The Protection of Civilians in War: Non-combatant Immunity in Islamic law War

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

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“Fight you all in the path of God and combat those who do not believe in the path of God. Yet never commit breach of trust, nor treachery, nor mutilate anybody nor kill

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any minor or woman. This is the demand of God and the conduct of His Messenger for your guidance."

Abstract

Islamic law makes a distinction between combatants (those who fight) and non-combatants (those who do not fight) and allows fighting with the former and protection to the latter. The Prophet (PBUH) and his four successors have been issuing instructions to their armies against the killing of civilians. Modern Orientalists rely on Khudduri who has relied on Ṭabarī and who in turn has relied on Wāqidi to present a very distorted version of Islamic jus in bello. The work critically evaluates Ṭabarī’s methodology.

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

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faith and preserving the lives of 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, especially the immunity given to 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 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; whether their immunity is absolute or there exist some

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2 A complete bibliography of the works on Islamic *jus in bello* is beyond the scope of this work.

exceptions? What immunity is granted to civilian objects? Certain authors as well as organizations have attempted to present a picture of Islamic *jus in bello* as if Islam had no such rules at all. This work attempts to answer the questions raised by Western scholars as well as global radical jihadists about non-

combatant immunity in Islam. Other questions that are related to this discussion are explained along the way. The methodology of research used in this work is such, that efforts have been made to mention the rules of Islamic *jus in bello* from their original sources, i.e., the Qurʾān, the Sunnah, *Ijmāʿ* (where available), and analogy. The conduct of the Prophet (PBUH) 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 Imams 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 Imams by *fuqaha* (jurists) of other schools of thought. In cases of conflict, in such situations, we have relied on the original work of the school of thought. Below we explain the questions posed in the introduction one by one.

**Non-combatant Immunity in The Qurʾān**

Islamic law makes a distinction between 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 Qurʾān, to be followed by the
Sunnah and then to the conduct of the Prophet (PBUH) and his successors. The Holy Qur’an says, “And fight in God’s cause against those who wage war against you, but do not commit aggression—for, verily, God does not love aggressors.” Since this verse is the most significant in the discussion about the conduct of war therefore it needs detailed discussion. Muslim scholars differ in their interpretation of the above verse.

1) According to Al-Rabi’ b. Kesām al-Kūfī (d.64/684) this verse is superseded by 9: 5 and 9: 36, that is, “And so, when the sacred months are over, slay those who ascribe divinity to aught beside God wherever you may come upon them,’ and take them captive, and besiege them, and lie in wait for them at every conceivable place! Yet if they repent, and take to prayer, and render the purifying dues, let them go their way: for, behold, God is much-forgiving, a dispenser of grace.”

2) According to the second interpretation the above verse is not superseded and that Muslims should not attack first as this would be ‘Ītida (transgression) mentioned in the verse. They consider verse 9:1,

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3 2:190.
4 9:5.
5 9:36.
5 and 9: 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 saḥābas (companions of the Prophet) such as ‘Abdullah b. ‘Abbās (d.68/687) and tabi‘ūn (followers of saḥābas) such as ‘Umar b. ‘Abdul ‘Azīz (d.101/719) and Mujāhid b. Jabr Mawla (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.⁶ They argue that the verse prohibits 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 qatāla (fighting) on the pattern of fa‘ala the verbal noun of which is mufā‘ala 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 abādith 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

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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 Muslims should not fight those who do not fight them. This is the opinion of Abū Muḥammad Sa‘eed b. Jubayr (d.95/713) and Abī al-‘Āliya Rafi‘ b. Mehrān (d. 93/711).

4) According to Muqātil b. Sulaymān (d.149/767) it means that 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. According to Muhammad Abdel Haleem the “Arabic command la ta‘tadu is so general that commentators have

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agreed that it includes prohibition of starting hostilities, fighting non-combatants, disproportionate response to aggression, etc."

5) According to al-Ḥassān Al- Başrī (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 (2:190) can never be superseded because it not only mentions the Islamic *jus ad bellum* but also the Islamic *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 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 Shafi‘, while the second part (the *jus in bello*) is not superseded? Moreover, this is the only verse which mentions the kind of *jihād* on which there is consensus (*ijma*), that is, *jihād* in self-defence and the defence of faith. It should be remembered that anything on

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which there is *ijma'* (consensus) among the *mujtahideen* cannot be superseded.\(^{10}\) I have explained elsewhere that the theory of the development of Qura‘nic concept of *jihād* in four stages is not sustainable\(^{11}\) 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 (PBUH) were offensive (which is historically not true).\(^{12}\)

7) According to Muhammad b. al-Ḥasan al-Shaybānī (d.189/804) women, children, elderly and the like cannot be killed in war because of the


\(^{11}\) These four stages are: (1) non-confrontation (Q. 15: 94-5); (2) confrontation with good argumentation (Q. 16: 125, Q. 29: 46); (3) permission to wage war if attacked (Q. 22: 39); and (4) the unconditional command to fight the unbelievers (Q. 2: 216). For details of these stages see, Muhammad b. Ahmad al-Sarakhāsi, *Kitāb al-Mabsūt*, (Beirut: Dār Ehīa al-Tourath al-‘Arabi, 2002), 10:5. See also, Abū Bakr Aḥmad al-Rāzī al-Jaṣṣās, *Abkām al-Qur‘ān*, ed., Sidqi Muḥammad Jamil, (Beirut: Dār al-Fikr, 2001), 1:352-53.

