to have committed a grave sin for doing so. However, when a group of Muslims dissent based on a plausible interpretation or cause, separate fighting rules are applied (Islamic law on *bughā*). These rules are different from the rules that apply for fighting against non-Muslims or apostates. For example, in the *bugha* war, Muslim fugitives and the wounded may not be dispatched, the Muslim prisoners may not be enslaved or executed, children and women may not be targeted intentionally, and their property may not be taken as spoils of war.⁵⁵

Lastly, the discussion on *bughā* in Islamic law is closely related to the discussion on the fight against organized crime/the brigands or terrorism (*hirābah*) because they are connected. Islamic jurisprudence differentiates the brigands from rebels by testing whether two requirements are met: the insurrection based on plausible rationales/interpretation or cause (reason of renouncing the authority/*ta'wīl al-muhtamal*) and the degree of strength and ability to fight (*shawka*).⁵⁶ If these two requirements are met, then it may be considered as *bughā*. If a group has different plausible interpretations but did not renounce the authority and does not actively rebel (let's say like a peaceful opposition), they can reside peacefully. The authority may persuade them to abandon their interpretation and return to the orthodoxy.

52. For the juristic elaboration from the classical to the contemporary studies, see e.g., ABŪ YŪSUF, *supra* note 37, at 128–29; 7 MUHAMMAD IBN AL-HASAN AL-SHAYBĀNĪ, AL-ASL 510 (Muḥammad Boynukalin ed., 2012); 12 IBN QUDĀMA, *supra* note 49, at 264; 5 AL-SHĀFI'Ī, *supra* note 37, at 516; 10 MUHAMMAD IBN AḤMAD AL-SARAKHSĪ, KITĀB AL-MABSŪT 98 (n.d); KHADDURI, *supra* note 35, at 76; ALALWANI, *supra* note 48, at 89; ABDULLAH SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM (2017).

53. WAEL B. HALLAQ, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS 319 (2009).

54. For the elaboration of this topic, the best study is written by Professor Abou El Fadl. See KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 206 (2006).

55. Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 MUSLIM WORLD 144, 155 (1999); ABOU EL FADL, *supra* note 54, at 173.

56. ABOU EL FADL, *supra* note 54, at 145–49. For a more elaborate discussion on different juristic opinions on this issue, see ABOU EL FADL, *supra* note 54, at 219.

However, when they fight (with weapons) opposing the authority, their status is regulated under *bughā*. The Khārijite (Khawārij) case is a clear example: when they disagreed with the Caliph Ali (the 4th Caliph), they were allowed to use their mosque and live in Islamic territory as long as they did not oppose Ali with their strength.⁵⁷ Meanwhile, organized criminals or brigands (*hirābah*) may have one requirement: the degree of strength they use for criminal activities, but they do not have the intent and the plausible cause to rebel and topple the authority.

Islamic jurisprudence does not elaborate on what is the parameter of the plausible interpretation and cause and the degree of strength. Muslim jurists rely on historical precedent rather than setting systematic theoretical parameters.⁵⁸ For example, Muslim jurists argue that Muawiyya and ‘Aisha relied on plausible causes when they rebelled against the Caliph ‘Alī. However, as Abou El Fadl says, plausible interpretation simply means religious disagreement that is not heretical, while the plausible cause is “a grievance from a perceived injustice.” Further, Abou El Fadl argues that “in principle, Muslim jurists were not willing to equate Muslims who fight or rebel because of “higher motives” or unselfish reasons, and those who resort to violence out of the desire for personal gain or out of blind allegiance to a tribe or family.”⁵⁹ Concerning the degree of strength, Muslim jurists do not elaborate on the minimum number of people or minimum strength for the *shawka* to exist. Instead, they simply stated that one or two people clearly do not meet the requirement.⁶⁰

III.A.2. Obligation of jihad

Muslim jurists agree that jihad is a collective obligation (*farḍ al-kifāyah*).⁶¹ It means that each individual is not obliged to do certain

57. *Id.* at 151–52.

58. *Id.* at 145.

59. *Id.*

60. *Id.* at 148.

61. This agreement, however, is not clearly formulated until al-Shāfi‘ī. If one investigates the earliest books of Islamic law, such as *al-Muwatta’*, *al-Mudawwana*, *al-Aṣl*, *Siyar al-Kabīr*, one will not find their elaboration on the issue of jihad’s obligation. In al-Muṣannaf, ‘Abd al-Razzāq interestingly reported that when Ibn Jurayj (d. 150/768) asked ‘Aṭā’ ibn Abī Rabbāh (d. 115/733) regarding whether jihad is an obligation upon each Muslim, ‘Aṭā’ replied very briefly saying he had no knowledge about this. 4 AL-ṢON’ĀNĪ, *supra* note 44, at 479.

Unlike other jurists in his period, al-Shāfi‘ī, in his *al-Umm*, systematically elaborates the obligation of jihad by presenting the evolution of this obligation. To summarize, his elaboration basically says that both Quran and the Prophetic traditions seem to have contradictory accounts. On the one hand, in many verses it commands Muslims to participate in jihad. Relying solely on these verses, one may conclude that jihad is an obligation upon each Muslim. However, on the other hand, Qur’an also stipulates that some Muslims may not participate in the battle; they may

obligations (in this regard, jihad) when part of the Muslim community has performed it. A minority jurist, such as Saʿīd ibn al-Musayyab (d. 94/712-5), one of the early prominent jurists of Medina, however, argues that jihad is an obligation upon every Muslim (*farḍ al-ʿayn*).⁶² In addition, ʿAbd Allāh ibn al-Ḥassan (d. 61/680) says that jihad is simply a voluntary or recommended act.⁶³

The nature of collective obligation changes to be an individual obligation when the enemy attacks Muslim polity and the community are in danger. If the enemy attacks Muslim territory in military aggression, every individual in the occupied land is obliged to wage jihad against the aggressor, and it remains so until the aggressor of the hostile force is defeated.⁶⁴

decide to stay with the community for a legitimate reason (*al-takhalluf*), such as for study. Qurʿan says “Yet it is not right for all the believers to go out [to battle] together: out of each community, a group should go out to gain understanding of the religion, so that they can teach their people when they return and guard themselves against evil.” Qurʿan 9:122. Historical account also shows that in each battle the Prophet instructed some of his companions to stay in Medina to guard the city and to take care of the community. Al-Shāfiʿī, one of the greatest jurists with a brilliant legal mind, resolved this superficial contradiction by proposing what he calls *farḍ al-kifāya*. 5 AL-SHĀFIʿĪ, *supra* note 37, at 384. Unlike *farḍ al-ʿayn* where each Muslim must perform certain obligations such as praying, fasting, almsgiving and pilgrimage, the *farḍ al-kifāyah* is an obligation upon Muslims as a community. Thus, in this regard, if some individuals have performed such obligation, the rest are exempted. For full elaboration on the obligation of jihad according to al-Shāfiʿī, see *id.* at 361–91.

62. 3 SHIHĀB AL-DĪN AL-QARĀFĪ, AL-DHAKHĪRAH 385 (Muḥammad Abū Khubzah ed., 1994). Ibn al-Musayyab, however, see jihad as a defensive mechanism, such as when the enemy attack the Muslim land. Thus, in this situation, jihad becomes an obligation upon each Muslim.

63. 2 MUḤAMMAD IBN RUSHD, BIDĀYAH AL-MUJTAHĪD WA NIHĀYAH AL-MUQTAṢĪD 329 (Muḥammad Hasan Hallaq ed., 1994). In *al-Muṣannaḥ* we found that some Meccan scholars seems to argue that jihad is merely a good deed like *ṣadaqa*. 4 AL-ṢONʿĀNĪ, *supra* note 44, at 479–83.

64. This juristic formulation, according to my investigation, is rarely found in the books of jurisprudence before the fourth/ninth or fifth/tenth century. The idea of jihad as an individual obligation in the situation of emergency/necessity (*jihād al-Idṭirār*) is elaborated primarily because starting around the sixth/eleventh century, Muslims faced an imminent danger and crisis posed by both the Mongols and the Crusaders. Ibn Qudāma (d. 620/1223), one of the most prominent Hanbali jurists, argues that jihad become an obligation for each Muslim (*farḍ al-ʿayn*) in three situations: where one meets the enemy in the frontline, when the enemy enters and attacks the Muslim land and if one is conscripted by the authority. 13 IBN QUDĀMA, *supra* note 37, at 9. Ibn Taymiyya (d. 728/1328) who lived during the crisis following the Mongol attacks that captured Baghdad and many parts of the Muslim territory, elaborates this issue in his *al-Siyāsah al-Sharʿiyyah*. TAQĪ AL-DĪN IBN TAYMIYAH, AL-SIYĀSAH AL-SHARʿIYYAH FĪ IṢLĀH AL-RĀʿĪ WA AL-RĀʿIYYAH 163–64 (ʿAlī ibn Muḥammad Al-ʿImrān ed., n.d). A Ḥanafī jurist who lived in the ninth century Hijra, Ibn al-Hammām al-Ḥanafī (d.861/1456) similarly examines this issue when saying that it is an obligation upon each Muslim when the enemy attacks their land. It is also an obligation for Muslims living in a nearby territory to help their fellows who are under attacks. 5 AL-ḤANAFĪ IBN AL-HAMĀM, SHARḤ FATḤ AL-QADĪR 425 (2003). This juristic ruling would later be integrated into the modern Islamic juristic discourses on jihad. For the modern discussion, see,

While most of the jurists agree that in the case of defensive war (*jihād al-daf‘ū*), every Muslim may participate in jihad without any authorization, scholars disagree on the role and nature of Muslim rulers in "offensive jihad" (*jihād al-ṭalab*). The majority of Muslim jurists agree that in the case of jihad for establishing just and public order (to spread the Islamic faith or the so-called ‘offensive jihad’) through a military operation, the conduct of jihad must be authorized by Muslim leaders (either Caliph or Imams). However, Sunni and Shī‘ī scholars have a different opinion on the nature of Muslim leaders whom Muslims must obey their jihad’s authorization.

Most Sunni jurists see that any established Muslim authority, whether just or not, can authorize jihad. The personal behaviors of a leader are not an issue when authorizing jihad.⁶⁵ Imam Aḥmad (d. 241/855) even says that if one knows a commander or a leader drinks alcohol and is malignant but has the quality of compassion, prudence, and strength that would prevent Muslims from being defeated, one should join the jihad and ignore these personal matters. He also said that if one sees possible defeat during the war because the army leader is weak, then one may refuse to join the jihad. Thus, for him, also for many of the Sunni scholars, the strength (*al-quwwa*) of the leader that could guarantee the victory of jihad is more important than personal piety.⁶⁶

Shī‘ī jurists like Muḥammad Ibn Ya‘qub al-Kulaynī (d. 329/941), Abū Ja‘far al-Ṭūsī (d. 460/1068) and Al-Hurr al-‘Āmilī (d. 1014/1693), by contrast, argue that the presence of a divinely appointed just leader (Imam) is a necessary condition for the authorization of (offensive) jihad.⁶⁷ Al-Hurr

e.g., 1 YŪSUF AL-QARADĀWĪ, *FIQH AL-JIHĀD: DIRĀSAH MUQĀRANAḤ LI-AḤKĀMIHI WA FALSAFATIHI FĪ ḌAW’ AL-QUR’ĀN WA-AL-SUNNAH* 114–16 (al-Ṭab‘ah 1 ed. 2009); 16 WIZĀRAH AL-AWQĀF WA AL-SHU‘ŪN AL-ĪSLAMIYYAH, *AL-MAWSŪ‘AH AL-FIQHIYYAH* 130–31 (1989).

