فقـه الجهاد

THE JURISPRUDENCE OF JIHAD

اسـتخدام القوة وأخلاقيـات العنف مـن منظور قانون الحرب الإسـلامي

The Use of Force and the Ethics of Violence through the Prism of the Islamic Law of War

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CHAPTER 1. INTRODUCTION TO ISLAMIC LAW

I. What is Islamic Law

Sharī'a is the totality of rules which God has laid down for the governing of man's behavior. It is the pure, ideal existence of those rules in the mind of God.

II. The *Ḥukm* and Its Discovery

A. Overview

A *ḥukm* (حكم) (pl. *aḥkām*, احكام) is a ruling on or a classification of an act. There are five possible *aḥkām*, or classifications:

- Prohibited (*maḥẓūr*, محظور / *ḥarām*, حرام)
- Reprehensible / discouraged (*makrūh*, مكروه)
- Permitted (*mubāh*, مَباح / *ḥalāl*, حلال)
- Recommended/Preferred (*mustaḥab*, مستحاب)
- Mandatory (*wājib*, واجب / *farḍ*, فرض)

B. Who discovers what the *ḥukm* is

There is no definitive body of law that Muslims may rely on in the way that legislation may be relied on in the West. Islamic law is a law of jurists and scholars. It is a tradition of collected rules and a method of reasoning used to come to answers.

Because Islamic law is a law of jurists and scholars, there may be disagreement in discovering what the *Sharī'a* and it's a*ḥkām* are. The authority in *Islām* is based not only sacred texts based, also on scholarly authority. Islamic groups care deeply about how scholars interpret and apply the texts. There is a strong emphasis on collecting and circulating the opinions of scholars.

Often, scholars are older men who are well trained in universities in Medina that are part of a wing of scholarship that is prevalent in

Saudi Arabia. Some of them follow what previous scholars have said, with others actively defining the law (*ijtihād*).

III. *Fiqh* (فقه)

Fiqh is the body of legal arguments that Islamic scholars hve made as representing their understanding of God's ruling. Through *uṣūl al-fiqh*, Islamic legal scholars employ a methodology for making legal arguments. The output of this process is the *fiqh*, or body of legal arguments which Islamic scholars have made as representing their understanding of God's ruling.

IV. Probability in Islamic law

Scholars recognize the right of other scholars and schools to disagree and have an equal claim to being "Islamic." There is thus normally no single Islamic position on a question. Rather, legitimate disagreement (*ikhtilāf*) prevails.

V. Sources */ Uṣūl al-fiqh*

The *Qur'ān* states: "*Obey God* and the *Apostle* and *those in authority over you*; and if you dispute on a matter, *refer it back* to God and His Apostle …" (4:59). On this basis, there are four principle sources of Islamic law:

- *Qurʾān* / القرآن ("Obey God")
- *Sunna* / *ḥadīth* / السنة والاحاديث (based on the adage that Muslims should "obey the Apostle")
- *Ijmāʿ* / الإجماع (unanimous consensus of "those in authority")
- *Qiyās* / قياس (analogical reasoning) ("refer back")

Some argue that these are the sources of Islamic law (*i.e.*, the divine *Sharīʿa*); others argue that these are the sources of only man-made jurisprudence (*i.e.*, the *fiqh*).

We will look at each of these sources in turn.

A. Qur'ān

CHAPTER 2. ISLAMIC PUBLIC INTERNATIONAL LAW

I. Introduction

A. Overview

Muslim jurists in the foundational era understood international law as comprised of the obligations that *Islām* imposed upon Muslims toward persons who were not part of the Islamic State.

Accordingly, Muslim jurists looked to the same sources of law that they used to develop internal Islamic law in order to develop Islamic international law: the *Qur'ān*; the *Sunna* / *aḥādīth*; *ijmā*'; and *qiyās*. However, ancillary sources such as custom, state practice and treaties also played an important and sometimes decisive role in the formulation of Islamic international law. These rules can be understood as the "conventional" rules of Islamic international law, in contrast with the previous class of rules that can be understood to be the "revealed" rules of Islamic international law. The conventional rules are "international" in the sense of being a common law applicable to both parties, in contrast with "internal" law, which is binding only on Muslims.

B. Background: From Caliphate to Colonies to Nation States; The Future Caliphate?

With the demise of the Ottoman Empire, the Muslim world was largely subject to the control of colonial powers. Turkey, while independent, renounced its character as an Islamic State. Nationalism, with the goal of national independence, became a central demand of Muslim peoples around the world. Following World War II, most Muslim peoples successfully obtained this goal of national independence.

As Muslim nations became independent nations, international law, and in particular the principle of non-aggression, has led an overwhelming majority of modern Muslim jurists to reject idea of offensive war.

