

## SAVING AND TAKING LIFE IN WAR: THREE MODERN MUSLIM VIEWS

A curious inversion of foci is evident in modern Islamic discussions of war when compared with the medieval literature. The majority of medieval writers began with a consensus on the grounds for war (*jus ad bellum*), which held jihad to be both a war of defense as well as a war for the expansion of a *pax Islamica*. They focused in their writings much more on concerns of legitimate means in warfare (*jus in bello*). Modern writers, on the other hand, concentrate heavily on *jus ad bellum* while devoting very little attention to *jus in bello*. A number of explanations may account for this emphasis:

First, modern writers are generally so fixated upon reinterpreting the grounds for jihad in light of modern sensibilities on wars of religion that discussion of proper conduct in jihad becomes marginalized. Virtually all works produced during the past century are to some degree responses to Western apprehensions of jihad.

Second, most Muslims would agree that international norms of behavior in wartime conform to Islamic injunctions on humane behavior toward the enemy.<sup>1</sup> Moreover, inasmuch as modern Muslim jurists have contributed to the evolution of international humanitarian law and Muslim states have acceded to the UN Charter, the Geneva Conventions and related protocols, as well as other international agreements, one could argue both that Islamic values have contributed implicitly if not explicitly to the evolution of international humanitarian law, and that most Muslims hold incompatible features of the medieval Islamic theory to be obsolete.<sup>2</sup> Indeed, some Muslim writers have argued that the antecedents for the Western just war tradition's concerns with proportionality and discrimination in war, which in turn contributed to the rise of humanitarian law, lie in Islamic conceptions of jihad.<sup>3</sup>

<sup>1</sup> In addition to the authors considered in this article, see Muḥammad Abū Zahrā', *Concept of War in Islam*, trans. Muhammad al-Hady and Taha Omar (Cairo: Ministry of Waqf, 1961); Yadh ben Ashoor, *Islam and International Humanitarian Law* (Geneva: International Committee of the Red Cross, 1980); and the survey of Muslim doctrine and contemporary practice by Karima Bennoune, "As-Salāmu 'Alaykum? Humanitarian Law in Islamic Jurisprudence," *Michigan Journal of International Law* 15 (Winter 1994): 605-43.

<sup>2</sup> See Ann Elizabeth Mayer, "War and Peace in the Islamic Law Tradition and International Law," in *Just War and Jihad*, ed. James Turner Johnson and John Kelsay (New York: Greenwood, 1991), 198.

<sup>3</sup> Muḥammad Hamidullah, *Muslim Conduct of State*, 7th ed. (Lahore: Sh. Muḥammad Ashraf, 1961), 66-73. Most recent writers making this claim rely upon Marcel Boisard, "On the Probable Influence of Islam on Western Public and International Law," *International Journal of Middle East Studies* 11 (July 1980): 429-50.

the emergence of certain moral absolutist trends in the juristic culture Muslim jurists look to issues of moral culpability or guilt in articulating the appropriate rules of conduct that should be afforded to Muslim or non-Muslim combatants. But the assessment of guilt works in favor of Muslim combatants who rely on an interpretation or cause. Muslims who espouse unacceptable causes (such as tribalism), or non-Muslims who refuse to adopt Islam, are considered morally culpable, and this in turn affects their treatment. Nevertheless, despite the consideration given to issues of guilt Muslim jurists did not focus on a *jus ad bellum* style of inquiry. They seemed to adopt a functional approach, and attempted to influence the conduct of war rather than the commencement of war. In this context Muslim jurists balanced practical interests against various imperatives. Importantly, however, one clearly discerns various attempts to create moral absolutist parameters within which the balancing and negotiative process may take place. One suspects that the various moralistic trends correlated with specific socio-historical contexts as Muslim jurists continued to creatively negotiate their realities. Importantly, Muslim juristic discourses were neither purely functional nor moralistic. Even more, they were far from dogmatic or essentialist in nature. In order to better understand the processes and nature of the juristic discourses it is important to study the details of the juristic linguistic practice within various historical contexts. For instance, it is imperative to examine the rise or demise of absolutist moral tendencies within the context of the dynamics between the abode of Islam and abode of disbelief. With the disintegration of the 'Abbāsi Caliphate in the fourth/tenth century, and the Crusades and Mongol invasions after the sixth/twelfth century, the clarity and neatness of the dichotomy between the abode of Islam and the abode of disbelief came under a serious challenge.<sup>43</sup> It would be of great significance to examine whether the deconstruction of the conceptual unity of the abode of Islam aided or hampered the rise of moralistic tendencies in the juristic discourses. Perhaps such inquiries would contribute to the debunking of essentialist positions on the nature of Islamic international law.

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<sup>43</sup> See Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1/2 (1994): 161 n. 56 where the various definitions of the abode of Islam is addressed.

Third, free discussion by Muslim authors of such controversial subjects as the morality of torture, rape, terrorism, assassination, guerrilla insurgency, and weapons of mass destruction, or the punishment of violators of Islamic principles, is seriously limited by the repressive political atmosphere in which many work.

The paucity of Muslim discussion of *jus in bello* poses some serious problems for students of the Islamic ethics of saving and taking life in war, for it is within *jus in bello* that most of the moral concerns on this topic are raised. This paper will focus on the works of three modern writers who have addressed both *jus ad bellum* and *jus in bello* issues. Abū al-Ālā Mawdūdī (d. 1979), the founder of the most important Islamic party in the Indian subcontinent, the Jamā'at-i Islāmī, began *al-jihād fī al-Islām* in 1926 as a series of articles in the Urdu-language newspaper *al-Jam'iyat*.<sup>4</sup> The complete work was first published in 1930 to wide acclaim from Indian Muslim intellectuals.<sup>5</sup> Mawdūdī would continue to address topics relating to jihad in his subsequent works, most notably in his voluminous Qur'anic commentary, *Tafhīm al-Qur'ān*, published between 1950 and 1973.<sup>6</sup> Muhammad Hamidullah, professor of Islamic law and history at Osmania University in Hyderabad, India, and later at the Sorbonne, published *The Muslim Conduct of State* in 1941-42 as a series of articles in the journal *Islamic Culture*. It was one of the earliest works on Islamic international law published in a Western language and thus provided an introduction to the subject to many non-Muslim as well as Muslim students. Hamidullah continued to revise the text, publishing in 1977 the seventh edition.<sup>7</sup> Wahba al-Zuhaylī, professor of Islamic jurisprudence at the University of Damascus, first published *Āthār al-ḥarb fī al-fiqh al-Islāmī: dirāsa muqārana* in 1963, with the third edition appearing in 1981.<sup>8</sup> In addition, al-Zuhaylī has published a second, shorter work entitled *al-Ālāqāt al-duwaliya fī al-Islām: muqārana bi-l-qānūn al-duwalī al-ḥadīth* (1981) that both summarizes some arguments in *Āthār al-ḥarb* and expands on other topics.<sup>9</sup>

<sup>4</sup> See Seyyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (New York: Oxford University Press, 1996), 22-23, for the background to Mawdūdī's writing of *al-jihād fī al-Islām*.

<sup>5</sup> From the publisher's preface to Abū al-Ālā Mawdūdī, *al-jihād fī al-Islām* (Lahore: Idāra Tarjumān al-Qur'ān, 1988).

<sup>6</sup> Khurshid Ahmad, foreword to Abū al-Ālā Mawdūdī, *Tafhīm al-Qur'ān*, trans. and ed. Zafar Ishaq Ansari, *Towards Understanding the Qur'an* (Leicester, UK: The Islamic Foundation, 1988), 1: xiii.

<sup>7</sup> Hamidullah, *op. cit.*

<sup>8</sup> Wahba al-Zuhaylī, *Āthār al-ḥarb fī al-fiqh al-Islāmī: dirāsa muqārana* (Beirut: Dār al-Fikr, 1981).