65. See, e.g., 4 AL-ṢON’ĀNĪ, *supra* note 44, at 552–53; 1 AL-TANŪKHĪ, *supra* note 39, at 497; 13 IBN QUDĀMA, *supra* note 37, at 14; 1 MUḤAMMAD IBN AḤMAD AL-SARAKHSĪ, *SHARḤ KITĀB AL-SIYAR AL-KABĪR* 110–12 (Abī ‘Abd Allāh Muḥammad Ḥasan Ismā‘īl ed., 1997); 3 AL-QARĀFĪ, *supra* note 62, at 404; ABĪ ‘ABD ALLĀH MUḤAMMAD AL-BUKHĀRĪ, *ṢAḤĪḤ AL-BUKHĀRĪ* 705 N. 2852 (2002). Ibn Taymiyya who lived in a period when Muslim community was experiencing the crisis of leadership, further elaborates this issue by asking a hypothetical question regarding the choice between the trustworthy as opposed to strong leadership (*al-quwwah wa al-amanah*). He argues that it should be measured by the need upon those qualities in certain situations. In the context of war, for example, a strong leader is preferable although he might be untrustworthy. Despite his opinion, from overall discussion it seems that strong leadership is preferable in this hypothetical situation for Ibn Taymiyya. See IBN TAYMIYAH, *supra* note 64, at 19–25.

66. 13 IBN QUDĀMA, *supra* note 37, at 14–15.

67. See 5 MUḤAMMAD IBN YA‘QŪB AL-KULAYNĪ, *FURŪ‘ AL-KĀFĪ* 13–14 (2007); MUḤAMMAD IBN AL-ḤASAN IBN ‘ALĪ AL-ṬŪSĪ, *AL-NIḤĀYAH FĪ AL-MUJARRAD AL-FIQH WA AL-FATĀWĀ* 290 (1970); 6 MUḤAMMAD IBN AL-ḤASAN AL-ḤUR AL-‘ĀMILĪ, *WASĀ‘IL AL-SHĪ‘A ILĀ TAḤṢĪL MASĀ‘IL AL-SHARĪ‘A* 32 (1962); AL-ZUHĪLĪ, *supra* note 24, at 92.

al-‘Āmilī even said that jihad without the presence of a just Imām is forbidden just like the eating of dead animals, blood and swine is forbidden for Muslims.⁶⁸ The presence of a just leader for Shī‘ī jurists is necessary to guarantee that Muslims’ jihad is for God’s cause only, not for personal and political purposes like the consolidation of power or the expansion of the empire.⁶⁹

It is essential to mention this discussion here because the contemporary Muslim extremists would later reinterpret the nature of jihad as an individual obligation in the modern global conflict. Started from the colonization of the Muslim lands by European until the age of the post-9/11, Muslim scholars like Ḥassan al-Banna (d.1949), ‘Abd al-Salam Farāj (d.1982), ‘Abdullah ‘Azzām (d.1989), to Abu Musab al-Suri have formulated reasoning to justify individual obligations of jihad against invaders or corrupt leaders without any authorization from de facto Muslim leaders.⁷⁰ As we have discussed, shifting the jihad narrative from a collective to an individual obligation started during the Mongols’ invasion. At that time, half of the Muslim empire was devastated by their invasion (except Egypt and the Levant). At that period, the Muslim community was also constantly challenged by the Christian crusaders.⁷¹

III.A.3. Muslim territory⁷²

A state’s territory is not fixed and visibly defined by a clear boundary until the post-Westphalian period and colonization. By contrast, the territory of a polity or an empire during the classical time was fluid and dynamic. It depended on its ability to preserve or expand the existing territory and power. Thus, the idea of an obligation to participate in *ribāṭ* (the guard duty at the frontier outposts) as part of jihad at least once every year for Muslims, as promulgated by the classical Islamic jurisprudence, could be understood in the context of preserving and expanding boundary.

68. 6 AL-ḤUR AL-‘ĀMILĪ, *supra* note 67.

69. Abdulaziz Sachedina, *The Development of Jihad in Islamic Revelation and History*, in CROSS, CRESCENT, AND SWORD THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION 35, 40–47 (James Turner Johnson & John Kelsay eds., 1990).

70. I will not discuss this issue in this part. For a summary introduction on this topic, see e.g., Nelly Laboud, *The Pitfalls of Jihad as An Individual Obligation*, in JIHAD AND ITS CHALLENGES TO INTERNATIONAL AND DOMESTIC LAW 87 (M. Cherif Bassiouni & Amna Guellali eds., 2010).

71. Paul L. Heck, *Jihad Revisited*, 32 J. OF RELIGIOUS ETHICS 95, 113-14 (2004).

72. For a comprehensive discussion on this issue, see DĀR AL-ISLĀM / DĀR AL-ḤARB: TERRITORIES, PEOPLE, IDENTITIES (Giovanna Calasso & Giuliano Lancioni eds., 2017); SARAH ALBRECHT, DĀR AL-ISLĀM REVISITED: TERRITORIALITY IN CONTEMPORARY ISLAMIC LEGAL DISCOURSE ON MUSLIMS IN THE WEST (2018). For a brief but yet nuanced discussion, see al-Sayyid, *supra* note 44.

By a routine military campaign on the border (*ribāʿ*), the state continuously asserted its power in the borders/frontiers to prevent the enemy from entering the land of Islam. The raiding in the frontier area (*thughūr*) was also an effort to delineate their territorial sovereignty.⁷³

According to most classical interpreters, al-Qurʿan declares that jihad should continue until the entire earth belongs to God (Q: 2:193).⁷⁴ However, this apocalyptic aspiration would later meet the reality that the Roman-Byzantine empire remained strong and could not be subjugated. Presumably, while waiting until the entire earth “belongs to God,” Muslims must draw a temporary line between Muslim’s land and the land of the enemy. Thus, the idea of territorial boundary of the land of Islam (*dār al-Islām*) versus the land of the war/unbeliever (*dār al-harb/dār al-kuffār*) is a juridical construct of the imperial period of Islam to respond to that geopolitical reality. While Qurʿanic verses never mention such division, classical Muslim jurists, started by Muhammad Nasf al-Zakiyya (d.145/762) and al-Shāfiʿī, constructed the division based on the political reality of their time in which the Abbasid rulers were in a constant confrontation with the Byzantine.⁷⁵ Muslim jurists disagreed on the definition or situation that constitutes the territory of Islam (*dār al-Islām*). Some said it requires Islamic law application; some said the land must be ruled by the Muslim sovereign or Muslims can safely reside and practice their religion. Some said it is the land where Islamic law applied, and

73. Heck, *supra* note 71, at 31.

74. “Fight them until there is no more persecution (*fitna*), and worship (*dīn*) is devoted to God. If they cease hostilities, there can be no further hostility, except towards aggressors.” Most of the classical exegetes interpret the word “*fitna*” in this verse as “*kufr*” (unbelieve) or “*shirk*” (polytheism/paganism) and the word “*dīn*” as simply “the religion” instead of “worship.” Thus, if following this interpretation, as often found in the classical exegeses, fight and jihad should not stop until Muslims eradicate polytheism and unbelieve (*shirk* and *kufr*) from this earth. But this interpretation is inaccurate since this verse, when read along with the surrounding verses (Q 2:189-194), is talking about the fear of the prosecution by the Meccan against Muslims in the context of peace treaty of al-Ḥudaybiyya. See also 3 ABŪ JAʿFAR AL-ṬAHĀWĪ, MUKHTASAR IKHTILĀF AL-ʿULAMĀʾ 426 (ʿAbd Allāh Nadhīr Aḥmad ed., 1995).

75. Mottahedeh & al-Sayyid, *supra* note 44, at 28–29. Importantly, this type of the world division is not unique to the Muslim experience. In the Roman-Byzantine tradition, the world also divided between the Roman and the Barbarians. See Roberta Denaro, *Naming the Enemy’s Land Definition of Dār al-Harb in Ibn al-Mubarak’s Kitāb al-Jihād*, in *DĀR AL-ISLAM/DĀR AL-ḤARB TERRITORIES, PEOPLE AND IDENTITIES* 93–94 (Giovanna Calasso & Giuliano Lancioni eds., 2017). Furthermore, Denaro argues that before the term *dār al-harb* was “invented,” many scholars such as Ibn al-Mubārak (d. 181/797), to whom one of the oldest treaties on jihad is ascribed, simply uses the term *al-ʿaduww* (the enemy) to refer to the Muslim enemy in general. In many occasions, Ibn al-Mubārak refers to the enemy of Islam by naming their geographical origins such as the Sicily, Iraq and Syria, or refers to their inhabitants such as the Roman (al-rūm), the Turk or the Persians. The term *dār al-harb* is very rarely used (if not at all) in Ibn al-Mubarak’s book. *Id.* at 94–98.

Muslims and the people of the covenant are safe. *Dar al-ḥarb*, by logic, is simply defined as the absence of those criteria.⁷⁶

When the peace agreement between Muslim rulers and the Roman-Byzantine existed, partly because the Abbasid rulers should combine military excursions with diplomatic missions to expand and maintain its territory, al-Shāfi'i later added to the theory of territorial boundary his conception of *dār al-'ahd/dar al-sulḥ* or the land of covenant/the land of non-belligerence. It refers to a concept in which non-Muslim polities have a peace accord with Muslims, generally under conditions that they must pay the poll tax (*jizya or kharāj*).⁷⁷ We could conclude that the division of the realm is a political conception rather than a religious one. However, the territorial division would later become an important legal concept that determines other legal determinations like the ruling on residing in the non-Muslim territory, the security guarantee (safe conduct), the application of Islamic criminal law (*hudūd*), and the distribution of the spoils of war in *dār al-harb*.⁷⁸

III.B. Restraint: protection of persons

Is it legitimate to pursue a just-caused war unjustly? In other words, is it justifiable to dictate and measure the means by its end? If you think you are fighting against the enemy for just and noble causes, you are tempted to do whatever possible to subjugate and destroy the enemy. For example, in the holy war, when the enemy is judged as morally wrong and evil, you may think that your conduct in war is always lawful. Thus, there is an inherent risk in assuming that one wage war against the enemy by a just cause: unrestrained war. When the Medieval church engaged in the Crusades against Muslims, as elaborated by Johnson, the church saw that restraint (and the law in general) was not extended to war against Muslims.⁷⁹

Contrary to this tendency, not only do Qur'anic norms, prophetic traditions, and Muslim juristic discourses recognize certain legal rights of non-Muslims, but they also further regulate limits, restraints, and

76. AL-DAWOODY, *supra* note 25, at 92-93.

77. 5 AL-SHĀFI'I, *supra* note 37, at 433-35, 461-63, 476-78; Mottahedeh & al-Sayyid, *supra* note 44, at 29; Halil Inalcik, *Dār al-'Ahd*, 2 THE ENCYCLOPAEDIA OF ISLAM NEW EDITION 116-7 (1983).

78. See Khaled Abou El Fadl, *Legal Debates on Muslim Minorities: Between Rejection and Accommodation*, 22 J. OF RELIGIOUS ETHICS 127 (1994).

79. The medieval Christian traditions recognized the limits of war among Christians only. See JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* 108-11 (1997).

protections granted for them. However, when discussing the conduct of warfare, it is crucial to recognize that Muslim jurists were not occupied with an abstract discussion on the issue of justice and fairness toward non-Muslims. Their concern on regulating the limits of war was instead motivated by their effort in finding a balance between holding “the normative impulses inherited from the Prophet and his Companions, against the discretionary leverage conceded to the ruler in promoting the interests of Muslims.”⁸⁰

After briefly discussing critical issues on the law governing the use of force in Islam, now it is time to dwell on the juristic discussion on the conduct of hostilities (*jus in bello*). However, due to limited space, this will only be focused on the protection aspects. We need to examine juristic elaboration on the limitations in a separate study. This part will further be divided into two main sections. We will start the discussion by examining juristic debates and their evolution on the protection of persons. It will be followed by a discussion on the protection of property.

