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THE PERFORMATIVE OF "JIHAD" IN ISLAMIC INTERNATIONAL LAW: DRAWING A LINE BETWEEN JIHAD AND TERRORISM

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ABSTRACT

This paper has addressed whether *jihad* and terrorism denote the same act in Islamic legal discourse, namely Islamic criminal and international law. This paper uses the performativity in Speech act theory as a method. This paper has discussed the legal performative of "*jihad*" in Islamic international law. It argues that the use of force under *jihad* is different from the use of force in terrorism offences in Islamic legal discourse. In addition, this paper has discussed does jihad mean terrorism? and is terrorism criminalised by Islamic criminal law?. The key elements of this paper has shown that *jihad* and terrorism are not the same acts of the use of force. *Jihad* is a legitimate act of the use of force that is defined and regulated in Islamic interactional law, whereas violations of the rules of jihad establish the criminal liability of terrorism as *hirabah* or *baghi* offences. Thus, it is deduced that the performative of jihad in Islamic legal discourse is different from the performative of terrorism.

INTRODUCTION

Legal discourse is a professional discourse that uses ordinary language in a particular way, so that language takes on a legal performative. Legal discourse has a normative and authoritative perlocutionary and illocutionary effects. Legal language therefore loses its legal performative once removed from legal discourse. In addition to this, punishment is one of the perlocutionary effects of legal discourse insofar as failure to implement or to comply with a legal ruling will have legal consequences.

On the other hand, it has been explained that legal language that occurs in radical discourse has an instrumental performative. It is used as a covert language to legitimise the use of force, and to change the emotions around and perceptions of the acts committed.

This paper, however, aims to explain the performative of "*jihad*" in legal discourse, namely Islamic international law from a Sunni perspective. It will be argued that "*jihad*" is a legal concept in Islamic international law, which regulates the use of force in an exceptional case that legitimises it. Due to the fact that Islamic international law is a legal and professional discourse, this paper will examine Islamic criminal law so as to find a legal response to the abuse of the rules of *jihad*. On this basis, the paper is divided into three sections. The first section explains *jihad* in Islamic international law. The second provides a brief general introduction to Islamic criminal law. The third section explains terrorism offences in Islamic criminal law.

Jihad In Islamic And International Law

Islamic international law is a legal discourse that uses the Arabic language to communicate legal rules for topics of war, peace, treaties, international relations and the treatment of prisoners. These rules are mainly expressed in the Qur'an [1]. Islamic international law as a professional discourse addresses the Islamic polity, and the head of the Islamic polity, its military and its soldiers

Islamic legal discourse is mainly expressed in the Qur'an and certain other sources, such as the Sunna. In order to read the Qur'anic texts as legal discourse, it is necessary to adopt legal methods so as to ascertain the topic of the legal text, the addressees and when and how to apply the rules. Islamic international law is a significant part of terrorism scholarship, as Schwartz [2] has commented, 'An informed conception of international terrorism will not be complete until the *Shari'ah* is included in the analysis'. Islamic international law has been under intensive analysis and scrutiny. Current debates vary in this regard; some believe that Islamic international law has failed to maintain peaceful relations with other states; for example, An-Na'im [3] considers that there is tension and conflict between *shari'ah* and modern international law due to the fact that Islamic international law permits the use of force under the rules of *jihad*.

Muslim perpetrators of terrorism, who seem not only willing to die but also to inhumanely attack people. Silverman [4] expresses such a concern in regard to the attackers of the World Trade Centre in the USA in 2001, as he states, 'The Islamic identities of the hijackers, an identity based in a unique and peculiar interpretation of Islam not shared by the majority of Muslims, was so powerful that it allowed them to go willingly to their deaths'.

On the other hand, some views do not seem to be threatened by the divine nature of Islamic international law; instead, the inseparable nature of law and religion in Islam seems to strengthen legal rules. Subjects of Islamic international law are legally and morally obligated to respect its rules [1].