<sup>9</sup> Wahba al-Zuhaylī, *al-Ālāqāt al-duwaliya fī al-Islām: muqārana bi-l-qānūn al-duwalī al-ḥadīth* (Beirut: Mu'assasat al-Risāla, 1981); a précis of al-Zuhaylī's views is available in French in Wahba Moustapha Zehili, "Dispositions internationales relatives à la guerre, justifiées au regard de l'Islam et leurs aspects humains caractéristiques," in *Les religions et la guerre. Judaïsme, Christianisme, Islam*, ed. Pierre Viaud (Paris: Cerf, 1991), 389-419.

These three authors have been selected not only because they are among the few modern writers who address comprehensively and systematically the whole theory of jihad, but also because they are among the few modern writers who evaluate critically the relevance of various aspects of the medieval theory to modern norms and circumstances. Because their works are pioneering and innovative, they have significantly influenced generations of students and are well-known beyond their native cultural context. Mawdūdī's work, for example, was summarized in Arabic and appeared alongside articles on jihad written by Ḥasan al-Bannā<sup>7</sup> and another Muslim Brother who was profoundly influenced by Mawdūdī, Sayyid Quṭb.<sup>10</sup>

These three authors are also significant in that they represent the general direction of Islamic thinking on issues of war and peace. Despite differing cultural backgrounds, their works bear some remarkable similarities in both methodology and substance.

First, all three authors' works are primarily exegeses of authoritative texts. Hamidullah and al-Zuḥaylī, as specialists in *sharī'a*, feel compelled to address the medieval juristic literature on international relations (*siyar*), highlighting its continued relevance to modern Islamic discussions. For Mawdūdī, the only authoritative texts are the Qur'an and *hadīth*, and he only infrequently mentions the *siyar*, primarily to buttress his own views. The point is, though, that all three writers, like the vast majority of their colleagues, assign no Islamic value to nearly thirteen hundred years of Muslim practice or legislation.<sup>11</sup> Moreover, the fact that twentieth-century writers feel compelled to engage the works of theorists from the eighth through the fourteenth centuries highlights the stagnation of Islamic theory over some five centuries. Nevertheless, Hamidullah, al-Zuḥaylī, and of course Mawdūdī do not feel bound by the conclusions of the medieval jurists (*fuqahā*). Each assumes the need for critical reevaluation of the

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<sup>10</sup> See Ḥasan al-Bannā<sup>7</sup>, Sayyid Quṭb, and Abū al-Ālā al-Mawdūdī, *al-Jihād fī sabīl Allāh* (Cairo: Ṣawt al-Ḥaqq, 1977). On Mawdūdī's influence on Sayyid Quṭb, see for example Emmanuel Sivan, *Radical Islam: Medieval Theology and Modern Politics* (New Haven: Yale University Press, 1990), 84-86. Ibrahim Abu-Rabi<sup>6</sup> critically reappraises this view in *Intellectual Origins of Islamic Resurgence in the Modern Arab World* (Albany: State University of New York, 1996), 139.

<sup>11</sup> Hamidullah does mention several sources beyond the Qur'an and Prophetic *sunna* as "roots and sources" of Islamic international law, including the practice of the four rightly-guided caliphs and other rulers who have not been repudiated by *ūlamā*<sup>7</sup>; arbitral awards; treaties, pacts, and other conventions; internal legislation; and custom and usage. But he concludes this discussion by suggesting that only the Qur'an and *sunna* form "permanent positive law," while all others are "temporary positive law," "non-positive or case law," and "suggested law." Hamidullah, *Muslim Conduct of State*, 18-37. His subsequent discussion of legal doctrine relies almost entirely on the corpus of medieval jurisprudence, which itself relied almost entirely on the Qur'an and precedents attributed to the Prophet and the first four caliphs.

medieval literature, and each performs, in effect, *ijtihād* by advancing opinions based on his own reading of the Qur'an and *sunna*.<sup>12</sup>

Second, all three realize the necessity of addressing the prevailing international legal regime. Each writes with the awareness that many aspects of the medieval Islamic theory of world order are incompatible with modern international law. Moreover, each is aware that this international law originated among European states that long considered Muslim states as unworthy of full or even partial inclusion in international society. There is thus an unmistakable apologetic tone, present to varying degrees, underlying the comparisons that each author makes between Islamic law and international law.<sup>13</sup>

Third, all three arrive at remarkably similar conclusions on the ethics of killing and saving life in war. We will begin by briefly considering their views on *jus ad bellum*, the legitimate grounds for war, for the very first moral calculation that occurs in war is the justification of the loss of innocent life that inevitably follows the beginning of war. But at the level of *jus ad bellum*, the morality of saving and taking life remains at a high level of abstraction. It is only when we move to *jus in bello*, the justification for killing or protecting human beings in the midst of battle, that the moral issues become sharply focused and acquire human dimensions. Thus we will concentrate here upon five of the most salient issues within *jus in bello*, issues discussed by all three of our authors: (1) the definition of combatants and noncombatants, (2) the tactics and weapons which may be used against the enemy, (3) the giving of quarter in battle, (4) the treatment of prisoners of war, and (5) the suspension of normal restrictions on killing in cases of necessity.

## The Justification for War

Medieval Muslim writers devoted remarkably little attention to the philosophical question: Why do human beings kill each other through

<sup>12</sup> Of the three, Hamidullah is most reluctant to adopt openly the goal of reinterpreting medieval theory. He writes in the preface to the third edition: "I am not writing on what, according to [the] modern average Muslim, ought to be the Muslim law, but what has always been considered to be the Muslim law." Hamidullah, *Muslim Conduct of State*, vi-vii. The process of adducing "what has always been considered to be Muslim law" is, however, itself an interpretive process, particularly when it is coupled with Hamidullah's underlying goal, which is to argue the medieval *sijar*'s essential compatibility with public international law.

<sup>13</sup> In using the term "apologetic," I do not mean to link these three writers with the so-called apologists of the nineteenth century, mainly Indian, whose avowed goal was to refute point-by-point the charges of various Orientalists regarding jihad. This is clearly not the goal of the three considered here, particularly al-Zuhayli. Their works are apologetic in the sense of advocating or defending a particular view, namely that Islamic law is as just and humane—if not more so—as public international law and other conceptions of world order. On this point see Mayer, "War and Peace in Islamic Tradition," 221, n. 8.

war?<sup>14</sup> In the medieval juristic literature on jihad in particular, war is treated as a mundane, universal aspect of human existence, and as such, something that Islamic law must necessarily include within its purview. Sunni jurists distinguished wars against unbelievers from wars against other Muslims. Wars against unbelievers were further divided into defensive fighting to repulse enemy aggression against Islamic territory or Muslim populations, and the struggle to expand the territory in which Islamic law applied (*dār al-Islām*) by reducing the territory of the infidels (*dār al-ḥarb*). Both types of conflict justified killing, although in the second type (what we may call the expansionist jihad), killing of the enemy was permitted only as the final stage in a hierarchy of options to be offered the enemy: first, that they accept Islam; second, that they accept Islamic sovereignty and agree to *dhimmi* (protected) status; third, and finally, if they refuse the other two options, they are to be given fair warning and fought.<sup>15</sup>

Conflicts against other Muslims were discussed in the context of the Islamic state suppressing rebels, fighting apostates, or combating highway robbers and pirates—all of which fell within the state's police power to suppress *fitna* (civil discord) and *fasād* (corruption in society). Although killing was certainly permitted in dealing with each of the above categories of enemies of the state, medieval jurists emphasized the preference to avoid such extreme measures if other means to rehabilitate the offenders could be found, particularly in the case of rebels. Even though rebellion aimed at overthrowing the regime in power or secession aimed at creating a separate state were both seriously limited in the medieval theory, stricter rules of engagement pertained to fighting between the state and rebels or secessionists than those governing fighting with non-Muslims.<sup>16</sup>

The collapse of a unitary Islamic caliphate and the lapse of the expansionist jihad reduced the medieval juristic worldview to a historical abstraction quite early in Islamic history. European imperialism and the subsequent emergence of Muslim states organized according to the territorial state model raised even more obvious and profound problems for the medieval Islamic approach to world order. The reinterpretation of jihad has figured prominently in modern Muslim attempts to accommodate to the changed international realities.

