

Compatibility between Anti-terrorism Legislation and *Shari'a*

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Abstract

This work argues that acts of terror carried out by non-state Islamic actors and other terrorist groups are against the Qur'an, the Sunna of the Prophet, the conduct of rightly guided Caliphs and companions of the Prophet, the ijma' (consensus) of mujtahideen, against any logic and against the obligations of a Muslim state. Moreover, acts of terror which include the declaration of war, conduct of war, committing acts of perfidy and treachery, killing of civilians and prisoners of war, destroying civilian properties, suicide attacks, mutilating of bodies, terrifying citizens, killing of diplomats and foreigners and so on are strictly prohibited in Islam. It is argued that the crime of terrorism is worse than hudud or taz'ir crimes under Islamic law. Domestic legislation in Muslim countries may put terrorism either under ta'zir or syasa because of the political nature of the crime.

Introduction:

Terrorism is one of the greatest '*fitna*' and one of the most influential issues on the international stage in our times. Its effects are being felt in international relations, the global economy, and the national laws of most countries. There is no consensus legal definition of terrorism; this, however, is not important in our discussion because there is a consensus that it is a "crime."¹ This paper does not attempt a legal definition of terrorism in *Shari'a*; instead, it examines the elements constituting this crime, such as the 'use of force', 'victim(s)', 'weapon' and the 'intent'. It concentrates on the various acts of terror, such as terrifying civilian population, attacks on civilians, attacks on civilian property, indiscriminate attacks, murder, and suicide attacks from an Islamic perspective and examines whether anti-terrorism legislation, both international as well as domestic, is compatible with *Shari'a* and whether there are any obstacles related to *Shari'a* that Muslim states have to overcome to formulate and enact anti-terrorism legislation? Most of the acts of terror that have been carried out in recent years stem from a misunderstanding or a misinterpretation of religious text, while others stem from a lack of a reliable and sound religious knowledge.

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¹ Attempts to define terrorism have been made since the Convention for the Prevention and Punishment of Terrorism 1937. The issue of defining terrorism was thoroughly discussed by experts in The Eleventh Round Table on Current Problems of IHL in Sanremo but they failed to agree on a definition. The UN General Assembly has also failed to formulate a definition. Also see GA/Res/3034 (XXVII) (1972), GA/Res/46/51 (1991), GA/Res/50/53 (1995), GA/Res/50/210 (1996). CherifBassiouni argues that "to define international 'terrorism' in a way that is both all inclusive and unambiguous is very difficult, if not impossible." M. CherifBassiouni, *Legal Responses to International Terrorism*, (Leiden: Martin Nijhoff Publishers, 1988), xv.

Categorization and Elements of the Crime of Terrorism: An Islamic perspective:

There is a consensus that terrorism is a “crime” but where should it be placed among other crimes. In Islamic jurisprudence crimes may be placed into many categories. An important categorization is one founded on the nature of the violated right.² These are: ‘Rights of God’, (e.g. the *hudud* offences – adultery, theft and highway robbery also called *hiraba* are crimes that violate the ‘Rights of God’), ‘Rights of Individuals’,³ (e.g. murder, manslaughter, beating and wounding and other *ta’zir* offences are crimes that violate the ‘Rights of Individuals’),⁴ ‘Rights of God mixed with Rights of Individuals’⁵ and ‘Right of the State’ also called *syasa* offences.⁶ The type of right violated determines the procedure to be followed in courts. Crimes affecting the Rights of God are set forth either in the Qur’an or the *Sunna* of the Prophet. The Muslim ruler is empowered to define *ta’zir* crimes, where necessary, in response to the evolving needs of the society.⁷ Now, where should terrorism be placed?

² In Islam, all rights are bestowed by God. Whether a right falls within the ‘Rights of God’ or the ‘Rights of the individuals’ depends on the extent to which that right is related to the public interest of society. Rights granted in the public interest are considered Rights of God, while rights bestowed to protect private interests are deemed Rights of Individuals. For all the details see ‘Abdul Qadar ‘Awdah, *al-Tashri’ al-Jina’i al-Islami*, (Beirut: Dar Ehya al-Turath al-‘Arabi, 1985), 1: 78, 109; and Imran A. K. Nyazee, *Outlines of Islamic Jurisprudence*, (Islamabad: Center for Islamic Law and Legal Heritage, 2002), 310.

³ Crimes affecting the Rights of Individuals include acts that affect a person’s life and safety.

⁴ These crimes are referred to according to the punishment warranted by the circumstances surrounding the prohibited act. If parity of punishment is warranted, the crime is known as a *qisas* crime. If compensation is appropriate, the crime is known as *diya* crime. The procedure to be followed in such crimes is that prescribed for *ta’zir* which maintains the *nisab* in evidence of two females for one male.

⁵ The last category was divided into two types depending on whether it was the right of God that was predominant or the right of the individual. For example, the *hadd* of *qadhif* (libelous accusations of adultery), is classified as a mixture of the right of Allah and the right of the individual, in which the right of Allah is predominant. The offence of murder liable to *qisas* is a mixture of the right of Allah and the right of the individual, but here it is the right of the individual that is predominant. See, Nyazee, *Outlines*, 310.

⁶ In Pakistan *ta’zir* and *syasa* are both classified under the heading of *ta’zir*. See *ibid*, at 312.

