



JIHAD¹ AND JUST WAR

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Abstract

This paper attempts to demonstrate that the differences between the Western and Islamic traditions on the ethics of warfare run far deeper than what traditional scholarship suggests. The present study focuses on three main areas: the sources of our knowledge of morality, the objectives of warfare, and the principle of non-combatant immunity. We shall see that these three topics are inter-connected, and also that understanding the classical Islamic law of war is essential to understanding the ideology and allure of contemporary Islamism.

INTRODUCTION

Many recent scholars of Islam have either downplayed or denied any differences between the Western just war tradition and Islam regarding the ethics of warfare, some of them asserting, for example, that Islam allows warfare only in self-defense, or that Islam prohibits any attacks on innocent noncombatants. Such authors include Karen Armstrong,² John Esposito,³ John Kelsay,⁴ Sayyid Ahmed Khan,⁵ Mahmoud Shaltut,⁶ Seyyed Hossein

¹ The term “jihad” can mean various types of struggle, but in the hadith collections and manuals of Islamic law, the primary meaning is armed struggle for Islam against unbelievers, a certain type of religiously sanctioned warfare. That is the sense in which it is used in this paper. On the meanings of “jihad,” see Ella Landau Tasserou, “Jihad,” in *The Encyclopedia of the Quran*, Vol. III (Leiden: Brill, 2001-6), 35-43.

² Karen Armstrong, *Muhammad: A Biography of the Prophet* (New York: Harper Collins, 1992), 209.

³ John Esposito, *Unholy War: Terror in the Name of Islam* (New York: Oxford University Press, 2002), 34-5.

⁴ John Kelsay, *Arguing the Just War in Islam* (Cambridge, MA: Harvard University Press, 2007), 97 and *passim*. For a thorough refutation of Kelsay’s book, see Ella Landau Tasserou, “Is *jihad* comparable to just war? A review article,” *Jerusalem Studies in Arabic and Islam* 34 (2008), 535-550.

⁵ See Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton: Marcus Wiener, 1996), 6.

⁶ Peters, *Jihad in Classical and Modern Islam*, 59-101 (“A Modernist Interpretation of Jihad: Mahmud Shaltut’s *Treatise Koran and Fighting*”).



Nasr,⁷ Ahmed Rashid,⁸ A.G. Noorani,⁹ Reza Aslan,¹⁰ Tariq Ramadan,¹¹ Louay M. Safi,¹² Majid Khadduri,¹³ and Khaled Abu El Fadl.¹⁴

I shall attempt to show in this paper that the differences between the Western and Islamic traditions on the ethics of warfare run far deeper than these authors suggest. I shall focus on three main areas: the sources of our knowledge of morality, the objectives of warfare, and the principle of non-combatant immunity. We shall see that these three topics are inter-connected, and also that understanding the classical Islamic law of war is essential to understanding the ideology and allure of contemporary Islamism.

To begin with, however, we must establish the terms of the comparison. Since the Western and Islamic traditions both contain diversity and took some centuries to develop, we must decide which thinkers in each to choose as representative. The logical choice is to focus, first of all, on thinkers who are part of the mainstream, not minority or fringe figures. Secondly, they should be thinkers who articulate mature and developed, as opposed to nascent or inchoate, theories of warfare. On the Islamic side, these considerations would point to Sunni rather than Shiite Islam, and within Sunni Islam, to Asharite rather than Mutazalite approaches to theology.¹⁵ They also would point towards the four great Sunni schools of jurisprudence, especially that of Muhammad al-Shafi (767-820), who was the first to work out the distinction between offensive war as a collective obligation and

⁷ Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: Harper Collins, 2002), 256-272.

⁸ Ahmed Rashid, *Jihad: The Rise of Militant Islam in Central Asia* (New Haven: Yale University Press, 2002), 2.

⁹ A.G. Noorani, *Islam and Jihad: Prejudice versus Reality* (London: Zed Books, 2002).

¹⁰ Reza Aslan, *No god but God: The Origins, Evolution, and Future of Islam* (New York: Random House, 2005), 75-87.

¹¹ Tariq Ramadan, *In the Footsteps of the Prophet: Lessons from the Life of Muhammad* (Oxford: Oxford University Press, 2007), 98.

¹² Louay M. Safi, *Peace and the Limits of War: Transcending the Classical Conception of Jihad* (London: International Institute of Islamic Thought, 2003).

¹³ Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 57-9, and *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: The Johns Hopkins Press, 1966), 16.

¹⁴ Khaled Abu El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: HarperCollins, 2005), 220-249.

¹⁵ As Antony Black points out, "The impact of Asharism on intellectual life in general [in Sunni Islam] was decisive." Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present*, second ed. (Edinburgh: Edinburgh University Press, 2011), 83.



defensive war as an individual obligation.¹⁶ Al-Shafi is also commonly called the founder of the science of Islamic jurisprudence (*usul al-fiqh*).¹⁷

On the Western side, these same considerations point towards the Aristotelian-Thomistic natural law school that became the mainstream view in the Latin West from the thirteenth century on. It took some time, however, for a mature, developed theory of warfare to emerge in this school. Only in the early and mid-sixteenth century do we find systematic statements of the just war doctrine in the writings of the great Spanish Catholic Thomistic theologians Francisco de Vitoria, OP (1492-1546) and Francisco Suarez, SJ (1548-1617), whose thought on warfare would form the basis for modern international law.¹⁸

THE SOURCES OF MORAL KNOWLEDGE

The Western Tradition

The Western approach to the sources of moral knowledge is best illustrated by the thought of St. Thomas Aquinas (1225-1274), the single-most respected theologian in the Latin West and the master whose disciples, de Vitoria and Suarez, would go on to craft the full-fledged theory of the just war or *bellum justum*. As a Christian, Aquinas of course accepts divine revelation as a vital source of moral and other knowledge.¹⁹ However, he also develops a detailed account of natural law, a set of basic moral values and norms which, on his account, human beings know by reason unaided by revelation, for “the natural law is promulgated by the very fact that God instilled it into man’s mind so as to be known by him naturally.”²⁰ Aquinas defines law, not as an arbitrary and inscrutable command, but as “a dictate of reason in the ruler by whom his subjects are governed” (emphasis added).²¹ The

¹⁶ Michael Bonner, *Jihad in Islamic History: Doctrines and Practice* (Princeton and Oxford: Princeton University Press, 2006), 106-7. See Majid Khadduri trans., *Al-Shafi’s Risala: Treatise on the Foundations of Islamic Jurisprudence*, second ed. (Cambridge: Islamic Texts Society, 1987), 82-6. On the central importance of al-Shafi to the development of Sunni Islamic thought, see, in the same work, 40-8, and Ahmad ibn Naqib al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, Nuh Ha Mim Keller ed. and trans., revised ed. (Beltsville MD: Amana Publications, 1994), 1095-96.

¹⁷ Majid Khadduri, *Al-Shafi’s Risala*, 40.

¹⁸ James Turner Johnson, “Historical Roots and Sources of the Just War Tradition in Western Culture,” in John Kelsay and James Turner Johnson, eds, *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York, Westport CT, and London: Greenwood Press, 1991), 3-29 esp. 15-16.

¹⁹ St. Thomas Aquinas, *Summa Theologica*, translated by the Fathers of the English Dominican Province, rev. ed. (Westminster, MD: Christian Classics, 1981), I, Q. 1, A. 1.

²⁰ Aquinas, *Summa Theologica*, I-II, Q. 90, A. 4, ad. 1.