\(^{12}\) For details see, my, *The Law of War and Peace in Islam*, forthcoming, chapter two.
above verse (2:190) and because Muslim army have to fight only combatants.\textsuperscript{13}

In a nutshell the verse (2:190) has two meanings: firstly, that fighting is confined to those who fight the Muslims and attack them first and that 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, women, children, monks, elderly, maimed, sick and the like should not be fought with.\textsuperscript{14} In other words, this is what is described as the principle of distinction (to use the IHL parlance).

\begin{footnotes}
\footnotetext[14]{According to Qutbuddin al-Rawandi of the Shi'a Imamiyyah 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 \textit{jihad} being one of the fundamentals of Islam can only be fought if a just and fair Imam exists. Qutbuddin al-Rawandi, \textit{Fiqh al-Qur'an}, ed., Al-Syed Aham al-Hasaini, (Qum: Maktba Ayatullah: 1405), 2\textsuperscript{nd} edn., 1:330. To him the verse prohibits the killing of women, children, and those given \textit{aman} (pledge). Rawandi, \textit{Fiqh}, 1:330-1.}
\end{footnotes}
NON-COMBATANT IMMUNITY IN THE SUNNAH\textsuperscript{15}

There are many traditions of the Prophet (PBUH) regarding the prohibition of the killing of women and children. In one tradition the Prophet (PBUH) is reported to have said, “Don’t kill women and children.”\textsuperscript{16} Ibn ‘Abbās reports that the Prophet (PBUH) prohibited from the killing of women and children.\textsuperscript{17} ‘Abdullah b. 'Umar (d.73/692) reports that in one of the battles of the Prophet (PBUH) he saw the body of a slain woman on which he prohibited the killing of women and children.\textsuperscript{18} This hadith is also reported by Abū 'Ubayd al-Qāsim b. Salām (d.226/837) in his Kitāb al-Amwāl (The Book of Revenue).\textsuperscript{19} There is an addition in some reports that she certainly could not

\textsuperscript{15} It is defined as “what was transmitted from the Messenger of Allah (PBUH) of his words, acts, and (tacit) approvals.” See, Imran A. K. Nyazee, Outlines of Islamic Jurisprudence, (Islamabad: Centre for Islamic Law: 2003), 124.

\textsuperscript{16} Abī Ja‘far al-Tahāwi, Ma‘āni al-Athār, (Beirut: Tasweer, n. d.), 3: 221.

\textsuperscript{17} Imām Aḥmad b. Ḥanbale, Musnad, (Cairo: Mu’assah al-Qurtabah, n. d), 2:22-23, aḥadith no. 4739, 4747.


have been fighting. 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 Khālid (who was commanding one part of the army) was responsible for this. On hearing this he dispatched a companion to tell Khālid b. al-Walid never, never to kill a woman and a servant.

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This hadith is very important for it mentions the prohibition of the killing of servant. The Arabic word 'aseef (pl. 'usafa) means servant.\textsuperscript{22} 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 in the meaning of 'usafa’ (servants).\textsuperscript{23}

In another hadith, the Prophet 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.”\textsuperscript{24} In addition, the Prophet 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


\textsuperscript{23} Also see, Muḥammad Khair Haikal, \textit{Al-Jihād wa al-Qitāl fī al-Siyāsa al-Sharî‘ya}, (Beirut: Dâr al-Bayāriq: 1996), 2nd ed., 2:1247.

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.\(^{25}\)

Similarly religious persons are not killed because of the report of Ibn 'Abbās that whenever the Prophet (PBUH) dispatched his army he instructed them not to kill religious people.\(^{26}\) Imām Ābū Bakr Muḥammad b. Āḥmad al-Sarakhasī (d.490/1097) – the leading Ḥanafī scholar, while mentioning that priests can be killed in the battle field, says, “[A]nd killing is to repel fighting.”\(^{27}\) Shaybānī argues that those priests and visitors in mountains who do not mix up with people are not killed.\(^{28}\) Moreover, the killing of elderly is prohibited according to the majority of Muslim jurists (if he does not advise the enemy regarding war)\(^{29}\) because as reported by Anus the Prophet (PBUH) has said to his dispatching army, “Go in the name of Allah adhering to the


\(^{27}\) *Ibid.*, 129.

\(^{28}\) Shaybānī, *Kitāb Siyar al-Kabīr*, 4:196. According to Imām Abū Ḥanīfa, they can be killed.

community to the messenger of Allah, do not kill any old and weak person or any children or any women.”

Moreover, it is also mentioned by Shaybānī in his treatise that whenever the Prophet (PBUH) dispatched his army he instructed them and said, *inter alia*, “… Do not break your pledge, and do not mutilate (bodies) and do not kill children and women and elderly.”

In another report the Prophet (PBUH) has said: “go in the name of Allah; fight in the path of Allah those who disbelieve; do not commit perfidy and do not break your pledge; and do not mutilate (bodies); and do not kill women and children and priests.”

