

## Seclected Classical Sources on Jihad\*

Al-Shaybani (8<sup>th</sup>-9<sup>th</sup> centuries), was a leading disciple of Abu Hanifa, the founder of the school of Hanafi jurisprudence (one of the four still extant and authoritative Sunni schools), was an important jurist and the first to write extensively on the topic of the Law of Nations, or the Siyar as it came to be termed. He wrote, always assuming a state of war must exist between Dar al-Islam and Dar al-Harb, that:

Fight in the name of Allah and in the “path of Allah”. Combat those who disbelieve in Allah. Do not cheat or commit treachery, nor should you mutilate anyone or kill children. Whenever you meet your polytheist enemies, invite them [first] to adopt Islam. If they do so, accept it, and let them alone. . . .If they refuse, then call upon them to pay the jizya [poll tax imposed on Dhimmis]; if they do, accept it and leave them alone. . . .

If the army [of Islam] attacks Dar al-Harb and it is a territory that has received an invitation to accept Islam , it is commendable if the army renews the invitation, but if it fails to do so it is not wrong. The army may launch the attack by night or by day and it is permissible to burn [the enemy] fortifications with fire or to inundate them with water.

In the same legal text, *Kitab al-Asl*, Shaybani employs the common question and answer format of the jurists:

I asked: If male captives of war were taken from Dar al-Harb, do you think that the Imam should kill them all or divide them as slaves among the Muslims?

He replied: The Imam is entitled to a choice between taking them to Dar al-Islam to be divided [among the warriors] and killing them [while in Dar al-Harb].

I asked: Which is preferable?

He replied: [The Imam] should examine the situation and decide whatever he deems to be advantageous to the Muslims.

I asked: If killing them were advantageous to the Muslims, [do you think that the Imam] should order their killing?

He replied: Yes.

In the context of the debate over whether jihad-inspired terrorism allows for the murdering of innocent civilians, we find:

I asked: Do you think the blind, the crippled, the helpless insane, if taken as prisoners of war or captured by the warriors in a surprise attack, would be killed?

He replied: [No,] they should not be killed.

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I asked: Would it be permissible to inundate a city in Dar al-Harb with water, to burn it with fire, or to attack [its people] with mangonels [a hurling machine] even though there may be slaves, women, old men, and children in it?

He replied: Yes, I would approve of doing all of that to them.

We have also often heard that Muslims were victims of 9-11 and other terrorist attacks on Western targets and this supposedly demonstrates that the acts of terror were wholly unlawful per Shariah. Shaybani answers these rather baseless claims as follows in the inquiries immediately following the one above:

I asked: Would the same be true if those people [unbelievers in Dar al-Harb] have among them Muslim prisoners of war or Muslim merchants?

He replied: Yes, even if they had among them [Muslims], there would be no harm to do all of that to them.

I asked: Why?

He replied: If the Muslims stopped attacking the inhabitants of Dar al-Harb for any of the reasons that you have stated, they would be unable to go to war at all, for there is no city in Dar al-Harb in which there is no one at all of these you have mentioned.

I asked: If the Muslims besieged a city, and its people [in their defense] from behind walls shielded themselves with Muslim children, would it be permissible for the Muslim [warriors] to attack them with arrows and mangonels?

He replied: Yes, but the warriors should aim at the inhabitants of Dar al-Harb and not the Muslim children.

I asked: Would it be permissible for the Muslims to attack them with swords and lances if the children were not intentionally aimed at?

He replied: Yes.

I asked: If the Muslim [warriors] attack [a place] with mangonels and arrows, flood it with water, and burn it with fire, thereby killing or wounding Muslim children or men, or enemy women, old men, blind, crippled, or lunatic persons, would the [Muslim warriors] be liable for the diya [blood money] or the kaffara [expiation or atonement]?

He replied: They would be liable for neither the diya nor for the kaffara.

In the context of an inquiry into whether Muslims can simply join a self-forming group to attack the unbelievers in Dar al-Harb and obtain private financing without the support of the Imam as the Muslim political leader of the region sponsoring the attack:

I asked: If a group of Muslims desired to attack the territory of war but did not have the [sufficient] force or the finances to do so, do you think that it would be lawful for them to

help each other and the ones who would not go forth to battle to contribute [financial support and supplies] to those who take the field?

He replied: It would be lawful to do so in such a situation; but if the Imam had the wherewithal [financial] and the Muslim had the forces, I would neither approve of it nor should I permit it. However, if the Imam lacked the means, it would be lawful [for some to contribute to others who take the field]. . . .

I asked: If some of the inhabitants of Dar al-Harb asked the Muslims to make peace with them for a specified number of years [usually limited by law to 10 years] without paying jizya [tribute as a Dhimmi], do you think the Muslims should grant the request?

He replied: Yes, provided the Imam has considered the situation and has found that the inhabitants of Dar al-Harb are too strong for the Muslims to prevail against them and it would be better for the Muslims to make peace with them.