²¹ Aquinas, *Summa Theologica*, I-II, Q. 92, A. 1, respondeo.



eternal law is God's wisdom as applied to the creation and governance of the universe,²² and the natural law is this eternal law as understood by rational creatures such as human beings: "all men know the truth to a certain extent, at least as to the common principles of the natural law: and as to the others, they partake of the knowledge of truth, some more, some less; and in this respect are more or less cognizant of the eternal law."²³ Indeed, the first principles of the natural law are self-evident to all rational beings, and thus known by all men independently of divine revelation.²⁴ Quoting Isidore of Seville (560-636), Aquinas insists that "the natural law is common to all nations."²⁵ Quoting St. Augustine and echoing St. Paul, he asserts that the natural law is written on the hearts of all men and can never be blotted out, even by sin and the loss of divine grace.²⁶

Following the natural law thinking of Thomas Aquinas, both Francisco de Vitoria and Francisco Suarez reach some important conclusions that have a bearing on the ethics of warfare. In his famous treatise "On the American Indians," de Vitoria argues that unbelievers can be true masters both of their private property and of their own nations: "Aquinas shows that unbelief does not cancel either natural or human law, but all forms of dominion (*dominia*) derive from natural or human law; therefore, they cannot be annulled by lack of faith."²⁷ Since neither mortal sin nor unbelief deprives people of their right to dominion over their own goods and lands, it follows that Christians may not use such arguments to dispossess non-Christians of these things.²⁸ Francisco Suarez also emphatically rejects the claim that non-Christians are incapable of governing themselves properly, pointing out that "there are many unbelievers more gifted by nature than are the faithful, and better adapted to political life."²⁹ Echoing Vitoria, Suarez writes, "there is no title for war so exclusively reserved to Christian princes that it has not some basis in, or at least some due relation to, natural law, being therefore also applicable to princes who are

²² Aquinas, *Summa Theologica*, I-II, Q. 93, A. 1, respondeo.

²³ Aquinas, *Summa Theologica*, I-II, Q. 93, A. 2, respondeo..

²⁴ Aquinas, *Summa Theologica*, I-II, Q. 94, A. 1, respondeo.

²⁵ Aquinas, *Summa Theologica*, I-II, Q. 94, A. 4, sed contra. Aquinas does qualify this by noting that reason can be perverted by passion, or evil habit, or an evil disposition, so that, while the first principles of natural law are known by all, not all apply these principles correctly all the time.

²⁶ Aquinas, *Summa Theologica*, I-II, Q. 94, A. 6, sed contra, ad 1, and ad 2. See St. Paul, Letter to the Romans, 2:15.

²⁷ Francisco de Vitoria, *Political Writings*, eds. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 244.

²⁸ Vitoria, *Political Writings*, 246.

²⁹ Francisco Suarez, "On War" (*De Bello*), Disputation XIII, Section V, in Gregory M. Reichberg, Henrik Syse, and Endre Begby eds., *The Ethics of War: Classic and Contemporary Readings* (Oxford: Blackwell Publishing, 2006), 353-6.



unbelievers.”³⁰ In other words, unbelievers also can wage just wars. Both Vitoria and Suarez follow here the teaching of Pope Innocent IV (1180-1254), one of the foremost canon lawyer of the high middle ages, who had taught that “dominions, possessions, and jurisdictions may licitly and without sin be held by the infidels, for these were ordained not only for the faithful, but for every rational creature.”³¹ Conditioning all of this is the fact that Christianity had always accepted the moral legitimacy of the (pagan) Roman state, with Jesus instructing his followers to “give to Caesar what is Caesar’s”³² and St. Paul exhorting the early Christian community to pay their taxes and in general obey the civil authorities, who have been established by God for the common good of the community.³³

The Islamic Tradition

The mainstream Asharite school of theology embraced a faith-based, divine-command conception of ethics, in opposition to the more rationalistic (but minority) Mutazalites. Whereas the Mutazalites, in the words of Majid Fakhry,

*held that man can determine rationally what is good and evil, prior to revelation, the Asharites adhered to a strict voluntarist ethics. Good is what God has prescribed, evil what He has prohibited. In keeping with this voluntarist thesis, they were reluctant to admit that any merit attached to that type of rational knowledge which is attained through unaided reason.[note omitted] God’s power and sovereignty are such that the very meaning of justice and injustice is bound up with His arbitrary decrees. Apart from these decrees, justice and injustice, good and evil, have no meaning whatsoever.*³⁴

Patricia Crone points out the implications of this ethical voluntarism: “...all acts were good or bad only because God had defined them so to us. It followed that humans could not have

³⁰Francisco Suarez, “On War” (*De Bello*), Disputation XIII, Section V, in Gregory M. Reichberg, Henrik Syse, and Endre Begby eds., *The Ethics of War: Classic and Contemporary Readings*, 355. See also James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton: Princeton University Press, 1975), 163-8.

³¹ Innocent IV, “On Vows and the Fulfilling of Vows,” Decretal *Quod super his* (*Decretals*, III, 34, 8), n. 2, in Reichberg et al. eds, *The Ethics of War*, 153.

³² Matthew 22:15-22.

³³ Letter to the Romans, 13:1-7. Cf. also Romans 2:14-5, Titus 3:1, 1 Timothy 2:1-3, Hebrews 13:17.

³⁴ Majid Fakhry, *A History of Islamic Philosophy*, third ed. (New York: Columbia University Press, 2004), 218. See also Ahmad ibn Naqib al-Misri, *Reliance of the Traveller*, 2-3. The latter work describes al-Ashari (874-936) as “the standard-bearer for the faith of Sunni Islam for most of its history,” 1030. Another useful source on this topic is Richard M. Frank, “Moral Obligation in Classical Muslim Theology,” *Journal of Religious Ethics* 11 (1983), 204-223.



an inner moral compass, or any 'law written in their hearts' (Rom. 2:15) enabling them to live moral lives on the basis of their own unaided reason. All morality took the form of positive law enacted by God.[note omitted]"³⁵ In other words, the rightness or wrongness of actions are not grounded in any properties intrinsic to the acts themselves that human reason can discern; they are grounded merely in the arbitrary will of God, which is known from divine revelation.³⁶ In general, Asharite theologians express greater skepticism about the ability of natural human reason to apprehend the truth, especially in ethics, than do the mainstream thinkers of the Medieval Latin West.³⁷

³⁵ Patricia Crone, *God's Rule: Government and Islam* (New York: Columbia University Press, 2004), 264. Anver M. Emon argues that the Sunni tradition does allow *some* room for reason as a source of moral knowledge, but only in cases where there is no revealed teaching (either via the Koran or the *sunna*) on the matter in question. Anver M. Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010). On Emon's account, of course, Mutazalite thinkers place far more confidence in reason than do Asharites. Emon is also careful to point out that Asharites are quite grudging in the scope they accord to reasoned deliberation, seeking to limit it as far as possible while ensuring the primacy of God's express will (pp. 36-7, 146, 187-8, 194-5, 204-5). In any case, my topic in this paper is the ethics of warfare, and the Koran and *sunna* provide abundant materials on this topic, such that the thinkers discussed by Emon would have no need to turn to unaided reason as a means of answering questions about the morality of war. Emon points out that for Asharites, the divine law is intended to protect and promote certain goods or *maslaha*, but "Not all *maslaha*-based arguments are authoritative. Indeed, those that contravene an authoritative source-text must fail for a lack of authority" (p. 34). Moreover, Emon fails to stress that the Koran, *sira*, and *hadith* contain such a huge body of ethical teachings on such a wide range of topics that they leave comparatively limited scope for reasoned deliberation. The contrast with the Christian tradition is stark, since in the New Testament one finds mainly general moral principles and parables rather than the mass of detailed teachings and precedents contained in the Koran, *sira*, and *hadith*.

³⁶ As one Asharite thinker puts it, "The ethical valuations (*ahkam*) of actions are grounded neither in the acts themselves nor in their properties; they are grounded simply in what God says." Frank, "Moral Obligation in Classical Muslim Theology," p. 207. Frank quotes another Asharite thinker who writes, "he who does not validly know the law does not validly know that a bad action is bad" (p. 208). See also Eric Ormsby, *Ghazali: The Revival of Islam* (Oxford: Oneworld Publications, 2008), 14-5.

