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ARTICLE: **ISLAMIC LAW** AND THE APOLOGETICS OF JIHAD: A REVIEW OF IS JIHAD A JUST WAR?

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TEXT:

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Hilmi Zawati's *Is Jihad a Just War?: War, Peace, and Human Rights Under Islamic and Public International Law*¹ sets out to deconstruct Orientalist notions of jihad as a permanent state of hostility between an Islamic polity and an enemy state, and to prove that the notion of jihad can only be understood as a defensive war. He further goes on to argue that the notion of jihad is completely consistent with modern notions of human rights and is similar to the Just War doctrine that developed in Western legal history.

While at times this work seems to avoid the symbolic polemics surrounding the issue of jihad by investigating the classical Islamic juristic tradition, ultimately the work succumbs to the apologetic temptation of trying to show how the concept of jihad in the Islamic legal tradition was really quite humane and well ahead of its time. To accomplish this task, the work sacrifices methodological consistency in engaging the sources. Rather than systematically tracing the development of the notion of jihad in Islamic juristic writings (primarily fiqh and fatawa works²) and then building upon these to offer a normative theory of jihad as an Islamic doctrine of Just War, the work selectively gathers a variety of statements from various Islamic literary sources to prove a symbolic point: namely, that jihad is defensive war and an Islamic version of Just War theory.

Before I engage Zawati's work at the substantive level, I would first like to clarify some theoretical issues in exactly what is meant when one claims that a particular doctrine or idea is representative of "**Islamic law**." Implicit in the definition of what is meant by "**Islamic law**" is at least a commitment **[*156]** to certain epistemological presumptions. So in other words, perhaps at a minimum, one would have to admit that the Qur'an is a legally relevant and normatively binding source for legal determination. Perhaps further, there must minimally be somewhat of a commitment to the sunna.³ In other words, any scholar who holds that the Qur'an or the sunna is irrelevant in the construction of a legal determination, cannot ever hold her particular legal determination to be in any way connected or representative of "**Islamic Law**," because the acceptance of the Qur'an and the Prophetic traditions as sources of **Islamic Law** is a fundamental aspect of the very definition of "**Islamic Law**" itself. This begs the question: What about the pre-modern legal tradition? Is it also the case that by definition, a determination that is purported to be representative of **Islamic law** must also accept at least in theory that the pre-modern legal tradition is a source for legal analysis and must take its pronouncements into consideration? This question implies a clear-cut, easily recognizable distinction between the pre-modern legal tradition and the Qur'an and the sunna, when historically this was not the case. The claim to regard the Qur'an and sunna as law in and of themselves denies the historicity of these sources and how intimately our understanding of them is linked with the pre-modern juristic tradition. Perhaps the following will help illustrate this point more fully:

This approach [i.e., the claim to return to a pristine and uncorrupted Islam by only relying on the Qur'an

and sunna] proved to be hopelessly simplistic and naive - it was impossible to return to the Qu'ran and Sunnah in a vacuum. For instance, a return to the Qur'an necessarily meant a return to classical sources that commented on the context and meaning of the verses and that explained the collection and documentation of the Qu'ranic text. Furthermore, a return to the Sunnah necessarily meant a return to the classical sources that compiled, authenticated, contextualized, and interpreted the traditions of the Prophet and his Companions. Furthermore, it was soon discovered that **Islamic law** simply cannot exist without the cumulative classical tradition with its many and varied sources. ⁴

Given the fact that the foundational texts of the Islamic legal tradition, namely the Qur'an and the sunna, are intimately intertwined with the pre-modern juristic tradition itself, what then should the place of the Islamic juristic tradition be, in so far as it represents the numerous legal texts written by Muslims? Many participants in modern Islamic legal discourses selectively invoke a particular juristic text, and knowingly exclude contradictory [*157] texts to support their own particular determination or conclusion, without ever articulating a principle for including or excluding certain jurists or texts. In some cases, implicit in this approach is the assumption that because of the unique and previously unfathomable requirements of modernity, one can skip over the juristic tradition itself and attempt de novo interpretations of the foundational sources of Islam, namely the Qur'an and the sunna, and perhaps invoke a few pre-modern authorities to bolster one's argument. I would argue, that at the most fundamental level, this betrays a degree of intellectual dishonesty and arrogance. Part and parcel of scholarship in general, and legal scholarship in particular, is the requirement of being comprehensive. ⁵ One must consider texts and arguments that may undermine one's central conclusions. It is one thing to survey the pre-modern tradition on the issue of jihad, and argue that the tradition is inherently lacking in its ability to speak to our modern predicament, and then go on to attempt a de novo interpretation of the foundational sources. It is quite another thing to be highly selective in one's engagement with the tradition or dismissive of it altogether.