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<sup>14</sup> Majid Khadduri has discussed briefly the few philosophical treatments of this issue in *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins University Press, 1955), 55-73.

<sup>15</sup> This injunction is grounded in a Prophetic *ḥadīth* narrated by Muslim, Abū Da'ūd, and Tirmidhi.

<sup>16</sup> See Khaled Abou El Fadl's article in this issue of *The Muslim World*; see also idem., "Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam," in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay (New York: Greenwood, 1990), 149-76.

Mustansir Mīr divides modern Muslim interpreters of the medieval conceptions of jihad into three broad categories: (1) the apologists, centered mainly in British India, who seek to present jihad historically (confining themselves largely to the life of the Prophet) as well as theoretically (confining themselves largely to the Qur'an) as purely defensive war; (2) the neo-classicists, who reinterpret the Qur'an and *sunna* according to their own light and deduce new formulations regarding jihad; (3) the modernists, whose principal motivation is to reinterpret the Qur'an and *sunna* in light of modern conditions and prevailing international norms.<sup>17</sup>

Mīr's typology is useful at a very general level for distinguishing different approaches, motivations, and even substantive conclusions on the meaning of jihad in modern times. But very few writers fit neatly into one category or the other, even in large part. For example, Mīr considers Mawdūdī representative of the neo-classical position, for his goal is to infuse Muslims with a proper appreciation of jihad following the "false" interpretations rendered by earlier apologists. Yet, another of Mawdūdī's stated motivations closely resembles those of the very apologists he decried, namely to refute the false assertion of Orientalists that Islam was spread by the sword. At the same time, his views on the justifications and aims of jihad are hardly distinguishable from those of many modernists.

One thing that unites apologists, neo-classicists, and modernists is the very modern need to justify the resort to war.

Mawdūdī opens *al-Jihād fī al-Islām* by asserting that "the first principle of the law upon which human society rests is that life is sacred."<sup>18</sup> No social intercourse is possible without this principle, and thus all societies require governments to protect life by maintaining order and punishing offenders. But the role of religion, he writes, is to impress upon people the intrinsic value of life, so that life will be honored and safeguarded even in the absence of government.<sup>19</sup>

In Islam, Mawdūdī argues, the importance assigned to protecting life, and the enormity of taking innocent life, is indicated in numerous Qur'anic verses and Prophetic *ḥadīth*. Yet the prohibition on shedding blood is qualified by the Qur'anic injunction which reads: "Do not slay the soul sanctified by God, except for just cause" (6: 151; 25: 68). Mawdūdī comments in *Tafhīm al-Qur'ān* that what is meant by "just cause" is

three cases. . . embodied in the Qur'an whereas two additional cases have been stated by the Prophet (peace be upon him). The cases

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<sup>17</sup> Mustansir Mir, "Jihad in Islam," in *The Jihad and Its Times*, ed. Hadia Dajani-Shakeel and Ronald Messier (Ann Arbor: Center for Near Eastern and North African Studies, University of Michigan, 1991), 117-22.

<sup>18</sup> Mawdūdī, *al-Jihād fī al-Islām*, 23.

<sup>19</sup> *Ibid.*, 24.

mentioned in the Qur'an are the following: (1) That a man is convicted of deliberate homicide and thus the claim of retaliation is established against him. (2) That someone resists the establishment of the true faith so that fighting against him might become necessary. (3) That someone is guilty of spreading disorder in the Domain of Islam and strives to overthrow the Islamic order of government. The two cases mentioned in the *Hadith* are: (1) That a person commits illegitimate sexual intercourse even after marriage. (2) That a Muslim is guilty of apostasy and rebellion against the Muslim body-politic. Except for these five reasons, slaying a human being is not permissible, regardless of whether he is a believer, a protected non-Muslim (*dhimmi*) or an ordinary unbeliever.<sup>20</sup>

The duty to take life in cases where it is warranted, Mawdūdī concludes in *al-Jihād fī al-Islām*, is as strong as the normal obligation to save life. For if anything is more precious than life, it is the upholding of truth and justice (*ḥaqq*) which makes life meaningful.<sup>21</sup> As individuals may justly defend themselves against attack, even to the point of killing the attacker, so may communities defend themselves against threats to social stability, even to the point of eliminating the threat.<sup>22</sup> Likewise, as societies consist of recalcitrant individuals who resist the laws of the community, so humankind as a whole consists of recalcitrant societies who resist divine laws and thereby promote oppression (*ẓulm*), rebellion (*fitna*), and corruption (*fasād*).<sup>23</sup> Given the presence of such oppressive and unjust rulers or communities, Muslims must be constantly prepared for war.

Hamidullah opens his discussion of Islamic conceptions of war by observing that Muslims "think of war only as unavoidable, not as desired or to be sought after." He consciously omits what he terms "any philosophical or historical discussion of war," but it is clear from the structure of his book, which begins with regulations on peaceful intercourse, that he considers war as the exception to the normal state of peace between Islamic and non-Islamic states.<sup>24</sup>

Like Mawdūdī, al-Zuḥaylī begins his discussion with a lengthy consideration of the Islamic approach to war and peace. He acknowledges that war is a necessary aspect of human existence, one sanctioned by the Qur'an as a means of self-defense and preserving a just society. But, he argues, war is not something natural to human beings, as Ibn Khaldūn proposes in the *Muqaddima*. Rather, it is contrary to human nature, which inclines

<sup>20</sup> Mawdūdī, *Tafhīm al-Qur'ān*, trans. Ansari, 2: 291-92.

<sup>21</sup> Mawdūdī, *al-Jihād fī al-Islām*, 32.

<sup>22</sup> *Ibid.*, 30-34.

<sup>23</sup> *Ibid.*, 34-36.

<sup>24</sup> Hamidullah, *Muslim Conduct of State*, 162.

toward peace, for does not the Qur'an state that "War is prescribed for you, though it be hateful to you" (2: 216)?<sup>25</sup>

Al-Zuḥaylī expands this point to the international level by positing that the Qur'anic vision holds peace to be the normal and universal state of human relations. The majority of medieval Muslim jurists who held the opposite view, he avers, arrived at their conclusion through strained interpretations of the Qur'an and *sunna*. For example, in order to justify their conception of jihad as an ongoing war to incorporate *dār al-ḥarb* into *dār al-Islām*, the majority held some 124 Qur'anic verses to have been abrogated by a single verse, the "verse of the sword" (9: 5). This was clearly a misapplication of the concept of abrogation, al-Zuḥaylī argues. For abrogation requires some conflict between verses, and such is not the case with regard to the Qur'anic revelation regarding war. All the verses on fighting were revealed in the context of those who had persecuted and attacked the Muslims before they were ordered to be fought.<sup>26</sup>

What then do Mawdūdī, Hamidullah, and al-Zuḥaylī consider to be legitimate grounds for war? Here again all three authors are in general agreement, although their specific classifications vary.

