

December 2017

# Jurisdiction over Jihad: Islamic Law and the Duty to Fight

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## Recommended Citation

Adnan A. Zulfiqar, *Jurisdiction over Jihad: Islamic Law and the Duty to Fight*, 120 W. Va. L. Rev. (2017).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol120/iss2/5>

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**JURISDICTION OVER *JIHĀD*:  
ISLAMIC LAW AND THE DUTY TO FIGHT**

*Adnan A. Zulfiqar\**

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\* Assistant Professor of Law, Rutgers Law School. I am grateful for engaging comments on an early version of this paper from participants in Harvard Law’s International and Comparative Law Workshop, the Legal History Consortium at the University of Pennsylvania and the Law & Society Association Conference (2016). Special thanks to Sarah Barringer Gordon, Serena Mayeri, Joseph Lowry, Intisar Rabb, Darryl Li and Jean Galbraith for their detailed and invaluable feedback. Finally, support from faculty and staff at the University of Pennsylvania Law School during my tenure as a George Sharswood Fellow was indispensable for the completion of this project. Unless otherwise noted, the translations of all non-English works are by the Author.

*A serious deficiency in the current discourse on jihād involves the failure to adequately evaluate competing jurisdictional claims over lawful violence, specifically warfare. While limitations and guidelines in armed conflict are frequently discussed, there is rarely any mention of who can legitimately regulate Islamic law's duty to fight. This duty emerged shortly after Islam's founding in the 7th century A.D. and was a collective one (fard kifāya), meant to support the state's war efforts in the absence of standing armies. The duty was regulated by the state and responsibility for it was shared across society: if at least some people performed, then the obligation was satisfied for everyone else. However, colonial rule and the advent of weak post-colonial states contributed to circumstances that transformed the duty into an individual obligation (fard ʿayn); required of every person with legal capacity and not subject to state oversight.*

*This Article makes a number of contributions. First, it utilizes pre-modern historical sources to construct a detailed understanding of how the duty to fight functioned in classical Islamic law. Second, it reveals how a variety of factors caused jihād to shift from a collective to individual duty and the impact this has on state jurisdiction over violence. Third, it provides a new reading of colonial resistance, suggesting a predilection for statist frameworks among actors engaged in anti-colonial jihād. Finally, the Article analyzes a pivotal 20<sup>th</sup>-century fatwā (advisory legal opinion) that reframed the classical jihād-duty, making it a perpetual obligation required of all Muslims. The Article contends that this reframing led to the state losing oversight over jihād and lawful violence, contributed to the militancy of non-state actors and created distorting effects in Islamic law's interpretation and application, with consequences that continue to manifest.*

## I. INTRODUCTION

During a famous speech in the late 1980s, entitled “*Jihād in Afghanistan*,” ʿAbdallah Yūsuf ʿAzzām, considered by many the intellectual forefather of Al-Qaeda, argued that “if *jihād* is not [an individual obligation] (*fard ʿayn*) now, it will never be an individual obligation . . . !”<sup>1</sup> His words carried a powerful message: if you are unwilling to fight in this context, you will

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<sup>1</sup> ʿAbdallah ʿAzzām, *Just How Far is Jihad?*, YOUTUBE, at 1:11–1:14 (Mar. 3, 2012), <https://www.youtube.com/watch?v=k3XTPZcLaJc> [in Arabic]. I have been unable to find the location or exact date this speech was given. It likely occurred between 1984 and 1989, the period when ʿAzzām traveled around the globe giving speeches on the Afghan *jihād*. It should be noted that ʿAzzām had no formal link to al-Qaeda as it did not exist in his lifetime, and, as Darryl Li has convincingly shown, there is no evidence to suggest that it was even being contemplated. The term *al-qaʿida* does appear in an article by ʿAzzām, but is used in a general sense. See Darryl Li, “*Afghan Arabs*,” *Real and Imagined*, MIDDLE EAST REP. 260 (Fall 2011), <http://www.merip.org/mer/mer260/afghan-arabs-real-imagined>.

never be ready to fight. <sup>2</sup> Azzām spoke at the height of Soviet aggression against Afghanistan (1979–89).<sup>2</sup> He claimed “broad consensus” among everyone, from exegetes to jurists, that “if [disbelievers] approach an inch . . . towards the land of [] Muslims, [then] *jihād* becomes [an individual obligation] upon every Muslim[.]”<sup>3</sup> This obligation, he clarified, extends beyond the inhabitants of Afghanistan and applies to Muslims “all over the world”; in fact, it was surpassed in importance only by belief in God and the Prophet Muḥammad.<sup>4</sup> Azzām spread this message across the globe from 1984 until his death in 1989.<sup>5</sup> By that stage, he is reported to have recruited between 16,000 and 20,000 men, from 20 different countries, to fight in Afghanistan.<sup>6</sup> His speech illustrates the stark transformation of Islamic law’s duty to fight (or *jihād*-duty) during the 20th century.<sup>7</sup> New understandings of who possessed authority to regulate the *jihād*-duty reflected changes in socio-political circumstances in the Muslim world—with profound consequences for conceptualizing Islamic law.

Ever since September 11, 2001, government officials and pundits, academics and policy experts, have dissected *jihād* in an effort to make sense of growing religious militancy.<sup>8</sup> Unfortunately, this wealth of scholarship and commentary consistently neglects the nature of *jihād* as a legal duty. Islamic law has two forms of legal duties: collective and individual. Collective duties (*farḍ kifāya*) are required acts that can be satisfied by the performance of one person or a group of people. Individual duties (*farḍ ‘ayn*) are obligations that everyone is required to perform. The duty to fight, or *jihād*-duty, originated as a collective duty, but in the past few decades became individually obligated, according to many prominent jurists.<sup>9</sup> Historically, re-categorizing a collective duty as an

<sup>2</sup> See Aryn Baker, *Who Killed Abdullah Azzam?*, TIME (June 18, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1902809\\_1902810\\_1905173-2,00.html](http://content.time.com/time/specials/packages/article/0,28804,1902809_1902810_1905173-2,00.html).

<sup>3</sup> Azzām, *supra* note 1, at 1:31–1:37. Note that Azzām’s use of the term “disbeliever” (*kuffār*) here refers to non-Muslims. The same statement is also made in current times by the “Islamic State” (also known as the Islamic State of Iraq and Sham/Levant, or ISIS/ISIL). See *Why We Hate You and Why We Fight You*, 15 DABIQ 30, 32 (July 2016) (“As long as there is an inch of territory left for us to reclaim, jihad will continue to be a personal obligation on every single Muslim.”). ISIS only uses the Muslim calendar dates, but I have included the approximate Gregorian date as well. I am grateful to Akbar Hossain for bringing this quote to my attention.

<sup>4</sup> Azzām, *supra* note 1.

<sup>5</sup> Baker, *supra* note 2.

<sup>6</sup> Chris Suellentrop, *Abdullah Azzam: The Godfather of Jihad*, SLATE (Apr. 16, 2002), [http://www.slate.com/articles/news\\_and\\_politics/assessment/2002/04/abdullah\\_azzam.html](http://www.slate.com/articles/news_and_politics/assessment/2002/04/abdullah_azzam.html).

<sup>7</sup> All dates are C.E. unless otherwise noted.

<sup>8</sup> For a useful short primer on these approaches, see Darryl Li, *A Jihadism Anti-Primer*, 45 MIDDLE EAST REP. 1, 1 (Fall 2015), <http://www.merip.org/mer/mer276/jihadism-anti-primer>.

<sup>9</sup> While pre-modern jurists generally classified the *jihād*-duty as collective, there were specific cases where circumstances temporarily necessitated participation from everyone. For instance, if an enemy attacked a town, the population of that town was required to participate in its

individual obligation did occur, but only temporarily. The sole exception is the modern *jihād*-duty. It has effectively become a *permanent* individual obligation—a change that is unprecedented in Islamic law.

This Article explores *jihād* as a legal duty and unpacks the consequences of this novel shift from collective to individual obligation. Specifically, re-categorization of the duty has significantly diminished the state's traditional jurisdiction over violence and warfare, as well as altered the way Islamic legal interpretation is done. When a collective duty is re-categorized as an individual obligation, the state's oversight over the duty is theoretically lost. This is because the duty is no longer a shared responsibility: everyone has to perform. Unfortunately, as the state's authority decreased in practice, it was also increasingly ignored in concept. Modern juristic interpretation of substantive law on *jihād* routinely fails to account for the state's essential administrative role.<sup>10</sup>

Part I of this paper provides a brief background on Islamic law, the concept of *jihād*, how Islamic legal duties function and the role of the state in Islamic law and practice. Part II traces the medieval juristic arguments, both scriptural and non-scriptural, for *jihād* as a collective duty and uncovers the structure of authority undergirding the obligation. It examines the details of the doctrine that developed around the pre-modern *jihād*-duty in order for the reader to fully appreciate how militant jurists depart from it. Part III takes a closer look at how this jurisdiction over *jihād* functions in Islamic law. It provides an original examination of the different entities that claim authority over *jihād* and how they interact together. Specifically, it outlines the nature of the state's authority over *jihād* according to pre-modern jurists. It also discusses the role of status-based authority in the *jihād* context. Part IV is a novel legal explanation for some of the features of *jihād*-based resistance during the period of colonialism in the Muslim world. It will examine why colonization served as a catalyst for the duty's transformation. Part V explores how juristic thinking about the *jihād*-duty changed in the late twentieth century from a collective duty to an individual obligation. It argues that in the process of this change, individuals gained powers generally reserved for the state, which further weakened the ability of nations emerging out of colonialism to regulate violence. A pivotal moment in this change was when militant jurists began issuing legal opinions supporting *jihād* as an individual duty. This Part analyzes arguably the most important opinion

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defense. The difference in the contemporary period is that many jurists consider defense of Muslim territory anywhere the duty of Muslims everywhere. I have only found one premodern reference to such an expansive duty: the 12th century North African jurist Muḥammad al-Māziṛī reports that there were unnamed pre-modern jurists who also considered *jihād* individually obligated outside of exceptional circumstances. 3 SHIHĀB AL-DĪN AL-QARĀFĪ (d. 1285), AL-DHAKHĪRA [THE RESERVOIR] 385 (1994).

<sup>10</sup> For a broad survey of these opinions, see generally MUHAMMAD QASIM ZAMAN, MODERN ISLAMIC THOUGHT IN A RADICAL AGE: RELIGIOUS AUTHORITY AND INTERNAL CRITICISM (2012); and, TWENTY-FIRST CENTURY JIHAD: LAW, SOCIETY AND MILITARY ACTION (Elisabeth Kendall & Ewan Stein eds., 2015).

issued during this period. Part VI discusses the implications of the change in the *jihād*-duty and what is necessary to rectify the current state of affairs. It argues that the current approach to violence by non-state actors engaged in *jihād* is flawed because it fails to consider *jihād* as the performance of a legal duty. More importantly, by not appreciating how this duty has changed, the policy crafted to address the problem of religious militancy overlooks how reconstituting the state's pre-modern role in regulating *jihād* can delegitimize non-state actors operating today.

This project is a much-needed examination of an overlooked development in Islamic law. It investigates how contemporary jurists, namely °Abdallah °Azzām, transformed Islamic law's duty to fight from a collective to an individual obligation. It argues that °Azzām, in an unprecedented move, changed the conventional view of *jihād* from a state-authorized collective duty to an individual obligation under the authority of non-state actors. This is significant in a number of ways. First, the move decouples the state from the analysis of Islamic law, leading to a disjuncture between Islamic law in theory and how it is meant to be administered in practice. Second, it radically transforms the doctrine of *jihād* to justify the actions of non-state actors, like al-Qaeda, and empowers them with an unprecedented authority to regulate violence. Third, it reorients the classically recognized forms of interpretation in Islamic law to include approaches that are sui generis and illegitimate according to its own terms. By understanding the legal discourse surrounding *jihād*, from medieval times to today, we will acquire a better appreciation of not only contemporary thinking on *jihād*, but also its impact on the entire edifice of Islamic law. In the process, we will arrive at more effective conceptual approaches to addressing modern religious militancy.

## II. BACKGROUND

This Part presents some key ideas about Islamic law, its history, and current debates. Specifically, it looks at the framework of the Islamic legal tradition, the nature of collective duties, what *jihād* means and the debate over a state's role in Islamic law. The aim is to provide the uninitiated reader with enough background to appreciate the argument being advanced and the significance of the legal change that took place within juristic discussions of Islamic law's duty to fight.

### A. *Islamic Legal Tradition*

The Islamic legal tradition takes shape in the eighth century, shortly after the religion's founding.<sup>11</sup> Its evolution since then has adapted to different

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<sup>11</sup> See WAEL HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 5 (Wael B. Hallaq ed., 2005) ("By the end of the second/eighth century, all essential features of the judiciary and positive

geographies, social contexts and political orders. It has functioned inside and outside the state, as an official part of the legal system and informally as essentially customary law.

Islamic law is premised on two key sources of law: a scripture, the Qur'an, and texts that preserve traditions from the Prophet Muḥammad, the Hadith.<sup>12</sup> The Qur'an is considered to be God's verbatim message to humanity, but it is not primarily a legal text; in fact, most of it does not pertain to law at all.<sup>13</sup> Aside from some explicit verses containing legal injunctions on subjects like criminal punishment, inheritance and family law, the Qur'an's utility for the jurist is in the guidelines and principles it contains.<sup>14</sup> The jurist uses these to create legal rules.<sup>15</sup> Most traditions ascribed to Muhammad are also not legal in nature. However, the corpus of Prophetic traditions is immense, far larger than the Qur'anic text, and because of the sheer volume of traditions, there are a fair number relating to law.<sup>16</sup> Collectively, the Qur'an and these Prophetic traditions are known as *Shari'a*.<sup>17</sup> However, in common parlance, *Shari'a* has also come to encompass the positive law that jurists derived from these sources.<sup>18</sup> Much of the corpus of Islamic law was a result of examining these sources, extracting legal injunctions from them, reconciling potential conflict between them and constructing additional rules from the implicit principles they contain.

The task of derivation was left to qualified jurists functioning inside and outside of the state apparatus. Those on the outside were jurists that operated in their private capacity and historically became the "locus of legal expertise" and authority.<sup>19</sup> Their motivation to study the law was "largely a matter of piety" driven by the need to articulate law that would "deal with all the problems of society."<sup>20</sup> It was also a scholastic activity that involved intellectual play.

legal doctrine had clearly acquired a highly developed form . . ."); 41 HARALD MOTZKI, THE ORIGINS OF ISLAMIC JURISPRUDENCE: MECCAN FIQH BEFORE THE CLASSICAL SCHOOLS xiv–xv (Wadad Kadi ed., Marion H. Katz trans., 2002); INTISAR A. RABB, DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW 8–15 (2015); AHMED EL SHAMSY, THE CANONIZATION OF ISLAMIC LAW: A SOCIAL AND INTELLECTUAL HISTORY 2–3 (2013).

<sup>12</sup> See 30 JOSEPH E. LOWRY, EARLY ISLAMIC LEGAL THEORY: THE RISĀLA OF MUḤAMMAD IBN IDRĪS AL-SHĀFI'Ī 8–9 (Bernard Weiss et al. eds., 2007).

<sup>13</sup> *Id.* at 207 ("The Qur'ān is not for the most part legislative in nature . . .").

<sup>14</sup> See *id.* at 211.

<sup>15</sup> See HALLAQ, *supra* note 11, at 63–68.

<sup>16</sup> See *id.* at 69.

