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(Allah is the light of the heavens and the earth – Al-Qur'an, XXIV:35)



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THE PROTECTION OF CIVILIANS IN WAR NON-COMBATANT IMMUNITY IN ISLAMIC LAW

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Introduction

War in Islam is allowed only to defend the faith and the faithful from any external attack. In other words, the sole objective of war is the protection of faith and preserving lives of the faithful. Just as the objective is noble so should be the means to achieve it. Islam has introduced and prescribed the most humane rules for the conduct of an inevitable incident such as war. The issues that are discussed in this work cover the various rules governing the conduct of war also known as the Islamic *jus in bello*, especially the immunity given to the non-combatants, i.e., women, children, servants, wounded, sick, elderly, peasants, priests, etc and the protection available to civilian objects, i.e., things on which civilians depend. Under the Islamic law all the non-combatants who are given immunity are called 'protected persons.' This work explains in detail the immunity provided to non-combatants;¹ whether their immunity is absolute or there exist some exceptions? What immunity is granted to the civilian objects? Certain authors as well as organizations have attempted to present a picture of the Islamic *jus in bello* as if Islam had no such rules at all. This work attempts to answer the questions raised by the Western scholars as well as the global non-state Islamic actors about the non-combatant immunity in Islam. This work does not discuss rules governing the causes of war in Islam or the Islamic *jus ad bellum*. Other questions that are

related to this discussion are explained along the way. Efforts have been made to mention the rules of Islamic *jus in bello* from their original sources, i.e., the Qur'ān, the *Sunnah*, *Ijmā'* (where available), and analogy. The conduct of the holy Prophet (ﷺ) and his successors (their *siyar*) before, during and after the war is given special attention. Moreover, care has been taken to quote the opinions of *Imāms* (founding jurists of schools of thoughts) from their original and primary treatises where available. However, when original sources are not found then, secondary sources are consulted. This research reveals that less care has been exercised in transmitting the opinions of leading *Imāms* by the *fuqhā'* (jurists) of other schools of thought. In cases of conflict, in such situations, we have relied on the original work of the concerned particular school of thought. Below an attempt has been made to explain the questions posed in the introduction.

Non-combatant Immunity in the Qur'ān

The Islamic law makes a distinction between the combatants (those who do indulge in fighting) and non-combatants (those who do not fight) and allows fighting with the former and protection to the latter. For the proofs of the protection of non-combatants we shall first look into the Qur'ān, to be followed by the *Sunnah* of the Prophet (ﷺ) and the conduct of his successors. The Holy Qur'ān says: Fight in the cause of Allah those who fight you but do not transgress limits; for Allah loveth not transgressors.² Since this verse is the most significant in the discussion about the conduct of war therefore it needs a detailed discussion. The Muslim scholars differ in their interpretation of the above verse.

1. According to al-Rabī' b. Kesam al-Kūfī (d. 64/684) this verse (II:190) is superseded by IX:5 and IX:36, that is, "But when the forbidden months are past then fight and slay the pagans wherever ye find them and seize them, beleaguer them and lie in wait for them in every stratagem (of war); but if they repent and establish regular prayers and practise regular charity then open the way for them: for Allah is Oft-Forgiving Most Merciful."³ "... and fight the pagans all together as they fight you all together."⁴

2. According to the second interpretation, the above verse is not superseded and that the Muslims should not attack first as this would be *i'tidā'* (transgression) mentioned in the verse. They consider verse IX:1, 5 and IX:36 to be for those infidels who broke their covenants with the Muslims and waged war against them. This is the opinion of the most reliable commentators among the *Ṣaḥābah* (Companions of the Prophet [ﷺ]) such as 'Abd Allah b. 'Abbās (d.68/687) and *tābi'ūn* (followers of the *Ṣaḥābah*) such as 'Umar b. 'Abd al-'Azīz (d. 101/719) and Mujāhid b. Jabr Mawlā (d. 103/721). They opined that 'those who wage war against you' in the verse means those who participate in the war against you. That is, do not fight women, children and elderly.⁵ They argue that the verse prohibits the Muslims from attacking those who are not capable of fighting and defending themselves such as children, women, elderly, monks, and the like. Because the verbal noun of the Arabic word *qatalā* (fighting) on the pattern of *fa'alā* the verbal noun of which is *mufa'alā* can only happen if there are two or more people to fight. Whereas women, children, monks, elderly, peasants, servants etc cannot fight, therefore, they are exempted and cannot be fought with. Moreover, they argue that this point is supported by many *aḥādīth* that prohibit their killing.

3. According to another interpretation the verses of chapter nine (*al-Tawbah* – Repentance) are absolute whereas those of chapter two (The Cow) are conditional because the later mentioned the cause (*'illah*) of war whereas the former did not mention it. They argue that the prohibition of *i'tidā'* means that the Muslims should not fight those who do not fight them. This is the opinion of Abū Muḥammad Sa'īd b. Jubayr (d. 95/713) and Abī al-'Āliya Rāfi' b. Mehrān (d. 93/711).

4. According to Muqātil b. Sulaymān (d. 149/767), it means that the Muslims should not attack first. Many of the interpreters of the Holy Qur'ān from Arabic into English have given the Arabic word *i'tidā'* the meaning of aggression.⁶ According to Muhammad Abdel Haleem the "Arabic command *lā ta'tadū* is so general that commentators have agreed that it includes prohibition of starting hostilities, fighting non-combatants, disproportionate response to aggression, etc."⁷

5. According to al-Ḥassan al-Baṣrī (d. 346/957) the verse prohibits mutilation, exceeding the limits besides prohibiting the killing of women, children, elderly, monks and the like.

6. Ibn ‘Abbās reports that the meaning of the verse ‘and don’t transgress’ is that ‘don’t kill women and children and elderly.’ This is the best opinion as this verse (II:190) can never be superseded because it not only mentions the cause(s) of war (*jus ad bellum*) but also the conduct of war in Islam (*jus in bello*). Those who hold the opinion that it is superseded have not given proper thought to the Qur’ānic scheme of *jihād* as well as its abrogation. Is it possible that the first part of the verse (the *jus ad bellum* is superseded) as is the opinion of Muftī Taqī Usmānī and his father Muftī Muḥammad Shafī’, while the second part (the *jus in bello*) is not superseded?⁸ Moreover, this is the only verse which mentions the kind of *jihād* on which there is consensus (*ijmā’*), that is, *jihād* in self-defence and in the defence of faith. It should be remembered that anything on which there is *ijmā’* (consensus) among the *mujtahidīn* cannot be superseded.⁹ I have explained elsewhere that the theory of the development of Qur’ānic concept of *jihād* in four stages is not sustainable¹⁰ because it would mean that more than 100 verses of the Holy Qur’ān are superseded; that the permanent relationship between the Muslims and the non-Muslims are hostile; that permanent peace treaties cannot be signed between the Muslims and the non-Muslims; and the wars of the Prophet (ﷺ) were offensive (which is historically not true).¹¹

7. According to Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804) the women, children, elderly and the like cannot be killed in war because of the above verse (II:190) and because the Muslim army has to fight only the combatants.¹²

In a nutshell the verse (II:190) has two meanings: firstly, that fighting is confined to those who fight the Muslims and attack them first and that the Muslims should not initiate hostilities and secondly, only those who fight with Muslims should be targeted whereas those who do not participate in war, that is, the women, children, monks, elderly, maimed, sick and the like should not be fought with.¹³ They lose their immunity if they participate in hostilities. This is explained in detail below. In other words, this is what is described as the principle of distinction (to use the IHL parlance).

Non-Combatant Immunity in the *Sunnah*¹⁴

There are many *Traditions* of the Prophet (ﷺ) regarding the prohibition of the killing of women and children. In one *Tradition* the Prophet (ﷺ) is reported to have said, "Don't kill women and children."¹⁵ Ibn 'Abbās reports that the Prophet (ﷺ) prohibited the killing of women and children.¹⁶ 'Abdullah b. 'Umar (d. 73/692) reports that in one of the battles of the Prophet (ﷺ) he saw the body of a slain woman on which he prohibited the killing of women and children.¹⁷ This *hadīth* is also reported by Abū 'Ubayd al-Qāsim b. Salām (d. 226/837) in his *Kitāb al-Amwāl (The Book of Revenue)*.¹⁸ There is an addition in some reports that she certainly could not have been fighting.¹⁹ In another report about the same incident it is mentioned that when he saw the slain woman he asked as to who killed her and was told that Khālīd b. Walīd (who was commanding one part of the army) was responsible for this. On hearing this he dispatched a *Companion* to tell Khālīd b. al-Walīd never, never to kill a woman and a servant.²⁰

This *hadīth* is very important for it mentions the prohibition of killing of servants. The Arabic word '*asīf*' (pl. '*usafā*') means servant.²¹ By analogy all those employees, such as those working in factories, doctors taking care of the wounded and sick soldiers, as well as those in a similar position cannot be killed because they come under the meaning of '*usafā*' (servants).²²

In another *hadīth*, the Prophet (ﷺ) is reported to have said, "Fight and do not exceed the limits and be not unfaithful and do not mutilate bodies and do not kill children."²³ In addition, the Prophet (ﷺ) instructed the Muslim troops despatched against the advancing Byzantine army and said:

In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit-trees and touch not the palm.²⁴

Similarly religious persons are not to be killed as reported by

Ibn ‘Abbās that whenever the Prophet (ﷺ) dispatched his army he instructed them not to kill religious people.²⁵ Imām Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī (d. 490/1097) – the leading Ḥanafī scholar, while mentioning that priests can be killed in the battlefield, says, “[A]nd killing is to repel fighting.”²⁶ Shaybanī argues that those priests and visitors in mountains who do not mix up with people are not killed.²⁷ Moreover, the killing of elderly is prohibited according to the majority of the Muslim jurists (if they do not advise the enemy regarding war)²⁸ because as reported by Anas, the Prophet (ﷺ) has said to his dispatching army, “Go in the name of Allah, adhering to the community to the messenger of Allah, do not kill any old and weak person or any children or any women.”²⁹ Moreover, it is also mentioned by Shaybanī in his treatise that whenever the Prophet (ﷺ) dispatched his army he instructed them and said, *inter alia*, “... Do not break your pledge, and do not mutilate (bodies) and do not kill the children and women and elderly.”³⁰ In another report the Prophet (ﷺ) has said: “Go in the name of Allah; fight in the path of Allah (with) those who disbelieve; do not commit perfidy and do not break your pledge;* and do not mutilate (bodies); and do not kill the women and children and priests.”³¹

The crux of the matter seems to be that those persons who cannot fight because of their disability, such as the blind, have immunity from killing. Such persons are treated just like children and women.

The instructions given by Abū Bakr ‘Abd Allah b. Abi Quḥāfah (d. 13/634) – the first *Khalīfah* (successor) of the Prophet (ﷺ), are very important in this regard and should be quoted in full. When he was sending his army to Syria headed by Yazīd b. Abū Sufyān (d. 18/693), he told them the following:

I enjoin upon you ten instructions. Remember them: do not embezzle. Do not cheat. Do not breach trust. Do not mutilate the dead, nor to slay the elderly, women, and children. Do not inundate a date-palm nor burn it. Do not cut down a fruit tree, nor to kill cattle unless they were needed for food. Don’t destroy any building. May be, you will pass by people who have secluded themselves in convents; leave them and do not interfere in what they do.³²

*Pledge means pledge of peace givent to any of the opponents or combatants.