Zawati cites Qur'anic verses and hadith directly as proof of certain juristic doctrines found in Just War theory. In accordance with the puritanical fundamentalism of Wahhabi thought, he states: "methodologically, in examining the theory of jihad, this study relies heavily on the Qur'an and the Prophetic Traditions as law." ⁶ But this begs the question of whether Qur'anic verses or Prophetic traditions can, in and of themselves, be considered "law" or if they must be appropriated and given legal import by a juristic tradition to be properly considered as at least relevant to legal hermeneutics. ⁷ For [*158] instance, Zawati cites the verse in the Qur'an declaring that there is no compulsion in religion, as conclusive and self-evident proof that "waging jihad against non-Muslims on account of their denial of Muhammad's mission is at variance with Qur'anic teachings." ⁸ It does not seem relevant to Zawati that this verse was not given juristic relevance by the historical juristic tradition in the context of legal discussions of jihad or international relations. Time and again, Zawati cites Qur'anic verses and Prophetic hadith as conclusive proof that there existed concepts and doctrines similar to those that developed from within the Western juristic traditions. But all the while, he ignores the fact that a juristic tradition existed that conducted its own particular, highly technical and legalistic discourse on jihad. ⁹ This tradition selectively and creatively appropriated Qur'anic verses and historical precedents (Prophetic and otherwise) in constructing often-competing conceptions of jihad. Jihad is a complex subject that has been debated by Muslim jurists for centuries, to the point that the notion of jihad and international relations came to form a staple subject matter in Muslim legal sources. ¹⁰ Yet, at the methodological [*159] level, Zawati, in turn, selectively invokes Qur'anic verses, ¹¹ Prophetic precedents, and random, historically decontextualized juristic pronouncements as if this were the totality of what the Islamic civilization has to say about the issue. This approach betrays a kind of puritanism that ignores the historical relevance of centuries of debate and legal development. ¹²

Consistent with the methodology described above, Zawati offers Qur'anic verses and Prophetic traditions as the basis and proof of the existence of certain rules governing combat during war. ¹³ Following each of the rules that regulated conduct during warfare in the Islamic tradition, Zawati discusses the origin of the corresponding rule in the Western legal tradition. The symbolic political point being made is that the **Islamic laws** governing [*160] warfare are compatible with modern conceptions regarding this same subject. In fact, as Zawati would want to argue, **Islamic law**, if anything, is actually quite advanced and ahead of its age. In a footnote, Zawati states, "It is important to mention that Islamic international law has prosecuted and considered rape in war as a war crime, as early as fourteen centuries before the

Geneva Convention of 1949, and the statute of the International Criminal Tribunal for the Former Yugoslavia, 1993." ¹⁴

In the beginning of chapter two, Zawati successfully deconstructs Majid Khadduri's assertion that the default state between an Islamic polity and a non-Islamic state is hostility, by showing that the tripartite juristic distinction between dar al-Islam (realm of Islam), dar al-harb (realm of war), and dar al-salam (realm of peace) was not interpreted as static, unchanging definitions by classical jurists. In other words a "territory can be considered dar al-Islam even if it is not under Muslim rule as long as a Muslim can reside there in safety and freely fulfill his religious obligations." ¹⁵ Conversely, citing the Hanafi jurist al-Kasani (d. 587/1191), Zawati argues that "dar al-harb is the country where Muslims lack security, except by a given pledge, and dar al-Islam is the country where Muslims and dhimmis enjoy protection and security." ¹⁶