Mawdūdī continues his discussion by dividing legitimate wars into two types. The first is "defensive" war, which, he argues, is clearly enjoined by the Qur'an. But his reading of the Qur'an leads him to invoke the modern terminology of rights. Defensive war is justified in Islam, he writes, whenever hostile forces threaten the human rights (*insānī ḥuqūq*) of Muslims:

The Judicious Qur'an enjoins patience and forbearance in all matters, but it does not enjoin tolerating any attempts to wipe out the Islamic faith or the imposition upon Muslims of any other political order. It has forcefully commanded that if anyone attempts to seize your human rights, commits oppression, expels you from legitimately occupied land, deprives you of your faith and conscience, attempts to thwart you from your religious life, disrupts your social life with the aim of forcing you away from Islam, then in response you should never show weakness and you should devote your utmost strength to repel this oppression.<sup>27</sup>

As he wrote this passage, Mawdūdī was aware that prominent Muslim leaders, most notably the nineteenth-century reformer Sayyid Aḥmad Khān, had declared that jihad was unnecessary against an enemy, such as the British, who may deprive Muslims of sovereignty but do not interfere with

<sup>25</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 56-59.

<sup>26</sup> Ibid., 106-20.

<sup>27</sup> Mawdūdī, *al-Jihād fī al-Islām*, 55-56.

Muslim religious life.<sup>28</sup> Mawdūdī responds by arguing that defensive war is necessary whenever any threat exists against the Islamic state or territories, not just when an enemy prevents the performance of religious duties. The threat may originate from within the Muslim body politic in the form of hypocrites, rebels, or ordinary criminals.<sup>29</sup> Moreover, if the Muslims of a particular area are unable to defend themselves successfully against external attack or persecution, then it is obligatory (*fard 'ayn*) for all Muslims in all lands to assist them.<sup>30</sup>

The second type of legitimate war, Mawdūdī suggests, is what he terms "reformative" war. This type of war derives, he believes, from Islam's two inseparable goals, the first being to "command the right" (*amr bi-l-ma'rūf*) that is, to invite people to accept the truth of Islam's "religious" message. This appeal can in no way be pursued through coercion, and Mawdūdī expatiates at length on the falsehood of Muslim and non-Muslim claims to the contrary.

"Commanding the right" is linked, however, to "forbidding the wrong" (*nahy 'an al-munkar*), and it is this goal—Islam's "moral/political" mission to establish a just social order—which is the basis for reformative war. The second mission can and most often must be pursued through coercive means because unjust and oppressive regimes are rarely overthrown except through forceful resistance.<sup>31</sup>

The moral duty to enforce God's laws in this world is established, Mawdūdī argues, in the Prophet's interpretation of "commanding the right and forbidding the wrong." In the Meccan period of his mission, the Prophet's weakness in the face of his enemies prevented him from resisting oppression and injury by resort to arms. In this period, commanding the right and forbidding the wrong were synonymous in terms of the means employed: verbal suasion. But when in Medina the Prophet acquired the means to resist forcefully, he fought not only in response to persecution, but also to establish an Islamic order. In Medina, according to Mawdūdī, "commanding the right" diverged from "forbidding the wrong." The former obligation remained one of peacefully preaching the Islamic faith, whereas the latter became one of "cleansing the entire world of strife and corruption (*fitna* and *fasād*), whether the world consented to it or not."<sup>32</sup>

Mawdūdī acknowledges the historical linkage between war and the spread of Islam, at least in the initial expansion of the seventh-eighth cen-

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<sup>28</sup> See Aziz Ahmad, *Islamic Modernism in India and Pakistan: 1857-1964* (London: Oxford University Press, 1967), 31-34.

<sup>29</sup> Mawdūdī, *al-Jihād fi al-Islām*, 70-77.

<sup>30</sup> *Ibid.*, 57.

<sup>31</sup> *Ibid.*, 164-65.

<sup>32</sup> *Ibid.*

turies.<sup>33</sup> Yet his lengthy discussion is vague on the moral import for modern Muslims of this history. He suggests that Islam does not oppose independent national states.<sup>34</sup> But because he situates the ethical basis for the expansionist jihad in the Qur'anic injunction to forbid the wrong, we can only conclude that Mawdūdī sees in theory no prospect of this jihad ending as long as human beings remain true to his rather bleak assessment of their nature. In reality, however, Mawdūdī and the Jamā'at-i Islāmī put the reformative jihad very much on hold while they concentrated almost exclusively on defensive jihad in places like Kashmir and Afghanistan.<sup>35</sup>

Hamidullah's discussion parallels much of Mawdūdī's. He categorizes lawful wars into (1) defensive, which may include preventive strikes; (2) sympathetic, by which he means intervention of the Islamic state on behalf of persecuted and oppressed Muslims living under non-Muslim jurisdiction; (3) punitive, which includes wars against rebels, brigands, and apostates, or non-Muslims who have violated treaties; and (4) idealistic, which is his term for the expansionist jihad. Hamidullah emphasizes that this type of war is permissible only when peaceful means of propagating Islam have been foreclosed by a foreign power. This type of war emerges in Hamidullah's account as a sort of *mission civilisatrice*, bringing Islam's higher principles of justice and equality to corrupt societies and thereby opening them up to the preaching of Islam, not to coercion of faith. This was the basis for the jihad waged by the Prophet and the rightly-guided caliphs, suggests Hamidullah, but it is unclear from his discussion what relevance he attaches to this type of war in modern times.<sup>36</sup>

Al-Zuḥaylī outlines three types of legitimate war: (1) War against those who block the preaching of Islam, or against those who foment internal dissension and conflict. (2) War in defense of persecuted individuals or communities. Al-Zuḥaylī compares this type of war to cases of legitimate intervention, especially humanitarian intervention, allowed under international law. (3) War to repel aggression against oneself and one's country.<sup>37</sup> Although he holds that these grounds for war are not incompatible with principles of international law allowing resort to arms to repel aggression or oppression, al-Zuḥaylī also acknowledges that jihad's purposes may not be reduced to categories employed in international law. Jihad cannot be classified as either "defensive" or "aggressive" war if defense is understood as merely protection of one's national boundaries. Islam's call

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<sup>33</sup> Ibid., 174-75.

<sup>34</sup> Ibid., 146.

<sup>35</sup> See Masudul Hasan, *Sayyed Abu'l A'ala Maududi and His Thought* (Lahore: Islamic Publications, 1986), 185-96; and Seyyed Vali Reza Nasr, *The Vanguard of the Islamic Revolution: the Jamā'at-i Islāmī of Pakistan* (Berkeley: University of California Press, 1994), 120-21.

<sup>36</sup> Hamidullah, *Muslim Conduct of State*, 84, 172.

<sup>37</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 93-94.

to defend the right and repel injustice and oppression cannot be limited to any geographic boundaries. Jihad, he concludes, is *sui generis*.<sup>38</sup>

Regardless of the motivations for war, Mawdūdī, Hamidullah, and al-Zuḥaylī emphasize that war in Islam is always regulated by concerns for fighting and killing properly. Indeed, as they argue, the proper conduct of jihad has been an important concern of the Islamic approach to war from its origins.<sup>39</sup> The Qur'an provides the basis for *jus in bello* considerations in the first verse which transformed jihad from a nonviolent struggle, as it had been in Mecca, to a defensive war incumbent upon all able-bodied Muslims: "And fight in God's cause against those who wage war against you, but do not transgress (*lā ta'tadū*), for God loves not the transgressors" (2:190). The transgression mentioned here is ambiguous; the verse could be referring to concerns of *jus ad bellum*. But throughout Islamic history, the verse has been interpreted as restricting as well the means that Muslim forces may legitimately employ in war. Indeed, until the nineteenth century, Muslim discussion of the ethics of war (*adab al-ḥarb* or *akhlāq al-ḥarb*) meant essentially acceptable strategy or tactics.

The scope of Muslim discussion of proper conduct in war includes a broad range of issues relating to the treatment of persons and their property. In this discussion we will address only two broad questions that pertain directly to the ethics of saving and taking human life: Who ought to be saved and who may be killed in war? What means ought to be used to save life and which may be used to kill?

