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AN APPRAISAL OF LAW OF WAR IN ISLAMIC INTERNATIONAL LAW AND INTERNATIONAL HUMANITARIAN LAW

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Abstract

Islamic law is the bedrock of Islam and one of the three major legal systems in the world today. Owing to its unique characteristics, some parties to armed conflict continue to refer to Islamic law as a primary source of rules governing their conduct during armed conflict. The similarities in the principles underpinning international humanitarian law (IHL) and Islamic laws of war suggest that these two legal traditions have the same objectives. Promoting the universality of these principles, which transcend legal traditions, cultures and civilizations, is essential for ensuring compliance with IHL.

Introduction

Modern armed conflicts are employed in a wide array of operations that range from peacetime to outright international armed conflict, and hence the necessity to regulate armed conflicts especially in the conduct of hostilities. Islamic Law has a complete system of law has corresponding rules regulating the conduct of hostilities and imbibe therein is the elementary considerations of humanity. This paper examines the principles regulating the conduct of hostilities under Islamic Law compared to the International humanitarian laws of the Geneva Conventions and concludes that the fundamental rules and principles of international humanitarian law relating to restriction on the means and methods of warfare, principle of proportionality, use of force, inviolability of civilian and non – combatant population and property as well as protection of the wounded, sick, ameliorate and captured combatants and or prisoners of war show striking similarities with that of the Geneva Conventions.

Armed conflicts have unfortunately become an inherent characteristic. It is indeed one of the most ancient form of inter course between various communities in the world. Conflict situation in general are as old as the beginning of life here on earth. That is from the point where man moved from the state of purity to the state of impurity. Armed conflict is first and foremost the unfortunate or dismissal result of failed endeavor of mankind to settle real problems and solve immediate conflict by

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In all situations of armed conflicts or hostilities, there must be human suffering.

Sources of Islamic International Law

To its believers, Islam is a complete way of life, and its law encompasses every aspect of life including the hereafter (both daily life aspects and worship) including laws governing the conduct of warfare. To understand Islamic law, one should start from the sources. The primary sources of Islamic law are as follows:

The Glorious Quran

The Quran is the basis of all Islamic Law. In its literal sense, it means the words of Allah (SWT) revealed to the Holy Prophet Mohammed (SAW) over a period of 22 years (i.e. 610 AD 632 AD) through Angel Jibril the Quran is immutable since its revelation, the text has not changed even in the minutest of details. The Quran contains two kinds of rules; general and specific. The general rules are far more numerous. The specific rules tend to deal with matters of worship or with matters relating to family, Commercial or Criminal Law. Other matters involving those in the area of Constitution law and War are governed by the general rules. The predominant reliance on general rules by the Quran was viewed by the Mujttahids as the indication of divine mercy and wishes to facilitate for Muslim, the practice of their religion throughout the ages. The activity which the Mujttahids engage is called "Ijtihad.

Sunnah

This is another major and significant source of Islamic Law. The Sunnah comprised of the reported sayings of the Holy Prophet (SAW), his reported actions, which includes his silence or acquiescence in instances where such behavior is viewed as permissive. The Sunnah is equally used to supplement Quranic laws as well as help in its interpretation. The Holy Prophet (SAW) prohibited the recordings of the Sunnah for the purposes of undermining the status of the Quran as the only source of divine law. This made a substantial part of the Sunnah unrecorded until the 9th and 10th century during the Abbasid rule. There is however evidence of recording the Hadith based on the argument that earlier prohibition was temporal and only related to the earlier period of Quranic revelations. It was for this reasons that Muslims scholars developed a sophisticated science of attribution in connection with the Sunnah for the purposes of minimizing the problem associated with hearsay.

As the primary sources do not always prescribe clear rulings, or new objects emerge, scholars make fatwas(rulings) by ijtihad. There are two ways to achieve these kinds of rulings based on reasoning:

- Ijma(consensus): consensus by the entire Muslim communities represented by the most learned Islamic jurists, deciding by ijtihad.
- Individual ijtihad: done in absence of ijma.

To make rulings, there are a number of methods. The first would be Qiyas (analogy from existing primary sources). In doing Qiyas, a jurist will consider Istihsan (juristic preference), and Maslahah (public interest for this life and the hereafter) in accordance with the maqqasid shari'ah (purpose of the law): to protect the life, religion, wealth, mind, and lineage. Other considerations used is Saddad-Dhara'I (preventing evil), i.e. something normally lawful will be prohibited if it provides means to prohibited things. Urf(customary rules) are also considered if consistent with primary sources.

Sources of International Law

The traditionally known sources of international law are: international agreements, customary international law, and general principles of law (as primary sources), then past judicial decisions and the works of the most highly qualified publicists.[1] More directly relevant to the law governing the conduct of armed conflict, or international humanitarian law (IHL)[2], the central sources would be around the four Geneva conventions of 1949 (GC) with its additional protocols of 1977 and 2005 (AP), customary international humanitarian law, at times cross-referencing to human rights laws,[3]*etc*. A question arises: is Islamic law compatible with international law?

