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***Jus in Bello* and General Principles Related to Warfare According to Islamic Law**

Abdelrahman Afifi*

5.1. Introduction

In some parts of the Muslim world, the level of knowledge about Islam is basic. This makes such communities vulnerable to misleading teaching by religious and political leaders. Vulnerability in turn may lead to political extremism; and I would argue, despite what many in the West might say, the suffering that results from wrongful, violent practices and erroneous or misleading religious beliefs held by some Muslims is most severe among Muslims themselves.¹ The purpose of this chapter is, therefore, not primarily analytical. Rather, it seeks to empower those grappling to dispel those misconceptions in societies damaged by extremism by citing traditional Islamic texts and exploring their existing interpretations by legal scholars alert to the importance of spatial and temporal context, underlining the very real synergy between Islamic law and contemporary international criminal law.

The attitude that underlies extremism wilfully ignores an important point: Muslims cannot find every answer to every query directly in the *Qur'ân* or the *Sunnah*, and that includes questions of law. Indeed, according to *fuqahah al-uşûl* (the specialists in principles of Islamic jurisprudence) only 250 verses of the *Qur'ân* from the total of 6,632 are related to legal questions. From these verses, however, the *fuqahah al-uşûl* have extracted general rules and principles. From the second source, *Sunnah*,

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¹ M. Cherif Bassouini, *The Shari’ah and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, Cambridge, 2013, p. 1.

the *fuqahah al-uşûl* also extracted rules and principles from the authentic *ḥadīth*. These together establish the way revealed by God. But it is now the fundamental task of all scholars to work within these general rules to find solutions to particular legal problems, using all means possible. Rules are not created in a vacuum. They originate in a particular time and context and aim to regulate specific kinds of conduct. If a situation changes, rules need to change in such a way as to achieve the objective of regulating it; this idea is supported by the juristic principle that the ruling evolves with the effective cause.²

A legal framework to make this possible has existed within Islam since the tenth century, developed and enriched by the work of eminent scholars in the thirteenth and fourteenth centuries. It is a framework that allows Muslims to progress in their research and develop their skills in order to provide appropriate answers to the questions of their respective communities. It is grounded in the concept of *ijtihād*, a technical term of Islamic law that describes the process of making a legal decision by independent interpretation of the legal sources, the *Qur'ān* and the *Sunnah*. The principal function of *ijtihād* is to maintain fidelity to the principles identified by the *fuqahah al-uşûl* while formulating specific rules adapted to the historical and geographical context.

The opposite of *ijtihād* is *taqlīd*, the Arabic word for 'imitation'. For centuries, many dominant Muslim scholars have followed the path of blind *taqlīd* conformity. This has seriously disabled their capacity to re-discover the authentic and dynamic message contained in the *Qur'ān* and *Sunnah*.³ This failure to actively follow *ijtihād* has had the disturbing effect of moving people further away from the sources of *Shari'ah*. The tide of *taqlīd* has carried some so far as to say that there is no further need to interpret the *Qur'ān* and *ḥadīth*, and that the door of *ijtihād* is now closed.⁴ It is a disturbing prospect, as Muhammed Abú Zahrah notes:

² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Pelanduk Publications, Selangor, 1989, p. 120.

³ Tariq Ramadan, *Etre musulman Européen: Etude des sources islamiques islamique à la lumière du contexte européen*, Tawhid, 1999, p. 82.

⁴ Wael B. Hallaq, "Was the Gate of Ijtihad Closed?", in *International Journal of Middle East Studies*, 1984, vol. 16, pp. 3–4; Bernard G. Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad", in *American Journal of Comparative Law*, 1978, vol. 26, pp. 199–212.

“Nothing is further from the truth – and we seek refuge in God from such excesses”.⁵

This study is an attempt to clear some ground around a particular legal principle, that of *jus in bello*, the rules relating to the conduct of war. It asks: “What are the rules stipulated in the Islamic law in relation to the conduct of Muslims in war? How should Muslims behave? How can Muslims integrate the modern rules into Islamic law?”. These questions seem to me to be paramount for two reasons. Firstly, as many scholars of Islamic law point out, classical Muslim jurists paid the greatest part of their attention to the Islamic *jus in bello* (rules regulating the conduct of war)⁶ and far less to the Islamic *jus ad bellum* (justification for resorting to war).⁷ Secondly, there is a particular problem in terms of Western understanding of the term *jihād*. This word literally means ‘struggle or effort’. It can refer to internal psychological struggle or to the effort to build a just society, as well as armed struggle to protect Islam. Regrettably, *jihād* is often understood in Western literature as a holy war to convert non-Muslims by the sword or as a war to universalise the rule of Islam.⁸ Even a brief glance at Muslim scholarship around *jus in bello* will indicate that the strict prohibition against targeting clergy on the one hand, and the protection granted to non-Muslim enemy combatants on the other hand, disprove any claim that *jihād* is a holy war to convert by force or to kill infidels.⁹ However, more detail is necessary to dispel the deep roots of this misunderstanding.

