

## **Criminal Liability in Case of Self-Defense: A Comparative Jurisprudential Study**

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### **Abstract**

*This study aims to examine the level of individual responsibility where self-defense leads to the death of the aggressor. It explores this issue from two perspectives: the perspective of taking action (such as when self-defense is initiated), and the perspective of refraining from action (such as when someone is prevented from accessing essential resources). The study discusses killing an attacker who poses a threat, and the conditions under which such actions may be justifiable. The second section focuses on situations where someone is deprived of access to food or drink, examining the permissibility of killing in such circumstances. The third section explores the killing of an enemy combatant who infiltrates Islamic territory without safety guarantees. The study ends by summarizing the findings and conclusions drawn from the research.*

**Keywords:** *Attacker, defense, inhibitor, warrior.*

### **Introduction**

In western jurisprudence that largely draws from the English Common Law, execution of a criminal act alone is not criminal unless accompanied by a guilty mind or the intent to harm. In Latin, this is worded as *actus non facit reum, nisi mens sit rea*, which literally means “An act does not make a person guilty unless there is a guilty mind.” In addition, its five components are spelt out to include guilty act, guilty mind, concurrence of mind and action, causation, and harm. Punishment, in other words, for a criminal act such as physical harm is contingent upon fulfilment of these conditions. Self defense, however, is a different matter even though it also involves the use of force but for what the user believes is in defense of one’s life. Thus, criminal liability in the latter case, stands to be diluted if the reason is proven to be indisputable. In Islamic jurisprudence, the issue of criminal liability is significantly central in cases concerning self-defense and the preservation of life and property. Its two aspects, viz., defense of oneself and, the repulsion of an aggressor, are the focus of this study. It is believed that this exposition will have practical applications in modern legal cases as well as in the study of Islamic jurisprudence and justice delivery. With the guidance of Allah, I have strived to address this topic and underscore its importance and relevance to the elements discussed in this study.

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## Research significance and objectives

Criminal liability is of great importance to scholars due to the existence of legal precedents that can be quantified and graded. As such, their relevance is linked to applied Islamic jurisprudence, which helps scholars make informed legal judgments. Furthermore, this research contributes to the acquisition of knowledge regarding the investigated issues and rulings. The significant aspects of this research can be summarized as follows:

1. Understanding the issues of self-defense and their corresponding rulings, given their prevalence in real-life situations.
2. Developing practical skills by studying and applying the criminal laws derived from the jurisprudence of early Islamic scholars.
3. Exploring and justifying the differences in legal reasoning among scholars, based on valid arguments and evidence rather than personal preferences.

## Gap in previous literature

Though many previous jurisprudential studies have treated criminal liability and its applications as the subject matter, and in practice too, it finds frequent mention, none so far have included the financial aspect of criminal liability in the Saudi context. The closest that any treatment has come to this has been in general jurisprudential discussions or in unrelated contexts. Identifying this as a perceptible gap in the literature, the current study delves into its depths, explores its details, and uncovers its intricacies. Furthermore, I hope that this study will make a unique contribution by linking this discourse to financial or criminal wastage.

### Killing the attackers

The Arabic word *al-Sa'il* refers to a person who persistently and relentlessly seeks to harm or commit evil to others (Al-Jawhari, 1987). The conditions for killing such a person would depend on the laws and regulations of the specific jurisdiction involved (Ibn Farris, 1986). In legal terminology, *al-Sa'il* refers to someone who unjustly attacks another person's life, property, or honor (Al-Jawhari, 1987; Al-Haytami, 1995). However, the current study is delimited to the scope of killing a human aggressor, rather than killing an aggressor's animal, as the latter involves financial loss rather than loss of human life. To prevent the aggressor's attack and stop their aggression, many scholars (e.g., Al-Haskafi, 2002; Al-Kharshi, 1317 AH; Al-Maliki, n. d; Al-Nawawi, 1412 AH) have established conditions and regulations that must be met before killing the aggressor so as to fall within the purview of self defense. These conditions are based on the definition of the aggressor and the texts related to their killing:

- 1- There must be an attack that occurs without right. If the act is justified, such as killing someone who deserves the death penalty, it is not considered an attack but rather a legitimate use of authority. This is apparent from the concept of *al-Sa'il*, which I previously referred to.
- 2- The act of self-defense must be gradual in its intensity. For example, if it is possible to stop the attack verbally, physical force should not be used, and if physical force is necessary, lethal force should only be used as a last resort. This follows in application of the rule: "The greater harm is removed by the lesser harm." (Al-Nawawi, 1412 AH).
- 3- The aggressor must be warned and informed before any self-defensive action is initiated, especially if they are capable of understanding verbal communication. The warning can take various forms such as advising them, admonishing them, or rebuking

them. Some scholars consider this recommended rather than obligatory (Al-Kharshi, 1317AH).

4- The aggressor must be in a state of readiness to harm and must be carrying a weapon that poses a threat to the victim's life or property. In such cases, the victim cannot rely on the authorities to protect them and must act in self-defense (Al-Kharshi, 1317AH; Al-Maliki, n.d).

5- The victim must provide evidence that proves the attack against them occurred. Mere allegations are not sufficient to absolve them of responsibility. Otherwise, people's money and bodies would be violated under false accusations of aggression (Al-Zurqani, 2003).

#### Killing an attacker who poses a threat

Scholars unanimously agree that it is permissible to kill the mature aggressor who poses a threat to one's life if there is no other way to repel the attack (Al-Afindi, 1328 AH; Al-Mawaq, 1994; Al-Qarafi, 1994; Ibn Abidin, 1992; Ibn Qudamah, 1968; Al-Nawawi, 1412 AH). This is based on the verse in the Quran which translates to: Fight in the cause of Allah only against those who wage war against you, but do not exceed the limits. Allah does not like transgressors (2:190), and the statement of the Prophet Muhammad (PBUH): Abu Huraira told that a man came and asked God's Messenger to tell him what he should do if a man came wanting to take his property. He replied, "Do not give him your property." He asked him to tell him what to do if the man fought with him, and He replied, "Fight with him." He asked him to tell him what would happen if the man killed him, and he replied, "You will be a martyr." He asked him to tell him what would happen if he killed the man, and he replied, "He will go to hell" (Sahih Muslim 225).

In other words, if the aggressor is killed in self-defense, they are responsible for their own death. The command to fight and kill in self-defense is distinct from the concept of guaranteeing safety.

Muslim scholars have differed regarding the permissibility of killing a child aggressor who poses a threat to one's life. There are two opinions on this matter: The first opinion is that the blood of the aggressor in this case is completely wasted and cannot be guaranteed, regardless of whether the aggressor is responsible or not. This opinion is held by the scholars of the Maliki (Al-Mawaq, 1994; Al-Qarafi, 1994), Shafi'i (Al-Haytami, 1995; Al-Nawawi, 1412 AH), as well as the Hanbali (Ibn Muflih, 1997; Ibn Qudamah, 1968) schools of thought.

The proponents of this opinion have argued that the general verse in 2: 194 (So, if anyone attacks you, retaliate in the same manner. But be mindful of Allah, and know that Allah is with those mindful of Him) supports their position. This verse discusses the permissibility of fighting in self-defense but does not specifically address the issue of killing child aggressors. Another evidence is the saying of the Prophet (PBUH) when He was asked what a man should do if another came wanting to take his property, and He replied, "Do not give him your property." Then, he asked him to tell him what to do if the man fought with him, and he replied, "Fight with him." He asked him to tell him what would happen if the man killed him, and he replied, "You will be a martyr." He asked him to tell him what would happen if he killed the man, and he replied, "He will go to hell." (Sahih Muslim 225). The evidence is that the person being attacked is commanded in the previous two cases to fight and kill, and between the command to fight and the guarantee is a contradiction, as the legal permissibility contradicts the guarantee (Al-Zurqā, 1989). There is nothing that excludes from this ruling the immature person. Furthermore, the generality of the Prophet when He says, Whoever unsheathes his sword and starts to strike the people with it, it is permissible to shed his blood (Sunan an-Nasa'i 4097), inherently includes the mature and immature attackers (Al-Sindi, 1968).