None of the sources of Islamic law (e.g. the *Qur'an*) is mentioned among the sources of international law. However, Islamic law is one of the legal systems represented in the world civilization, which can also be taken as source from which to derive 'general principles of law recognized by civilized nations' as per Article 38(1)(c) of the ICJ Statute.[4]

The GCs mention how mechanisms of accountability will be triggered only in the event of breaches[5]. It consequently follows that international humanitarian law (IHL) will not be opposed towards Islamic law so long as there are no breaches towards

[1] Article 38(1) of the Statute of the International Court of Justice 1946 (ICJ Statute).
[2] Sassoli, Note 5, Chapter 4: pg. 3-14.
[3] *Ibid*, Chapter 14: pg.1-20.
[4] James Cockayne. 'Islam and International Law: from a Clash to a Conversation between Civilizations'. *International Review of the Red Cross*, Vol. 84, No. 847 (2002), pg. 597-626, at p.623
[5] Articles 49, 50, 129 and 146 respectively of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), the Geneva Convention relative to the Treatment of Prisoners of War (GC III), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV) respectively.

humanitarian law (IHL) committed. It does not matter how these norms and obligations of international humanitarian law (IHL) are characterized (be it under religious obligations, or whatever), as long as they are indeed recognized as binding.[6]

Concept of War in Islamic International Law

By examining **the theory** of war in Islamic international law, Sayyed Qutb concludes that peace is the rule, while war is the exception.[7] In the following statement, Qutb pinpoints the conditions, which should be met by Muslims prior to their engagement in war:

"In Islam, peace is the rule, and war is a necessity that should not be resorted to, but to achieve the following objectives: to uphold the rule of Allah on earth, so that the complete submission of men would be exclusively to Him; to eliminate oppression, extortion and injustice by instituting the word of Allah; to achieve the human ideas that are considered by Allah as the aims of life; and to secure people against terror, coercion and injury."[8]

Similarly, John Kelsay perceives that the Islamic tradition presents evidence of both senses of peace: the desire to avoid conflict, and the interest in the achievement of an ideal social order. He proceeds to say:

"In the Islamic tradition, one must strive for peace with justice. That is the obligation of believers; more than, it is the natural obligation of all of humanity. The surest guarantee of peace is the predominance of al-Islam, "the submission" to the will of God. One must therefore think in terms of an obligation to establish a social order in which the priority of Islam is recognized.... The Islamic tradition stresses, not the simple avoidance of strife, but the struggle for a just social order. In its broadest sense, the Islamic view of peace, like its Western counterpart, is in fact part of a theory of statecraft founded on notions of God, of humanity, and of the relations between the two."[9]

Accordingly, jihad, in Islamic legal theory, is a temporary legal device designed to achieve the ideal Islamic public order, and to secure justice and equality among all peoples.[10] As a matter of fact, there is not a single piece of evidence in Islamic legal

[6] Cockayne, op. cit., at pg. 624.
[7] Sayyed Qutb, Islam and Universal peace (Indianapolis, Indiana: The American Trust Publications, 1977), pg. 9.
[8] Ibid.
[9] John Kelsay, Islam and War (Louisville, Kentucky: Westminster/John Knox Press, 1993), pg. 30.
[10] Majid Khadduri, The Islamic Law of Nations: Shaybānī's Siyar (Baltimore, Maryland: The John Hopkins University Press, 1966), pg. 17.

discourse which instructs Muslims to wage perpetual war against those nations which fall outside of the sovereignty of the Islamic State, or to kill non-Muslims.[11]

The chief aim of jihad is not to force unbelievers to embrace Islam, nor to expand the boundaries of the Islamic state.[12] Ibn Taymiyya, for his part, notes that the jihad is a just war waged by Muslims whenever their security is threatened by the infidels.[13] Killing unbelievers who refuse to adopt Islam is worse than disbelief, and inconsistent with the spirit and the message of the Holy Qur'ān. This point is illustrated by Ibn Taymiyya, who argues that

"if the unbeliever were to be killed unless he becomes a Muslim, such an action would constitute the greatest compulsion in religion,"

which contradicts the Qur'anic verse,
"Let there be no compulsion in religion".[14]

Ibn Taymiyya deemed lawful warfare to be the essence of jihad and a means to securing peace, justice and equity. No one is to be killed for being a non-Muslim, for the Holy Qur'ān regards the subversion of faith and oppression as worse than manslaughter.[15] This point is emphasized in the Qur'anic verse "for tumult and oppression are worse than slaughter."[16] According to the basic Qur'anic rule of fighting, Muslims are instructed to

"fight in the cause of Allah those who fight you, but do not transgress limits, for Allah loveth not transgressors."[17]

Ibn Taymiyya marks out the following motives behind jihad: to defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission (al-da'wah) of Islam.[18]

Based on the above argument, one concludes that peace is the rule and war is the exception in Islam, and that no obligatory state of war exists between Muslims and the rest of the world, nor is jihad to be waged until the world has either accepted the Islamic faith or submitted to the power of the Islamic state, as Bernard Lewis and Majid Khadduri suggest;[19] Jihad is a defensive war launched with the aim of