⁷ It is important to note that Punishments in Islamic law are usually discussed under four headings: *hudud*, *taz’ir*, *qesas*, and *diyat*. *Hudud* crimes are punishable by a *hadd*, which means that the penalty for them is prescribed by the *Qur’an* or by the *Sunna*. *Ta’zir* literally means deterrence. Technically it means the power of the *qadi* to award discretionary and variable punishment. See, Muhammad Munir, “*Is Zinabiljabr a Hadd, Taz’ir or Syasa Offence?: A Reappraisal of the Protection of Women Act 2006 in Pakistan*”, *Yearbook of Islamic and Middle Eastern Law*, Vol. 14, (2008-2009), pp. 95-115 at 115 and Muhammad Munir, “*The Layha for the Mujahideen: an analysis of the code of conduct for the fighters the Taliban fighters under Islamic law*”, 93: 881 (March 2011), 15-16. *Taz’ir* offences are those that are not included in either of the above three categories. “They comprise conduct that results in tangible and intangible individual social harm and for which the purpose of the penalty is to be corrective.” See, M. Cherif Bassiouni, “*Crimes and the Criminal Process*”, *Arab Law Quarterly*, Vol. 12 (1997), p. 270. That is precisely the meaning of the word *taz’ir*.

Let us consider an act of terror for this purpose. A terrorist blows him/herself up in a crowded shopping centre. 10 people are killed, 30 injured, property worth millions is destroyed, the fear of more suicide attacks keeps shoppers away from shopping, the stock market dives down, and so on. What punishment should be given to the planners, abettors and others (in this case the bomber is killed) who assisted the bomber under Islamic law and what procedural law should be followed? It all depends on the category to which this crime belongs. The above act of terror is a violation of the 'Rights of Individuals' (as innocent people are killed and maimed and their property destroyed), 'Rights of God' (as the generalization of fear and terror – a common element between this crime and the crime of *hiraba*), and the 'Rights of the State' because of the effects of the aftermath of this act. Thus, on the one hand it comes under *ta'zir*, on the other hand it resembles *hiraba* (a *hadd* offence).⁸ In addition, it also comes under *syasa* (the penalty and procedural law for which is to be fixed by the state). It is clear that the crime of terrorism is worse than other crimes. Domestic legislation in Muslim countries must take the above points into consideration and put terrorism either under *ta'zir* or *syasa* (because of the political nature of the crime).

The general elements of the crime of terrorism are: 'use of force', 'weapon', 'victim' and 'intent'. With regard to terrorism, the use of force used by terrorists is strictly illegal in Islamic law. The victims are mostly civilians but even military personals have also been killed in cold blood. As is explained below, civilians and their properties can never be the targets of attacks, whereas military personnel can never be attacked unaware. Although the use of force by terrorists is strictly illegal *per se* they are also not free to use any method and any weapon in their use of force.⁹ Lastly, intent is very important for an act of terror at the level of national legislation. For instance, if a psychiatric patient kills ten people in a crowded market, he might

Penalties for *taz'ir* may be imprisonment, physical chastisement, compensation, and fines or a combination of any two of these penalties. The prosecution and penalty of *taz'ir* offences are discretionary as opposed to *hudud* which are mandatory. No *taz'ir* penalty can be greater than a *hadd* penalty. *Qesas* crimes are not given a specific and mandatory definition or penalty in the *Qur'an*. Its meaning and contents are shaped by state legislation, judicial decisions and legal doctrine. The *qesas* crimes include: murder; voluntary homicide; involuntary homicide; intentional crimes against the person; and unintentional crimes against the person. The difference between *hudud* and *ta'zir* offences is that crimes falling within the former category are perpetually prohibited, while acts belonging to the latter category may be subject to decriminalization.

⁸ Punishments for *hiraba* range from amputation of the right hand and left foot for the first offence and amputation of the left hand and right foot for the second offence. The condition of the *nisab* is also imposed after dividing the property taken amongst the culprits. If only death has been caused, punishment is death by the sword as *hadd* and not *qisas*. Homicide along with plunder invokes the punishment of crucifixion.

⁹ However, it seems that terrorist organizations such as *al-Qa'ida* has used any possible weapon or adapted weapon to commit acts of terror. But in carrying out counter-terrorism acts a state is not free to use any type of weapon. Similarly, when a counter-terrorism operation becomes an armed conflict the choice of methods and means of warfare of the attacking state is not unlimited. See Article 35 (1) of P I of 1977.

not be considered a terrorist but if a person with some political motive, agenda, membership of a terrorist group, carries out the same act, he would be called a terrorist.

In case of terrorism, the action itself is less important in terms of the extent of damage, than the aftermath of the event as such as fear of crowded places, public transport, or public events. In other words, the goal of terrorist means, tactics, and doctrine is to create the condition that should be considered terrorism.

Prohibition of Acts of Terror in *Shari'a*:

Below we examine certain acts of terror (rather than a condition of terror) to determine whether or not their prohibition in state legislation would be compatible with *Shari'a*. An act of terror may include (but may not be confined to) terrifying civilian population, attacks on civilians, attacks on civilian property, indiscriminate attacks, murder, and suicide attacks and many more. Let us consider another act of terror in which terrorists attack civilians kill and maim many, destroy property and terrify the rest of the people of the town. We will examine these acts from the perspective of domestic legislation as well as international legislation.

We will discuss terrifying civilian population, attacks on civilians and their properties, and killing civilians all of which are acts prohibited in Islamic *jus in bello*. As indicated above the only crime that has all these elements is *hiraba* which is a *hadd* offence. *Hiraba*, or waging war against God and his Apostle and making or spreading corruption on earth, is a very serious *hadd* crime under Islamic *Shari'a*. The Qur'an states:

Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the Hereafter, unless they repent before you overpower them – in that case bear in mind that God is forgiving and merciful (Q. 5:33-4).¹⁰

Some contemporary scholars argue that terrorism is included under the crime of *hiraba*,¹¹ also called 'major theft'.¹² However, theft is committed only if the thief steals the property, whereas a robber commits *hiraba* when s/he goes out to violently take the money of another person(s) whether s/he succeeds in it or not. Thus, the following criminal acts come under the definition of *hiraba*. First, a person

¹⁰ If the offender repents and surrenders before apprehension, the *hadd* is waived, but any liability for homicide in such a case is subjected to *qisas* proceedings for settlement. See Nyazee, *Outlines*, at 317.