³⁷ "The position of the Asharis...is that the mind is unable to know the rule of Allah about the acts of those morally responsible except by means of His messengers and inspired books. For minds are in obvious disagreement about acts. Some minds find certain acts good, others find them bad.... [Consequently,] The good is not what reason considers good, nor the bad what reason considers bad. The measure of good and bad...is the Sacred Law, not reason." Ahmad ibn Naqib al-Misri, *Reliance of the Traveller*, 2-3 (a1.3-4). "The Mutazilite thesis, that what is good and bad, obligatory and wholly wrong, is known



It is no wonder, therefore, that the standard Islamic epithet for the non-Muslim world became “the *dar al-harb*” or the “house of war.” As James Turner Johnson puts it, “the world outside Islam is by definition one in which the divine will is not observed, and the result is continuing strife.”³⁸ This strife contrasts with the peace that reigns within the *dar al-Islam* or house of Islam, where God’s revelation, the true source of moral knowledge, is acknowledged and followed. The *dar al-harb* is the geographical equivalent of *jahiliyya*, the era of ignorance that preceded the revelation of the Koran through the prophecy of Muhammad.

Bernard Lewis points out a further implication of Islamic voluntarism: “the rule of an unbeliever is, by definition, illegitimate, since only Islam can confer true legitimacy in government.”³⁹ Patricia Crone writes, “Whether one could live in the abode of war or not, the abode itself was illegitimate. It had no right to exist, like states denied diplomatic recognition in modern times.”⁴⁰ Westerners refer to the great Islamic “conquests” that followed upon the death of Muhammad,⁴¹ but the Muslim tradition refers to these conquests as *futuh*, literally “openings” or “liberations.” Lewis observes that “These were not seen as conquests in the vulgar sense of territorial acquisitions, but as the overthrow of impious regimes and illegitimate hierarchies, and the ‘opening’ of their peoples to the new revelation and dispensation.”⁴² After all, if revelation, not natural reason, is the source of moral knowledge, then unbelievers necessarily lack the knowledge needed for legitimate and morally upright self-governance. As Antony Black writes, on the Shafite-Asharite view of morality, “to be moral one virtually must be Muslim,” since “[t]here is no ‘natural’ law knowable by humans as humans through their own understanding.” This divine-command

intuitively, is denied on the basis of the observed fact that there is no universal agreement among prudent and intelligent men regarding these values.” Frank, “Moral Obligation in Classical Muslim Theology,” p. 208. See also Robert R. Reilly, *The Closing of the Muslim Mind: How Intellectual Suicide Created the Modern Islamist Crisis* (Wilmington, DE: ISI Books, 2010), 49, 67-83.

³⁸ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (University Park, PA: The Pennsylvania State University Press, 1997), p. 48; cf. 51-2.

³⁹ Bernard Lewis, *The Political Language of Islam* (Chicago and London: The University of Chicago Press, 1988), 103.

⁴⁰ Crone, *God’s Rule*, 362.

⁴¹ E.g. Hugh Kennedy, *The Great Arab Conquests* (Philadelphia: DaCapo Press, 2007).

⁴² Lewis, *The Political Language of Islam*, p. 93. See also Bassam Tibi, “War and Peace in Islam,” in Terry Nardin ed., *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton: Princeton University Press, 1996), 130, and Fred M. Donner, “The Sources of Islamic Conceptions of War,” in John Kelsay and James Turner Johnson eds. *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York, Westport CT, and London: Greenwood Press, 1991), 50.



theory of morality “had and has a catastrophic effect on Islamic attitudes towards non-believers...”⁴³

THE OBJECTIVES OF WARFARE

The Western Tradition

In the Western just war tradition, there is one and only one just cause for going to war, and that is for one state to prevent or to rectify a grave injury unjustly inflicted by another state. Just wars are defensive or retributive in nature only, waged in order to repel an injury in progress, avenge an injury already inflicted, or restore something wrongly taken.⁴⁴ In the words of Francisco de Vitoria, “the sole and only just cause for waging war is when harm has been inflicted,”⁴⁵ and “the defense and preservation of the commonwealth is the purpose of war.”⁴⁶ Vitoria makes it clear, however, that this is only a necessary and not a sufficient reason for going to war. Sometimes the defense and preservation of the commonwealth are best served by avoiding war, even when one has just cause for going to war, due to the risk of provoking greater conflict or worse injuries;⁴⁷ moreover, given the “cruel and horrible” effects of war, one should not wage war in response to trivial offenses,⁴⁸ and negotiation should always be preferred to war when it is feasible.⁴⁹ The heavily pacifistic tendencies of the Christian Gospel and of pre-Constantinian Christian thinkers⁵⁰ did not prevent the post-Constantinian Church from embracing the idea of just war, but it did lead to a strong presumption against violence, which became an important part of the just war tradition.

⁴³ Black, *The History of Islamic Political Thought*, pp. 83-4. On p. 100, Black writes that for Al-Ghazali, the Sunni equivalent of Thomas Aquinas, “the only proper guide in politics is revelation.” This contrasts sharply with Aquinas’ declaration that the natural law, the basis of right governance, “is common to all nations.” See also, in the same source, 58-9.

⁴⁴ James Turner Johnson, *Ideology, Reason, and the Limitation of War*, 39, 46; Johnson, “Historical Roots and Sources,” 14-15.

⁴⁵ Vitoria, *Political Writings*, p. 303 (*On the Law of War*, Q. 1, A. 3).

⁴⁶ Vitoria, *Political Writings*, p. 304 (*On the Law of War*, Q. 1, A. 4).

⁴⁷ Vitoria, *Political Writings*, p. 314 (*On the Law of War*, Q. 2 A. 5).

⁴⁸ Vitoria, *Political Writings*, p. 304 (*On the Law of War*, Q. 1, A. 3).

⁴⁹ Vitoria, *Political Writings*, p. 307 (*On the Law of War*, Q. 2, A. 1).

⁵⁰ See Ronald J. Sider ed., *The Early Church on Killing: A Comprehensive Sourcebook on War, Abortion, and Capital Punishment* (Grand Rapids, MI: Baker Academic, 2012). In this extremely important and useful book, Sider includes, and provides historical context for, every single pre-Constantinian Christian text outside of the Bible that addresses the topic of killing in any way. He demonstrates that the pacifistic tendency of the pre-Constantinian Church was far more pronounced than most commentators have recognized, including James Turner Johnson, whose scholarship looms large in this subject area.



It follows that warfare is an extraordinary or exceptional condition; the ordinary condition is peace among nations. Nations that are not inflicting injuries on each other have no reason to go to war. Anything that is not an injury, such as mere difference of religious belief, is not a just cause for war. Thus, Francisco de Vitoria insists that “difference of religion cannot be a cause of just war.” Vitoria, exceptionally erudite and well-read in the Christian theological tradition, adds: “This is the opinion of St. Thomas [Aquinas] ... and of all the doctors [of the Church]; I know of no one who thinks the contrary.”⁵¹ James Turner Johnson points out that “Suarez likewise rejects the possibility that religion may offer just cause for war.”⁵²

The reader may wonder what Vitoria thought of the depredations of the conquistadors in the new world, which were happening during his lifetime. Vitoria does allow that Spaniards have a natural right to travel in foreign countries, including the Americas, for the sake of commerce and missionary activity, so long as they do not harm the local inhabitants.⁵³ If invasion were necessary to secure these rights, then, Vitoria writes, it may, at least in principle, be justified.⁵⁴ However, he hastens to add that, as regards missionary activity, “the resulting war, with its massacres and pillage, obstructs the conversion of the barbarians instead of encouraging it....my fear is that the affair may have gone beyond the bounds of justice and religion.”⁵⁵ Regarding the treatment of the Native Americans in his own day at the hands of his countrymen, Vitoria writes: “I hear only of provocations, savage crimes, and multitudes of unholy acts.”⁵⁶ In a letter to a fellow Dominican, he writes, “I cannot see how to excuse these conquistadors of utter impiety and tyranny.”⁵⁷

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⁵¹ Vitoria, *Political Writings*, pp. 302-3 (*On the Law of War*, Q. 1, A. 3). See also Johnson, *Ideology, Reason, and the Limitation of War*, 154-8.

