Palgrave Series in Islamic Theology, Law, and History

The Islamic Law of War

Justifications and Regulations

Ahmed Al-Dawoody

Palgrave Series in Islamic Theology, Law, and History

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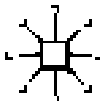

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Printed in the United States of America.

To my mother, my father, Hisham, Do'a', and Muhammad.
Also dedicated to anyone interested in the subject.

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Foreword

It is my privilege to introduce the outstanding scholarship of Ahmed Al-Dawoody on the law of war in Islam as the second volume of the Palgrave Series on Islamic Law and Theology. This series is dedicated to publishing original and transformative scholarship in Islamic Studies and to raising the threshold for the standards of scholarship in the field. I feel fortunate to introduce this gifted scholar to Western readers because his work is not just timely and reliable, but he is the kind of academic whose scholarship is so masterful that it is bound to command the subject for the foreseeable future. Al-Dawoody's background and training equip him with the skills necessary for making a transformative contribution to the understudied but overgeneralized and grossly essentialized topic of Islamic law and warfare. Al-Dawoody was trained in Islamic theology and law at Al-Azhar University, the oldest Muslim seminary and also the oldest surviving university in the world. He combined this traditional classical training with a Western graduate education from the University of Leiden and the University of Birmingham. Therefore, he is able to combine an encyclopedic knowledge of classical Islamic sources and contemporary analytical methodologies. Al-Dawoody speaks with commanding ease and relevance to the Muslim and non-Muslim worlds, and his book satisfies a pressing need for both Muslim and non-Muslim readers.

The subject of Islam and war has been at the forefront of current events and interests, and there has been a virtual deluge of commentary and writings on the topic. Surprisingly, however, despite its relevance and importance, the subject has received precious little scholarly attention from qualified specialists, and what little has been published in academic sources has been narrow and limited in scope and focus. Especially when it comes to Islamic law and jurisprudence, much of what is published on the regulation and conduct of war has been so superficial and methodologically flawed to the point of being not just unhelpful but positively misleading. This is not the place to investigate why so much of what has been published about Islamic law and war, whether in the Western or the Muslim worlds, has been so wanting or deficient. Al-Dawoody has written

the most exhaustive and thorough book to date on the regulation and conduct of war in the Islamic legal tradition. Not only has he written the authoritative reference source on the subject, but he has set the standard for future discourses in this field.

Al-Dawoody has examined and analyzed numerous legal and historical sources, which enabled him to trace the progression and trajectories of juristic discourses on the conduct and regulation of war providing a nuanced and dynamic exploration of the laws of war in the Islamic legal tradition. Al-Dawoody's command of original sources and sheer range of his research is very impressive. For practical reasons related to cost and marketability, Al-Dawoody was forced to trim his copious citations but without compromising the quality of the scholarship. It is important to note, however, that Al-Dawoody has performed the most comprehensive and rigorous review of original sources accomplished to date. Therefore, his book should replace earlier academic publications that, although widely cited and influential, were based on a very limited study of just a few original sources, and that were usually taken out of historical context or without the benefit of a broad comparative approach. After the publication of this book, in my view, it will become simply unacceptable to write or speak about the subject of war and Islam without first having read and studied this authoritative work. Al-Dawoody's book is essential reading for any person with an interest in this topic, and it is definitely required reading for all students of Islamic law and theology, political and religious violence, and the just war tradition. This book will continue to occupy this well-deserved venerable position for a long time to come.

KHALED ABOU EL FADL

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I would like to express my great gratitude to everyone who contributed in any way toward the publication of this book.

Transliteration Table

Consonants:

ا	ʾ	د	D	ض	ḍ	ك	k
ب	b	ذ	dh	ط	ṭ	ل	l
ت	t	ر	R	ظ	ẓ	م	m
ث	th	ز	Z	ع	ʿ	ن	n
ج	j	س	S	غ	gh	ه	h
ح	ḥ	ش	sh	ف	f	و	w
خ	kh	ص	ṣ	ق	q	ي	y

Short Vowels:

fatḥah ◌َ	a
kasrah ◌ِ	I
ḍammah ◌ُ	U

Long Vowels:

ālif (ا)	ā
yā' (ي)	Ī
wāw (و)	Ū

Diphthongs:

◌َو	aw
◌َي	ay

Hamzah (ʾ) is omitted at the beginning of a word.
Final *hā'* (ة) is transliterated (*h*).