¹¹ See, Ameen Ahsan Islahi, *Tadabbur-e-Qur'an* (Urdu), (Lahore: Maktaba Khuddamul Qur'an, 1976), 2:277; Javaid Ahmad Ghamidi, *Mizan* (Urdu), (Lahore: Dar ul Ishaq, 2001), 284; and Gamil Muhammed Hussein, "Basic Guarantees in the Islamic Criminal Justice System," in *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, ed. M. A. Haleem, Adel O. Sherif & Kate Daniels, (London-New York: I. B. Tauris, 2003), 41.

¹² Theft itself in this context is called as minor theft. 'Abdul Qadar 'Awda argues that although theft is to take someone's property secretly whereas in *hiraba* it is to take it by force. However, in *hiraba* there is an element of secrecy because the robbers hide from the authorities and commits breach of peace secretly. See, 'Awda, *al-Tashri' al-Jina'i*, 2: 638.

going out to violently take the property of another person(s), which leads to frightening that person or persons although property is not taken; he does not kill any person and does not take the money; secondly, the criminal takes the property but does not kill anyone; thirdly, in situation one the criminal kills someone but does not take the property; finally, in the above situation, the criminal takes the property and kills its possessor(s). However, if the criminal does not frighten anyone, does not take property nor kills anyone, he is not guilty of *hiraba*.¹³

Coming back to the question whether terrorism comes under *hiraba*, or not it is submitted that there are some differences between the two. In *hiraba* the criminals violently take property, kill, maim, and frighten population. They do not fight to overthrow the government; do not consider the authority of the state to be illegitimate; do not fight the government and its allies to establish a government of their own. In terrorism, all the elements of *hiraba* except the violent taking of property are found. In addition, terrorism has other elements which are not requisite for *hiraba* including fighting and trying to overthrow the legitimate government. In addition, the war waged by terrorists is doctrinal and ideological whereas the criminal activities of robbers, in committing *hiraba*, have nothing to do with ideology.

Today's terrorists are at war with humanity at large, Muslims and non-Muslims, and elected and free governments whether Muslim or non-Muslim. If terrorists fight just one Muslim government, they would be called rebels but what should they be called when they fight with the whole world? Terrorism, therefore, could be analogous to *hiraba* if it is confined to just one state but when terrorists do not recognize boundaries, strike anywhere, and use any weapon they can, then it is obligatory for all states of the world to cooperate in the fight against terrorism. It is from this perspective that Muslim states have even a stronger obligation to fight terrorism in all its kinds and manifestations, as required by treaty law. Islamic law strengthens this obligation of Muslim states. Therefore, all states, especially Muslim states, are under an obligation to prevent, eradicate and fight terrorism and punish terrorists as required under international law. Consequently, *Shari'a* poses no obstacles whatsoever that may prevent any Muslim state from entering into, and abiding by, international treaties in combating terrorism.

One of the hallmarks of terrorism today is suicide attacks. On a national level (as against using it as a method of warfare), a suicide bomber might be committing at least four crimes according to Islamic law, namely killing civilians, mutilating their bodies, committing suicide, and destroying civilian objects or properties.¹⁴ Suicide is strictly prohibited in Islam. The Prophet is reported to have

¹³*Ibid.*, 638-9. When robbery is not committed the criminal is punished under *ta'zir*. *Ibid.*, 2: 639.

¹⁴ Outside an armed conflict, a suicide bomber might be committing at least five crimes according to Islamic law, namely killing civilians, mutilating their bodies, violating the trust of enemy soldiers and civilians, committing suicide, and destroying civilian objects or properties. For a detail analysis of this topic see my "Suicide Attacks and Islamic Law", 90 (869) *Int'l Rev of the Red Cross*, (March 2008), 71-89; also available at <http://journals.cambridge.org/action/displayIssue?jid=IRC&volumelD=90&issuelD=869> (last

said: “None amongst you should make a request for death, and do not call for it before it comes, for when any of you dies, he ceases [to do good] deeds and the life of the believer is not prolonged but for goodness.”¹⁵ Suicide in Islamic law is intentional self-murder. There is a *hadithqudsi* – a statement of the Prophet (PBUH) ascribed to God himself – in which he says that a wounded man takes his own life. God then says, “My servant anticipated my action by taking his soul (life) in his own hand; therefore, he will not be admitted to paradise.”¹⁶ In another saying of the Prophet (PBUH) he has given a stern warning to a person committing suicide, stating that the wrongdoer would be repeating the suicidal act endlessly in hell and would reside in hell for ever.¹⁷

The killing of civilians, i.e. women, children, elderly, sick, farmers, servants, priests in their places of worships, travelers who do not get mixed up with people, and businessmen is strictly prohibited. In short, all those who do not participate in hostilities shall not be killed. They could be harmed indirectly or if they participate in hostilities. The Holy Qur’an says: “Fight in God’s cause against those who fight you, but do not overstep the limits” (Q. 2:190). The reservation “those who fight you” in the original text of the verse is of extreme importance, because the Arabic word “*muqatil*” (pl. “*muqatileen*”) means combatant. Thus, non-combatants must not be fought against. According to Muhammad ibn al-Hasan al-Shaybani (d. 189 AH), it is prohibited to kill them because the Qur’an says, “Fight those who fight you” and “they do not fight.”¹⁸ Moreover, in the above verse the Qur’an commands Muslims not to transgress by “killing non-combatants” and “behaving degradingly towards those who are defeated.” The Prophet has prohibited, in the strongest possible words in the Arabic language, the killing of women and servants: “Never, never kill a woman or a servant.”¹⁹ It is reported by Anus that the Prophet (PBUH) has said to his dispatching army, “Go in the name of Allah adhering to the community to the messenger of Allah, do not kill any old and weak person or any children or any women.”²⁰ There is complete unanimity (*ijma’a*) among Muslim

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¹⁵ Muslim Ibn Al-Hajjaj, *Saheeh Muslim*, (Beirut: Dar Ehya Al-Turath Al-‘Arabi, 1955), 4:2065, hadith no. 2682.