The rest of chapter two is devoted to explicating various doctrines found in Islamic international law. But Zawati's engagement with these doctrines, for the most part, suffers from the same confusions and weaknesses outlined above. Zawati invokes in an undisciplined way juristic pronouncements, prophetic traditions, historical events, and Qur'anic verses throughout the chapter to argue for a particular normative conception of jihad doctrines. For example, when arguing that Muslim soldiers are required by **Islamic law** to uphold certain fundamental moral principles in their conduct towards the captured enemy soldiers regardless of the practice of the enemy towards captured Muslim soldiers, Zawati cites as proof an incident in which "Salah al-Din al-Ayyubi released a large number of enemy captives when he could not find enough food for them," despite the fact that "Richard the Lion Heart executed three thousand Muslim captives who had surrendered to him after having obtained his pledge to spare their lives." ¹⁷ By adducing this specific historical incident as proof of a principle in **Islamic law**, Zawati confuses the actions of particular historical individuals with normative pronouncements of **Islamic law**. In other words, how can the actions of Salah al-Din have precedent-value **[*161]** in and of themselves, unless they were theorized as such by a jurist working from within the Islamic legal tradition?

Chapter three is a comparative analysis between an Islamic conception of human rights and the conception of rights as delineated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Zawati cites two main sources for the rights he delineates. He either cites a Qur'anic verse or an article from the Cairo Declaration of Human Rights in Islam to support the view that a particular right exists in Islamic beliefs. Methodologically there are two problems with this approach. First, at the theological and the sociological level, the normative value of the Cairo Declaration of Human Rights in Islam remains problematic. Put differently, it is debatable that a significant number of Muslims hold the Cairo Declaration of Human Rights in Islam to be a binding document as to either their beliefs or behavior. The second methodological hurdle is one I've already noted regarding the usage of Prophetic tradition and Qur'anic verses as direct and self-evident proof of legal value. The various rights discussed, namely the right to life, to choose one's religion, and to protection from torture, Zawati argues, exist both in Islam and in Western international law. In the end, Zawati's conclusions are apologetic and predictable.

The last chapter deals with the question of whether or not the notion of jihad in Islam can be considered, in principle, a version of "Just War." Zawati begins with a brief outline summarizing the development of the "Just War" notion in European history from medieval times onwards. Zawati says, "The classical sources of Islamic legal theory maintain that all kinds of warfare are outlawed except the jihad, which is an exceptional war waged by Muslims to defend the freedom of religious belief for all humanity, and constitutes a deterrent against aggression, injustice, and corruption." To support this claim, however, Zawati cites four sources, three of which are written by modern scholars, as opposed to classical jurists. Furthermore, Zawati presents the position found in the classical sources as uniform and unitary, when this is far from the case. Zawati glosses over the fact that some Muslim jurists considered the enemy's lack of belief as enough of a reason to engage it in war. ¹⁸

In typical apologetic fashion, Zawati goes on to argue that there "is considerable support for the belief that the norms of **international humanitarian law** adopted in more recent international agreements were in fact endorsed by Islamic international law fifteen centuries ago." ¹⁹ Thus the inevitable conclusion **[*162]** must be that the notion of jihad as theorized in the Islamic legal tradition is compatible with the notion of Just War.

The book contains seven appendices of a variety of historical documents the author sees as relevant to the issue of jihad. It contains the texts of the "Treaty of Medina," "The Pact of Najran," "The Farewell Pilgrimage Sermon," "The Treaty of Jerusalem," "The Treaty of Egypt," "Universal Islamic Declaration of Human Rights," "The Cairo Declaration on Human Rights in Islam."

Although this work at times tries hard to bring a new perspective or even new evidence as to the notion of jihad in Islamic legal discourses, ultimately it ends up being another symbolic volley in the political discourse against those who essentialize the doctrine of jihad into a Muslim religious justification for conquering enemy territories and maintaining a posture of active hostility against the rest of the world. Lacking a spirit of critical inquiry and intellectual honesty, Zawati's work is just another modern apologetic attempt to defend the doctrine of jihad and even assert its superiority above modern theories governing the conduct of war.

Legal Topics:

For related research and practice materials, see the following legal topics:

[International Law](#) > [Sovereign States & Individuals](#) > [Human Rights](#) > [Torture](#) 

FOOTNOTES:

¹n1. Hilmi M. Zawati, *Is Jihad a Just War?: War, Peace, and Human Rights Under Islamic and Public International Law* (The Edwin Mellen Press 2001).

²n2. For an understanding of the relationship between fiqh and fatawa literature, see Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* 184-85 (Cambridge University Press 2001).