I asked: If [the Imam] made peace with them and found upon reconsideration it was disadvantageous for the Muslims since it was made without any tribute being paid to him, can he give them notice, abrogate the peace agreement, and attack them?

He replied: Yes.

Ibn Abi Zayd al-Qayrawani (10<sup>th</sup> century), a leading Maliki jurist, declared:

Jihad is a precept of Divine institution. Its performance by certain individuals may dispense others from it. We Malikis maintain that it is preferable not to begin hostilities with the enemy before having invited the latter to embrace the religion of Allah except where the enemy attacks first. They have the alternative of either converting to Islam or paying the poll tax (jizya), short of which war will be declared against them.

Ibn Rushd or Averroes as he is known in Christian circles (12th century), was a renowned philosopher and legal scholar in Sevilla and Cordoba, Spain during the "Golden Era" of Islam as it has come to be known. Writing in his magnum opus and authoritative *Bidayat al-Mudtahid wa-Nihayat al-Muqtasid*, he ruled:

Scholars agree that the jihad is a collective not a personal obligation. Only 'Abd Allah Ibn al-Hasan professed it to be a recommendable act. According to the majority of scholars, the compulsory nature of the jihad is founded on [2:216]: "Prescribed for you is fighting, though it be hateful to you." That this obligation, when it can be properly carried out by a limited number of individuals, is cancelled for the remaining Muslims, is founded on [9:122]: "It is not for the believers to go forth totally," on [4:95]: "Yet to each Allah has promised the reward most fair" and, lastly, on the fact that the Prophet never went to battle without leaving some people behind. All this together implies that this activity is a collective obligation. . . .

Scholars agree that all polytheists [according to many modern Shariah authorities, this includes anyone who holds secular law as superior to Allah's Shariah] should be fought. This is founded on [8:39]: "Fight them until there is

no persecution and the religion is Allah's entirely." . . . Damage inflicted upon the enemy may consist in damage to his property, injury to his person or violation of his personal liberty, i.e., that he is made a slave and is appropriated. This may be done, according to ijma [the consensus the Shariah authorities] to all polytheists: men, women, young and old, important and unimportant. . . .

Most scholars are agreed that, in his dealings with captives, various policies are open to the Imam [head of the Islamic state, or caliph]. He may pardon them, enslave them, kill them, or release them either on ransom or as dhimmi [non-Muslim subjugated to the Muslim regime], in which latter case the released captive is obliged to pay poll-tax (jizya).

Ibn Taymiyya (14<sup>th</sup> century), a Hanbali jurist, and a favorite of contemporary jihadists:

Since lawful warfare is essentially jihad and since its aim is that the religion is Allah's entirely and Allah's word is uppermost, therefore according to all Muslims, those who stand in the way of this aim must be fought. As for those who cannot offer resistance or cannot fight, such as women, children, monks, old people, the blind, handicapped and their likes, they shall not be killed unless they actually fight with words (e.g. by propaganda) and acts (e.g. by spying or otherwise assisting in the warfare).

While Ibn Taymiyya focused almost exclusively on the obligation of defensive jihad in light of the Mongol invasion of the Muslim empire, and indeed held that offensive jihad was voluntary and had no place in Shariah without the sufficient resources and order of a military campaign because arbitrary and unlawful offensive jihad would “constitute the greatest compulsion in religion” and presumably violate the Quranic prohibition against compulsion (Q. II, 257) (*see* Ibn Taymiyya, “Qa’ida fi Qital al-Kuffar,” in *Majmu’at Rasa’al*, ed. M. Hamid al-Fiqqi (Cairo, 1949) (Arabic), pp. 126-153), his injunction for defensive jihad as a personal obligation to fight the “false” Muslim leaders and all others who might utilize non-Shariah law to govern Dar al-Islam or otherwise allow non-acceptable worship in the realm has been the favorite source of the contemporary mujahideen for jihad against all Western interests anywhere in the Muslim world—including that part of the world once considered in the domain of Dar al-Islam such as Spain and other parts of Europe, northern and parts of sub-Saharan Africa, and large regions of Asia (*see* Shaykh al-Islam Ibn Taymiyah, *Al-'Ubuliyah. Being a True Slave of Allah* (London: Ta-Ha Publishers, 1999), pp. 112-113; Ibn Taymiyya, *Ibn Taymiyya on Public and Private Law in Islam: Or Public Policy in Islamic Jurisprudence*, trans. Omar A. Farrukh (Beirut, Lebanon: Khayats, 1966), pp. 138-145; for the use of Ibn Taymiyya by modern jihad advocates, *see* Mary Habeck, *Knowing the Enemy* (New Haven: Yale U. Press, 2006), fn. 10 at p.182).

The Hanafi school, as set forth in an the authoritative work, *Hidaya*, authored by Burhan-ud-din Ali ben Abu Bakr al-Marghilani (12th century), a work which is considered widely authoritative as a guide to Islamic jurisprudence in Central Asia, Afghanistan, and India, rules:

It is not lawful to make war upon any people who have never before been called to the faith, without previously requiring them to embrace it, because the Prophet so instructed his commanders, directing them to call the infidels to the faith, and also because the people will hence perceive that they are attacked for the sake of religion, and not for the sake of taking their property, or making slaves of their

children, and on this consideration it is possible that they may be induced to agree to the call, in order to save themselves from the troubles of war.