## Combatants and Noncombatants

The idea of discrimination in targets was an early and important subject in the medieval literature. As al-Zuḥaylī notes, it was a topic not entirely free from controversy. The majority of jurists agreed that certain categories of persons, especially women and children, should be protected from harm because the legal rationale (*'illa*) for killing was the "capacity to fight and harm the Muslims." In support of their position, they cited not only several Qur'anic verses on fighting, including "Fight in the way of God those who fight you. . ." (2: 190), but also many Prophetic *ḥadīths* admonishing Muslim armies to spare noncombatants.<sup>40</sup>

A minority argued, however, that the legal rationale for killing was lack of belief (*kufr*), and thus permitted the killing of all unbelievers. They based this view on the claim that the "verse of the sword," "And

<sup>38</sup> Ibid., 124-26; *al-'Alāqāt al-duwaliya*, 35-36.

<sup>39</sup> Mawdūdī, *al-jihād fī al-Islām*, 180, 216; Hamidullah, *Muslim Conduct of State*, 74-76; al-Zuḥaylī, *Āthār al-ḥarb*, 494-97, and *al-'Alāqāt al-duwaliya*, 45.

<sup>40</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 494-99.

when the forbidden months are passed, slay the unbelievers wherever you find them" (9: 5), abrogates other Qur'anic verses. In addition, the Prophetic *ḥadīth*, "I have been commanded to fight the people until they say 'There is no god but God' " establishes belief and unbelief as the motivation for war.<sup>41</sup>

Because they accept the general reasoning of the medieval majority, Mawdūdī, Hamidullah, and al-Zuḥaylī generally concur on the treatment of combatants and noncombatants. Al-Zuḥaylī concludes his discussion by arguing, in accordance with his views on the grounds for war, that the majority position was clearly correct: women, children, and others who ordinarily do not take part in the fighting should not be killed. The Qur'anic verse 2: 190 is not abrogated but binding, and if we consider closely its wording, we realize that the imperative verb "fight" (*qātilū*) belongs to the verbal form implying reciprocity (*af'āl al-mushārika*), verbs that connote action being done by more than one person. It must be read as "Do not fight anyone unless they fight you. Fighting is thus justified if you fight the enemy and the enemy fights you. It is not justified against anyone who does not fight the Muslims, and it is necessary [in this event] to make peace."<sup>42</sup>

Al-Zuḥaylī rejects any notion of collective responsibility for war among the enemy population. He writes that "Islamic law does not consider the entirety of the enemy population as combatants (*muḥāribūn*). The combatants are those who prepare themselves for battle directly or indirectly, such as soldiers—either officers or enlisted men—whether on land, the sea, or the air."<sup>43</sup> But al-Zuḥaylī's definition of combatants is not limited to soldiers actually in the field, and includes the head of state, military leaders, and even military medical personnel and military postal carriers—all who direct or support the war effort and prevent the early conclusion of hostilities. All such individuals may be targeted for attack by Muslim forces.<sup>44</sup>

Mawdūdī opens his discussion by observing that because the purpose of war in Islam is not to annihilate or excessively injure the enemy, Islam establishes two principles for the conduct of war: "In war, only that much force that is necessary to repel evil should be used, and this force should be used only against those ranks that are engaged in fighting or at the most against those from whom you fear some evil. All others should be safeguarded from the effects of war. . . ."<sup>45</sup> These two principles are famil-

<sup>41</sup> Ibid., 498-99.

<sup>42</sup> Ibid., 500-1.

<sup>43</sup> Ibid., 503; *al-Ālāqāt al-duwālīya*, 70-71.

<sup>44</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 505.

<sup>45</sup> Mawdūdī, *al-jihād fi al-Islām*, 217.

iar to just war theorists as proportionality of means and noncombatant immunity, although Mawdūdī's discussion of the latter differs in some crucial ways from the modern just war notions.

Mawdūdī continues by stating that Islamic law divides enemy persons into two categories: combatants (*ahl-i qitāl*) and noncombatants (*ghayr ahl-i qitāl*).<sup>46</sup> He defines combatants, in keeping with the medieval theory, as those who actually take part in fighting *or those who have the mental and physical capacity* to take part in the fighting, i.e. all adult males. All adult males, Mawdūdī concludes, may be killed, whether they are actually taking part in the fighting or not. How Mawdūdī reconciles this view with his position that prisoners of war may not be killed is unclear. Perhaps he means to say that enemy soldiers in rout or retreating to regroup for another battle may be killed even though they are momentarily not engaged in combat.

Noncombatants are defined as those who lack the mental and physical capacity to fight, or those who ordinarily do not fight. These include, according to Mawdūdī, women, children, old people, the sick, wounded, the blind, the insane, travelers, hermits, and religious functionaries.

Hamidullah adds to Mawdūdī's list peasants, traders, merchants, contractors, and others who do not fight and are indifferent to the effects of war.<sup>47</sup> All of these people are protected from killing by Islamic law, unless they themselves compromise their immunity by directly participating in the fighting or by aiding enemy troops. For example, if a woman spies upon Muslim forces, or an infirm person passes military information to the enemy, they may be killed.<sup>48</sup>

In spite of all efforts to spare noncombatants in war, some will of course be killed. Since the time of the medieval jurists, Islamic theory has excused Muslim soldiers from culpability in such unintentional killing, what just war theory terms "double effect." As Hamidullah writes, noncombatant casualties in the course of military operations where discrimination is difficult, such as night raids, are to be expected.<sup>49</sup> And as al-Zuḥaylī notes, the possibility of separating combatants from noncombatants has become nearly impossible with the advent of total war and air bombardment. The loss of life that should ordinarily have been spared is, he concludes, one of the inevitable consequences of military necessity.<sup>50</sup>

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<sup>46</sup> Ibid., 222-24.

<sup>47</sup> Hamidullah, *Muslim Conduct of State*, 207.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., 223.

<sup>50</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 504-6.

## Permissible Tactics and Weapons

The medieval legal approach to permissible tactics and weapons demonstrates a keenly practical bent. Muslim commanders must try to avoid unnecessary killing of enemy noncombatants, but if women, children, and others who are not engaged in the hostilities are killed as a consequence of military action, the fault lies with the enemy commanders who put such persons in harm's way. In other words, the killing of enemy non-combatants at the hands of Muslim troops is self-incurred harm.<sup>51</sup>

In *al-ʿAlāqāt al-duwalīya*, al-Zuḥaylī observes that the medieval *fuqahā* divided into two camps on the question of legitimate means. The first, including the Ḥanafīs, Shāfiʿīs, and Ḥanbalīs generally permitted all means required “to break the enemy’s strength, whether they are stringent or lenient. But the use of severity when more lenient means are available is reprehensible, because this is unwarranted corruption. . . .” In effect, Muslim armies are “free in fighting to subdue the enemy to use any means, for example, weapons of steel (*silāḥ al-abyaḍ*) and deadly agents, even to the point of poisoning the enemy with projected incendiaries and noxious gases. . . .”<sup>52</sup> The Shāfiʿīs and Ḥanbalīs made one exception to this general permission: None of the enemy may be killed by burning, according to the *ḥadīth*: “Do not punish a creature of God with the punishment of God.”<sup>53</sup> Ḥanafī jurists appear to have been the most liberal in permitting rather indiscriminate tactics, including the cutting off of the enemy’s water supply, or rendering it undrinkable by poisoning it. In addition, they allowed firing enemy fortresses or inundating them with water.<sup>54</sup>

As for the Mālikī school, al-Zuḥaylī writes that it did not give free latitude to overcome the enemy. Mālikī jurists did not permit the firing of enemy fortresses, unless the enemy employed such means and the Muslims resorted to them in retaliation. In addition, the Mālikīs did not permit poisoning of the enemy, whether it was in the water, or through gases, or on arrows.<sup>55</sup>

Al-Zuḥaylī is the only writer among the three considered here who discusses in any depth the issue of permissible means and weapons. Mawdūdī’s primary concern is to list the acts that Islam proscribes, and we shall consider these in the section on necessity. Hamidullah does discuss “acts permitted” in war, but he does so largely by listing medieval positions on a range of issues. He concludes that “it is very difficult

<sup>51</sup> See John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster/John Knox Press, 1993), 64-67.

