

Jihad's Captives: Prisoners of War in Islam

TROY S. THOMAS^{*}

Introduction

The on-going war against terrorism is waged against an array of adversaries that assert a religious and moral justification for their fight based on the Islamic doctrine of *jihad*. An invocation of *jihad* by Islamic leaders, both political and religious, has become increasingly common in conflicts against both Muslim and non-Muslim states, and more recently, non-state actors. Saddam Hussein declared a *jihad* against both Iran in the 1980s and the U.S.-led coalition in 1990. Mohammad Farrah Aideed's radio station in Mogadishu, Somalia broadcasted calls to join the *jihad* against United Nations (UN) forces in 1993. Fugitive leaders of the Taliban and Al Qaeda, Mullah Omar and Usama bin Laden, enjoined the Muslim world community to unite in *jihad* against the Northern Alliance and the United States. In these examples and many others, Islamic adversaries are asserting legal and religious justifications for violence with very real implications for the justice of war, or *jus ad bellum*, and justice in war, or *jus in bello*.

These implications spring from a rich body of Islamic Law regarding international relations known as *siyar*. This work addresses one aspect of *siyar*, the laws regarding prisoners of war (POWs), as a means to develop a wider understanding of the legal traditions of the fastest growing religious and political community in the world. This topic is especially important given the proliferation of conflict in which participants invoke *jihad* and the possibility of American and allied warriors becoming POWs in such conflicts. The need for understanding is further accentuated by the reality of conflict involving violent non-state actors such as Al Qaeda, the Islamic Movement of Uzbekistan and Abu Sayyaf of the Philippines. War with non-state actors exists outside the body of contemporary international law. Traditionally, war is the circumstance of states, and international law is the law of states. Even if we extended the laws of war to non-state actors like Al Qaeda, they reject the system on which these very laws are predicated. However, these groups, as well as hostile Islamic states, are bound by the legal maxims associated with *jihad*. These maxims entitle their adversaries, including the U.S., to certain expectations. Armed with this understanding, individual warriors can assert rights even where the jurisdiction of international law ends. Additionally, policy-makers will be better positioned to leverage international opinion against those who violate the same laws they claim to enforce.

International law, in the history of Western legal thought, is a relatively young sub-field. Westerners tend to assume that current codifications are the result of Judeo-Christian traditions and ethical precepts. The first Muslim community at Medina, however, was guided in their political and military activities by injunctions in the *Qur'an* and by the deeds of the Prophet Mohammad, or *sunna*. Moreover, with the development of Islamic law, or *shari'a*, so too

^{*} Major Thomas (B.S., United States Air Force Academy; M.A., University of Texas; M.A., George Washington University) is an intelligence officer at Langley Air Force Base, Virginia.

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 2005		2. REPORT TYPE		3. DATES COVERED -	
4. TITLE AND SUBTITLE Jihad's Captives: Prisoners of War in Islam				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Department of Defense ,Washington,DC,20301				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT see report					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 10	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

evolved a doctrine of international law.¹ *Siyar* generates a legal and moral doctrine, which is conceptually similar to later Western constructs. In addition to comparing *siyar* to the Western traditions enshrined in the Geneva Conventions, this effort examines the perception that Islam is spread by military force. The origin of this perception is found in the so-called "verse of the sword," found in verse IX: 5 of the *Qur'an*. The verse translates, "When the forbidden months are past, then fight and slay the Pagans wherever ye find them."² A case study on POWs strikes at the heart of conventional wisdom regarding *jihad* both in terms of its initiation and conduct. To begin, the POW case study is placed in the legal context of laws governing armed conflict. Attention is then given to an examination of these laws in four areas: 1) the means by which a person becomes a POW; 2) the status of POW; 3) the rules governing POW treatment; and 4) the conditions for release. In conclusion, the *siyar* for prisoners is compared to the western-derived laws for POW treatment as encapsulated in the Third Geneva Convention of 1949.