Jihad has several variants and meanings depending on the context and the tense, as is the case with many other words in the Arabic language [5]. There are 30 verses in the Qur'an on *jihad*; some identify these verses as the 'sword

verses' [1]. The term *jihad* takes 15 linguistic variants in the Qur'an; 6 verses of *jihad* were revealed in Makkah, whereas 24 were revealed in Madinah [5]. Thus, the verses that were revealed in Madinah established *jihad* as a legal rule in Islamic international law [5].

Although the definition of "*jihad*" does not imply violence, it seems that *jihad* has an undeniably negative perception in the West [4], as *jihad* seems to be understood as the use of force against non-Muslims, despite the emphasize on the unjustified association between *jihad* and violence. Fatoohi [5] explained that donating money is a form of *jihad* in terms of resisting one's desire, selfishness, and evil drive. Thus, it may be argued that the use of force is one amongst many forms of *jihad*, and not the only form.

Jihad in the context of Islamic international law denotes a set of legal rules that deal with the temporary permission for the Islamic state as an international polity to use force against armed aggression [6]. This permission terminates once the external aggression ends. The permission of *jihad* was revealed in Madinah, in a verse of the Qur'an, which states:

Sanction (to fight) is given unto those who fight because they have been wronged; and Allah is indeed Able to give them victory; Those who have been driven from their homes unjustly only because they said: Our Lord is Allah - For had it not been for Allah's repelling some men by means of others, cloisters and churches and oratories and mosques, wherein the name of Allah is oft mentioned, would assuredly have been pulled down. Verily Allah helpeth one who helpeth Him. Lo! Allah is Strong, Almighty [7].

The verse was revealed in the second year after Muslims had immigrated to Madinah from Makkah (14 years after the revelation of the Qur'an began) [5]. The permission of *jihad* came after twelve years of revelation of Islam in Makkah, despite the fact that Muslims were under prosecution and torture by the Makkans (Quraysh tribe). Yet, Muslims were not permitted to use force against this aggression but, rather, they were instructed to migrate to Abyssinia in 614 CE under the protection of the Christian king, and then to migrate to Madinah in 622 CE where the permission for self-defence was granted. This has led some to argue that there are two forms of *jihad*: peaceful and armed. It has been argued that the Muslims' relations with the Makkans demonstrate the peaceful *jihad* (including the other forms of *jihad*, except the use of force), whereas the armed *jihad* is the one that took place in Madinah. Fatoohi [5] argues that peaceful *jihad* is permanent, while *jihad* in the form of the use of force is temporary.

Others, however, argue that *jihad* was temporarily suspended in Makkah and that the Prophet assessed the situation, and chose the form of *jihad* that was most suitable under the circumstances [8]. There are certain conditions that are required in order for *jihad* to be legally valid, and these requirements are related to the type of aggression that *jihad* is responding to, when *jihad* is used, the actors involved in *jihad* (who practices it and against whom?), and how *jihad* is to be carried out.

First, it seems that *jihad* provides the Islamic polity the legal framework for regulating the use of force in cases of self-defence. *Jihad* was first used for self-defence against aggression that was initiated against religious freedom, namely that people were not free to adopt and practise Islam openly. Religious freedom in this context is different to discriminatory acts, such as preventing Muslim women from wearing the headscarf, or banning halal meat. Religious freedom indicates that a Muslim is not forced to change his religion, or forced to believe in two gods, for example. So the use of force in this particular context is not valid in recent times.

Secondly, Islamic international law requires that the use of force be initiated with a pure intention that it is for the sake of Allah. The intention is important in distinguishing the use of force in *jihad* from other types [1]. This can be understood from the legal texts in the Qur'an, in which *jihad* is associated with *fi sabeel Allah* (for the sake of Allah) in 13 verses [9]. Thirdly, the military is the only actor that is entitled to perform *jihad* on behalf of the Islamic state.