⁵² Johnson, *Ideology, Reason, and the Limitation of War*, 163. The concept of war for religion is present in the Western tradition, but, as James Turner Johnson points out, “its role in Christian tradition overall has not been central but peripheral.” In contrast, “fighting has had a place in the defense and spread of Islam from the time of the Prophet himself.” Johnson, *The Holy War Idea in Western and Islamic Traditions*, p. 25. Johnson observes that “the papally accepted apologetic for the crusades always strongly emphasized the temporal injustices perpetrated by the infidels upon nations and pilgrims who just happened to be Christian.” Johnson, *Ideology, Reason, and the Limitation of War*, 51.

⁵³ Vitoria, *Political Writings*, pp. 278-286 (“On the American Indians,” Q. 3 AA. 1-2).

⁵⁴ Vitoria, *Political Writings*, p. 283 (“On the American Indians,” Q. 3, A.1).

⁵⁵ Vitoria, *Political Writings*, p. 286 (“On the American Indians,” Q.3, A.2).

⁵⁶ Vitoria, *Political Writings*, p. 271 (“On the American Indians,” Q. 2 A. 4). See also 331-333 (Letter to Miguel de Arcos OP, 8 Nov. 1534).

⁵⁷ Vitoria, *Political Writings*, pp. 331-333 (Letter to Miguel de Arcos OP, 8 Nov. 1534).



If we turn to the Islamic tradition, we find a very different account of the purpose of warfare, concisely stated in a famous formulation by the great Muslim historian Ibn Khaldun (1332-1406):

In the Muslim community, the holy war is a religious duty, because of the universalism of the (Muslim) mission and (the obligation to) convert everyone to Islam either by persuasion or by force. [...] The other religious groups did not have a universal mission, and the holy war was not a religious duty to them, save only for purposes of defense... It is (for them [Christians] to choose between) conversion to Islam, payment of the poll tax, or death.⁵⁸

As Ibn Khaldun makes clear, the universal mission of Islam is both religious and political. Political power must be in the hands of Muslims alone so that Muslims can implement the revealed law and use pressure or persuasion to convert all people to Islam. The universality of the Muslim mission means that non-Muslims have no right to govern anywhere. This imperialistic impulse can be traced to the earliest extant biography of Muhammad, the *sira* of Ibn Ishaq, in which Muslims are exhorted, "Conquer where you will, by God, you have not conquered and to the resurrection day you will not conquer a city whose keys God had not given beforehand to Muhammad."⁵⁹

Difference of religion is thus, by itself, a just cause of war. Ann K. S. Lambton writes:

When considering the relations of Muslims to non-Muslims it must be borne in mind that the universality of the Islamic theory of state precludes any theory of international relations between states as equals, except possibly as a temporary expedient, or of an international society of states.... Under its [the Islamic state's] laws no other state is recognized: universal supremacy belongs to the sharia and its representative, the imam. [...] The first duty of the Islamic world is to exalt the word of God until it is supreme. Hence the only proper relationship to the non-Islamic world is one of perpetual warfare. Strife is to go on until all non-Muslims are either converted

⁵⁸ Ibn Khaldun, *Al Muqqadima*, quoted in Bat Ye'or, *The Dhimmi: Jews and Christians under Islam*, David Maisel et al. trans. (Rutherford NJ: Fairleigh Dickinson University Press, 1985), 162.

⁵⁹ Alfred Guillaume, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Oxford: Oxford University Press, 1955), p. 452. See also *Sahih Bukhari*, Vol. 9, Bk. 92, No. 378. http://www.sahih-bukhari.com/Pages/Bukhari_9_92.php (accessed on Sept. 12, 2013). The classical doctrine of *jihad*, with its religiously motivated imperialistic thrust, is already present in, and inextricably woven into, Ibn Ishaq's *sira*. See Joseph S. Spoerl, "Islam and War: Tradition vs. Modernity," *Comparative Islamic Studies* 4 (2008), 181-212.



*or pay tribute in humiliation.[note omitted] Unbelievers must be either converted, subjugated, or killed.*⁶⁰

Michael Bonner makes the same point:

*Since the only legitimate sovereign is God, and the only legitimate form of rule is Islam, the various rulers and states within the Abode of War have no legitimacy, and their rule is mere oppression or tyranny. The Muslim state – in the classical theory, the imam – may conclude a truce with those rulers or states, but for no longer than ten years.*⁶¹

The doctrine of warfare in Islam, as Lambton points out, is closely connected to the duty to “exalt the word of God until it is supreme.” In his magisterial work on interfaith relations in the Islamic tradition, Yohanan Friedmann demonstrates that “[t]he idea of Muslim superiority is central to the Islamic world-view and figures prominently in ... Islamic law and tradition.”⁶² This idea is conveyed both in the Koran⁶³ and in the *hadith*, according to which Muhammad said, “Islam is superior and nothing is to be made superior to it” (or “Islam is exalted and nothing is to be exalted above it”).⁶⁴ As Friedmann points out, the most conspicuous way in which the superiority or exaltedness of Islam is demonstrated is in military victories resulting in the expansion of Muslim dominion.⁶⁵ These victories are linked to another manifestation of Islamic superiority, namely, the humiliation of the subjugated infidel, symbolized by the imposition of the *jizya* on conquered “people of the

⁶⁰ Ann K. S. Lambton, *State and Government in Medieval Islam* (Oxford: Oxford University Press, 1981), 201. See also Khadduri, *War and Peace in the Law of Islam*, 45, 51, 144, 154.

⁶¹ Bonner, *Jihad in Islamic History*, p. 92. See also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982), p. 130: “The basis of the Islamic attitude towards unbelievers is the law of war; they must be either converted[note omitted] or subjugated or killed...”

⁶² Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003), 14.

⁶³ Koran 9:33, 9:40, 48:28, 61:9. These verses tell us that God sent Muhammad to exalt the true faith above all other religions. Since the Koran also commands Muslims to obey and emulate Muhammad (3:32, 3:132, 4:13, 4:59, 4:69, 5:92, 8:1, 8:20, 8:46, 9:71, 24:47, 24:51, 24:52, 24:54, 24:56, 33:33, 33:36, 47:33, 49:14, 58:13, 64:12), it follows that Muslims in general have the duty to exalt Islam above all other religions. It is highly significant that verses 9:33 and 9:40 follow hard upon verse 9:29, the *jizya* verse, which commands the conquest and humiliation of Jews and Christians: this is part of what it means to exalt Islam above all other religions.

⁶⁴ Yohanan Friedmann, “Islam is superior...”, *The Jerusalem Quarterly* 11 (1979), 37; Friedmann, *Tolerance and Coercion in Islam*, 34-5.

⁶⁵ Friedmann, “Islam is Superior...”, 37.



book” as mandated by Koran 9:29.⁶⁶ For example, the great Asharite-Shafi scholar Abu Hamid al-Ghazali (1058-1111), the most influential and respected thinker in the Sunni tradition, stipulates that “on offering the *jizya*, the dhimmi must hang his head while the official takes hold of his beard and hits [the dhimmi] on the protruberant bone beneath his ear [i.e. the mandible]...”⁶⁷ Another great Asharite-Shafi scholar, Fakhr al-Din al-Razi (1149-1209), explains that the whole point of collecting the *jizya* is to give the infidels a respite for a time in the hopes that they will convert to Islam; the legally mandated forms of humiliation and debasement will act as a spur and incentive to this.⁶⁸ Pagans (or at least Arab pagans) were treated even more harshly, forced to choose between conversion to