The Islamic Law of War

Islamic international law can be loosely defined as those rules and practices the *shari'a* allows in international relations.³ It pertains to relations between Muslims and non-Muslims and has its origins in the activities of the first Muslim community at Medina in 630.⁴ Although it originally pertained to the Prophet Mohammad's conduct in war, *siyar* was later formalized to encompass laws on the conditions for peace and neutrality. Formalization first occurred under the guidance of the Islamic scholar, Imam Abu Hanafi (699-768), who gave a series of lectures entitled "The Muslim Laws of War and Peace."⁵ These lectures were compiled by his pupil, Mohammad bin Hasan Shaybani, in 804 for the text, *Introduction to the Law of Nations*. The text was later translated to English by Majid Khadduri, entitled *The Islamic Law of Nations*, and now forms the basis for contemporary *siyar*. The *siyar* manifests from the same sources as the *shari'a*. Its primary sources are the *Qur'an* and the *sunna* of the Prophet, which together comprise the scriptural sources.⁶ In terms of modern international law, *siyar* conforms to the same standards for development, including authority, custom, reason, and agreement.⁷

Two aspects of *siyar* are particularly important for understanding the law governing prisoners. The first involves the conceptual division of the world into two categories, *Dar al-Islam* and *Dar al-Harb*. *Dar al-Islam* literally means the "abode of Islam" and refers to those territories governed by a Muslim ruler according to the *shari'a*.⁸ Although there is some debate about whether *Dar al-Islam* is geographically or spiritually defined, it is useful in international law to make a territorial distinction among nation-states. *Dar al-Harb* is its antithesis and is literally translated as the "abode of War."⁹ One must be careful not to assume that this dichotomy implies continual battle between Muslim and non-Muslim states, as this is certainly not the case. To account for times of peace, the Islamic scholar Shafi'i introduced a third construct, *Dar al-Sulh*, or "abode of Covenant," which refers to states with which the Muslim nation has a formal treaty, or at least non-belligerent relations.¹⁰

A second area of *siyar*, which guides the law of prisoners, is the so-called "Doctrine of *Jihad*." Two interpretations of the law regulating *jihad* permeate *siyar*. One generates a strict definition based on the "verse of the sword" and commands Muslims to attack disbelief until it is eradicated from the earth.¹¹ According to this conservative interpretation, *jihad* becomes an instrument of the state to transform *Dar al-Harb* to *Dar al-Islam*.¹² This view has been widely embraced by several conservative Islamist movements, including the Wahhabi movement, which originated out of Saudi Arabia and has been embraced by militant Islamist groups in the

Caucuses as well as Central and South Asia. For these groups and others, the “verse of the sword” compels every Muslim to take up arms against idolaters (the West and corrupt Muslim regimes) until the unbelievers convert or submit.¹³

Placed in a broader context, the “verse of the sword” takes on a different, second meaning. Indeed, one finds that it is directed against those that initiate an attack on Muslims and the idolatrous tribes that broke treaties with Muslims, as found in verses IX: 13 and VIII: 56.¹⁴ This understanding also appreciates that permanent war does not mean continuous conflict. A broader and more widely accepted interpretation, as explained in Shaybani's *The Islamic Law of Nations*, suggests *jihad* to be a struggle both to improve and expand Islam, but not necessarily through violent means.¹⁵ The “greater” *jihad* is actually exertion in God's (Allah's) path through one's heart.¹⁶ Other ways to fulfill the *jihad* obligation include through the tongue, hands and finally the sword. Where the greater *jihad* represents a struggle against oneself to be along the straight path of Islam, the *jihad* of the sword is actually considered the “lesser” *jihad*.¹⁷ Thus, references to *jihad* as “holy war” are generally inaccurate. Indeed, warfare is only justified under certain conditions, and it is only in the context of a sanctioned religious war that the law for prisoners applies. When declared with proper authority and reason, *jihad* creates a “legal state of hostilities” as the collective duty of the Islamic polity.¹⁸

Becoming a Prisoner of War

The term designated for POWs is *ma malakat aimanu-kum*, which literally translates, “what your right hand possesses.”¹⁹ A person becomes a POW at the hands of an Islamic nation only after being captured during one of several lawful wars. Of note, the concept of an Islamic nation pre-dates the establishment of the modern nation-state after the Peace of Westphalia and refers more generally to lands governed by Muslims.