<sup>17</sup> M. Cherif Bassiouni, *Islamic Law – The Shariah*, MIDDLE EAST INST. (Jan. 24, 2012), <http://www.mei.edu/content/islamic-law-shariah>.

<sup>18</sup> Rudolph Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified*, in SHAPING THE CURRENT ISLAMIC REFORMATION 81, 83 (B.A. Roberson ed., 2003).

<sup>19</sup> HALLAQ, *supra* note 11, at 63.

<sup>20</sup> *Id.*

Eventually, jurists coalesced into different schools of thought, each committed to slightly different methodological approaches to the derivation of law.<sup>21</sup> The rulings that were produced out of these schools represented the “fruits of source-critical methods to address issues of textual authenticity and reliability”; they also had “precedential value.”<sup>22</sup> However, as this Article will demonstrate, jurists have never been the “exclusive interpreters” of Islamic law, as some claim.<sup>23</sup> Public officials, including judges, rulers and administrators, have also played an important role in the interpretive process, especially because they gave meaning to legal rules by defining how they were applied. Application of legal rules inevitably contributes to the interpretation of Islamic law because it adjusts the law to better fit the circumstances. Furthermore, while in theory only jurists were involved in law making, in practice this was not always the case.<sup>24</sup> In fact, an “interesting discrepancy” exists in the “early Islamic empires between law making and the perception of law making.”<sup>25</sup> Specifically, in relation to public law, the state routinely “determined the rules and regulations in several areas of the law . . . .”<sup>26</sup>

### B. *Legal Duties: Collective (kifāya) and Individual (ʿayn)*

There are various ways to divide up the rules of Islamic law into conceptual rubrics. One such rubric that potentially encompasses all Islamic positive law depends on the distinction between individual and collective obligations. In general, obligatory acts are understood as acts that every Muslim must fulfill: technically known as “individual obligations” (*farḍ ʿayn*). The most common examples are prayer, paying an annual charitable tax and pilgrimage. Although these individual obligations may be classified as “religious,” pre-modern works on Islamic law also discuss other legal subjects that might be classified as “secular.”<sup>27</sup> In this vein, another type of obligatory act, often not

<sup>21</sup> See generally Intisar A. Rabb, “We the Jurists”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 546 (2008) (explaining the formation of regional circles of schools devoted to the study of Islamic law).

<sup>22</sup> *Id.*

<sup>23</sup> See generally Aharon Layish, *Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement*, 21 ISLAMIC L. & SOC’Y 276, 277 (2014) (claiming that Islamic law is mostly a jurist law). This is the view held by many scholars, but it obscures the role of judges, government administrators and other public officials in the creation of law.

<sup>24</sup> Nimrod Hurvitz, *The Contribution of Early Islamic Rulers to Adjudication and Legislation: The Case of the Mazalim Tribunals*, in LAW AND EMPIRE: IDEAS, PRACTICES, ACTORS 135 (Jeroen Duindam et al. eds., 2013).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> For example, the table of contents for a typical juristic treatise on substantive law will cover topics like sales transactions, leases, trusts, torts, criminal punishment, etc. See WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 29–30 (2009).



strictly religious, emerged in early juristic writings: a collective or communal duty (*fard kifāya*).<sup>28</sup>

Collective duties consist of activities or roles that a society needs enough of its citizens to perform.<sup>29</sup> If an adequate number of people fulfill these duties then everyone else is exempt from them, but if no one fulfills them then everyone is liable. Historically, jurists kept these duties separate, rarely re-categorizing a collective duty as individually obligated, or vice versa. In the rare instances that they did re-categorize a duty, it was temporary and generally specific to a locality. For instance, performing funeral rites for the deceased is a collective duty.<sup>30</sup> However, if only one person in a town knows the rites it becomes individually obligated for that person until someone else is trained.<sup>31</sup> Everywhere else, performing funeral rites remains collectively obligated. The temporary and local nature of such re-categorization is key. As noted above, this framework has only one exception: the modern conception of the *jihād*-duty.

Pre-modern jurists developed an entire doctrine around these collective duties, finding different ways to group them. In many respects, they were trying to develop theory for law that they had developed in response to social needs. Some even proposed three broad types of collective duties: acts related to religion, acts related to livelihood, and acts related to both religion and livelihood.<sup>32</sup> Jurists also gave various justifications for classifying an act as a collective duty. For instance, certain acts are collective duties because they are “useful to religion” or give “life to the Sharī‘a,” while in other instances, an act “fortifies” the faith or reflects cooperation in the “performance of good works.”<sup>33</sup> In the *jihād* context, in addition to achieving the above justifications, collective duties empowered the state with the ability to regulate participation in war and exert control over an important political and revenue-related activity. It also allowed individuals to share responsibility for a moral obligation.

<sup>28</sup> A literal translation of the legal term is “sufficiency obligation,” indicating that if a sufficient number of people perform, the duty is satisfied; however, it is commonly understood as a collective duty.

<sup>29</sup> Banan Malkawi & Tamara Sonn, *Ibn Taymiyya on Islamic Governance, in ISLAM, THE STATE, AND POLITICAL AUTHORITY: MEDIEVAL ISSUES AND MODERN CONCERNS* 111, 114 (Asma Afsaruddin ed., 2011).

<sup>30</sup> Mairaj Syed, *Jihad in Classical Islamic Legal and Moral Thought, in JUST WAR IN RELIGION AND POLITICS: STUDIES IN RELIGION AND THE SOCIAL ORDER* 135, 144 (Jacob Neusner et al. eds., 2013).

<sup>31</sup> *Id.*

<sup>32</sup> 7 ABŪ HĀMID AL-GHAZĀLĪ, *AL-WASĪT FĪ AL-MADHĤAB* [THE MEDIATOR OF THE LEGAL SCHOOL] 6–7 (1997).

<sup>33</sup> 30 ABŪ BAKR AL-SARAKHSĪ, *KITĀB AL-MABSŪT* [THE EXTENSIVE BOOK] 245; 2 SARAKHSĪ, *USŪL AL-SARAKHSĪ* [THE LEGAL THEORY OF SARAKHSĪ] 289; 1 GHAZĀLĪ, *IḤYĀ’ ‘ULŪM AL-DĪN* [THE REVIVAL OF RELIGIOUS SCIENCES] 66 (2004); MUḤAMMAD AL-SHAYBĀNĪ, *KITĀB AL-KASB* [THE BOOK ON EARNING] 72.

### C. *The Meaning of Jihād*

Bearing the above in mind, pre-modern jurists spend considerable effort developing rules for the *jihād*-duty. The term *jihād* often occurs in the Qur'an where warfare is *implied*, but becomes more explicitly associated with warfare in early juristic literature. However, semantically its meaning is to "struggle" in general. Ibn Manẓūr, the late 13th-century author of a well-regarded Arabic dictionary, explains that the basic meaning of the Arabic term *jihād* is to struggle against something or exert effort towards an objective.<sup>34</sup> While it is frequently translated as holy war, *jihād*'s "semantic meaning" has "no relation" to war, holy or otherwise.<sup>35</sup> It was eventually broadened in Sufi circles to include a "non-violent" element, specifically the struggle against one's own desires. They characterized this dichotomy between a non-violent and violent *jihād* as between a "greater jihad" (*al-jihād al-akbar*) and "lesser jihad" (*al-jihād al-aṣghar*), respectively.<sup>36</sup> Jurists have tried to connect this greater *jihād* to a "personal moral struggle," even suggesting that it divides into a "jihād against the self" and a "jihād against the devil."<sup>37</sup> However, the idea of greater *jihād* is "often rejected by many in Islam's mainstream 'orthodoxy' from the late medieval period onwards."<sup>38</sup> Hence, when *jihād* occurs "without qualifiers" it is "universally understood as war on behalf of Islam."<sup>39</sup> As a result, in the legal literature, *jihād* has meant "armed struggle against the unbelievers" and for our purposes that is exclusively how it will be considered here.<sup>40</sup>

<sup>34</sup> 3 IBN MANẒŪR, LISĀN AL-ʿARAB [THE LANGUAGE OF THE ARABS] 135 (1990).

<sup>35</sup> REUVEN FIRESTONE, JIHĀD: THE ORIGIN OF HOLY WAR IN ISLAM 16 (1999).

<sup>36</sup> AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS 76–77 (2011); *see also* RUDOLPH PETERS, JIHĀD IN CLASSICAL AND MODERN ISLAM: A READER 1–5 (1996) [hereinafter JIHAD READER] (discussing the utilization of jihad in religion and warfare).

<sup>37</sup> *Id.*

<sup>38</sup> Gavin Picken, *The Greater Jihad in Classical Islam, in TWENTY-FIRST CENTURY JIHAD: LAW, SOCIETY AND MILITARY ACTION* 126 (Elisabeth Kendall & Ewan Stein eds., 2015) (discussing the contextualization of the term "jihad" through history as a result of specific historical and political circumstances). Some recent scholarship has tried to argue, with mixed results, that the militaristic aspect of *jihād* was not as prominent early on as it is now. It claims that due to sociopolitical circumstances, the term's meaning, as found in the Qur'an, hadith and exegetical literature, actually narrowed as compared to its original meaning which encompassed many other aspects. *See generally* ASMA AFSARUDDIN, STRIVING IN THE PATH OF GOD: JIHĀD AND MARTYRDOM IN ISLAMIC THOUGHT (2013).

<sup>39</sup> FIRESTONE, *supra* note 35, at 17.

<sup>40</sup> JIHAD READER, *supra* note 36, at 1. Peters also notes that when the word *jihād* is used "without qualification," it means armed struggle. *See id.* at 1–3. As Suleiman Mourad and James E. Lindsay note, "in a specifically religious context, and as understood and articulated by almost every Muslim religious scholar past and present, including Ibn Manẓūr, *jihād* has one meaning: to exert one's effort in fighting the enemies of God by acts or by words." 99 SULEIMAN A. MOURAD & JAMES E. LINDSAY, THE INTENSIFICATION AND REORIENTATION OF SUNNI JIHAD IDEOLOGY IN THE CRUSADER PERIOD 16 (Sebastian Günther & Wadad Kadi eds., 2013).

“Armed action” (*qitāl*) is an essential aspect of *jihād* and the larger concept of “struggle” mentioned in the Qur’an.<sup>41</sup> The Qur’an provides some guidelines for when armed action is necessary and what the limits are for “justified military combat.”<sup>42</sup> Furthermore, Muḥammad’s historical practice also informs Islamic legal thought on *jihād*. Tradition records Muḥammad participating in at least 27 military campaigns of his own and deputizing persons to lead about 59 others.<sup>43</sup> His biographers have coined a term about this period in his life: *al-maghāzī* (the raids).<sup>44</sup> Muḥammad’s behavior during and around these battles is used as justification or refutation of opinions that later jurists developed.

In addition to the Qur’an and Muḥammad’s practice, it is important to bear in mind that these rules were initially developed as Late Antique Muslim empires emerged and were then elaborated in scholastic institutions during the Middle Ages.<sup>45</sup> In this context, religion and warfare were often closely connected and not only in Islam. Centuries earlier, specifically in the 4th century, “militant interpretations of the Christian message and mission” had become “normative” both for Roman policy and Christian communities.<sup>46</sup> In some respects, later Western theories of just war are premised on this background. The idea of “just war” is also captured in Islam’s law of armed conflict, which includes concern for the “a priori reasons for engaging in justified armed conflict” (*jus ad bellum*) and issues of “humane conduct” (*jus in bello*).<sup>47</sup>

Developing rules for *jihād* requires accommodating both aspects of its definition: the functional and the pietistic. The functional perspective relates to tasks associated with war’s administrative and military objectives. Jurists generally agree that the *jihād* obligation is connected to certain functions: propagating religion, supporting the state’s activities, defending against attack and rescuing prisoners of war.<sup>48</sup> For example, the 9th century jurist Muḥammad

<sup>41</sup> Mustansir Mir, *Jihād in Islam*, in *THE JIHAD AND ITS TIMES* 114 (Hadia Dajani-Shakeel & Ronald A. Messier eds., 1991).

<sup>42</sup> See AFSARUDDIN, *supra* note 38, at 34.

<sup>43</sup> See MOURAD & LINDSAY, *supra* note 40, at 18.

<sup>44</sup> *Id.*

<sup>45</sup> See generally Rabb, *supra* note 21, at 546 (discussing the development of scholastic institutions and schools of law during the Middle Ages).

<sup>46</sup> THOMAS SIZGORICH, *VIOLENCE AND BELIEF IN LATE ANTIQUITY: MILITANT DEVOTION IN CHRISTIANITY AND ISLAM* 5 (2009). As some scholars have noted, Constantine’s evocation of the “symbol of Christ in his military drive to seize Rome” was one of the acts that fixated a Christian holy war conception in late antiquity that eventually “morphed into the high medieval crusade.” PHILIPPE BUC, *HOLY WAR, MARTYRDOM, AND TERROR: CHRISTIANITY, VIOLENCE, AND THE WEST* 24–25 (2015). The one major difference in the crusader period was that, unlike in the holy war of late antiquity, it involved “ordinary believers massively, both as combatants and as economic and spiritual supporters.” *Id.* at 25. This is very similar to roles played in *jihād*.

<sup>47</sup> AFSARUDDIN, *supra* note 38, at 34–35.

<sup>48</sup> QARĀFĪ, *supra* note 9, at 388–89.

b. Idrīs al-Shāfiʿī<sup>49</sup> defined *jihād*'s basic purpose as preventing the enemy from entering Muslim territory and sending Muslims on military campaigns to convert or impose a poll tax (*jizya*) on non-Muslims.<sup>50</sup>

The second aspect was pietistic, focusing on what it means for the fighter to perform this act. For instance, some jurists spoke of how *jihād* meant “strenuously striving to improve oneself.”<sup>51</sup> Others discussed the *jihād*-duty as an act meant to “elevate God’s word and bring greatness to His religion.”<sup>52</sup> They considered *jihād* a “significant act of worship” (*min al-ʿibādāt al-ʿaẓīma*) and in their treatises placed it alongside other individual acts of worship, such as prayer and fasting. In contrast, those who emphasized the functional aspect classified *jihād* as a part of criminal law (*jināyāt*) and considered it a state-administered “punishment for disbelief” (*ʿuqūba ʿalā al-kufr*).<sup>53</sup>

By way of background, there were two primary categories of fighters in the early Islamic context. The first was the “volunteer” (*mutaṭawwiʿ*) who performed military service without compensation (*ʿāṭā*) but was apportioned parts of the war booty and promised divine recompense. The second category was the “non-volunteer fighter” (*muqātila*) who received a stipend and eventually formed the basis of a professional military class.<sup>54</sup> Pre-modern jurists were generally uncomfortable with the commodification of religious duties like *jihād* and many prohibited payment in return for fulfilling obligatory acts. They

<sup>49</sup> Shāfiʿī (d. 820) is a “centrally important figure in the history of Islamic law,” and he is considered to have authored the earliest surviving work containing a “sustained theoretical account of textual interpretation, legal epistemology, and legal reasoning in Islamic law.” Joseph Lowry, *Introduction to MUHAMMAD IBN IDRIS AL-SHĀFIʿĪ, THE EPISTLE ON LEGAL THEORY* xv (Philip F. Kennedy et al. eds., Joseph E. Lowry trans., 2013).

<sup>50</sup> 81 MICHAEL BONNER, *ARISTOCRATIC VIOLENCE AND HOLY WAR: STUDIES IN THE JIHAD AND THE ARAB-BYZANTINE FRONTIER* 40 (Edwin Gerow et al. eds., 1996) (citing Shāfiʿī’s *Kitāb al-Umm* 4:90.9f).