³n3. Perhaps the nature of this commitment is a matter of debate.

⁴n4. Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* 174-75 (Oneworld Publications 2001).

⁵n5. See *id.* at 51-60 (discussing the "contingencies" which govern the claim to authoritativeness made for a particular determination within the Islamic legal tradition, one of which is comprehensiveness).

⁶n6. Zawati, *supra* note 1, at 6.

⁷n7. For instance the renowned Shafi'i jurist Abu Hamid al-Ghazali (d. 505/1111), in the beginning of his theoretical jurisprudence work emphasizes the distinction between the *dalil* (the indicator) and the *hukm* (the rule). The *dalil* is the piece of evidence (like a verse from the Qur'an, or a Prophetic tradition) that points to or indicates a particular *hukm* or ruling regarding an act, for example, whether a particular act is

obligated, permitted, prohibited, disliked, preferred, etc. By explicitly distinguishing between the *dalil* and the *hukm*, al-Ghazali is implying that the *dalil* cannot be considered, in and of itself, a rule or law. This is contrary to what Zawati asserts. Abu Hamid b. Muhammad b. Muhammad b. Muhammad al-Ghazali, *al-Mustasfa min 'Ilm al-Usul* 38-41 (Mu'assasat al-Risala 1997). More recently see the work of the contemporary reformer, Khaled Abou El Fadl, who, using the dichotomous categories of the authoritative/authoritarian, argues that a speaker who does not acknowledge an interpretive distance between herself and the text, "will assume that the text has a clear, precise, and singular meaning, while excluding all evidence to the contrary. Furthermore, after superimposing his or her understanding upon the text, the speaker equates himself or herself to the text. The authoritative text is subsumed into the speaker, who in turn, becomes the authoritarian." Khaled Abou El Fadl, *And God Knows the Soldiers* 41 (University Press of America 2001). For a more detailed investigation of the authoritative/authoritarian dichotomy in interpretation, see Abou El Fadl, *supra* note 4, at 96-209.

¶n8. *Id.* at 37. It does not seem to matter to Zawati that there did exist a minority juristic opinion which stated that the "moral guilt incurred when one fails to adopt Islam justifies their execution." See Khaled Abou El Fadl, *The Rules of Killing at War*, 89 *Muslim World* 144, 152 (1999).

¶n9. For the notion of the highly technical "linguistic practice" of classical Muslim jurists see Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001).