One type of lawful war is the defensive war. It is initiated when an enemy invades *Dar al-Islam*.²⁰ Mohammed delineated its nature in a *hadith*, a narrative of the Prophet's life, which reads

Whoever fights in defense of his person and is killed, he is a martyr, whoever is killed in defense of his property is a martyr, whoever is killed in defense of his family and is killed is a martyr, and whoever is killed for the cause of God is a martyr.²¹

A second type is the sympathetic war in which Muslims living in *Dar al-Harb* implore a Muslim nation to emancipate them from a tyrannical ruler.²² Its legality is derived from verse IV: 74 of the *Qur'an*, which obligates Muslims to “fight in the cause of Allah and of those who, being weak, are ill-treated and oppressed . . . [w]hose cry is: 'Our Lord! Rescue us from this town', whose people are oppressors.”²³ The third type, the punitive war, is directed against organized apostates, rebellions, international highway robbery, and those who break covenants.²⁴ A fourth type manifests from the strict interpretation noted earlier. Termed idealistic, it refers to wars fought with the intent to establish a universal Muslim community and to subordinate “the non-Islamic sovereignties to the Sovereignty of God.”²⁵ The idealistic war has gained greater prominence in the last decade, as militant Islamist movements such as al-Qaeda assert goals that include the creation of a new Caliphate, or Islamic nation, in the place of existing nation-states.

In the course of a religiously sanctioned war, *Qur'anic* verse XLVII: 4 in particular governs taking prisoners. It states, "when ye meet the Unbelievers, smite at their necks; at length, when ye have thoroughly subdued them, bind a bond firmly on them."²⁶ A majority of jurists interpret this to mean that a Muslim army must continue to fight until the enemy surrenders or is taken in battle, at which point they become prisoners and can no longer be killed.²⁷ Prior to battle, the enemy has the option to either embrace Islam or pay a tribute, or *jizya*, and thus become a quasi-citizen with certain rights.²⁸ The *jizya* is only offered to people of the Book (including Jews, Christians, Zoroastrians, and Samaritans and Sabians) and creates a responsibility on the part of the Muslim government for their protection.²⁹

Having refused both, the enemy is then engaged in war and is either killed in the course of battle or captured. Once captured, the Muslim commander has several options which differ according to the Islamic school of thought (*madhab*) followed by the commander. According to the Shafi'i *madhab*, the commander is allowed four options: execution, enslavement and release with or without ransom.³⁰ The Maliki *madhab* does not allow for gratuitous release (without ransom), while the Hanafi *madhab* forbids release under any condition until the war is terminated.³¹ The controversy surrounding the dealing with captives springs from contradictions among *Qur'anic* verses and inconsistent practices by the Prophet Mohammad. It points to the need to thoroughly understand the prevailing *madhab* of any potential adversary to discern expected actions.³² There is general consensus, however, that the commander is not authorized to force the enemy to embrace Islam. Indeed, the POW must be kept alive and ultimately released, unless the Muslim commander follows the Maliki *madhab*. As stated in verse XLVII: 4 of the *Qur'an*, after subjection, "It is the time for either generosity or ransom."³³ This legal maxim, which is obligatory, contradicts perceptions that Islam is spread by force with a requirement to kill all who refuse Islam. The authority to execute is only granted by law under certain conditions.

Prisoner Status

An enemy's treatment hinges on his status in terms of the aforementioned conceptual division of the world and according to his legal capacity to engage in combat. If the person is in *Dar al-Islam*, their status is either as a *mustamin* or a lawful combatant. The *mustamin* is one who is in *Dar al-Sulh* and has temporarily contracted with the Muslim state for permission to act therein. Essentially, U.S. relations with most Muslim states such as Saudi Arabia or Egypt reflect a state of *Dar al-Sulh*. The *mustamin* is guaranteed protection and may leave at any time with his property.³⁴ If the *mustamin* engages in any illegal activity, such as spying, he immediately becomes a legal combatant, now existing in *Dar al-Islam*. The new combatant may be killed as part of the consequences of battle, unless he surrenders, at which point he becomes a prisoner. An enemy soldier in *Dar al-Harb* always becomes a POW upon capture. Non-combatants also become POWs, although it is forbidden to kill them in both *Dar al-Islam* and the war zone.³⁵ Non-combatants (those physically incapable of fighting) include such categories as women, minors, elderly, hermits, the physically disabled, the insane and the like.³⁶ Indeed, the Muslim army should take all precautions to spare them from the violence and terror inherent in war.