<sup>51</sup> 14 ABŪ ʿL-ḤASAN AL-MĀWARDĪ, *AL-HĀWĪ AL-KABĪR FĪ FIQH MADHĤAB AL-IMĀM AL-SHĀFIʿĪ [THE GREAT COMPENDIUM OF THE SHĀFIʿĪ SCHOOL OF LAW]* 114 (1999). Ibn Taymiyya also speaks of a *jihād* that is fought “against the desires of one’s own soul.” Interestingly enough, he classifies this as an individual obligation (*farḍ ʿayn*), whereas he considers armed struggle to be a collective duty (*farḍ kifāya*). 10 IBN TAYMIYYA, *MAJMŪʿ AL-FATĀWĀ [COLLECTION OF LEGAL OPINIONS]* 357 (2005). In this classification, the *jihād* against one’s own desires is seemingly a more important obligation than participating in armed struggle.

<sup>52</sup> ABŪ BAKR AL-SARAKHSĪ, *supra* note 33, at 262–63.

<sup>53</sup> QARĀFĪ, *supra* note 9, at 384. This was how Mālik and his associates classified it.

<sup>54</sup> BONNER, *supra* note 50, at 7–8. It is not entirely clear how pre-modern jurists reconciled the *jihād*-duty with these different categories of soldiers since they only seem to contemplate volunteers fighting. However, both the idea of *jihād* as a collective duty and the idea of various soldier classes exist in early Islamic history. In my opinion, this presents a challenge for understanding how collective duties operated in practice and is a subject I plan to explore in more detail elsewhere.

considered it impermissible to wage *jihād* as mercenaries for rent because you cannot “rent an act of worship or the performance of a religious duty.”<sup>55</sup>

This duality of purpose, functional and pietistic, is at the heart of jurisdictional claims over *jihād*. While the state relies on the pietistic component to help supply its ranks, the functional aspect is its primary objective. The change in duty strains the relationship between these two components and brings the role of the state into question.

#### D. Debating the State

The relationship between Islamic law and the state is a subject of intense debate within the field of Islamic legal studies. Though the details of the debate are beyond the scope of this Article, a few points are important to appreciate. With respect to the pre-modern period, academics argue about the exact nature of the relationship between private juristic authority and the effective power of the state. In the contemporary period, the question is how this pre-modern religious authority should be realized in the modern state. Some reject the idea that Islamic law is compatible with law in a nation-state. They operate on an implicit assumption that to be *authentic*, Islamic law must be in its pre-modern form and implemented through a pre-modern governance structure. Hence, any accommodation of modern legal systems or modern forms of political organization carries the potential either to corrupt Islamic law, as medievalist Wael Hallaq contends, or to corrupt the secular nature of the modern state, as human rights scholar Abdullahi An-Na’im argues.<sup>56</sup> In contrast, many scholars based in the Muslim world, like Ahmed al-Dawoody, offer a neater overlap with the Western framework, such that most aspects of secular rule of law find counterparts in Islamic law.<sup>57</sup>

I believe both these approaches are flawed. Islamic law is a product of many centuries of differently situated jurists interpreting the foundational sources of the faith. No period, either classical or contemporary, can lay claim to *the* authentic, or to use Hallaq’s term, “paradigmatic,” version of Islamic law; it

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<sup>55</sup> SARAKHSĪ, SHARH AL-SIYAR AL-KABĪR [COMMENTARY ON THE COMPENDIUM OF REGULATIONS] 944 (1997). Ghazālī also reports that jurists from the Shāfi‘ī legal tradition reject the hiring of a Muslim to perform *jihād* on someone else’s behalf because *jihād* is a duty and cannot be transferred in that fashion. GHAZĀLĪ, *supra* note 32, at 18. However, he argues that the head of state (*imām*) is permitted to hire slaves for *jihād* (if their masters give permission), as well as to hire people who don’t meet the legal standard for performance of religious duties, such as minors and non-Muslims. *Id.* As justification, he cites the fact that the Prophet permitted hiring Jewish fighters for certain military expeditions. *Id.* He gives the ruler broad latitude over the circumstances when it would be appropriate to hire people for *jihād*. *Id.* at 16.

<sup>56</sup> See generally ABDULLAHI AHMED AN-NA’IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A 1–2 (2008); WAEL B. HALLAQ, THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY’S MORAL PREDICAMENT 37–38 (2013).

<sup>57</sup> See generally DAWOODY, *supra* note 36, at 108.

has consistently adapted in diverse ways to contexts far removed from its origins. At the same time, Islamic law cannot escape the fact that it is a religious law; one that places greater value on older jurisprudence and whose basic structures were elaborated in a series of diverse pre-modern and early modern socio-political situations. As a result, there are inevitable, often insurmountable, points of conflict between Islamic law and modern secular legal systems. It is critical not to obscure the significant challenges that arise in adapting a law premised on religion and developed in the context of empire, to a modern, secular republic.<sup>58</sup>

While the term “state” is loaded with many meanings and deeply contested, I use it for practical reasons in order to avoid using various terms, some unwieldy, to refer to a broad set of governance structures.<sup>59</sup> This is not unique in the field of medieval Islamic studies despite the term’s inadequacies.<sup>60</sup> Furthermore, I believe the definition Islamic law uses for the “state” is a functional one: as long as an entity performs certain activities, it acquires rights and responsibilities associated with governance. These activities include adjudicating disputes, punishing crime, regulating the marketplace, collecting taxes, administering religious services, engaging in warfare and negotiating external agreements. For my purposes, in the context of *jihād*, Max Weber’s well-known definition of state, offered in his “Politics as a Vocation” lecture in 1919, is especially useful because it puts the issue in its starkest light. He says that “the state is the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory . . . .”<sup>61</sup> He goes on to note that any other entity can only “assert the right to use physical violence” when the state “permits them to do so.”<sup>62</sup> In other words, “the state is

<sup>58</sup> When I speak of the imperial context, I am speaking of the relationships that often characterize empire—specifically, the ruler/ruled dynamic or the master/slave. I recognize that other smaller polities operated within the larger empire and that jurists often transcended the boundaries of the state, operating as part of an international network.

<sup>59</sup> Theoretically, one might also use the term “polity” instead, but, stylistically, “state” makes for easier reading. For classic definitions of the “state,” see THOMAS HOBBS, *LEVIATHAN* 134–42 (Michael Oakeshott ed., 1962); JOHN HOFFMAN, *BEYOND THE STATE: AN INTRODUCTORY CRITIQUE* 19 (1995); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 101–48 (1968); and 1 MAX WEBER, *ECONOMY AND SOCIETY* 56 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978).

<sup>60</sup> See MICHAEL COOK, *ANCIENT RELIGIONS, MODERN POLITICS: THE ISLAMIC CASE IN COMPARATIVE PERSPECTIVE* 1–3 (2014) (using the term “state” as part of a broader concept of the “nation state” throughout different regions of the world); FRED M. DONNER, *THE EARLY ISLAMIC CONQUESTS* 38–39 (1981) (utilizing the term “state” to discuss governing formations prior to Islamic control); IRA M. LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* (2d ed. 2002); ROY MOTTAHEDEH, *LOYALTY AND LEADERSHIP IN AN EARLY ISLAMIC SOCIETY* (1980).

<sup>61</sup> MAX WEBER, *THE VOCATION LECTURES* 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004) (emphasis omitted).

<sup>62</sup> *Id.*

regarded as the sole source of the ‘right’ to use violence.”<sup>63</sup> As the next Part will show, this is precisely how I believe pre-modern Islamic law envisions the state’s relationship to violence. Jurists considered violence to be legitimate only under the administration of a political authority and indicate this when writing about the *jihād*-duty.

### III. THE CLASSICAL *JIHĀD*-DUTY

Pre-modern jurists assigned the “right” to use violence almost exclusively to the state. It was an integral part of their extensive commentary on the *jihād*-duty—a commentary that is essential for understanding how the duty functions today. As one scholar notes, when contemporary militant jurists revive the classical *jihād* doctrine, they connect “significant numbers of young Muslim men to paradigmatic moments of their past . . . .”<sup>64</sup> This both enhances and directs “their incentive to challenge forces seen as responsible for the decline of Muslim fortunes in the modern world.”<sup>65</sup> The pre-modern *jihād*-duty has as its principal scriptural support a Qur’anic verse that compares the virtues of people who fight in “God’s way” and those who stay behind:

Those believers who stay at home, apart from those with an incapacity, are not equal to those who commit themselves and their possessions to striving in God’s way. God has raised such people to a rank above those who stay at home—although He has promised all believers a good reward, those who strive are favored with a tremendous reward above those who stay at home . . . .<sup>66</sup>

Jurists noted that while the verse’s literal implication is that the duty to fight is incumbent upon everyone, a later portion of the verse indicates that both sets of people, those who fight and those who stay behind, will receive God’s “reward.”<sup>67</sup> In other words, they understood the verse to mean that staying behind does not imply a failure to fulfill the duty and there is no penalty associated with it. Due to the absence of a penalty for non-performance the duty was considered *collectively obligated*.<sup>68</sup>

<sup>63</sup> *Id.*

<sup>64</sup> John C. M. Calvert, *The Striving Shaykh: Abdullah Azzam and the Revival of Jihād*, J. RELIGION & SOC’Y 83, 85 (Supp. II 2007).

<sup>65</sup> *Id.*

<sup>66</sup> THE QUR’AN 60 (M.A.S. Abdul-Haleem trans., 2004) (citing chapter 4, verse 95, hereinafter formatted as Q 4/al-Nisā’:95).

<sup>67</sup> MUHAMMAD IBN IDRĪS AL-SHĀFI‘Ī, AL-RISĀLAH [THE EPISTLE] 365 (1940).

<sup>68</sup> See 1 IBN ‘ABD AL-BARR, JĀMI‘A BAYĀN AL-‘ILM WA FAḌILHU [A COMPENDIUM OF STATEMENTS ON KNOWLEDGE AND ITS BENEFITS] 60 (1994); 7 ‘ALĀ’ AL-DĪN AL-KĀSĀNĪ, BADĀ’I‘ AL-ŠANĀ’I‘ [THE MARVELOUS ART] 98 (1974); ISMĀ‘ĪL B. YAHYĀ AL-MUZANĪ, MUKHTAŠAR AL-

### A. Jihād as a Collective Duty

*Jihād* is unlike any other duty within the category of collective duties. Medieval jurists generally claimed a consensus (*‘ijmā*) that *jihād* is a collective duty and not individually obligated.<sup>69</sup> On this view, *jihād* functions as a key mechanism through which the Muslim state exerts its authority and maintains its legitimacy: the state historically used *jihād* to defend itself against attack and expand its frontiers.<sup>70</sup> In fact, some scholars argue that the development of a “classical theory” around the entire category of collective duties emerged as a result of early jurists addressing the “problem of finding enough men to fight on the frontiers, [] while preserving a role in all this for constituted authority, the *sultān*.”<sup>71</sup> Only the state had the ability to preemptively declare *jihād*; otherwise, the duty was triggered when people faced an impending attack.<sup>72</sup> In the collective context, persons subject to the *jihād*-duty were free, sane men of mature age; when the duty was individualized, then everyone, regardless of gender or status, was obligated.<sup>73</sup>

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MUZANĪ [MUZANĪ’S ABRIDGED EXPOSITION] 353 (1998); 5 IBN QUDĀMA AL-MAQDISĪ, AL-KĀFĪ FĪ FĪQH IBN ḤANBAL [THE SUFFICIENT EXPOSITION OF THE JURISPRUDENCE OF IBN HANBAL] 453 (1997); 2 ABŪ IŞĤĀQ AL-SĤĪRĀZĪ, AL-MUHADHDHAB FĪ FĪQH AL-IMĀM AL-SĤĀFĪ’Ī [THE REFINED EXAMINATION OF THE JURISPRUDENCE OF SĤĀFĪ’Ī] 265 (1995). Another verse supports this position by stating that “it is not right for all the believers to go out [to battle] together: out of each community, a group should go out to gain understanding of the religion, so that they can teach their people . . . .” QUR’AN, *supra* note 66, at 127 (citing Q 9/al-Tawba:122). SĤĀFĪ’Ī cites precedent from one of Muḥammad’s closest associates, ‘Alī b. Abī Ṭālib, who did not join the battle of Tabūk. SĤĀFĪ’Ī, *supra* note 67, at 365.

<sup>69</sup> I IBN RUSHD (d. 1198), BIDĀYAT AL-MUJTAHĪD [THE DISTINGUISHED JURIST’S PRIMER] 454 (Imran Ahsan Khan Nyazee trans., 1984). Specifically, he cites Q 2/al-Baqara:216 as the basis of juristic consensus that *jihād* is an obligation and not voluntary: “[f]ighting is ordained for you, though you dislike it. You may dislike something although it is good for you, or like something although it is bad for you: God knows and you do not.” QUR’AN, *supra* note 66, at 24. He then cites Q 9/al-Tawba:122 (previously quoted) as the reason why it is a collective duty as opposed to an individual obligation.

<sup>70</sup> See JIHAD READER, *supra* note 36, at 2–6.

<sup>71</sup> See Michael Bonner, *Some Observations Concerning the Early Development of Jihad on the Arab-Byzantine Frontier*, 75 *STUDIA ISLAMICA* 28 (1992) (speaking of SĤĀFĪ’Ī specifically) [hereinafter *Arab-Byzantine Frontier*]. In fact, Bonner contends that the *kiḥāya* theory was “not yet available” for authors of specific books on *jihād*, like Abū Işḥāq al-Fazārī and ‘Abdallāh b. al-Mubārak. *Id.* Elsewhere he notes that the theory came about in connection to the “development of the concept of ‘*umma*’, as military service became increasingly understood as pertaining to one’s status as a Muslim.” Michael Bonner, *Ja‘ā’il and Holy War in Early Islam*, 68 *DER ISLAM* 45, 46 (1991) [hereinafter *Ja‘ā’il and Holy War*].

<sup>72</sup> Unlike in the medieval Christian context where Urban II eventually “took the prerogative for declaring holy war away from emperors and kings,” leaving it for individuals and the Church, it is only in recent decades that there has been a widespread disintegration of the state’s role in waging *jihād*. BONNER, *supra* note 50, at 3.

<sup>73</sup> See BONNER, *supra* note 50, at 39.



The absence of standing armies in early Islamic history meant that governing authorities necessarily relied on volunteer forces to pursue defensive or offensive military campaigns. As a collective duty, *jihād* gives the state full jurisdiction over military affairs. The state determines when and where warfare exists, as well as who participates in it. Only the state can trigger the duty by issuing a call for volunteer fighters. It also determines when to halt the fighting. The state sets the overall size of the deployment and the number of soldiers a locality is required to contribute. If any of them fail to perform or a minimum number of required performers do not step forward, then everyone in the locality is liable for non-performance of the duty.<sup>74</sup>

### B. *Jihād as an Individual Obligation*

As noted above, an individual obligation designated the duty to a single person and only that person's performance could satisfy the obligation. In the *jihād* context, the duty became individualized only in cases of emergency, i.e., for defensive purposes during an invasion. In such cases, every able-bodied person was burdened with the duty to fight. Classically, the majority of jurists considered this expanded application of the duty to be temporary.<sup>75</sup> There was no notion that individually-obligated *jihād* was the de facto, permanent state.<sup>76</sup> This distinction is particularly important because the major shift in thinking among contemporary jurists, particularly militant jurists, is that the *jihād*-duty is now essentially in a permanent state of being individually obligated. In order to get a sense of how they arrive at this idea and the significance of its departure from classical legal thought, it is important to consider pre-cursors in the pre-modern discussion.<sup>77</sup> Pre-modern jurists permitted the collective-individual transformation to take place in three specific scenarios: when performance of the duty is initiated, when border (or frontier) towns come under attack and when there is an unexpected encounter with enemy forces.<sup>78</sup>

<sup>74</sup> It should be noted that, classically, fighters could be exempt from participation in the *jihād*-duty for a variety of reasons, such as being unable to secure riding animals. 14 IBN 'ABD AL-BARR, AL-ISTIDHKĀR [THE REMINISCENCE] 292 (1993).