[11]Abdulrahman Abdulkadir Kurdi, The Islamic State: A Study Based on the Islamic Holy Constitution (London: Mansell Publishing Limited, 1984), pg. 97.
[12]Rudolph Peters, jihad in Mediaeval and Modern Islam (Leiden, The Netherlands: E.J. Brill, 1977), pg. 3.
[13]Majmu'at Rasa'il Ibn Taymiyya, ed. Muhammad Hamid al-Faqi (Cairo: Matba'at al-Sunna al-Muhammadiyya,1949), pg. 123.
[14]Qur'an Chapter 2 verse 257.
[15]Shaykh al-Islam Ahmad Ibn Taymiyya; al-Siyasa al-Shar'iyya fi Islah } al-Ra'iwal-Ra'iyya (Dar al-Kutub al-'Arabiyya, 1966), at pg. 107.
[16]Qur'an Chapter 2 verse 192.
[17]Qur'an Chapter 2 verse 191.
[18] Rasa'il Ibn Taymiyya, op. cit., at pg. 116-117.
[19]Bernard Lewis, The Political Language of Islam (Chicago: The University of Chicago Press, 1988), at pg. 73; Majid Khadduri, op. cit., at pg. 13.

 establishing justice (‘adl) and protecting basic human rights (huquq al-‘ibad).[20] Jihad cannot be understood out of its historical context, and can easily be misinterpreted if approached in terms of latter day occidental conceptions.[21]

Rudolph Peters, argues that: “‘Holy War’ is thus, strictly speaking, a wrong translation of Jihad, and the reason why it is nevertheless used here is that the term has become current in Western literature.”[22] In other words, the description of the jihad as a “holy war” is utterly misleading.[23]

Linguistically speaking, the term jihad is a verbal noun derived from the verb jahada, the abstract noun juhd, which means to exert oneself, and to strive in doing things to one’s best capabilities. Its meaning is, in fact, extended to comprise all that is in one’s power or capacity.[24]Technically, however, jihad denotes the exertion of one’s power in Allah’s path, encompassing the struggle against evil in whatever form or shape it arises.[25]This definition is forwarded in similar words in the different works of Muslim scholars.

In his legal work Bada’i Al-Sana’i, Al-kasani stipulates that, “according to Islamic law, jihad is used in expending ability and power in struggling in the path of Allah by means of life, property, words and more.”[26]

However, the exercise of jihad is the responsibility of the Imam or Caliph, who is the head of the Muslim State.[27] In other words, the Imam declares the call of jihad, not the public. This point was made by Abu Yusuf, who states that “no armymarches without the permission of the Imām.”[28]

Similarly, Abu al-Hasan al-Mawardidevotes a chapter in his work al-Ahkam al-Sultaniyya to the duties of the Imam. The sixth of these basic duties, he argues, is the fight in the path of Allah. Mawardiemphasizes the fact that a war cannot be waged without the permission of the Imam.[29]Unlike Shi’ite scholars, who hold that jihad can

[20]Ahmed Zaki Yamani, “Humanitarian International Law in Islam: A General Outlook,” Michigan Yearbook of International Legal Studies 7 (1985), at pg.190.
[21] W. Montgomery Watt, Islamic Political Thought: The Basic Concepts (Edinburgh: Edinburgh University Press, 1968), at pg. 15
[22]Rudolph Peters, op. cit., at pg. 4.
[23]W. Montgomery Watt, Islamic Political Thought: The Basic Concepts (Edinburgh: Edinburgh University Press, 1968), 18.
[24] Muhammad Ibn AbuBakr al-Razi>, Mukhtar al-Sihah (Maktabat Lubnan, 1988), at pg. 48.
[25]Ahmad al-Sawi, Bulghat al-Salik li-Aqrab al-Masalik, vol. 2.
[26]Ala al-Din al-Kasani, Kitab Bada'I al-Sana'i fi Tartib al-Shara'i, vol. 7 (Cairo: al-Matba‘a alJamaliyya, 1910), 7:97.
[27]Noor Mohammad, “The Doctrine of Jihad: An Introduction,” Journal of Law and Religion 3 (1985): at pg. 390.
[28]Abu Yusuf Ya‘qub Ibn Ibrahim, Kitab al-Kharaj 1990, at pg. 349.
[29]Abu al-Hasan al-Mawardi, al-Ahkam al-Sultaniyya wal-Wilayat al-Diniyya 1983, at pg. 33.

only be exercised under the leadership of the rightful Imam,[30]and contrary to the view held by the Kharijites who believe that Jihad is the sixth pillar of Islam.[31]

Sunnite jurists conceive of jihad, in accordance with the nature of its obligation, as a collective duty (Fard Kifaya) on the one hand,[32] and an individual duty (Fard ‘Ayn) on the other.[33] When war is waged against infidels living in their own country, jihad is a collective duty; that is to say that Jihad is an obligation incumbent upon the Muslim community as a whole, which, if accomplished by a sufficient number of them, exempts the rest from being indicted for its neglect. If, however, no one performs this duty, all individual Muslims, qualified to take part in the Jihad, are sinning.[34]