The second opinion is that the blood of a child aggressor is considered wasted only if the child is responsible for their actions. However, if the child is not responsible, or the aggressor is mentally ill, then their blood is not wasted and their life is still protected. If it is necessary to kill them in self-defense, then their blood money is guaranteed. This opinion is held by the Hanafi school of thought (Afindi, 1328 AH; Al-Haskafi, 2002; Khusrav, 1480 AH).

They justified their argument by saying that the actions of a child or mentally ill person cannot be considered a crime or aggression because they lack intention and understanding. Therefore, their life is still protected, and it is not permissible to kill them unless there is no other way to defend oneself. Killing the attacker is prerequisite by the intent to attack and aggression, and this is something that is unthinkable for someone who is not responsible for their actions given their immaturity or state of mind (Afindi, 1328 AH; Khusrav, 1480 AH). However, the counterargument is that the non-responsible attacker as in a child who has reached the age of discernment does have some level of choice and intention, and therefore their life may not be protected in the same way as a non-responsible mentally ill person (Al-Haytami, 1995; Ibn Qudamah, 1968).

#### Giving preference

The most correct opinion, logically, and Allah knows best, is the view held by the proponents of the earlier opinion which states that the blood of the attacker should be considered wasted regardless of their level of responsibility. This opinion is supported by strong evidence, while the opposing opinion lacks specific evidence to restrict its generalities.

#### Killing someone who prevents the distressed from accessing food and drink

The ruling on preventing access to leftover food or drink for those who are in need

There is no disagreement among scholars regarding the prohibition of withholding food or drink from someone in dire need. It is unanimously agreed upon that if a person possesses food or drink and is not in immediate need of it, they are obligated to provide it to the one who is in need to alleviate their hunger or thirst (Al-Buhuti, 2000; Al-Dardir, 2013; Al-Kasani, 1986; Al-Qarafi, 1994; Al-Shirazi, 1992; Bin qasim, 1406AH; Ibn Abidin, 1992; Ibn Qudamah; 1968; Ibn Rajab, 1419AH).

Scholars have provided the following arguments with the general principles of mutual support and cooperation among Muslims, as mentioned in the Quran, "Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression." (5:2). God Almighty said in the context of rebuke and threat (107:7) "and refuse to give even the simplest aid". They cite verses that emphasize the importance of helping and providing for others. They also highlight that if preventing access to basic necessities like water and food is condemned, then withholding food or drink from someone in dire need is even more reprehensible (Bin qasim, 1406AH).

They also argue that withholding assistance or resources from someone in need can contribute to their harm or even death (Al-Buhuti, 2000; Al-Kasani, 1986; Ibn Abidin, 1992; Ibn Qudamah, 1968). They refer to a hadith that states, "Whoever helps in the killing of a Muslim, even if only half a word, will come on the Day of Resurrection with written between his eyes: Deprived of God's mercy." (Sunan Ibn Majah 2620). They interpret this hadith to include withholding assistance that could potentially lead to someone's death.

They argue that providing food or drink to those in need is directly related to preserving the sanctity of human life. They believe that it is an obligation to provide these basic necessities to sustain and preserve human life (Al-Buhuti, 2000; Al-Kasani, 1986; Ibn Abidin, 1992; Ibn Qudamah, 1968). Allah has said, "and whoever saves a life, it will be as if they saved all of humanity" (5: 32).