¹⁶ Isma‘eel Al-Bukhari, *SaheehBukhari*, (Istanbul: Dar Sahnun, 1992), 3: 32.

¹⁷ *Ibid.*, 3: 212.

¹⁸ Muhammad Ibn al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad Ibn Ahmad al-Sarakhasi, (Beirut: Dar al-Kotob al-‘Ilmiyah, 1997), 4:186.

¹⁹ IbnMajah, *Sunnan*, , (Beirut: Dar Ehya Al-Turath Al-‘Arabi, n. d.), 2: 948, hadith no. 2842; Imam al-Nasa’i, *al-Sunnan al-kubra*, (Beirut: Dar Al-Kotob Al-‘Elmyia, 5: 187, hadith nos. 8625 and 8626; Abu Bakr al-Baihaqi, *al-Sunnan al-kubra with al-Jawhar al-Naqi*, (Beirut: Dar al-Fikr, n.d.), 9:83. This hadith is also quoted with slightly different wording in AbiJa‘far al-Tahawi’s *SharhMa’ni al-Asa’r*, (Beirut: Dar Al-Kotob Al-‘Ilmia, n.d.), 3: 222.

²⁰ In another report he is reported to have said to the dispatching army: “... Do not break your pledge, and do not mutilate (dead bodies) and do not kill children and women and elderly.” Abu Dawood, *Sunnan*, (Istanbul: Dar Sahnun, 1992), 3: 52.

jurists that women and children must not be killed.²¹ Shaybani lays down the principle of distinction regarding non-combatant immunity in his *Kitab al-Siyar al-Kabir* and says, "only the combatants from among them [the enemy] are killed not those who do not fight."²² The Prophet (PUBH) has strictly prohibited the mutilation of bodies,²³ damage and destruction of civilian objects and property because this would amount to *fasad fi al-ardh* (mischief in land). Allah says: "and do not spread corruption in the land."²⁴ Allah hates *fasad* and attributes it to a *munafiq* (hypocrite): "when he leaves, he sets out to spread out corruption in the land, destroying crops and livestock – God does not like corruption."²⁵ The instructions of Abu Bakr – the first successor of the Prophet (PBUH) – are worth citing in full, as they constitute the major dos and don'ts of Islamic *jus in bello*. When he ordered Yazid ibn Abi Sufyan to proceed to Syria, he accompanied him and instructed him as follows:

O Yazid! ... You will come across people who have secluded themselves in convents; leave them and their seclusion. But you will also come across people on whose heads the devil has taken his abode so strike their heads off. But do not kill any old man or woman or minor or sick person or monk. Do not devastate any population. Do not cut a tree except for some useful purpose. Do not burn a palm-tree nor inundate it. Do not commit treachery, do not mutilate [dead bodies], do not show cowardice, and do not cheat.²⁶

These instructions are self-explanatory. Similar instructions were also issued by 'Umar, 'Usman, and 'Ali.²⁷

We have to add only one other element, i.e. the prohibition of treachery and perfidy in Islamic law *jus in bello* to complete our discussion of the possible crimes that are committed by a suicide bomber during a war. If a suicide bomber pretends to be a civilian and blows him/herself up in a bus, as explained above, s/he is killing innocent civilians, which is murder plain and simple and is strictly prohibited in Islam. But if the same bomber approaches soldiers pretending to be a civilian, he will not be targeted by the armed forces because s/he enjoys non-combatant immunity.²⁸ However, when that person detonates his bomb to kill and maim soldiers, then he has

²¹ To Imam Awzai' and Imam Malik the immunity given to women and children is absolute and there are no exceptions. See, my, "The Protection of Civilians in War: Non-combatant Immunity in Islamic Law", *HamdardIslamicus*, forthcoming.

²² Shaybani, *Kitab al-Siyar al-Kabir*, 4:196.

²³ Abu Dawood, *Sunnan*, 3:137, hadith no. 2687. *Sabrun* killing (tying up a person while still alive to use as target practice and aiming at that person with a variety of weapons until the person is dead).

²⁴ Qur'an 7:74. Also see Qur'an 5:64 and 28:77.

²⁵ Qur'an 2:205.

²⁶ 'Ali al-Muttaqiy, *Kanz-ul-'Ummal*, (HaiderabadDaccan: Matba'atUsmania, n. d.), 2: hadith No. 6259, on the authority of al-Baihaqi.

²⁷ See, my, "The Protection of Civilians in War: Non-combatant Immunity in Islamic law", forthcoming.