III.B.1. Protection of “noncombatants”

The combatant and noncombatant category in the modern law of armed conflict has a long history that is deeply rooted in human traditions. It evolves and gradually changes over time. There is no doubt that this humanitarian categorization is very modern, appeared concomitant with the rise of modern humanitarian law. This distinction or discrimination is essential in defining the line between a legitimate and illegitimate target in battle. This principle is considered one of the cornerstones of the model law of armed conflict.

While we could undoubtedly find similar principles in classical Islamic law, we can nevertheless ask whether the motive of protecting certain categories of people is dictated by “humanitarian” interest or determined by the advancement of the Muslim interests or merely following the textual prescription (moral imperatives). For example, according to Heck, one may see the discussion in the classical Islamic law on the issue of protection such as the prohibition of targeting/killing captives, elderly, women, and children in the frame of Muslims’ effort to “debilitate the enemy’s capacity for attacking in the future and upsetting the frontier line or balance of power between neighboring states.” Thus, for Heck, such discussion should not be seen as an “odd twist of categorization between combatants and noncombatants, soldier and civilian,” something that is very modern.⁸¹

80. Abou El Fadl, *supra* note 34, at 20.

81. Heck, *supra* note 71, at 112.

Heck's pragmatic and functional approach, in my opinion, is a simplification because Muslim jurists, as will be discussed, most of the time have to balance between holding functional needs and following the moral imperative of the texts (Al-Qur'an and Sunna).

III.B.1.a. Women and children

Islamic traditions, also probably other civilizations at that time, consider all adult male able-bodied individuals as combatants in a war situation.⁸² By contrast, all Muslim jurists agree that women and children categorically enjoy the status of noncombatants.⁸³ Because of their status, women and children shall be protected and cannot be targeted or harmed by intent.⁸⁴ Muslim jurists, however, disagree on targeting them in three different situations: in the situation of necessity,⁸⁵ when they participate in the fighting, and if they are harmed unintentionally as collateral damage. While all the three situations need elaboration, for now, let us focus on the issue of women and children's participation in hostilities.⁸⁶

82. See, e.g., 2 IBN RUSHD, *supra* note 63, at 336.

83. Ibn Qudama, when discussing the status of women and children, express the logic of reasoning behind the ruling: jurists would regard women and children as non-combatants based on the prevailing customs and practices (*al-'ādah*) of that time. While jurists refer to the prevailing traditions and practices, however, they also constantly use textual prescriptions as the reference in their judgement. See 13 IBN QUDĀMA, *supra* note 37, at 180.

84. Abū Bakr, in his "ten commandments," orders his warriors to protect and leave the enemy's women and children unmolested. The prohibition of targeting women and children by intent in the battle is unanimously agreed by jurists across ideological and jurisprudential spectrum. See, e.g., 1 ANAS, *supra* note 37, at 577–78; 5 AL-SHĀFI'Ī, *supra* note 37, at 576; 1 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, *KITĀB AL-SIYAR AL-KABĪR* 29–33 (Abī 'Abdullah Muhammad Ḥasan Ismā'īl ed., 1997); 4 AL-ṢON'ĀNĪ, *supra* note 44, at 498; MUSLIM IBN AL-ḤAJJĀJ AL-NAYSĀBŪRĪ, *ṢAḤĪḤ MUSLIM* 828 N. 1831 (2006); 4 ABĪ DĀWUD AL-SIJISTĀNĪ, *SUNAN ABĪ DĀWUD* 303-5 N. 2668-70 (Shu'ayb Al-Arnu'ūt ed., 2009); AL-ṬŪSĪ, *supra* note 67, at 292; 6 AL-ḤUR AL-'ĀMILĪ, *supra* note 67, at 43, 47–49.

85. *The situation of necessity* according to Wahbah al-Zuhaylī refers to "state of danger and severe hardship which comes to face a person and as a result he fears an injury to his life, his organs, his offspring, his reason or his property. In such a situation, committing an illegal act or neglecting or delaying an obligation becomes obligatory or permissible." Under this definition, three elements of necessity are: the existence of compelling situation, there should be a genuine threat to life or severe injury and the severe injury should be directed to one of five fundamentals (*al-darūriyat al-khamsa* which include life, organs, offspring, reason, property). WAHBAH AL-ZUHĪLĪ, *NAZIRIYYAH AL-DHARŪRAH AL-SHAR'IYYAH MUQĀRANAHA MA'A AL-QĀNŪN AL-WADHĪ'Ī* 67–68 (1885). For a comprehensive study on the concept of necessity in Islamic law, see, e.g., Mansour Z. Al-Mutairi, *Necessity in Islamic Law*, 1997.

86. When giving the interpretation to the notion of direct participation in hostilities in IHL, the ICRC (International Committee of the Red Cross) set three constitutive elements that can qualify certain act as an act of participation in hostilities. Those elements are: "1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected

When one reads through the book of Islamic jurisprudence, modern and pre-modern alike, one will find this legal question: if women and children participate in hostilities, join with the enemy in a fight against Muslims, is it permissible to kill them? In answering these questions, an overwhelming majority of jurists argue that women and children forfeit their protection rights if they play a role in armed conflict. Women and children who join the battle with their arms can be killed.⁸⁷ Furthermore, al-

against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).” NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16 (2009).

87. 14 ABI ‘UMAR YŪSUF ‘ABD ALLĀH IBN ‘ABD AL-BARR, *AL-ISTIDHKĀR AL-JĀMI‘ LI MADHĀHIB FUQAHĀ’ AL-AMṢĀR WA ‘ULAMĀ’ AL-AQTĀR FĪMĀ TAḌAMANAHU AL-MUWAṬṬĀ’* 60–61 (‘Abd al-Mu‘ī Amīn Qal‘ajī ed., 1993); 13 IBN QUDĀMA, *supra* note 37, at 179.

While it seems that jurists like Ibn Abd al-Barr and Ibn Qudama firmly state that there was no disagreement on this issue during his time, my investigation suggests that the exceptional rule to the original directive “women and children cannot be killed” in battle indicates an advance development of juristic elaboration, extracted from the text using advance legal logic. From my investigation, I found that this question is not elaborated in some of the earliest books of jurisprudence. The earliest books of jurisprudence only briefly discuss the original directive that women and children must not be killed based on the Prophetic tradition and the Abu Bakr’s report (the Ten Commandments). This prohibition is only interpreted by the later jurists, mainly by the students of the author, by explaining that the prohibition is valid as long as women/children do not take any role in the fight.

The legal elaboration in this issue goes even further when jurists further ask what kind of role and what degree of involvement are sufficient to judge their participation (and so women and children forfeit their right of protection)? For example, jurists argue that merely throwing a stone or giving a warning or guarding the enemy soldiers would not be sufficient to drop their immunity. In *Kitab Siyar al-Kabir*, Al-Shaybānī (d. 189/805) does not explain the condition of women’s participation in the hostility that may cancel their rights of protection. Al-Sarakhsī (d.483/1090) the fifth/eleventh century jurist who saved the original text of al-Shaybānī in his commentary, however, put an explanation regarding this issue by saying: women and children should be protected as long as they do not take part in fighting against Muslims. 1 AL-SARAKHSĪ, *supra* note 65, at 32.

Similarly, in both *al-Muwaṭṭa* and *a-Mudawwana*, among the earliest references of the Maliki school, we could not find this exceptional rule. We only find its elaboration, for example, in *al-Istidhkār*, written by Ibn ‘Abd al-Barr (d. 463/1071), the fifth/eleventh century Andalusian-Maliki jurists and in *al-Dhakhīrah*, written by al-Qarāfī, the seventh/twelfth century Maliki jurists. 14 IBN ‘ABD AL-BARR, *supra* note 87, at 54–55, 60–61; 3 AL-QARĀFĪ, *supra* note 62, at 399. By the seventh/thirteenth century it seems that this exceptional directive has been established as part of the legal discourse on the law of war. For example, in *Al-Mughnī* Ibn al-Qudama, a prominent Hanbali jurist, claims that there is no disagreement on this issue (that women and children shall be protected unless they take part in the battle), as we discussed.

My investigation asserts that al-Shāfī‘ī is probably the first jurist who elaborated this logic in his *al-Umm*. He argues that all protected persons can be killed if they fight because the condition that is required for its prohibition (being non-combatants) has ceased to exist by their participation in fighting. He further extends the logic by saying that women and children should not be executed if

Shīrāzī (d.476/1083), a Shāfi'ī jurist, argues that the permissibility of killing women and children in such a situation is based on a report from Ibn Abbas: The Prophet passed by a woman who was killed in the battle of Hunayn, and he asked: "who killed this woman?" One of the companions said he killed her because she followed him from behind and tried to take over his sword to kill him. When he was aware of it, he instead killed her in self-defense. Then the Prophet says, "What was wrong with this woman? We are not supposed to kill her."⁸⁸ This report indicates that in this situation, for self-defense and because the woman was actively engaged in the hostility, Muslims may target them.

However, some jurists, especially from the Maliki school, put an extra precaution to this ruling: warriors must, beyond a reasonable doubt, believe that the women and children possess and use the weapon in the battle to harm Muslims. For example, if women or children help the enemy by shouting and give a warning, or if women guard the enemy's soldiers, or even if women throw a stone at Muslim warriors, all of that would not be sufficient to forfeit their rights of protection.⁸⁹ Some Shi'ī jurists further emphasize that even if women and children help the enemy soldiers in the battle, Muslim soldiers must refrain from attacking them as much as possible.⁹⁰ Jurists also set an extra precaution when Muslim soldiers doubt whether the target is a man or a woman, or when the target is the *khunthā*

they are captured or injured in the battle because the condition that allows them to be a target has ceased to exist as well. Thus, the law is returned to the original verdict that women cannot be killed or targeted by intent. 5 AL-SHĀFI'Ī, *supra* note 37, at 581–82. In *al-Iqnā'*, Ibn Mudhir (318/930), one of the most prominent Shāfi'ī jurists, following his teacher, elaborates that women and children forfeit their rights of protection by taking part in the battle. 1 ABĪ BAKR MUḤAMMAD IBN AL-MUNDHIR AL-NAYSĀBŪRĪ, AL-IQNĀ' 463–64 ('Abd Allāh ibn 'Abd al-Azīz al-Jibrīn ed., 1988). This exceptional directive became a standard elaboration after al-Shāfi'ī and it has influenced other school's juristic elaboration.

88. In another report, the narration is slightly different. The prophet says that "she was not the one who would have fought." 5 AL-SHĪRĀZĪ, *supra* note 39, at 250; 13 IBN QUDĀMA, *supra* note 37, at 180; 13 ABĪ BAKR ABĪ SHAYBAH, AL-MUḤANNAF 128 (Usāmah Ibrāhīm Ibn Muḥammad ed., 2007). As we discussed, in the previous notes, the extraction of this exceptional directive to the protection of women from this hadith is indicative of the advanced development of Muslim legal discourse.

89. Unless that throwing kills Muslim. For this discussion, see 3 AL-QARĀFĪ, *supra* note 62, at 399; 2 MUḤAMMAD 'ARĀFA AL-DASŪQĪ, ḤĀSHIYYAH AL-DASŪQĪ 'ALĀ AL-SHARḤ AL-KABĪR 176 (n.d).