#### The distressed kills someone who withholds surplus food and drink

Just as the scholars unanimously agree on the prohibition of withholding food or drink from someone in dire need and the obligation to provide it, they also unanimously agree that if someone refuses to give their surplus food or drink to the one in need, even for a price, the one in need has the right to take it. If it requires fighting the one who withholds it, and the person in need is killed in the process, they are considered a martyr and their killer bears the responsibility. However, if the owner of the food or drink is killed, his blood is considered a waste (Al-Buhuti, 2000; Al-Kasani, 1986; Ibn Abidin, 1992; Ibn Rajab, 1419AH; Bin qasim, 1406 AH; Ibn Qudamah, 1968). They have supported their opinions by the following arguments:

1. One who withholds surplus food or drink from the one in need is unjust and oppressive, denying them their right, and they are also unjust by fighting against them. Therefore, they cannot be guaranteed protection (Al-Buhuti, 2000; Al-Kasani, 1986; Ibn Abidin, 1992; Ibn Rajab, 1419AH; Bin qasim, 1406 AH; Ibn Qudamah, 1968).
2. They cite a narration where a group of people refused to provide water to others in need and also, refused to lend them a bucket. When they explained that their lives were at risk, they were still denied assistance. This incident was mentioned to Umar ibn Al-Khattab when he questioned why they fought them (Al-Qadi, 2018).
3. The one in need has a right to receive what preserves their dignity, even if it requires purchasing it. If the one who possesses the surplus refuses, then the one in need has the right to fight for their entitlement to protect/ save themselves (Ibn Abidin, 1992). Therefore, all the evidence presented regarding the obligation to provide surplus food and drink to the one in need indicates that the one in need deserves this surplus. If someone obstructs them from obtaining it, they have the right to fight for it. The Prophet Muhammad (PBUH) said, "Whoever is killed defending his wealth and is killed unjustly, he is a martyr." (Sunan an-Nasa'i 4093).
4. They argue that whoever neglects to provide assistance to a person in need, knowing that they have the ability to help them, is exposing them to harm and is considered responsible for their destruction. This is similar to someone who neglects to warn a blind person of danger or fails to rescue a drowning person (Al-Kasani, 1986; Al-Shirazi, 1992).

#### Killing any of the enemy warriors who entered the land of Islam

Self-defense is also connected with defending the general welfare of the subjects of the Islamic state from enemy combatants or those who infiltrate without any covenant or agreement. These individuals are referred to by the scholars as "harbi" or "harbi kafir," which means a non-Muslim combatant who does not have a covenant of protection or peace with the Muslims. Therefore, the term "harbi" includes non-Muslims who have not entered into a covenant of protection and do not enjoy the safety guaranteed by the Muslims (Al-Buhuti, 2000; Al-Shawkani, 1414 AH; Ibn Abi al-Fath, 2003).

It is not permissible for those who are in war with Muslims to enter the land of Islam without agreement, because it is believed that they enter as a spy, an infiltrator, or to buy weapons that would harm the Muslims (Al-Marghinani, 2020; Al-Shirazi, 1992; Ibn Qudamah, 1968).

So if a harbi person enters the land of Islam with an agreement, and it is established that one of the Muslims has granted him protection because he wants to hear the words of Allah, or because he is a messenger or a trader, then he has the right to preserve himself, his wealth, and all his rights and interests, as long as he adheres to the contract of safety and does not deviate from it. His person and his wealth have temporary guaranteed protection (Al-Marghinani, 2020; Al-Shirazi, 1992; Ibn Qudamah, 1968). The evidence for this is the saying of Allah (SWT), "And if anyone from the polytheists asks for your

protection O Prophet, grant it to them so they may hear the Word of Allah, then escort them to a place of safety, for they are a people who have no knowledge" (9: 6).