²⁸ Similarly if a soldier feigns to surrender by waiving white flag, he will not be targeted by the armed forces as he has immunity available to such persons. See, Muhammad Munir, "Suicide Attacks and Islamic law", 82.

committed treachery or perfidy – an act strictly prohibited in Islam. He has breached the trust of the enemy, which in future may not trust genuine civilians or surrendering soldiers.²⁹ The Prophet as well as the rightly-guided Caliphs have prohibited perfidy on many occasions. In the 8th year after his migration to Madina, he issued commands to his departing army, and said: “Fight with the name of God and in the path of God. Combat those who disbelieve in God. Fight yet do not cheat, do not breach trust, do not mutilate, do not kill minors.”³⁰

On another occasion, while instructing the army led by ‘Abdar-Rahmanibn ‘Awf, he said:

O son of ‘Awf! Take it [the banner]. Fight you all in the path of God and combat those who do not believe in the path of God. Yet never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the demand of God and the conduct of His Messenger for your guidance.³¹

Moreover any pledge given by any Muslim soldier to an enemy soldier is binding on the entire Muslim army and no derogation is possible. A person breaching his pledge is roundly condemned by the Prophet (PBUH) who declared such a person to be a hypocrite. He also said that “on the day of resurrection anyone who has breached his pledge will be exposed by the hoisting of a flag and that the size of the flag will be according to his treachery. And remember that the biggest treachery is the one carried out by the leader of the nation.”³²

What about the arguments that since non-Muslims have occupied the land of the Muslims and Muslims are militarily weaker, or that since a particular non-Muslim society is militaristic in nature, Muslims are allowed to carry out suicide attacks and women are legitimate targets for such attacks?³³ These arguments are without any foundation in the Islamic legal tradition and are thus unacceptable. For this would mean that Islamic *jus in bello* is applicable when Muslims invade or occupy an enemy’s territory, but that Muslims are not bound by them when Muslim territory is invaded or occupied – in other words, that Islamic *jus in bello* are applicable only if Muslims are victorious, but not applicable if they lose the war. The implication is that we should follow one principle for situation one, because it suits us, but a different principle in situation two if the first principle is not to our benefit. If this were the case, then in Dworkin’s parlance we would have no principles and no

²⁹ If suicide attacks are carried out by soldiers (not feigning to be civilians or feigning to be surrendering) against enemy’s soldiers then, they are legitimate battle tactic. See, Shaybani, *Kitab al-Siyar al-Kabir*, 4: 250.

³⁰ Imam Shoukani, *Nail al-Awtar*, (Lahore: Ansar Al-Sunah Al-Muhammadiya, n. d.), 7: 246.

³¹ Abdul Malik ibn Hisham, *Al-Sirah Al-Nabawiyah*, ed. Mustafa Al-Saqa, (Beirut: Dar al-Ma’rifah, n.d.), 2: 632.

³² Muslim, *Saheeh Muslim*, 3:1361, hadith no. 1738.

³³ Sheikh Qaradawi used this argument to justify the killing of Israeli women and civilians by Palestinian suicide bombers. See, Yusuf al-Qardawi, “Shari’yah al-‘Amaliyat al-Istishhadiyah fi Filastin al-Muhtalla” [The legality of martyrdom operations in the Occupied Palestine], 375 *al-Islah*, 375 (1997), 44; also available at www.memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA5301; www.mediareviewnet.com/SHEIKH%20QARDAWI%20lecture.htm

integrity at all.³⁴ On the contrary, under Islamic law, Muslims have one and the same set of principles: whether they invade or occupy an enemy's land, whether they are weak or strong, and whether they win or lose, the rules of Islamic *ius in bello* remain unchanged.

Other acts of terror that we want to discuss are the killing of non-Muslim diplomats and other non-Muslim foreigners.³⁵ Both acts are strictly prohibited in Islam. The Prophet is reported to have willed on his death bed, "... and accord envoys [privileges] that I used to accord them."³⁶ On another occasion the envoys of MusailamaKazzab abused the Prophet who is reported to have said: "... if the killing of envoys would be allowed, then I would have slain both of you." 'Abdullah ibnMas'ood who reported this *hadith* adds, that "it has been a custom that envoys are not killed." Moreover, the Prophet received a delegation led by 'Amir ibnTufail who used abusive language and threatened to attack Madina and destroy it. Despite their misbehaviour and threats, the Prophet was extremely polite to them and saw them off with great honour and respect.³⁷ The only punishment for an emissary is expulsion by the host country. According to *Surat al-Nahl 27:37* when Prophet Sulaiman (992-952 B. C.) considered the sending of gifts by Balqis, Queen of Shaiba, an insult for himself, he told the delegation: "Go back to your people: we shall certainly come upon them with irresistible forces, and drive them, disgraced and humbled, from their land."

This verse indicates that emissaries were immune from the wrath of the host state, and were not held responsible for the acts or messages sent by their head of state. Although Sulaiman was offended, the only thing he did was to send them back whence they came. There is thus dual mandate granted by the Qur'an: protection must be granted to the envoys, and expulsion is the only sanction to be taken against them.

Moreover, the killing of foreigners is strictly against Islam. The Qur'an says: "If anyone of the idolaters should seek your protection, grant it to him so that he may hear the word of God, then take him to a place safe for him, for they are people with no knowledge."³⁸ Muslim jurists while interpreting this verse argue that all non-Muslim citizens who visit the Muslim state for business, touring, seeking knowledge or any other purpose with the permission of the Muslim state, then they must be given permission accordingly and they will be free to move around.³⁹ When such

³⁴ For discussion of Dworkin's theory, see, my, "How Right is Dworkin's 'Right Answer Thesis' and his 'Law as Integrity Theory'?", *Journal of Social Sciences*, 2:1 (2006), 1-25.

³⁵ As I was writing this paper it was reported that six persons were killed in the US consulate bombing in Istanbul on 9th July, 2008. See, *Dawn*, 10 July, 2008, at 1.

³⁶ Bukhari, *SaheehBukhari*, 4: 31.