90. For these jurists, however, women and children may still be killed in the situation of absolute necessity. The fact they argue that Muslims soldiers have to refrain from killing although women and children play a role in the battle indicates that for the Shi'ī jurists the bar of precaution and the protection should be elevated into a higher level, probably by assuming that women and children by default are incapable of killing Muslim in the battle. 5 AL-KULAYNĪ, *supra* note 67, at 18; AL-ṬŪSĪ, *supra* note 67, at 292; 6 AL-ḤUR AL-'ĀMILĪ, *supra* note 67, at 47–48.

(hermaphrodite person who looks both a man and woman or who has both male and female genital organs). In this situation, Muslim soldiers must refrain from attacking and assume that they are women. Muslim soldiers must avoid killing when in doubt.⁹¹ This juristic elaboration should remind us of the notion of direct participation in hostilities in the modern law of war.

Concerning this issue, Muslim jurists further elaborate on whether women and children who fight can be executed if they are captured, presumably because they have dropped their immunity by fighting. Some jurists hold that once women and children play a role in a war, they may be killed during the battle or executed upon captivity. The Ḥanafīs argue that killing women and children who actively fight against Muslims is allowed only during the battle. Once they are captured, they cannot be killed. The reasoning for that is that killing them in the battle is for repealing the evil of war (*dafʿu shar al-qital*) while executing them upon captivity is a punishment (*al-ʿuqūbah*). Since women and children are not part of the group punishable by execution upon their captivity, killing them when captured is prohibited.⁹² Al-Shāfiʿī similarly argues that women and children can be killed if they fight, but when they are captured or injured, they cannot be killed/executed because the condition that allowed them to be a target has ceased to exist. Thus, the law should be returned to the original directive: women and children cannot be killed by intent.⁹³ Al-ʿAwzāʿī (d. 158/774) concurs with the Ḥanafīs, saying that while it is permissible to kill them in the battle, they must not be killed once they are captured. Sufyan al-Thawrī argued that women joining the battle with the enemy might be killed, but it is still disfavored to target children in that situation.⁹⁴

III.B.1.b. The Clergy

In this regard, Islamic tradition uses two terminologies to refer to the clergy: *al-shamāmasah* and *al-ruhbān*. These two terms can roughly be interpreted as the deacon as opposed to the monk. Sometimes the texts simply refer to it as *aṣḥāb al-ṣawāmiʿ* (the resident of the monastery). Legal discourse on the clergy's protection is mainly based on a report that comes from Abū Bakr. When Abū Bakr instructed his commanders, he said, "[...] you will find people who claim to have devoted themselves to God in their

91. See, e.g., 5 AL-SHĪRĀZĪ, *supra* note 39, at 249.

92. 14 IBN ʿABD AL-BARR, *supra* note 87, at 54.

93. 5 AL-SHĀFIʿĪ, *supra* note 37, at 581.

94. AL-ṬABARĪ, *supra* note 37, at 8–9.

monasteries, leave them to what they claim to themselves. But you will also find a people who shaved a bald spot in the middle of their head (tonsured), so you may kill them with your sword [...]"⁹⁵

It is interesting to see this differentiation as mentioned in the tradition above. If the verbatim narration originated from Abū Bakr, he presumably knew quite well the Christian tradition in the Roman-Byzantine land to the extent that he knew different hierarchies and roles of the priesthood within the church ministry. One may speculate that this knowledge was well known at that time, at least among the scholars and the leaders. However, it seems that it was not the case, at least for some. Al-Bayhāqī (d. 458/1066), one of the canonical hadith compilers, in his hadith collection narrates that Muḥammad Ibn Jaʿfar ibn al-Zubayr (d. 99/717), a companion, was asked: “do you know why Abū Bakr distinguished between the deacon (*al-shamāmisah*) and the monk (*al-ruhbān*)?” He replies, “I see that the monk secluded and deserted themselves in their monastery, while the deacon does fight in a battle.”⁹⁶

The distinction between the two types of clergy has a significant impact on their protection. For most jurists, if the priests are not involved in public affairs and stay away from their participation in conflict in any form, they shall be protected and considered noncombatant. It is important to note that for the classical Muslim jurists, simply giving bits of advice or having opinions in hostilities is enough to forfeit their protection. While in the case of women and children the ceiling of protection is high enough to the extent that Muslim soldiers must put extra precaution, the priests, it seems, do not enjoy that level of privilege.

Prominent jurists such as Abū Ḥanīfah, Imam Mālik, and al-Shāfiʿī, according to some reports, even deny their right to protection completely.⁹⁷ In *al-Siyar al-Kabīr*, one may find surprising what Abū Ḥanīfah said when answering a question from Abū Yūsuf, one of his prominent students, regarding the question on killing priests. He says: “Killing them is righteous

95. 1 ANAS, *supra* note 37, at 577; 1 AL-SHAYBĀNĪ, *supra* note 84, at 32–33; 4 AL-ṢONʿĀNĪ, *supra* note 44, at 498, N. 101000; 11 ABĪ BAKR ABĪ SHAYBAH, AL-MUṢANNAF 130, N. 33704-6 (Usāmah Ibrāhīm Ibn Muḥammad ed., 2007).

96. 18 ABĪ BAKR AḤMAD AL-BAYHAQĪ, AL-SUNAN AL-KABĪR 299 N. 18202 (ʿAbdullah ibn Abd al-Muhsin Al-Turkī ed., 2011).

97. Al-Dawoody in *The Islamic Law of War* does not mention this important dynamic. He rushes to his conclusion by saying “the jurists unanimously grant noncombatant immunity granted to all hermit [...]” Al-Dawoody, however, recognizes that Ibn Hazm (d. 456/1064), a literalist Andalusian jurist, dissents on this issue by arguing that the clergy is considered as combatant. But he fails to elaborate that even in the mainstream schools, the discourse is very dynamic. AL-DAWOODY, *supra* note 25, at 115.

(*husnan*) because they are occupied by many endeavors of sinful disbelief, and so they entice people toward *kufr*.⁹⁸

Similarly, according to Saḥnūn in his *al-Mudawwana*, Imām Mālik has a contradictory account on the protection of the clergy (*al-ruhbān*). On the one hand, he sees the priests/the clergy as a combatant because of their advice, and their intellectual and spiritual competence could be detrimental to Muslims. On the other hand, as stated clearly in his *al-Muwattāʾ*, Imām Malik considers the clergy as a noncombatant, and they should enjoy protection. Mālik even further says that their property like monastery and possessions should be left unmolested to sustain their life.⁹⁹

Al-Shāfiʿī, furthermore, is also unclear in this regard. In one part of his *al-Umm*, he argues that Muslim warriors must refrain from attacking the clergy and anyone who lives in hermitage, following Abū Bakr's precedent. On the other part, when he elaborates on al-Wāqidi's juristic opinion on the law of war, he says that "I do not see any disagreement on the status of the monk that they shall accept Islam, pay the poll tax (*jizya*) or be killed." His statement indicates that for him, the monk is a combatant.¹⁰⁰ Ibn Mundhir (d. 318/930), a prominent fourth/tenth century al-Shāfiʿī jurists, in his *al-Iqnāʾ* further states: "I do not see clear and firm textual evidence that prohibits Muslims from killing the monk...."¹⁰¹

Jurists who came later have resolved this apparent contradiction by defining a clear boundary between the clergy who secluded themselves, lock their monastery from outsiders, and ultimately stay away from conflict as opposed to those who mingle with people and potentially would take part in hostility. For example, al-Sarakhsī in his commentary to the *al-Siyar al-Kabir* says that one should read the statement of Abū Ḥanīfa (that killing priest can be righteous) in the situation when the priest performs social services and mingle with people, giving the enemy support or comfort them to endure on their religion.¹⁰² Thus, for al-Sarakhsī, giving support to the

98. 4 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, *KITĀB AL-SIYAR AL-KABĪR* 196 (Abī ʿAbdullah Muhammad Ḥasan Ismāʿīl ed., 1997).

99. 1 ANAS, *supra* note 37, at 577; 1 AL-TANŪKHĪ, *supra* note 39, at 499–500.

100. 5 AL-SHĀFIʿĪ, *supra* note 37, at 581, 699; 4 ABŪ BAKR MUḤAMMAD IBN IBRĀHĪM IBN MUNDHIR, *AL-ISHRĀF ʿALA MADHĀHĪB AL-ʿULAMĀʾ* 23–24 (Abū Ḥammād Al-Anṣārī ed., 2004).

101. 1 IBN AL-MUNDHIR AL-NAYSĀBŪRĪ, *supra* note 87, at 464. Imām al-Baghāwī, a prominent sixth/twelfth century Shāfiʿī jurist, argues that Shāfiʿī's position on this issue leans toward the permissibility of targeting the monk. He further adds that Abū Bakr's instruction should not be interpreted as the prohibition (*tahrīm*) of attacking the monk but rather a suggestion for Muslim soldiers to prioritize subjugating the enemy combatant and do not distracted by fighting and attacking against less strategic targets like the monastery. See 11 ABĪ MUḤAMMAD AL-ḤUSAYN IBN MASʿUD AL-BAGHAWĪ, *SHARḤ AL-SUNNAH* 12 (Shuʿayb Al-Arnuūṭ ed., 1983).

102. 1 AL-SARAKHSĪ, *supra* note 65, at 39; 4 MUḤAMMAD IBN AḤMAD AL-SARAKHSĪ, *SHARḤ KITĀB AL-SIYAR AL-KABĪR* 196 (Abī ʿAbdullah Muhammad Ḥasan Ismāʿīl ed., 1997).

enemy in any kind, such as advice, opinion, or monetary donations, is enough for the clergy to be deprived of their protection. However, if the monks are devoted to their religious life entirely in their monastery, not only shall they not be harmed, but also Muslims must neither attack their monastery nor seize their belongings.¹⁰³

It is worthwhile to note that, according to my investigation, Shī'a jurists omit the elaboration on this issue, even though they talk about women and children's protection. It is probably because the primary textual evidence for this matter has relied on the chain of transmission that ends in Abū Bakr's authority.¹⁰⁴ Because they are silent, we could not judge the legal positions of the Shī'a jurist on this specific issue. In addition to that, interestingly, although the report on the protection of the clergy (Abū Bakr ten commands) is included in the earliest book of hadith collection such as al-Muwattā and al-Muṣannafāt, the reports are omitted from many canonical hadith's collections such as Ṣaḥīḥ al-Muslim, al-Bukhārī, Sunan al-Nasā'ī, and al-Turmudhī. The reason for that is probably, as echoed by Ibn Ḥazm, because the reliability of the report is disputed.¹⁰⁵

III.B.1.c. Other groups of people

There are numerous separate reports within the prophetic tradition and juristic discourses about other categories of people that should be protected. However, Muslim jurists disagree on what conditions (like whether they

This ruling becomes a predominant norm and we can find this legal position across the board of the Sunni legal schools, except the literalist. Ibn Ḥazm, a prominent literalist, argues that because of their infidelity (kufr), all non-believers, combatants, and non-combatants alike, can be killed in war. The exception is granted only to the women and children because the textual evidence says so. Other groups of people, including the clergy, can be harmed because the textual evidence that guarantee their protection are unreliable and weak. See 7 ABŪ MUḤAMMAD IBN SA'ĪD IBN ḤAZM, AL-MUḤALLĀ 296–98 (1930).

103. 1 AL-TANŪKHĪ, *supra* note 39, at 499. The prohibition of seizing the belongings of the monk mainly refers to the Māliki School. Interestingly, Al-Qarāfī mentions that if the property in the monastery is plentiful, according to Ṣaḥnūn, Muslims may seize part of it but must leave some of it for their survival. See 3 AL-QARĀFĪ, *supra* note 62, at 399.