Once an enemy is captured, he becomes either a POW or a slave. During the classical period ending in the mid-nineteenth century, enslavement was the only option other than release offered by the Muslim commander. Although slavery was a recognized institution under the

law, it could only manifest by birth or in the course of a religiously sanctioned war. Moreover, emancipation was encouraged through both religious and civil methods.³⁷ The *Qur'an*, in verse IV: 92, encourages manumission as a means to atone for sins, evidenced by the *surra*: "if the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave is enough."³⁸

The traditions of the Prophet Mohammad also discouraged slavery. There were only four instances during Mohammad's life in which enemy persons were enslaved. Slaves were taken from the Banu Quraizah, Hawanzinites, Banu al-Mustaliq and Banu al-Anbar tribes during the course of battle.³⁹ In each case, the slaves were eventually set free, except for the women and children of the Banu Quraizah tribe, who were distributed as booty.⁴⁰ The Hawanzinites were freed after embracing Islam, as were the Anbarites. Mohammad married the daughter of a Banu al-Mustaliq chieftain, freeing the rest.

Slavery's legal significance also declined with the advent of Western notions of international law and its emphasis on formal treaties. These treaties, such as the Brussel's Conference of 1874, the first Hague Conference of 1907 and the two Geneva Conventions of 1929 and 1949, prohibited enslaving POWs. According to the *siyar* of treaties, as derived from the *shari'a* law of contracts, treaty adherence is obligatory for the Muslim nation. According to the Hanafi *madhab*, "if the Muslims have prisoners and the non-Muslims too have them, and both of them agree on their exchange, it must be done."⁴¹ Here we see a case of an obligatory legal maxim, treaty obligations, superseding an issue, slavery, that is essentially discouraged by both the *shari'a* and custom.⁴² If the non-Muslim enemy violates a treaty, however, enslavement remains a legal institution that may be used for reciprocity.

Laws Governing Treatment

Since a treaty prohibiting slavery currently exists, the more pertinent legal issue becomes the treatment of prisoners. The laws for prisoners are not significantly different from those governing slavery. In fact, the slave actually enjoys greater rights than the prisoner but forfeits the right to eventual emancipation as a condition of war termination. The slave can obtain his freedom through other means. The fundamental difference is one of determining the burden of responsibility. In the case of slavery, the burden is on the master, while the Muslim government is responsible for the POW. Government responsibility is derived in part from the collective nature of *jihad*, which is the responsibility of the Muslim community even though not all Muslims are required to actively participate.

The laws regulating treatment are guided by one *hadith* in particular, which calls on Muslims to "take heed of the recommendation to treat the prisoners fairly."⁴³ Critics of *siyar*'s concept of fairness point to the sanctioning of execution by each of the *madhabs* and to Mohammad's own practice of executing four persons in the course of a war, Nadhr bin Harith, Okba, Abul Ozza, and Moavia bin Mughira. The execution of a POW, however, is generally forbidden, as evidenced in the *Qur'an* verse XLVII: 4, the Prophet's deeds and according to a consensus of the Prophet's Companions.⁴⁴ Execution is only allowed if the individual is tried and found guilty of war crimes. These crimes must exceed a prisoner's legal right to belligerency and bitter enmity against Islam.⁴⁵ Indeed, this appears to have been the case when Mohammad ordered the execution of Nadhr bin Harith and Okba, two prisoners from the Battle of Badr. Moreover, a majority of jurists agree that prisoners cannot be held liable for damage they inflicted on Muslim life and property while combatants.⁴⁶ *Siyar* displays a practical

appreciation of war's nature, while still holding individuals responsible for gross violations of human dignities, such as the killing of innocents.

Several obligatory laws govern the rights of prisoners. It has already been established that they are to be treated fairly. Additionally, they are to be fed at no charge and provided with the needed care. As evidenced by the treatment of Taliban POWs at the prison in Mazar-i-Sharif, Muslim commanders have proven willing to free prisoners when they could no longer provide for their basic care. The basis of this maxim comes from verse LXXVI: 5,8, which reads, "as to the righteous . . . they feed, for the love of Allah, the indigent, the orphan, and the captive."⁴⁷ They enjoy the right to be protected from the heat and cold and to be provided with clothes, as was the habit of the Prophet Mohammad.⁴⁸ Other *hadiths* obligate Muslims to relieve prisoners of any discomfort, treat them for their ills and allow them to complete wills for their property, which the state must communicate to its enemy.⁴⁹ Furthermore, the mother cannot be separated from child, nor can near relatives be split apart.⁵⁰