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

The instructions given by Abū Bakr ʿAbdullāh b. Abī Quḥāfa (d. 13/634) – the first successor of the Prophet (PBUH), are very important in this regard and should be quoted in full. When he was sending his army to Syria headed by Yaẓīd b. Abī Sufyān (d.18/693), he told them the following:

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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.33

These instructions were never specific to that particular army and that particular occasion because similar instructions were given by the Prophet (PBUH) on many occasions before. Moreover, similar instructions were given by ‘Umar b. al-Khaṭāb (d.24/644),34 ’Uṣmān b. ‘Affān (d.36/656) and ’Alī b. Abī Tālib (d. 40/661).35 In addition, farmers and businessmen are not killed.36 ’Umar is reported to have said regarding farmers, “[B]e scared of Allah

regarding farmers. Do not kill them till they fight you.” Abū Bakr al-Baihaqī (d.458/1065) mentions on the authority of Jābir b. ‘Abdullah al-Ansārī (d.114/732) who said that the companions of the apostle did not kill infidel businessmen. These instructions must prevail over the opinions of jurists and their interpretations. 38

Shaybānī lays down the rule of distinction regarding 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.” 39 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 abl 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’an) ‘and fight in the path of Allah those who fight with you’ and these cannot fight and when the Prophet (PBUH) saw the slain

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38 Khadduri, however, mentions the odd view of some Ḥanafi and Shafī‘i jurists who believe that they should be killed. See, Khadduri, War and Peace, 104. This view cannot be accepted.

39 Shaybānī, Kitāb al-Siyar al-Kabīr, commentary, Sarakhsī, 4:196.
women, he pointed to this by his words, ‘she was not capable of fighting; go and tell Khālid ‘never, never to kill woman and servant.’

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 [hereafter].” He, therefore, asserts that if anyone of those who are protected persons fought in war, then they can be killed.

Abū Yūṣuf 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.

Abū Bakr b. Maṣʿūd al-Kasānī (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.” 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

\[40\] Ibid., 4:186.

\[41\] Ibid.

\[42\] Ibid., 187.


\[44\] Kasānī, Badā‘i‘, 7:101.
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.  

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 Mohammadan conquest. 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.

Opinions of Classical Muslims Jurists


47 As quoted in Daryabadi, Tafsir, 123.
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 classical Sunny Muslim jurists, as well as Imāmiyya and Zaydiyya only combatants can be killed. This view is supported by Abū Ḥanīfa al-Nuʿmān b. Thābit (d. 150/767), Mālik b. Anas (d. 179/795), and Aḥmad b. Ḥanbal (d. 241/855). Imām Muḥammad b. Idrīs al-Shāfīʿi (d. 204/820) has also supported this view in one of his opinions.\(^{48}\) According to Imām Mālik and Imām Abū ʿAbd al-Raḥmān al-Awzāʾī (d. 157/774) women and children shall not be killed under any circumstances so much so that if they were used by the enemy as shield they shall never be hit with arrows and shall not be burnt.\(^{49}\) According to the Zāhirī (literal) school, Ḥasan b. al-Munẓir (d. 309/921) and Shāfīʿi (in one of his two opinions) all non-combatants except women and children can be killed. Abū Muḥammad Ali b. Aḥmad b. Ḥazm (d. 456/1064) argues that all combatants and non-combatants other than women and children can be killed because of the Qurʾānic verse, “so kill infidels wherever you find them.”\(^{50}\) For Ibn Ḥazm all abadith regarding non-

\(^{48}\) Abū Yūṣuf, Kitāb al-Kirāj, 195; Al-Sarkhasi, Al-Mabsūt, 10: 8, 30, 129; Al-Kasānī, Badāʿiʿ, 6: 64; Ibn Rushd, Bidayatul Mujtahid, 1:371; Ibn Qudāmah, Al-Mughnī, 8:477.

\(^{49}\) Shoukānī, Nail, 8: 8 & 56.

\(^{50}\) 9:5; Ibn Ḥazm, Al-Muḥalla, 7:296-7.
combatant immunity except women and children are not authentic.\textsuperscript{51} Moreover, he rejects \((qiyās)\) analogy whereas \textit{jamhore} – the majority of scholars, do accept it as a method of interpretation. Today since all states have organized army, therefore, all civilians male and female are presumed not to take part in combat.

A question may be asked as to why civilians or non-combatants are not mentioned specifically by either the Prophet (PBUH) or his successors. The reason is probably that at the time of the Prophet (PBUH), 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 Muslim men were not fighting with the enemy. The new conquered land was left to its owners and a land-tax, the “\textit{kharāj}” was charged to the land. The Prophet (PBUH) imposed “\textit{jizyab}” and “\textit{kharāj}” on the persons and land of the tribe of Hawazin respectively. The \textit{kharāj} was spent on the welfare of the army.\textsuperscript{52} 'Umar b. al-Kaṭāb did the same thing in Iraq. Since the cause of the killing of

\textsuperscript{51} Ibn Ḥazm, \textit{ibid.}, 298.

\textsuperscript{52} 'Umar did this in Iraq when he charged a personal annual tax, the “\textit{jizyab}”, to 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.
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 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: Firstly, if they participate in hostilities; secondly, if they are killed unintentionally; and finally, if they are used as shield by the enemy.