Jihad is considered an individual duty “fard ‘ayn” when infidels invade Muslim territory. In this scenario, Jihad becomes a duty incumbent upon all the inhabitants of the occupied territory including the poor, women, minors, debtors and slaves without previous permissions.[35]

For his part, Bernard Lewis argues that “Jihad, in an offensive war, is an obligation, which is incumbent upon the Muslim community as a whole (fard kifāya); in a defensive war, it becomes a personal obligation of every adult male Muslim (Fard ‘Ayn).”[36]Two things may be highlighted for criticism in that statement: the use of the term offensive war, and the misunderstanding of Muslim obligations where Jihad pertains to individual duty. In point of fact, only one kind of Jihad is acknowledged by Islamic law - the defensive one; whether it is waged against infidels living in their own country or when they attack Muslim territory.

With regards to the other claim in this statement, it should be made clear that Jihad is an obligation upon every Muslim, whether adult, minor, male, female, rich, poor, debtor or slave, only when it is Fard ‘Ayn. In this case, Jihad, therefore, must be performed by the levée en masse of every competent Muslim person.[37]

However, as a collective duty, Jihad is incumbent upon every Muslim male, who is mature, sane, free, healthy and capable of adequate support.[38] Indeed, being a Muslim, adult and sane are the three necessary conditions for bulugh al-takalīf (legal

[30] Abu Ja‘far Muhammad Ibn Jarir al-Tabari, Kitab Ikhtilaf al-Fuqaha, at pg. 12.
[31] Majid Khadduri, op. cit., at pg. 67-69.
[32] Qur’an Chapter 9 verse 123
[33] Qur’an Chapter 9 verse 42
[34]Rudolph Peters, op. cit., at pg. 3.
[35]Imam al-Haramayn Abu al-Ma‘ali al-Juwayni, Ghiyath al-Umam fi Iltiyāth al-Zulam, at pg. 260-261.
[36] Bernard Lewis, op. cit., at pg. 73.
[37]Ahmed Rechid, “L’Islam et le droit des gens,” Recueil des cours 60 (1937): at pg. 466-467
[38] Muwaffaq al- Din Ibn Qudama and Shams al- Din ‘Abd al-Rahman Ibn Qudama, al-Mughni wa Yalihi al-Sharh al-Kabir, vol. 12, at pg. 10:366.

 capacity.)[39] In this respect, females, according to the Prophet, are only to be engaged in non-combative Jihad; such as hajj and ‘umra (pilgrimage and the so-called minor pilgrimage to Mecca).[40] Thus, Islam exempts women from suffering wars’ disasters and witnessing killing and bloodshed.

In spite of this, however, women have taken part in the Jihad, side by side with men, from the outset of the Islamic mission, nursing the wounded; transporting the injured; cooking and pouring water into the mouths of the soldiers; scouting and intelligence; fierce combat; and army command. The condition of freedom, mentioned earlier, is there because a slave is normally involved in taking care of his master’s affairs.[41] In fact, the prophet used to take the pledge (al-bay‘a) of free people for Islam and jihad, and that of slaves forIslam only.

The stipulation of good health means that the jihadist should be free of any permanent physical disability such as blindness, lameness or a chronic disease. The Holy Qur’ān explicitly excludes that: “no blame is there on the blind, nor is there blame on the lame, nor on the ill (if he does not join the war).”[42] In another verse, the Holy Qur’ān exempts the person who cannot earn his own household’s daily living expenses, unless he is sponsored by the Muslim State, textually: “There is no blame on those who are infirm, or ill, or who find no resources to spend (on the cause), if they are sincere (in duty) to Allah and His Apostle.”[43]

Finally, the mujahid (Muslim fighter) should seek his parents’ permission before taking part in the jihad[44] and, if he is indebted to any person, including dhimmis, must ask for an excuse from his creditor. As long as Islam has sanctioned jihad for the very reasons quoted above, it is only natural that military actions will take place, culminating, as it were, in the Muslim army’s entry into the territory of war (dar al-harb) and ruling over. This is the so-called al-fath } (conquest or victory).

Concept of War in International Law

It can be inferred from the above that the concept of jihad in Islamic international law is based on the premise that an armed conflict arises between the Muslim State and non-Muslim State for the purpose of deterring aggression, protecting Islam, and defending the interests of the Muslim State.[45]Nevertheless, the concept of war in international law is, on the other hand, ambiguous. For example, we find that while

[39] Ibid.
[40] Abu ‘Abdallah Muhammad Ibn Isma‘il al-Bukharī, Sahīh } al-Bukhari, vols. 8, 3:220.
[41] Al-Juwayni, op. cit., at pg. 262.
[42] Qur’an Chapter 48 verse 17.
[43] Qur’an Chapter 9 verse 91.
[44]Al-Juwayni, op. cit., at pg. 262.
[45]Sami A. Aldeeb Abu-Sahlieh, Les Musulmans face aux droits de l’homme: religion & droit & politique (Bochum, Germany: Winkler, 1994), 273-275.