These instructions were never specific to that particular army and that particular occasion because similar instructions were given by the Prophet (ﷺ) on many occasions before. Moreover, similar instructions were given by ‘Umar b. al-Khaṭṭāb (d. 24/644),³³ ‘Uthmān b. ‘Affān (d. 36/656) and ‘Alī b. Abī Ṭālib (d. 40/661).³⁴ In addition, the farmers and businessmen are not to be killed.³⁵ ‘Umar b. al-Khaṭṭāb is reported to have said regarding farmers, “[B]e scared of Allah regarding the farmers. Do not kill them till they fight you.”³⁶ Abū Bakr al-Bayhaqī (d.458/1065) mentions on the authority of Jābir b. ‘Abd Allah al-Anṣārī (d. 114/732) who said that the *Companions* of the Apostle (ﷺ) did not kill infidel businessmen. These instructions must prevail over the opinions of jurists and their interpretations.³⁷

Shaybānī lays down the rule of distinction regarding the non-combatant immunity in his *Kitāb al-Siyar al-Kabīr* and says, “only the combatants from among them [the enemy] are killed not those who do not fight.”³⁸ Before giving the principle of distinction he explains in detail the cause of war and who should be killed in war and who are protected. He says,

It is not allowed to kill the women of *ahl al-ḥarb* (those with whom the war is going on), the children, the mentally retarded, nor the aged because Allah says (in the Holy Qur’ān) ‘and fight in the path of Allah those who fight with you’ and these cannot fight and when the Prophet (ﷺ) saw the slain woman, he pointed to this by his words, ‘she was not capable of fighting; go and tell Khālīd ‘never, never to kill (any) woman and servant.’³⁹

He further argues that, “infidelity [*per se*] even if it is the biggest of all sins; it is between the individual and his Lord, the Exalted, and the punishment of this sin [that is, infidelity] is delayed to the day of reward [*Qiyāmah*].”⁴⁰ He, therefore, asserts that if anyone of those who are protected persons fight in a war, then they can be killed.⁴¹

Abū Yūsuf Ya‘qūb b. Ibrāhīm (d.183/798) mentions that all the above protected persons, especially the women, the children, the aged, and the priests shall not be killed.⁴²

Abū Bakr b. Mas‘ūd al-Kāsānī (d. 587/1191) argues, “Anyone who is not a combatant, his killing is prohibited, unless he actually takes part in hostility, or advises about war or encourages others or does something

similar.”⁴³ Thus, the cause of the killing of combatants is their participation in war, therefore, those who do not fight they are not killed. The *ratio legis* of killing in war can be extended to all those civilians who do not fight so that they should not be killed. Thus, those of the enemy, who were not actual combatants – children, women, monks, hermits, the aged and the infirm, the maimed, and the like, had nothing to fear from the Muslim soldiery.⁴⁴

Bosworth Smith while commenting on the instructions of Abū Bakr states that these humane precepts served like a code of laws of war during the career of the Mohammadan conquest.⁴⁵ According to George Finlay the moral tone adopted by the Caliph Abū Bakr, in his instructions, to the Syrian army, was so unlike the principles of the Roman government [of that time], that it must have commanded profound attention from a subject people ... such a proclamation announced to the Jews and Christians’ sentiments of justice and principles of tolerance which neither Roman Emperors nor orthodox bishops had ever adopted as the rules of their conduct.⁴⁶

Opinions of Classical Muslims Jurists

The opinions of some classical jurists are mentioned above but there are others classical scholars whose views are germane to this discussion. According to the majority of the classical Sunni Muslim jurists, as well as the Imāmiyyah and Zaydiyyah, only combatants can be killed. This view is supported by Abū Ḥanīfah al-Nu‘mān b. Thābit (d. 150/767), Mālik b. Anas (d. 179/795), and Aḥmad b. Ḥanbal (d. 241/855). Imām Muḥammad b. Idrīs al-Shāfi‘ī (d. 204/820) has also supported this view in one of his opinions.⁴⁷ According to Imām Mālik and Imām Abū ‘Abd al-Raḥmān al-Awzā‘ī (d. 157/774), the women and children shall not be killed under any circumstances so much so that if they are used by the enemy as shield they shall never be hit with arrows and shall not be burnt.⁴⁸ According to the Zāhīrī (literal) school, Ḥasan b. al-Mundhir (d. 309/921) and Shāfi‘ī (in one of his two opinions), all the non-combatants except women and children can be killed. Abū Muḥammad ‘Alī b. Aḥmad b. Ḥazm (d. 456/1064) argues that all the combatants and non-combatants other than women and children can be killed because of the Qur’ānic verse, “... fight and slay the pagans wherever ye find

them..”⁴⁹ For Ibn Ḥazm all the *aḥādīth* regarding non-combatant immunity except women and children are not authentic.⁵⁰ Moreover, he rejects (*qiyas*) analogy whereas *jamhore* (the majority of scholars), do accept it as a method of interpretation. Today since all states have organized armies, therefore, all civilians male and female are presumed not to take part in actual combat.

A question may be asked as to why civilians or non-combatants are not mentioned specifically by either the Prophet (ﷺ) or his successors. The reason is probably that at the time of the Prophet (ﷺ), battles were fought among tribes or groups within limited areas. War at that time, being an exercise in group solidarity, all able-bodied men (from both sides) used to participate in it. Later on large states were involved in war. All the Muslim men were not fighting with the enemy. The newly conquered land was left to its owners and a land-tax, the *kharāj*, was levied on the land. The Prophet (ﷺ) imposed *jizyah* and *kharāj* on the persons and land of the tribe of Hawāzin respectively. The *kharāj* was spent on the welfare of the army.⁵¹ ‘Umar b. al-Khaṭṭāb did the same thing in Iraq. Since the cause of the killing of combatants is their participation in war, therefore, those who do not fight they are not killed. Thus, in the very beginning of Islamic history every adult Muslim male had to participate in war except those who were specifically exempted from killing (because of their non-participation in war) but latter on only the organized army had to do this job and not every adult Muslim.

Is Non-Combatant Immunity Absolute?

The question is whether the non-combatant, immunity is absolute or are there some exceptions. The answer is that it is not absolute and there are three exceptions in which they may lose their immunity: First, if they participate in hostilities; secondly, if they are killed unintentionally; and finally, if they are used as a shield by the enemy.

Participation in War

In the first situation, as is already mentioned, the cause of their immunity is their non-participation in any hostile activity. The Prophet (ﷺ) while condemning the killing of a woman in the battle of Ḥunayn is reported to have said that she was not capable of fighting. It means that

had she participated in hostile activity then her killing would have been justified.⁵² According to Imām Nawawī, “Muslim jurists are unanimous about the prohibition of killing of women and children when they do not fight. But if they fight, then according to the overwhelming majority of jurists, they may be killed.”⁵³ On another occasion the Prophet (ﷺ) did not condemn the killing of a woman from Banū Qurayzah who had attacked Khallād b. Suwayd (d. 5/627).⁵⁴ Similarly Zubayr b. Bata (d. 5/627) was killed although he was blind because he came to fight the Muslims in the battle of Aḥzāb (Trench 5 H.).⁵⁵ In addition one of the detachments sent by the Prophet (ﷺ) in Ḥunayn was headed by Abū ‘Āmir al-Ash‘arī (d.8/629) which killed Darīd b. al-Thamma (d. 8/630)⁵⁶ who was famous for bravery and fighting and was also an excellent poet. He fought more than one hundred wars in his life and was never defeated but was killed in the battle of Ḥunayn.⁵⁷ Although he was very old yet he was planning war strategy for them.⁵⁸ Thus, if the cause is found they could be killed because “what becomes lawful for a reason becomes unlawful when that reason disappears.”⁵⁹

What about the *ḥadīth* which says, “Kill elderly polytheists and leave out their children.” However, this *ḥadīth* is not authentic and secondly, the Arabic word *shaykh* means a person who is capable of fighting.⁶⁰

Unintentional Killing of Civilians

In the second situation in which the non-combatants could be killed or harmed is where such killing is unintentional. In Islam the loss of civilian life must be avoided as far as possible while attacking the combatants and other military objects. However, if attacks on the military objects become impossible without the loss of civilian life then the principle of proportionality will apply and the civilians might be killed without intention. This is inferred from the saying of the Prophet (ﷺ) who, while referring to attacks at night resulting in collateral damage to women and especially children thereto stated that, “they are from them.” This *ḥadīth* is narrated by al-Sa‘ab b. Jasama and is reported by *Saḥīḥ Bukhārī*,⁶¹ Abū Dāwūd,⁶² Ibn Ḥajar,⁶³ and Shaukānī.⁶⁴ However, the *ḥadīth* is a debatable one. John Kelsay believes that the *ḥadīth* allows the intentional killing of women and children in war.⁶⁵ However, this *ḥadīth* does not allow their killing intentionally as is very clear from the very words of the questioner

that, “killing (of women and children) occurs without intention” It is true that they (women and children) are infidels but their killing, if happens during attacks at night and where they could not be differentiated from the combatants, can never be considered intentional. The Prophet (ﷺ) is reported by Aswad b. Sarī‘ (d. 42/662) to have said, “Don’t kill children in war”, the *Companion* asked, “O Apostle of God (ﷺ), but they are the children of pagans.” He replied, “Aren’t the pious of you the children of pagans.”⁶⁶ Imām Aḥmad b. Ḥanbal (d. 241/855) points out that “the enemy can be attacked at night ... (but) if someone objects to it by saying that the Apostle of God (ﷺ) has prohibited the killing of women and children, our reply is that it is about to kill them intentionally ... (that is, he has prohibited their intentional killing). But if their killing is intended then the answer is no!” That is, the answer is no.⁶⁷ Ibn Ḥajr explains the words, ‘they are from them’, that is, in such a situation the combatants and non-combatants are similar It simply means that if it is impossible to get to their fathers without harming their children then they could be harmed or killed to get at their fathers.⁶⁸ Abū Dāwūd mentions on the authority of Muḥammad b. Shihāb al-Zuhrī (d. 124/741) that at the end of this *ḥadīth* thereafter the Prophet (ﷺ) prohibited the killing of women and children. Ibn Ḥajr states that this view (of total prohibition) is supported by the emphasis of the Prophet (ﷺ) in the battle of Ḥunayn in the 8th A.H. He argues that the *ḥadīth* ‘they are from them’, is superseded. This was the reason why Awzā‘ī held the view that the *aḥādīth* about the general prohibition on the killing of women and children have superseded the *ḥadīth* about attacks at night.⁶⁹ This *ḥadīth* (they are from them) is in harmony with attacks at night and the principle of distinction as well as the general principles of Islamic law such as ‘necessity renders the prohibited legal’⁷⁰ and ‘committing the lesser evil.’

Protocol I of 1977 Additional to the Geneva Convention of 12 August 1949 mentions that “states shall take all feasible precautions ... with a view to avoiding loss of civilian objects.”⁷¹ Moreover, nations shall refrain from any attack that may be expected to cause incidental loss of civilian life ... that would be excessive in relation to the concrete and direct military advantage anticipated.⁷² This is an application of the doctrine of necessity on the one hand and proportionality on the other. Both of them are in accord with the Islamic law.