(a) **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 (PBUH) 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 if she would be
participating in hostile activity then her killing would be justified.\(^{53}\) 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.”\(^{54}\) On another occasion the Prophet (PBUH) did not condemn the killing of a woman from Banū Qurayḍa who had attacked Khālid b. Suwayd (d.5/627).\(^{55}\) Similarly Zubayr b. Bāṭa (d.5/627) was killed although he was blind because he came to fight the Muslims in the battle of Aḥzāb.\(^{56}\) In addition one of the detachments sent by the Prophet (PBUH) in Ḥunayn was headed by Abū 'Āmīr al-Ash'arī (d.8/629) which killed Darid b. al-Thamma (d.8/630)\(^{57}\) who was famous for bravery, fighting and was an excellent poet. He fought more than one hundred wars in his life and was never defeated but was killed in the


\(^{55}\) Shaybānī, Kitāb al-Siyar al-Kabīr, 4:190; Baihaqī, Sunna, 9:91, kitāb al-siyar, bab al-ma'at tuqatīl fa tuqatīl.

\(^{56}\) Ibid.

\(^{57}\) Shoukānī, Nāiḥ, 8:56.
battle of Ḥunayn. They were very old yet he was planning war strategy for them. Thus, if the cause is found they could be killed because “what becomes lawful for a reason becomes unlawful when that reason disappears.”

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

(b) **unintentional killing of civilians:**

In the second situation in which non-combatants could be killed or harmed is where such killing is unintentional. In Islam the loss of civilian life must be

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61 Sheikh ‘Allūuddīn points out that one of the narrators in its chain is Al-Ḥajāj b. Ṭ走t who is famous for fabricating ḥadīth and he narrates them even from those whom he never met. See, *Al-Jowhar Al-Naqī,* (Beirut: Dār Al-Fikr, n. d.), 9:92. Moreover, al-Sheikh means a person who showed signs of old age or the one who reaches 50 or 51 years of age. Sana‘ānī argues that al-Sheikh is the one who is capable to fight and not the elderly whose killing is prohibited. See, Muhammad b. Ismā‘īl al-San‘ānī, *Subul al-Salām,* (Lahore: Dār Nashr al-Kutub al-Arabīya, n. d.), 4:50; Ibn Qudāmah, *Al-Mugni,* 12:477.
avoided as far as possible while attacking combatants and other military objects. However, if attacks on military objects become impossible without the loss of civilian life then the principle of proportionality will apply and civilians might be killed without intention. This is inferred from the saying of the Prophet (PBUH) who, while referring to attacks at night resulting in collateral damage to women and especially children thereto stated that, “they are from them.” This hadith is narrated by Al-Sa’ab b. Jasāma and is reported by Șāhiḥ Bukhārī⁶² Abū Dāwūd,⁶³ Ibn Ḥajar,⁶⁴ and Shoukānī.⁶⁵ However, the hadith is a debatable one. John Kelsay believes that the hadith allows the intentional killing of women and children in war.⁶⁶ However, this hadith 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

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⁶² Bukhārī, Șāhiḥ, 3:1097, hadith no. 2850, kitāb al-jihād, bab abl al-dār yubnītūn fa yuṣāb al-wildān wa al-ḍarārī.

⁶³ Abū Dawūd, Sunan, 2:61, hadith no. 2672, kitāb al-jihād, bab qatl al-nisa’.


⁶⁵ Shoukānī, Nāl, 8:8 & 54.

....” 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 combatants, can never be considered intentional. The Prophet (PBUH) is reported by Aswad b. Sarî’ (d. 42/662) to have said, “Don’t kill children in war”, the companion asked, “O the Apostle of God, but they are the children of pagans.” He replied, “Aren’t the pious of you the children of pagans.”

Imâm Aḥmad b. Ḥanbal (d.241/855) points out that “enemy can be attacked at night ... (but) if someone objects to it by saying that the Apostle of God 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. Ibn Ḥajr explains the words, ‘they are from them’, that is, in such a situation 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 to their fathers. Abu Dawūd mentions on the authority of Muḥammad b. Shihāb al-Zuhri (d.124/741) that at the end of this hadith thereafter the Prophet (PBUH) prohibited the killing of women

67 Since his companions were converted to Islām and their parents were not Muslims. See, Shoukānī, Nail, 8: 64.


69 See, his Fatḥ, 6: 147-8.
and children. Ibn Hajr states that this view (of total prohibition) is supported by the emphasis of the Prophet (PBUH) in the battle of Hunayn in the 8th A. H. He argues that the hadith ‘they are from them’, is superseded. This was the reason why Awzai’ held the view that ahadith about the general prohibition on the killing of women and children have superseded the hadith about attacks at night.70 This hadith (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’71 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.”72 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

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70 See, Abū Dawūd, Sunan, 2: 62, 26, 72.