international law jurists attempt to find a specific definition for the concept of war, the International Law Commission of the United Nations, for its part, decides not to include the concept of war in its agenda, on the grounds that the United Nations Charter considers war an illegal action.[46]

In an attempt to conclude a specific definition of war in international law, it is imperative therefore that we discuss various views posited by scholars working on international law. Indeed, these views vary a great deal among themselves in this respect. To most scholars, war is a real eventuality, which cannot be stemmed by law, but law comes at a later stage in the process of war, regulating its actions and attempting to safeguard its humane standards of conduct. To

others, war is seen as a state between two or more disputing parties, which requires the law's intervention to regulate its action in relation to rights and commitments arising from the conduct of war.

Oppenheim, defines war as:
"A contention between two or more states through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases. War is a fact recognized, and with regard to many points regulated, but not established, by international law."[47]

On the other hand, Hyde argues that war is
"A condition of armed hostility between states."[48]

It is clear from these definitions that all law experts gravitate towards one definition despite ostensible differences. It is therefore plausible to define war as a condition of animosity arising between two or more parties, thereby terminating the peaceful state of co-existence between them through resorting to arms in settling disputes.

Moreover, international law is a recent phenomenon, dating back only to the writings of Hugo Grotius and the Treaty of Westphalia of 1648, which recognized states as units enjoying equal rights and responsibilities within the international community. It can be said that wars have raged ever since, as prevailing international practices do not impose any restrictions against countries resorting to power in their respective relations, regardless of the emergence of the so-called just wars, and Grotius' exclusion of preventive wars.[49] That is why Grotius's theory on the distinction

[46]Hersch Lauterpacht, "The Problem of the Revision of the Law of War," The British Year Book of International Law 29 (1952): 361
[47]L. Oppenheim, International Law, vol. 2, Disputes, war and Neutrality, 7th ed., revised by Hersch Lauterpacht (London: Longmans, Green and Co., Inc., 1952), 202
[48]Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States, 3 vols. (Boston: Little, Brown and Co., 1945), 3: 1686
[49]Josef L. Kunz, "Bellum Justum and Bellum Legale," AJIL 45 (1951): 529.

unjust wars did not last long, and was overshadowed, in the centuries after him, by the principle that states may resort to war as a legitimate right of sovereignty; a principle maintained until the conclusion of the Hague conventions of 1907.[50]

Reference to the Covenant of the League of Nations reveals that Articles 11 and 12 did indeed deal with the use of force among nations, whereas Article 12 also obliged member states to submit any dispute among them to an arbitration council, and not to resort to war until three months had lapsed since the arbitration ruling. Articles 13 and 15 provide that states should implement this ruling in good faith, whereas Article 16, for its part, included the imposition of sanctions against a state that resorted to war contrary to its commitments not to do so according to Articles 12, 13 and 15.[51]

In 1924, the Geneva Protocol signatories committed themselves not to resort to war except in certain cases specified by Article 2 of that Protocol. In 1925, member states signing the Locarno Treaty agreed among themselves not to resort to war against each other except in certain cases.[52] At the initiative of France and the United States, the General Treaty for the Renunciation of War (the Briand-Kellogg Pact, or Pact of Paris) was signed in Paris on August 27, 1928, by representatives of 15 governments; at a later stage, several other states also signed it. In its first article, the Treaty condemns the use of power in solving international disputes, and denounces it as a means of maintaining national sovereignty in international relations. Article 3 bans aggressive wars completely.[53]

The United Nations Charter does not use the word "war" except in its preamble in which member states pledge not to use armed force for other than common interest. Article 1 provides that among the purposes of the United Nations is the promulgation of effective measures for the prevention of threats to international peace and security, and for the suppression of acts of aggression.[54] Article 2 (4) proclaims that member states commit themselves to refrain from threatening or actually using force against the safety of the territory or political independence of any state.[55] The Charter, however, proclaims that members, individually or collectively, may use armed force in self-defence, if an armed aggression is perpetuated against them.[56]

[50] L. Oppenheim, op. cit., pg. 180.
[51] Gerhard von Glahn, Law Among Nations: An Introduction to Public International Law (New York: The Macmillam Company, 1970), 518
[52]Ibid.
[53]Leon Friedman, ed., The Law of War: A Documentary History, 2 vols. (New York: Random House, 1972), 1: 468; Quincy Wright, "The Meaning of the Pact of Paris," AJIL 27 (1933): 41.
[54]United Nations Charter, signed at San Francisco, 26 June 1945. Entered into force on 24 October 1945.
[55]Ibid.

[56]Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," AJIL 41 (1947): 873

Nevertheless, the Geneva Conventions signed in the wake of World War II, in 1949, are seen as some of the most important agreements to establish international principles in the laws of war and armed disputes. Ever since the signing of the UN Charter, the United Nations has failed to prevent wars, as a result of the fact that the Charter could not establish a workable alternative capable of preventing the use of force once disputes had erupted into armed conflicts. Another argument is that the Great Powers have continued to bend the international laws to their own desires, and to retain the right to veto any and all the Security Council's resolutions.