⁶⁶ Friedmann writes, “Reading the relevant material in the Muslim sources, one has frequently the impression that the humiliation of the unbeliever is more important than his conversion.” Friedmann, *Tolerance and Coercion in Islam*, 37. Like Lambton and Friedmann, David Cook and Bernard Lewis also write that the purpose of the *jizya* was to humiliate: David Cook, *Understanding Jihad* (Berkeley: University of California Press, 2005), 60, and Bernard Lewis, *The Jews of Islam* (Princeton: Princeton University Press, 1984), 14-15. See also Bat Ye’or, *The Dhimmi: Jews and Christians under Islam*, David Maisel et al. trans. (Rutherford NJ: Fairleigh Dickinson University Press, 1985), 53-4, 175-80, 188-9, 190-2, 201-2, and *passim*; Mark Durie, *The Third Choice: Islam, Dhimmitude and Freedom* (N.P.: Deror Books, 2010), 131-41 and *passim*; Uri Rubin, “Qur’an and poetry: more data concerning the Qur’anic *jizya* verse (*‘an yadin*), *Jerusalem Studies in Arabic and Islam* 31 (2006), 139-45. Discrimination and persecution remain the daily lot of non-Muslims living in Muslim lands to the present day, even if Muslim rulers have abandoned formal collection of the *jizya*: see e.g. Farideh Goldin, *Wedding Song: Memoirs of an Iranian Jewish Woman* (Hanover NH and London: Brandeis University Press/University Press of New England, 2003); Samuel Tadros, *Motherland Lost: The Egyptian and Coptic Quest for Modernity* (Stanford: Hoover Institution Press, 2013); Paul Marshall and Nina Shea, *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide* (Oxford and New York: Oxford University Press, 2011); Paul Marshall, Lela Gilbert, Nina Shea, *Persecuted: The Global Assault on Christians* (Nashville, TN: Thomas Nelson, 2013); U.S. State Department, International Religious Freedom Reports (see annual Country Reports for Muslim-majority countries), <http://www.state.gov/j/drl/irf/rpt/index.htm>.

⁶⁷ Quoted in Andrew Bostom ed., *The Legacy of Jihad: Islamic Holy War and the Fate of Non-Muslims* (Amherst, NY: Prometheus Books, 2005), p. 199. Numerous other passages in this anthology by classical Islamic jurists confirm that the *jizya* was meant to humiliate “people of the book:” e.g. 169, 178-9, 200, 202-4, 206, 216-20.

⁶⁸ Jane Dammen McAuliffe, “Fakhr al-Din al-Razi on *ayat al-jizyah* and *ayat al-sayf*,” in Michael Gervers and Ramzi Jibran Bikhazi eds., *Indigenous Christian Communities in Islamic Lands, Eighth to Eighteenth Centuries, Papers in Medieval Studies 9* (Toronto: Pontifical Institute of Medieval Studies, 1990), 103-19 at 111.



Islam or death, as mandated by the Koran 9:5.⁶⁹ Equally harsh treatment is meted out to anyone adhering to a religion founded after Muhammad. As Friedmann points out, Islam claims to have abrogated all earlier religions and yet itself to be immune to abrogation: “Islam’s immunity from abrogation is an essential component of its superiority in comparison to all other religions.[note omitted].”⁷⁰ The *jizya* is thus not to be accepted from Mormons, Ahmadis or Qadianis, Bahais, or Sikhs, who follow religions founded after the coming of Islam, for which Islamic law has no tolerance.⁷¹

The purpose of warfare in Islam is thus radically different than its purpose as envisioned in the Western concept of the just war or *bellum justum*. Bassam Tibi makes this point with admirable clarity (specifically criticizing Majid Khadduri):

*The Western distinction between just and unjust wars linked to specific grounds for war is unknown in Islam. Any war against unbelievers, whatever its immediate ground, is morally justified... The usual Western interpretation of jihad as a ‘just war’ is, therefore, a misreading of this Islamic concept. I disagree, for example, with Khadduri’s interpretation of the jihad as bellum justum. [...] According to the Western just war concept, just wars are limited to a single issue; they are not universal and permanent wars grounded on a religious worldview.*⁷²

A historical anecdote illustrates the stark contrast between the Western and Islamic conceptions of warfare and reinforces Bassam Tibi’s point. After the American Revolution separated the North American colonies from Great Britain, U.S. shipping on the high seas lost the protection from Islamic piracy purchased by Great Britain for its merchant fleet. In May 1786, Thomas Jefferson and John Adams, the U.S. ambassadors to France and Britain respectively, met in London with Sidi Haji Abdul Rahman Adja, the ambassador from Tripoli in North Africa, to negotiate a treaty protecting U.S. shipping from Barbary Coast pirates. Jefferson and Adams asked the ambassador from Tripoli why his government was

⁶⁹ Cook, *Understanding Jihad*, p. 10. In fact, classical Muslim exegetes held that verse 9:5 “abrogates every other verse in the Qur’an which commands anything less than a total offensive against the non-believers.[note omitted].” David S. Powers, “The Exegetical Genre nasikh al-Qur’an wa mansukhuhu,” in Andrew Rippin ed., *Approaches to the History of the Interpretation of the Qur’an* (Oxford: Clarendon Press, 1988), 130. See also Uri Rubin, “Bara’a: A Study of some Quranic passages,” *Jerusalem Studies in Arabic and Islam* 5 (1984), 13-32, and Uri Rubin, “The Great Pilgrimage of Muhammad: Some Notes on Sura IX,” *Journal of Semitic Studies* 27 (1982), 241-60.

⁷⁰ Friedmann, *Tolerance and Coercion in Islam*, 26.

⁷¹ Ahmad ibn Naqib al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, 607 (o11.2).

⁷² Bassam Tibi, “War and Peace in Islam,” 131.



so hostile to the U.S. even though the U.S. had done nothing to provoke the North Africans. The ambassador's reply, as summarized in their report to Congress, was to explain

that it was founded on the Laws of their Prophet, that it was written in their Koran, that all nations who should not have acknowledged their authority were sinners, that it was their right and duty to make war upon them wherever they could be found, and to make slaves of all they could take as prisoners, and that every Musselman who should be slain in Battle was sure to go to Paradise.⁷³

This reasoning is perfectly consistent with the traditional Islamic law of war, yet utterly inconsistent with the Western just war doctrine.⁷⁴

NONCOMBATANT IMMUNITY

The Western Tradition

A central principle of the Western just war doctrine is noncombatant immunity: civilians are not to be intentionally targeted in war, and unintentional harm to civilians is justified only when proportionate and militarily necessary. There is a tight logical link between this principle and the basic idea that a war is just only when it is a proportionate response to an unjust injury. Francisco de Vitoria lays out a four-point case for noncombatant immunity in war:

First, It is never lawful in itself intentionally to kill innocent persons. This is proved, in the first place, by Exod. 23:7, where it says 'the innocent and righteous slay thou not.' Second, the foundation of the just war is the injury inflicted upon one by the enemy...; but an innocent person has done you no harm. Ergo, etc. Third, within the commonwealth it is not permissible to punish the innocent for the crimes of the evil,

⁷³ Joshua E. London, *Victory in Tripoli: How America's War with the Barbary Pirates Established the U.S. Navy and Built a Nation* (Hoboken, NJ: John Wiley & Sons, 2005), 23-4.

⁷⁴ There is no requirement under *shariah* that offensive warfare actually be likely to succeed in overthrowing the infidel state that is being attacked. In fact, Islamic law requires the Islamic ruler to wage offensive *jihad* at least once per year, merely in order to keep the idea of *jihad* alive: See Rudolph Peters, *Jihad in Classical and Modern Islam*, 3, and Ahmad ibn Naqib al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, p. 600 (o9.1). This is yet another major difference between the Western and Islamic traditions regarding the ethics of warfare. Thus, Francisco de Vitoria writes that princes "should strive above all to avoid all provocations and causes of war," for "it is a mark of utter monstrosity to seek out and rejoice in causes which lead to nothing but death and persecution of our fellow men, whom God created, and for whom Christ suffered death." Vitoria, *Political Writings*, 326-7 (*On the Law of War*, Conclusion).