¶n10. These discussions would take place in chapters titled "Jihad" or in Hanafi sources in chapters titled "Siyar." Initial research into this subject produced the following legal sources that devoted a chapter to jihad: Abu 'Abdallah Muhammad b. Muhammad b. 'Abd al-Rahman al-Tarabulusi al-Maghribi, *Mawahib al-Jalil li Sharh Mukhtasar Khalil* (Makataba al-Najja n.d.); Ahmed b. Muhammad al-Sawi al-Maliki, *Bulghat al-Salik li Aqrab al-Masalik ila Madhhab al-Imam Malik* (al-Dar al-Sudaniyya 1998); Abu al-Walid al-Baji, *al-Muntaqa Sharh Muwatta' Imam Malik* (Maktaba al-Sa'ada 1913); 'Abd al-'Aziz Hamad al-Mubarak al-Ajsa'i, *Tabyin al-Masalik Sharh Tadrib al-Salik ila Aqrab al-Masalik* (Dar al-Gharb al-Islami 1995); al-Sayyid Muhammad Hasan Tarhini al-'Amili, *al-Zubdah al-Fiqhiyyah fi Sharh al-Rawah al-Bahiyya* (Dar al-Hijra 1995); Muhammad b. Isma'il al-Kahlani, *Subul al-Salam Sharh Bulugh al-Maram Jam' Adillat al-Ahkam* (Dar Sadir 1998); Muflih al-Suyamari al-Bahrani, *Ghayat al-Maram fi Sharh Shara'i' al-Islam* (Dar al-Hadi 1999); Ibn Qayyim al-Jawziyya, *Jami' al-Fiqh* (Dar al-Wafa' 2000); Abdallah al-Zarkashi, *Sharh al-Zarkashi 'Ala Mukhtasar al-Kharafi fi al-Fiqh 'Ala Madhhab al-Imam Ahmad b. Hanbal* (n.d.); Ahmad b. Siyam al-Damhuri, *al-Fath al-Rabbani bi Mufradat ibn Hanbal al-Shaybani* (Dar al-'Asima 1993); Abu al-Barakat al-Dardir, *al-Sharh al-Saghir 'Ala Aqrab al-Masalik ila Madhhab al-Imam Malik* (Dar al-Ma'arif, n.d.); Zayn al-Din al-Razi, *Tuhfat al-Muluk fi Fiqh Madhhab al-Imam Abu Hanifa al-Nu'man* (Dar al-Basa'ir al-Islamiyya 1997); Abu al-Abbas b. Farh al-Ishbili, *Mukhtasar al-Khilafiyat li al-Imam al-Bayhaqi* (Dar al-Kutub al-'Ilmiyya 2000); Badr al-Din al-'Ayni, *al-Binaya Sharh al-Hidaya* (Dar al-Kutub al-'Ilmiyya 2000); Abu Layth al-Samarqandi, *Khizanat al-Fiqh wa 'Uyun al-Masa'il* (Jami'a Baghdad 1965); Abu al-Hasan al-Marghinani, *al-Hidaya Sharh Bidayat al-Mubtadi'* (n.d.); Muhammad b. 'Abidin, *Radd al-Muhtar 'Ala al-Durr al-Mukhtar Sharh Tanwir al-Absar* (Dar al-Kutub al-'Ilmiyya 1994); Taqi al-Din al-Husni, *Kifayat al-Akhyar fi Hall Ghayat al-Ikhtisar* (Dar al-Khayr 1991); Abu al-Hasan al-Mawardi, *al-Hawi al-Kabir* (Dar al-Kutub al-'Ilmiyya 1994); Muhyi al-Din al-Nawawi, *Minhaj al-Talibin* (Dar al-Basha'ir al-'Islamiyya 2000); Shams al-Din Muhammad b. al-Khatib al-Shirbini, *Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj* (Dar al-Ma'rifa 1997); Muhammad b. Idris al-Shafi'i, *Mukhtasar Kitab al-Umm fi al-Fiqh* (Dar al-Arqam b. 'Ali Arqam n.d.); Abu Ishaq al-Shirazi, *al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i* (Dar al-Kutub al-'Ilmiyya 1995); Sahnun bin Sa'id al-Tanukhi, *al-Mudawwanat al-Kubra* (Dar al-Kutub al-'Ilmiyya n.d.); Muhammad b. Ahmad b. Muhammad b. Ahmad b. Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (Dar al-Ma'rifa 1997); Jamal al-Din b. al-Hajib, *Jami' al-Ummuhat* (al-Yamama 1998); 'Ala' al-Din al-Samarqandi, *Tuhfat al-Fuqaha'* (Dar al-Kutub al-'Ilmiyya, n.d.); 'Ala' al-Din al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (Dar al-Ihya' al-Turath al-'Arabi 1998); Abu Muhammad 'Ali b. Hazm, *al-Muhalla bi al-Athar* (Dar al-Fikr n.d.); Baha' al-Din b. Shaddad, *Dala'il al-Ahkam* (Dar al-Kutub al-'Ilmiyya 1991); Salih b. Mahdi al-Maqbali, *al-Manar fi al-Mukhtar* (Mu'assasat al-Risala 1988).

✚n11. For example, Zawati does not even mention, nor attempt to reconcile the "no compulsion" verse with verses like the following: "Fight those among the People of the Book (Jews and Christians) who do not believe in God or the Hereafter, who do not forbid what God and His Prophet have forbidden, and who do not acknowledge the religion of truth - fight them until they pay the poll tax (jizyah) with willing submission and feel themselves subdued." Qur'an 9:29.

✚n12. For an excellent article on the relationship of apologetics to the puritan trend within Islam, see Khaled Abou El Fadl, *The Orphans of Modernity and the Clash of Civilizations*, *Global Dialogue* (forthcoming).

✚n13. Zawati, *supra* note 1, at 41-42.

✚n14. *Id.* at 43 n.211.

✚n15. *Id.* at 51.

✚n16. *Id.*

✚n17. *Id.* at 68.

✚n18. Abou El Fadl, *supra* note 8, at 150-53.

✚n19. Zawati, *supra* note 1, at 108.