Introduction

A few individuals create ideas, arguments, theories, ideologies, laws, or a specific understanding or interpretation of an issue. Even when part of a religion is believed to be from the Divine, some people still offer their own understanding of such divine material and attempt to infer the divine intention that lies behind it. The great majority of the rest of the human race and other creatures often become directly or indirectly influenced, or sometimes victimized, by either believing in or being targeted by such ideas, arguments, theories, ideologies, or interpretations based on divine material. Some ideas and theories become a driving force that dictates the course of human actions toward other humans and the rest of creation. They also regulate, no less importantly, how people deal with themselves—their own desires and physical needs.

Such ideas, arguments, and theories, although they may be produced by an individual, sometimes develop into widely held strong beliefs, religions, truths, and ways of life, which constitute a core component of what divides humanity into different civilizations, cultures, faiths, ideologies, and even nations. On the one hand, such ideas and theories become products that generate a sense of identity, including respect for and acceptance of others or hatred and animosity toward them. On the other, they turn into a commodity that becomes widely accepted among certain people while being totally rejected by others. Peace, genocide, the Holocaust, and international and even civil wars are all examples of human actions usually motivated by specific ideas, arguments, and beliefs about an "other," and by whether this "other" is viewed as belonging to a different ethnicity, religion, sect, ideology, civilization, and so on.

In the arena of the study of ideas and theories, researchers—generation after generation—sometimes produce particular interpretations or even theories about the original ideas or theories they are studying. At a certain point, the true meaning and nature of the original theory or idea become disputed, confused, and contested, depending on which and whose view, interpretation, and literature the researchers are studying. But throughout its history, a theory or a law sometimes becomes like a living creature that

develops and changes, first, according to the one who is creating it or writing about it and, second, according to the context in which it is applied.

Among the most important theories are those that shape relations with others, because such theories become either a source of peaceful coexistence, setting the rules for just and equitable relations, or one of hatred and demonization of others, which may lead to the use of violence. In short, theories and ideas about others may sometimes resemble weapons of mass destruction, as has been witnessed throughout the various stages of human history. Anti-Semitism and racism are prime examples.

This book examines one theory, or more precisely a law, namely, the Islamic law governing the use of force in both international and domestic conflicts. One of the most complex fields in the study of "others" is the study of their religion. This is because an outsider tends to interpret and judge the religion of others through the historical, religious, and cultural experiences that have formed his/her own intellect. Furthermore, the complexity is doubled in the case of the study of the law of war in the religion of others because outsiders may find themselves to be the enemy according to the law of war they are studying. Thus, the insider/outsider methodology, as explained here, can be a very useful approach in the study of religion, war, history, and international relations.

Rationale

To the West, Islam has been a source of fear and suspicion for centuries. Orientalists have depicted the religion and culture of Islam as inferior to that of the West.[1] But more importantly, for these and other reasons, Islam has been a source of misunderstanding. According to the words of Reuven Firestone, "Islam is perhaps the most misunderstood religion to the West, and many stereotypes still hinder clarity about its tenets and practices. Western prejudice toward Islam is as old as Islam itself."[2] This misunderstanding has created a yawning gap and even contradictory readings between insider/Islamic and outsider/Western scholarship in many areas of the study of Islam. But of the many areas of misunderstanding, as James Turner Johnson clearly puts it, "between Western and Islamic culture there is possibly no other single issue at the same time as divisive or as poorly understood as that of jihad."[3] Fortunately, however, one of the main reasons for the misunderstanding or lack of understanding of jihād among Western scholars has been recognized by some of them. According to Johnson, Western "scholarship on Islamic normative tradition on war is considerably less well developed."[4] He adds that "there exist no general

histories treating the understanding of normative tradition on religion, statecraft, and war in Islamic societies or in Islamic religious thought. Many significant subjects remain unexplored for lack of researchers with the necessary training and language skills."[5] Fred McGraw Donner describes the problem in the current state of scholarship on jihād in the West as "a practical one," in that there is a lack of "preliminary work on a vast subject."[6]