Professor Kelsay argues that infidel children “are the legitimate

targets of other types of force, e.g. enslavement.” This is not correct. The only time women and children were enslaved was the incident of Banū Qurayzah. However, it must be remembered that their punishment was the result of arbitration between them and the Prophet (ﷺ) and that they had chosen Sa‘d b. Mu‘ādh as arbitrator themselves who had punished them according to the Jewish law.⁷³ A single incident which was an arbitration award cannot be made a general rule as I have noted elsewhere.⁷⁴ According to Abū ‘Ubayd, Arab women and children were never enslaved in the time of the Prophet (ﷺ) as his practice regarding the women and children of Hawāzin shows. ‘Umar (R.A.), the second Caliph, followed this tradition and returned the women and children of idolaters free to their relatives and uttered his famous saying, “An Arab shall not be enslaved.”⁷⁵

Kelsay quotes a solitary opinion of Imām Shāfi‘ī in which he opines that polytheist women should be distinguished from the Jewish and Christians and that the former should be killed if they refuse to accept Islam. On the one hand Kelsay attributes it to Imām Shāfi‘ī while on the other hand he refers in his footnote to Ibn Rushd’s (d. 1198/ 1783) book *Bidāyah al-Mujtahid* without mentioning the page number. His reference is to the translation of the chapter on *jihād* by Rudolph Peter who renamed it as *Jihād in Medieval and Modern Islam*, published in Leiden, in 1977. However, Ibn Rushd’s book does not contain what is attributed to him and to Imām al-Shāfi‘ī. Kelsay goes one step further and says, “Muslim jurists writing about the immunity of women and children have in mind the situation of captivity; in battle, they assume⁷⁶ women and children may be killed.” He seems very disingenuous because he must have seen what Ibn Rushd says about this issue who mentions that Muslim jurists are unanimous that women and children should not be killed as long as they do not fight.⁷⁷ The above opinion of Imām Shāfi‘ī is mentioned only by al-Māwardī (d. 450/1058)⁷⁸ but this is not the true position of al-Shāfi‘ī because he himself mentions in his book *al-Umm* that women and children are immune but if they somehow get killed then their killers are not liable to blood money.⁷⁹ Even if his opinion is true it can still be unacceptable because of the general prohibition on their killing imposed by the Prophet (ﷺ).

According to Tasseron the prohibition against harming the non-combatants in the classical legal works “[I]s usually based on the personal

judgment of the jurist, or on a few sayings (*ahādīth*) going back to the Prophet (ﷺ) and the first two caliphs, Abū Bakr and ‘Umar (R.A.). Only rarely is an attempt made to justify these sayings rationally⁸⁰ He further argues that any non-combatant, “although protected to a certain extent, does not in fact have immunity (*‘iṣmah*) and is not considered to be a ‘soul whom Allah has forbidden to kill.’⁸¹ He concludes that the terminology used by Muslim jurists for protecting the non-combatants such as “those who are not allowed to kill,” “one who should not be aimed at,” “one whose blood is not to be split,” and “one who should not be killed”, convey a “weaker prohibition than that expressed by the root *h-r-m*.” “It appears,” argues Taasseron, “therefore, that ‘non-combatants’ – the infidels who may not be harmed – cannot be considered to have real immunity that protects them from harm.”⁸²

Tasseron’s arguments cannot be accepted for various reasons. First, any student of the Islamic law knows that if the words of a Prophetic saying are clear and unambiguous, then neither any interpretation nor justification is needed by any jurist. Believers consider any saying of the Prophet (ﷺ), which is revelation from God, to be justified even if it apparently seems to be otherwise. Secondly, the personal judgments of jurists regarding the non-combatant immunity are rare. In general, as explained above, the jurists have extended the cause of killing – fighting – to all those individuals who are not capable of fighting. Thirdly, the classical jurists usually cite precedents from the time of the Prophet (ﷺ) and his four Caliphs because that was the golden period of Islam. Fourthly, he seems very disingenuous because he himself quotes in his footnote four books in which the Muslim jurists have mentioned the word *yuharram* to denote the prohibition against killing of the non-combatants.⁸³ In addition, the Prophet (ﷺ) has prohibited the killing of women and servants in the strongest possible words, *la taqtullanna dhuriyyatan wa la ‘asīfan*.

Let us discuss another situation regarding the indirect and unintentional killing of civilians. In this situation combatants are besieged along with civilians and water and food supplies are cut off to force them to surrender or die. The *Sharī‘ah* allows that combatants may be besieged and their supplies cut off if there is no other way to force them to surrender. In such a situation the commander has to apply the principle of proportionality discussed earlier.⁸⁴ This situation is similar to the one in which civilians could be harmed as collateral damage but their killing

is not intended. However, it is not allowed to besiege the civilian population *per se*. Article 55 of Protocol I says the same.

Another way of unintentional and indirect harm to the civilians is killing the enemy combatants (who have some civilians among them) by fire. Although the jurists are split on the issue: only the Ḥanafī school of thought allows this.⁸⁵

Using Civilians as Human Shield

Another situation of unintentional and indirect harm to the civilians is the situation where the women and children are used as a human shield by the enemy to avoid attacks on their military objects or themselves. Are the Muslim soldiers allowed to attack the enemy in such a situation? Shaybānī has put this question to Imām Abū Ḥanīfah with the addition that if the children be those of Muslims could the enemy be attacked with arrows and catapults? He reports that Abū Ḥanīfah said, “Yes, however, the enemy shall be aimed at and not the children.”⁸⁶ According to Muslim jurists enemy could be attacked even if Muslim women, children or other detainees are used as human shields, then if attack was the only solution to overpower the enemy.⁸⁷ However, according to Imām Mālik and Awzā‘ī attack on the enemy in such a situation is illegal because according to them the immunity of women and children is absolute.⁸⁸

An interesting question is whether the civilians can be killed in retaliation. The answer is no because the Qur’ān says, “If then anyone transgresses the prohibition against you transgress ye likewise against him.”⁸⁹ Thus the killing of enemy’s women and children would be killing the innocent whose killing is prohibited. According to Muḥammad b. Aḥmad al-Qurṭubī (d. 671/1272) – the great commentator of the Holy Qur’ān, if someone has wronged you then your wrong to him should not extend (it) to his parents, sons or relatives.⁹⁰ This is why retribution is allowed from the accused only. Moreover, Allah has prohibited their killing in (II:190) and there are many *aḥādīth* to this effect. In addition there is strict prohibition on their killing intentionally whereas killing them in reprisal would be intentional, therefore, it is prohibited.

Al-Qā‘idah (Qaeda) – the global radical terrorist organization, justifies the killing of innocent civilians in war, in its communique issued after the horrendous attacks of 9/11, the group laid down its own bizarre rules of

fighting. It allows the killing of enemy civilians in reciprocity and because the civilians vote for the [US] government – regarded by them as a legitimate target.⁹¹ The principle of reciprocity, however, does not allow any prohibited act, such as the killing of civilians. The second rule invented by al-Qā'idah is what we have described and rejected earlier, that is, the rule of absolute destruction.

Some commentators argue that the reason why the non-Muslim women, children and other non-combatants are not killed, is to protect the rights of the Muslims to profit from them, and these rules are not induced by notions of justice. In other words, the rules of Islamic *jus in bello* as expounded by the Muslim *fuqhā* do not focus on abstract notions of fairness and justice in dealing with the non-Muslims. According to James Johnson, "The reason given in the text is not that these [non-combatants] have rights of their own to be spared harm, rights derived either from nature or from considerations of fairness or justice, but rather that they are potentially of value to the Muslims."⁹² This, statement is very unfair.

This statement seems to be based on the attitude of the Ḥanafī scholars towards the non-combatants. However, as we have discussed above, the enslavement of non-combatants has been prohibited by 'Umar b. al-Khaṭṭāb and the later conduct of the Caliphs have been not to enslave any enemy person. Secondly, is there any benefit to Muslims in enslaving the insane, crippled, hermit, elderly, blind and so on? The obvious answer to the question is, no. Moreover, according to the Muslim *fuqhā*' the non-combatants do not have to pay *jizyah*. Khaled Abou El Fadl argues that "[T]his seems to indicate that the prohibition against the killing of certain categories of individuals is a broad and principled imperative."⁹³ Thirdly, although there is benefit for the Muslims to release the POWs free (*amān*), yet this is the option available to the *Imām*. Such POWs, if released, would provide substantial aid to the non-Muslims! Fourthly, the prohibition of treachery, perfidy, mutilation, torture, and all other acts prohibited in war are because of fairness and justice to the enemy in war. Fifthly, Islam prohibits the *Imām* from breaching the treaty without duly informing the other side of the same.⁹⁴ The Qur'ān says, "If thou fearest treachery from any group throw back (their covenant) to them (so as to be) on equal terms: for Allah loveth not the treacherous."⁹⁵ The story of Amīr Mu'āwiyah who was preparing to dispatch his army against the Romans without sending them a notice of termination of the peace treaty but

abandoning the plan on the intervention of ‘Amr b. ‘Anbasah is not only an example of absolute justice to the opponents but rather a redefinition of justice in the sense that enemy’s rights are safeguarded.⁹⁶ Finally, there is confession by Johnson himself who says that certain rules adopted by the classical jurists seem to be pure acts “of moderation outside considerations of benefit.”⁹⁷

Last but not the least issue in this discussion is the status of nuclear weapons and WMDs (weapons of mass destruction). Is their use allowed in the Islamic law? It is reported by the *fuqahā’* as well as historians that it is allowed to target the enemy with mangonels because the Prophet (ﷺ) used mangonel* when he besieged Ṭā’if. However, as I have discussed elsewhere, this report is of doubtful authority.⁹⁸ A relevant issue for our times in this context is the status of nuclear weapons and WMDs from an Islamic law perspective. Given the principles of necessity, proportionality and distinction discussed in this work the use of nuclear weapons and WMDs is totally prohibited in the Islamic *jus in bello* because their use will undermine the principle of distinction in particular. These weapons cannot be used in retaliation either because the Islamic law puts restrictions regarding the use of the principle of reciprocity and does not allow any prohibited act to become lawful even in retaliation. As mentioned above, the killing of enemy’s women and children are not allowed in retaliation either. Thus, what is prohibited *ab initio* remains prohibited and the principles of necessity, proportionality and reciprocity do not render it legal.

To sum up this discussion the Muslim jurists are unanimous that the non-combatants, especially women and children shall not be killed, however, this is not absolute as they could be killed (1) if they participate in war, and (2) unintentionally, if they cannot be distinguished from the combatants but they shall never be aimed at.