*and therefore it is not permissible to kill innocent members of the enemy population for the injury done by the wicked among them. Fourth, the war would otherwise become just on both sides, since it is clear that the innocent would also have the right to defend themselves.[note omitted][emphasis in original]*⁷⁵

Vitoria does allow that one may cause the deaths of innocents so long as this is a non-intentional effect of a military operation that is truly necessary to winning a just war; however, he reiterates an earlier point that “care must be taken to ensure that the evil effects of the war do not outweigh the possible benefits sought by waging it.”⁷⁶ Here we have the requirement of proportionality, a key component of modern just war theory. This principal applies not only to the whole war but also to each military operation within the war. Vitoria and Suarez do, however, permit actions that would be condemned under the contemporary just war standard of non-combatant immunity, such as plundering and enslaving the enemy and executing captured enemy soldiers.⁷⁷

The Islamic Tradition

The Islamic tradition is superficially similar to but in fact quite different from the Western Christian tradition regarding the treatment of noncombatants in war, as Ella Landau Tasserón demonstrates in her painstaking and path-breaking study, “Non-Combatants’ in Muslim Legal Thought.”⁷⁸ One might think that any discussion of noncombatant immunity would begin with a general definition of “noncombatant” and then consider individuals or groups insofar as they fall under this definition or not. In fact, the Islamic tradition never approaches the matter in this way. Instead, Islamic thinkers begin with lists, based on prophetic tradition or *hadith*, of those who should not be intentionally killed in combat, minimally women and children, usually monks and the elderly as well.⁷⁹ Anyone not on the list may be intentionally killed, even if not involved in combat in any way.⁸⁰ Sometimes the

⁷⁵ Vitoria, *Political Writings*, 314-15 (*On the Law of War*, Q. 3 A. 1).

⁷⁶ Vitoria, *Political Writings*, 315-16 (*On the Law of War*, Q. 3 A. 1).

⁷⁷ Vitoria, *Political Writings*, pp. 317-325 (*On the Law of War*, Q. 3 AA. 2-8).

⁷⁸ Ella Landau Tasserón, “Non-Combatants’ in Muslim Legal Thought,” Hudson Institute, Center on Islam, Democracy, and the Future of the Muslim World: Research Monographs on the Muslim World, Series No. 1, Paper No. 3, December 2006, available at http://www.currenttrends.org/docLib/20061226_NoncombatantsFinal.pdf (accessed on Sept. 12, 2013).

⁷⁹ Landau Tasserón, “Non-Combatants,” 19-20.

⁸⁰ Thus, Averroes writes, “As regards injury to the person, that is, the slaying of the enemy, the Muslims agree that in times of war, all adult, able-bodied, unbelieving males may be slain.” Averroes, “The Legal Doctrine of Jihad,” in Rudolph Peters ed., *Jihad in Classical and Modern Islam*, 33. Those slain need not be involved in combat in any way. Likewise, Ibn Hazm condones the killing of any adult male, “combatant or noncombatant, merchant,



lists were extended on the basis of analogy, but “[t]here is no general concept of a category of ‘non-combatants,’ nor is there one theoretical basis for the rules concerning them.”⁸¹ The most obvious moral principle, “that is, the inculpability of those not involved in combat, is usually absent from the explanations offered by Muslim jurists.”⁸² “It is no accident that Muslim law has no term analogous to that of non-combatants, or civilians, in international law. Rather, it has defined lists of various categories of people, which do not include all the non-combatants.”⁸³ This is why Landau Tasserón always places the term “non-combatants” in quotation marks in her discussion of this topic in Islamic law.

Another problem lies in the terminology used by Islamic legal scholars in discussing the status of enemy women, children, etc. in wartime. In the language developed since the eighth century in classical Islamic jurisprudence, “any given ‘non-combatant,’ although protected to a certain extent, does not in fact have immunity (*isma*) and is not considered to be ‘a soul whom Allah has forbidden to kill’ (*nafs harrama Allah qatlaha*).” Landau Tasserón points out that this concept – *isma* or immunity – “is the key to understanding Muslim attitudes toward ‘the other’ in general, and toward the killing of ‘non-combatants’ in particular.” She explains:

*The prohibition against killing has the validity of law in regard to Muslims and their allies, but it is merely a general and non-binding directive in regard to others. The category of those who have full immunity (isma), meaning that they must not be harmed, includes only Muslims and their allies, the infidels who have a specific legal treaty with Muslims.*⁸⁴

Such a treaty could be either the *dhimma* contract secured by “people of the book” by payment of the *jizya*, or it could be a temporary grant of safe passage (*aman*). The sanctity of the lives of Muslims and of those non-Muslims protected by the *dhimma* or *aman* “is defined as *hurma* and is absolute.” Muslims may inflict harm on such people only in self-defense or as punishment for crime.

On the other hand, the lives of ‘non-combatants’ from among the non-Muslim enemy are forfeit to begin with. If they have immunity at all, it is merely ‘immunity that incurs a sin’ (isma mu’thima). A Muslim who harms them is a sinner, but no punishment is meted out to him, and he owes no compensation. There is general agreement regarding the exemption from punishment for a Muslim who harms ‘non-combatants.’

hireling...elderly man...peasant, bishop, priest, monk, blind man...” Quoted in David Cook, *Understanding Jihad*, 58.

⁸¹ Landau Tasserón, “Non-Combatants,” 20.

⁸² Landau Tasserón, “Non-Combatants,” 20.

⁸³ Landau Tasserón, “Non-Combatants,” 19.

⁸⁴ Landau Tasserón, “Non-Combatants,” 2.



It is usually said that 'there is nothing wrong' (la ba's bihi) with inflicting harm on a non-'combatant;' at most, the person who inflicted the harm must ask Allah's forgiveness and express his remorse (istighfar, tawha).⁸⁵

There is another important terminological difference between killing a person with full immunity and killing an infidel non-combatant, and that is that the strongest degree of legal prohibition in Islam, that conveyed by the root *h-r-m*, applies only to those with full immunity, who are *ma'sum* (protected) or *haram al-dam* (one whose blood is sacred). In contrast, the prohibitions against killing infidel women, children, etc. are all couched in language that conveys a weaker prohibition than that conveyed by *h-r-m*. Landau Tasseron sums up: "It appears, therefore, that 'non-combatants' – the infidels who may not be harmed – cannot be considered to have real immunity that protects them from harm.[note omitted]."⁸⁶

Weak as it is, the "protection" given to infidel non-combatants by Islamic law is weakened even further by a variety of loopholes, restrictions, and qualifications. The great jurist al-Shafi, for example, interpreted the Koran in verse 9:5 as commanding the killing of all infidels. He grudgingly accepted the *hadith* forbidding the killing of women and children as an exception to the rule. However,

Instead of viewing it as a moral imperative, which would mean respecting the lives of infidels, he interpreted the prohibition as a directive based on financial considerations. Women and children, Shafi explains, are property, and property should not be damaged.[note omitted] Thus Shafi was able to resolve the contradiction between the ruling in the tradition forbidding the killing of women and children and the principle in which he believed: that the lives of all infidels are forfeit due to their idolatry.⁸⁷

Shafi insisted in general that non-combatants other than women and children should be killed, e.g. cowards, craftsmen, farmers, the ill, etc., though he did make an exception for slaves, since they were valuable property for Muslim conquerors.⁸⁸ "A restricted list is

⁸⁵ Landau Tasseron, "Non-Combatants," 2. See also Majjid Khadduri trans., *Al-Shafi's Risala*, 221-2, where al-Shafi asserts that in cases of killing non-Muslim children who are not protected by *aman* or *dhimma*, "compensation to the near of kin, retaliation, blood money, and atonement are not obligatory."

⁸⁶ Landau Tasseron, "Non-Combatants," p. 3. See also Joseph Schacht, *An Introduction to Islamic Law*, 131: "A non-Muslim who is not protected by a treaty is called *harbi*, 'in a state of war,' 'enemy alien;' his life and property are completely unprotected by law unless he has been given a temporary safe-conduct (*aman*)..."