<sup>52</sup> Al-Zuḥaylī, *al-ʿAlāqāt al-duwalīya*, 46.

<sup>53</sup> Ibid.

<sup>54</sup> Hamidullah, *Muslim Conduct of State*, 225.

<sup>55</sup> Ibid.

to give a comprehensive list of what acts are permitted. The general principle may help to a great extent that everything not prohibited is permissible."<sup>56</sup>

Al-Zuḥaylī permits, on the basis of military necessity, some tactics and weapons which undeniably will yield civilian casualties and large-scale destruction. He argues, for example, that Muslims may attack fortified locations even though they know that women, children, and possibly even Muslim hostages will likely be killed. The Muslims do not intend to kill these noncombatants, but the enemy has made their protection impossible by seeking refuge among them. This was the situation faced by the Prophet when he authorized the use of a catapult or mangonel during the siege of al-Taʿif.<sup>57</sup>

By invoking necessity, al-Zuḥaylī clearly seeks to limit the recourse to such means and to proscribe completely indiscriminate and irreversible weapons. On the issue of poisons, for example, he agrees with the minority position of the Mālikīs that their use is prohibited.<sup>58</sup>

Perhaps the most salient issue confronting modern Muslim writers is the advent of weapons of mass destruction. Modern chemical weapons, one may argue, are analogous to the medieval poisons and noxious gases described and permitted by most medieval writers—although of course the analogy is strained by the lethal qualities of the modern varieties. Biological and nuclear weapons pose altogether new challenges to contemporary Muslim ethicists. To my knowledge, Mawdūdī and Hamidullah have not directly addressed the implications of weapons of mass destruction for the Islamic ethics of war. Mawdūdī writes only generally that the Muslims are obliged to develop and acquire all types of weapons as a deterrent to possible enemy attack. The Qurʾanic verse he cites in support of this position is the one generally cited by all Muslim scholars who express an opinion on this topic: “And so prepare against them whatever force and war mounts you are able to muster, so that you might deter thereby the enemies of God” (8:60).<sup>59</sup>

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<sup>56</sup> Ibid., 229.

<sup>57</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 506-7.

<sup>58</sup> Al-Zuḥaylī, *al-Ālāqāt al-duwalīya*, 50.

<sup>59</sup> Mawdūdī, *al-Jihād fi al-Islām*, 82. Mawdūdī's party, the Jamaʿat-i Islami, has not been as reticent about nuclear weapons. It has long advocated Pakistan's acquisition of nuclear weapons, particularly after India's nuclear explosion in 1974. The Jamaʿat agitated for a Pakistani test in May 1998 following India's resumption of nuclear testing. Khurshid Ahmad, a leading Jamaʿat spokesman on foreign policy, has repeatedly urged the Pakistani government not to sign the Nonproliferation Treaty without Indian compliance, and to build a nuclear deterrence to counter India's arsenal. He bases his arguments in part on the Qurʾanic verse 8:60, as in his comments published in *Tarjumān al-Qurʾān*, December 1998 (transcript provided by the Jamaʿat-i Islami Pakistan).

Al-Zuḥaylī is one of the few Muslim scholars to address this issue, but even he does not explore the full range of moral concerns raised by such weapons. He mentions briefly that Islamic principles do not eliminate the possibility of considering these weapons as permissible, but that they “do not accord with the principle of compassion which is the basis of Islamic law, or requirements of fairness in battle.”<sup>60</sup> Muslims may develop such weapons as a deterrent against their enemies, but they should not be used first by Muslims, for as he writes, “they cause the destruction and death of those whom it is not permissible to kill, such as those not fighting, women, and the like.”<sup>61</sup> Their use is conceivable only if deterrence fails, and the enemy employs them first. Muslims may retaliate with such deadly force as a final and necessary recourse (*ākhir al-dawā’ al-kayy*, literally “the remedy that cauterizes” the wound).<sup>62</sup>

Thus, for al-Zuḥaylī, it would seem that weapons of mass destruction do not pose qualitatively different moral concerns than conventional weapons. He, like most Muslim commentators on this subject, does not probe the moral issues raised by deterrence, including the morality of threatening to do what one considers so reprehensible, or those raised by the actual use of such weapons, such as whether mass destruction may even be justified on the basis of reciprocity or punishment.

## Quarter

One of the most important features of the Islamic ethics of war is the giving of quarter (*amān*) to enemy troops or nonbelligerents. It was an important topic in the medieval literature, so significant, al-Zuḥaylī notes, that it belies the claim of the jurists that Islam’s international relations are predicated on war and not peace.<sup>63</sup> The scope of *amān* exceeded the assurance of security on the battlefield; *amān* could be granted to any foreigner originating from any territory—belligerent or not—by any adult Muslim for purposes of travel, residence, and trade within Islamic territory. The *amān* thus given was binding upon the Islamic state.

Our concern here though is with *amān* as an instrument for saving life in war. Muslims must always be inclined, writes Mawdūdī, towards peace, even in the midst of battle. The giving of quarter to the enemy soldier is an important means of furthering this goal. If any soldier lays down his arms and requests the security of his person, Muslims must grant him quarter according to the Qur’anic verse 4:90: “Therefore if they with-

<sup>60</sup> Al-Zuḥaylī, *al-Ālāqāt al-duwaliya*, 48.

<sup>61</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 789.

<sup>62</sup> Interview with Wahba al-Zuḥaylī, Damascus, Syria, 2 January 1991.

<sup>63</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 220.

draw from you and fight you not, and instead give you [assurances] of peace, then God has opened no way for you against them.”

According to another verse (9: 6) the purpose of *amān* is to allow the person given security (*musta'min*) to hear the call to Islam. Mawdūdī observes that “If they [who have been given *amān*] receive guidance and accept Islam, then that is the best outcome. But if their hearts do not open to Islam, then [Muslims] cannot kill them but must transport them safely to their own country.”<sup>64</sup>

Hamidullah points out that it is the act of requesting security that separates the *musta'min* from ordinary prisoners of war. *Amān* may thus be extended to individuals or groups of soldiers who capitulate to the conditions offered by the Muslim commander. *Amān* may also be extended unilaterally by the Muslims, as when the Prophet declared an amnesty to the general population of Mecca upon entering the city.<sup>65</sup>

## Prisoners of War

The majority opinion among medieval jurists that noncombatants should not be killed did not establish, however, the absolute immunity from harm of noncombatants. According to most jurists, all of the protected categories of persons are subject to the laws pertaining to prisoners of war. Though the majority held that they should not be executed, they could be enslaved, ransomed, or released.<sup>66</sup>

The most contentious issue for the medieval jurists was the fate of able-bodied, male prisoners of war, who, though momentarily incapacitated by capture, posed a potential future threat if freed. The medieval laws were based upon interpretations of two Qur'anic verses:

When you meet the unbelievers in battle, smite at their necks; at length, when you have thoroughly subdued them, bind a bond firmly (on them); thereafter (is the time for) either generosity or ransom, until war lays down its burdens (47:4).