A third *hadith* encourages Muslim soldiers to respect the dignity of prisoners as well as their status. It reads, "Pay respect to the dignity of a nation who is brought low."⁵¹ Most jurists also concur that labor cannot be extracted from a POW. There is no historical evidence to contradict this maxim, nor is forced labor mentioned in scripture. A prisoner can be disciplined, however, for violating administrative rules. The punishment for a breach of discipline must be commensurate with the violation. Finally, an escaped POW, who is later recaptured, cannot be tried for escaping or for his actions after reaching *Dar al-Harb*. He may be punished for the minor offense of breaching parole, unless he is killed in the process of fleeing, while still in *Dar al-Islam*.⁵² In all cases of POW treatment, the Islamic state bears the burden of responsibility for the well-being of prisoners due to the collective nature of *jihad*.

Laws of Release and Exchange

As stated earlier, the POW must be cared for until exchanged or released gratuitously. The authority to release prisoners for ransom is found in the aforementioned *surra* and can also be found in the deeds of the Prophet Mohammad. Ransom took many forms. Often it was gold, silver, armaments (spears in one case) or munitions. In some cases, ransom involved some type of work. For example, Mohammad released seventy prisoners taken in the battle of Badr while the Muslims were still at war with the Quraish.⁵³ Their release was predicated on the charitable work of the Quraish, who were instructed to teach young boys to read and write.⁵⁴ If monetary, the ransom could be paid out of the prisoner's pocket or out of the enemy state's treasury. An exchange for Muslim prisoners was also a common practice of the Prophet and involved exchanges on all levels, from one-for-one exchanges to those that freed thousands.⁵⁵ During the course of the transfer, the Muslim state is responsible for the safe passage of the prisoner.

The gratuitous release, as mentioned earlier, is recommended by Islamic law and can atone for many types of sins. Gratuitous manumission can occur at any point during the course of the war and it is clearly required by the *Qur'an* at least by the end of the war. Both the commander and the state have the authorization to release a POW, unless the POW is a slave, in which case the master's permission must also be obtained. There are many incidents of gratuitous emancipation during the Prophet's lifetime. Six thousand prisoners were set free following the battle of Hunain, with no ransom collected.⁵⁶ In fact, the Prophet compensated "all those who were not willing to part with their booty of slaves" out of the public treasury.

Comparing the Geneva Convention

This work has thus far revealed that the Islamic law governing POWs is both well-developed and generally humane. Its prescriptions are particularly interesting when compared to the Geneva Convention of 1949 and its own code for treating prisoners. While the rules of the Geneva Convention are significantly more detailed, the principles on which they are based are quite similar to those of *siyar*. Some of the more pertinent accords are:

1. POWs shall be in the custody of the belligerent state and not that of any individual.
2. Except for the officers, the detaining state can exact labor from them.
3. The detaining state is responsible for their maintenance, which will be subject to repatriation.
4. They shall be subjected to humane treatment.
5. They shall obey the laws of the detaining state.
6. They shall be permitted to perform their religious rites.
7. Their wills shall be executed.
8. They should not be exposed to brutality to procure information useful for the conduct of operations.
9. They should be released and repatriated without delay after the cessation of active hostilities.⁵⁷

The *siyar* specifically accounts for accords 2, 3, 4, 5, 6, 7 and 9, while the 8th can be derived through analogy, as the requirement for humane treatment and maintenance implies a restriction on brutality. The first accord prohibits slavery, which is accounted for in *siyar* by virtue of treaty obligations. In some respects, *siyar* actually supersedes the Geneva Convention. For example, the Convention recommends facilities for POWs that are equivalent to those of the detaining state.⁵⁸ In the history of warfare, these standards are rarely met. Mohammad, however, established such a tradition when he directed Muslim soldiers to be content with dates, while the prisoners received bread.⁵⁹ Placed in its historical context, this seemingly inconsequential concession takes on greater significance. *Siyar* also forbids forced labor for all POWs, not just for officers. Finally, *siyar* does not require that the cost of maintenance be repatriated.