71 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. According to Protocol I Additional to the

72 Article 57 (2 a ii) of Protocol I.
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 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 Qurayḍa. However, it must be remembered that their punishment was the result of arbitration between them and the Prophet (PBUH) and that they had chosen Sa’d b. Ma‘ād as arbitrator themselves who had punished them according to the Jewish law. A single incident which was an arbitration award cannot be

73 Ibid.

74 According to Denteroumy, “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, Denteroumy, (New York: Gideons International, 1987), 20: 10-14, & 230; also see, The Holy Scriptures According to the Mosoretic Text, (Philadelphia: The Jewish publication Society, 1953), 237; and Good News Bible (today’s English Version), (Glasgow: Harper Collins, 1976), 191.
made a general rule as I have noted elsewhere. According to Abū ‘Ubayd, Arab women and children were never enslaved at the time of the Prophet as his practice regarding the women and children of Hawāzin shows. ‘Umar (R), 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.”

Kelsay quotes a solitary opinion of Imām Shāfi‘ī in which he opines that polytheists women should be distinguished from 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 Mediaeval and Modern Islam, published in Leiden, in 1977. However, Ibn Rushd’s book does not contain what is attributed to him and to Imam 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 assume 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. The above opinion of Imām Shāfi‘i is mentioned only by al-Mawardī (d. 450/1058) but this is not the true position of al-Shāfi‘i 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. Even if his opinion is true it can still be unacceptable because of the general prohibition on their killing imposed by the Prophet (PBUH).

According to Tasseron the prohibition against harming non-combatants in the classical legal works “[I]s usually based on the personal judgment of the jurist, or on a few sayings (hādīths) going back to the Prophet and the first two caliphs, Abu Bakr and ‘Umar. Only rarely is an attempt made to justify these

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77 Kelsay, Cross, Crescent and Sword, 103.


He further argues that any non-combatant, “although protected to a certain extent, does not in fact have immunity (ʾismā) and is not considered to be a ‘soul whom Allah has forbidden to kill.’” He concludes that the terminology used by Muslim jurists for protecting 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.”

Tasseron’s arguments cannot be accepted for various reasons. First, any student of 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, which is revelation from God, to be justified even if it apparently seems to be otherwise. Secondly, the personal judgments of jurists regarding non-combatant

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82 Ibid., 2.

83 Ibid., 3.
immunity are rare. In general, as explained above, jurists have extended the cause of killing – fighting – to all those individuals who are not capable of fighting. Thirdly, classical jurists usually cite precedents from the time of the Prophet 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 Muslim jurists have mentioned the word yuharram to denote the prohibition against killing non-combatants.\textsuperscript{84} In addition, the Prophet has prohibited the killing of women and servants in the strongest possible words, “\textit{la taqtullanna dhuriyyatan wa la ‘a’sifan}.”

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 Shari‘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.\textsuperscript{85} This situation is similar to the one in which civilians could be harmed

\textsuperscript{84} \textit{Ibid.}, 3, f. n. 11.

\textsuperscript{85} Besieging enemy combatants is allowed \textit{per se} according to the Qur‘ān (9:5 “and take them and besiege them”), and because the Prophet besieged combatants in Ta‘if and used catapult against them. See, ‘Abdul Malik b. Hishām, \textit{Al-Sira}, (Beirut: Dār Ihya al-Thurās al-Arabi: n. d.), 3: 658.
as collateral damage but their killing is not intended. However, it is not allowed to besiege 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 jurists are split on the issue: only the Ḥanafī school of thought allows this.\(^{86}\)

\[c\] **using civilians as human shield**

Another situation of unintentional and indirect harm to the civilians is the situation where women and children are used as 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 Ḥanīfa with the addition that if the children be those of Muslims could the enemy be attacked with arrows and catapults? He reports that Abū Ḥanīfa said, “Yes, however, the enemy shall be aimed at and

\[^{86}\] This is according to the Ḥanafī, Shafi‘i and Ḥanbali schools of thought. See, Ibn Qudamah, *Al-Mughni*, 8:488-9.

not the children.\textsuperscript{87} 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.\textsuperscript{88} However, according to Imám Málík and Awzâ‘î attack on the enemy in such a situation is illegal because according to them the immunity of women and children is absolute.\textsuperscript{89}

An interesting question is whether civilians can be killed in retaliation. The answer is no because the Qur’ān says, “So when anyone aggresses against you, aggress against him in the like manner.”\textsuperscript{90} Thus the killing of enemy’s women and children would be killing the innocent whose killing is prohibited. According to Muhammad b. Ahmad al-Qurtubî (d. 671/1272) – the great commentator of the Holy Qur’ān, if someone has wronged you then your wrong to him should not extend to his parents, sons or relatives.\textsuperscript{91} This is


\textsuperscript{88} There is no blood money if such Muslims got killed. See, Wahbah al-Zuḥayli, \textit{al-Fuqah al-Islāmi wa Adillatubu}, (Beirut: Dār al-Fikr, 1989) 2nd edn., 6:424.

\textsuperscript{89} Shoukānī, \textit{Nail}, 8: 8 & 56.

\textsuperscript{90} 2:194.

\textsuperscript{91} Qurtubi, \textit{Aḥkām}, 1:240.
why retribution is allowed from the accused only. Moreover, Allah has prohibited their killing in 2:190 (discussed earlier) and there are many *ahadith* 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‘ida – the global radical terrorist organization, justifies the killing of innocent civilians in war. In its communiqué 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 [U S] government – a legitimate target for al-qā‘ida.\(^{92}\) The principle of reciprocity, however, does not allow any prohibited act, such as the killing of civilians. The second rule invented by al-qā‘ida is what we have described and rejected below, that is, the rule of “absolute destruction.”