In modern times, no one could dispute the fact that international humanitarian law, including the rules related to war, contains a level of

⁵ Muḥammad Abū Zahrah, *Uṣūl Al-Fiqh*, Dār Al-Fikr Al-‘Arabi, Beirut. 2003, p. 318.

⁶ Rudolph Peters, *Jihad in Classical and Modern Islam: A Reader (Princeton Series on the Middle East)*, Markus Wiener Publishers, Princeton, 1996, p. 119.

⁷ See Sohail Hashmi, “Saving and Taking life in War”, in Jonathan E. Brockopp (ed.), *Islamic Ethics of Life: Abortion, War and Euthanasia*, University of South Carolina Press, Columbia, 2003, p. 158; Elisabeth Kendall and Ewan Stein (eds.), *Twenty-first Century Jihad: Law, Society and Military Action*, I. B. Tauris, 2015; Asma Afsaruddin, *Striving in the Path of God: Jihād and Martyrdom in Islamic Thought*, Oxford University Press, Oxford, 2013.

⁸ Lester Sumrall, *Jihad: The Holy War, Timebomb in the Middle East*, Sumrall Publishing, 2002.

⁹ M. Cherif Bassiouni, “Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence”, in *Chicago Journal of International Law*, 2007, vol. 8, no. 1, pp. 119–46.

detail not found in the Islamic laws. This is because the means used in war in the past have completely changed, necessitating the creation of rules and principles to adapt to the new concepts of war. This study will demonstrate areas in historic Islamic law where there are considerable opportunities for adaptation, harmonisation, and the integration of international rules. It will go back to first principles, established at the time of the Prophet Muḥammad and his companions, and will also explore the principle of *jus in bello* from the perspective of *siyāsah al-Sharī'ah* (*Sharī'ah*-oriented policy) and *maqāṣid al-Sharī'ah* (objectives of *Sharī'ah*).

It is here worth noting too that when it refers to *fuqahah al-uṣūl* (the specialists in principles of Islamic jurisprudence) it refers also to the sources of Islamic law highlighted in this study and in particular to the concept of *al-maṣlaḥah* (public good or public interest) in order to integrate the international rules related to warfare into the Islamic system.

Before debating *jus in bello*, it is important to provide a general idea about the meaning of *Sharī'ah*, Islamic jurisprudence (*fiqh*) and primary sources of Islamic law.

5.2. General Definitions

5.2.1. Meaning of *Sharī'ah*

Sharī'ah refers to that which God ordained in the *Qur'ān* (and which is also reflected in the *Sunnah*); this includes, *inter alia*, general principles, guidance, prescriptions and proscriptions that define a Muslim and his or her relation with God, him- or herself, family, community, as well as the relation between the ruler and the people, and the nations in the international community.¹⁰

Islamic law refers to the legal discipline based on legislation, edicts of rules, *fiqh*, judicial interpretation, and valid *fatwās* (expert legal opinion). The issue to be explored here is the on-going struggle between progressive development and rigid adherence to *Sharī'ah* principles.

The 'Science of the Rules of *Fiqh*' means the accepted methodology of legal reasoning by means of which *fiqh* is developed.¹¹

¹⁰ Wael B. Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, 2009, p. 14.

¹¹ Kamali, p. 572, see *supra* note 2.

5.2.2. Primary Sources of Islamic Law

5.2.2.1. The *Qur'án*

The *Qur'án* is the holy book of Islam, containing the revelations delivered to the Prophet Muḥammad by the angel Gabriel over a period of about twenty-three years. The *Qur'án* is, for Muslims, the word of God and comprises legislative proscriptions and rulings as well as spiritual guidance. It also constitutes the source of all law and legal obligation. The *Qur'án* consists of 114 chapters, which contain 6,236 verses.¹² It is the highest source of law, supreme over all other legal sources or evidence.