³⁷ See, M. CherifBassiouni, "Protection of Diplomats under Islamic Law", *AJIL* 74 (3), (1980), 609-633 and my, "Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shari'a", *Journal of Law and Society XXII* (35), (2000), 48-51.

³⁸ Qur'an 9:6.

³⁹ See Abul 'Aa'laMawdudi, *al-Jihad fi al-Islam*, (Lahore: IdaraTarjuman al-Qur'an, 1980), 273.

persons are given the permission to visit, that is, a valid visa, it means that they must be protected by the Muslim state. This is the Qur'anic obligation addressed to Muslims, but, terrorists do not pay heed to what God says.

Jihad: the Islamic Jus ad bellum:

Since international terrorists' organizations such as *al-Qa'ida* and other non-state Islamic actors call themselves Muslims and disguise their acts of terror as *jihad* (which it is not), it is necessary to discuss the cause(s) of war in Islam (Arabic: '*illa al-Qital*').⁴⁰ For *al-Qa'ida* and many other non-state Islamic actors the cause of war in Islam is the elimination of infidelity from the whole world.⁴¹ Below we want to prove that the use of force in Islam is only in self-defence and it is never allowed to use force to eliminate infidelity or coerce non-Muslims to become Muslims.

Under Islamic law, infidelity *per se* can never be the cause of war at all. There are irrefutable arguments to support this view. First, if infidelity would be a cause to fight the non-Muslims, then why would have the Prophet accepted poll tax (*jizya*) from non-Muslims because its acceptance meant that they were totally free to practice their religion and the Muslim state was responsible for the security of their person, property and honour. Non-Muslims citizens of the Muslim state had to pay one or two *dinars* annually in return for all the privileges.⁴² Secondly, why had the Prophet released the prisoners of war either for ransom or without ransom⁴³ because they were released as non-Muslims? The Prophet is reported to have executed three or four POWs in all his wars and in the first 100 years of Islamic history only six or seven POWs were executed all of whom could have been found guilty by a war crime tribunal under international law today.⁴⁴ Thirdly, why was the killing of civilians, especially women and children prohibited in war? Women and children, religious personnel, elderly, sick, religious people, farmers, businessmen and so on or all those who do not participate in hostile activities, shall not be killed during armed conflicts or during captivity thereafter. This is according to the majority of scholars.⁴⁵ This is also evident from the Qur'anic verse that says, "*Fight in God's*

⁴⁰ Muslim scholars and intellectuals are under an obligation to fight terrorism through the power of their pens. Moreover, it would be a sin to keep quiet over terrorism without deploring it. The present paper is the realization of that obligation as a Muslim.

⁴¹ They also consider all Muslim rulers to be the agents of the United States and want their removal as well. For *al-Qa'ida's* interpretation (rather distortion of Islamic *jus ad bellum* and *jus in bello*) of Qur'anic text and the *Sunna* of the Prophet, see, David Cook, *Understanding Jihad*, (Berkeley/Los Angeles: University of California Press, 2005), 128-161 & 175-195.

⁴² For details of this, see, M. Ahmad 'Amir, "Aqd al-Dhimmah: AhkamuhowaAssaroho", (PhD diss., Al-Azhar University, 1979), 7-13; Also, see, RahmanDoi, *Non-Muslims Under Sharia*, (Lahore: Kazi Publications, 1981), 55-60.

⁴³ See, Muhammad Tal'at al-Gunaimi, "Nazra 'Aama fi al-Qanoon al-Duwali al-Insani al-Islami", in *Maqalat fi al-Qanoon al-Duwali al-Insaniwa al-Islam*, ed. Amir al-Zamali, (Geneva: ICRC, 2007), 47-51.

⁴⁴ See, Munir, "The Protection of Civilians in War: Non-combatant Immunity in Islamic Law", *HamdardIslamicus*.

⁴⁵ See, Al-Mawardi, *Al-Ahkamal-Sultania*, (Cairo: al-matbat al-Mahmoodia, n. d.), 50-51; Shaybani, *Kitab al-Siyar al-Kabir*, 4: 186, 196; and Imam Sarkhasi, *Kitabal-Mabsut*, (Beirut:

cause against those who fight you, but do not overstep the limits.”⁴⁶ Fourthly, non-Muslims cannot be punished in this world for their disbelief (*kufr*) because this life is not the Hereafter. Here people are free to choose, “Let those who wish to believe in it [the truth] do so, and let those who wish to reject it do so.”⁴⁷ Moreover, this is against the basic Islamic principle of non-compulsion. “Had your Lord willed, all the people on earth would have believed. So can you [Prophet] compel people to believe?”⁴⁸ Fifthly, according to eminent classical Muslim scholars the cause of war in Islam is not infidelity; instead it is aggression and attack from the infidels when no peace treaty exists between the Muslims and the non-Muslim states. Shaybani argues that, “because infidelity [*per se*] even if it is the biggest of all sins it is between the individual and his Lord, the Exalted and the punishment of this sin [that is, infidelity] is delayed to the day of reward [hereafter].”⁴⁹ According to Kamal ibn al-Humam (d. 861 A.H.) of the Hanafi school of thought, “the aim of fighting (*qital*) is to root out *fitna* (persecution, viciousness, wickedness and wrongness) from the world and our (that is, Muslims) fighting them (non-Muslims) is prompted by their fighting against us.”⁵⁰