Some commentators argue that the reason why 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 *fuqha* do not focus on abstract notions of fairness and justice in dealing with 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.”93 This statement is very unfair.

This statement seems to be based on the attitude of the Hanafi scholars towards the non-combatants. However, as we have discussed above, 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 Muslim *fuqā‘* non-combatants do not have to pay *jizya*. 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.”94 Thirdly, although there is benefit to Muslims to release the POWs free (*man*), yet this is the option available to the *Imām*. Such

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POWs, if released, would provide substantial aid to 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 Imam from breaching the treaty without duly informing the other side of the same. The Qur‘an says, “If thou hast reason to fear treachery from people [with whom thou hast made a covenant], cast it back at them in an equitable manner: for, verily, God does not love the treacherous!” The story of Amir Mu‘awiya 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. ‘Anbasa 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. Finally, there is confession by Johnson himself who says that certain rules


8:58.

adopted by the classical jurists seem to be pure acts “of moderation outside considerations of benefit.”

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 Islamic law? It is reported by fuqaha as well as historians that it is allowed to target the enemy with mangonels because the Prophet used mangonel when he besieged Tā’if. However, as I have discussed elsewhere, this report is of doubtful authority. 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 Islamic jus in bello because their use will undermine the principle of distinction in particular. These weapons cannot be used in retaliation either because Islamic law puts

98 Johnson, The Holy War, 123.

99 This report is not authentic according to Abu Dawūd, Termidhi, Bukhāri, Abu Hatham and Ḥafiz b. Ḥajr. Abū Dawūd narrates it from Yahyā b. Abū Kathir and says that the Prophet besieged them for a month. Awzā’i states that I asked Yahya whether “the Prophet used a mangonel against them?” and Yahyā rejected this. This report is mursal (there is a missing link in its chain). Another narration of this episode is reported through ‘Abdullah b. Kharash whose narrations are not acceptable to the scholars of hadīth as he was condemned for his false reporting. For details see, my, Aḥkām al-Madani‘n, 57-58, n. 2.
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 Muslim jurists are unanimous that 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 ISLAMIC LAW

The attack or destruction of foodstuffs, agricultural areas, livestock and other objects indispensable for the survival of civilians, is prohibited 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 ....”\(^{100}\) 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 ‘Aāmir’ (building) is general, that is, common noun, it includes cultural as well as other buildings.\footnote{Today Muslim states are under their treaty obligation especially Article 53 of P I.} Moreover, this would be considered some kind of ‘fasād’ (mischief) on earth which is strictly prohibited by Allah who says, “And do not go about the earth spreading disorder.”\footnote{Qur’an, 2:60.} 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.”\footnote{2:205.}

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).”\footnote{Shaybānī, Kitāb al-Siyar al-Kabīr, 4:198.} Imām Sarkhāsī, while commenting on this text adds that “it is condemnable to leave the weapons or the mules (al-silāḥ wa al-kirā) if the Muslim army seized them because leaving them behind would mean that the enemy could use them again against the Muslims.”\footnote{Ibid.} 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 Abu Ḥanifa and his disciples by Imām Shāfi‘i, and Ibn Jarir al-Ṭabarī, which is reproduced by Khadduri and others as is explained below. Imām Shāfi‘i 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.”\(^\text{106}\) It may be noted that property in this context (that could be taken away by Muslims) such as goats (but could not be removed), is of course, moveable property and not immoveable especially fixtures. Imām Abū Ja‘far Muḥammad b. Jarir al-Ṭabarī (d.310/923) in his Ikthilāf al-Fuqahā’, has gone one step further than Shāfi‘i by mentioning that according to Abu Ḥanifa and his colleagues, “everything that the mujahidin cannot bring under their control must be destroyed, including the houses, churches, trees, flocks and herds.”\(^\text{107}\) 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

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talks of property that could be brought under control by the mujāhidin, which would obviously mean, moveable property to the exclusion of houses and churches. In other words, what can be moved to the territory of Muslims cannot include ‘houses and churches’ because these things are immoveable. The above quote is, therefore, self-contradictory apart from being totally contrary to the Ḥanafi doctrine.

To prove that what is attributed to Abū Ḥanifa and his disciples is not true according to Ibn Jarir al-Ṭabarî as well, we will give the text of the treaty between ‘Umar – the 2nd successor of the Prophet and the people of Quds (Jerusalem) as quoted by Tabarî himself in his Tārikh al-Ummam wa al-Mulûk. 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.108

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What Ṭabarî 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 Ṭabarî *was less careful in transmitting the opinions of Imāms of other schools of thought, especially the Ahnaf*. However, it is difficult to know whether it was done intentionally or because of mistake. The finding of this investigation is that Ṭabarî is not reliable. As mentioned above, this is not the position of Abū Yūsuf and Shaybānî – the two top disciples of Abū Ḥanifa as stated by them in their own books.

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

Some jurists consider the incident of burning some trees of Banū Naḍhir by the Prophet (PBUH) to be a general rule during warfare. However, this is not true because of the instructions of Abū Bakr, ʿAlī and

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109 59:5.