If a Muslim attacks infidels without previously calling them to the faith, he is an offender, because this is forbidden; but yet if he does attack them before thus inviting them and slay them, and takes their property, neither fine, expiation, nor atonement are due, because that which protects [namely, Islam] does not exist in them, nor are they under protection by place [namely the Dar al-Islam], and the mere prohibition of the act is not sufficient to sanction the exaction either of fine or of atonement for property; in the same manner as the slaying of the women or infant children of infidels is forbidden, but if, notwithstanding, a person were to slay such, he is not liable to a fine. It is laudable to call to the faith a people to whom a call has already come, in order that they may have the more full and ample warning; but yet this is not incumbent, as it appears in the Traditions that the Prophet plundered and despoiled the tribe of al-Mustaliq by surprise, and he also agreed with Asamah to make a predatory attack upon Qubna at an early hour, and to set it on fire, and such attacks are not preceded by a call. (Qubna is a place in Syria: some assert it is the name of a tribe).

If the infidels, upon receiving the call, neither consent to it nor agree to pay capitation tax, it is then incumbent on the Muslims to call upon Allah for assistance, and to make war upon them, because Allah is the assistant of those who serve Him, and the destroyer of His enemies, the infidels, and it is necessary to implore His aid upon every occasion; the Prophet, moreover, commands us so to do. And having so done, the Muslims must then with Allah's assistance attack the infidels with all manner of warlike engines (as the Prophet did by the people of Ta'if), and must also set fire to their habitations (in the same manner as the Prophet fired Baweera), and must inundate them with water and tear up their plantations and tread down their grain because by these means they will become weakened, and their resolution will fail and their force be broken; these means are, therefore, all sanctified by the law.

The renowned Shafi'i scholar Abu'l Hasan al-Mawardi (11<sup>th</sup> century), holds:

The mushrikun [polytheists] of Dar al-Harb (the arena of battle) are of two types: First, those whom the call of Islam has reached, but they have refused it and have taken up arms. The amir of the army has the option of fighting them...in accordance with what he judges to be in the best interest of the Muslims and most harmful to the mushrikun... Second, those whom the invitation to Islam has not reached, although such persons are few nowadays since Allah has made manifest the call of his Messenger...it is forbidden to...begin an attack before explaining the invitation to Islam to them, informing them of the miracles of the Prophet and making plain the proofs so as to encourage acceptance on their part; if they still refuse to accept after this, war is waged against them and they are treated as those whom the call has reached...

Underscoring the fact that this is not merely of historical interest is another Shafi'i manual of Islamic law that in 1991 was certified by the highest authority in Sunni Islam, Cairo's Al-Azhar University, as conforming "to the practice and faith of the orthodox Sunni community." This manual, *'Umdat al-Salik* (available in English as *Reliance of the Traveller*), after defining the

“greater jihad” as “spiritual warfare against the lower self,” devotes eleven pages to the “lesser jihad.” It defines this jihad as “war against non-Muslims,” noting that the word itself “is etymologically derived from the word mujahada, signifying warfare to establish the religion.”

It spells out the nature of this warfare in quite specific terms: “the caliph makes war upon Jews, Christians, and Zoroastrians . . . until they become Muslim or pay the non-Muslim poll tax.” It adds a comment by a Jordanian jurist that corresponds to Muhammad’s instructions to call the unbelievers to Islam before fighting them: the caliph wages this war only “provided that he has first invited [Jews, Christians, and Zoroastrians] to enter Islam in faith and practice, and if they will not, then invited them to enter the social order of Islam by paying the non-Muslim poll tax (jizya) . . . while remaining in their ancestral religions.” Also, if there is no caliph, Muslims must still wage jihad.

Ibn Khaldun (1332-1406), a pioneering historian and philosopher, was also a Maliki legal theorist. In his renowned *Muqaddimah*, the first work of historical theory, he notes that “in the Muslim community, the holy war is a religious duty, because of the universalism of the Muslim mission and (the obligation to) convert everybody to Islam either by persuasion or by force.” In Islam, the person in charge of religious affairs is concerned with “power politics,” because Islam is “under obligation to gain power over other nations.”

#### Additional Academic Secondary Sources:

Rudolph Peters, *Jihad in Classical and Modern Islam*, 2<sup>nd</sup> ed. (Princeton: Markus Wiener Publications, 2005).

David Cook, *Understanding Jihad* (Berkeley: Univ. of Cal. Press, 2005).

Reuven Firestone, *Jihad: The Origins of Holy War in Islam* (New York: Oxford Univ. Press, 1999).

For an excellent collection of primary and secondary source materials, Andrew G. Bostom, ed., *The Legacy of Jihad* (New York: Prometheus Books, 2005).