The Protection of Civilian Objects in the Islamic Law

The attack or destruction of foodstuffs, agricultural areas, livestock and other objects indispensable for the survival of civilians, is prohibited

* Qastalānī (*Mawāhib li duniyā*, Ur. Karachi, n.d., pp. 556-557) refers to it as the first use of mangonel in Islamic history. Ibn Ishāq (Guillaume, p. 589) does not refer to any mangonel but mentions use of a *dubūr* (a sort of testudo, or cover of shields) for approaching the walls of the fort of Ṭāif by the Muslim warriors – *Ed.*

in Islam. The instructions of Abū Bakr discussed earlier include *inter alia*, “do not inundate palm-trees, do not burn cultivation, do not cut down fruit-trees, do not devastate a building ...”.⁹⁹ These instructions clearly prohibit destruction of civilian objects. They also include prohibition of destroying any building let alone a cultural building. Since the Arabic word ‘*āmīr* (building) is general, that is, common noun, it includes cultural as well as other buildings.⁶ Moreover, this would be considered some kind of *fasād* (mischief) on earth which is strictly prohibited by Allah Who says, “... and do no evil nor mischief on the (face of the) earth”.¹⁰¹ In addition *fasād* is the work of hypocrites. Allah says, “And once he turns back, he runs about in the earth trying to spread disorder therein and to destroy the tillage and the stock; and Allah does not like disorder.”¹⁰²

According to Shaybānī, “Muslims can take away enemy’s cows, goats, and other property, or they may leave it because these (things) do not strengthen the enemy to fight (the Muslims).”¹⁰³ Imām Sarakhsī, while commenting on this text adds that “it is condemnable to leave the weapons or the mules (*al-silah wa al-kira*) if the Muslim army seized them because leaving them behind would mean that the enemy could use them again against the Muslims.”¹⁰⁴ He uses the Arabic word *ukrahu* which means ‘condemnable.’ Both Shaybānī as well as his commentator never mentioned that anything that the Muslims cannot take away must be destroyed. This is what is attributed to Abū Ḥanīfah and his disciples by Imām Shāfi‘ī, and Ibn Jarīr al-Ṭabarī, which is reproduced by Khaddūri and others as is explained below. Imām Shāfi‘ī mentions in his *Kitāb al-Umm* that if the “Muslims took under their control booty comprising of property or goats which they could not take away with them; they should slaughter the goats and burn the property and the meat of goats so that the infidels should not benefit from them.”¹⁰⁵ It may be noted that property in this context (that could be taken away by the Muslims) such as goats (but could not be removed), is of course, moveable property and not immovable, especially fixtures. Imām Abū Ja‘far Muḥammad b. Jarīr al-Ṭabarī (d. 310/923) in his *Ikhtilāf al-Fuqahā*, has gone one step further than Shāfi‘ī by mentioning that according to Abū Ḥanīfah and his colleagues, “everything that the *mujāhidīn* cannot bring under their control must be destroyed, including the houses, churches, trees, flocks and herds.”¹⁰⁶ The words ‘everything’ and the destruction of ‘houses, churches, trees, flocks and herds’ are added to by Ṭabarī.

There is self-contradiction in this quote as well. On the one hand it talks of property that could be brought under control by the *mujāhidīn*, which would obviously mean, moveable property to the exclusion of houses and churches. In other words, what can be moved to the territory of the Muslims cannot include 'houses and churches' because these things are immovable. The above quote is, therefore, self-contradictory apart from being totally contrary to the Ḥanafī doctrine.

To prove that what is attributed to Abū Ḥanīfah and his disciples is not true according to Ibn Jarīr al-Ṭabarī as well, we will give the text of the treaty between 'Umar – the 2nd successor of the Prophet (ﷺ) and the people of Quds (Jerusalem) as quoted by Ṭabarī himself in his *Tārīkh al-Ummam wa al-Mulūk*. The text of the treaty says:

He gave protection to their persons, properties, churches, crosses, to the accused and the acquitted and everyone of them; and that their churches would neither be destroyed nor damaged nor any premises [from their churches] or the cross [be destroyed or damaged] neither would anything be taken from their properties nor would they be coerced [because] off their religion and none of them would be harmed.¹⁰⁷

What Ṭabarī could have done is to mention that whatever opinion from whosoever he is quoting is right or wrong because of what he knew was the position of Islamic *jus in bello*. It seems that Ṭabarī was less careful in transmitting the opinions of *Imāms* of other schools of thought, especially the *Aḥnāf*. However, it is difficult to know whether it was done intentionally or because of mistake. The finding of this investigation is that Ṭabarī should be quoted with caution.* As mentioned above, this is not the position of Abū Yūsuf and Shaybānī – the two top disciples of Abū Ḥanīfah as stated by them in their own books.

Today the Muslim states are under their treaty obligations especially Article 53 of Protocol I of 1977 and it is, therefore, prohibited for them to carry out any act of hostility directed against historic monuments, works of art or places of worships. Thus, the Geneva Conventions of

*A striking example is of the author of the *Hidāyah*, who stated that it is reported that in the Mālikī fiqh *mut'ah* marriage is regarded as legal. On this very basis Akbar's more than four (actually so far discovered 16) marriages were legalized. See 'Abdul Qādir Badaoni, *Muntakhab al-Tawārīkh*, Persian ed., Calcutta, 1815, vol. II, p. 210; see also the *Hidāyah*, Arabic, Karachi, n.d., pp. 312-313 – *Ed.*

1949 and its Additional Protocols of 1977 have strengthened the obligations of the Muslim states to respect historical and cultural objects.

Some jurists consider the incident of cutting or burning some trees of Banū Naḍīr¹⁰⁸ by the Prophet (ﷺ)¹⁰⁹ to be a general rule during warfare. However, this is not true because of the instructions of Abū Bakr, ‘Alī (R.A.) and other successors as quoted above. According to Imām Ṭabarī the prohibition is probably about intentional cutting of trees not the damage done during warfare itself. However, the instructions are asking soldiers to avoid it during the war. Similarly the Prophet (ﷺ) did not cut off any date tree or other tree belonging to his enemies in Khyber* (Khaybar).¹¹⁰

The Muslim jurists argue that both sides to the war could agree to protect special places or objects. Shaybānī has mentioned many such cases in his *Kitāb al-Siyar al-Kabīr*.¹¹¹ Thus, civilians seem to be in the spotlight when we talk of the principles of necessity (necessity renders prohibited things legal)¹¹² and proportionality (committing the lesser evil).¹¹³

The Protection of Wounded, Sick and the Like

We have concluded above that civilians who do not participate in war are immune but what about the wounded, the sick and other enemy disabled soldiers who are not capable to fight any more or who are in peril at sea as shipwrecked! (to borrow the IHL terminology). On conquering Makkah the Prophet (ﷺ) did not harm any person or his/her property. Afterwards he ordered an announcer to announce that, “wounded shall not be killed, *mudbir* (anyone who turns his back and runs away from fighting) shall not be chased, prisoner shall not be killed, and whosoever shuts his door shall be immune.”**¹¹⁴ Killing such people would amount to torture which is strictly prohibited in Islam. There is also a Prophetic saying that, “Verily God will punish those who torture other people in this world.”¹¹⁵ This *ḥadīth* prohibits the torturing of people at all times, that is, war and peace alike regardless of the fact whether the victims are the Muslims or the non-Muslims. Moreover, we may use analogy in the case of wounded, sick and other disabled enemy soldiers.

*Khyber is the Anglicised version – *Ed.*

**The conditions were announced through Abū Sufiyān who had just converted to Islam. As he had become Muslim his house was also declared as a place of *amān* (peace) – *Ed.*

As they become non-combatant which implies that they are not legitimate targets any more owing to their incapacity to take any further part in the war, therefore, they become immune and join the group of people whose killing is prohibited. Moreover, they will be taken as Prisoners of War (POWs),¹¹⁶ and will be the liability of the head of the Muslim state.

Responding to Some Other Critics

Serious researchers of the Islamic *jus in bello* may have noted one thing – the sole authority and authentic source for many publicists is Majīd Khaddūri who is famous for his many publications in the area of Islamic *jus ad bellum* as well as *jus in bello*. His well-known publications include: *The Islamic law of Nations: Shaybani's Siyar*,¹¹⁷ which he thought to be Shaybānī's *Kitāb al-Siyar al-Ṣaghīr* – the very first book of *Siyar* (Islamic International Law). His lengthy introduction to this book informs us of his ideas about many issues of the *jus ad bellum* and *jus in bello*. His second work is *War and Peace in the Law of Islam*.¹¹⁸ This work is concerned with our discussion of the Islamic *jus in bello*. Latter authors who do not know Arabic and cannot refer to the original books in Arabic rely on Majīd Khaddūri. Khaddūri is, therefore, regarded by many authors as an authentic authority and probably a school of thought more important than the four famous Sunnī schools. He is relied upon by researchers to understand the *jus ad bellum* and *jus in bello* of Islam. In other words, instead of quoting Abū Ḥanīfah, Shaybānī, Awzā'ī, Abū Yūsuf, Mālik or Shāfi'ī, they quote Khaddūri. In Khaddūri's scheme of things, humanitarian principles would simply be used as tools for conversion. For example, Islamic humanitarian law protects prisoners of war and non-combatants: that would be for the purpose of converting them to Islam. This is against the Qur'ānic verse of non-compulsion in religion.¹¹⁹ According to him, the mission of *jihād* is the universalization of Islam through violence and the establishment of an imperial world state.¹²⁰ It is indeed interesting to know the sources used by Majīd Khaddūri to draw his conclusions. Below we will give some examples given by Khaddūri regarding non-combatant immunity and acts prohibited in war. He states on page 103 of his *War and Peace*:

Malik in his treatment of the law of war in the Muwatta', prohibited only the slaying of the flock and the destruction of beehives.¹²¹

Abu Hanifa laid down the rule that everything that the jihadists cannot bring under their control must be destroyed, including the houses, churches, trees, flocks and herds. Shafi'i contended that everything which is lifeless must be destroyed, including trees; but animals can be slain only if the jihadists believed they would strengthen their enemies.¹²²

This paragraph from his *War and Peace* is reproduced by James Busuttil in his work,¹²³ who draws his swift conclusions by saying that virtually every adult male non-Muslim in the *dār al-ḥarb* is subject to attack and almost every property there could be destroyed.¹²⁴ However, we are more concerned with Khaddūri rather than those who relied on him. Khaddūri in his above quote regarding Abū Ḥanīfah has relied on Ibn Jarīr al-Ṭabarī's *Ikhtilāf al-Fuqahā'* edited by Joseph Schacht.¹²⁵ On page 105 of the same book Khaddūri goes one a step further than Ṭabarī and says:

Once the unbelievers in the dar al-harb had been invited to adopt Islam and refused to accept one of the alternatives (i.e. Islam or the poll tax), the jihadists were allowed in principle to kill any one of them, combatants or noncombatants, provided they were not killed treacherously and with mutilation.¹²⁶

In his footnote he mentions that the Prophet Muḥammad (ﷺ) was against the practice of treacherous killing and mutilation, but when the Makkans did not respect this rule he ordered his followers to retaliate. His sources for this information are: Abū 'Abd Allah Muḥammad b. 'Umar al-Wāqidī (207/822)¹²⁷ and Ibn Jarīr al-Ṭabarī.¹²⁸ In other words, Khaddūri has formulated his own rule about the conduct of war. This, we may call, 'the rule of absolute destruction'.¹²⁹ This rule, it may be pointed out, is his own innovation, as he could not cite any reference to support his view and not a single reference can be found elsewhere. This rule is against the Qur'ān, the *Sunnah*, *Ijmā'*, *qiyās* and the *siyar* (conduct) of the Prophet (ﷺ) and his successors in their battles with infidels. In other words, he is very disingenuous, unreliable and opinionated.