International law experts do indeed draw a distinction between the cold war and the actual war, as well as between acts of revenge exercised by some states against other states, in order to achieve certain ends without terminating the state ofpeace between the war parties and replace it with belligerency. Furthermore, the articles related to war in international law have defined the principles by which war could be begun; the conduct of the warring states during the process of military operations; the type of weapons to be used; and the relations of the non-warring states with those engaged in the war through legal principles stated in the law of neutrality.[57]

In addition to international treaties and conventions governing the conduct of military actions among the warring parties, and seen as the primary sources of the laws of war, there are also other sources for this law, such as customary practices and international laws acceptable to the international community. Among such practices and laws, in addition to the Nuremberg judgements, 1945-1946; the Tokyo war crimes trial, 1948; the statute of the International Criminal Tribunal for the Former Yugoslavia, 1993; and the International Tribunal for crimes in Rwanda, 1994, are rulings and principles that have been concluded from court martial, particularly in the aftermath of World War I and World War II.[58]

Comparison through Ethics and Conducts of War under Islamic International Law and International Humanitarian Law (IHL)

The vast and detailed Islamic legal literature concerned with regulating armed conflict shows that many of the issues covered by IHL were addressed by Muslim jurists to achieve some of the same objectives as those of IHL, namely alleviating the suffering of the victims of armed conflict and protecting certain persons and objects.

As with IHL, classical Islamic legal literature distinguished between international and non-international armed conflicts. The Islamic rules on the use of force in non-

[57] L. Oppenheim, op. cit., pg. 634-652

[58]Among war crimes trials are the Trial of Captain Henry Wirz, 1865; Court-Martial of Major Edwin F. Glenn, 1902; Court-Martial of General Jacob H. Smith, 1902; Court-Martial of Lieutenant Preston Brown, 1902; Prosecution and Punishment of Major War Crimes of European Axis, 1945; Hirota, Dohihara, and Kido v. General MacArthur, 1948; The Eichmann Trial, 1961; and Court-Martial of William L. Calley, Jr., 1971.

armed conflicts are much stricter and more humane than those for international armed conflicts. Due to early Islamic history, Islamic law identifies four different categories of non-international armed conflicts, each of which has different regulations on the use of force.

Islamic laws of war sought to humanize armed conflict by protecting the lives of noncombatants, respecting the dignity of enemy combatants, and forbidding deliberate damage to an adversary's property except when absolutely required by military necessity. The following are the core principles of Islamic laws of war.

Protection of Civilians and Non-Combatants

Islamic law makes it abundantly clear that all fighting on the battlefield must be directed solely against enemy combatants. Civilians and other non-combatants must not be deliberately harmed during the course of hostilities.According to the Qur'an[59]:

"And fight in the way of God those who fight against you and do not transgress, indeed God does not like transgressors."

This broad principle is aligned with IHL, which requires belligerents to distinguish between combatants and civilians and prohibits attacks against civilians or civilian objects (Additional Protocol I of 1977 (AP I), Arts 48 and 51(2); Customary IHL Study (CIHL), Rule 1).

Five categories of people are specifically protected from attack under Islamic law: women; children, the elderly; the clergy; and, significantly, the 'usafā' (slaves or people hired to perform certain services for the enemy on the battlefield, but who take no part in actual hostilities). The duties of the 'usafā' on the battlefield at the time included such things as taking care of the animals and of combatants' personal belongings. Their equivalent in the context of modern warfare would be civilians accompanying the armed forces who do not take part in actual hostilities and, accordingly, cannot be targeted (Third Geneva Convention of 1949 (GC III), Art. 4A(4).

Based on the logic guiding these categories, the Companions of the Prophet and succeeding generations of jurists have extended protection from attack to additional categories of people, such as the sick, the blind, the incapacitated, the mentally ill, farmers, traders and craftspeople.

As is the case for civilians under IHL, members of these categories will lose their protection from attack if they take part in hostilities (Article 3 common to the four Geneva Conventions of 1949 (GC I–IV); AP I, Art. 51(3); Additional Protocol II of

[59] Qur'an Chapter 2 verse 190

1977 (AP II), Art. 13(3); CIHL, Rule 6).[60] The mere fact that jurists investigated cases of individual participation shows that the principle of distinction and the prohibition of attacks against those not participating in hostilities were major concerns for many classical Muslim jurists.