A second verse dealt specifically with the fate of some seventy prisoners captured during the battle of Badr:

It is not fitting for a prophet that he should have prisoners of war until he has thoroughly subdued the land. You look for the temporal goods of this world, but God looks to the Hereafter and God is exalted in might, wise. Had it not been for a previous ordainment from God, a severe penalty would have reached you for what you took.

<sup>64</sup> Mawdūdī, *al-Jihād fī al-Islām*, 273.

<sup>65</sup> Hamidullah, *Muslim Conduct of State*, 209-11.

<sup>66</sup> See al-Zuhaylī, *Āthār al-ḥarb*, 418-29.

But (now) enjoy what you took in war, lawful and good: But fear God, for God is oft-forgiving, most merciful (8: 67-69).

The attempt to reconcile these apparently contradictory verses with each other, with other verses on war, and with the Prophet's practice yielded a number of different rulings on the treatment of prisoners. Jurists of the Ḥanafī school held that the second verse overruled the first and thus limited the options open to the *imām* to three: execution, enslavement, or release as *dhimmi*s. Some Ḥanafī jurists conceded that ransoming for money or exchanging prisoners for Muslims held by the enemy were options available to the *imām* in cases of necessity. The majority from other schools, however, held that the Muslim commander may decide according to the interests of the Muslims whether prisoners were to be executed, enslaved, ransomed, exchanged, or released. Thus, all the major schools of law held that execution of prisoners was an option available to the *imām*. They based this permission, writes al-Zuḥaylī, on (1) the claim that the "verse of the sword" (9: 5) had abrogated other rulings regarding male prisoners, (2) on instances where the Prophet had executed prisoners, and (3) on common sense which dictates that killing belligerents is most likely to bring war to a speedy conclusion.<sup>67</sup> Only a minority of jurists prohibited altogether the killing of prisoners, and held that this was the policy practiced by the Prophet and his companions.<sup>68</sup>

Mawdūdī, Hamidullah, and al-Zuḥaylī, like most contemporary writers, reject the medieval consensus on this view while embracing the minority position. Hamidullah's presentation of this topic clearly strains to make the medieval *fiqh* accord with current international norms. He cites Ibn Rushd as recording a consensus among the companions of the Prophet that a prisoner may not be killed simply for having undertaken hostile action against Muslims. If prisoners were executed, it was for reasons other than their belligerency. Later Ḥamidullah qualifies slightly his assertion that Islamic law prohibits the general execution of prisoners when he notes that Abū Yūsuf permitted killing if the *imām* deemed it in the Muslim interest. Peremptory, battlefield executions are unlikely, Hamidullah suggests, because medieval law vests the decision to kill or not to kill prisoners in the *imām* only, and not field commanders.<sup>69</sup>

In *al-Jihād fī al-Islām*, Mawdūdī also categorically states that "Islam prohibits the killing of prisoners of war."<sup>70</sup> A full exposition of Mawdūdī's

<sup>67</sup> Ibid., 429-35.

<sup>68</sup> Ibid., 439.

<sup>69</sup> Hamidullah, *Muslim Conduct of State*, 214-16. Al-Zuḥaylī writes that the majority of jurists gave the final decision on the disposition of prisoners to the *imām* as well as to his military commanders in the field. Their decision should be based on legal reasoning and not personal desire. Al-Zuḥaylī, *Āthār al-ḥarb*, 431.

<sup>70</sup> Mawdūdī, *al-Jihād fī al-Islām*, 249.

reasoning behind this claim is found in *Tafhīm al-Qurʾān*. In his interpretation of verses 8: 67-69, Mawdūdī argues that the medieval jurists had falsely interpreted them to sanction the general execution of prisoners. The verses can only be comprehended, he argues, if they are read in conjunction with verse 47: 4. Verse 47: 4 must be the "previous decree from God" mentioned in verse 8: 67 and not a later revelation as assumed by many Qurʾanic interpreters.<sup>71</sup> Thus, the real subject of the latter verse's disapproval is not the Prophet's ransoming of prisoners, but the Muslims' eagerness to collect spoils before sealing the victory over the enemy. The Qurʾan's legal judgment regarding prisoners, in Mawdūdī's view, is that they must be either freed or ransomed in accordance with the more general prescriptions of verse 47: 4.<sup>72</sup>

Al-Zuḥaylī proceeds in his argument by systematically refuting the medieval arguments permitting the killing of prisoners. First, on the claim of abrogation, al-Zuḥaylī argues that verse 47: 4 is binding and not abrogated by verse 9: 5 because abrogation presumes some direct conflict between verses. The two verses in question do not conflict with each other, as each deals with different aspects of fighting: The beginning of verse 47: 4 pertains to the time before prisoners are taken; verse 9: 5 deals with on-going battle; and the end of 47: 4 focuses on the disposition of prisoners. Muslims are offered only two choices in this matter, al-Zuḥaylī notes, freedom or ransom.<sup>73</sup>

As for the Prophet's practice and military requirements, al-Zuḥaylī argues that the Prophet executed prisoners only in special circumstances and only when other means to prevent harm and injury to the Muslims were not available. These instances do not constitute general or binding legal precedents. They pertain to a time when the Islamic community was weak and in constant danger, as indicated by the wording of what al-Zuḥaylī considers to be the earlier revelation (8: 67): "... until you have subdued the land." The second verse (47: 4) was revealed later, al-Zuḥaylī argues, to be the binding ruling on treatment of prisoners.<sup>74</sup> He concludes that "killing of prisoners in Islam is closer to being prohibited than it is to being permitted. When it is permitted, it is a useful remedy in specific, special cases under extreme necessity, and not a general rule."<sup>75</sup>

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<sup>71</sup> Mawdūdī writes in his interpretation of verse 47: 4: "This verse's language and context make clear that it was revealed after the command to fight had been revealed, and before fighting had actually started." It must have preceded, therefore, verses 8: 67-69, which by wide agreement were revealed after the first battle fought at Badr. Mawdūdī, *Tafhīm al-Qurʾān* (Lahore: Idāra Tarjumān al-Qurʾān, 1989), 5: 11 (The English translation by Ansari has not yet reached this chapter).

<sup>72</sup> Mawdūdī, *Tafhīm al-Qurʾān*, trans. Ansari, 3: 169-70.

<sup>73</sup> Al-Zuḥaylī, *Āthār al-ḥarb*, 435.

<sup>74</sup> Ibid., 436-38.

<sup>75</sup> Ibid., 440.

## Necessity

The language of necessity has arisen repeatedly in the course of our discussion. The idea of necessity (*darūra*) and the moral problems attached to it are familiar to Muslim theorists of war. As the well-established principle of Islamic jurisprudence states: *al-darūrāt tubīḥ al-maḥzūrāt* (necessity makes permissible the prohibited). In medieval law, it was generally applied to cases of imminent danger to the life or physical welfare of the individual or the community, such as in the lifting of dietary restrictions when faced with starvation.<sup>76</sup> Applied to war, however, necessity acquired a much broader scope than imminent destruction of an individual soldier or the Muslim community as a whole. It was invoked to legitimate normally prohibited actions in situations far less dire meaning most often—though the conditions were seldom specified—simply practical needs to attain victory or to remove exigencies such as the imminent defeat of Muslim forces in battle.