It is interesting that some scholars give particular attention to Khaddūri's work who has distorted the rules of Islamic *jus in bello*.

Moreover, the sources of his information are not authentic as quoting Wāqidī to describe the Islamic *jus in bello* can never be considered as worthy of historicism and scholarship. Another interesting thing to note is why such scholars in general and Khaddūri in particular rely on the books of Ṭabarī and Wāqidī? For example, Ṭabarī's *Ikhtilāf al-Fuqahā'* is partly published by Fredrik Kirn, who has dedicated it to his teacher Ignaz Goldziher;¹³⁰ whereas chapters on the conduct of war from the original book are edited by Joseph Schacht. Both Goldziher and Schacht are well known for rejecting the *Sunnah* of the Prophet (ﷺ) as a source of the Islamic law.¹³¹ The best known treatises on *Siyar* are by the Ḥanafī jurists like Abū Yūsuf and Shaybānī, most of them are edited and published and Khaddūri could have based his views on Shaybānī's *Kitāb al-Siyar al-Kabīr* but he did not do it. The reason is not very simple. By examining Ṭabarī's books one finds strange things. For example, he cites the opinions of Mālik, Abū Ḥanīfah, Shāfi'ī, Abū Thor Ibrāhīm b. Khālid (d. 240/854) and other *Imāms* but in between he cites Wāqidī – a person unanimously regarded by the Sunnī scholars as *Kadhhab* (liar), who is not considered trustworthy; and is known for his Shī'ī leaning, fabricating *aḥādīth*, and distorting historical facts and so on.¹³² But is it just co-incidence that Ibn Jarīr al-Ṭabarī quotes Wāqidī or is there another reason? The Ḥanbalīs do not consider him trustworthy at all¹³³ but even Muḥammad b. Aḥmad al-Dhahabī (d.749/1348) agrees that Ṭabarī was inclined towards the Shī'ah [doctrine].¹³⁴ 'Allāmah Tamannā 'Imādī has documented Ṭabarī's Shī'ah links in his many articles.¹³⁵

It is plain from the above discussion that many researchers quote Khaddūri, who relies on Ṭabarī and who in turn takes things even from Wāqidī. The approach of scholars who denounce *ḥadīth* of the Prophet (ﷺ) as untrustworthy but who accept every story of the biographers (collectors of *sīrat* – biography) as the very gospel of truth, so long as it is damaging to the Prophet (ﷺ) and Islam does not need any explanation. They seem to follow a rule (if it is right to call it one) that what is unfavourable to the Prophet (ﷺ) must be true. In addition, ignoring Shaybānī's *magnum opus* study of the *Siyar* (*Kitāb al-Siyar al-Kabīr*) in this discussion by Khaddūri is not worthy of a good historian. Persons who are not trustworthy because of their exaggeration of early Muslim history cannot be trusted when they formulate rules of the Islamic *jus in bello*. It was very unfortunate that the Sunnī

scholars ignored the field of history earlier in Islam and most of the Muslim history that was written earlier was the work of scholars of other schools of thought or those who were inclined to others schools of thought, especially Ibn Jarīr al-Ṭabarī, whose work is relied upon by everyone who wanted to write about early Muslim history.

Now what about the attribution to the Ḥanafīs regarding the destruction of everything that the jihādists cannot “bring under their control must be destroyed, including the houses, churches, trees, flocks and herds,” quoted above? We have already explained that according to Imām Shaybānī – the disciple, who wrote the *fiqh* of Abū Ḥanīfah that we have today, maintains that the Muslims have the option of taking away cows, goats and other property or leaving them behind. He never mentioned that these can ever be destroyed. Sarakhsī added that it is not good for the Muslim army to leave behind weapons and horses if they brought them under their control because leaving them behind will strengthen the enemy. As mentioned above, less care is taken by the Imāms and followers of one school of thought while quoting the opinions of another school of thought.

Conclusion

To wind up the foregoing the important conclusions are summarized. The Islamic law makes a distinction between the combatants (those who fight) and non-combatants (those who do not fight) and allows fighting with the former and protection to the latter. The Qur’ānic verse II:190 lays down the principle of distinction because its authoritative interpretation is that ‘those who do not fight cannot be killed’. The immunity of ‘protected persons’, that is, the women, children, servants, peasants, wounded, sick and priests who do not mix up with people, is provided for in many *aḥādīth*. The prohibition of the killing of women, children and servants is very strict. According to Imām Shaybānī all those persons who do not fight shall not be killed. The instructions given by Abū Bakr (R.A.) to his dispatching army were never specific to that army. These were not different from the instructions given by the Prophet (ﷺ) on many occasions before. Moreover, similar instructions were given by other Caliphs as well. These instructions must prevail over the opinions of any jurist and his interpretations. The use of nuclear weapons and

WMDs is prohibited in the Islamic law, whether used for attack or in retaliation

This discussion shows that less care is taken by the *Imām* or followers of one school of thought in transmitting the opinions of another school of thought.* *Imām Ṭabarī* has attributed opinions to the *Ḥanafīs* that they do not subscribe to. Modern Orientalists quote *Khaddūri* who has taken things from *Ṭabarī*, mixes it up with his own ideas, and formulates some distorted version of the Islamic *jus in bello*. *Ṭabarī* in turn relies on some of the opinions of *Wāqidī* who is totally unreliable. This practice has led to the distortion of many norms of the Islamic *jus in bello*.

Notes and References

1. A complete bibliography of the works on the Islamic *jus in bello* is beyond the scope of this work. The most cited works include *Majīd Khaddūri, War and Peace in the Law of Islam*, Baltimore, The John Hopkins Press, 1955, and his "Islam and the Modern Law of Nations", *AJIL* 50 (1956), pp. 353-372. Most scholars, however, rely on secondary sources especially *Khaddūri*. See, for example, James J. Busuttil, "Slay Them Wherever You Find Them: Humanitarian Law in Islam", *Revue de Droit Penal Militaire et de Droit d la Guerre* 30 (1991), pp. 113-126; Karima Bennouna, "As-Salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence", *Mich. J. Int'l L.*, 15 (1993-1994), p. 629. This article is mostly based on the article of Ahmed Zaki Yamani and to some extent on *Khaddūri*. See, Ahmed Zaki Yamani, "Humanitarian Law in Islam: A General Outlook", *Mich. YBI Legal Stud.*, 7 (1985), pp. 189-215. Yamani's article is by far the best article in this field with the only shortcoming that he does not quote any source for his many quotations from the classical books of Islamic law. Karima's article has been relied upon by Engeland. See, Anisseh Van Engeland, "The differences and similarities between international humanitarian law and Islamic humanitarian law: Is there ground for reconciliation?" *Journal of Islamic Law and Culture*, 10:1, (2008), pp. 81-99. John Kelsay in his many works relies on *Khaddūri*. See, John Kelsay, "Islam and the distinction between the combatants and non-combatants", in *Cross, Crescent and Sword*, eds., James Turner and John Kelsay, Westport, Greenwood Press, 1990, pp. 197-220; and his, "Al-Shaybani and the Islamic Law of War", *Journal of Military Ethics*, 2:1 (2003), pp. 63-75. A recent work in Arabic language is *Maqālāt fi al-Qānūn al-Duwali al-Insini wa al-Islam*, ed., Amer al-Zamali, (ICRC: n.p., 2007), 2nd edn. This publication has put together 15 essays previously published in the *Int'l. Rev. of the Red Cross* on the various aspects of Islamic *jus in bello* and in some cases its comparison with international humanitarian law. Most of the essays are based on original sources. Other noteworthy work based on original sources include Gerhard Conrad, "Combatants

and Prisoner of War in Classical Islamic Law: Concepts Formulated by Ḥanafī Jurists of the 12th Century”, *Revue De Droit Penal Militaire et de Droit de la Guerre*, XX:3-4, (1981), pp. 271-307; Khaled Abou El Fadl, “Saving and Taking Life in War: Three Modern Muslim Views”, *The Muslim World*, LXXXIX:2, (1999), pp. 158-180; and Ellah Landau-Tasserou, “Non-Combatants” in *Muslim Legal Thought*, Research Monographs on the Muslim World, Series No. 1, Paper no. 3, December 2006, Washington, Hudson Institute, 2006, pp. 1-25. In this paper the author has attempted to generalize exceptional views of Muslim jurists regarding Islamic *jus in bello*.

2. II:190.
3. IX:5.
4. IX:36.
5. M. Ṭāhir b. ‘A’shur, *Tafsīr al-Taḥrīr wa-Tanwīr*, Tunis, Dar Sahnun, n. d., vol. I, p. 200.
6. For example according to Arthur T. Arberry the translation is aggression. Arthur T. Arberry, *The Koran Interpreted*, Oxford, Clarendon Press, 1982, repr. Oxford World’s Classic, 1998, p. 25. According to Muḥammad Asad it means ‘aggression’. See, Asad, *The Message of the Qur’an*, 41. For Pickthall it means, beginning hostilities. See, Muḥammad M. Pickthall, *The Meaning of the Glorious Qur’an*, Karachi, Begum Aisha Bawani Wakf, n.d., p. 29. According to Irving it means, initiating hostilities. T.B. Irving, *A Translation of the Meaning of the Holy Qur’an*, Lahore, Suhail Academy, 2002, p. 30. For Shākir it means, exceeding the limits. See, M. H. Shākir, *The Koran*, New Delhi, Goodword Books, 1999, repr. 2005, p. 18. According to Abdel Ḥaleem it means overstepping the limits. See, M.A.S. Abdel Ḥaleem, *The Qur’an: A New Translation*, Oxford, Clarendon Press, 2004, repr. Oxford World’s Classics, 2005, p. 21.
7. See Ḥaleem, *The Qur’an*, XXI, f.n.d.
8. Muftī M. Shafī‘, *Ma’āriful Qur’an*, trans. M.H. Askari and M. Shamim, Karachi, Maktaba-e-Darul-Uloom, 2004, vol. I, pp. 483-485.
9. Saifuddin ‘Ali b. Muhammad al-A‘amīdī, *Al-Aḥkām fī Uṣūl al-Aḥkām*, Beirut, Dar al-Kutub al-Ilmiya, 1980, vol. III, p. 226.
10. These four stages are: (1) non-confrontation (al-Qur’ān, XV:94-5); (2) confrontation with good argumentation (al-Qur’ān, XVI:125; XXIX:46); (3) permission to wage war if attacked (al-Qur’ān, XXII:39); and (4) the unconditional command to fight the unbelievers (al-Qur’ān, II:216). For details of these stages see, Muḥammad b. Aḥmad al-Sarakhsī, *Kitāb al-Mabsūt*, Beirut, Dar Ehia al-Tourath al-‘Arabi, 2002, X:5. See also, Abū Bakr Aḥmad al-Razī al-Jaṣṣās, *Aḥkām al-Qur’an*, ed., Sidqī Muhammad Jamil, Beirut, Dar al-Fikr, 2001, vol. I, pp. 352-353.
11. For details see, Muhammad Munir, *Causes of War in Islam: Infidelity or the Defence of Faith*, forthcoming.
12. Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, commentary Muḥammad b. Aḥmad al-Sarakhsī, ed., Muḥammad Ḥasan al-Shāfi‘ī, Beirut, Dar al-Kotob al-‘Ilmiyah, 1997, vol. IV, p. 186.
13. According to Quṭbuddīn al-Rāwandī of the Shī‘ah Imāmiyyah school of thought, the verse is not superseded because it allows the Muslims to fight those who attack them and excludes women. However, he argues that *jihād* being one of the