Prohibition against Indiscriminate Use of Weapons

From the Qur'anic prohibition against killing another human being come rulings prohibiting means or methods of warfare that may cause incidental harm to protected people and objects which would be excessive in relation to the anticipated military advantage. In order to preserve the lives and dignity of protected civilians and noncombatants, classical Muslim jurists discussed the permissibility of using indiscriminate weapons of various kinds, such as catapults and poison- or fire-tipped arrows. According to the Qur'an:

"For that We have decreed upon the children of Israel that whosoever kills a human soul except in retribution of committing fasad (destruction, damage) in the land, it shall be as if he killed all of humanity, and whosoever saves it [a human soul] it shall be as if he saved all of humanity."[61]

The fact that these indiscriminate weapons were the subject of discussion also indicates a genuine concern for enemy property and a wish to protect it, as shown below.In the interpretation of this prohibition, jurists arrived at varying conclusions depending on the circumstances. Military necessity is one of the circumstances in which the use of indiscriminate weapons may be permitted.

Balancing this humanitarian principle with that of military necessity, most of the jurists permitted shooting at the enemy fortifications with mangonels, but they disagreed sharply on the permissibility of shooting fire-tipped arrows at enemy fortifications: one group prohibited it, another expressed its dislike for this method of warfare, and a third permitted it in those instances when military necessity called for it or when it was retaliation in kind. Conflicting rulings of this kind create major difficulties when the Islamic law of war is used as the source of reference in contemporary armed conflicts, because they can be used selectively to justify attacks against protected civilians and objects.

The notion that belligerents must minimize incidental harm to civilians and civilian objects, and that this limits the means and methods that they can use, is common to both Islamic law and IHL (AP I, Art. 51(4); CIHL, Rule 17). However, the two legal

[60] Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, ICRC, Geneva, 2010

[61] Qur'an Chapter 5 Verse 32

differ as to whether or in what circumstances specific means or methods are lawful.

Prohibition against Indiscriminate Methods of Warfare

Motivated by the same concerns that led them to investigate the lawfulness of using certain means of warfare, classical Muslim jurists discussed the permissibility of two potentially indiscriminate methods of warfare that could result in the killing of protected persons and damage to protected objects: al-bayat (attacks at night): increased the risk of protected persons and objects being harmed; al-tatarrus (human shields): jurists deliberated the permissibility of shooting at human shields because of the risk of inflicting incidental harm on protected persons.

The rationale for studying the lawfulness of night fighting, an issue that first arose during a discussion between the Prophet and his companions was that it did not involve fighting between individuals because they cannot see each other at night. Mangonels and similar weapons were mainly used against an enemy at night, which increased the risk of protected persons and objects being harmed. Similarly, they found that attacking human shields might also cause incidental harm in two instances they studied: to persons protected from the enemy or to Muslim prisoners of war.

While some jurists made some contradictory rulings, there was consensus on the fundamental point that protected persons and objects were not to be deliberately harmed.

In IHL, the prohibition of indiscriminate attacks includes attacks employing a method of combat which cannot be directed at a specific military objective (AP I, Art. 51(4); CIHL, Rule 11). The use of human shields is specifically prohibited (GC I, Art. 23; GC IV, Art. 28; AP I, Art. 51(7); CIHL, Rule 97). Whether an attack at night is permissible under IHL depends on the circumstances, taking into account the attacker's obligation to comply with the principles of distinction, proportionality and precaution in particular.

IHL rules already reflect the balance between considerations of humanity and military necessity. Therefore, military necessity cannot justify adeparture from belligerents' obligations under IHL.

Protection of Property

In Islam, everything in this world belongs to God, and human beings are entrusted with the responsibility of protecting His property and contributing to human civilization. Hence, even during the course of hostilities, wanton destruction of enemy

property is strictly prohibited. Such destruction constitutes the criminal act described metaphorically in the Qur'ān as fasād fī al-arḍ (literally, 'destruction in the land').

The first caliph Abu Bakr instructed his army commander thus: *"do not cut down fruit-bearing trees; do not destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or drown palm trees."* The eighth-century jurist Al-Awza'i declared: "it is prohibited for Muslims to commit any sort of takhrib, wanton destruction, [during the course of hostilities] in enemy territories". Such destruction was forbidden because it constituted — as the crime of terrorism does under Islamic law — the criminal act described metaphorically in the Qur'ān as fasad fi al-arḍ (literally, destruction in the land).

As a rule, except when required by military necessity, attacks against enemy property may only be carried out with one of two aims in mind: to force the enemy to surrender or to put an end to the fighting. Belligerents must not deliberately cause the destruction of property for the sake of it. This rule generally applies to animate and inanimate property alike.

Classical Islamic legal literature reflects the sanctity of an adversary's private and public property. For example, consuming an enemy's food supplies or using his fodder to feed one's own animals was regarded as permissible only in the quantities absolutely necessary for military purposes. Targeting horses and similar animals during the course of hostilities was permitted only if enemy soldiers were mounted on them while fighting. Such targeting also formed part of the prohibitions against indiscriminate means or methods of warfare (see above).

IHL rules on the protection of property in the conduct of hostilities are complex and wide-ranging. The general rule is that attacks must not be directed against civilian objects (AP I, Art. 52; CIHL, Rule 7). Additionally, certain objects benefit from specific protections, e.g. medical facilities, the natural environment, objects indispensable to the survival of the civilian population, and cultural property.