110 59:2.
other successors as quoted above. According to Imām Tabarī 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 (PBUH) did not cut off any date tree or other tree belonging to his enemies in Khyber.\textsuperscript{111}

Muslim jurists argue that both sides to the war could agree to protect special places or objects. Shybānī has mentioned many such cases in his \textit{Kitāb al-Syar al-Kabīr}.\textsuperscript{112} Thus, civilians seem to be in the spotlight when we talk of the principles of necessity ‘(necessity renders prohibited things legal)\textsuperscript{113} and proportionality (committing the lesser evil).\textsuperscript{114}

\textbf{The Protection of Wounded, Sick and the Like}

\textsuperscript{111} Shoukānī, \textit{Nail}, 7; 294. The issue of the cutting of trees and other related issues are discussed in detail in my, “The Conduct of the Prophet in War with Special Reference to Prohibited Acts” \textit{Insights}, forthcoming.

\textsuperscript{112} Shybānī, \textit{Kitāb al-Syar al-Kabīr}, 1:200-205.


\textsuperscript{114} Ibid., Maxim number 29, rule 28.
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 Makka the Prophet (PBUH) 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.” Killing such people would amount to torture which is strictly prohibited in Islām. There is also a Prophetic saying that, “Verily God will punish those who torture other people in this world.” This hadith prohibits the torturing of people at all times, that is, war and peace alike regardless of the fact whether the victims are Muslims or non-Muslims. Moreover, we may use analogy in the case of wounded, sick and other disabled enemy soldiers. 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), and will be the liability of the head of the Muslim state.

Responding to Some Other Critics

Serious researchers of Islamic *jus in bello* may have noted one thing – the sole authority and authentic source for many publicists is Majid Khuddori 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*, which he thought to be Shaybani’s *Kitab al-Siyar al-Saghir* –

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118 Khadduri, *The Islamic law of Nations*, especially his introduction to the translation from which one can know his views. Khadduri had edited the chapters on *Siyar* from Shaybani’s *Kitab al-Ashl* on the assumption that it is Shaybani’s *Kitab al-Siyar al-Saghir*. This book is also available in Arabic as *al-Qanun al-Duwali al-Insani: Kitab al-Siyar*, (Karachi: Idara al-Qur’an wa al-Ulum al-Islamiya, n. d.). According to Mahmood Ahmad Ghazi the real *Siyar al-Saghir* is preserved in Hakim al-Shaheed al-Marwazi’s *Al-Kaffi fi furu’ al-Hanafiyab*. This is evident from the many manuscripts of the *Al-Kaffi* as well as its commentary by al-Sarakhsi as *Kitab al-Siyar*
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*.\(^\text{119}\) This work is concerned with our discussion of Islamic *jus in bello*. Latter authors who do not know Arabic and cannot refer to original books in Arabic rely on Majid Khadduri. Khadduri is, therefore, regarded by many authors as an authentic authority and probably a school of thought more important than the four famous Sunni 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 Ḥanīfa, Shaybānī, Awzā‘ī, Abū Yūṣuf, Mālīk or Shāfi‘i, they quote Khadduri. In Khadduri’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.\(^\text{120}\) According to him, the mission of jihād


\(^{\text{120}}\) Qur’ān 2: 256.
is the universalization of Islam through violence and the establishment of an imperial world state.\footnote{Khadduri, \textit{The Islamic Law of Nations}, 51.} It is indeed interesting to know the sources used by Majid Khadduri to draw his conclusions. Below we will give some examples given by Khadduri regarding non-combatant immunity and acts prohibited in war. He states on page 103 of his \textit{War and Peace}:

Mālik in his treatment of the law of war in the Muwaṭṭa’, prohibited only the slaying of the flock and the destruction of beehives.\footnote{Ibn Hazm prohibits the slaying of animals except pigs. See, Muḥammad ‘Alī b. Ahmad b. Ḥazm, \textit{al-Maḥalla}, (Cairo: Taba’ Munir al-Dimishqi, 1349 A. H.), 7:294, (Khadduri’s note).} Abū Ḥanifa 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. Shāfiʿi 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.\footnote{Tabari, \textit{Iktilaf al-Fuqaha}, 106-7 (Khadduri’s note). See, Khadduri, \textit{War and Peace}, 103. Shāfiʿi’s opinion is available in his book \textit{Al-Umm}. See, Muhammad b. Idris al-Shaфиʿi, \textit{Kitāb al-Umm}, ed., Aḥmad Badruddin Ḥassan, (Damascus & Beirut: Dar Qutaybah: 2003), 15:305.}
This paragraph from his *War and Peace* is reproduced by James Busuttil in his work,\(^{124}\) who draws his swift conclusions by saying that virtually any adult male non-Muslim in the *dār al-ḥarb* is subject to attack and almost every property there could be destroyed.\(^{125}\) However, we are more concerned with Khadduri rather than those who relied on him. Khadduri in his first quote above regarding Abū Ḥanifa has relied on Ibn Jarʿar al-Ṭabarī’s *Ikhtilāf al-Fuqahāʾ* edited by Joseph Schacht.\(^{126}\) On page 105 of the same book Khadduri goes one step further than Ṭabarī and says:

> Once the unbelievers in the *dār al-ḥarb* 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.\(^{127}\)

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\(^{125}\) Busuttil, *ibid.*, 121-122. (Notes omitted).