104. I must admit that this conclusion is possibly because of the limitation of my investigation. In my investigation, I focus on these Shī'a references: AL-TŪSĪ, *supra* note 67, at 291; 6 AL-ḤUR AL-ĀMILĪ, *supra* note 67, at 47–48; 5 AL-KULAYNĪ, *supra* note 67, at 17–19; 9 MUḤAMMAD MUḤSIN AL-FAYD AL-KĀSHĀNĪ, KITĀB AL-WĀFĪ 92–96 (2000); 100 MUḤAMMAD BĀQIR AL-MAJLISĪ, BIḤĀR AL-ANWĀR AL-JĀMĪ' AH LI ḌURARI AKHBĀR AL-A'IMMAH AL-ATHĀR 25–26 (1983).

105. In the books of hadith collection that I mentioned, several hadiths narrate the protection of women and children, but they do not mention the monk, except in al-Bayhaqī where he mentions the report from Abū Bakr, as we discussed. See AL-BUKHĀRĪ, *supra* note 65, at 742–45; AL-NAYSĀBŪRĪ, *supra* note 84, at 823–24; 3 MUḤAMMAD IBN 'ĪSĀ AL-TURMUDHĪ, SUNAN AL-TURMUDHĪ AL-JĀMĪ' AL-KABĪR 29–54 (2016); 4 AL-SIJISTĀNĪ, *supra* note 84, at 303–05; 8 ABI 'ABD AL-RAḤMĀN AḤMAD B. SHU'AYB AL-NASĀ'Ī, KITĀB AL-SUNAN AL-KUBRĀ 23–28 (2001).

participate in fighting or posing threats) and based on what reasoning (like whether it is based solely on the Muslim interests or merely following the precedent or textual prescription) they deserve protection. Included in this category are the aged, the blind, the sick, the hermaphrodite person, the traveler, the idiot, the hired man, the helper, and the farmer.¹⁰⁶ This long list simply indicates that jurists are willing to include any individual if they meet noncombatants' conditions.

Disagreement among jurists, specifically in this case and on the issue of protection of noncombatants in general, is based on different approaches in defining the *ratio* (*illah*) or legal reasoning for a legitimate killing in war: one group of jurists like al-Shāfi'ī and Ibn Ḥazm argue that the status of *kufr* (unbelief/disbelief) is the *ratio* for legally killing or inflicting harm against the enemy. Because of this reasoning, all non-Muslims can be killed unless the textual evidence says otherwise (such as women, children, and the clergy).¹⁰⁷

The majority of jurists, like the Mālikī, the Ḥanafī, and the Ḥabalī, argue that the *rationale* for legally killing or inflicting harm against the enemy is their ability to fight or their actual threats against Muslims. In other words, for the second group of jurists, the enemy disbelief (*kufr*) or their status of non-Muslims in itself is not sufficient reasoning for Muslims to legally attack the enemy. Fighting may only be pursued if they are capable of making aggression or posing threats against Muslims. Based on this reasoning, while also referring to the hadiths, they are willing to extend the list of protected persons to other categories other than women, children, and the monks as long as they meet the criteria: the aged, the blind, the farmer, the hired men, and others.¹⁰⁸

Due to limited space, I simply summarize the earliest Muslim jurists' opinion on the permissibility of targeting these categories of people in the battle in the column below. This classification is based on the discussion of al-Ṭabarī in his book *Ikhtilāf al-Fuqhā*,¹⁰⁹ and Ibn Rushd in his *Bidāyah al-*

106. We have discussed some of individuals such as the aged in the report from Abū Bakr in his "ten commandments." We can find other hadiths mentioning these groups of people, for example, in Sunan al-Bayhaqī. See 18 AL-BAYHAQĪ, *supra* note 96, at 303 nn.18208-11.

107. 5 AL-SHĀFI'Ī, *supra* note 37, at 581–82.

108. The summary of this discussion can be found in *e.g.*, 2 IBN RUSHD, *supra* note 63, at 399; AL-DAWOODY, *supra* note 25, at 111; Abou El Fadl, *supra* note 55, at 152. 'Abd al-'Azīz al-Zīr has collected opinions of Ibn Taymiyya in which we can find a deep elaboration from different legal schools specifically on this issue. See TAQĪ AL-DĪN IBN TAYMIYYAH, QĀ'IDAH MUKHTAṢARAH FI QITĀL AL-KUFFĀR WA MUHĀDHATIḤIM WA TAḤRIMI QATLIḤIM LI MUJARRADI KUFRIḤIM ('Abd al-'Azīz 'Abd Allah Al-Zīr ed., 2004).

109. AL-ṬABARĪ, *supra* note 37, at 9–13.

Mujtahid.¹¹⁰ I have also cross-checked their elaboration with other books of the classical comparative jurisprudence such as *al-Ishrāf*,¹¹¹ *Mukhtasar ikhtliāf al-Ulamā*,¹¹² *al-Istidhkar*,¹¹³ and *al-Mughnī*¹¹⁴ and put information if needed:

Jurists	Opinions
The Mālikī	Al-Ṭabarī only briefly mentioned Mālik’s opinion in this regard. He only mentions that Imām Mālik prohibits attacking the clergy/monk, and they must be left unmolested. However, in <i>al-Bidāyah</i> , Ibn Rushd summarizes that, according to the Mālikī school, the clergy, the blind, the sick, the aged who do not fight, the insane, the farmer, and the laborer cannot be killed in the battle.
Al-‘Awzā‘ī	The blind, the young sick person, the traveler (<i>al-jawwāb</i>), the helper, the aged, the clergy, cannot be killed. If they are killed, presumably unintentionally, Muslims must repent to God. He further argues that if those protected persons are suspected of helping the enemy, Muslim warriors cannot kill them until they gain more evidence that they fight against Muslims. Targeting them merely based on presumptions is not allowed.
The Ḥanafī	The aged, the insane, the sick, and the blind cannot be killed. Presumably, the list can be added if those individuals are considered unable to fight, as indicated by the list of the protected persons mentioned in <i>al-Bidāyah</i> that include the clergy, the blind, the sick, the aged who do not fight, the insane, the farmer, and the laborer.
Al-Thawrī (161/778)	The young, sick, and wounded person, the client (<i>al-mawlā</i>), the traveler (<i>al-sā‘ih</i>) can be killed. The monk shall be protected if they pay <i>jizya</i> . The blind and the disabled/incapacitated (<i>al-muq‘ad</i>), if they can fight (<i>ma‘ūnah and quwwah</i>), may be killed. However, if they cannot fight, then they should be protected. The

110. 2 IBN RUSHD, *supra* note 63, at 336–37.

111. 4 IBN MUNDHIR, *supra* note 100, at 20–26.

112. 3 AL-ṬAHĀWĪ, *supra* note 74, at 455–56.

113. 14 IBN ‘ABD AL-BARR, *supra* note 87, at 54–81.

114. 13 IBN QUDĀMA, *supra* note 37, at 175–84.

	insane and the idiot, in his opinion, may also be killed. ¹¹⁵
Al-Shāfi‘ī	His opinion on the clergy has been discussed above. Furthermore, for al-Shāfi‘ī, as we discussed, all individuals other than women, children, and the monk can be killed unless they pay the jizya or become Muslim. Al-Ṭabarī only explicitly mentions the farmer, the laborer, and the aged. According to al-Shāfi‘ī, they should be protected if they pay the jizya or become a Muslim. ¹¹⁶

Here, we must briefly add the opinion of the Ḥanbalī School, represented by Ibn Qudāma in his *al-Mughnī*. The Ḥanbalī, in essence, are following the majority opinion, arguing that all those groups of people cannot be killed because they are not combatants.¹¹⁷

The Shī‘ī and Zaydī jurists such as Zayd bin ‘Alī (d. 121/739), Abu Ja‘far al-Ṭūsī and al-Hurr al-‘Āmilī has no significantly different opinion from above mentioned Sunni jurists. Zayd bin ‘Alī, one of the earliest authorities in Shī‘ism, said in his *Majmu‘* that women, children, and the aged should be protected.¹¹⁸ Al-Ṭūsī argues that only women and children who are being protected and all other persons are legitimate targets unless they accept Islam or pay tribute/the poll tax (*jizyah*) if they are Christians, Jews, or Zoroastrians. Al-Hurr al-‘Āmilī said that women, children, the aged, and the hermit/the monk could not become targets.¹¹⁹

The above column shows how jurists exercise the juristic logic in almost every issue in the classical *fiqh*. There is no clear-cut answer for every legal issue because every problem in jurists’ hands should be

115. In *al-Istidhkār*, Al-Thawrī argues that the aged, women and children cannot be killed in the battle. 14 IBN ‘ABD AL-BARR, *supra* note 87, at 72.

116. We have to add here the opinion of the textualist school, represented by Ibn Ḥazm (456/1064) who concurs with the al-Shāfi‘ī’s position. For Ibn Ḥazm, all other groups of people other than women and children are a legitimate target for attack and killing. He argues that the various reports that mention their protection in the battle are weak and unreliable. Thus, beyond women and children, for Ibn Ḥazm, can be targeted. 7 IBN ḤAZM, *supra* note 102, at 296–99. It is also worthwhile to mention one reasoning stipulated by one of the al-Shāfi‘ī jurists, Ibn Mundhir regarding the permissibility of killing the aged. For him, the aged is not excluded from the general meaning of the verse 9:5 (the “sword verses”) and because of that the aged may be killed. Importantly, Ibn Mundhir further argue that the elderly is no longer useful and have no benefit for Muslims, so they may be killed. Quoted from 13 IBN QUDĀMA, *supra* note 37, at 177.

117. 13 IBN QUDĀMA, *supra* note 37, at 178–79.

118. ABĪ AL-ḤUSAYN ZAYD IBN ‘ALĪ, AL-JUZU‘ AL-AWWAL MIN MAJMU‘ AL-FIQH 231–34 (Eugenio Griffini ed., 1919).

119. AL-ṬŪSĪ, *supra* note 67, at 290–92; 6 AL-HUR AL-‘ĀMILĪ, *supra* note 67, at 43–44.

weighed upon a unique contingency and following the precedents and religious texts. However, because the precedents and textual references quite often contradict one another, jurists' opinions are also diverse and contradicting one another.

Take, for example, the issue of the permissibility of targeting the aged. Based on the precedent from Abū Bakr, who instructed clearly to avoid targeting children, women, the elder, and the monks/hermit, some jurists argued that targeting them is clearly prohibited. However, there are reports from the Prophet that during the war of Hunāyn, a very old warrior of the unbeliever, Durayd ibn al-Ṣomma, a veteran of Badr war, also a military strategist, was executed even though he was very old and wounded.¹²⁰ In the absence of an explicit condemnation or prohibition from the Prophet, some jurists, such as the al-Shāfi'ī, conclude that targeting the aged is permissible.¹²¹ Those who have argued for the prohibition reply that the incident was an exception and applied only to that particular situation. Durayd was executed because he participated in the battle by giving his opinion and advice to plan the military operation.¹²²

It is also interesting to briefly touch upon other examples regarding the permissibility of killing the wounded in the battle (especially if they are young), as argued by some jurists like al-Shafi'i. One may find this ruling inhumane, especially if one uses the modern law of war as one's standard. However, the expression in Arabic used by al-Shāfi'ī in his *al-Umm* when he says '*duffifa 'alā al-jarhī*,' implies that the execution of the seriously wounded enemy in the battlefield should be very quick and aimed at ending the agony of the wounded.¹²³ Torturing and pending the execution that may prolong the pain and suffering or humiliate the wounded soldier is prohibited. Most of the jurists prohibit execution that may cause prolonged

120. According to al-Shīrāzī, planning and giving advice in war may contribute greatly to the winning of the battle than the battle itself. See 5 AL-SHĀFI'Ī, *supra* note 37, at 582; 5 AL-SHĪRĀZĪ, *supra* note 39, at 250; 14 IBN 'ABD AL-BARR, *supra* note 87, at 73.