As explained previously, although Muslims in Makkah were subject to harsh aggression, Muslims were prohibited from the use of force. *Jihad* was commanded only after the Muslims established an independent polity from the Makkans. One should not forget that peaceful means failed to stop this aggression, and *jihad* was the last resort for self-defence, after other political means had been tried [5]. Fourthly, *jihad* requires a declaration from the head of the Islamic state. This declaration is not legally sufficient until it is approved by legal jurists. Jurists have a supervisory role in approving the use of force to ensure that it is for legitimate purposes and that is in accordance with Islamic international law. Legal jurists play a similar role to the Attorney General's role in the United Kingdom, whose role is, amongst many others, a legal adviser to the crown on international law [10].

It is worth noting that the rules of *jihad* are the same in the Sunni and the Shi'a branch of Islam. However, there is a slight difference between the two schools concerning who declares *jihad*. For the Sunni school, it is the head of the Islamic state who declares *jihad*, as explained previously. Meanwhile, in the Shi'a school, it is the twelve imams who have the authority to declare *jihad* [6].

Jihad appears in Islamic legal scholarship as a possible necessity, not as an ultimate goal. Legal jurists cover different aspects of *jihad*, starting from declaring war to dealing with the outcomes of the war. It is unfortunate that Khadduri only translated a summary of the *Siyar*, and not the whole book, because reading the whole chapter dedicated to regulating *jihad* provides a crystal clear image of *jihad* as a legitimate use of force, practiced by the official military of the Islamic state after a declaration from the ruler and with the approval of legal jurists.

Jihad in Islamic international law is not equivalent to the Christian phenomenon of holy war [2]. As is the expected approach to understanding different legal systems, they should be put in context using familiar concepts. As Porter [11] comments in this regard:

If "militancy is not the essence of *jihād*," then the west sees *jihād* as an Islamic war against Christians only because western thought has been heavily influenced by the Crusades and medieval Christian ideas about holy war. However, the doctrine of *jihād* was codified during the Muslim conquests of the eighth century, long before Pope Urban II preached the First Crusade in 1095 [11].

However, *jihad* cannot be holy, because the use of force involves armed opposition, which results in the killing of a human being. Murder in Islam is prohibited and is one of the great sins. As the Qur'an states, 'And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, We have given power unto his heir, but let him not commit excess in slaying. Lo! he will be helped.' [12]. So if killing in Islam is not holy, ultimately *jihad*, even if it was for self-defence, cannot be holy, because performing *jihad* involves the use of force. None of the verses in the Qur'an describe *jihad* as holy. However, Majid [13] also suggests that jihad is equivalent to holy war. As he comments, 'The *jihad* was equivalent to the Christian concept of the crusade, or a war of words as well as of the sword.

All in all, *jihad* in Islamic international law does not denote a criminal act. In fact, *jihad* is a legal concept that alludes to the legitimate use of force that is practised by the official military on behalf of the Islamic state. The use of force in Islamic international law is conditioned by a clear declaration from the ruler and the approval of legal jurists to ensure that the ruler is not abusing his authority.

Brief Introduction To Islamic Criminal Law

There are three broad categories of offence in Islamic criminal law, these being *hudod*, *qisas*, and the last category includes both *dyyah* and *ta'zseer*. *Hudod* in the Arabic language is the plural of hadd, which literally means border; it also refers to the line/limit/boundary that cannot be crossed.

Hudod, in Islamic criminal law, refers to seven crimes: zina (adultery), *qathf* (accusation of adultery), *alshurb* (use of alcohol), *riddah* (apostasy), *hirabah* (unlawful warfare), *baghi* (unjustified rebellion) and *sariqah* (theft) [14]. *Hadd* also denotes the punishment of the criminal acts of hudod crimes.

Hudod offences are the most serious crimes and constitute a serious violation of what is considered in Islam to be the five necessities: the purpose of legal norms in Islam is to preserve the honour, the mind, the faith, the soul, and the wealth of an individual [15]. Accordingly, offences of adultery and accusation of adultery go against the preservation of the honour of an individual.²⁵⁶ The use of alcohol is an offence against the necessity of preserving the mind. Apostasy is an offence against the preservation of faith, while unlawful warfare and unjustified rebellion are offences against the preservation of soul and wealth. Finally, theft is an offence against preserving the necessity of wealth. The criminal liability of *hudod* offences cannot be forgone by the victim/victim's family, judge, or the ruler (unless in exceptional and restricted

cases), because *hudod* are considered to be Allah's right. However, in exceptional circumstances, the head of the Islamic state may suspend *hudod*.