However, despite this lack of "preliminary work" and the fact that many subjects related to the study of this complex topic are still admittedly unexplored in Western scholarship, jihād has generally been portrayed in Western literature as a holy war to convert non-Muslims. For centuries, Europe's image of Islam has been associated with its spectacular spread and the wide expansion of its territories. Christian Europe was very much alarmed by this phenomenon, especially after the Muslim conquest of Spain, which remained under Muslim rule for eight centuries.[7] Moreover, there has been a tendency in the West to conceive of Islam as an inherently violent religion. Richard C. Martin confirms that the modern media and many Westerners who attempt to characterize Islam and the Arabs have concluded that there is a consciously "discernible ethos of violence in Islamic society."[8] Yvonne Yazbeck Haddad states: "The association of Islam with holy war, and of Muslims with the propagation of violence, seems to be endemic to Western awareness of Muslim faith. This is deeply disturbing to Muslims."[9]

Furthermore, in 1993 Samuel P. Huntington hypothesized in his "The Clash of Civilizations?" that "a central focus of conflict for the immediate future will be between the West and several Islamic-Confucian states."[10] In fact, analysts have limited this conflict or clash to one between "Islam" and "the West," and the involvement of the so-called Confucian states in this anticipated conflict has been totally ignored. Moreover, a few years after Huntington presented his theory, the 9/11 terrorist attacks, the London and Madrid bombings, suicide bombings, hostage-taking, and beheadings in certain Muslim countries under occupation brought new dimensions to the association of Islam with violence in Western literature. In the bulk of post-9/11 literature, the term "jihād" has been used in the sense of terrorism. In other words, a line of thought in the West has related the causes of these terrorist acts to Islamic religious extremism, and particularly to jihād, rather than to specific regional conflicts and the occupation of particular Muslim countries, which are the causes stated by the terrorists themselves.

This book has therefore been driven by the two reasons referred to earlier: first, the poor understanding and the as-yet unexplored subjects related to the study of jihād, which have led to the characterization of the

current state of scholarship on it—particularly in Western literature—as "considerably less well developed"; and second, the claim that the law of war in Islam, the religion of one-fifth of the world's population, is the cause of acts of terrorism, which is a serious claim that requires scholarly investigation. For these reasons, the study of the law of war in Islam becomes not only a matter of timely relevance, but also, more significantly, one of strategic importance to the understanding, and political treatment, of both international and domestic conflicts and acts of terrorism in which Muslims are involved, or, more precisely, in which the teachings of Islam play, or are thought to play, a role.

Aims of the Book

This book attempts to examine the nature of the Islamic law of war—the contested, misunderstood, and inadequately explored jihād. Despite the vast literature—both Islamic and Western—on jihād, the results of achieving this target varies according to how and where it is pursued. This book argues that the best approach is to examine both the Islamic *jus ad bellum* (the justifications for resorting to war) and the Islamic *jus in bello* (the rules regulating the conduct of war) in both international and domestic armed conflicts. The examination of each of these contributes to the understanding of the other and hence ultimately indicates the nature of jihād. What is meant by the nature of jihād here is whether it is a "holy war," either defensive or offensive, or a war of expansion for economic or other purposes. The term "holy war" is used here in the sense of a war waged either in order to convert a people to a certain religion by force, or solely because the opponents hold different beliefs. In other words, this book attempts to find out whether or not jihād is a just war. The meaning of a just war here is a war fought in self-defense that complies with the United Nations restrictions on the use of force.

Thus, the aim of this book is to examine the justifications for and the regulations of the use of force under Islamic law in both international and domestic armed conflicts. It examines all varieties of the use of force—either by state or by nonstate actors—that are treated under Islamic law. In other words, it examines why and how Muslims resort to the use of force. The significance of studying the treatment of the use of force by nonstate actors under Islamic law is fourfold. First, it tests the claim that jihād is the cause of contemporary acts of terrorism perpetrated by Muslims. Second, it examines the degree of tolerance or intolerance Islamic law shows toward the internal opponents of an Islamic government in the case of a rebellion.