Prohibition against Mutilation and Management of the Dead

Islamic law strictly prohibits mutilation, and instructs Muslims to avoid deliberately attacking an enemy's face. The Prophet's instructions on the use of force include these injunctions:

"do not steal from the booty, do not betray and do not mutilate."[62]

[62] This tradition have been reported by several traditionalists from a number of companion that include "Abdullah .b. Mashud, Anas. B Malik, Samurah, Ya'la, Buraydah, Shaddad, Imran and Abu Ayyub.

The Prophet also instructed Muslims to avoid deliberately attacking an enemy's face. Abu Bakr's written instructions to the governor of Hadramaut, Yemen, included the following: *"Beware of mutilation, because it is a sin and a disgusting act."*

Regard for human dignity requires that dead enemy soldiers be buried or their bodies handed over to the adversary after the cessation of hostilities. Failure to discharge this obligation is, according to the jurist Ibn Ḥazm, tantamount to mutilation.

Similar rules apply under IHL. Parties to armed conflict must take all possible measures to search for, collect and evacuate the dead without adverse distinction (GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP II, Art. 8; CIHL, Rule 112). They must take all possible measures to prevent the dead from being despoiled; the mutilation of dead bodies is prohibited (GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP I, Art. 34(1); AP II, Art. 8; CIHL, Rule 113). They must endeavor to either facilitate the return of the remains of the deceased or dispose of them in a respectful manner (GC I, Art. 17; AP I, Art. 34; CIHL, Rules 114–115).

Treatment of Prisoners of War

Some of the above-mentioned characteristics of Islamic law also come to the fore in the matter of prisoners of war. There are two main issues here: how prisoners of war should be treated; and what to do with them.The general principle of Islamic law is that war captives must be treated humanely. The Glorious Quran states the qualities of a righteous Muslim as follows:

"And (they) feed with food the needy, wretch, the orphan and the captive, for love of him, (saying); we feed you, for the sake of Allah only. We wish for no reward nor thanks from you: Lo! We fear our Lord a day of frowning and of fate".[63]

The Holy Prophet (SAW) on the victory of Mecca gave these following imperatives: "Do not attack the injured person: Do not follow the one who leaves the battle field: and do not kill anyone who is captured".[64]

As to the treatment of prisoners of war, Islamic law requires that they be treated humanely and with respect. They must be fed and given water to drink, clothed if necessary, and protected from the heat and the cold and from cruel treatment. Their families would remain with them, so as to protect family unity. Torturing prisoners

[63] Qur'an chapter 76 verse 8-10
[64]Al Baladhar, Futuh al – Buldan (Cairo Maktabat al – Misriyah) 1957, P. 47.

of war to obtain military information is prohibited. These rules broadly reflect the principles articulated in IHL.

In the matter of what should be done with prisoners of war, classical Muslim jurists fell into three groups. The first found that prisoners of war must be released unilaterally or in exchange for captured Muslim soldiers. The second group, made up of some Ḥanafī jurists, argued that the State should decide, based on its best interests, whether to execute or enslave prisoners of war.[65] Others from the Ḥanafī school said that the prisoners of war may be freed, but must remain in the Muslim State because permitting them to return totheir country would strengthen the enemy's forces. The third group, representing the majority of jurists, found that the State should decide, based on its best interests, between all of the above options (execution, enslavement, unilateral release, exchange for captured Muslim soldiers, or release within the Muslim State).

IHL provides detailed rules for the treatment of prisoners of war. They must be released and repatriated without delay after the cessation of active hostilities (GC III, Art. 118; CIHL, Rule 128), although some categories of prisoners of war may be repatriated or interned in a neutral country sooner, or otherwise released on parole or promise (GC III, Arts 21, 109 and 111).

Islamic regulations have the same underlying principles as IHL as concerns prisoners of war: they are interned not to punish them but to prevent them from further participating in hostilities; and they are to be treated humanely at all times. However, IHL specifically prohibits enslavement or execution of prisoners of war (GC I–IV, Common Art. 3; GC III, Art. 130; AP II, Art. 4(2)(f); CIHL, Rules 89 and 94).

Note that "prisoner of war" has a specific meaning in IHL (GC III, Art. 4 and AP I, Art. 44); separate rules govern the treatment of others deprived of their liberty in relation to armed conflict (GC IV, Arts 79–135; AP I, Arts 72–79; AP II, Arts 4–5; CIHL, Rules 118–128).

Conclusion

The uniqueness of Islamic lawis in its origins and sources, and its methods of creating and applying laws is very clear. Nevertheless, the similarities between IHL and Islamic laws of war suggest that these two legal traditions have the same objectives.

[65]Relevantly, those jurists who argued that it was permitted to execute prisoners of war based their conclusion on reports that three prisoners of war had been executed in the wars between the Muslims and their enemies during the Prophet's lifetime. Examination of the historical record, however, shows that if all or some of these reports were true, these three prisoners of war were singled out for crimes they had committed before joining the war

The above-mentioned principles of Islamic law regulating the use of force in armed conflict demonstrate that the legal literature produced by classical Muslim jurists was intended to humanize armed conflicts.