<sup>75</sup> See RUDOLPH PETERS, ISLAM AND COLONIALISM: THE DOCTRINE OF JIHAD IN MODERN HISTORY 36-37 (Leo Laeyendecker & Jacques Waardenburg eds., 1979) [hereinafter COLONIALISM] (describing situations in which *jihād* terminates and no longer requires obligation).

<sup>76</sup> AL-GHAZĀLĪ, *supra* note 32, at 12; KĀSĀNĪ, *supra* note 68, at 98; 3 'ALĀ AL-DĪN AL-SAMARQANDĪ, TUHFAT AL-FUQAHĀ' [GEMS OF THE JURISTS] 294 (1984).

<sup>77</sup> Jurists often reject this idea of *jihād* being an individual obligation by noting that the Prophet himself did not participate in certain military expeditions he dispatched and that it would be unthinkable for the Prophet to forgo an individual obligation. KĀSĀNĪ, *supra* note 68, at 98.

<sup>78</sup> There is some mention of this in the secondary literature as well, but the discussion is often incomplete. Rudolph Peters mentions three instances where *jihād* becomes an individual obligation: appointment by the caliph, swearing an oath to fight and defending one's region if it is under attack. JIHAD READER, *supra* note 36, at 3-4.

In the first case, the *jihād*-duty becomes an individual obligation as soon as performance begins. Jurists agreed that every collective duty is individually obligated for whoever takes substantial steps towards fulfilling it.<sup>79</sup> In essence, once you begin performance, the duty is assigned to you. There were differences as to when the exact point of initiation was. Opinions ranged from as soon as the army marches to not until the army enters the battlefield.<sup>80</sup> The “obligation through initiation” condition was particularly important in the context of military substitution (*ja‘ā’il*).<sup>81</sup> Substitution was when a person who had been assigned the duty to fight arranged for someone else to perform it instead, sometimes in return for compensation.<sup>82</sup> Jurists opposed this transfer because once a substituted individual enters the battlefield they themselves acquire an individual obligation to perform. In other words, it is no longer possible for the substituted individual to satisfy the duty on behalf of someone else because they are now personally responsible.<sup>83</sup>

Two other scenarios where jurists permitted changing the nature of the *jihād*-duty were when an enemy attacks a border town under Muslim sovereignty or when one comes upon the enemy unexpectedly. These are classic self-defense scenarios where the collective duty’s preconditions are suspended due to an imminent attack. Everyone in proximity to the attack must engage in the fight out of necessity.<sup>84</sup> Hence, while normally the *jihād*-duty could only be discharged by a direct order from the head of state (*imām*), in cases of imminent attack the inhabitants of a besieged town did not need to wait for the state’s

<sup>79</sup> See, e.g., 2 SARAKHSĪ, USŪL AL-SARAKHSĪ [The Legal Theory of Sarakhsī] 289.

<sup>80</sup> 7 YAḤYĀ b. SHARAF AL-NAWAWĪ, RAWDAT AL-ṬĀLIBĪN [The Training of Students] 416 (2003).

<sup>81</sup> Substitution, in the sense of military substitute, seems to be “first clearly attested for” in the reign of Mu‘āwiya (661-680 CE), but there were “scattered references” prior to this as well. In the battle of Badr, “one of every two warriors” stayed at home and Abū Bakr even summoned an “army of substitutes” in his caliphate. The early references to substitution used the term *badīl*, which contains differences from the later concept of *ja‘ā’il*. See *Ja‘ā’il and Holy War*, *supra* note 71, at 47–48.

<sup>82</sup> In general, leasing individuals to fight on your behalf was not permitted by jurists. For instance, according to Abū Ishāq al-Fazārī, Awzā‘ī did not allow someone to be hired for the purpose of fighting (*sami‘nā ‘annahū la yasham li-l-‘abīd wa al-ujarā’*). He also did not require the participation of slaves (*‘abīd*), blacksmiths (*al-ḥadād*) and farriers (*al-biṭār*) in this category. ABŪ IṢHĀQ AL-FAZĀRĪ, KITĀB AL-SIYAR [BOOK ON THE LAWS OF WAR] 193–94 (1987); see also *Arab-Byzantine Frontier*, *supra* note 71, at 21. There are several hadith from the early period as well that make a distinction between someone who stays back from war but provides a donation to a fighter versus someone who hires someone else to go in his place. *Ja‘ā’il and Holy War*, *supra* note 71, at 52. Unlike hiring someone, donations do not involve a *quid pro quo*. *Id.* at 52.

<sup>83</sup> SHĪRĀZĪ, *supra* note 68, at 266.

<sup>84</sup> IBN ‘ABD AL-BARR, *supra* note 74, at 292 (requiring the performance from “every person in that vicinity,” especially those with the “requisite strength necessary to achieve victory,” regardless of whether they are “lightly armed” and “young”).

instruction, unless they were unable to handle the situation.<sup>85</sup> If they were incapable of handling the hostile situation themselves or were too weak, then the duty fell on the people in closest proximity to the besieged town.<sup>86</sup>

That said, even here, jurists debated how to define what constituted an “attack.” There was apparent consensus that a collective *jihād*-duty became an individual *jihād* obligation if enemy forces actually *enter* a Muslim city.<sup>87</sup> However, the nature of the duty prior to their actual entrance into the city was controversial. Some jurists converted the duty into an individual obligation at points other than the army’s entry into a city. For them, the duty became individually obligated as soon as enemy forces “set foot on Muslim land,” if they “persist[ed]” in the land or if they began to “descend upon its gates, but [did] not enter.”<sup>88</sup>

In addition, when an attack occurred and there was no time to prepare, standard subordinate relationships were superseded by the locality’s need for defense. For instance, in the pre-modern period, women needed permission from their male guardians, typically their husbands or fathers, to participate in *jihād*, but during an attack, this requirement was temporarily lifted.<sup>89</sup> In other words, everyone, regardless of social status, must fight, and the ordinary constraints previously mitigating an individual’s involvement are no longer valid.<sup>90</sup> Hence, groups normally exempt from the *jihād*-duty, like slaves, children and married women, were required to perform if they possessed the requisite strength, regardless of whether they received permission from their masters, parents or husbands, respectively.<sup>91</sup> The reason was simple: if one had to seek permission to defend oneself then one would place one’s life in danger and this would be “self-destructive,” let alone destructive for the collective. As a result, a besieged town’s residents can give precedence to the “right” of self-defense over anyone else’s rights with respect to them.<sup>92</sup>

Jurists also discussed the nature of the obligation for people who reside outside the locality under attack. Most suggested that the participation of non-residents is only necessary when the collective duty cannot be adequately

<sup>85</sup> See, e.g., IBN QUDĀMA, *supra* note 68, at 456 (requires everyone to perform the duty as soon as the enemy descends on Muslim land).

<sup>86</sup> KĀSĀNĪ, *supra* note 68, at 98.

<sup>87</sup> 10 AL-ḤUSAYN B. MASŪD AL-BAGHAWĪ, SHARḤ AL-SUNNA [COMMENTARY ON TRADITION] 375 (1983).

<sup>88</sup> MAWĀRDĪ, *supra* note 51, at 112–13 (supporting the position of a persistent attack that presents the possibility of losing territory); 7 YAḤYĀ B. SHARAF AL-NAWAWĪ, RAWḌAT AL-ṬĀLIBĪN [THE TRAINING OF STUDENTS] 416 (2003) (discussing all three positions).

<sup>89</sup> GHAZĀLĪ, *supra* note 32, at 11–12.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 11. Similarly, debtors would ordinarily be required to get permission from their creditors before engaging in *jihād*, but in this scenario, it is not required.

<sup>92</sup> SHĪRĀZĪ, *supra* note 68, at 269–70.

addressed without them.<sup>93</sup> Others noted that in addition to the inability to resist, if residents of the territory under attack feared for their land and offspring, then the duty was triggered for non-residents.<sup>94</sup> These non-residents, particularly those in closest proximity, were required to remain “alert” and ready to respond.<sup>95</sup>

In sum, the classical *jihād*-duty that pre-modern jurists developed functioned as a collective duty by default. Not everyone needed to perform as long as enough people did. In certain circumstances, the duty could transform into an individual obligation where everyone was required to perform. This was never permanent; it was a temporary allowance due to immediate need. Additionally, it did not extend to people residing outside the area under attack unless the head of state or besieged residents required assistance. To a great extent, the nature of the obligation on specific individuals is dependent on who has jurisdiction over *jihād* at a particular moment. To understand this better, it is necessary to explore how different authorities exercised jurisdiction over *jihād* in the classical legal tradition.

#### IV. JURISDICTION OVER *JIHĀD*

For my purposes, there are two critical questions here: who has jurisdiction over the *jihād*-duty and what conditions allow this jurisdiction to be challenged. This Part investigates the legal tradition to extract more details on the ways in which the state, in theory, exerts authority over the *jihād*-duty. It also discusses how the two types of authority, state and non-state, interact. Having understood how this authority operates, we are then able to examine the ways in which militant jurists contest it in the modern period.

##### A. State Authority

Most pre-modern discussions on the *jihād*-duty, by Sunni and Shi'i jurists alike, assumed that the duty was regulated by a state or other political authority. Unlike the writings of many Islamic jurists<sup>96</sup> in the modern period, pre-modern jurists did not believe that individuals possessed the right to declare

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<sup>93</sup> 1 ABŪ BAKR IBN ʿARABĪ, *AHKĀM AL-QURʾAN* [LEGAL RULES OF THE QURʾAN] 205 (2003); BAGHAWĪ, *supra* note 87; GHAZĀLĪ, *supra* note 32, at 12; SAMARQANDĪ, *supra* note 76, at 294.

<sup>94</sup> 4 ABŪ BAKR AL-JAṢṢĀS, *AHKĀM AL-QURʾAN* [LEGAL RULES OF THE QURʾAN] 311 (1996).

<sup>95</sup> *Id.* at 312.

<sup>96</sup> By “Islamic jurist,” I mean individuals engaged exclusively in understanding Islamic law. While the term “Muslim jurist” is commonly used instead, it carries the potential for confusion. There are many jurists who are Muslim and engaged in the jurisprudence of their respective countries but not involved in Islamic law.

*jihād*.<sup>97</sup> Two aspects of state authority in the context of pre-modern *jihād* figure prominently here. First, the state had sole jurisdiction over *jihād* except for certain circumstances. This jurisdiction includes the power to declare war, to punish non-participation and to raise an army. Second, the scope of the state's authority in military matters was mainly obligating people to *protect* Muslim territory.<sup>98</sup> If necessary, it could also include obligating the pursuit of hostile forces into enemy territory.<sup>99</sup>

As for the fighting force's composition, the state possessed authority to determine *who* could participate, but jurists permitted some flexibility here. This is where the tension between *jihād* as a religious obligation (pietistic) and *jihād* as a tool for exerting state power (functional) come to light. Although pre-modern jurists discouraged individuals from participating in *jihād* without state permission, not all of them forbade it. An individual who joined the fight without permission was not considered blameworthy.<sup>100</sup> It is less clear what their opinion was on situations where an individual received a direct order not to participate but did so anyway. Regardless, this dispensation highlights the balance that must be struck when the state has authority over acts that are also moral obligations.

As mentioned earlier, the key roles for the state in the *jihād*-duty were to indicate when the fighting will commence and when it should cease; how many fighters must be deployed; where those fighters should come from; and, theoretically, what the penalty was for non-compliance. Classical jurists noted that the head of state (*imām*), as part of his official duties, could personally take charge of the *jihād* and trigger the collective duty.<sup>101</sup> They were the only individuals empowered in this fashion; no other individual could assume responsibility for *jihād*.<sup>102</sup> The duty began collectively and became individually obligated on everyone in the immediate vicinity of the attack, depending on its

<sup>97</sup> For a good overview of classical Sunni jurists' views on this, see °Ammar Khān Nāsir, *Jihād kī farḍiyat awr us kā ikhtiyār: chand ghalt fahmīyān (Jihad's Obligation and its Pursuit: Some Misconceptions)*, ALSHARIA (Nov.–Dec. 2009), <http://www.alsharia.org/mujalla/2009/nov-dec/jihad-farziyyat-ammār#top>. The predominant Twelver Shi'i view on this was even more restrictive: *jihād* could only be waged "under the leadership of the rightful *Imām*" and, after 873 CE, "theoretically no lawful *jihād*" could be fought because the *Imām* was hidden. JIHAD READER, *supra* note 36, at 4. Of course, Shi'i jurists developed an exception for "defensive *jihād*" and went to great lengths to frame military confrontations in this manner. See *Id.* at 3–4 (discussing the obligations of "defensive *jihād*" on all Muslims).

<sup>98</sup> SHĪRĀZĪ, *supra* note 68, at 269–70 (requiring security measures be taken to protect the territory, like placing emissaries, building castles and digging trenches). Classical jurists required the head of state gather forces for both removing enemy forces from Muslim land and securing that land in the first place.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> MAWĀRDĪ, *supra* note 51, at 113. This does not account for the exceptions noted above where a town under attack is not required to acquire permission before it defends itself.

<sup>102</sup> *Id.*

persistence and intensity.<sup>103</sup> Jurists also allowed a retreating enemy force to be pursued into territory outside the jurisdiction of the Muslim polity. They noted that while technically pursuing enemy forces is no longer a defensive act, thus not individually obligated, the head of state is permitted to extend the individual obligation in this manner as a strategic military decision.<sup>104</sup> Historically, jurists connected the ruler's power to move forces into other territories with his ability to obligate people to migrate (*hijra*).<sup>105</sup> Early Islamic history featured a number of migrations, including the mass migration from Mecca to Yathrib (later named Medina) in 622.<sup>106</sup> Jurists connected the two cases, *jihād* and migration, because each involved the state's ability to physically displace its constituents. Like *jihād*, in the case of migration they stressed that only the ruler has authority to do this.<sup>107</sup>

Not only does the state have jurisdiction over administering the *jihād*-duty, but some, not all, pre-modern jurists also required preemptive engagement in *jihād*. Specifically, they encouraged the state to engage in regular military campaigns against adversaries and raise an army annually to undertake *jihād*.<sup>108</sup> They listed multiple reasons for this: to demonstrate "Islam's presence," to stop harm being caused, to collect tributes, and to present a "compelling propagation" of the faith.<sup>109</sup> Jurists disagreed about where military campaigns should be focused: some favored a narrower mandate based on territory of strategic importance, while others included everywhere outside Muslim sovereignty.<sup>110</sup> Many also viewed these campaigns as a means of revenue generation for the state. They reasoned that a minimum of one military engagement per year was necessary to collect tribute (*jizya*) from "non-Muslim subjects" (*dhimma*), in lieu

<sup>103</sup> *Id.*

<sup>104</sup> 7 IBN HAZM, AL-MUḤALLĀ [THE ADORNED TREATISE] 291 (2001); see ṢAḤĪḤ AL-BUKHĀRĪ 3077, BOOK 56, HADITH 283; ṢAḤĪḤ MUSLIM 1353, BOOK 15, HADITH 507; SUNAN ABŪ DAWŪD 2480, BOOK 15, HADITH 4; and SUNAN AL-NASĀ'Ī 4170, BOOK 39, HADITH 22. He quotes a famous tradition of the Prophet that the obligation to emigrate, as in the migration to Medina, is no longer operative after the conquest of Mecca. The only exception is in the context of *jihād*; hence, if you are summoned (presumably by the ruler) to emigrate for the sake of *jihād*, you must go forth.