Third, studying the regulations in Islamic law for the use of force in both international and domestic armed conflicts can provide pointers for possible measures for humanizing armed conflicts in which one-fifth of the world's population may be involved. It also presents the Islamic positions on certain acts committed by a few Muslims, such as targeting noncombatants, beheadings, kidnapping journalists and humanitarian aid workers in specific Muslim countries, and acts of terrorism such as blowing up airplanes, trains, and buses. Fourth, it reveals the potential contribution the legal system of one of the world's largest religions may make toward for the world's discussions on war and thus the impact it may have on the attainment of world peace and stability.

In the light of the findings of this examination, first, it can be decided whether Muslim calls for recourse to jihād in international and domestic armed conflicts at the present time are justified or not, and second, and no less importantly, it can be judged whether or not these contemporary calls for jihād comply with the teachings of Islam on the use of force. In this way, the practices of Muslims can be judged according to their theory, that is, the teachings of Islam, and thus the major error of confusing the practices of Muslims with the teachings of Islam can be avoided.

Research Questions

To achieve the aforementioned aims, this book attempts to answer the following main questions:

1. What are the Islamic justifications for the use of force in international armed conflicts, namely, going to war against non-Muslims? (See chapters one, two, and three.)
2. What are the justifications of both the Islamic state authorities and its citizens for the resort to war against each other? (See chapter five.)
3. What are the main rules in Islamic law regulating the conduct of Muslims with regard to the lives and property of enemies during and after hostilities in international armed conflicts? (See chapter four.)
4. What are the Islamic rules regulating the conduct of the Islamic state during and after hostilities in various kinds of domestic armed conflicts, and what are the differences between the rules regulating these various domestic conflicts and those regulating the conduct of Muslims in international armed conflicts with non-Muslims? (See chapter five.)

5. Do classical Muslim jurists treat the issues of international and domestic terrorism? (See chapter five.)
6. If the answer to question five is in the affirmative, what then constitutes an act of terrorism and what is the punishment for terrorists and their accomplices under Islamic law? (See chapter five.)

Scope and Limitations

This book is confined to Sunni literature and does not include Shiʿite literature on the subject. More specifically, it is limited to the four Sunni schools of Islamic law, that is, the Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī schools. In some cases it refers to the extinct Ẓāhirī school, namely, the opinions of Ibn Ḥazm (d. 456/1064). It includes literature written in both Arabic and English. With a few exceptions, the book deals with mainstream Islamic and Western literature and does not focus on hate literature or the writings of extremists on either side. The Islamic literature surveyed includes the writings of both classical and modern Muslim jurists and scholars. The term "modern Muslim scholars" refers to the scholars who lived during the period extending from the last quarter of the nineteenth century up to the present, while "classical Muslim jurists/scholars" refers to those who lived during the period preceding that time.

This book examines Islamic normative sources on justifications and regulations for war and thus is not a historical study. In other words, it does not follow the occasions when Muslims resorted to war, or their conduct during war throughout history, apart from the incidents of armed conflict that took place between Muslims and their enemies during the lifetime of the Prophet. The reason of this exception is that the incidents of fighting that took place during the Prophet's lifetime, which are treated in the *Sīrah* (biographies of the Prophet) literature, along with the Qur'ān, are the bases for the formulation of the Islamic law of war, as explained here.

Methodology

This book is a library-based research project and the material studied here consists mainly of books, articles, and, in some cases, online resources. It utilizes an insider/outsider approach. The insider approach refers to what

Muslims advocate about their specific understandings of the issues in question. The outsider approach in this book refers to the understandings of these issues in the Western literature that has been consulted. The terms Islamic/insider literature and Western/outsider literature refer specifically to the works discussed in this book. Thus, the insider/outsider approach adopted here is simply a comparative method that aims at tracing and analyzing when, how, and why these two literatures agree or disagree on the same issues in question.