At the same time, however, the Muslim nations continue to propagate a doctrine of a *dār al-Islām* that transcends the political boundaries of independent Muslim states, which often act in a concerted fashion in international *fora* such as the United Nations and through the Organization of the Islamic Conference and the League of Arab States. Much of this is a reflection of the fact that *Islām* has not yet been able to incorporate the idea of a plurality of nation-States, and many await the day in which the Islamic caliphate will be restored to unite all Muslim nations into a single Islamic community.

II. General Principles of Islamic International Law

A. Customary International Law

Islamic law has adopted numerous rules that are based on customary international law, including:

- The immunity of ambassadors;
- The rule of unique nationality;
- Ships taking the nationality of their flag;
- Wives taking the nationality of their husbands.

B. Islamic Law and the Law of the Sea

Muslim jurists have generally adopted the principle of the freedom of the seas, with Muslim States claiming sovereignty only over first six-miles of water off the coast (the "self-defense" distance).

C. Treaties in Islamic International Law

Muslims were bound to the terms of peace treaties pursuant to the legal principle *al-muslimun 'inda shurutihim* (المسلمون عند شروطهم), which literally means, "Muslims abide by their stipulations" and figuratively, "Muslims must keep their agreements," as well as the principle *al-taḥarruz `an al-ghādr* (التحرز عن الغادر), meaning "avoid treachery."

Treaties are to be read to the benefit of the other party and agreements with non-Muslims become incorporated into internal Islamic law upon ratification.

D. Islamic Diplomatic Practice

1. Overview

Prophet Muhammad entered into numerous treaties with pagan Arabian tribes during course of mission and sent diplomatic missions to surrounding powers toward end of his life. The first caliphs entered into numerous treaties with local communities in the course of the initial Islamic expansion.

Islamic diplomatic law is largely based on the concept of *amān* (safe passage). Muslim trading communities living in India and China thus entered into protection treaties with their non-Muslim kings that recognized the limited autonomy of these communities.

2. Islamic Diplomatic Practice in the Mediterranean Region in late Middle Ages (13th - 16th Centuries)

Islamic states regularly entered into treaties with Italian city-states and the Crusader kingdoms from the 13th to 16th centuries. Treaties were for ten years and could be renewed indefinitely. If not renewed, warfare would resume. Muslim States from this period also entered into commercial treaties with Italian city-states, including Florence and Venice. Commercial treaties, unlike political treaties, were not limited for a term.

3. Muslim-European Diplomacy in the Early Modern Period (16th - 18th Centuries)

Ottoman treaties were negotiated over three stages:

- First, an interim peace, (*tamassuk*/*temesük*) would be negotiated in the field;
- Second, after Sultan in Istanbul ratified the agreement, the formal text of the treaty would be promulgated (*`ahdname*/*barat*)
- Third, if the other state shared a border with the Ottomans, a document setting out the borders, *hududname*, would be prepared

Ottomans entered into treaties of indefinite duration with Western European powers that did not share a common border and thus were not deemed a threat (*e.g.*, England). Ottoman treaties with closer neighbors such as the Hapsburgs were generally of much shorter duration.

4. Inter-Muslim Diplomacy

Muslim States were legally at peace, and accordingly, their agreements were not called truces or grants of security. They were instead called "reconciliations." Terms of such agreements would be less detailed because Islamic law typically required each party to cooperate by, for example, returning property and releasing prisoners.

III. Bifurcation of the World Into *Dār al-Islām* (Abode of Peace) and *Dār al-Ḥarb* (Abode of War)

A. Introduction

Islamic international law creates two categories: *dār al-Islām* and *dār al-ḥarb*:

- *Dār al-Islām*: The Islamic state/territory/commonwealth that transcends the political boundaries of the independent Muslim states in the current international order. It is characterized by a legal state of permanent peace from the perspective of Islamic law. Everyone is in a state of permanent peace and violations that occur are criminal acts only.
- *Dār al-ḥarb*: Non-Islamic states or territories, which are in a legal state of war from the perspective of Islamic law. Islamic law cannot apply because the territories are not subject to Islam. What happens here is in a legal "black hole" where the law of war applies from the perspective of the Islamic State.

B. Justification for the Distinction

The *Qur'ān* does not use terms "dar *al-Islām*" or "*dār al-ḥarb.*" However the *Qur'ān* sets forth different rules depending on the political status of a person or group, thus creating *dar al-Islām* as an implicit limitation on Islamic law.

Examples of this limitation from the *Qur'ān* include:

- Q. 8.72: Those who believed, and emigrated, and fought for the Faith, with their property and their persons, in the cause of God, as well as those who gave (them) asylum and aid, these are (all) friends and protectors, one of another. As to those who believed but did not emigrate, ye owe no duty of

protection to them until they emigrate; but if they seek your aid on account of religious persecution, it is your duty to help them, *except against a people with whom ye have a treaty of mutual alliance*. And (remember) God sees all that ye do.