<sup>105</sup> See generally Muhammad Khalid Masud, *The Obligation to Migrate: The Doctrine of "Hijra" in Islamic Law*, in MUSLIM TRAVELLERS: PILGRIMAGE, MIGRATION, AND THE RELIGIOUS IMAGINATION 35 (Dale F. Eikelman et al. eds., 1990).

<sup>106</sup> *Id.* at 30.

<sup>107</sup> Qarāfī reports a similar opinion from Saḥnūn b. Sa'īd (d. 854) that *jihād* is no longer obligatory (as an individual obligation) after the conquest of Mecca except if "the ruler commands it." QARĀFĪ, *supra* note 9, at 385.

<sup>108</sup> AL-GHAZĀLĪ, *supra* note 32, at 6.

<sup>109</sup> *Id.* This often focused on the "most dangerous" areas to Muslims. A ruler could delay this annual *jihād* if the army was weak or if the roads to the enemy territory were in a poor state. COLONIALISM, *supra* note 75, at 13. Some have argued that *jihād* actually functioned as a way to legitimate a ruler, especially after the loss of political unity in the late 8th century. JIHĀD READER, *supra* note 36, at 5.

<sup>110</sup> AL-GHAZĀLĪ, *supra* note 32, at 6.

of taxes Muslims paid, “in exchange for providing them protection, which is an alternative to waging war against them.”<sup>111</sup>

One point of dispute, briefly raised earlier, is what happened when, despite the collective duty being fulfilled, a ruler wanted a more aggressive engagement with the enemy in order to inflict a harsher blow. Put another way, to what extent did the *jihād*-duty accommodate the state’s ability to craft military strategy? In this dispute, jurists allowed the state to utilize the *jihād*-duty for strategic objectives beyond territorial defense. They required fighters to follow the state’s mandate in offensively engaging the enemy.<sup>112</sup> This again raises a tension inherent in the *jihād*-duty because it operates as both a moral obligation for individual Muslims and a mechanism for meeting the state’s military objectives. Repelling an attack on Muslim territory allows an individual’s moral obligation of self-defense to converge with the state’s duty to safeguard its population. In the defensive context, the moral duty on an individual to engage the enemy on Muslim territory is clear, but it is less apparent when pursuing them into foreign lands. The moral imperative weakens outside the defensive context, but jurists still felt a functional need to accommodate the state’s legitimate strategy to continue the fight. Pre-modern jurists chose to extend the moral imperative beyond the defense of one’s land to the defense of the state’s military strategy. The confusion between these dual aims continues to play out in the contemporary context as well.

### B. Status-Based Authority

It is useful to briefly discuss the manner in which status-based authority functions in the *jihād* context because, among other things, status-based authority maintains a role in the present day as well. There are various reasons why pre-modern jurists exempted an individual from the *jihād*-duty, the foremost of which was the presence or absence of some personal characteristic that disqualified their participation. Examples include a mental health issue, not having reached the age of maturity, or even poverty. However, the *jihād*-duty also contained another set of exemptions arising out of additional “authorities” that exercised rights over individuals, superseding the state’s authority.

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<sup>111</sup> IBN QUDĀMA, *supra* note 68, at 457. He goes on to state that based on need, the *jihād*-duty can be carried out more than once a year. He does note that not all engagements with “non-Muslims” are divided into either getting tribute or fighting. For instance, fighting might be excused (or postponed) if these non-Muslims are received as guests, if it is necessary to wait for reinforcements, if the supply chain on the road to battle is not sufficient, if delaying the fight will allow them time to be tempted to become Muslim, etc. *Id.*

<sup>112</sup> JAṢṢAṢ, *supra* note 94, at 311. Mawārdī notes that aside from a defensive duty to protect Muslim lands, the duty also extends to military campaigns in the “land of disbelievers” where they are either fought until they embrace Islam or, if they do not accept Islam, agree to pay a poll tax. He argues this on the basis of Q 2/al-Baqara:193, which instructs people to “fight them till there is no longer chaos and all of religion belongs to God.” MAWĀRDĪ, *supra* note 51, at 113.

Classically, Islamic law empowered certain societal actors, like creditors, slave masters, husbands and parents, with the right to prevent their subordinates from participating in *jihād* in order to fulfill duties they were owed.<sup>113</sup> This is an interesting interference with the typical authorities having dominion over Islamic law.<sup>114</sup> In the *jihād* context, this interference is especially significant since status-based authorities were able to disrupt the state's ability to raise an army.

However, even status-based authority was restricted when the duty transformed from collective to individual. Where a hostile party descended upon a town, jurists agreed that permission from status-based authorities was not required prior to participating. Parents could prevent their son from participating in *jihād* because it would cause them emotional distress or they required him to care for them.<sup>115</sup> As long as *jihād* was collective, it could be performed by others and did not take precedence over the son's individual obligation to his parents.<sup>116</sup> However, when there was an insufficient number of people to carry out the duty, parental permission was no longer required.<sup>117</sup> In the absence of an approaching hostile party, parental authority must be respected, but when a hostile party initiates an attack, fighting is privileged over the individual obligation to care for one's parents.<sup>118</sup>

In sum, in the classical period, the *jihād*-duty was primarily collective except in special circumstances where it temporarily became an individual obligation for everyone in a particular locality. In addition, it was assumed that a state would regulate the *jihād*-duty except during an imminent attack. Furthermore, with rare exceptions, the state had jurisdiction over the level of participation necessary to satisfy the *jihād*-duty and also formulated military strategy. This role for the state was not only established by legal treatises, but also by the practice of Muslim states from the pre-modern period into the 19th century. It was only with the arrival of European colonialism in Muslim territory that this entire framework was disrupted.

<sup>113</sup> COLONIALISM, *supra* note 75, at 17–18.

<sup>114</sup> *Id.* The picture is further complicated by the notion of early Muslim caliphs being “divinely selected rulers . . . sent by God for the right ordering of worldly affairs.” LAPIDUS, *supra* note 60, at 74. Theoretically, despite divine selection, these caliphal powers can be undercut by intervening, mundane authorities.

<sup>115</sup> IBN ḤAZM, *supra* note 104, at 292.

<sup>116</sup> *Id.*

<sup>117</sup> RUSHD, *supra* note 69, at 278.

<sup>118</sup> 2 ASAD AL-KARĀBĪSĪ, AL-FURŪQ FĪ AL-FURŪ' [DIFFERENCES IN THE BRANCHES OF LAW] 210 (2005); SAMARQANDĪ, *supra* note 76, at 294 (noting that the duty of care to one's parents is automatically reinstated if the *jihād*-duty begins to be adequately fulfilled).



## V. COLONIALISM'S ENDURING LEGACY

As shown above, pre-modern jurists considered use of violence generally to be the exclusive right of the state. The primary exception was when a territory faced imminent attack or invasion. At those points, the state's jurisdiction over *jihād* was temporarily suspended. Broadly speaking, European colonialism represents the starkest example in Islamic history of conditions that suspend the state's authority over the *jihād*-duty. Colonialism contributed to the dispersal of the state's powers among non-state actors, particularly religious and tribal groups, resisting foreign invaders. This authority included not only the ability to gather forces, but also the right to determine when to engage in armed conflict. The disruptive effect of colonial rule transitioned the *jihād*-duty from its classical representation to its modern reformulation.

However, despite this disruption and eventual transition, my contention is that a classical organizing structure, real or imagined, for waging *jihād* was deeply embedded in resisting populations. Even in a decentralized pre-modern state, authority over the *jihād*-duty resided with the center: the ruler or *imām*. This remained the case for the majority of Islamic history, arguably up through the fall of the Ottoman Empire in the early 20th century. However, as early as the late 18th century, parts of the authority over *jihād* began to change with the invasion of colonial powers. The "rise and expansion of Western industrial capitalism" in the 19th and 20th centuries led to most Muslim populations being "subjected to Western colonial rule."<sup>119</sup> European rule over Muslim populations expanded and "forever changed all aspects of geography, the economy, social relations and politics in the areas that it ruled."<sup>120</sup> In particular, as colonial and local elites negotiated their relationship, Islamic law went through a process of codification that limited it to "areas of personal and family law," depriving it of a role in military matters.<sup>121</sup> Background on this critical period of colonization is crucial to understanding the break from the classical political framework for regulating *jihād* and why it has not been rectified.

Despite the break from the existing political order in many countries, "the doctrine of *jihād* was of paramount importance" in the resistance to colonial rule.<sup>122</sup> In response to colonial rule, fragmented groups of societal actors lifted the banner of *jihād* in place of the Muslim state. Local populations organized

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<sup>119</sup> COLONIALISM, *supra* note 75, at 39.

<sup>120</sup> S.V.R. Nasr, *European Colonialism and the Emergence of Muslim States*, in THE OXFORD HISTORY OF ISLAM 552 (John L. Esposito ed., 1999).

<sup>121</sup> IZA R. HUSSIN, THE POLITICS OF ISLAMIC LAW: LOCAL ELITES, COLONIAL AUTHORITY, AND THE MAKING OF THE MUSLIM STATE 10 (2016). For many scholars, the changes colonialism brought to Islamic law represent a "significant departure from the instance-based, judge-centered, and often diverse applications of Islamic law." *Id.*

<sup>122</sup> COLONIALISM, *supra* note 75, at 41 (emphasis added).

themselves into politico-religious movements to fight foreign rule.<sup>123</sup> Arguably the most determined resistance occurred in Sudan, Somaliland, Libya and Morocco.<sup>124</sup> In each of these countries, religious leaders were at the forefront of the resistance, often giving it “cohesion” through the organizational structures they already had in place.<sup>125</sup> This was indicative of the centrality of political authority in *jihād*’s administration; these movements formed quasi-states to carry out their resistance.

The formation of these quasi-states connected to another area of classical Islamic law: the obligation to migrate (*hijra*).<sup>126</sup> In the medieval period, when a Muslim territory came under a foreign invader’s control, the land went from being Islamic to disputed. In these cases, many jurists required people to migrate to the nearest territory under Muslim sovereignty.<sup>127</sup> There is an intimate connection between the obligation to migrate and the duty to fight because the former often serves as a precursor to the latter.<sup>128</sup> My research suggests that, in the colonial context, many resistance movements would separate themselves from the territory under colonial rule in order to establish their own writ before continuing their fight. This allowed them the opportunity to not only unify various factions, but to replicate the political structure that governed them prior to colonial rule.<sup>129</sup> The historical record also shows that other movements simply utilized pre-existing hierarchical networks and infused them with political functions to recreate state authority. Any subsequent *jihād* against foreign occupiers was guided by these new authorities.

For example, in Algeria, the Sufi brotherhoods, or *turuq*, had “the organizational framework necessary for waging a struggle” and eventually formed a “large confederation of tribes” to fight the French pledging allegiance

<sup>123</sup> *Id.* at 39.

<sup>124</sup> 7 C.C. Stewart, *Islam*, in THE CAMBRIDGE HISTORY OF AFRICA 195 (J.D. Fage et al. eds., 1986).

<sup>125</sup> 7 Catherine Coquery-Vidrovitch, *French Black Africa*, in THE CAMBRIDGE HISTORY OF AFRICA 331 (J.D. Fage et al. eds., 1986).

<sup>126</sup> For a more detailed discussion, see generally Masud, *supra* note 105, at 29–49.

<sup>127</sup> In the colonial period, both ‘Abd al-Qādir in Algeria and Usman dan Fodio in Nigeria “wrote about the need for Muslims to migrate (*hijra*) from regions under the military occupation or political control of ‘unbelievers’ and also about the necessity of a ‘holy war’ (*jihād*) against them.” B.G. MARTIN, MUSLIM BROTHERHOODS IN NINETEENTH-CENTURY AFRICA 36 (1976).

<sup>128</sup> This is arguably true from the very first migrations in Islamic history, in particular when Muḥammad moved his followers from Mecca to Yathrib (later Medina). It was only after the move and subsequent formation of a state that Muḥammad began pursuing any militaristic ventures. For a more elaborate discussion of this point, see JAVED AHMAD GHAMIDI, MIZĀN [THE BALANCE] 592–99 (6th ed. 2012).

<sup>129</sup> Of course, the level of external governance Muslim territories received prior to colonialism was not uniform. In some territories, a central authority played a prominent role while in others it was relatively absent.

to one leader.<sup>130</sup> This leader began carrying out functions normally reserved for a state: forming an army, collecting taxes, and appointing representatives throughout the territory.<sup>131</sup> In Libya, the Sanūsiyyah order, a Sufi brotherhood established in Cyrenaica in the 1840s, gathered the tribes in opposition to the European state.<sup>132</sup> Together they formed a state-like structure that performed “typical governmental functions,” including educating the populace, administering justice, and maintaining public security.<sup>133</sup> On the other hand, in India, opposition to the British eventually developed into armed resistance and the “doctrine of *jihād* played a significant part [ ] . . . [with] [t]he most important [ ] movement [ ] [being] *Tariqah-i Muḥammadi*. . . .”<sup>134</sup> Their strategy was to occupy “territory out of reach of the British” in order to “establish a righteous Islamic government that could conduct the struggle for the liberation of India.”<sup>135</sup>

<sup>130</sup> COLONIALISM, *supra* note 75, at 54. Sufi brotherhoods were communities based on doctrines and rituals intended to develop the “spiritual” side of Islam. *Id.* at 116. They emerged in the 12th and 13th centuries but evolved into “exclusive religious communities” in the middle of the 18th century. JAMIL M. ABUN-NASR, MUSLIM COMMUNITIES OF GRACE: THE SUFI BROTHERHOODS IN ISLAMIC RELIGIOUS LIFE 127 (2007). They had a “distinct religious rule set for it by [a] founder and [ ] followers were required to pledge exclusive allegiance to his spiritual authority.” *Id.* When the political order “reached its lowest point in regard to unity and common purposes,” it was the Sufi brotherhood that “arose and provided a type of spiritual unity that proved in many ways to be much more powerful even than the caliphate.” FREDERICK DENNY, AN INTRODUCTION TO ISLAM 240 (4th ed. 2016).

<sup>131</sup> COLONIALISM, *supra* note 75, at 54–55. The leader was °Abd al-Qādir b. Muḥyi al-Dīn (1808–83). In his own description, °Abd al-Qādir notes how he made sure that his deputies left “twice a year” to collect taxes: the *zakāt* (or charitable tax) and *‘ushr* (tax on production). RAPHAEL DANZIGER, °ABD AL-QADIR AND THE ALGERIANS: RESISTANCE TO THE FRENCH AND INTERNAL CONSOLIDATION 190 (1977). His centralization of these activities did cause friction. Previously the collection of taxes had been delegated to the religious brotherhoods by the central authority and the maintenance of public security to the *makhzan*-tribes connected to the central Turkish government. °Abd al-Qādir essentially usurped their role. *See* MARTIN, *supra* note 127, at 41.

<sup>132</sup> Anna Maria Medici, *Waqfs of Cyrenaica and Italian Colonialism in Libya (1911-41)*, in HELD IN TRUST: WAQF IN THE ISLAMIC WORLD 1 (Pascale Ghazaleh ed., 2011).