- fundamentals of Islam can only be fought if a just and fair *Imām* exists. Quṭbuddīn al-Rāwandī, *Fiqh al-Qur'ān*, ed., Al-Syed Alam al-Husaini, Qum, Maktaba Ayatullah, 1405, 2nd edn., vol. I, p. 330. To him the verse prohibits the killing of women, children, and those given *amān* (pledge of peace). Rāwandī, *Fiqh*, vol. I, pp. 330-331.
14. It is defined as "what was transmitted from the Messenger of Allah (ﷺ) of his words, acts, and (tacit) approvals." See, Imran A.K. Nyazee, *Outlines of Islamic Jurisprudence*, Islamabad, Centre for Islamic Law, 2003, p. 124.
 15. Abū Ja'far al-Tahāwī, *Ma'ānī al-Āthār*, Beirut, Tasweer, n.d., vol. III, p. 221.
 16. Imām Aḥmad b. Ḥanbal, *Musnad*, Cairo, Mu'assah al-Qurtabah, n.d., vol. II, pp. 22-23, *aḥādīth* nos. 4739, 4747.
 17. Muḥammad b. Yazīd b. Mājāh, *Sunan*, ed., M. Fo'ad 'Abdul Baqi, Beirut, Dar al-Fikr, n.d., vol. II, p. 947, *ḥadīth* no. 2841, *Kitāb al-Jihād, bāb al-garat (?) wa al-bayāt wa qitāl al-nisā' wa al-sibyān*.
 18. Abū 'Ubayd al-Qasam b. Salām, *The Book of Revenue*, trans. Imran A.K. Nyazee, Reading, Garnet Publishing, 2002, p. 36.
 19. Sulymān b. al-Ash'ath Abū Dāwūd, *Sunan*, ed., M. Muḥī ud-dīn 'Abdul Ḥamid, Beirut, Dar al-Fikr, n.d., vol. II, p. 60, *ḥadīth* no. 2669, *kitāb al-jihād, bāb fi qatal al-nisā'*; Muḥammad b. 'Alī b. M. al-Shaukānī, *Nayl al-Awtār min Aḥādīth Syed al-Akhyār Sharḥ Muntaqa al-akbar*, Cairo, Idara al-Taba'a al-Muniriyyah, n.d., vol. VIII, p. 55, *kitāb al-jihād wa al-siyar, bāb fi kaf an qasd al-nisā' wa al-sibyān*.
 20. Shaybānī, *Kitāb al-Siyar al-Kabīr*, 4:186; Abū Bakr 'Abdur Razzāq, *Muṣannaḥ*, Beirut, al-Maktab al-Islami, 1403, 2nd edn. Vol. V, p. 201, *ḥadīth* no. 9382, *kitāb al-jihād, bāb qatl 'al-shajr fi ard al-'addu*; Al-Ṭabrīzī, *Mishkāt al-Maṣūbīh*, Cairo, al-Maktab al-Islami, n.d., *ḥadīth* no. 3955; Ibn Mājāh, *Sunnan*, vol. II, *ḥadīth* no. 2842, *kitāb al-jihād, bāb al-ghara wa al-bayat wa qitāl al-nisa' wa al-sibyān*; Imām al-Nasā'ī, *al-Sunnan al-Kubrā*, vol. II, *ḥadīth* no. 8625 and 8626, *kitāb al-siyar, bāb qatl al-'asīf*; Imām Bayhaqī, *Ma'rifat al-Sunnan*, ed., M. 'Abdul Qādir 'Aṭa', Makkah, Maktabah Dar al-Bāz, 1414/1994, 1: *ḥadīth* no. 5643; Abū Bakr al-Aḥmad b. al-Ḥussayn al-Bayhaqī, *Sunnan al-Bayhaqī al-Kubrā with al-Jawhar al-Naqī*, ed., M. 'Abdul Qadar Ata', Makkah, Maktab Dar al-Baz, 1994, vol. IX, p. 83, *kitāb al-siyar, bāb al-mar'a tuqātil fa tuqtal*. This *ḥadīth* is also quoted with slightly different words in Abū Ja'far al-Tahāwī's *Sharḥ Ma'ānī al-Āthār*, Beirut, Dar al-kutub al-'ilmiyya, n.d., vol. III, p. 222. There is another version of this report which says: "Never, Never to kill children and a servant." Ibn Mājāh, *Sunan*, vol. II, p. 948, *ḥadīth* no. 2842, *kitāb al-jihād*.
 21. See, Abū al-Sa'dāt al-Mubārak b. al-Āthār, *Jāmi' al-Uṣūl fi Aḥādīth al-Rasūl*, ed., 'Abdul Qādar, Damascus, Maktaba al-Halwani wa al-Malah, 1389, vol. II, p. 598. According to Shaukānī "the servant has to guard the belongings and the horses and camels and in case he fights, he can be killed." Imām Shaukānī, *Al-Sa'il al-Jarrar*, vol. IV, p. 532. Also see, Sheikh Muhammad Abū Zahra, *al-'Alaqa al-Duwaliya fi al-Islam*, Cairo, Dar al-Fikr al-Arabi, n.d., p. 99.
 22. Also see, Muhamamd Khair Haikal, *Al-Jihād wa al-Qitāl fi al-Siyāsah al-Shar'iyah*, Beirut, Dar al-Bayariq, 1996, 2nd ed., vol. II, p. 1247.

23. Muslim b. al-Ḥajjāj al-Nīsāpūrī, *Ṣaḥīḥ Muslim*, ed., M. Fo'ad 'Abdul Baqī, Beirut, Dar Iha' al-Turath al-'Arabi, n.d., vol. III, p. 1356, *ḥadīth* no. 1731, *kitāb al-jihād wa al-siyar, bāb t'amīr al-umarā' 'ala bu'oos*.
24. See, Anwar Ahmad Quadri, *Islamic Jurisprudence in the Modern World*, Lahore, Sh. Muhammad Ashraf Sons, 1973, p. 278.
25. Abū Bakr 'Abdullah b. Abī Shaybah, *Muṣannaḥ fi al-Aḥādīth wa al-Akḥbār*, ed., Kamal Yusuf al-Hut, Ryad, Maktab al-Rushd, 1409, vol. XII, p. 387.
26. *Ibid.*, p. 129.
27. Shaybānī, *Kitāb Siyar al-Kabīr*, vol. IV, p. 196. According to Imām Abū Ḥanīfah, they can be killed.
28. *Ibid.*, pp. 187, 196-197.
29. Abū Dāwūd, *Sunnan*, II:44, *ḥadīth* no. 2613, *kitāb al-jihād bāb fi du' al-mushrikīn*.
30. Mājīd Khuddūri, *The Islamic Law of Nations: Shaybani's Siyar*, (Maryland, John Hopkins University Press, 1966), p. 100.
31. Bayhaqī, *Sunan*, vol. IX, p. 90, *ḥadīth* no. 17931, *kitāb al-siyar, bāb tark qatl man la qitāl fihī min al-ruhbān wa al-kabīr wa ghairihā*; see also, Shaukānī, *Nayl al-Awṭār*, vol. VIII, p. 54.
32. Bayhaqī, *Sunnan*, vol. IX, p. 85, *kitāb al-siyar, bāb man ikhtara al-kaf 'ann al-qaṭ' wa al-tahrīq*; Shaukānī, *Nayl al-Awṭār*, vol. VII, p. 249.
33. Abū Yūsuf Ya'qūb b. Ibrāhīm, *Kitāb al-Khirāj*, ed., Muhammad Ibrahim al-Banna', Peshawar, Maktabh al-Faruqiyya, n.d., p. 377; Ibn Qudāmah, *al-Mughni*, vol. VIII, p. 477; M. Hamidullah, *The Muslim Conduct of State*, Lahore, Sheikh M. Ashraf Sons, 1977, p. 302.
34. See, M. Munir, *Aḥkām al-Madaniyyin fil Ḥarb*, unpublished LLM thesis submitted to the Faculty of Shari'a and Law, International Islamic University, Islamabad, 1996, pp. 16-17.
35. Ibn Abi Shaybah, *Muṣannaḥ*, vol. VI, p. 483, *ḥadīth* no. 33120, *kitāb al-siyar, bāb mann yunha 'ann qatlihi fi dār al-ḥarb*.
36. Bayhaqī, *Sunan*, vol. IX, p. 91, *ḥadīth* no. 17938, *kitāb al-siyar, bāb tark al-qitāl mann la qitāla fihī minn al-ruhbān wa al-kabīr wa gairihima*.
37. Khaddūri, however, mentions the odd view of some Ḥanafī and Shāfi'ī jurists who believe that they should be killed. See, Khaddūri, *War and Peace*, p. 104. This view cannot be accepted.
38. Shaybānī, *Kitāb al-Siyar al-Kabīr*, commentary, Sarakhasī, vol. IV, p. 196.
39. *Ibid.*, vol. IV, p. 186.
40. *Ibid.*
41. *Ibid.*, p. 187.
42. Abū Yūsuf, *Kitāb al-Khirāj*, Peshawar, Maktabh Faruqiyya, n.d., p. 379.
43. Kāsānī, *Badā'i*, vol. VII, p. 101.
44. 'Abdul Mājīd Daryābādī, *Tafsīr ul Qur'ān: Translation and Commentary of the Holy Qur'an*, Karachi, Darul Isha'at, 1991, vol. I, p. 123.
45. Smith R. Bosworth, *Mohammed and Mohammedanism*, India, Book Tree, n.d., p. 185.
46. As quoted in Daryābādī, *Tafsīr*, p. 123.