Indeed, this book argues the necessity of utilizing an insider approach when it comes to the study of religion and history of others, or in comparative studies, but only *as a first step* to fairly present and understand what is maintained by the insiders. Put differently, researchers should refer to the original sources, that is, the insiders, to find out how the issues in question are described by the insiders rather than depending on secondary resources, that is, the outsider. This does not mean that the conclusions of the insiders should be adopted, but rather that a fair, objective presentation of the insiders must be given on the basis of how they themselves maintain and advocate their own beliefs and views. This methodology also applies to different sects within the same religion, or different ethnicities, or any rival within the same entity. Then, only after this initial step, scholars can start objective studies and develop their own conclusions. If this process is not followed, outsider scholars may slip into producing theories and conclusions that are later developed into widely circulated so-called facts, based simply on misrepresentation, in outsider literature, with the insider literature being ignored. With the passage of time, two different readings of an other are created, which may often be described as negative/outsider and positive/insider.

Therefore, objectivity remains a relative term that changes according to who and which literature (insider or outsider) is dealing with the issues in question. This is because researchers are influenced by their own religious, historical, cultural, and personal experiences, which inevitably dictate how they analyze, study,[11] and judge others. W. Montgomery Watt (d. 2006) writes:

> Normally a person can only reach important levels of religious experience through participating in the life of the community in which he has been brought up and basing his activity on its ideas. There are exceptions, but this is the normal case. It is not easy for a person brought up in a Christian environment to appreciate the religious ideas of Islam, far less to make them the basis of a satisfactory life. The same is true for the Muslim with Christian ideas. This means that it is Christian ideas which give the Christian the best chance of attaining a richer and deeper experience, and likewise Muslim ideas the Muslim.[12]

In fact, Watt's observation here about the appreciation of the ideas of religions different from one's own also applies to any other set of ideas, whether political, social, or otherwise, because human beings generally become products of certain ideas and thus tend to work, analyze, and judge others accordingly.

All translations of the Qur'ānic texts and Ḥadīths are mine. An important note concerning transliteration: all Arabic words are transliterated according to their pausal forms. The point here is to help the non-Arabic speaking reader to know how the Arabic word is written.

Structure of the Book

This book consists of an introduction, five chapters, and a conclusion. The first four chapters treat international wars, while chapter five treats internal hostilities and terrorism in Islamic law. The book examines the Islamic justifications for war against non-Muslims, that is, international war according to the classical Islamic state system, in the first three chapters. Chapter one studies the *Sīrah* literature to find out the justifications for the incidents of fighting between the Muslims and their enemies during the Prophet's lifetime. Chapter two studies the interpretations of the Qur'ānic justifications for war in some of the most influential classical and modern Qur'ān *Tafsīr* (exegeses) literature. Chapter three studies the justifications for war and Islamic attitudes toward non-Muslims in the classical Islamic juridical theory of international law and modern Islamic writings on the subject.

The specific order of these three chapters is very important because, first, the Qur'ānic texts on war address specific contexts; hence, determining the appropriate context is essential before commencing any study of the Qur'ānic position on the subject. Second, it was on the basis of the incidents of fighting between the Muslims and their enemies (discussed in chapter one), and the interpretations of the Qur'ānic texts addressing these incidents (discussed in chapter two) that Muslim jurists developed the Islamic law of war. Chapter four discusses the regulations governing war in international armed conflicts under Islamic law and completes the treatment of international armed conflicts in this book.

Chapter five is devoted to internal armed conflicts and terrorism in Islamic law. It studies the justifications and regulations for the use of force in internal armed conflicts. In particular, it discusses in some detail the law of fighting against *al-bughāh* (rebels, secessionists) and that of fighting against *al-muḥāribūn/quṭṭāʿ al-ṭarīq* (bandits, highway robbers, pirates).

Following the discussions of these two kinds of internal armed conflicts and, before that, the use of force in international armed conflicts, chapter five discusses the claim that the concept of jihād is the cause of acts of terrorism perpetrated by Muslims and addresses the questions of the treatment and punishment of terrorism under Islamic law. Chapter five is longer than the other chapters, but this is necessary in order to cover the arguments regarding the treatment of terrorism and the punishment of terrorists under Islamic law, dealt with in the same chapter, following the consideration of the kinds of internal hostilities referred to earlier.

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