<sup>133</sup> *See* MARTIN, *supra* note 127, at 86–87. Muḥammad al-Sanūsi led the brotherhood (1791–1859). *Id.* at 99.

<sup>134</sup> COLONIALISM, *supra* note 75, at 46.

<sup>135</sup> *Id.* at 48. The movement was led by Sayyid Aḥmad Barēlwī (1786–1831). He chose the North West frontier area near the Afghan border but had to begin by fighting the Sikhs that ruled there. Eventually, the organization established headquarters at Patna in North East India. *Id.* at 49. Barēlwī was likely inspired by his teacher Shāh °Abd al-°Azīz, son of the religious reformer Shāh Waliullah, whose famous *fatwa* from 1803 seemed to depart from a long-held consensus regarding the British and argued that India should now be considered *dār al-ḥarb* (land of conflict). Yohanan Friedmann, *Dār al-islām and dār al-ḥarb in Modern Indian Muslim Thought*, in DĀR AL-ISLĀM/DĀR AL-ḤARB: TERRITORIES, PEOPLE, IDENTITIES 352 (Giovanna Calasso and Giuliano Lancioni eds., 2017). This was inferred from his argument that “the rulings of the *imām* of the Muslims are in actuality no longer enforced” (*ḥukm-i-imām al-Muslimīn ašlān jārī nīst*) and instead “decrees of Christian leaders” (*ḥukm-i ru’asā’ naṣārā*) are followed “without trepidation.” 1 SHĀH °ABD AL-°AZIZ, FATĀWĀ-E-AZĪZĪ 16 (1905).

In these and other examples, we find non-state actors purposefully assumed state-like functions before they would engage in the *jihād* of resistance.

However, as colonial rule ended, non-state actors faced the prospect of relinquishing their acquired authority over *jihād* to new Muslim states.<sup>136</sup> In theory, the withdrawal of foreign forces from Muslim lands removed the temporary justification for *jihād* to function as an individual obligation. Thus, once the foreign invaders left, the classical doctrine required *jihād* return to its status as a collective duty with state oversight. Hence, non-state actors had a strong incentive to maintain the *jihād*-duty as an individual obligation. Their power relative to the new state arguably hinged on their ability to retain authority over *jihād*. As will be shown subsequently, jurists sympathetic to this reality assumed the task of providing justification for why *jihād* was still required of every person. They resisted the state's jurisdictional claim over *jihād* and argued trenchantly that, among other things, the new states were illegitimate. They claimed these states had failed to adequately incorporate Islamic law, adopted Western modes of governance, and allowed foreigners to continue their hegemony over the Muslim world. It is against this backdrop that militant jurists eventually began to reformulate classical understandings of the *jihād*-duty.

VI. REFORMULATION OF THE *JIHĀD*-DUTY:  
 ABDALLAH YŪSUF °AZZĀM  
 (1941–1989)

This part examines how key aspects of the classical *jihād*-duty frame the discussion of *jihād* today. More importantly, it aims to unpack how the modern understanding of the *jihād*-duty departed from the earlier formulation. In order to illustrate the continuity and evolution of the ideas surrounding the *jihād*-duty, one pivotal 1984 *fatwā* (“advisory legal opinion”) will be examined. The *fatwā*, entitled “In Defense of Muslim Lands” (*al-Difā° °an arāḍī al-muslimīn*), was issued by the jurist °Abdallāh Yūsuf °Azzām, often considered the ideological forefather of al-Qaeda and an “inspiration” to militant movements around the world today.<sup>137</sup>

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<sup>136</sup> Of course, this is a broad generalization. Post-colonial Muslim states had varying relationships with non-state actors, particularly religious scholars. State marginalization of religious scholars was quite common either as an extension of trends that emerged during the late Ottoman empire or due to a desire to eschew religious institutions in favor of an expressly secular political framework.

<sup>137</sup> Andrew McGregor, ‘*Jihad and the Rifle Alone*’: °Abdullah °Azzam and the Islamist Revolution, 23 J. CONFLICT STUD. 92, 106 (2003). This *fatwā* was introduced by the famous Saudi cleric, Shaykh °Abd al-°Azīz b. Bāz, and endorsed by many others. They considered °Azzām “sufficiently educated to issue a legitimate *fatwā*.” Calvert, *supra* note 64, at 93. With regard to the date of the *fatwā*, the earliest physical copy seems to be from 1987, but Basil Muhammad has “credibly” argued that it was “first written in [ ] 1984.” THOMAS HEGGHAMMER, *JIHĀD IN SAUDI ARABIA: VIOLENCE AND PAN-ISLAMISM SINCE 1979*, 41 n.6 (2010). This date has been confirmed by Darryl Li, who provided me with a copy of the *fatwā* from 1984 (on file with the author).

In the *fatwā*, °Azzām employs a number of different techniques to make subtle but profound changes to the classical doctrine, such as requiring practical impossibilities and broadening the scope of narrow legal rules. His *fatwā* is replete with references to pre-modern jurists, a tactic routinely used by modern jurists to validate their own opinions. However, when he applies those legal opinions he departs significantly from the classical doctrine. Hence, even as °Azzām pays homage to the tradition, he initiates a paradigm shift in how *jihād* is understood.

*A. Background on °Azzām and His Fatwā*

°Abdallāh Yūsuf Muṣṭafā °Azzām is considered by many to be the “first modern ideologue of transnational *jihād*.”<sup>138</sup> Most of his predecessors who wrote on *jihād* confined their militant ideology to “struggles against their respective governments.”<sup>139</sup> While he himself “never advocated international terrorism,” his ideas have inspired “foreign fighter activism to this day.”<sup>140</sup> For many, he was the “critical force both ideologically and organizationally for the recruitment of thousands of Muslims from around the world” to engage in *jihād* against the Soviets.<sup>141</sup> Some have argued that he was a “mentor” to Osama bin Laden and his “first and most important . . . father figure.”<sup>142</sup>

°Azzām was born in 1941 in the village of Sīlat al-Hārthīyah, northwest of Jenin, in pre-Mandate Palestine.<sup>143</sup> After 1948, the village found itself on the border with Israel; “[I]f[e] on the border with the enemy [] bec[a]me a recurrent theme in °Azzām’s life.”<sup>144</sup> He nominally participated in the Six Day War, and in 1969 fled with his immediate family to Jordan as a refugee.<sup>145</sup> This seems to have been when he began to “seriously consider taking up arms” as a tactic of

<sup>138</sup> Thomas Hegghammer, ‘Abdallāh ‘Azzām and Palestine, WELT DES ISLAMIS 354, 354 (2013) [hereinafter *Azzām and Palestine*].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 355; see Calvert, *supra* note 64, at 85 (“arguably did more than any other person to create the theoretical underpinnings of the contemporary Jihadist movement”).

<sup>141</sup> PETER BERGEN, THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA 13 (2011).

<sup>142</sup> *Id.*

<sup>143</sup> *Azzām and Palestine*, *supra* note 138, at 359. He was born in the neighborhood of Hārat al-Shawāhina to a family that owned some land and was marginally better off than the average village resident. *Id.* at 360. The village itself had about 1,800 inhabitants at the time, primarily farmers, and the closest town, Jenin, was not much larger, with a population of 4,000. *Id.* at 359. The area itself, the northern West Bank, is historically known for its “political activism and resistance to foreign occupation,” such as fighting Napoleon, the Ottomans, the British and Israelis. *Id.*

<sup>144</sup> *Id.* at 364.

<sup>145</sup> *Id.* at 366–67.

resistance.<sup>146</sup> From February, 1969 to September, 1970, he spent time with the Fedayeen (“self-sacrificers”)<sup>147</sup> in Jordan, participating in combat operations against the Israeli military.<sup>148</sup> They set up four training camps, which would receive visitors from all over the world, including some who became prominent Islamist leaders elsewhere, particularly with the Muslim Brotherhood.<sup>149</sup> Prior to this, °Azzām received a B.A. in theology from Damascus University in 1966 and, in 1973, earned a doctorate in Islamic jurisprudence from al-Azhar University in Cairo.<sup>150</sup> For a period of time, he taught Islamic studies at various universities in the Muslim world until he resigned his post at the Islamic University of Islamabad in 1984 and took up residence in the Pakistani border town of Peshawar, an epicenter of activity in the Afghan *jihād* against the Soviet Union.<sup>151</sup> That same year, he partnered with Osama bin Laden to establish the Office of Fighter Services (*Maktab Khadāmāt al-Mujāhidīn*), a charity that provided various services to fighters, raised donations for the cause, and found new recruits.<sup>152</sup> On November 24, 1989, a bomb was planted along the path that °Azzām took to Friday congregational prayers.<sup>153</sup> It detonated as his car drove by, killing him, his two sons, and another passenger.<sup>154</sup> After °Azzām’s death, the Office of Fighter Services faded out and Bin Laden focused his energies on a separate network he was building: al-Qaeda.<sup>155</sup>

In the early 1980s, °Azzām’s writings were revolutionary because they “articulated a new jihād doctrine” that considers “liberati[on] [of] occupied Muslim territory [to be] more important than toppling Muslim governments” and

<sup>146</sup> *Id.* at 367.

<sup>147</sup> This term generally refers to fighters in guerilla movements. MARY ELIZABETH KING, *A QUIET REVOLUTION: THE FIRST PALESTINIAN INTIFADA AND NONVIOLENT RESISTANCE* 62 (2007).

<sup>148</sup> *Azzām and Palestine*, *supra* note 138, at 369.

<sup>149</sup> *Id.* at 368–69.

<sup>150</sup> *Id.* at 376. It should be noted that °Azzām never lived in Syria for any extended period. He resided in Jenin but went to Damascus “once or twice a term for exams and other formalities.” *Id.* at 364. “His thesis compared Islamic rulings on divorce with those [in Jordan’s and Syria’s] secular civil codes.” Calvert, *supra* note 64, at 86.

<sup>151</sup> *Azzām and Palestine*, *supra* note 138, at 376.

<sup>152</sup> See Asaf Maliach, *Abdullah Azzam, al-Qaeda, and Hamas: Concepts of Jihad and Istishhad*, 2 *MIL. AND STRATEGIC AFF.* 2, 79, 80 (Oct. 2010).

<sup>153</sup> MUHAMMAD HANIFF HASSAN, *THE FATHER OF JIHAD: ‘ABD ALLĀH ‘AZZĀM’S JIHAD IDEAS AND IMPLICATIONS FOR NATIONAL SECURITY* 25 (2014).

<sup>154</sup> *Id.*

<sup>155</sup> For biographical information about °Azzām, see Maliach, *supra* note 152, at 79–81; McGregor, *supra* note 137, at 92; see generally HASSAN, *supra* note 153, at 1–25. Al-Qaeda’s formation was announced by Osama bin Laden in Peshawar in late November/early December 1989. It was based on the idea of *al-Qaidah al-Sulbah* (“the solid base”), which °Azzām had outlined in an April 1988 article for the monthly magazine *al-Jihad*. Maliach, *supra* note 152, at 80.

requires “Muslims worldwide [to engage in this] fight together.”<sup>156</sup> In essence, he believed Muslims had a “religious duty to fight in each other’s wars of national liberation.”<sup>157</sup> °Azzām’s *fatwā*, “In Defense of Muslim Lands,” written during the Afghan war with the Soviet Union, centers on using proof-texts from the Qur’an and Hadith, as well as the classical Islamic legal tradition, to demonstrate why engaging in *jihād* today is not only urgent, but a legal duty incumbent on everyone.<sup>158</sup> °Azzām considers the classical literature on *jihād* to be a “template capable of sustaining and directing the struggle against Islam’s enemies in the contemporary period.”<sup>159</sup> His aim is to demonstrate that the *jihād*-duty is no longer collective, but individual, and to delineate what this implies.<sup>160</sup> While he avoids saying this explicitly, and may not have intended it, by shifting the duty from collective to individual and making it globally applicable, °Azzām promotes a process of divesting Muslim states of their broad regulatory power over *jihād*. He also removes the jurisdiction of various societal actors over specific individuals in subordinate relationships to them. Essentially, °Azzām transfers the authority over *jihād* to individual Muslims: a process others had begun, but °Azzām advances on a global stage. In addition, he also transfers some authority to frontline commanders he considers best situated to appreciate the battlefield context.<sup>161</sup> Thus, in °Azzām’s framework, there is a shift away from central jurisdiction over *jihād* toward local control. Each individual is now operational and battlefield commanders are left with the responsibility for requesting fighters and formulating military strategy.

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<sup>156</sup> *Azzām and Palestine*, *supra* note 138, at 354–55.

<sup>157</sup> *Id.* at 355. Of course, °Azzām’s connection to Palestine and its struggle may very well have “predisposed him to transnational militancy.” *Id.* at 358.

<sup>158</sup> See °ABDALLĀH °AZZĀM, AL-DIFĀ° AN ARĀDĪ AL-MUSLIMĪN: AHAMM FURŪD AL-A°YĀN [DEFENSE OF THE MUSLIM LANDS: THE FIRST OBLIGATION AFTER IMAN] 42 (Brothers in Ribatt trans., 1987). The original Arabic version of °Azzām’s *fatwā* was “officially” translated into multiple languages, including English. The English translation is done by an unspecified group referred to as “Brothers in Ribatt.” While there are some problems in the translation, the general points are adequately conveyed. As a result, I have primarily relied on the English translation and where necessary, as a corrective, refer to the Arabic original. Note: a more accurate translation of the *fatwā* title would be “In Defense of Muslim Lands: The Most Important of the Individual Obligations.”

<sup>159</sup> Calvert, *supra* note 64, at 93.

<sup>160</sup> °Azzām was not the first modern writer to take up the issue of *jihād* as an individual obligation. Another prominent example, published a few years before °Azzām’s *fatwa*, was Muḥammad °Abd al-Salām Faraj’s famous work, *The Neglected Duty (al-Farīda al-Ghā’iba)*, which he wrote in 1981. HEGGHAMMER, *supra* note 137, at 41–42. However, Faraj’s work and similar ones did not have the transnational character of °Azzām’s *fatwā*; they were primarily focused on their own national context.

<sup>161</sup> See °AZZĀM, *supra* note 158, at 35.

### B. Interpretive Techniques

°Azzām's *fatwā* has one primary goal: to activate every Muslim as a potential fighter while delegitimizing the authority of the state, or, more specifically, those states he dislikes. In order to do this, he employs four main interpretive techniques. First, he broadens the scope of legal rules so that they have universal application. Second, he requires performance of acts that are practical impossibilities. Third, he makes certain classical legal rules functional when in fact they were meant to be aspirational. Finally, he makes conditional rules automatically applicable. The end result is a weak central state and individuals empowered to function like mini-states.