- Q. 4:92: *Never should a believer kill a believer*; but (If it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. *If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough)*. If he belonged to a people with whom ye have a treaty, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, a fast for two months running (is prescribed): by way of repentance to Allah. For Allah hath all knowledge and all wisdom.

Similarly, the Charter of Medina (صحافة المدينة) provides justification for the distinction between *dār al-Islām* and *dār al-ḥarb*:

- The believers and the people of Medina, and those who join them, are a "people" (*umma*) distinct from all others (Art. 1).
- *Lex talionis* is not to be applied to a believer who has killed a non-believer (Art. 14);

C. Consequences of the *Dār al-Ḥarb*/*Dār al-Islām* Distinction

In the Islamic State, lives and property of Muslims were rendered legally sacrosanct by virtue of conjunction of common belief *(al-dīn)* and common membership in polity *(al-dār)*. Outside of the territory of this commonwealth, non-Muslims had neither obligations nor rights and Muslims had greatly diminished legal standing.

D. Legal Recognition of Non-Muslims in the Islamic State

Non-Muslims could gain legal recognition in the Islamic State in one of two ways:

1. Contract of *Dhimma* (ذِمّة) (Permanent Residence)

The contract of *dhimma* grants a right of permanent residence in the Islamic State to non-Muslims.

For the non-Muslim *dhimmī* (protected person), the *dhimma* contract imposed upon non-Muslim adult males an obligation to pay an annual poll tax. In return, the Islamic State was obliged to protect non-Muslim permanent residents against all aggression, to the same extent it protects Muslims

Non-Muslims enjoyed all of the "civil" rights and were subject to all of the "civil" obligations with respect to contracts, property and torts that Muslims enjoyed. With some exceptions, they were also subject to the same criminal laws as Muslims. Moreover, non-Muslims could retain their non-Islamic religions and were exempt from the Islamic law prohibitions that interfered with their religious beliefs and practices.

Taliban Afghanistan and Iran are the only modern ones that had *dhimmī* contracts and Turkey is the only one that has formally abrogated Islamic law.

2. Contract of *Amān* (أمان) (Safe Passage)

The contract of *amān*, or safe passage, granted non-Muslims a right of temporary residence in and to enter into and exit safely from the Islamic State. It is comprised of a promise on the part of Islamic State to a non-Muslim (individual or state) of non-aggression and recognition of property entitlements for a term. Unlike the *dhimma* contract, the *amān* contract is *not* a promise to protect the non-Muslim against aggression by non-Muslims.

Non-Muslims under *amān* contracts, like their counterparts under *dhimma* contracts, were required to abide by the secular provisions of Islamic law. Moreover, because the non-Muslim under the *amān* contract was a non-permanent resident, he was subject to fewer legal obligations. For example, deportation could be practiced in place of the strict application of criminal penalties when the criminal law was breached.

The contract of safe passage required offer and acceptance; could be concluded by non-verbal communication. It was a permissive, not a binding contract, meaning, either party could repudiate it, in which case non-Muslim would return to his territory. Its contents were subject to negotiation; while at a minimum it offered mutual promises of non-aggression, it could also entail much more substantial rights and obligations

As an instance of how seriously the *amān* pledge was to be taken, Saybānī has written in *Kitāb al-Siyar*, "I asked: 'If a group of Muslims known to be of just character testified that a pledge of safe passage (*amān*) had been given by a party of war to the prisoners of war who were still capable of resistance, would the prisoners of war be set free?' He replied: 'yes.'"

3. Contracting Parties

The *dhimma* contract could be entered into on the Muslim side only by the representative of the Islamic State. A non-Muslim ruler could enter into a *dhimma* contract with the Islamic State on behalf of all his people, as could any adult non-Muslim, including females. Similarly, any Muslim, male or female, free or slave, could grant safe passage (*amān*) to individual non-Muslims.

E. Choice of Law

1. Choice of Law Consequences

Within the territory of the Islamic State, Islamic law governed all interactions among persons lawfully present in Islamic territory

Beyond its territory, Islamic law was agnostic as to legal claims arising outside its territory between non-Muslims, unless at a later time,

- Both parties to the dispute became Muslim. Islamic law governs all their interactions; or
- The territory became part of the Islamic State. In this case, Islamic law adopts the rule of non-Islamic regime to resolve the dispute

Interactions between Muslims and non-Muslims that are not in a legal relationship with the Islamic State (known as *ḥarbīyūn*) are governed by the Islamic law of war. In such cases in the absence of legal relationships, seizure was effective in creating legal entitlements to movable property as well as in creating slavery status as to captured persons, provided that the captured goods and/or persons were removed to the Muslim territory. Moreover, entitlement to land changed with outright conquest.

2. Choice of Law Examples