\(^{127}\) Khadduri, *War and Peace*, 106.
In his footnote he mentions that the Prophet Muhammad 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 ‘Abdullah Muḥammad b. ‘Umar al-Wāqidi (207/822)\textsuperscript{128} and Ibn Jarîr al-Ṭabarî.\textsuperscript{129} In other words, Khadduri has formulated his own rule about the conduct of war. This, we may call, ‘the rule of absolute destruction’.\textsuperscript{130} 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, Ijma’, qiyās and the siyar (conduct) of the Prophet (PBUH) and his successors in their battles with infidels. In other words, he is very disingenuous, unreliable and opinionated.

\textsuperscript{128} Muḥammad b. ‘Umar al-Wāqîdî, Kitāb al-Maghâzî, ed., Von Kremer, (Calcutta: 1856), 284 (Khadduri’s note).


It is interesting that some scholars give particular attention to Khadduri’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 Khadduri in particular rely on the books of Tabarî and Wāqidī? For example, Tabarî’s *Ikhtilāf al-Fuqahā’* is partly published by Fredrik Kirn, who has dedicated it to his teacher Ignaz Goldziher;\(^1\) 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 (PBUH) as a source of Islamic law.\(^2\) The best known treatises on *Siyar* are by

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the Ḥanafi jurists like Abū Yūṣuf and Shaybānī, most of them are edited and published and Khadduri could have based his views on Shabānī’s Kitāb al-Siyar al-Kabir 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 Ḥanifa, Shāfiʿi, Abū Thour Ibrahīm b. Khālid (d.240/854) and other Imāms but in between he cites Waqīdī – a person unanimously regarded by the Sunni scholars as Kazzāb (liar), who is not considered trustworthy; is a Shiʿa; is known for fabricating aḥādīth and distorting historical facts and so on. But is it just co-incidence that Ibn Jarīr al-Ṭabarī quotes Waqīdī or is


there another reason? According to authentic sources Ṭabarî himself was inclined towards the Shi‘a doctrine. The Ḥanbalis do not consider him trustworthy at all\textsuperscript{134} but even Muḥammad b. Aḥmad al-Zahābî (d.749/1348) – agrees that Ṭabarî was inclined towards the Shi‘a [doctrine].\textsuperscript{135} ʿAllāma Tamannā ‘Imādī has documented Ṭabarî’s Shi‘a links in his many articles.\textsuperscript{136}


\textsuperscript{135} Zahābī, \textit{Mizān}, 499.

\textsuperscript{136} Tamannā ‘Imādī argues that Ibn Jarīr was a Shi‘a but used to hide his real identity. See, ʿAllāma Tamannā ‘Imādī, “Sub se Pehle awr sub se bare Mufasir – Abū Ja‘far Muḥammad ibn Jarīr al-Ṭabarī”, \textit{Tulā‘-e-Islām} 7\textsuperscript{th} May (1955), 11-13. Tamannā mentions that most of the teachers as well as students of Ibn Jarīr were Shi‘a. See, his “Sub se Pehle awr sub se bare Mufasir – Abū Ja‘far Muḥammad ibn Jarīr al-Ṭabarī”, \textit{Tulā‘-e--Islām} 21\textsuperscript{st} May (1955), 11-13. Tamannā asserts that there was only one Abū Ja‘far ibn Jarīr al-Ṭabarī and not two as propagated by many historians. See, Tamannā, “Sub se Pehle awr sub se bare Mufasir – Abū Ja‘far Muḥammad ibn Jarīr al-
It is plain from the above that many researchers quote Khadduri, who relies on Tabari and who in turn takes things even from Wāqīdī. The approach of scholars who denounce hadith of the Prophet as untrustworthy but who accept every story of the biographers (collectors of sirat – biography) as the very gospel truth, so long as it is damaging to the Prophet and Islam does not need any explanation. They seem to follow a rule (if it is right to call it one) that what is unfavorable to the Prophet must be true. In addition, ignoring Shaybānī’s magnum opus study of Siyar (Kitāb al-Siyar al-Kabīr) in this discussion by Khadduri 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 Islamic *jus in bello*. It was very unfortunate that Sunni scholars ignored the field of history earlier in Islam and most of the Muslim history that was written earlier was the work of Shi`a scholars, especially Ibn Jarir al-Tabari, whose work is relied upon by everyone who wanted to write about early Muslim history.

Now what about the attribution to Hanafis regarding the destruction of everything that the jihadists 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 Imam Shaybani – the disciple, who wrote the *fiqh* of Abu Hanifa 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. Sarakhsi 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 Imams 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. Islamic law makes a distinction between combatants (those who fight) and non-combatants (those who do not fight) and allows fighting with the former and protection to the latter. Verse 2:190 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, women, children, servants, peasants, wounded, sick and priests who do not mix up with people, is provided for in many *ahadith*. 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 to his dispatching army were never specific to that army. These were not different from the instructions given by the Prophet (PBUH) 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 Islamic law, whether used for attack or in retaliation.

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