#### 1. Broadening Particular Rules to Apply Universally

°Azzām employs an interesting maneuver when putting a classical legal rule into practice: he adjusts its scope to give it universal application. In other words, even when a rule is meant to operate within certain confines, °Azzām broadens its application. For instance, he speaks of the *jihād*-duty in two types of military contexts: offensive actions and defensive responses to provocation.<sup>162</sup> °Azzām assigns offensive *jihād* exclusively to the category of collective duties and defensive *jihād* exclusively to individual obligations.<sup>163</sup> In contrast, premodern jurists discussed both offensive and defensive contexts, but did not assign any one legal duty to them. The nature of the legal duty was not fixed for everyone in a particular military context; rather, the duty adjusted for individuals and communities based on how they were situated in relation to the conflict. Classically, the individual obligation only attached to residents of the town under attack; for everyone else it remained a collective duty. However, °Azzām is not concerned with *who* performs the duty; his defensive *jihād* triggers an individual obligation not only for residents of a besieged town, but universally as well. °Azzām wants a limited role for the collective version of the *jihād*-duty and therefore restricts it to offensive contexts.<sup>164</sup>

°Azzām's strategy is to argue that the individual duty to fight is not limited to the besieged local community. He applies the rules activated for besieged residents of a town to the global Muslim community. In other words, every Muslim, regardless of where they are, is required to engage as a solitary unit, with each of them equally vested in the battle regardless of how they are

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.* at 14. In this scenario, °Azzām notes a few minimum requirements necessary to satisfy the duty: guards patrolling the border and engaging in an annual show of force by invading enemy territory. *Id.*



situated.<sup>165</sup> This is a significant departure from how the classical doctrine applied legal rules. Pre-modern jurists never assumed universal application but instead created different legal duties based on proximity to the area of hostility.<sup>166</sup> For °Azzām, universal application is necessary because the alternative is for the *jihād*-duty to stay collective and the state's authority to remain intact.

°Azzām expands the individual obligation's application beyond the area of conflict and has it move out in "[concentric] circles from the nearest [group] to the next nearest" until the besieged territory is successfully retaken.<sup>167</sup> He contends that this process of expanding the obligation continues until *jihād* "becomes [an individual obligation] on the whole world," arguing that this is the view of pre-modern jurists like Ibn Taymiyya and the four Sunnī schools of legal thought.<sup>168</sup> This notion of an individual obligation expanding in concentric circles to include other groups aligns with the pre-modern view, but with significant caveats. For instance, °Azzām seemingly leaves no room for a situation where the Muslim state, under whose jurisdiction the afflicted territory falls, might reach peaceful terms with the invaders. He does not acknowledge the state's authority to do this because he activates the individual obligation for everyone without any oversight. In addition, the pre-modern doctrine requires the besieged population or the head of state issue an appeal for help before an individual obligation is initiated for the next nearest group.<sup>169</sup> There is no notion in the pre-modern doctrine that individuals march off to war on their own behest when their services have not explicitly been requested. However, this is precisely

<sup>165</sup> There is one interesting departure in the *fatwā* where °Azzām goes from speaking of the Muslim community in universal terms to creating a "nationalistic" distinction between the priorities of different fighting forces. He requires Arabs to first try to fight *jihād* in Palestine and then, if unable to do so, set out for Afghanistan (when it was under Russian occupation). For the rest of the Muslims, he thinks they should start in Afghanistan even though he considers Palestine the "foremost Islamic problem." But he feels there are more compelling reasons to start with Afghanistan. One of the main ones is that the banner of a secular state has been proposed for Palestine, while Afghanistan "flies the banner" of the declaration of faith. *Id.* at 23–24.

<sup>166</sup> See, e.g., SHAYKH ZAINUDDIN MAKHDUM, TUHFAT AL-MUJĀHIDĪN: A HISTORICAL EPIC OF THE SIXTEENTH CENTURY 13 (S. Muhammad Husayn Nainar trans., 2006) (arguing that you must fulfill the *jihād*-duty unless you are traveling and satisfy the conditions for "shortening your prayers" since travelers get special allowances under Islamic law). I am grateful to Fahad Bishara for pointing me to this treatise.

<sup>167</sup> °AZZĀM, *supra* note 158, at 15. Interestingly enough, the same juristic framework is laid out in °Azzām's *Ayat al-Rahmān fī jihād al-Afghān*, but he does not apply the individual obligation to all Muslims. Instead, he argues that they must work in "their own countries to establish the law of God." In other words, he does not seem to extend the concentric circles at this time even though this piece was written just a year prior in 1983. °ABDALLĀH °AZZĀM, AYAT AL-RAHMĀN FĪ JIHĀD AL-AFGHĀN [SIGNS OF THE MERCIFUL IN THE JIHAD OF THE AFGHANS] 165 (1985), <https://archive.org/details/waq38881>. I am grateful to Darryl Li for bringing this difference to my attention.

<sup>168</sup> °AZZĀM, *supra* note 158, at 15–17.

<sup>169</sup> JAṢṢĀS, *supra* note 94.

what °Azzām anticipates and his reframing dispenses with the requirement for this direct appeal. Instead, he creates an automatic appeal because a global individual obligation is triggered whenever there is conflict.

In essence, °Azzām's *fatwā* fails to consider the importance of proximity in determining the type of legal duty that an individual has in an armed conflict. His governing assumption is that at least some corner of the world is facing a failed Muslim military effort against an enemy. As a result, the duty to fight is perpetually triggered for everyone: not temporarily, but permanently. He makes no distinction between the obligation for those on the frontlines and those thousands of miles away; they are equally responsible for fulfilling the duty. In this vein, he quotes a hypothetical interlocutor as saying that “[w]e already know that *jihād* with your person today is [an individual obligation] and that *jihād* is now obligatory like prayer and fasting . . . .”<sup>170</sup> Even the hypothetical question he seeks to answer assumes *jihād* functions as a permanent individual obligation. There are no qualifiers with regard to circumstances or proximity to the conflict. In brief, °Azzām is implying that if *jihād* is individually obligated on a Muslim anywhere, it is also individually obligated on Muslims everywhere. For pre-modern jurists, it would be untenable to expect someone halfway across the globe to be both informed about the conflict in Afghanistan and be expected to perpetually join the frontlines of every conflict involving Muslims. Yet this is precisely how °Azzām constructs the legal duty. When confronted with the logical impossibility of this construction, he offers only an emotional lament over how different Muslim fortunes would be if they could mobilize the masses to their frontlines.<sup>171</sup> He is invested in contemporary Muslims thinking of themselves globally.<sup>172</sup> However, much of Islamic law is configured to account for the local, not the global, when developing legal rules.<sup>173</sup>

## 2. Requiring Practical Impossibility to Delegitimize the State

Similarly, °Azzām also attempts to delegitimize the state's authority through his advocacy of practical impossibilities. These are legal rules that may possibly have been operative in the pre-modern period but are impossible to implement today without catastrophic results. One example is the pre-modern requirement to wage *jihād* annually. Pursuit of yearly *jihād* is an untenable proposition in modern times with international agreements and a different notion of sovereignty. Any Muslim nation that preemptively disregards its treaty obligations would violate both international law and Islamic law. However, °Azzām requires this annual *jihād* regardless of the circumstances. This allows

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<sup>170</sup> °AZZĀM, *supra* note 158, at 33 (emphasis added).

<sup>171</sup> *See id.* at 36–41.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 36.

him to claim that any state failing to pursue *jihād* every year is guilty of sin and people are not required to obey the orders of a sinful state.<sup>174</sup> This is also a misstatement of the majority view of pre-modern doctrine that even impious rulers deserve obedience.<sup>175</sup> However, for °Azzām, when the state prohibits you from engaging in *jihād*, not only are you not required to obey it, but the state is sinning by preventing you from performing an individual obligation.<sup>176</sup> This argument almost seems to be preparing the individual to carry on *jihād* against their own sinful state after they have answered the call in Afghanistan.

°Azzām’s suggestion that the obligation to fight persists “as long as any [tract of] land that *was* Islamic [remains] in the hands” of disbelievers is an even starker example of practical impossibility.<sup>177</sup> In other words, not only is he advocating for the liberation of Muslim territory *presently* under attack, but also for the liberation of all Muslim territory that has *ever* been attacked. This framing can only promote a posture of perpetual warfare requiring retaking territory, such as the past Islamic empire in al-Andalus, now an integral part of Spain. The obligation to recapture all territory previously under Muslim control is absent from pre-modern Islamic treatises. In fact, the position does not even seem to be adopted by jurists during the 13th century Mongol conquest of the Muslim world. There is no indication from the writings of jurists living during that period, including Ibn Taymiyya, that *jihād* remained an individual obligation *until* the Mongols were expelled from every tract of land that at some point was under Muslim political authority. It would have been a practical impossibility.

### 3. Ignoring Pre-Conditions

°Azzām’s *fatwā* also makes other subtle changes to the classical juristic position by glossing over certain points or expanding particular definitions. Like

<sup>174</sup> See *id.* at 14.

<sup>175</sup> See generally N.J. COULSON, A HISTORY OF ISLAMIC LAW 133 (Edinburgh Univ. Press 1964). Khaled Abou El Fadl provides a more nuanced picture of what was going on in the pre-modern period regarding this obedience. He shows that there were both obedience and “counter-obedience” traditions as some jurists struggled with requiring absolute obedience to the ruler. KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 118–31 (Cambridge Univ. Press 2001).

<sup>176</sup> See °AZZĀM, *supra* note 158, at 35. Interestingly, °Azzām also expands the end goals of *jihād* that lead to the logical conclusion that there will be perpetual warfare. He notes up front that *jihād* is not only “[propagation by] force” but also obligatory to perform until only “people who submit to Islam” remain. *Id.* at 14.

<sup>177</sup> *Id.* at 23 (emphasis added) (*ay buq’a kānat islāmīya*). This also comes up in another famous *fatwā* of his, entitled *Join the Caravan (Ilhaq bi'l-Qāfila)*. °ABDALLĀH °AZZĀM, ILHAQ BI’L-QĀFILA (JOIN THE CARAVAN) 10, [https://archive.org/stream/JoinTheCaravan/JoinTheCaravan\\_djvu.txt](https://archive.org/stream/JoinTheCaravan/JoinTheCaravan_djvu.txt) (last visited Nov. 4, 2017) (“The sin is not lifted off the necks of the Muslims as long as any area of land (which was once Muslim) remains in the hands of the Disbelievers, and none are saved from the sin except those who perform jihad.”).

pre-modern jurists, °Azzām notes that the individual *jihād* obligation is automatically triggered by four conditions: non-believers entering Muslim land, an army advancing when two sides meet, the ruler commanding a specific person to march, and enemies “captur[ing] or imprison[ing] a group of Muslims.”<sup>178</sup>

For the most part, this position is in line with the classical opinion, though there is disagreement as to whether the mere capture of Muslims would trigger the obligation. °Azzām glosses over any difference of opinion here even though pre-modern jurists were far more reluctant to create circumstances that would even temporarily negate the state’s authority or allow autonomous decision-making on questions of war.<sup>179</sup> °Azzām’s articulation of the details of these conditions is where he creates some distance between his understanding and that of the pre-modern jurists. For instance, he speaks of non-Muslims as though they are always in a posture of hostility to the Muslim state.<sup>180</sup> Thus, “invasion” acquires a far broader meaning than it did in the classical period where it referred only to military confrontation.<sup>181</sup>

#### 4. Reading Functional Rules into Aspirational Suggestions

°Azzām’s reasoning on the annual *jihād* exemplifies a consistent problem that occurs in the interpretation of pre-modern Islamic jurisprudence. Contemporary jurists often broadly apply a legal rule that is meant to be operational only in particular contexts. In addition, they often read all classical juristic statements as moral prescriptions as opposed to aspirational suggestions. As Khaled Abou El Fadl points out, at times jurists may believe they are articulating an “actual social or political practice” from the classical period, but in reality, the pre-modern discourse is simply “aspirational in nature.”<sup>182</sup> Hence, in the case of yearly *jihād*, Abou El Fadl argues that a misreading or change in the context in which the jurist’s statement was made might mean that the functional rule is actually aspirational.<sup>183</sup> Had it been a moral prescription then it would persist regardless of circumstance.<sup>184</sup>

°Azzām leaves no room for the possibility of aspirational rules: every rule is functional for him. As a result, he takes the jurists literally, not

<sup>178</sup> °AZZĀM, *supra* note 158, at 14–15.

<sup>179</sup> *Id.* at 45–49. Even his own ideological forefather, °Abd al-Salām Faraj, does not mention the fourth condition in his famous treatise on the *jihād*-duty. See MUHAMMAD °ABDUS SALAM FARAJ, AL-JIHĀD: AL-FARĪDA AL-GHĀ’IBA [JIHĀD: THE ABSENT OBLIGATION] 60–61 (1981).

<sup>180</sup> °AZZĀM, *supra* note 158, at 39.

<sup>181</sup> *Id.* at 37.

<sup>182</sup> Khaled Abou El Fadl, *Between Functionalism and Morality: The Juristic Debates on the Conduct of War*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 103 (Jonathan E. Brockopp ed., 2003).

<sup>183</sup> *Id.* at 103.

<sup>184</sup> *Id.* at 104.

appreciating that they may have intended a more figurative meaning. The category of collective duties as a whole is a good example of this distinction between functional and aspirational rules. For instance, pre-modern jurists expanded the category of collective duties to include various crafts and trades that they deemed necessary for society.<sup>185</sup> However, their writings implied that these were aspirational obligations. They wanted to encourage these skills in society but were not interested in holding people morally liable for learning them.

### C. *Undermining Authorities: State and Status-Based*

Most importantly, °Azzām’s *fatwā* undermines entities that classically had regulatory authority over *jihād*, namely the state and certain societal actors. Transforming the *jihād*-duty to essentially a permanent state of individual obligation leads to this undermining. This is because there is universal agreement, among classical and contemporary jurists, that individual obligations do not require permission from any authority before performance.<sup>186</sup> For °Azzām, as long as the duty is individual, the state’s regulatory authority remains suspended. In fact, he argues, with surprisingly little hesitation, that even the Prophet Muḥammad’s permission would not be necessary when the *jihād*-duty is individualized.<sup>187</sup> In other words, if the political authority of the Prophet is inoperative here, then so is the authority of the modern state. Furthermore, he contends that not only would it be impossible for “every single [person]” to seek permission to join an expedition, but that he knows of no case in Islamic history where someone was “punished” for participating in *jihād* “without authorization.”<sup>188</sup>

That said, °Azzām is acutely aware of the potential chaos that might ensue if every individual is regulating their own *jihād*, but he is conflicted about empowering the state. Hence, °Azzām proposes placing the state’s regulatory authority over *jihād* in the hands of local authorities, specifically “the commander in the battle field.”<sup>189</sup> The commander’s permission should be acquired to avoid disrupting the organizational and military strategy. In essence, °Azzām is transferring the regulatory authority over *jihād* to entities whose power is contingent on the immediate conflict and nothing beyond that.

<sup>185</sup> GHAZĀLĪ, *supra* note 33, at 35 (expanding the category of communal duties to include tillage, knitting, politics, cupping, tailoring, etc.).

<sup>186</sup> °Azzām also notes a more extreme outlier opinion from Awzā’ī that, even in collective *jihād*, authorization from the ruler is “only for soldiers salaried by the state.” However, he does recognize other opinions which say that joining without authorization is “a hated thing, except [in certain circumstances].” °AZZĀM, *supra* note 158, at 35.

<sup>187</sup> *Id.* at 34.

<sup>188</sup> *Id.* at 35.

<sup>189</sup> *Id.*

°Azzām is not interested in permanently removing the state’s authority in this space. Rather, he only wants to do so until a more sufficiently “Islamic” power has replaced the current forces operating in Muslim lands.<sup>190</sup> As noted earlier, it is essential to understand that while suspension of the state’s regulatory authority in certain circumstances occurred in the classical period, jurists considered suspension temporary. Furthermore, while pre-modern jurists permitted populations under attack to militarily engage without permission, they were not permitted to formulate a long-term strategy of waging *jihād*.