One might also add to this argument that the signatories to the Geneva Convention expect similar treatment by their enemy. Indeed, the entire treaty is based on reciprocity. *Siyar*, on the other hand, obligates Muslim states to adhere unilaterally to the principles of treaty, including articles found specifically in *siyar*, regardless of the enemy state's action.⁶⁰ In fact, the only legal alteration in a Muslim state's policy would be that they could resort to slavery. Of further significance, *siyar*'s jurisdiction is not limited to states, but can embrace the full range of political actors of history and those not yet envisioned.

The requirement for unilateral adherence points to another fundamental respect in which *siyar* differs from the Geneva Accords—its sanction. Multilateral treaties are solely enforced by the weight of international law. The sanction for violation is state-directed and is usually no more than a lessening of diplomatic credibility. Clearly a violation carries long-term consequences in terms of a state's ability to locate partners for future treaties. Moreover, one might argue that treaties based on ethical principles, or Christian values, for example, carry some type of moral sanction. Apart from the Muslim community of nations, however, there are no

states whose actions are regulated by religious norms to the extent that their transgression would entail a violation of that state's laws. In addition to the weight of international law, the Muslim nation's obligation arises from two other potential sanctions. The first is a worldly sanction, suggesting that the Islamic state's leaders will be deemed illegitimate and may theoretically be forced to abdicate their positions by the Muslim community. A second, and more penetrating sanction, is the possibility of punishment in the after-life. As aptly put by one scholar, "spiritual and conscientious inducing and deterring factors are more effective than temporal persuasions and prohibitions."⁶¹ That is, Allah's sanction is far more persuasive than any form of international retribution.

Conclusion

The preceding discussion delineates the Islamic law of *siyar* as it pertains to prisoners of war as well as the precedents set by Islam in the field of international law. More importantly, it challenges the perception that Islam is spread only by force as evidenced by the options available to the enemies of Islam prior to war and the rights prisoner's have during the course of their captivity. Finally, it argues that the laws governing the treatment of POWs are at least as equally benevolent as the Geneva Convention and are in some specific cases broader in scope. Ultimately, they carry a more convincing sanction. A declaration of *jihad* carries with it a robust body of law that should guide policy and behavior lest all credibility for *jihad* be lost. This is a critical point, for the failure to properly treat prisoners brings the legal authority and credibility of the Muslim leader into direct question. For the adversary, whether the U.S. or another Muslim state, the call to *jihad* creates expectations for *jus ad bellum* and *jus in bello*. Finally, *siyar*'s applicability to violent non-state actors suggests that future efforts to advance the international laws of war should embrace an ecumenical dialogue across juridical traditions, drawing specifically on *siyar* for both precedent and enhanced legitimacy.

Notes

¹ For a clear explanation of Islam and the basic tenets of *shari'a*, I recommend John L. Esposito, *Islam: The Straight Path* (New York: Oxford University Press, 1988).

² Abdullah Yusuf Ali, trans., *The Meaning of the Glorious Qur'an* (London: Nadim and Co., 1976), 248.

³ Mohammad Tallat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), 96.

⁴ A.M. Khoja, *Elements of Islamic Jurisprudence* (Karachi: Mirror Press, Ltd., 1977), 145.

⁵ Mian Rashid Ahmad Khan, *Islamic Jurisprudence* (Lahore, Pakistan: Sh. Mohammad Ashraf, 1978), 199.

⁶ In addition to these primary sources of law, Islamic jurists also relied on analogy (*qiyas*), consensus among jurists (*ijma*) and independent reasoning (*ijtihad*) to extend Islamic law during the years of Islamic expansion following Mohammad's death in 632. By the mid-eleventh century, four schools of legal thought dominated--Hanafi, Maliki, Shafi'i and Hanbali--each placing emphasis on different sources of law. Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955), 36.

⁷ According to Khadduri, the *Qu'ran* and *hadiths* represent authority, the *sunna* are equivalent to custom, treaties with non-Muslims constitute agreements, and the *fatwas* (religious orders) of Islamic leaders are the application of reason through analogy. *Ibid.*, 48.

⁸ Maulana M. Ali bases this definition on the Hanafi school in *The Religion of Islam* (Lahore, Pakistan: The Ahmadiyya Anjuman Isha'at Islam, 1983), 557.

⁹ *Ibid.*

¹⁰ Kahn, 204.