5.2.2.2. The *Sunnah*

The *Sunnah* refers to the deeds and practices of the Prophet. Many of the fundamental obligations of the *Qur'án*, such as the performing the prayer, paying *zakáh* (religious taxes), or performing the *hajj* (pilgrimage) could not possibly have been put into practice unless there were some practical demonstrations of how to do so. The obvious model was of course the Prophet. The *ḥadīth* comprises the narratives passed on from generation to generation about a particular occurrence. The *Sunnah*, the rule of law deduced from such *ḥadīth*, is the practice of the Prophet, his 'model behaviour'. In order to ensure a certain authenticity, each *ḥadīth* was traced through the chain of recognised narrators, back to the original tradition.¹³ There are also subsidiary sources of Islamic law to which scholars might refer, such as *ijmá'* (consensus among Islamic scholars)¹⁴ and *qiyás* (analogy).¹⁵

5.2.3. 'Legal Maxims' (*Al-Qawá'id Al-Fiqhiyyah*)

'Legal maxims' (*al-qawá'id al-fiqhiyyah*) is a term applied to a particular science in Islamic jurisprudence. Islamic legal maxims are theoretical abstractions, usually in the form of short epithetic statements expressive of the nature and sources of Islamic law. They encompass general rules in

¹² Sheikh Wahbeh Al-Zuhili, *Úṣūl Al-Fiqh Al-Islamí*, Dār Al-Fikr, Beirut, 1986, p. 420.

¹³ Kamali, 2003, p. 48, see *supra* note 2.

¹⁴ Wael B. Hallaq, in "On the Authoritativeness of Sunni Consensus", in *International Journal of Middle East Studies*, 1986, vol. 18, pp. 427–54; Al-Zuhili, p. 481, see *supra* note 12.

¹⁵ Wael B. Hallaq, *A History of Islamic Legal Theories*, Cambridge University Press, Cambridge, 1997; Wael B. Hallaq, "Non-Analogical Arguments in Sunnī Juridical Qiyas", in *Arabica*, 1989, vol. 36, no. 3, pp. 286–306; Al-Zuhili, 1986, p. 600, see *supra* note 12.

cases that fall under their subject. They are different from *uṣūl al-fiqh* (fundamental guiding principles of Islamic jurisprudence) in that they are based on the *fiqh* itself and represent rules and principles derived from the reading of the detailed rules of *fiqh* on various themes. One of the main functions of the Islamic legal maxims is to depict the general picture of goals and objectives of Islamic law (*maqāṣid al-Sharī'ah*).

The five generally agreed-upon maxims are as follows: (i) *al-umūr bi-maqāṣidhā*¹⁶ ('acts are judged by their objectives and purposes'); (ii) *al-yaqīn lā yazālu bi'l-shak* ('certainty is not overruled by doubt'); (iii) *al-mashaqqatu tajlib al-taysīr* ('hardship begets ease'); (iv) *al-ḍararu yuzāl* ('hardship must be removed'); (v) *al-'ādatu muḥakkamatun* ('custom overrides where there is no provision'); and (vi), *lā ḍarar wā-lā dirār* ('injury/harm shall not be inflicted or reciprocated').¹⁷

5.2.4. *Siyāsah Al-Sharī'ah* and *Maqāṣid Al-Sharī'ah*

The objective of *siyāsah al-Sharī'ah* might be included to carry out the *maqāṣid al-Sharī'ah*, the objectives of *Sharī'ah*, in protecting five human interests, namely freedom of faith, life, mind or reason, lineage and honour, and property. These five essential interests must be protected because their neglect will lead to disorder. Although the classical concept of *siyāsah al-Sharī'ah* relates to the administration of the State, I would argue that this could be extended to describe an international humanitarian organisation that has an international legal personality. This extension is necessary because of the importance of protecting the five essential human interests.

5.2.5. *Asbāb Al-Nuzūl*

Finally, in order to understand the *Qur'ān*, Muslims should have knowledge about several disciplines in order to be able to understand the

¹⁶ In *Sharī'ah*, one of the basic legal maxims agreed upon by Muslim scholars is *al-umūr bi-maqāṣidhā*, which implies that any action, whether physical or verbal, should be considered and judged according to the intention of the doer. The first element of the maxim, *umūr* (plural for *amr*), is literally translated as a matter, issue, act, physical or verbal. The second word is *al-maqāṣid* (plural of *maqṣad*), which literally means willing, the determination to do something for a purpose. Thus, for an act to be punishable, the intention of the perpetrator has to be established.