Hence, °Azzām recognizes that Islamic law considers the state’s regulatory function critical to maintaining stability. Its erasure, particularly in the context of *jihād*, without any indication of its reinstatement, is a disconcerting proposition. As a result, °Azzām struggles to address the question of whether *jihād* can be fought in the absence of the state. Specifically, he addresses the question of whether *jihād* can be fought without the head of state.<sup>191</sup> In an odd response, °Azzām seems to answer a different question than the one he posed. He cites historical precedent suggesting that battles were fought where multiple political leaders existed.<sup>192</sup> Yet this does not address whether precedent exists for fighting in the absence of *any* political leader. He essentially conflates two different issues: fighting under unified rule versus fighting with no political authority. Just as important, °Azzām suggests that an entity can possess regulatory authority over warfare even if it lacks political authority in other spheres.<sup>193</sup> This was rarely, if ever, the case in Islamic history.<sup>194</sup> In fact, he claims that the fighting force “choose[s] their [leader] for *jihād* from amongst themselves,” again creating a process for military appointment that did not exist in the past; commanders were chosen by the state not elected by the people.<sup>195</sup>

Similarly, °Azzām must account for and negate status-based authorities that regulate *jihād*. Unlike the state, these social authorities have jurisdiction over specific individuals as opposed to entire populations.<sup>196</sup> The most common examples are parents, creditors, slave masters, and male guardians.<sup>197</sup> The jurisdiction of these authorities over their subordinates is suspended in cases of self-defense.<sup>198</sup> °Azzām extends the suspension of their authority—specifically parental authority—“until the enemy is expelled.”<sup>199</sup> He has to address the fact

<sup>190</sup> *Id.* at 24.

<sup>191</sup> *Id.* at 35.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 37.

<sup>195</sup> *Id.* at 38.

<sup>196</sup> *See supra* Section IV.B.

<sup>197</sup> *Id.*

<sup>198</sup> *See supra* Section III.B.

<sup>199</sup> °AZZĀM, *supra* note 158, at 28.

that two individual obligations exist here: the obligation to fight and the obligation to obey and care for one's parents. He gives precedence to participation in *jihād* over obeying one's parents because *jihād* is the "protection of [ ] religion" while obedience to parents is "caring for the individual."<sup>200</sup> This hierarchy between individual obligations is present in the classical treatises as well, but it is not as impactful since the *jihād*-duty is rarely individualized. In °Azzām's structure, parental authority is permanently of secondary importance to *jihād* because even though they are both now individual obligations, *jihād* is morally primary due to its urgency.

°Azzām presents two analogies meant to undermine the logic of giving parents authority over their children in these matters. First, he asks whether a son who is a good swimmer and walks by someone drowning should be restricted from helping that person if his father forbids it.<sup>201</sup> The answer for him is obviously no, and he places Afghanistan in the position of the drowning person then asks how it is reasonable not to "save" it.<sup>202</sup> Furthermore, he uses the example of the drowning person because it implicates another pre-modern collective duty: the duty to save a life, or a good Samaritan duty. Like the example °Azzām uses, pre-modern jurists collectively obligate individuals on the banks of a river to save someone drowning in it.<sup>203</sup> This only enhances the point he is making about coming to Afghanistan's aid. Second, °Azzām discusses the individual obligation to pray. He notes that just as a son does not need his father's permission to perform the dawn prayer, he does not need it to pursue *jihād*, which is also a form of worship.<sup>204</sup> He concludes his example by striking a sharp blow at the authority of parents. °Azzām says that a father who is not already engaged in *jihād* when it has become individualized is a sinner.<sup>205</sup> A son does not need permission from a sinner to fulfill his own obligation to the faith because "how can you seek permission from a sinner to engage in one of the obligations of religion?"<sup>206</sup> As discussed previously, applying the label of sinner is also a technique he uses to disqualify the authority of the head of state.

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> QARĀFĪ, *supra* note 9, at 23; 1 BADR AL-DĪN AL-ZARKASHĪ, AL-BAHR AL-MUHĪT FĪ USŪL AL-FIQH [THE ENVELOPING SEA OF LEGAL THEORY] 153 (1992); 4 °ALĪ B. MUḤAMMAD AL-ĀMIDĪ, IḤKĀM FĪ USŪL AL-AḤKĀM [THE JUDGMENT ON THE PRINCIPLES OF DIVINE COMMANDS] 338–39 (2003); 4 IBN AL-MUFLIḤ, KITĀB AL-FURŪ' [THE BOOK ON SUBSTANTIVE LAW] 448 (2003).

<sup>204</sup> See °AZZĀM, *supra* note 158, at 33.

<sup>205</sup> *Id.* at 29.

<sup>206</sup> Naqasat, *Abdullah Azzam – Jihad Fard Ayn or Fard Kafaayah*, YOUTUBE (Apr. 20, 2013), [www.youtube.com/watch?v=nxiLCKqZCbQ](http://www.youtube.com/watch?v=nxiLCKqZCbQ). The relevant part of the speech begins at 4:27.

## VII. IMPLICATIONS

The shift in understanding of the *jihād*-duty described above has had profound consequences not only for the legitimatization of militancy in the Muslim world, but also for contemporary Muslim states' ability to regulate violent behavior.<sup>207</sup> While in practice many of these states are not regulating violence on any religious basis, their population's views on permissible violence is heavily influenced by Islamic law.<sup>208</sup> Thus, the state's regulatory ability in this space is directly connected to what its population believes Islamic law says, in theory, about violence. Hence, if they perceive *jihād* to be a collective duty, then it is arguably much easier for the state to regulate. As a collective duty, the state can determine when *jihād* must be fought and when the duty is satisfied. The state is also responsible for determining what the military strategy will be, the diplomatic steps it wishes to take alongside the fighting, and when it will settle for peace. A state can put limits on how many people engage in the collective duty by fixing the number that would be sufficient to meet its needs and satisfy the obligation. On the other hand, as an individual obligation, *jihād* severely diminishes the state's regulatory authority, in theory, over conflicts in which it is engaged and the participation of its citizens in conflicts elsewhere in the world. An individual obligation requires everyone's performance. If *jihād* is a collective duty, then a state can legitimately prevent its citizens from engaging in military conflict by arguing that others are satisfying the duty. However, when the obligation becomes individualized, the state risks its own legitimacy in serving as an impediment to the fulfillment of a required religious obligation. It positions itself as the promoter of sin and disqualifies itself as a legal authority in the eyes of the citizenry. The overall effect is to undermine the rule of law in the state.

This transformation of the *jihād*-duty is unprecedented in Islamic law. Jurists rarely re-categorize an obligatory act as individually obligated when it was originally collective, except temporarily due to extenuating circumstances. Only the *jihād*-duty has evolved in such a way as to be recast as effectively a permanent individual obligation, regardless of the circumstances. A collective duty allows the state to determine the parameters of "who" can participate. When the obligation is made universal by individualizing it, the state loses its ability to regulate participation. In the process, other powers of the state over *jihād* are also undermined, in particular determining "when" and "how" participation will take place. In other words, an individualized conception of *jihād* cedes decisions relating to *jus ad bellum* and *jus in bello* to individuals. Removing the initial authority of the state over the *jihād*-duty slowly unravels the entire regulatory framework that Islamic law created for warfare.

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<sup>207</sup> By Muslim states, I am referring primarily to Muslim-majority countries, most of which have populations deferential to Islamic legal prescriptions concerning their behavior.

<sup>208</sup> See <sup>c</sup>AZZĀM, *supra* note 158, at 21.



Appreciating this transformation is essential to countering militant recruitment. There is much discussion among policymakers about creating counter narratives to the propaganda that militants use to convince people to embrace their cause.<sup>209</sup> While some of these counter arguments attempt to utilize Islamic law to criticize the behavior of militants on the battlefield, they rarely, if ever, address the question of authority over *jihād*. My contention is that the very same classical tradition that militants use to recruit fighters can, and must, be used to undermine their efforts. The legal tradition has been effectively used to critique militants for *how* they conduct war-related activities.<sup>210</sup> But it is seldom used to challenge their authority to wage *jihād* in the first place.<sup>211</sup> Hence, the pre-modern legal tradition should also be used to argue two key points. First, *jihād* is not an individual duty by default, but a collective one. All Muslims are not obligated to fight whenever a conflict occurs in territory under Muslim control. Second, regulatory authority over *jihād* is the province of the state, regardless of how pious its public officials may or may not be. In other words, it is possible to formulate an argument from the classical literature that there is no precedent in Islamic history for disparate groups of non-state actors, such as militants, to acquire state powers over warfare.<sup>212</sup>

<sup>209</sup> See Andrew Glazzard, *Losing the Plot: Narrative, Counter-Narrative and Violent Extremism*, INT'L CTR. FOR COUNTER-TERRORISM – THE HAGUE 1, 3 (2017).

<sup>210</sup> See generally *id.* at 3–12. Despite its flaws, one example is the Prevention Rehabilitation and After Care (PRAC) program run in Saudi Arabia. It is designed to “combat the intellectual and ideological tenets of violent extremism by characterizing them as deviations from Islam.” It has apparently had “significant success” with a recidivism rate of only one to two percent. The success has led to similar efforts in Jordan, Yemen, Egypt and North Africa. See ANTHONY H. CORDESMAN, SAUDI ARABIA: NATIONAL SECURITY IN A TROUBLE REGION 52 (2009). I am grateful to Glen Forster for bringing this program to my attention.

<sup>211</sup> For instance, in an open letter to Abu Bakr al-Baghdadi, the leader of ISIS, over 100 scholars and academics outlined 24 different criticisms of his activities. One point claimed the declaration of a caliphate was done incorrectly. None of the points related to the authority to wage *jihād*. See OPEN LETTER TO AL-BAGHDADI, <http://www.lettertobaghdadi.com> (last visited Oct. 11, 2017). Similarly, the authority was not challenged in a *fatwā* issued by 70,000 clerics in India against ISIS, al-Qaeda and the Taliban. See Priyangi Agarwall, *70,000 Clerics Issue Fatwā Against Terrorism, 15 Lakh Muslims Support It*, TIMES INDIA (Dec. 9, 2015, 6:55 AM IST), <http://timesofindia.indiatimes.com/india/70000-clerics-issue-fatwā-against-terrorism-15-lakh-Muslims-support-it/articleshow/50100656.cms>.

<sup>212</sup> It should be noted that some scholars have argued that acceptance of state authority in this realm was not universal and that one of the “distinguishing features” of the scholar-ascetics in the frontiers during the early ʿAbbāsīd period was their “indifference to and at least partial rejection of the authority of the caliphs in the conduct of war.” BONNER *supra* note 50, at 6. Bonner notes that Abū Ishāq al-Fazārī came to understand “proper authority” as being present in the “religious scholar, rather than in the delegated representatives of the imam.” *Id.* at 19; see generally Deborah Tor, *Privatized Jihad and Public Order in the Pre-Seljuq Period: The Role of the Mutatawwiʿa*, 38 IRANIAN STUD. 555 (Dec. 2005). My argument does not contest this point but, rather, notes a distinction between rejecting a *particular* authority and eschewing authority altogether. Even Fazārī is not advocating for the absence of all governing authority. The issue of whether a particular

In essence, in order to change the narrative of what is required from the average Muslim in their engagement with global conflicts, the *jihād*-duty must become collective once again. Such a shift would reconstitute the state's jurisdiction over warfare. An initial reservation may arise over requiring largely secular states in the Muslim world to regulate a religious duty to fight. However, as argued above, the *jihād*-duty is not simply a religious obligation.<sup>213</sup> It is also a secular one in the sense that every nation places a duty on its citizens to combat external threats and has a monopoly on regulating this duty. As historical and contemporary examples demonstrate, states that tolerate non-state actors engaging in unregulated violent behavior within their territory risk destabilization and dysfunction. While there is risk of infusing states with powers that could be exploited in authoritarian ways, limiting the manner in which specific states wield this power must come after placing *jihād* under the domain of the state in general. This is a necessary condition for its legitimate operation under Islamic law.<sup>214</sup>

Finally, there is also an important implication here for interpreting Islamic law in general. When reading Islamic legal texts, there is generally an outsized focus on substantive legal rules as opposed to other areas of law, such as procedure. To some degree, this is understandable because procedure does not figure prominently in the texts, even though it is present in the jurisprudence that develops around them. Still, procedure does at least get some treatment. However, guidelines on the administration of Islamic law are often completely ignored by modern jurists. To some degree, this makes sense as well, given the current absence of political structures that resemble ones in which Islamic law previously operated.<sup>215</sup> However, since many Islamic legal rules have a regulatory framework built into them, it is not possible to understand the law without appreciating how a political authority must administer it. In several areas of Islamic law, the administration and implementation of law is exclusively the purview of the state. For instance, *zakat*, or the charitable tax, is thought of today

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leader is legitimate is separate from whether the idea of political leadership is necessary. Even rebels often had governing structures that required rebel leaders to carry out responsibilities similar to the head of state. In fact, these rebellions were often associated with the leadership of particular individuals, such as Ibn al-Zubayr, al-Ash'ath, or al-Nafs al-Zakiyya. See KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 107 (2001).

<sup>213</sup> See *supra* Part VI.

<sup>214</sup> Additionally, understanding the regulatory authority over *jihād* also presents lessons for why ISIS's formation of a state was a strategic calculation that allowed it to legitimately assert certain regulatory powers while avoiding the Islamic legal critique faced by other militant groups. While this point deserves further elaboration, it is beyond the scope of the current paper. An important distinction exists between ISIS and other militant groups because of the former's declaration of a caliphate. Powers that were reserved for the state can now be asserted by ISIS. There are various arguments as to why Islamic law considers ISIS's declaration of a state to be invalid and thus prohibits its acquisition of powers traditionally reserved for the state.

<sup>215</sup> See *supra* Part III.

as an individual's charitable giving. In fact, it is a tax collected for the operation of the state, which included providing for the welfare of its citizens. Similarly, criminal punishments prescribed in Islamic law cannot be carried out by any entity lacking authority over the transgressing individual. This is part of the social contract embedded within Islamic criminal law: only the state or its agents can punish. *Jihād* is the most pertinent example of where the state's oversight is essential.

Hence, in reading Islamic law, it is critical to account for the regulatory framework built into it or otherwise risk misunderstanding how the substantive law is meant to function in practice. This regulatory reading bridges the gap between the theoretical rule and its application. When it is not accounted for, legal inconsistencies arise as laws are implemented without considering the limitations placed on their application. In many cases this manifests in individuals taking the law into their own hands. Once empowered in the *jihād* context, they begin to usurp the authority of the state in other arenas. Criminal law is the most glaring example of this with numerous instances of individuals believing they have the right, arguably an individual duty, to carry out criminal punishment, including extra-judicial application of the death penalty.<sup>216</sup> In essence then, this discussion shows the important role of the state within Islamic law by recognizing that law is not only substantive rules, but also the guidelines in place to administer those rules.

There is need to rectify the disruption in the 20th century that occurred in the understanding of Islamic law's duty to fight. The state needs to be reconstituted as the only authority regulating violence in Islamic law. Any acts of violence, by individuals and non-state actors, outside at least a functionally state-like authority, cannot be considered legitimate. An essential first step to achieving this paradigm shift is returning *jihād* to the domain of the collective.

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<sup>216</sup> For potent examples of this with blasphemy laws, see generally DARARA TIMOTEWOS GUBO, *BLASPHEMY AND DEFAMATION OF RELIGIONS IN A POLARIZED WORLD* 44–45 (2014); ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 164–65 (1999); and ERIC PATTERSON, *POLITICS IN A RELIGIOUS WORLD: BUILDING A RELIGIOUS LITERATE U.S. FOREIGN POLICY* 1–2 (2011) (“If the law punishes someone for blasphemy, and that person is pardoned, then we will also take the law in our hands.”). I hope to discuss this issue further in a forthcoming piece.