Qisas (retribution) or *dyyah* (blood money) are punishments for crimes of bodily harm. *Ta'zseer* (in Arabic, 'to discipline') denotes a crime proscribed by the ruler of the Islamic state. *Ta'zseer* crimes are not identified in the Qur'an or the Sunna. Moreover, there are no specific punishments, as the crimes are not defined. However, some jurists have set the limit of the punishment as not exceeding *hudod*. *Ta'zseer* includes any offences that do not belong to *hudod* or *qisas*, for example offences such as cyber terrorism, money laundering or traffic fines, or offences that did not occur when Islam was first introduced and began to enforce order in society. These offences are left uncategorised in the Qur'an and it is for legal jurists to develop this part of the law to accommodate society.

The legal norms of Islamic criminal law derive from three sources agreed upon by all Islamic schools of thought: the Qur'an, the Sunna and *ijma'* (consensus of opinion) [16]. Yet not all jurists consider *qiyas* (analogical deduction) to be one of the acceptable sources for constituting criminal offences in Islamic criminal law.

According to Islamic belief, the Qur'an is Allah's words [17]. Meanwhile, the Sunna (or Hadith) is the Prophet Muhammad's (peace be upon him) verbal (sayings) and nonverbal communications, which were narrated by his companions. Accordingly, the Sunna consists of Prophet Muhammad's own practices, and his response to other people's practices; this includes silence or approval [18]. Due to the fact that the Qur'an is one of the main sources of Islamic law, Islamic law is regarded as divine. A further attribute of Islamic criminal law is that lawbreakers are understood to be punished in the Hereafter beside receiving a legal punishment in this world [17]. Thus, the plurality and diversity of Islam do not constitute a problem regarding the criminality of terrorism. However, pluralism and diversity in Islamic criminal law may be seen to be limited by the availability of a clear, definite ruling verse from the Qur'an and/or the Sunna.

Terrorism Offences In Islamic Criminal Law

If jihad regulates the use of force for self-defence in Islamic international law, does Islamic criminal law establish criminal liability for terrorism? According to the Convention of the Organization of the Islamic Conference (OIC) on Combating International Terrorism, terrorism is a violation of human rights, and it destabilises the state [19]. "Terrorism" means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards [19].

The engagement that has been made here in identifying terrorism uses the same definition as that of *hirabah* (highway robbery) in Islamic criminal law.

Hirabah is one of the *hudud* crimes, and appears in English scholarship as banditry, disturbance of the peace, highway robbery, great theft, or unlawful warfare. *Hirabah* is the use of force taken by an armed group or individuals who threaten the security of the community and terrorise people. In other words, *hirabah* can be defined as any act of war in a time of peace. The ruling verse of *hirabah* did not identify the motives of the criminals, or the religious identity of the victims or the criminals. This indicates that these factors do not have any impact on changing the nature of the crime, or on diminishing criminal liability. In addition, the criminal liability of *hirabah* in cases of terrorist attacks is expressed clearly in fatwas. Thus, Accordingly, *hirabah* establishes the criminal liability for some of terrorism offences in Islamic criminal law.

In addition, *baghi* which is also one of terrorism offences in Islamic criminal law. *Baghi* is a crime that belongs to the *hudud* crimes, as with *hirabah*. In the Arabic language, *baghi* implies injustice or seeking corruption. In English language scholarship, *baghi* is commonly known as rebellion [14]. Furthermore, it is stated that ‘Rebellion or *baghi* is the intentional forceful overthrow or attempted overthrow of the legitimate leader (imam) of the Islamic state [14]. Identifying *baghi* as “rebellion” seems to give an indication that Islamic criminal law condemns justified rebellion; in contrast, it only condemns unjustified rebellion. Justified rebellion against the ruler of the Islamic state is not within the jurisdiction of the criminal law. Rebelling against or overthrowing an unjust ruler is discussed in the context of the Islamic conceptions of the state.