121. They also rely on several reports in which the Prophet commands Muslims to "kill the elders of the enemy and spare their children." See 2 MUḤAMMAD IBN 'ISA AL-TURMUDHĪ, SUNAN AL-TURMUDHĪ AL-JĀMI' AL-KABĪR 592, N. 1687 (2016); 4 ABĪ DĀWUD AL-SIJISTĀNĪ, SUNAN ABĪ DĀWUD 304, N. 2670 (Shu'ayb Al-Arnu'ūt ed., 2009); 18 AL-BAYHAQĪ, *supra* note 96, at 306 n.18215; 14 IBN 'ABD AL-BARR, *supra* note 87, at 73.

122. See, e.g., 1 AL-SARAKHSĪ, *supra* note 65, at 32. According to Al-Dawoody, Al-Shawkāni (1255/1839), the nineteenth century jurist, even further argues that if the aged persons support the army of the enemy by giving advice, Muslims are not permitted to kill them. AL-DAWOODY, *supra* note 25, at 144; 4 MUḤAMMAD IBN 'ALĪ AL-SHAWKĀNĪ, AL-SAYL AL-JARĀR AL-MUTADAFIQ 'ALĀ ḤADĀ'IQ AL-AZHĀR 503 (Maḥmūd Ibrāhīm Zayid ed., 1988).

123. 5 AL-SHĀFI'Ī, *supra* note 37, at 582.

suffering.¹²⁴ Thus, illuminating this juristic opinion in this light might help us understand that the purpose of execution of the seriously wounded soldier in the battle at that time is for the dignity of the victim.

To put it in perspective, in some Asian cultures, such as the Japanese Samurai, a wounded warrior would prefer to kill himself to avoid prolonged agony and avoid humiliation for his dignity.¹²⁵ Thus, measured by the prevailing standard and practice at that time, the ruling of al-Shāfi‘ī that the badly injured enemy can be killed in the battle is not surprising or cruel at all. It is, in fact, guided by virtue of avoiding prolonged suffering.

Part of the modern expectation that the wounded should be protected in the battle is because the modern law of war stipulates the presence of a neutral entity in which its primary responsibility is to help the wounded soldiers regardless of their affiliation. The classical Muslim jurists indeed talk about women’s participation in the battle to care for the wounded.¹²⁶ However, their participation is intended to take care of the wounded soldiers from their party only. It was unthinkable at that time, among Muslims and non-Muslims alike, to nurse the wounded indiscriminately, let alone think of a neutral entity in the conflict taking care of the sick and the wounded indiscriminately.¹²⁷

To conclude on this part, Muslim jurists unanimously agree that women and children should not intentionally be targeted all the time in war because they are noncombatants unless they participate in the fighting. Jurists have a different standard in setting the bar to define their participation in the battle. However, it seems that Muslim soldiers must put extra precautions for the women and the children, and they must be convinced that they pose actual threats before attacking them. According to

124. Jurists extract the ruling from a widely reported hadith that says: “verily Allah has enjoined goodness to everything; so when you kill, kill in a good way and when you slaughter, slaughter in a good way.” From this report as well, jurists extract a ruling on the prohibition of mutilation and torture. *See, e.g.*, AL-NAYSĀBŪRĪ, *supra* note 83, at 941 n.1955; 2 AL-TURMUDHĪ, *supra* note 121, at 482 n.1476-7; AL-ṬŪSĪ, *supra* note 67, at 293.

125. *See, e.g.*, ANDREW RANKIN, SEPPUKU: A HISTORY OF SAMURAI SUICIDE (2012).

126. *See, e.g.*, 4 AL-ṢON’ĀNĪ, *supra* note 44, at 565; 1 AL-SHAYBĀNĪ, *supra* note 84, at 129; 1 AL-TANŪKHĪ, *supra* note 39, at 499.

127. It is important to mention here a dissenting opinion on the permissibility of executing the wounded in the battle. Ibn Abī Shaybah in his *al-Muṣanaf* quotes a report on the prohibition of executing the wounded. During the *futh al-Makkah* (the liberation or the conquest of Mecca) the Prophet said: “do not kill those who surrender, do not execute the wounded and anyone who stays in their house will be protected.” 11 ABĪ SHAYBAH, *supra* note 95, at 155–56. Ibn Abī Shaybah also mentions other reports in which Alī Ibn Abī Ṭālib instructed his soldier during the war of Camel (the civil war between Alī and ‘Ā’ishah) by saying: “do not run after those who retrieve, do not kill the wounded and the prisoners; those who stay in their house or give up their weapon are safe; do not loot the property and possession of the enemy.” *Id.*; ALĪ IBN ABĪ ṬĀLIB, NAHJ AL-BALĀGHAH 398 (Muḥammad al-Ḥusaynī Al-Shīrāzī ed., n.d).

the majority of jurists, the status of the monk/the clergy follows that of women and children with some very minor disagreements. However, unlike women and children, jurists are very strict and push the standard of participation in hostility to the lowest bar. Merely mingling with people or giving an opinion will be enough to forfeit their protection's right. Other categories of persons such as the farmer, the trader, the hired man, the wounded, and the aged may not be targeted with or without conditions, such as paying tribute, depending on the school of law that becomes the reference. But it seems that most jurists see that they enjoy the protection simply because they usually do not fight. If they participate in the fighting, like in the case of women, children, and the monk, they forfeit their protection rights.

While it is certainly not as strict as the modern laws of war in defining the parameter of participation in hostility, for me, it is still fascinating to find a detailed and elaborate discussion on the issue of taking part in hostility. This aspect is substantial evidence of how Islamic law restrains the evil of violence while also considering military interest. In its juristic elaboration, the weight sometimes leans toward Muslim military interests. Nevertheless, that fact should not invalidate our judgment that Muslim jurists are unwilling to unleash the evil of war, even against the enemy. For its contemporary, this elaboration indicates the sophistication of Islamic jurisprudence.

III.B.2. Treatment of prisoners

After the first major battle between the Prophet and the Mecca polytheists in Badr, where Muslims gained the victory, around seventy polytheists were taken captives. Abū 'Azīz ibn 'Umyr Ibn Hashim, one of the prisoners recounted, "When they ate their morning and evening meals, they gave me the bread and ate the dates themselves following the orders that the apostle had given about us. If anyone had a morsel of bread, they gave it to me."¹²⁸

In an exciting expression, Al-Qur'an (76:8-9) instructs the believers to take care of captives or prisoners just like the believers are obliged to take care of the poor and the orphanage by giving them the best possible meals and kindness. In other verses, Al-Qur'an (47:4) also mentions rules regarding the treatment of the captives by saying that "now when you meet (in war) the unbelievers, smite their neck until you overcome them fully,

128. 2 'ABD AL-MALIK IBN HISHĀM, *AL-SĪRAH AL-NABAWWIYAH* 287 ('Umar 'Abd al-Salām Tadmūrī ed., 1990); NŪRĪ ḤAMŪDĪ AL-QAYSI, *AL-FURŪSIYYAH FĪ AL-SHI'R AL-JĀHILĪ* 87-89 (1964); 'ABD AL-MALIK IBN HISHĀM, MUḤAMMAD IBN ISHĀQ & ALFRED GUILLAUME, *THE LIFE OF MUHAMMAD: A TRANSLATION OF ISHĀQ'S SĪRAT RASŪL ALLĀH* 309 (1998).

and then tighten their bonds; *but thereafter set them free, either by an act of grace or against ransom*, so that the burden of war may be lifted.” Following this precedent and the textual references, Muslims are obliged to treat the captives well.¹²⁹ They should also release the captives either with grace or ransom once the hostility ends (Qur’anic normativity). No other options are available according to this Qur’anic injunction.

However, despite this clear Qur’anic command on captives by the third century of Hijra, the majority of Muslim jurists (al-Shafī’ī, Maliki, Hambali, Al-Awza’ī, Abū Thawr) assert that it is up to the Muslim political authority (Imam) to decide which option is serving the best interest for Muslim among four available choices: freeing, ransoming, execution or enslavement (the so-called Muslim best interest approach).¹³⁰ Abū Hanifah dissents by arguing that the only available options are execution or enslavement. He does not suggest other options like releasing the captive by grace or ransom, asserting that returning the captives to the enemy would only strengthen them.¹³¹ Interestingly, the earliest Muslim jurists like Ibn ‘Abbās, ‘Abd Allāh ibn ‘Umar, Ḥasan al-Basrī, and Aṭā’ Ibn Rabbah argue that the only available option for the Muslim political authority (Imam) is by releasing them, either by the act of grace or payment of ransom, as mentioned in the Qur’an (47:4). Al-Hasan ibn Muḥammad al-Tamīmī, as quoted by Ibn Rushd in *Bidāyah*, even said that this option is “the consensus of the Companions of the Prophet.”¹³² In addition, Shi’i jurists like al-Hillī concur with this opinion.¹³³

The reason for these different rulings among jurists is that there is an apparent contradiction, at least on the surface, between verses in the Qur’an and the contradictory reports regarding the Prophet’s practice. It has been agreed that the Prophet freed the captives of the Badr war by pardon or ransom. However, some reports are mentioning the exception: at least two of the captives, al-Naḍr bin al-Hārith, and ‘Uqba bin Abū Mu‘āyṭ, were

129. See, e.g., Muhammad Munir, *Debates on the Rights of Prisoners of War in Islamic Law*, 49 ISLAMIC STUDIES 463, 492 (2010); 2 YÜSUF AL-QARAḌĀWĪ, FİQH AL-JIHĀD: DIRĀSAH MUQĀRANAHA LI-AḤKĀMIHI WA FALSAFATIHI FĪ ḌAW’ AL-QUR’ĀN WA-AL-SUNNAH 955 (al-Ṭab’ah 1 ed. 2009).

130. See, e.g., 1 AL-TANÜKHĪ, *supra* note 39, at 501–03; ABĪ ‘UMAR YÜSUF ‘ABD ALLĀH IBN ‘ABD AL-BARR, KITĀB AL-KĀFĪ FĪ FİQH AHL AL-MADĪNAH AL-MĀLIKĪ 467 (Muḥammad Āḥīd Al-Mawrītānī ed., 1978); 3 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, KITĀB AL-SIYAR AL-KABĪR 124–27 (Abī ‘Abdullah Muhammad Ḥasan Ismā’īl ed., 1997); 5 AL-SHĀFĪ’Ī, *supra* note 37, at 602; AL-ṬABARĪ, *supra* note 37, at 141–46; Munir, *supra* note 129, at 465–66; LENA SALAYMEH, THE BEGINNINGS OF ISLAMIC LAW: LATE ANTIQUE ISLAMICATE LEGAL TRADITIONS 67–69 (2016).

131. AL-ṬABARĪ, *supra* note 37, at 145; AL-DAWOODY, *supra* note 25, at 137.

132. 2 IBN RUSHD, *supra* note 63, at 333.