⁸⁷ Landau Tasseron, "Non-Combatants," p. 6. See also Majjid Khadduri trans., *Al-Shafi's Risala*, 221.

⁸⁸ Landau Tasseron, "Non-Combatants," 8-9.



typical of Shafi'i jurists, who, insofar as they were able, abided by the general directive in the Qur'an, 'Kill the infidels.'"⁸⁹

The meager protection given to infidel non-combatants was completely taken away from them if they participated in combat. As if eager to justify killing as much of the enemy population as possible, Islamic jurists were ingenious in coming up with ways of extending the definition of "participation in combat." Such actions as espionage, turning Muslims over to the enemy, agitation, or giving counsel to the enemy could count as participation in combat, as could merely holding a position of authority, or merely being suspected of having taken part in battle, or possessing the ability to take part in battle or to cause any kind of damage to the Muslim side – "all of these became factors that made the life of a 'non-combatant' forfeit.[note omitted]."⁹⁰ For example, the Hanafi jurist Ibn Nujaym (16th C. CE) writes, "that which makes a person's life forfeit is combat," but he considers "combat" to include the mere ability to shout, the mere ability to have children, and the mere possession of mental clarity (which enables a person to give counsel).⁹¹ Such reasoning affords some comfort to infertile, quadriplegic, retarded deaf-mutes, perhaps, but to no one else.

There is another major loophole weakening the protection for civilian lives in Islamic law that Landau Tasseron does not mention, and that is the *shariah* principle that "necessity excuses one from any rule whatever."⁹² In cases of necessity, any prohibited act becomes permissible. This rule has played a role in justifying Islamic terrorism, for example, in Ayatollah Khomeini's justification of terrorism⁹³ and also in the justification of Hamas terror attacks against Israeli civilians given by Yusuf al-Qaradawi,⁹⁴ an expert on Islamic law who "is easily one of the most admired and best-known representatives of Sunni Islam today."⁹⁵ In contrast, the Western tradition as it developed under the aegis of the Catholic

⁸⁹ Landau Tasseron, "Non-Combatants," 10. For example, the Shafi jurist al-Misri in *The Reliance of the Traveller* says it is permissible to kill old men and monks; only women and children are on his list of those who should not be intentionally killed: 603 (o9.10).

⁹⁰ Landau Tasseron, "Non-Combatants," 15.

⁹¹ Landau Tasseron, "Non-Combatants," 16.

⁹² Al-Misri, *Reliance of the Traveller*, 37 (c6.2), 765 (r32.1); Bassam Tibi, "War and Peace in Islam," 133; Joseph Schacht, *An Introduction to Islamic Law*, 84, 199-200; Black, *The History of Islamic Political Thought*, 162, 285.

⁹³ Amir Taheri, *The Spirit of Allah: Khomeini and the Islamic Revolution* (Bethesda MD: Adler and Adler, 1985), 116, 195.

⁹⁴ "Al-Qaradawi Speaks in Favor of Suicide Operations at an Islamic Conference in Sweden," Middle East Media Research Institute, Special Dispatch No. 542, July 24, 2003, <http://www.memri.org/report/en/0/0/0/0/0/0/914.htm> (accessed on Sept. 12, 2013).

⁹⁵ Bettina Gräf and Jakob Skovgaard-Petersen, *Global Mufti: The Phenomenon of Yusuf al-Qaradawi* (New York: Columbia University Press, 2009), 1.



Church in the Latin Middle Ages holds that there are many acts that are always wrong no matter what the circumstances, including intentional killing of the innocent.⁹⁶ We saw above that Francisco de Vitoria defends noncombatant immunity in war by invoking this general principle: “It is never lawful in itself intentionally to kill innocent persons.”⁹⁷ Here he merely reiterates what he knows to be an ancient and firmly taught principle of the Roman Catholic Church.

Medieval and early modern just-war theorists in the Christian West, like their Islamic counterparts, were regrettably willing to tolerate treatment of non-combatants that we find abhorrent today, such as the execution or enslavement of POWs, the enslavement of enemy civilians, the plundering of cities, and the like. However, the just war concept had an inner logic that pointed it in the direction of ever-stricter protection for civilians. If war is justified only as a proportionate response to a specific injustice, then there is no moral reason for targeting people who are not clearly and directly involved in perpetrating that injustice. In general, war becomes harder and harder to justify if it adds new injustices to the one it was meant to rectify, and killing innocent bystanders is plainly unjust. The Islamic conception of war is totally different, since it rests on the complete denial of the moral legitimacy of non-Muslim states and the value-systems that underpin them. In the view of al-Shafi – described by Averroes as “the most authoritative opinion” – Islam even denies that infidels in general have any inherent moral right to life, apart from the *dhimma* or *aman*, since for him “the only motive why the enemy should be put to death...is their unbelief.”⁹⁸ The result is very weak restrictions on inflicting violence on civilians in wartime.

CONCLUSION

We have identified deep differences between the Western and Islamic understandings of the ethics of warfare. On each of the three topics we have considered—the sources of moral knowledge, the reasons for going to war, and the moral standing of civilians in war—the two traditions take directly contrary positions. The classical and mainstream Sunni position is to elevate revelation so far above reason as a source of moral knowledge as to deny the moral legitimacy of any non-Islamic government. It asserts the right and duty of

⁹⁶ John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington DC: The Catholic University of America Press, 1991), p. 2 and *passim*. See also St. Thomas Aquinas, *Summa Theologica*, II-II, Q. 64, A. 6: “it is in no way lawful to slay the innocent.”

⁹⁷ Vitoria, *Political Writings*, pp. 314-315 (*On the Law of War*, Q. 3 A. 1). The normally reliable Bassam Tibi suggests that all other traditions are like the Islamic tradition in allowing moral constraints to be set aside in extreme situations, but he is mistaken as regards the Catholic tradition. Tibi, “War and Peace in Islam,” 133.

⁹⁸ Averroes, “The Legal Doctrine of Jihad,” in Peters, *Jihad in Classical and Modern Islam*, 34-5.



the *umma* and its leaders to wage ceaseless war with the aim of overthrowing non-Islamic governments and imposing Islamic rule on any non-Muslims foolish enough to refuse conversion to Islam. It views unbelief as so dangerous, debilitating, and offensive, and victory so important, that it imposes only very weak limits on the use of violence against non-Muslim civilians in wartime. In contrast, the Western tradition affirms both reason and revelation as complementary sources of moral knowledge, which implies that unbelievers, who know natural law by natural human reason, have a right to dominion over their own lands. It teaches that war is just only as a proportionate response to a gravely unjust injury that cannot be rectified peacefully, and it seeks to focus violence in war on the perpetrators of the injustice while protecting innocent civilian bystanders.

At the end of his classic 1955 study, *War and Peace in the Law of Islam*, Majid Khadduri describes the classical Islamic law of *jihad* as “an obsolete weapon,” a relic of the past that cannot be revived in the modern era.⁹⁹ Bassam Tibi correctly describes this assessment as premature.¹⁰⁰ In fact, at the heart the ideology of modern Islamism one finds precisely the revival of the classical Islamic law of war. For example, Hasan al-Banna,¹⁰¹ Abdullah Azzam,¹⁰² Sayid Qutb,¹⁰³ Muhammad al-Salam Faraj,¹⁰⁴ Osama bin Laden,¹⁰⁵ and Yusuf al-Qaradawi¹⁰⁶ all draw on their own arguably sound understanding of the Sunni Islamic tradition as it pertains to war. Consider the following statement by Osama bin Laden:

⁹⁹ Khadduri, *War and Peace in the Law of Islam*, 295.

¹⁰⁰ Tibi, “War and Peace in Islam,” 143n10.

¹⁰¹ Hasan al-Banna, *Five Tracts of Hasan Al-Banna (1906-1949): A Selection from the Majmu at Rasail al-Imam al-Shahid Hasan al-Banna*, Charles Wendell trans. (Berkeley: University of California Press, 1978), “On Jihad,” 133-162.