Jurists consider *baghi* as a political crime, in which a group aims to overthrow a legitimate ruler of the Islamic state [14]. Obeying the ruler of the Islamic state is one of the essential principles that guarantee the stability of the Islamic state.

The Qur’anic verse identifies three aspects of *baghi*. Firstly, unlike *hirabah*, the Qur’anic verse identifies the religious identity of both the libels of *baghi*, and the victims, and describes them as believers. Secondly, the Qur’anic verse suggests that *baghi* is committed by a group not individuals. Thirdly, the verse escalates in the method of confronting this group. It encourages their defeat peacefully, saying ‘make peace between them’, and then, if peaceful means are not successful, it suggests the use of force: ‘And if one party of them doeth wrong to the other, fight ye that which doeth wrong till it return unto the ordinance of Allah’ [14].

The previous aspects of *baghi* suggest that this crime is a politically-motivated crime against the Islamic state. Political disagreements can be resolved peacefully; however, if the group uses violence against the state, the Islamic state will be in a situation of self-defence, and will therefore be able to use the required force to enforce law and order and protect the stability of the state. The verse states as follows: ‘Then, if it returns, make peace between them justly, and act equitably.

Jurists focus on state vulnerability in front of the criminals, and, unlike in the case of *hirabah*, victim vulnerability is what is taken into consideration.

However, *baghi* is a political crime in which criminals have political goals, and their power challenges the Islamic state and threatens its stability. Thus, *baghi* applies only if it is committed inside the Islamic state territory, which indicates that *baghi* criminalises internal terrorism. The judge has to make sure of the following, in order to convict on the basis of *baghi*: 1. The convicted rely on justifications for their actions (religious or political); 2. The group has power which challenges the state; 3. The group has a leader; and 4. The group shows their opposition violently.

In addition, *baghi* criminalises those who have abused their rights by committing violence that threatens public safety. Some might consider *baghi* as a political crime, and unrelated to terrorism. Terrorism may be seen as another dimension of *baghi*. Three of the Prophet's companions were killed for political reasons of *baghi*: Umar bin Al-Khatab, Othman bin Affan, and Ali ibn Abi Taleb. On the other hand, *baghi* is implemented with regard to the international relations of the Islamic state. Accordingly, it can be said that *hirabah* and *baghi* are two terrorism offences in Islamic criminal law, which establish the criminal liability for cases of internal and international terrorist attacks.

CONCLUSION

This work has explained the performative of “*jihad*” in Islamic international law. It has been found that “*jihad*” in Islamic international law regulates the use of force in an exceptional case of self-defence for religious freedom, in which the intention of initiating the use of force is for the sake of Allah, and must be proportionate to the attack; thus, *jihad* terminates once the aggression stops. It has been argued that not all cases of the use of force are considered *jihad*. For *jihad* to be valid legally, it requires declaration from the head of the Islamic state (for the Sunni branch of Islam), or a declaration from jurists, Shi'a branch of Islam), and approval from legal jurists regarding the validity of *jihad* conditions. Moreover, *jihad* is not the use of force against non-Muslims but against the aggressors. On the other hand, individual practices of the use of force, even in cases of aggression, without following the rules of *jihad* are criminal offences of *hirabah* or *baghi*. Since these offences belong to *hudud* offences, which derive from definite texts from the Qur'an and the Sunna, it has been found that the criminality of terrorism in Islamic criminal law belongs to the uncontested part of the law. Therefore, the criminality of terrorism is established despite the diversity and plurality of Islamic laws. Moreover, the verses in the Qur'an on the use of force are rules of Islamic international law that should not be taken out of context or examined separately. Thus, it is concluded that *jihad* and terrorism are not the same acts of the use of force. *Jihad* is a legitimate act of the use of force that is defined and regulated in Islamic interactional law, whereas violations of the rules of *jihad* establish the criminal liability of terrorism as *hirabah* or *baghi* offences.

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