133. Munir, *supra* note 129, at 486; SALAYMEH, *supra* note 130, at 44.

executed. In other battles like the Ḥunayn (6,000 captives) and the battle against Banū Quryzah (600 to 900 combatants were taken captive), the Prophet enforced a different ruling: pardoning and execution, respectively. As asked by contemporary scholars like Munir and Salaymeh, the question is whether the execution of prisoners is an exceptional rule or part of the established norm.¹³⁴ Let us discuss Munir's conclusion briefly.

Munir argues that in the first century of Islam, from the Prophet's time until the period of Umār Ibn' Abd al-'Azīz, there were only six or seven cases of prisoner execution. In addition, the execution of al-Hārith and 'Uqbah is unrelated to their captivity, but rather it was because of their grave crime against the Prophet and Muslims previously in Mecca. Furthermore, Munir asserts, the execution of Banū Qurayzah is historically unreliable, or even if we accept the reports, the execution (some scholars instead describe it as 'the massacre') has solely relied on their Jewish law, decided by their arbiter, Sa'd ibn Mu'ādh. Based on this evaluation, Munir concludes that the only option for treating prisoners in Islamic law is by releasing them.¹³⁵

Munir's conclusion may go too far. His elaboration is correct but one-sided. His discussion on prisoners' issues is imbalanced and tends to avoid juristic opinions that contradict his conclusion. While he briefly acknowledges the majority opinion, he fails to elaborate on those opinions and instead digs into one side of the tradition to find support for his conclusion: that Islamic law prohibits all treatment other than releasing the captive by grace. While I understand that Munir's purpose is to reinterpret tradition and make Islamic law relevant in modern times, his approach is incorrect. His conclusion that Islamic law allows only releasing the prisoner is dictated by his understanding of the modern law of war, and he uses it as a benchmark when he evaluates the tradition.

In every book of classical jurisprudence, one can find discussion on the power of Muslim authority to decide the captives' fate. When Saḥnūn (d. 240/854), the ninth century Maliki jurist, discusses prisoners' treatment, it seems that the rule is simple and unquestionable: a captive can be executed. He refers to several precedents such as the execution of sixty people of Banū Qurayza, the execution of 'Uqbah ibn Mu'ayṭ after the battle of Badr, the execution of a prisoner from al-Khazar (the Turk) by 'Umar ibn 'Abd al-'Azīz, and the practices of Muslim commanders such as Abū 'Ubayda

134. Munir, *supra* note 129, at 463; Salaymeh, *supra* note 27, at 525–29.

135. Munir, *supra* note 129, at 490–92.

and ‘Iyād ibn ‘Uqbah when subjugating the Byzantine town.¹³⁶ In *al-Mudawwana*, he does not even mention the dissenting opinion regarding this, nor mention the Qur’anic norms on the treatment of prisoners. Saḥnūn’s approach, in which he simply mentions the precedent that supports his argument, should remind us of Munir’s approach of our time.

Likewise, Al-Shāfi‘ī, concurring with the majority opinion, argues that the Muslim authority shall decide the best choice for Muslims between execution, releasing by grace, or ransom. He further argues that execution is permissible, mainly based on a consideration that it will strengthen the religion of God and weaken the enemy. It seems, for al-Shāfi‘ī, the enemy’s debilitation is one of the main reasons for allowing execution. Ransoming and pardoning are allowed if the Muslim authority sees that it will lead to their acceptance of Islam or ending their hostility to Muslims. For al-Shāfi‘ī, it is unfavorable to release captives based on other interests.¹³⁷ Those who are enslaved or taken for ransom become part of the spoils of war and should be distributed according to the law of the spoils. Women and children taken in Muslim captivity, for al-Shāfi‘ī, are considered the property of Muslims. They shall not be executed.¹³⁸

Furthermore, in *al-Muhadhab*, al-Shīrāzī mentioned that three Badr captives were executed, instead of two as mentioned in other reports: Muṭ‘ām ibn ‘Adī, al-Naḍir Ibn al-Hārith, and ‘Uqbah ibn Abī Mu‘ayt.¹³⁹ He also reported that Abū ‘Izza al-Jumahī, a captive of Uhud battle, and Ibn Khaṭāl, a captive during the conquest of Mecca, were executed. Thus, in his report, four individuals were executed under the Prophet’s order during the Prophet’s time.¹⁴⁰ However, he also emphasizes that releasing the captives by grace or ransom is permissible based on Qu’ran 47:4. It implies that for al-Shīrāzī, this verse is not abrogated by the “sword verses.” He also discusses the rules on the captive who become Muslim in his captivity. He argues that by becoming a Muslim, the captive must be exempted from execution. However, the captive still faces three possibilities: servitude, grace, or ransom. On this issue, according to al-Shīrāzī, jurists have different opinions. On one hand, while the captive may still be enslaved, other options are dropped. On the other hand, some jurists argue that the captive cannot be enslaved but may still face ransoming or releasing by

136. As we discussed, the number of captives of Banū Qurayza is debatable. Here, in his *al-Mudawwana*, we have information that the number of captives is only sixty people instead of six hundred. 1 AL-TANŪKHĪ, *supra* note 39, at 502–03.

137. 5 AL-SHĀFI‘Ī, *supra* note 37, at 637–38.

138. *Id.*

139. 5 AL-SHĪRĀZĪ, *supra* note 39, at 258–61.

140. *Id.* at 259–60.

grace.¹⁴¹ Thus, becoming a Muslim will not automatically release a captive from punishment, although the possibility of execution is dropped.

Instead of going into the elaboration of partial textual traditions to support a conclusion, as Munir did, my approach is somewhat different. While I recognized the existing rules on captive, I also tried to understand its evolution, from Quranic normativity (ransoming and releasing by grace only) to the Muslim-based-interest approach.

III.C. On the protection of properties.

A fascinating historical account narrated in Sunan Abū Dawud: When the truce between the Muslims and the Jews of the Khaybār tribe was concluded, Muslim soldiers started looting and plundering. The Jewish leader of Khaybār complained to the Prophet: “O the Prophet, how could your people kill our donkey, eat our fruits, and beat up our women?” The Prophet was infuriated and told his commanders and his soldiers in an assembly after praying: “[...] you are not permitted to enter the houses of the People of the Book; beat up their women; eat up their fruit when they have kept up their terms.”¹⁴²

Another interesting juristic debate narrated in *al-Muhadhdhab* on the looting and taking food stocks from the enemy’s territory.¹⁴³ Al-Shīrāzī, the author, asked a question: is it allowed to take food stocks for consumption if needed? The answer, as always, is not clear-cut. One opinion says it is not allowed to take the food stocks excessively without need, based on the opinion of Ibn Abi Hurayrah (d. 345/946), one of the al-Shāfi’ī jurists. The other groups of jurists, including al-Shīrāzī, say that it is allowed to take food stocks at any portion.¹⁴⁴ However, they agreed that it is forbidden to sell those food stocks because it is only taken for consumption. According to two separate opinions, if Muslim warriors return to the Muslim territory and still have leftovers of food stocks they took, then the leftovers should either: 1) become a spoil of war and does not need to be returned or 2) must be returned to the previous owner in the enemy territory because it should only be taken by the necessity for consumption.¹⁴⁵ An alternative juristic opinion was given by Imam al-Nawawī, who says: if the remaining food

141. *Id.* at 262.

142. 4 AL-SIJISTĀNĪ, *supra* note 84, at 656 n.3050; Muhammad Munir, *The Prophet’s Merciful Reforms in the Conduct of War: The Prohibited Acts*, 2 INSIGHT 221, 228 (2009).

143. For the prophetic report on the prohibition of looting, see, e.g., AL-BUKHĀRĪ, *supra* note 65, at 1404 n.5516; 13 IBN QUDĀMA, *supra* note 37, at 145.

144. 5 AL-SHIRĀZĪ, *supra* note 39, at 276–77.

145. *Id.*

stocks are plentiful, then it must be returned to the owner at the enemy territory, but if it is only a little, then no need to return it.

The short discussion above represents a juristic discussion on this issue which weighs two considerations: in order to subjugate the enemy, by necessity, it is permissible to inflict damage not only against the inanimate property like their fortress, armaments, and other buildings but also against their living property like cattle or vegetation. However, this damage must not be excessive and cross “the boundary” that would lead to the act of *al-fasad* or corruption, waste, and unnecessary destruction on earth as prohibited both by Al-Quran (2:205) and Hadith.¹⁴⁶

On this issue, as discussed, Muslim jurists also relied on a widely reported instruction of Abū Bakr to his army when he says: “you shall not cut down palm trees or burn it; shall not cut down any fruit-bearing vegetation, shall not slaughter animals and livestock except for consumption.”¹⁴⁷ These textual references on the prohibition of excessive destruction of the property also match the pragmatic consideration: excessive destruction is disadvantageous for Muslims’ interest if Muslims expect to acquire and seize the town in the future.

Muslim jurists agree on the following principle on this issue: if Muslims have retained or taken control over the enemy’s property by subjugation, it is unlawful to destroy such property by any means of destruction including burning,¹⁴⁸ killing, or demolition.¹⁴⁹ If the property becomes the spoil of war, then it shall follow the rule of the law of prize and booty (*salb* and *ghanimah*).

Muslim jurists, however, disagree with the situation when Muslims must undergo a military operation to subjugate the enemy. Here we can see how jurists weigh the balance of military objectives and the prohibition of committing *al-fasad* (unnecessary destruction). It seems that for the Māliki and the Ḥanafī schools, achieving a more significant objective (subjugating

146. Sohail H. Hashmi, *Islamic Ethics and Weapons of Mass Destruction, An Argument for Nonproliferation*, in *ETHICS AND WEAPONS OF MASS DESTRUCTION RELIGIOUS AND SECULAR PERSPECTIVES* 329 (2004).

147. 1 ANAS, *supra* note 37, at 577–78; 5 AL-SHĀFI’Ī, *supra* note 37, at 576; 1 AL-SHAYBĀNĪ, *supra* note 84, at 29–33; 4 AL-ṢON’ĀNĪ, *supra* note 44, at 498; AL-NAYSĀBŪRĪ, *supra* note 84, at 828 n.1831; 4 AL-SIJISTĀNĪ, *supra* note 84, at 303-05 nn.2668-70; AL-ṬŪSĪ, *supra* note 67, at 292; 6 AL-ḤUR AL-‘ĀMILĪ, *supra* note 67, at 43, 47–49.

148. On the use of fire as a weapon, jurists differentiate between using it as a tool of punishment and tool for attacking (incendiary weapon). While using fire to burn the enemy as a punishment is unanimously prohibited, most jurists have no reservation in using fire as incendiary weapon. Regarding incendiary weapons, however, most jurists agree that if Muslims still have an available alternative of weapons, the incendiary tool should be avoided. 13 IBN QUDĀMA, *supra* note 37, at 143–44; Hashmi, *supra* note 146, at 139.