47. Abū Yūsuf, *Kitāb al-Khirāj*, p. 195; Al-Sarkhasī, *Al-Mabsūt*, pp. 10:8, 30, 129; Al-Kasānī, *Badā'i*, vol. VI, p. 64; Ibn Rushd, *Bidāyatul Mujtahid*, vol. I, p. 371; Ibn Qudāmah, *Al-Mughni*, vol. VIII, p. 477.
48. Shokānī, *Nayl*, vol. VIII, pp. 8 and 56.
49. IX:5; Ibn Ḥazm, *Al-Muhalla*, vol. VII, pp. 296-297.
50. Ibn Ḥazm, *ibid.*, p. 298.
51. 'Umar Following the holy Prophet (ﷺ) did this in Iraq when he charged a personal annual tax, the *jizyah*, on the non-Muslim citizens of the Islamic state. In return they had to be defended and protected by the Islamic state; had the right to practice their religion freely; had their own social institutions and personal laws; and could move freely.
It is necessary to note when and why *jizyah* was ordered to be levied. Initially when the *Mithāq* of Madinah (Charter of Madinah) was enforced by the holy Prophet (ﷺ) it was decided with the non-Muslims (the Jews) to share in the common defence of the city state or the commonwealth and also in payment of blood money. Three Jewish tribes Banū Qunayqa', Banū Qurayzah and Banū Naḍīr did not honour this arrangement and even co-operated with the attackers (the Quraysh). As it became clear that non-Muslims were not ready to defend the commonwealth hence the Divine command to ask them to pay for this defence. This is known as *jizyah*. Those non-Muslims who were ready to participate in the defence were exempted from it. For Muslims defending the Commonwealth was mandatory. See the *Kitāb/Ṣaḥīfah*, articles nos. 23-38 in *Muhammad (ﷺ) Life and Times*, by S. Moinul Haq, Karachi, 1997, pp. 259-261, based on the Hamidullah's translation – Ed.
52. Aḥmad b. 'Alī b. Ḥajr, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, Beirut, Dar al-Ma'rifah, 1379, vol. VI, pp. 147-148, *kitāb al-jihād, bāb faḍl mann aslama minn ahl al-kitāb*.
53. Abū Zakariyā Yahyā b. Sharaf al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, Cairo, Matba' Mahmud Toufiq, n.d., vol. XII, pp. 48-49.
54. Shaybānī, *Kitāb al-Siyar al-Kabīr*, vol. IV, p. 190; Bayhaqī, *Sunnan*, vol. IX, p. 91, *kitāb al-siyar, bāb al-mar'at tuqātil fa tuqtal*.
55. *Ibid.*
56. Shaukānī, *Nayl*, vol. VIII, p. 56.
57. See, Khairuddin al-Zarkali, *Al-I'lam*, Cairo, al-Matba'a al-Arabiya, 1927, vol. III, p. 16.
58. Ibn Qudāmah, *al-Mughni*, vol. VIII, p. 478.
59. 'Abdul Wahāb Khallāf, *Ilm Uṣūl al-Fiqh*, Cairo, Dar al-Qur'an, 1978, p. 65.
60. Shaykh 'Allauddin points out that one of the narrators in its chain is Al-Ḥajjāj b. Artat who is famous for fabricating *aḥādīth* and he narrates them even from those whom he never met. See, his, *Al-Jawhar Al-Naqī*, Beirut, Dar Al-Fikr, n.d., vol. IX, p. 92. Moreover, al-shaykh means a person who showed signs of old age or the one who reaches 50 or 51 years of age. Ṣana'ānī argues that *al-shaykh* is the one who is capable to fight and not the elderly whose killing is prohibited. See, Muḥammad b. Ismā'īl al-Ṣana'ānī, *Subul al-Salam*, Lahore, Dar Nashr al-Kutub al-Arabiya, n.d., vol. IV, p. 50; Ibn Qudāmah, *Al-Mughni*, vol. XII, p. 477.

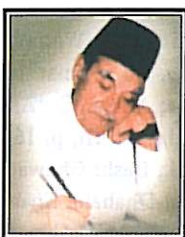
61. Bukhārī, *Ṣaḥīḥ*, vol. III, p. 1097, ḥadīth no. 2850, *kitāb al-jihād, bāb ahl al-dar yubyytun fa yusab al-wildān wa al-darāri*.
62. Abū Dāwūd, *Sunan*, vol. II, p. 61, ḥadīth no. 2672, *kitāb al-jihād, bāb qatl al-nisā*
63. See, Ibn Ḥajr, *Fatḥ al-Bārī*, vol. VI, p. 147, *kitāb al-jihād, bāb fadl mann aslama minn ahl al-kitāb*.
64. Shaukānī, *Nayl*, vol. VIII, pp. 8, 54.
65. John Kelsay, "Islam and the distinction between combatants and non-combatants", in *Cross, Crescent and Sword*, eds., James Turner and John Kelsay, Westport, Greenwood Press, 1990, 200; See, for a detailed rejoinder to this in M. Munir, "The protection of women and children in Islamic law and International Humanitarian law: A Critique of John Kelsay", *Hamdard Islamicus* xxv (July-Sep., 2002), pp. 69-82.
66. Since his Companions were converted to Islam and their parents were not Muslims. See, Shaukānī, *Nayl*, vol. VIII, p. 64.
67. Ibn Qudāmah, *al-Sharḥ al-Kabīr*, Cairo, Matba al-Mana, n.d., vol. V, p. 507.
68. See, his *Fatḥ*, vol. VI, pp. 147-148.
69. See, Abū Dāwūd, *Sunan*, vol. II, pp. 26, 62, 72.
70. However, 'necessity should be kept within its limits'; 'what becomes lawful for a reason becomes unlawful when such reason disappears' and 'committing the lesser evil'. This is the principle of proportionality.
71. Article 57 (2 a ii) of Protocol I.
72. *Ibid.*
73. According to Denteronomy, "When thy Lord hath delivered it unto thy hands, thou shalt smite every male therein with the edge of the sword. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou make unto thyself." See, *King James Version, Deuteronomy*, New York, Gideons International, 1987, vol. XX, pp. 10-14, and 230; also see, *The Holy Scriptures According to the Mosoretic Text*, Philadelphia, The Jewish publication Society, 1953, p. 237; and *Good News Bible (today's English Version)*, Glasgow, Harper Collins, 1976, p. 191. The Qurayzah were given the choice to choose arbitrator for their default and breach of peace. They chose Sa'd bin Ma'ādh who before converting to Islam had been their ally.
74. See, M. Munir, "The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsay", *Hamdard Islamicus* xxv:3, (July-September, 2000), pp. 69-82.
75. Abū 'Ubayd, *The Book of Revenue*, p. 135.
76. Kelsay, *Cross, Crescent and Sword*, p. 103.
77. Ibn Rushd, *Bidāyah*, Cairo, Matba'a Hasan, n.d., vol. I, p. 470.
78. 'Alī b. Ḥabīb al-Māwardī, *Al-Aḥkām al-Sulṭāniyah*, Cairo, al-Matba'a al-Mahmoodiya, n.d., p. 129.
79. Muḥammad b. Idris al-Shāfi'ī, *al-Umm*, Cairo, al-Matba'a al-Amiriyya, n.d., vol. IV, p. 176.
80. Ellah Landau-Tasseran, 'Non-Combatants' in *Muslim Legal Thought*, Research Monographs on the Muslim World, Series No. 1, Paper no. 3, December 2006, Washington, Hudson Institute, 2006, pp. 1-2.

81. *Ibid.*, p. 2.
82. *Ibid.*, p. 3.
83. *Ibid.*, p. 3, f.n. 11.
84. Besieging enemy combatants are allowed *per se* according to the Qur'an (IX:5 "and take them and besiege them"), and because the Prophet (ﷺ) besieged combatants in Ṭā'if and used catapult against them. See, 'Abdul Mālik b. Hishām, *Al-Sira*, Beirut, Dar Ihya al-Thurath al-Arabi, n.d., vol. III, p. 658. This is according to the Ḥanafī, Shāfi'ī and Ḥanbalī schools of thought. See, Ibn Qudāmah, *Al-Mughnī*, vol. VIII, pp. 488-489.
85. Abū Yūsuf, *Kitāb al-Khirāj*, pp. 194-195.
86. Khuddūri, *The Islamic Law of Nations*, 135; Muḥammad b. Jarīr al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Ahkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā'*, ed., Joseph Schacht, Leiden, Brill, 1933. p. 7.
87. There is no blood money if such Muslims got killed. See, Wahbah al-Zuhayli, *al-Fiqah al-Islami wa Adillatuhu*, Beirut, Dar al-Fikr, 1989 2nd edn., vol. VI, p. 424.
88. Shaukānī, *Nayl*, vol. VIII, pp. 8, 56.
89. Al-Qur'an, II:194.
90. Qurṭubī, *Ahkām*, vol. I, p. 240.
91. A Communique from Qa'idat al-Jihad Concerning the Testament of the Heroes and the Legality of the Washington and New York Operations, April 24, 2002, reproduced in David Cook, *Understanding Jihad*, Berkeley, University of California Press, 2005, pp. 176-181.
92. James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions*, Pennsylvania, The Pennsylvania State University Press, 1997, p. 122.
93. Khaled Abou El Fadl, "The Rules of Killing at War: An Enquiry into Classical Sources", *The Muslim World*, LXXXIX:2 (1999), pp. 144-157, 156.
94. See, M. Munir, *Fiqh-i-Islāmi mei Jang wa Sulḥ ke Mu'āhida ka Taṣawwur*, (The Concept of Treaty in relation to War and Peace in Islam), *Fikr-o-Nazar*, LXVII: 1 (July-September 2009), pp. 43-65.
95. Al-Qur'an, VIII:58.
95. For details see, M. Munir, "Suicide Attacks and Islamic Law" *International Review of the Red Cross*, 90:869 (2008), pp. 71-89, at 85-86. Also available at <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1889164>> (last accessed 24-03-2011) and <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-869-p71/\\$File/irrc-869_Munir.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-869-p71/$File/irrc-869_Munir.pdf)> (last accessed 24-03-2011).
97. Johnson, *The Holy War*, p. 123.
98. This report is not authentic according to Abū Dāwūd, Tirmidhī, Bukhārī, Abū Haytham and Ḥāfiẓ b. Ḥajr. Abū Dāwūd narrates it from Yaḥyā b. Abū Kathīr and says that the Prophet (ﷺ) besieged them for a month. Awzā'ī states that I asked Yaḥyā whether "the Prophet (ﷺ) used a mangonel against them?" and Yaḥyā rejected this. This report is *mursal* (there is a missing link in its chain). Another narration of this episode is reported through 'Abdullah b. Kharāsh whose narrations are not acceptable to the scholars of *ḥadīth* as he was condemned for his false reporting. For details see, M. Munir, *Ahkām al-Madanī'in*, pp. 57-58, n. 2.