Two justifications were usually offered for the recourse to arguments of necessity: first, public welfare of the Muslim community (*maṣlaḥa mursala*) and second, reciprocity (*muqābala bi-l-mithl*) for violations of *jus in bello* perpetrated by the enemy. Al-Ghazālī offers in *al-Mustaṣfa* one of the best-known invocations of *maṣlaḥa mursala* in the context of war: When a dangerous non-Muslim enemy that threatens to overwhelm the territory of Islam and kill all Muslims uses Muslim captives as shields it is permissible for Muslim troops to kill the Muslim captives as collateral damage in their attack on the enemy. The killing of the Muslim hostages violates a clear Qurʾanic prohibition on taking innocent life, but in this case their deaths do not incur moral culpability because “(1) it is a matter of vital necessity (*darūra*), (2) it is a case of clear-cut certainty (*qaṭʿiyya*), and (3) its importance is universal (*kullīyya*).” Al-Ghazālī’s invocation of necessity in this example involves the welfare of all or nearly all Muslims facing extinction; he clearly rules out the application of the same principle when a majority, even a large majority, confronts a similar situation.<sup>77</sup>

We should note that al-Ghazālī uses this example to illustrate a point in jurisprudence; he is not addressing Islamic injunctions on war *per se*. The rule he is illustrating is that appeals to public welfare can contradict clear injunctions in the Qurʾan and *sunna* only in cases of dire necessity. Other jurists who wrote specifically as interpreters of the law of war did not adhere to such a high threshold when invoking necessity in war, especially where the Qurʾan and *sunna* were silent or ambiguous. An instructive

<sup>76</sup> *Encyclopaedia of Islam*, 2nd ed., s.v. “Darūra.”

<sup>77</sup> Cited in Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (Berkeley: University of California Press, 1966), 93-94.

example comes from al-Shaybānī's *Kitāb al-siyar al-kabīr*. Muslim troops may flood, fire, or bombard a city, even though they know women, children, and old people are inside, even to the point that Muslim hostages inside are killed. The justification is that "If the Muslims stopped attacking the inhabitants of the territory of war for any of the reasons [given], they would be unable to go to war at all, for there is no city in the territory of war in which there is no one at all of these you have mentioned."<sup>78</sup> War could be prosecuted by other, less dire methods, of course. But that does not seem to figure into al-Shaybānī's argument. The legal permission for employing certain means against the enemy does not change because of any moral concerns raised by the injection of noncombatants into the hypothetical situation. It is the enemy's unwillingness or inability to safeguard noncombatants that makes the enemy responsible for their deaths.

Moreover, we should note finally that al-Ghazālī as well as other medieval jurists were concerned with the welfare of the Muslims, not their foes, when considering exceptions to normal prohibitions. To continue the example from al-Shaybānī: Muslim troops should avoid targeting Muslim hostages being used as shields by the enemy, and should aim "at the inhabitants of the territory of war."<sup>79</sup>

The principle of reciprocity was perhaps the more commonly invoked justification for necessary violations of normal prohibitions. Medieval writers found Qur'anic justification for reciprocity as a principle of *jus in bello* in such verses as "If then any one transgresses the prohibition against you, transgress you likewise against him" (2: 194); "And fight the polytheists all together (*kāffatan*) as they fight you all together" (9: 36). Both of these verses are in the context of the prohibition on fighting in the four sacred months. But by combining them with earlier Qur'anic injunctions on retaliating no worse than the original affront (16: 126-27; 22: 60), medieval jurists adduced the general principle that reciprocity permitted the resort to rather indiscriminate methods if the enemy had initiated their use. Unfortunately, the moral justification for such permission is developed no further than the invocation of necessity. Moreover, it disregards the fact that each of the Qur'anic verses permitting reciprocity are followed by admonitions for restraint and even forgiveness as the better moral choice.

Al-Zuḥaylī is one of the few contemporary scholars to grapple with the complex issue of justifying and limiting claims to military necessity.<sup>80</sup> He writes:

<sup>78</sup> Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-siyar al-kabīr*, trans. Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: Johns Hopkins University Press, 1966), 102.

<sup>79</sup> Ibid.

<sup>80</sup> See Wahba al-Zuḥaylī, *Nazariyat al-darūra al-sharʿiyya: muqārana bi-l-qānūn al-waḍʿī* (Beirut: Dār al-Fikr, 1997).

In the arena of battle, the ends justify the means, according to the Islamic view. This does not mean that the desire for victory subsumes humanitarian principles, which limit [appeals to] necessity or military requirements, whether they relate to the methods of fighting and the destruction of enemy installations and military fortifications, or to issues relating to enemy persons and the seizing of their property.<sup>81</sup>

We saw earlier that al-Zuḥaylī, as well as Mawdūdī and Hamidullah, are willing to permit attacks upon areas where noncombatants are likely to die if military necessity requires it. So what limits on necessity do al-Zuḥaylī, Mawdūdī, and Hamidullah posit? Hamidullah offers a list of categorical prohibitions, the majority of which enjoyed near-universal support among the medieval *fuqahā'* because they were grounded on strong Prophetic tradition and, one could argue, on fundamental principles of humanity common to most ethical systems. Mawdūdī and al-Zuḥaylī would concur with this list: Unnecessarily cruel means of killing, such as through burning alive, torture, and mutilation; killing of ambassadors or the taking of hostages as shields against enemy attack; general massacre of the enemy following surrender; killing through treachery and perfidy, such as in violating oaths or grants of *amān*.<sup>82</sup>

This list is not extensive, and clearly much more work needs to be done in this area by Muslim ethicists. But in war, any *a priori* list of categorical prohibitions—if it is to be plausible—can seldom be longer.

## Conclusion

One interesting aspect of Mawdūdī's, Hamidullah's, and al-Zuḥaylī's works is that they make no attempt to place their thought within the context of modern Muslim thought on war and peace. Their interlocutors are either long-dead, the medieval *fuqahā'*, or non-Muslim, mainly Westerners concerned with Islamic law and ethics. They do not seriously engage their fellow, contemporary Muslim writers.<sup>83</sup>

If we were to place the three scholars within the broader context of Muslim thought, we would find that the general agreement found in comparing their ideas would extend to other contemporary interpreters. We

<sup>81</sup> Al-Zuḥaylī, *al-ʿAlāqāt al-duwālīya*, 45.

<sup>82</sup> Hamidullah, *Muslim Conduct of State*, 205-8; Mawdūdī, *al-Jihād fī al-Islām*, 224-38; al-Zuḥaylī, *Āthār al-ḥarb*, 500-7, and *al-ʿAlāqāt al-duwālīya*, 45-71.

<sup>83</sup> Hamidullah briefly lists nineteenth- and twentieth-century Muslim works that preceded his book (pp. 30-31) and mentions English-language contributions to the field as they appear in the prefaces to the various editions of *Muslim Conduct of State*. Al-Zuḥaylī refers only occasionally to earlier writers with whom he agrees, most notably Muḥammad ʿAbduh and Muḥammad Abū Zahrāʾ.

may call this the modern scholastic consensus on the Islamic ethics of saving and taking life in war. There are certainly voices outside the mainstream, particularly those of the so-called Islamic radicals or militants. But these voices have always been marginal to the Islamic discourse and they are becoming further marginalized over time.

With regard to the grounds for war, all three emphasize the rationale of defense: defense of one's self and one's nation, defense of others suffering persecution and killing, and defense of the right to call people to God's message. All three go to great lengths to describe the early Islamic expansion as motivated by this last type of legitimate war—not by the desire to impose Islamic faith upon non-Muslims. And all three leave the import of this type of war for modern times rather ambiguous.

With regard to *jus in bello*, all three enjoin discrimination between combatants and noncombatants, and the avoidance of excessive destruction or cruel forms of military action. They all emphasize that wars should be fought with the goal of saving life as much as possible, and that killing in war is a means to repelling the original affront, not the goal itself.

Mawdūdī's, Hamidullah's, and al-Zuhaylī's works are also indicative of the current gaps in the Muslim literature. Some of these gaps have been evident in the preceding pages, topics such as weapons of mass destruction and the limits of military necessity. Other important topics, including terrorism, guerrilla insurgency, and accountability for violations of Islamic principles, have been absent from our discussion because the three writers—along with other Muslims—have yet to treat them systematically. There is hope though that these gaps will be increasingly filled as Muslims continue to elaborate on the Islamic ethics of war and peace.

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