149. AL-ṬABARĪ, *supra* note 37, at 102.

the enemy) is more meritorious than preserving the enemy's property, especially if there is no hope that Muslims may acquire that territory in the near future.¹⁵⁰

Following other jurists who argue for the permissibility of destroying the enemy's property, Saḥnūn embarked on a consequentialist interpretation when he elaborated that the command of Abū Bakr to his commander is not motivated by his leniency and mercy to the enemy's infidelity, but rather based on his prediction that the territory (Syria) would become a Muslim land in the foreseeable future. Thus, for him, in the situation when Muslims have no hope of overcoming the enemy and acquiring its territory, all methods of destruction such as cutting down trees, flooding or destroying the enemy's edifices are permissible. However, according to some reports, some of the Māliki jurists prohibit burning livestock and palm trees.¹⁵¹

Al-Awzā'ī, a Syrian jurist who lived in the frontier area, presents a contrasting opinion on this issue. Interestingly, he gives a detailed reservation on destructive methods, as quoted by al-Ṭabarī. Al-Awzā'ī rejects destructive methods such as cutting and destroying vegetation, burning and demolishing edifices or killing animals. However, Muslims may still destroy it out of necessity if the enemy used it as a fortification or a stronghold for their defense.¹⁵² Nevertheless, it seems that Al-Awzā'ī was not convinced by the consequentialist interpretation of Abū Bakr's command, such as of the Saḥnūn's interpretation, and asserts that Abū Bakr's instruction to avoid destruction should be understood within the Quranic norms that condemn *al-fasad* (such as Q 2:250).¹⁵³ Other jurists such as Abū Thawr (d. 240/854) concurs with al-Awzā'ī's opinion and says that it is forbidden to commit all kinds of destruction.¹⁵⁴

In response to al-Awzā'ī, the Ḥanafī jurists argue that since it is permissible to kill a human (the enemy's combatants), which is more valuable than property, it is illogical to reject the permissibility of damaging

150. 1 AL-TANŪKHĪ, *supra* note 39, at 500.

151. 3 IBN ABĪ ZAYD AL-QAYRAWĀNĪ, AL-NAWĀDIR WA AL-ZIYĀDĀ 'ALĀ MĀ FT AL-MUDAWWANAH MIN GHAYRIHĀ MIN AL-UMMAHĀT 63 (Muhammad Hajjī ed., 1999); 14 IBN 'ABD AL-BARR, *supra* note 87, at 75; 2 IBN RUSHD, *supra* note 63, at 340; AL-ṬABARĪ, *supra* note 37, at 102–03. In al-Ṭabarī, Malik is reported to only prohibit the killing of livestock.

152. AL-ṬABARĪ, *supra* note 37, at 103–06; 2 IBN RUSHD, *supra* note 63, at 340; 1 AL-SHAYBĀNĪ, *supra* note 84, at 33–34. Al-Awzā'ī argues that Abu Bakr clearly prohibits those acts and for him, Abu Bakr more knowledgeable than anyone else in interpreting the verse of Q 59: 5 (“Whatever you [believers] may have done to [their] palm trees—cutting them down or leaving them standing on their roots—was done by God's leave, so that He might disgrace those who defied Him.”).

153. “[...] When he leaves, he sets out to spread corruption in the land, destroying crops and livestock. God does not like corruption.” Ayah al-Baqarah (The Cow) 2:205.

154. AL-ṬABARĪ, *supra* note 37, at 107.

the enemy's property. Like the Māliki jurists, the Ḥanafis also opt for a consequentialist interpretation to the Abū Bakr's precedent.¹⁵⁵ For the Ḥanafis, the destruction is permissible because it weakens the enemy, forces them to surrender, and disrupts their unity. Even if Muslim traders or captives inhabit a fortress, the attack and destruction may still be launched because defeating the enemy is more meritorious to protect Islam than preserving the traders' lives. The defeat of Islam is of greater harm than sacrificing the life of the traders.¹⁵⁶

The al-Shāfi'ī's position concurs with the majority's opinion which gives room for a certain degree of destruction, although the approach is slightly different. For al-Shāfi'ī, if Muslims launch an attack against the enemy's town and see no possibility of defeating them or forcing them to pay *jizya*, Muslims may take necessary steps to destroy the enemy using any method of destruction. However, al-Shāfi'ī asserts an exception for all living property such as the enemy's cattle and horses, based on an explicit prohibition from the Prophet. It is only permissible to slaughter their cattle/animal if Muslim warriors need for consumption.

Why does al-Shāfi'ī prohibit killing and destroying the living being while allowing any destruction to the inanimate property? Al-Shāfi'ī asserts that to irritate and destroy the enemy, Muslims must not resort to a prohibited act. He further argues that if the sole purpose is to irritate the enemy, destroy their morale, or defeat their force while ignoring all prohibition, then killing their women and children should be allowed. Isn't the execution of their children and women more demoralizing than just killing their animals? Muslims are prohibited from killing women and children, although it contributes to the objective of defeating the enemy. Thus, like in the case of women and children, killing living creatures such as cattle and honeybees is prohibited despite its practical value in winning the battle, based on the textual instructions.¹⁵⁷

Before the conclusion, I would like to mention an interesting discussion indicating how legal elaboration on this topic is enriched and developed. On the issue of the destruction of vegetation, Ibn Qudāma, seventh/thirteenth century Ḥanbalī jurist, elaborates that we may first

155. 1 AL-SARAKHSĪ, *supra* note 65, at 32–33; 7 AL-SHAYBĀNĪ, *supra* note 52, at 455.

156. 4 BURHĀN AL-DĪN ABĪ BAKR AL-MARGĪNĀNĪ, AL-HIDĀYAH SHARḤ AL-BIDĀYAH AL-MUBTADĪ 224 (1996). Jurists who argue for the permissibility of cutting down trees and demolishing edifices often refer to a report that the Prophet curtailed the date trees belong to Banū Naḍīr to force them to surrender. To see the list of this report, see, e.g., 13 IBN QUDĀMA, *supra* note 37, at 147.

157. 5 AL-SHĀFI'Ī, *supra* note 37, at 633–34. Abū Thawr and the Ḥanbalī concur with the al-Shāfi'ī jurists in this regard (prohibition of killing and slaughtering living creature except for consumption. See 13 IBN QUDĀMA, *supra* note 37, at 143–44.

differentiate vegetation into three groups. First, the vegetation that needs to be destroyed by military necessity. For example, Muslim may destroy trees because the vegetation is too close to the enemy's fortification, or because Muslim warriors need to cut it down for their access, or because it may hinder the attack. Second, the vegetation which may bring harm if destroyed such as if the vegetation is used for consumption, Muslims must not cut down and destroy this type of vegetation. The third group is the one that does not fall under the first or the second category: it will not harm Muslims or hinder the military operation if vegetation is destroyed. Jurists have two different opinions about this last category. Al-Awzā'ī, Abū Thawr, and al-Layth (d. 175/791) opt for the prohibition of the destruction based on Abu Bakr's clear command. Imām Mālik, al-Shāfi'ī, Ishāq, and Ibn Mundhir argue that Muslims may destroy the vegetation because it will contribute to the enemy's subjugation. Some jurists even go further by saying that destroying such vegetation is not only permissible, but recommended.¹⁵⁸

IV. CONCLUSION

From our long elaboration, we can use the al-Shāfi'ī and the Ḥanafī schools as the representation of two opposite paradigms in formulating legal ruling on the issue of protection. On one hand, al-Shāfi'ī argues that all unbelievers may be targeted by default, except, in the case of the scripturaries, if they accept the hegemony of Islam by paying poll tax or becoming a Muslim. Other exceptions are given to women, children, and the clergy/the monk who confine in their monastery and do not involve in hostility in any way. These last three exceptions are not based upon the premise of their inability to pose an actual threat and engage in aggression, as argued by the majority of jurists, including the Ḥanafī. The reason Muslims must protect women, children, and the clergy is that Muslims must follow textual-normative prescriptions. In other words, al-Shāfi'ī seems to represent a typical moral deontologist: it is the right thing to protect women, children, and clergy because the textual tradition (the norms of the Quran and the *sunna*) says so. They are protected not because of any other functional-practical considerations. Because of this approach, al-Shāfi'ī excludes other categories of people such as the trader, farmer, helper, and elder from noncombatant status. They may be targeted in war, except if they pay the *jizya* or become a Muslim. Ibn Hazm of the textualist school of law (al-Ẓahiri) has relatively similar standing.

158. 13 IBN QUDĀMA, *supra* note 37, at 146–47.

Interestingly, this type of reasoning may lead to a more restrained approach in other issues, as explained when discussing the property's protection. While al-Shāfi'ī, in general, concurs with other majority jurists that allow any destruction method to achieve Muslims' military advantage, he nevertheless prohibits killing and slaughtering animate property. Again, his reasoning is based on a deontological paradigm: the exception of the prohibition of destroying animate property is because the text instructs Muslims to do so.

However, we could not assume that al-Shāfi'ī is detached completely from a rational and logical consideration. Al-Shāfi'ī is known for his synthesis of the rational (the Ḥanāfi) and the traditional approach (the Māliki) of legal reasoning. Moreover, we can see this approach clearly throughout our discussion. For example, when he discusses the permissibility of killing women and children who join a battle, he says that all protected persons can be killed if they fight because the condition that causes their protection has ceased to exist by their participation in the fighting. He further extends the logic by saying that women and children should not be executed if they are captured or injured because the condition that allows them to be a target has also ceased to exist, and thus the law is returned to the original verdict.

On the other spectrum is Ḥanafī and other jurists, which argue that all unbelievers may deserve protection, except if they pose an actual threat against Muslims. By custom, they considered all able-bodied males of the unbelievers as a threat and are considered able to fight. Because of that, they are excluded from the protected category. By default, women and children shall be protected because they are unable to fight and are not a threat. They further extend the protection to other categories of people who are unable or merely not posing a threat to Muslims, such as the clergy, the helper, the elder, the farmer, the trader, and the laborer.

Underlying these legal rulings is the functional moral paradigm: the enemy may or may not be protected based on the calculated possible outcome. The helper, the elder, and the farmer are considered noncombatant because they are expected to be peaceful and will not endanger Muslims. Based on this functional consideration, Syaikh Niẓām, a Hanafi jurist of the Mughal period, argues that if a woman is the Queen and a child is the Prince King of the enemy, they may be targeted because of their political status. Syaikh Niẓām further argues that if a wealthy woman

spends a great deal of her wealth to aid the enemy or to incite enmity against Muslims, she can be killed as well.¹⁵⁹

Muslim jurists often elaborate in a rather bizarre hypothetical situation to discuss legal issues. In this regard, some jurists, for example, argue that a man with no right hand and with no legs shall be protected while a man with no left hand and has one leg may be killed/targeted because the right arm is the main strength of the body. This example also explains that Muslim jurists quite often push the threshold of protection to a minimum limit and give more room for military interest by elaborating on many exceptions.

While this logic has brought these jurists to a more restrained approach concerning individuals' protection, it is not the case for property protection. Their reasoning seems to have led them to conclude that all destructive methods may be permissible if it is advantageous militarily for Muslims.

Along with these two lines of approaches, we have also discussed al-Awzā'ī's opinions on the issue of protection briefly. Al-Awzā'ī's legal arguments seem to be more restrained than both the rational and the traditional jurists. Modern scholars have difficulty fitting al-Awzā'ī into their categorization, but usually, he is considered a traditionalist because he relied a lot on a living tradition while occasionally used rudimentary logical reasoning.¹⁶⁰ From our discussion, al-Awzā'ī, who lived during the Umayyad but survived the Abbasid revolution, who also lived in the frontier area (Syria), surprisingly proposed a much less hawkish approach, compared to other schools. Unfortunately, the elaboration of his juristic thoughts on this issue is hindered by the fact that none of his treaties reach us, other than the fragments preserved by other jurists. But from knowing al-Awzā'ī's opinion (also other jurists like Abū Thawr), we may hypothesize that the evolution toward the advancement of Muslim military interests is evolving along with the line of the conquest and political expansion (of the Abbasid period).

159. 2 AL-SHAYKH NIẒĀM, AL-FATĀWĀ AL-HINDIYYA 113 ('Abd al-Laṭīf 'Abd al-Raḥmān ed., 2000); IBN QUDĀMA, *supra* note 37, at 215.

160. Steven C. Judd, *Competitive Hagiography in Biographies of al-Awzā'ī and Sufyān al-Thawrī*, 122 J. OF THE AM. ORIENTAL SOC'Y 25, 25-27 (2002).