However, if a non-Muslim warrior enters the land of Islam without agreement during times of war, then he has no protection or sanctity. There is no disagreement among the scholars (Al-Maliki, n.d; Al-Shirazi, 1992; Ibn Abidin, 1992; Ibn Najim, 2022) that his blood, if spilled, is considered permissible and not guaranteed. They base this on the following evidence:

1. The verse that generally commands the killing of polytheists is "Kill them wherever you come upon them" (2:191). Allah also says, "And fight them until there is no fitnah and [until] the religion, all of it, is for Allah" (8: 39).
2. The above-mentioned statement is a well-known hadith in which Prophet Muhammad (PBUH) said, "I have been commanded (by Allah) to fight people until they testify that there is no true god except Allah, and that Muhammad is the Messenger of Allah, and perform Salat and pay Zakat. If they do so, they will have protection of their blood and property from me except when justified by Islam, and then account is left to Allah". (Sahih Al-Bukhari 25; Sahih Muslim 21). If it has been excluded from the general statements of this hadith, all of the dhimmis (non-Muslims living under Islamic rule), mu'ahids (those with treaties of protection), and musta'mins (those granted safe passage) with other evidence, then there is no specific mention of exceptions for those engaged in warfare.
3. Scholars unanimously agree that the shedding of blood of a harbi is permissible, and there is no crime committed in doing so. However, it is crucial to emphasize that these rulings should be understood within the framework of Islamic law and its comprehensive guidelines for warfare and peace.
4. Because the protection of blood is established through either a guaranteed or a treaty of protection, and the harbi in this case does not have either of them (Ibn Abidin, 1992), scholars unanimously agree that it is permissible to shed the blood of the harbi, and that it is not considered a crime (Al-Maliki, n.d; Ibn Abidin, 1992; Ibn Qudamah, 1968).

## Conclusion

Based on the analysis of the scholars' opinions regarding self-defense, we can draw several important observations and conclusions. Firstly, it is crucial to regulate matters related to self-defense due to their frequent occurrence and potential impact on security. Secondly, it is important to differentiate between active self-defense, such as prompted in cases of combat, and passive self-defense, as when someone in need is being denied or prevented from accessing food and drink. Active self-defense is considered more severe in terms of causing harm to the aggressor. Thirdly, it is necessary to establish clear boundaries and regulations for what constitutes justifiable defense. Lastly, enriching Islamic jurisprudence with precise principles and comprehensive criteria can help address contemporary issues related to self-defense.

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## References

- Afindi, D. (1328AH). *Majma' Al-Anhar Fi Sharh Multaqa Al-Abhur*. A. B. C. Editor (Ed.). Al-Amira Printing House.