-
- ¹¹ Ali, *The Religion of Islam*, 540.
- ¹² Khadduri, 53.
- ¹³ Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton, NJ: Markus Wiener Publishers, 1996), 5.
- ¹⁴ Khadduri, 540-41.
- ¹⁵ Khan, 204.
- ¹⁶ Khadduri, 57.
- ¹⁷ Reuven Firestone provides a clear explanation of the different forms of *jihad* in *Jihad: The Origin of Holy War in Islam*, (New York: Oxford University Press, 1999).
- ¹⁸ Khadduri, 95.
- ¹⁹ Ali, *The Religion of Islam*, 569.
- ²⁰ The four types of wars are defined in Syed R. Hassan, *The Reconstruction of Legal Thought in Islam*, (Lahore, Pakistan: Law Publishing Company, 1974), 171. One scholar adds a fifth, which is the continuation of an existing war. Kahn, *Islamic*, 207.
- ²¹ Khan employs this *hadith*, quoting Suyuti, *Islamic*, 208.
- ²² Hassan, *The Reconstruction*, 171.
- ²³ Ali, *The Meaning*, 115.
- ²⁴ Hassan, *The Reconstruction*, 171.
- ²⁵ *Ibid.*, 171.
- ²⁶ Ali, *The Meaning*, 744.
- ²⁷ Hassan, *The Reconstruction*, 173.
- ²⁸ Individuals that agree to pay the *jizya* are known as *dhimmi*s, which refers to "a certain status, the acquisition of which entitles the person to certain rights which must be protected by the state." Majid Khadduri, *War and Peace in the Law of Islam*, 177.
- ²⁹ *Ibid.*, 176.
- ³⁰ Abdullahi A. An-Na'im, *Toward an Islamic Reformation* (Syracuse, NY: Syracuse University Press, 1990), 173.
- ³¹ *Ibid.*, 173.
- ³² Peters, *Jihad*, 31.
- ³³ Ali, *The Meaning*, 745.
- ³⁴ Hassan, *The Reconstruction*, 176.
- ³⁵ *Ibid.*, 173.
- ³⁶ *Ibid.*, 173.
- ³⁷ An-Na'im, *Toward*, 172.
- ³⁸ Ali, *The Meaning*, 118.
- ³⁹ Khan, *Islamic*, 224.
- ⁴⁰ *Ibid.*, 224.
- ⁴¹ Hassan, *Reconstruction*, 181.
- ⁴² Many scholars would argue that slavery is not discouraged, but that the *shari'a* is only neutral on the subject. Either way, a Muslim nation's agreement to an international treaty prohibiting slavery supplants the *shari'a*'s ambiguity.
- ⁴³ Dr. Mohammad Hamidullah draws on a *hadith* of Tabariy, in *Muslim Conduct of State* (Lahore, Pakistan: Sh. Mohammad Ashraf, 1961), 215.
- ⁴⁴ *Ibid.*, 214.
- ⁴⁵ Khan, *Islamic*, 222.
- ⁴⁶ Hamidullah, *Muslim*, 214.
- ⁴⁷ Ali, *The Meaning*, 580.
- ⁴⁸ Hamidullah, *Muslim*, 215.
- ⁴⁹ Hassan, *Reconstruction*, 176.
- ⁵⁰ *Ibid.*, 215.
- ⁵¹ Khan draws on the *hadith* collection of Sarakhsiy. *Islamic*, 223.
- ⁵² This general assessment is drawn from several sources, to include Khan, *Islamic*, 222, Hamidullah, *Muslim*, 216, and Hassan, *Reconstruction*, 177.
- ⁵³ Ali, *The Religion*, 569. Of note, the Quraish was the tribe of the Prophet Mohammad.
- ⁵⁴ *Ibid.*, 569.
- ⁵⁵ Hamidullah, *Muslim*, 220.

⁵⁶ Ali, *The Religion*, 568.

⁵⁷ Geneva Convention 1949, Articles 118-119. Hassan, *Reconstruction*, 177.

⁵⁸ Ibid., 177.

⁵⁹ Hassan, *Reconstruction*, 178.

⁶⁰ For a more complete explanation of how the universality of Islam should result in unilateral adherence to *siyar*, regardless of enemy behavior, see Peters, *Jihad*, 134.

⁶¹ Hamidullah, *Muslim*, 17.