Ibn-e-Taimiyah Taqiud-Din Ahmad (d. 1328) argues that God has allowed the killing of infidels only for the goodness of His human beings as God says, “...For *fitna* (persecution) is worse than killing”,⁵¹ that is, although killing is an evil and bad act but the persecution (the conspiracies and aggression from the infidels) is worse than killing. Thus, those who do not prevent Muslims from following and practicing their religion, their infidelity is harmful only to themselves.⁵² Ibn-e-Taimiyah quotes a *hadith* which says that, “whenever a wrong is done in private it harms the participants only, but when it is done in public and is not prevented, then it harms everyone.” He further says that, “if *jihad* was meant for preaching religion and was one of such means, then there would be no exception not to kill women and children. He argues that their exception is a strong evidence that fighting is for those who fight against us to push back their wickedness.”⁵³

According to Abu Bakr al-Sarakhasi (d.483 A.H.) – the leading Hanafimujtahid, they [non-believers] are fought to repel the *fitna* of infidelity and to

Dar Ehya al-Turath al-Arabi, 2002), 10: 7-9; Abu Yousuf, *Kitab al-Kiraj*, ed., M. Ibrahim al-Banna, (Peshawar: MaktabFaruqia, n. d.), 379.

⁴⁶ Qur'an 2:190.

⁴⁷ Qur'an 18:29.

⁴⁸ Qur'an 10:99. For other arguments regarding the cause of war in Islam see my “Public International Law and Islamic International Law: Identical Expressions of World Order”, *Islamabad Law Review* 1 (3 & 4) (2003), 400-402.

⁴⁹ Shaybani, *Kitab al-Siyar al-Kabir*, 4: 186.

⁵⁰ Kamal ibn al-Humam, *Fath al-Qadeer*, (Cairo: Matba't Mustafa Muhammad, n.d.), 4: 277.

⁵¹ Qur'an 2:217.

⁵² It means that non-Muslims could only engage in these activities if there is no peace treaty between them and the Muslim state.

⁵³ See Ibn-e-Taimiyah, *al-Syasa al-Shar'iyya*, (Beirut: Dar al-kutub al-'Arabia, n. d.), 124; also see Ali Ahmad al-Jarjawi, *Hikmat al-Tashree' waFalsafatuhu*, (Kabul: Ansari KutubKhana, 1961), 330-331.

repel the danger [posed by] non-believers [when relations between the two communities are hostile].”⁵⁴ He also states that “killing [of a person] is legal because of [his] aggression which is what ‘ulema of our school of thought (May Allah bless them all) believe or because of their infidelity which is what our opponents say.”⁵⁵ Burhan al-Din Al-Marghinani (d. 592 A. H.), the author of the famous Hanafi text *al-Hidayah*, asserts:

Mere disbelief does not of itself legalise killing. Rather, it is *muharabah* (aggression) that makes it permissible to kill the *muharib* (aggressor). That is why, it is not allowed to kill women, children, people of old age, the handicapped and others who do not have capability to fight.⁵⁶

Finally, under Islamic law individuals or a group cannot declare a *jihad*. Only the head of the Muslim state concerned has the authority to declare war. Imam Abu Yusuf (d. 182 A. H.), a top Hanafi jurist and the Chief Justice of Haroon al-Rashid, formulated this principle in this way: “No expedition can be dispatched without the permission of the government.”⁵⁷ Consequently, a band of criminals or “terrorists” has no legal authority to declare *jihad*. It is wrong to describe them as *jihadists*.⁵⁸ Moreover, *Shari’a* imposes obligation on a Muslim state to use force to defend its territory or citizens against aggression only. In other words, abiding by the UN Charter regarding the use of force is totally Islamic.

Respecting the terms of a treaty:

Islamic law permits the head of Muslim state (Imam) to enter into treaties binding the Islamic state. All the international treaties regarding prevention and elimination of terrorism,⁵⁹ the use of force (the UN Charter), the conduct of war, the protection of civilians, prisoners of war and civilian properties (the Hague Regulations and the Geneva Conventions 1949), the protection of diplomats (the Vienna Convention on Diplomatic Relations 1961), any bilateral/regional or international treaty about peaceful relations (e.g. the 1972 Simla Accord between India and Pakistan) and any other treaty entered into by the Muslim state are all binding on it. In Islamic law, once a treaty is entered into, all the citizens of the state are bound by it and must respect it in letter and spirit. The Prophet is reported to have said regarding *hifl fadul*: “If I would be invited to enter into it a similar pact, I would have no hesitation

⁵⁴ Sarkhasi, *Kitabal-Mabsut*, 10: 8.

⁵⁵ *Ibid.*, 32. And also Imam Shaybani, *Kitab al-Siyar al-Kabir*, 2:187. He says that “non-combatants are not killed because the cause of war is not found in them, that is, aggression.” While discussing why non-combatants are not killed, Sarkhasi says that they can be killed if they fight. at 187.

⁵⁶ Burhan al-Din al-Marghinani, *al-Hadayah*, (Beirut: Dar Ihya al-Turath al-‘Arabi, n. d.), 2: 380.

⁵⁷ See, Abu Yousuf, *Kitab al-Kiraj*, 385.

⁵⁸ For example, see, Cook, *Understanding Jihad*, 128-161.