¹⁰² Sheikh Abdullah Yusuf Azzam, “Join the Caravan,” in Jim Lacey ed., *The Canons of Jihad: Terrorists’ Strategy for Defeating America* (Annapolis, MD: Naval Institute Press, 2008), 123-137.

¹⁰³ Sayyid Qutb, “Jihad in the Cause of God” (excerpted from *Milestones*), in Jim Lacey ed., *The Canons of Jihad*, 19-25.

¹⁰⁴ Muhammad al-Salam Faraj, “The Neglected Obligation,” in Jim Lacey ed., *The Canons of Jihad*, 35-47.

¹⁰⁵ Osama bin Laden, “Moderate Islam is a Prostration to the West,” in Raymond Ibrahim ed. and trans., *The Al Qaeda Reader* (New York: Broadway Books, 2007), 22-62.

¹⁰⁶ For discussion of al-Qaradawi, see Joseph S. Spoerl, “ Hamas: Ideology, Elections, and Governance in Gaza,” in Thomas E. Copeland ed., *Drawing A Line in the Sea: The 2010 Gaza Flotilla Incident and the Israeli-Palestinian Conflict* (Lanham, MD: Lexington Books, 2011), 69-85. An earlier and perhaps more readily located version of this article is Joseph S. Spoerl, “ Hamas, Islam, and Israel,” *Journal of Conflict Studies* 26 (2006), 3-15, <http://journals.hil.unb.ca/index.php/JCS/article/view/2166> (accessed on Sept. 12, 2013).

Al-Qaradawi believes that offensive *jihad* is out of place in the contemporary world since Muslims can infiltrate and ultimately control non-Muslim societies by immigration,



Thus our talks with the infidel West and our conflict with them ultimately revolve around one issue [...]: Does Islam, or does it not, force people by the power of the sword to submit to its authority corporeally if not spiritually? Yes. There are only three choices in Islam: either willing submission [i.e. conversion]; or payment of the jizya, through physical though not spiritual submission to the authority of Islam; or the sword. [...] The matter is summed up for every person alive: Either submit, or live under the suzerainty of Islam, or die.¹⁰⁷

From the standpoint of classical Sunni *shariah*, this is an unimpeachably orthodox summary of Islamic doctrine.¹⁰⁸ Far from “hijacking” or “perverting” the Islamic faith, bin Laden understands the Islamic tradition accurately. Indeed, in the words of Efraim Karsh, bin Laden saw his own life’s work as “the natural extension of Islam’s millenarian struggle for world domination, dating back to the Prophet Muhammad.”¹⁰⁹ Bin Laden regarded

population growth, political organizing, and proselytizing; he predicts that Europe and the US will become Muslim countries in the not-too-distant future. However, he insists on “defensive” *jihad* to expel non-Muslim invaders from Muslim lands, e.g. Israel. See Samuel Helfont, *Yusuf Al-Qaradawi: Islam and Modernity* (Tel Aviv: The Moshe Dayan Center, 2009), 59-104.

¹⁰⁷ Osama bin Laden, “Moderate Islam Is a Prostration to the West,” in Ibrahim ed., *The Al Qaeda Reader*, 42.

¹⁰⁸ Some scholars mistakenly assert that offensive *jihad* can only be waged under a legitimate caliph, and since there has been no such caliph since 1924, the kind of war bin Laden is calling for is no longer licit for Sunni Muslims. (See e.g. David Cook, *Understanding Jihad*, 164.) This is not true, however. James Turner Johnson points out that there have always been two conceptions of rightful authority in the waging of war in the Sunni tradition: first, “by line of succession from the rightful caliphs, according to the concept of legitimacy defined by the jurists,” and secondly, “by demonstrably possessing the Prophet’s *Baraka*, according to the concept of legitimacy defined by the *ghazi* tradition,” as exemplified by the earliest Ottomans. Johnson, *The Holy War Idea in Western and Islamic Traditions*, 154-5. Bin Laden stands in precisely this *ghazi* tradition. (See also “Ghazi” in Gerhard Böwering ed., *The Princeton Encyclopedia of Islamic Political Thought* [Princeton and Oxford: Princeton University Press, 2013]). Moreover, even within the juristic tradition, there is the manifestly orthodox and mainstream teaching of the Asharite-Shafi legal manual, *The Reliance of the Traveller*, according to which it is merely offensive (*makruh*), not forbidden (*haram*), to conduct a military expedition against hostile non-Muslims without the caliph’s permission, and if there is no caliph, then no permission is required; Ahmad ibn Naqib al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, 602 (o9.6).

¹⁰⁹ Efraim Karsh, *Islamic Imperialism: A History* (New Haven and London: Yale University Press, 2006), 227.



himself as a true disciple of the Prophet who said, “I was ordered to fight all men until they say “There is no God but Allah.””¹¹⁰ At the end of his book *Understanding Jihad*, David Cook observes, “after surveying the evidence from classical until contemporary times, one must conclude that today’s jihad movements are as legitimate as any that have ever existed in classical Islam...”¹¹¹

The modern era has not been lacking in Islamic modernists who, unlike bin Laden, have sought to recast the Islamic ethics of war so as to make it resemble more closely the Western idea of the just war. For example, the Indian Muslim Sayyid Ahmad Khan (1817-1898) asserted that war is appropriate only in self-defense.¹¹² The Egyptian Sheikh Al-Azhar Mahmud Shaltut (1893-1963) did much the same.¹¹³ However, these modernists present arguments that will be unconvincing to many traditional Sunni Muslims. Sayyid Ahmed Khan’s test of religious truth was “conformity with the norms of natural reason,” which led him to interpret miracles in a naturalistic manner. He also did not shrink from rejecting the prophetic traditions as well as the *ijma* or consensus of the great Sunni Muslim legal scholars. In the words of Majid Fakhry, he “developed a syncretic brand of Islam which did not differ radically from Christianity” and which was marked by “extravagant” enthusiasm for Western (British) culture.¹¹⁴ Mahmud Shaltut did not go this route but instead re-interpreted Islamic history, beginning with the life of Muhammad, so as to argue that Muslims have never sanctioned or practiced anything but defensive war. The problem is that Shaltut ends up distorting the historical record in a way that any informed student of Islamic history will quickly recognize.¹¹⁵

The Osama bin Ladens of the Muslim world do not find it difficult to criticize the thinking of Muslim modernists like Sayyid Ahmed Khan or Mahmud Shaltut. They do so merely by quoting from the classical legal manuals, Koranic commentaries, and historical narratives of the Sunni Muslim tradition. This fact helps to explain the enduring allure of Islamism for

¹¹⁰ Karsh, *Islamic Imperialism*, p. 1. Karsh’s endnote traces this saying to Waqidi’s *Kitab al-Maghazi* (p. 236n 10). It can also be found in Al-Misri, *Reliance of the Traveller*, p. 599, and *Sahih Bukhari*, Vol. 4, Book 52, No. 196, http://www.sahih-bukhari.com/Pages/Bukhari_4_52.php (accessed on Sept. 12, 2013).

¹¹¹ Cook, *Understanding Jihad*, 164. Cook does assert that there is one exception to this, namely, the fact that they disregard the necessity of established authority (e.g. a caliph or imam as the one who can declare jihad). On this point I disagree with Cook – see note 108, above.

¹¹² Peters, *Jihad in Classical and Modern Islam*, p. 6, and Cook, *Understanding Jihad*, 81.

¹¹³ See Peters, *Jihad in Classical and Modern Islam*, 59-101, for Shaltut’s treatise “The Koran and Fighting.”

¹¹⁴ Fakhry, *A History of Islamic Philosophy*, 360-1.

¹¹⁵ See Spoerl, “Islam and War: Tradition versus Modernity,” for a detailed discussion of the problems with Shaltut’s recasting of early Islamic history.



many Muslims, who are drawn to it precisely because they wish to lead authentically Islamic lives. It also explains why the Islamist threat to non-Muslims and liberal Muslims is so grave and why it will not disappear anytime soon.

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