Chapter 3

Juridical Justifications for War

Introduction

The outbreaks of hostilities between the Muslims and their enemies in Medina during the Prophet’s lifetime and the different interpretations of the Qur’ānic *casus belli*, studied in chapters one and two, respectively, were the basis on which the jurists of the second/eighth and third/ninth centuries developed the Islamic law of war. This chapter studies the justifications for war and Islamic attitudes toward non-Muslims in the classical Islamic juridical theory of international law and modern Islamic writings on the issue. It also examines how the Islamic justifications for war in classical and modern writings are presented in Western literature. The significance of studying how the Islamic justifications for war are dealt with in Western literature is that it indicates how Western scholars and policymakers view the nature of conflicts where Islam plays, or is thought to play, a role.

The area of Islamic international law is part of the science of *fiqh* (Islamic jurisprudence) dealt with in the literature under various headings such as *Siyar*, *Jihād*, *Magḥāzī* (campaigns), and *Amān* (safe conduct). *Fiqh* covers seven main areas: (1) acts of worship; (2) family law; (3) financial transactions; (4) governance; (5) criminal law; (6) morality; and (7) international law. The major but very common error in Western scholarship in the area of Islamic international law is the confusion between shari’ah and *fiqh*. Apart from the diverse assessments of the historical instances of war during the Prophet’s lifetime, and the various interpretations of the Qur’ānic texts on war, confusing shari’ah with *fiqh* has made the area of Islamic international law in Western literature the most blatant area of conflict.
between Islamic/insider and Western/outsider scholarship. Moreover, the Islamic law of war was formulated by individual jurist-scholars according to their differing interpretations of the shari’ah texts and their use of exegetical disciplines and juridical methodologies. No less importantly, as John L. Esposito points out, this formulation of the tradition of war in Islam occurred “in specific historical and political contexts.” The failure to take into consideration the nature of the formulation of the Islamic law of war and to relate it to specific periods in history and the paradigm of international relations during which it emerged explains much of the confusion about the justifications for war in Islam. Thus, this chapter argues that, in the absence of a codification of applicable Islamic law of war by a body of international Muslim jurist-scholars, much of the confusion about the justifications for war in Islam, and the nature of jihād in general, will remain.

Shari’ah or Fiqh

Shari’ah is defined as the set of laws given by God to His messengers. Thus, Islamic shari’ah is confined to the laws given in the Qur’ān, as the revealed word of God, and in the Sunnah/Hadīth of the Prophet, by virtue of some of his acts being divinely inspired. Therefore, shari’ah “contained in God’s revelation (Qur’ān and hadīth), is explained and elaborated by the interpretative activity of scholars, masters of fiqh,” that is, the jurists.

The word fiqh literally means “understanding.” Hence, the science of fiqh is defined as “the practical rules derived by the mujtahids (independent legal thinkers) from particular sources or proofs.” This means that, in this “academic discipline,” jurists, on the one hand, attempt to discover, understand, explore, describe, explain, elaborate, interpret, and derive the rules of the shari’ah and, on the other, exercise their independent reasoning and judgment to formulate Islamic rules for all contemporary, practical activities. In the words of Kamali, fiqh “is a product largely of the juristic interpretation of scholars and their understanding of the general guidance of wahy [revelation].”

In the process of making Islamic rules, jurists refer to (1) the Qur’ān; (2) the Sunnah; and (3) ijmā’ (consensus of opinion), that is, the primary sources of Islamic law. If they do not find specific guidance in these sources, they exercise their own ijtihād (reasoning or judgment in making laws). Here, jurists have developed a number of methods and methodologies for applying what are called secondary sources: (4) qiyās (analogy); (5)