99. Mālik b. Anas, *al-Muwattā'*, ed., M. Fu'ad 'Abdul Baqī, Cairo, Dar Ihya al-Turath al-'Arabi, n.d., vol. II, p. 447, *ḥadīth* no. 965.
100. Today Muslim states are under their treaty obligation especially Article 53 of P.I.
101. Al-Qur'ān, II:60.
102. *Ibid.*, II:205.
103. Shaybānī, *Kitāb al-Siyar al-Kabīr*, vol. IV, p. 198.
104. *Ibid.*
105. Muḥammad b. Idrīs al-Shāfi'ī, *Kitāb al-Umm*, vol. XV, p. 304, para, 381.
106. Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 106-107 (Khaddūri's note). See, Khaddūri, *War and Peace*, p. 103.
107. Al-Ṭabarī, *Tā'rikh al-Ummam wa al-Muluk*, vol. II, p. 449.
108. Al-Qur'ān, LIX:5.
109. *Ibid.*, p. 2.
110. Shokānī, *Nayl*, vol. VII, p. 294. The issue of the cutting of trees and other related issues are discussed in detail in M. Munir, "The Conduct of the Prophet (ﷺ) in War with Special Reference to Prohibited Acts" *Insights*, forthcoming.
111. Shaybānī, *Kitāb al-Siyar al-Kabīr*, vol. I, pp. 200-205.
112. Commission of Ottoman Jurists, *Mujallah al-Aḥkam al-'Adliyyah*, (Constantinople, 1305), maxim number 20.
113. *Ibid.*, Maxim number 29, rule 28.
114. Bayhaqī, *Sunan*, vol. VIII, p. 181, *ḥadīth* no. 16524, *kitāb ahl al-baghī, bāb ahl al-baghī iza*; 'Abdur Razzāq, *Muḥannaḥ*, vol. X, p. 123. *ḥadīth* no. 18590, *kitāb al-jihād, bāb la uzafafu 'ala jareeh*.
115. Imām Muslim, *Ṣaḥīḥ Muslim*, ed., M. Fo'ad 'Abdul Baqī, Beirut, Dar Iha' al-Turath al-'Arabi, n.d., vol. IV, p. 2017, *ḥadīth* no. 2613, *kitāb al-birr wa al-silla wa al-adab, bāb al-wa'id al-shadīd liman 'azzaba al-nnasa bighayri ḥaq*.
116. For details see, M. Munir, "The Protection of Prisoners of War in Islam", *Islamic Studies*, forthcoming.
117. Khaddūri, *The Islamic law of Nations*, especially his introduction to the translation from which one can know his views. Khaddūri had edited the chapters on *Siyar* from Shaybānī's *Kitāb al-Aḥl* on the assumption that it is Shaybānī's *Kitāb al-Siyar al-Ṣaghīr*. This book is also available in Arabic as *al-Qānūn al-Duwalī al-Insānī: Kitāb al-Siyar*, Karachi, Idara al-Qur'an wa al-'Ulum al-Islamiya, n.d., According to Mahmood Ahmad Ghazi the real *Siyar al-Ṣaghīr* is preserved in Hakim al-Shahīd al-Marwazī's *al-kāffī fi furū' al-Ḥanafiyah*. This is evident from the many manuscripts of the *al-Kāffī* as well as its commentary by al-Sarakhsī as the *Kitāb al-Siyar* within his larger work *al-Mabsūṭ*. Ghazi has edited Shaybānī's *Kitāb al-Siyar al-Ṣaghīr* as *The Shorter Book of Muslim International Law*, trans. and ed., Mahmood Ahmad Ghazi, Islamabad, Islamic Research Institute, 1998.
118. Majīd Khaddūri, *War and Peace in the Law of Islam*. Also see, his "Islam and the Modern Law of Nations", *AJIL* 50 (1956), pp. 353-372.
119. Al-Qur'ān, II:256.
120. Khaddūri, *The Islamic Law of Nations*, p. 51.

121. Ibn Ḥazm prohibits the slaying of animals except pigs. See, *al-Mahalla*, vol. VII, p. 294, (Khadduri's note).
122. Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 106-107 (Khaddūri's note). See, Khaddūri, *War and Peace*, p. 103. Shāfi'ī's opinion is available in his book *al-Umm*. See, Shāfi'ī, *Kitāb al-Umm*, vol. XV, p. 305.
123. James J. Busuttil, "Slay Them Wherever You Find Them: Humanitarian Law in Islam", *Revue de Droit Penal Militaire et de Droit d la Guerre* 30 (1991), 113-126 at 121. Khadduri's assertion is also reproduced by Karima Bennouna. See, Karima Bennouna, "As-Salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence", *Mich. J. Int'l L.* 15 (1993-1994), p. 629.
124. Busuttil, *ibid.*, pp. 121-122, (Notes omitted).
125. See, Ṭabarī, *Kitāb al-Jihād*, *op. cit.*
126. Khaddūri, *War and Peace*, p. 106.
127. Muḥammad b. 'Umar al-Wāqidī, *Kitāb al-Maghāzī*, ed., Von Kremer, (Calcutta, 1856), 284 (Khaddūri's note).
128. Muḥammad b. Jarīr al-Ṭabarī, *Tārikhul Umam wa al-Muluk*, ed., vol. III, p. 160, (Khaddūri's note).
129. Khaddūri's innovation of this rule has confused many researchers, especially those who rely on secondary sources. See, for instance, Karima Bennouna, *As-Salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence*, *Mich. J. Int'l. L.*, 15 (1993-1994), p. 630.
130. Al-Ṭabarī, *Ikhtilāf al-Fuqahā'*.
131. See, Ignaz Goldziher, "On the development of the *ḥadīth*", in *Muslim Studies*, trans. S.M. Stern and C.R. Barber, ed., S.M. Stern, New York, New York State University, 1917, vol. II, pp. 17-250. Also see, Joseph Schacht, *Origins of Muhammadan Jurisprudence*, Oxford, Clarendon Press, 1959, 2nd edn., and his *An Introduction to Islamic Law*, (Oxford, Clarendon Press, 1964). Schacht's thesis is known as *e Silentio* which he describes as "The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed." See, Schacht, *Origins*, p. 140. This view has been dismissed by many scholars. See, M.M. Azami, *Studies in Early Hadīth Literature*, Lahore, Suhail Academy, 2001, pp. 207-268; and Zafar Ishaq Ansari, "The Authenticity of Traditions: A Critique of Joseph Schacht's Argument *e Silentio*", *Hamdard Islamicus* VII (1984), pp. 51-61 and his "The Contribution of the The Qur'an and The Prophet to The Development of Islamic Fiqh", *Journal of Islamic Studies* 3:2 (1992), pp. 156-169.
132. See, 'Abdur Raḥmān b. Abi Ḥathm al-Rāzī, *Kitāb al-jarḥ wa al-ta'dīl*, Beirut, Dar Ihya al-Turath al-'Arabi, 1953, vol. IV, pp. 20-21; Muḥammad b. Habbān al-Basīṭī, *Kitāb al-Majrūhīn min al-Muḥaddithīn wa al-Ḍu'afā' wa al-Matrūkīn*, ed., Mahmood Ibrahim Zaid, Halab: Dar al-Wa'i, n. d., vol. II, 290. There is unanimity among the Sunnī scholars of *ḥadīth* that Wāqidī had fabricated *aḥādīth*. See, Shamsuddin al-Dhahabī, *Siyar A'lām al-Nubala*, ed., Shu'ayb al-Arnawut, Beirut, Mu'asas al-Risala, 1990), 7th edn., vol. IV, pp. 454-467; al-Dhahabi, *Mizān al-'Itidāl fi Naqd al-Rijāl*, ed., 'Ali Muhammad al-Bajawi, Sangla Hill,

- al-Maktaba al-Asariya, n.d., pp. 663-666. For further accusation against Wāqidī, see, 'Alī b. al-Ḥusayn b. 'Asākir, *Tārīkh Madīnah Dimishq*, ed. 'Umar b. Gharama al-'Umrawi Beirut, Dar al-Fikr, 1997, vol. LIV, p. 434; Aḥmad b. 'Alī al-Khatīb al-Baghdādī, *Tārīkh Baghdād*, Beirut, Dar al-Fikr, n.d., vol. III, p. 16; Yūsuf b. Ibrāhīm al-Māzi, *Tahzīb al-Kāmil fi Asmā'a al-Rijāl*, ed., Bashr Ghawad Ma'ruf, Beirut, Mua'sasa al-Risala, 1992, vol. XXVI, p. 182; al-Dhahabi, *Siyar A'alam al-Nubala'* Beirut, Mua'sasa al-Risala, 1982, vol. IX, p. 455; Ahmad b. Shu'ayb al-Nasā'ī, *Al-Du'afa' wa al-Matrūkīn*, ed., Boran al-Dhanawi and Kamal Yusuf al-Hut, Beirut, Mu'asas al-Kutub al-Saqafiya, 1987, p. 217; Muhammad b. 'Amr b. Mūsā b. Ḥammad al-'Uqaylī, *Al-Du'afa' al-Kabīr*, ed., 'Abdul Muti' Amin Qilā'ji, Beirut, Dar al-Kutub al-'Ilmiya, n.d., vol. IV, pp. 107-108. See also, Rizwi S. Faizer, "The Issue of Authenticity regarding Traditions of al-Wāqidī as Established in his *Kitāb al-Maghazī*," *Journal of Near Eastern Studies*, 58:2 (April 1999), pp. 97-106.
133. Shibli Nu'māni, and Syed Suleman Nadawi, *Sirat-un-Nabi* (Urdu), Lahore, al-Faisal Nashiran wa Tajiran-e-Kutub, n.d., vol. I, p. 25.
134. Dhahabī, *Mizān*, p. 499.
135. Tamannā 'Imādī argues that Ibn Jarīr was a Shī'ah but used to hide his real identity. See, 'Allama Tamannā 'Imādī, "Sub se Pehle awr sub se bare Mufasssir – Abū Ja'far Muḥammad ibn Jarīr al-Ṭabarī", *Tulū'-e-Islam*, 7th May (1955), pp. 11-13. Tamannā mentions that most of the teachers as well as students of Ibn Jarīr were Shī'ah. Tamannā asserts that there was only one Abū Ja'far ibn Jarīr al-Ṭabarī and not two as propagated by many historians. See, Tamannā, *loc. cit.*, *Tulu'-e-Islam* 24th May (1955), pp. 11-14. The papers of 'Allama Tamannā 'Imādī are now put together in one publication. See, Tamannā 'Imādī, "*Imām Zuhrī wa Imām Ṭabarī: Taṣweer ka Doosrā Rukh (Imām Zuhrī and Imām Ṭabarī: The Other Side of the Picture)*" (Karachi, Al-Rahman Publishing Trust, n.d.). However, Syed Ridhwan 'Ali Nadawi has defended Ibn Jarīr against any accusation of being a Shī'ah. See, Syed Ridhwan 'Ali Nadawi, "Ṭabarī per Shī'yyat ka Buhtān: Tajziyah awr Tardīd" *Al-Bayān*, (August, 1990), pp. 29-50. Nadawi argues that Ibn Jarīr was accused only by the Ḥanbalī scholars to be a Shī'ah. But some Ḥanbalī scholars did not accuse Ibn Jarīr to be a Shī'ah and depended on him. For example, Ḥafiz 'Imāduddīn Ismā'il b. Kathīr (d. 774 A.H./1372) – a well known Ḥanbalī, has depended in his *Tafsīr* as well as history on Ibn Jarīr. See, 'Imaduddin Ismā'il b. Kathīr, *Tafsīr al-Qur'ān al-A'zam*, Beirut, Dar al-Ma'rifa, n.d. Similarly, Ibn Kathīr based on Ibn Jarīr in his *Al-Bidāyah wa al-Nihāyah*. See, 'Ibn Kathīr, *al-Bidāyah wa al-Nihāyah*, Beirut, Maktaba al-Ma'rif, 2nd edn., 1974.



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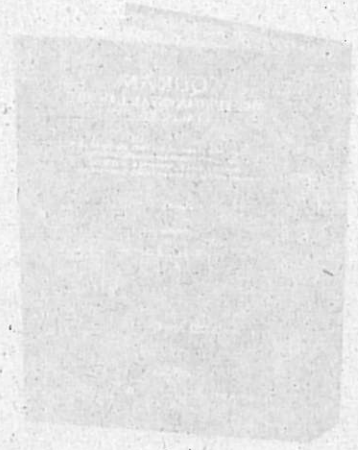
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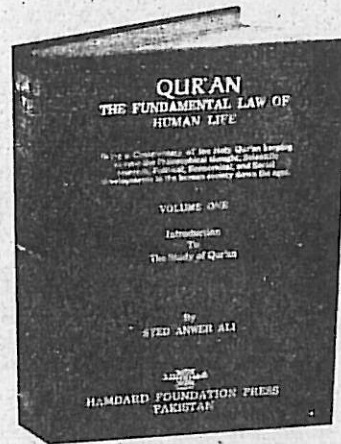
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