⁵⁹ Such as International Convention on Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December, 1997 and International Convention for the Suppression of Financing Terrorism, adopted by the General Assembly of the United Nations in 1999.

to do the same.” Moreover, the Prophet respected the treaty of Hudaibiyya in letter and spirit. Under the clauses of the treaty of Hudaibiyya, the Prophet had to return any Muslim who ran away from the clutches of Makkian tormentors and went to Makkina. The Prophet returned Abu Jandalibn Suhayl who joined him in Hudaibiyya just before the signing of the treaty, despite opposition from other Muslims.⁶⁰

To prove how strictly Muslims adhered to their treaties it is pertinent to cite the example of Ummayyad Caliph Amir Mu'awiyah. He once prepared his army to march against the Roman Empire, although the peace treaty between the two was still in force, for he wanted to attack as soon as it had expired. A companion of the Prophet (PBUH), 'Amr ibn 'Anbasah, considered it treachery to prepare and dispatch the army to the frontier. He therefore hastened to the Caliph shouting, “God is great, God is great, we should fulfil the pledge, we should not contravene it.” The Caliph questioned him, whereupon he replied that he had heard the Prophet (PBUH) saying:

If someone has an agreement with another community then there should be no [unilateral] alteration or change in it till its time is over. And if there is risk of a breach by the other side then give them notice of termination of the agreement on reciprocal basis.⁶¹

This tradition supports the Qur'anic verse which says: “And if you learn of treachery on the part of any people, throw their treaty back at them, for God does not love treacherous.”⁶² So if there is the danger of a breach of trust by the enemy, it is possible to go ahead and openly proclaim to them that Muslims will not remain bound by the treaty. But this proclamation must be made in a manner that places Muslims and the other party on the same footing: no prior preparations should be made to confront the other party without warning, when they are caught unaware and unable to make counter-preparations for their defence.⁶³ Islam is therefore redefining justice in the sense that the enemy's rights are safeguarded; that restrictions are placed on Muslims rather than on their adversaries; and that Muslims cannot prepare to attack the enemy before declaring their intention to dispense with the treaty. The best case in point is that of Mu'awiyah described above. This was the conduct of the companions of the Prophet but what about the conduct of terrorists regarding treaties?

Link between Religious Ignorance and Terrorism:

We have explained above that terrorism has nothing to do with Islam and that all the arguments put forward by terrorists, their supporters and other apologists are based on distortion of religious texts. Muslim states should punish terrorists for two other crimes: distortion of religious texts, and bringing in negative publicity to Islam. The

⁶⁰ See, Ibn Ishaq, *The Life of Muhammad*, trans. A. Guillaume, (Clarendon: Oxford University Press, 1955), 505.

⁶¹ Shaybani, *Kitab al-Siyar al-Kabir*, 1:185. According to Sarakhasi, it means that any act that resembles treachery in letter or spirit must be avoided. See, also Imam Termidhi, *Sunnan*, (Istanbul: Dar Sahnun, n. d.), 4: 143, hadith no. 1580.

⁶² Qur'an 8:58.

⁶³ The termination of a peace treaty or its expiry means that relations between the two communities become hostile.

bottom line is that religious ignorance has made them terrorists. There is a strong link between religious ignorance and terrorism. Karliga argues:

[I]gnorance,” or insufficient and false knowledge, feeds bigotry, bigotry prepares the ground for fanaticism, and fanaticism leaves the door ajar to terror. When the field in which ignorance reigns is religion, the situation becomes even more complex. People who are not well informed about their own beliefs cannot formulate a healthy correlation between the values in which they believe and the life that they lead. Consequently, they lose connection with life and start to adopt illogical behavior, or they start to despise their values and develop inferiority complexes. Both are nothing but errant behavior.⁶⁴

It is, therefore, obligatory for Muslim scholars to declare a *jihad* on terrorism and terrorists – the religiously misguided criminals. Just as politicians have declared a war on terror, similarly, scholars have to fight on a different front. Whatever the aim of an act of terror, the reasons that lead a person to commit terrorism must be uncovered and eradicated. This is the foremost duty of humanity.

Conclusion:

What is described above leads us to conclude that the acts of terror carried out by terrorist groups are against the Qur'an, the *Sunna* of the Prophet, the conduct of rightly guided Caliphs and companions of the Prophet, the *ijma'* (consensus) of *mujtahideen*, against any logic and against the obligations of a Muslim state. Moreover, their acts of terror which include the declaration of war, their conduct of war, committing acts of perfidy and treachery, killing of civilians and POWs, destroying their properties, suicide attacks, mutilating of bodies, terrifying citizens, killing of diplomats and foreigners and so on are strictly prohibited in Islam. If a Muslim state has no codified law, then it is not necessary to make anti-terrorism legislation as all the above acts would be considered *haram* (illegal) by the judges while prosecuting terrorists. However, in a Muslim state like Pakistan where judges interpret the codified law any anti-terrorism legislation that outlaws the above criminal activities would be totally in conformity with Islamic law. *Shari'a* does not prevent any Muslim state from bringing in anti-terrorism legislation. Therefore, anti-terrorism legislation and *Shari'a* are totally compatible. To argue the contrary would be to put *Shari'a* upside down. It must be noted that the leaders of terrorist organizations such as *al-Qa'da* and other non-state Islamic actors are neither *Muftis* nor jurists or *mujtahids* to give new rules or interpret the existing ones. How could someone accept a *fatwa* issued by a person who is not qualified for that job; secondly, how can such a *fatwa* be given any attention when it is against the Qur'an, the *Sunna*, the *ijma'*, the conduct of Caliphs and the companions of the Prophet, public interest, and obligations of the Muslim state. Moreover, Islam has nothing to do with acts of terror carried out in its name by gangs of criminals who deviated

⁶⁴BekirKarlīga, “Religion, Terror, War, and the Need for Global Ethics”, in *Terror and Suicide Attacks: An Islamic Perspective*, ed. Ergun Capan, trans. N. Haliloglu& M. Fanikucukmehmedoglu, Caglayan A. S. (Izmir: The Lights, Inc. 2005), 50.

Compatibility between Anti-terrorism Legislation and Shari'a

from Islam. "If they do not believe you, [Prophet], say, 'I act for myself, and you for yourselves. You are not responsible for my actions nor am I responsible for yours.'"⁶⁵

⁶⁵ Qur'an 10:41.