- Al-Buhuti, M. (2000). *Kashf Al-Qina' 'An Matn Al-Iqna'* [The Unveiling of the Mask on the Text of Al-Iqna']. Dar Al-Kutub Al-Ilmiyah.
- Al-Dardir, A. (2013). *Al-Sharh Al-Kabir* [The Great Explanation]. Dar Al-Fikr.
- Al-Haskafi, M. A. (2002). *Al-Durr Al-Mukhtar Sharh Tanwir Al-Absar wa-Jami Al-Bihar*. In A. M. K. Ibrahim (Ed.). Beirut: Dar Al-Kotob Al-Ilmiyah.
- Al-Haytami. (1995). *Tuhfat Al-Muhtaj fi Sharh Al-Minhaj* [The Gift for the Needy in the Explanation of the Curriculum]. Beirut: Dar Ihya Al-Turath Al-Arabi.
- Al-Jawhari, I. (1987). *Al-Sahah* [The Correct]. (A. A. Atar, Ed.). Dar Al-Ilm Lil-Malayin.
- Al-Kasani. (1986). *Badai' Al-Sanai' fi Tartib Al-Shara'i* [The Marvels of Craftsmanship in the Arrangement of Laws]. Dar Al-Kutub Al-Ilmiyah.
- Al-Kharshi, M. (1317A H). *Sharh Mukhtasar Khalil li Al-Kharshi* [Explanation of Khalil's Abridgment by Al-Kharshi]. Dar Al-Fikr li Al-Tiba'ah.
- Al-Maliki, M. A. (n.d). *Hashiyat Al-Dasuqi Ala Al-Sharh Al-Kabir*. Beirut: Dar Al-Fikr.
- Al-Marghinani, A. B. (2020). *Al-Hidayah Fi Sharh Bidayat Al-Mubtadi*. In T. Youssef (Ed). Beirut: Dar Ihya Al-Turath Al-Arabi.
- Al-Mawaq, M. Y. A. (1994). *Al-Taj wa al-Iklil li-Mukhtasar Khalil* [The Crown and the Wreath for Khalil's Abridgment]. Dar Al-Kutub Al-Ilmiyah.
- Al-Nawawi, Y. (1412 AH). *Rawdat Al-Talibin wa 'Umdat Al-Muftin*. (Z. Al-Shawish, Ed.). Dar Al-Maktabah Al-Islamiyah.
- Al-Qadi, A. Y. (2018). *Al-Athar*. Beirut: Dar al-Kotob al-Ilmiyah.
- Al-Qarafi, A. I. (1994). *Al-Dhakhira* [The Ammunition]. In M. A, Al-Salami, M. Haji, S Arab, & M. Boukheza (Eds). Dar Al-Gharb Al-Islami.
- Al-Shawkani, M. A. A. (1414). *Fath al-Qadeer*. Damascus: Dar Ibn Kathir.
- Al-Shirazi, A. I. (1992). *Al-Muḥaddab fi Fiqh al-Imām al-Shāfi'ī*. Dar Al-Kotob Al-Ilmiyah.
- Al-Sindi, M. B. A. H. (1986). *Hashiyat Al-Sindi Ala Sunan Al-Nasai* (2nd ed.). Aleppo: Maktab Al-Matbuat Al-Islamiyah.
- Al-Zurqā, A. A. M. (1989). *Sharh al-Qawa'id al-Fiqhiyyah* [Explanation of the Legal Rules]. (M. A. Al-Zurqā, Ed.). Dar Al-Qalam.
- Al-Zurqani, M. A. (2003). *Sharh Al-Zurqani Ala Muwatta Al-Imam Malik*. In, T. A. Saad (Ed.). Cairo: Maktabat Al-Thaqafah Al-Diniyah.
- Bin qasim, M. (1406AH). *Al-Ihkam Sharh Usul Al-Ahkam* (2nd ed.). Dar Al-Qasim
- Ibn Abi al-Fath. (2003). *Al-Matala' 'ala Alfaz al-Muqni'*. In, M. Arnaut & Y. M. Al-Khatib (Eds.). Maktabat al-Sawadi lil-Tawzi'.
- Ibn Abidin. (1992). *Radd Al-Muhtar 'Ala Al-Durr Al-Mukhtar* [Response to the Chosen Pearl]. Dar Al-Fikr.
- Ibn Farris, A. (1986). *Majma' al-Lughah* [Compendium of the Language] (Z. A. Sultan, Ed.). Dar Ihya' al-Turath al-Arabi.
- Ibn Majah. (n.d.). *Sunan Ibn Majah*. Dar Ihya al-Kutub al-Arabiyya.
- Ibn Muflih. (1997). *Al-Mubdi' fi Sharh Al-Muqni' li Ibn Muflih*. Dar Al-Kutub Al-Ilmiyah.
- Ibn Najim, Z. (2022). *Al-Bahr al-Ra'iq Sharh Kunz al-Daqa'iq*. Dar al-Kutub al-Islamiyya.
- Ibn Qudamah. (1968). *Al-Mughni* [The Enricher]. Cairo: Maktabat Al-Qahira.
- Ibn Rajab, A. (1419AH). *Taqrir alqawaeid watahkir alfawayidi*. Dar Ibn Affan. Dar Ibn Affan.
- Khatab, M. (2015). *The Clear Quran. Message for Humanity*.
- Khusrav, M. (1480). *Durar al-Hukam Sharh Ghurar al-Ahkam*. Dar Ihya al-Kutub al-Arabiyya.

Muslim. (2013). Sahih Muslim [Authentic Compilation of Muslim]. Edited by Muhammad Fuad Abdul-Baqi. Dar Ihya Al-Turath Al-Arabi.