¹⁷ Lukman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications*, Brill, Leiden, 2015, p. 235.

text itself. This would include *asbáb al-nuzúl* (causes of revelations) as many verses were revealed in response to particular incidents or questions directed to the Prophet. There should in principle be no conflict between the *Qur'án* and the authentic *Sunnah*. If, however, a conflict is seen to exist, they must be reconciled as far as possible and both should be retained. If this is not possible, the *Sunnah* in question is likely to be of doubtful authenticity and must therefore give way to the *Qur'án*.¹⁸

Understanding the *Qur'án*, *ḥadīth*, *al-qawá'id al-fiqhiyyah*, and *maqásid al-Sharí'ah*, will enable scholars to find new rules for emergent issues.

5.3. General Principles Governing Warfare under Islamic Law

There are many principles in Islamic law in relation to the conduct of Muslims in war. Four central principles can be highlighted: non-aggression, proportionality, justice, and amnesty. In the following, each principle will be addressed in turn.

5.3.1. Non-Aggression

Under Islamic rules, aggression against others, whether individual or collective, is strictly prohibited as a general principle. The *Qur'ánic* text at 2:190–191 generally discloses that there ought to be no transgression except against polytheists and the wrong doers. Numerous other verses underscore the *Qur'án's* general attitude towards aggression and violence, including, “And if they incline to peace, do thou incline to it; and put thy trust in God; He is the All-hearing, the All-knowing”.¹⁹

In a message to the leader of his armies, Sa'd Ibn Abí Waqas, Omar Ibn Al-Kha'áb²⁰ said:²¹

I order you and those accompanying you to be most careful about committing offences against your enemies, as the sins of the army are more fearful than their enemy. Muslims win because of their foe's disobedience to God; had it not been for this, we wouldn't have power over them, because their

¹⁸ Kamali, 2003, p. 61, see *supra* note 2.

¹⁹ *Ibid.*, 8:61.

²⁰ Omar I, Second *Caliph* of Islam (634–644).

²¹ Jamal Ayyad, *Nuzum Al-Ḥarb Fí Al-Islamí* [Statutes of War in Islam], Maktabat Al-Khangī, Cairo, 1951, p. 43.

numbers surpass ours, they are better equipped than we are. Hence, if we are equal in wrongdoing, they would be superior to us.

Jihād is lawful in Islam if necessary to suppress aggression. It was prescribed in the second year of the *Hijrah*,²² after Muslims had borne for fourteen years the harm done to them by the pagans of Mecca: “Leave is given to those who fight because they were wronged – surely God is able to help them”.²³ The prevalence of Islam as a religion was not the motive for warfare in *jihād*, nor was its purpose to subordinate others and compel them to convert to Islam. Islam was not spread by the sword. Compulsory conversion to Islam did not occur in the history of Islamic preaching, as underscored by God’s words: “No compulsion is there in religion. Rectitude has become clear from error [...]”.²⁴

There are three kinds of circumstances that legitimise warfare in Islam, namely:

1. aggression against Muslims: God the Almighty says: “Leave is given to those who fight because they were wronged – surely God is able to help them [...]”;²⁵
2. assistance for the victims of injustice: God the Almighty says: “How is it with you, that you do not fight in the way of God, and for the men, women, and children who, being abased, say ‘Our Lord, bring us forth from this city whose people are evildoers, and appoint to us a protector from Thee, and appoint to us from Thee a helper’?”,²⁶
3. self-defence: God the Almighty says: “And fight in the way of God with those who fight with you, but aggress not: God loves not the aggressors”.²⁷

²² The *Hijrah* is the emigration of the Prophet from Mecca to Medina in AD 622 (that is, year 1 of the *Hijrah*, the first year of the Muslim Era).

²³ The *Qur’án*, 22:39–40, see *supra* note 19.

²⁴ *Ibid.*, 2:256.

²⁵ *Ibid.*, 22:39.

²⁶ *Ibid.*, 4:75.

²⁷ *Ibid.*, 2:190.

Islamic rules establish a strict balance between military necessity and respect for human life, in a manner that gives primacy to saving the lives of non-combatants.

5.3.2. Proportionality

The principle of proportionality is reflected in many of the verses of the Holy *Qur'án* previously cited, such as the following:

1. “And fight in the way of God with those who fight with you, but aggress not: God loves not the aggressors”;²⁸
2. “And if you chastise, chastise even as you have been chastised; and yet assuredly if you are patient, better it is for those patient”;²⁹
3. “[T]he recompense of evil is evil the like of it; but whoso pardons and puts things right, his wage falls upon God; surely He loves not the evildoers”;³⁰ and
4. “O believers, prescribed for you is retaliation, touching the slain; freeman for freeman, slave for slave, female for female. But if aught is pardoned by his brother, let the pursuing be honourable, and let the payment be with kindness. That is a lightening granted you by your Lord, and a mercy; and for those who commit aggression after that – for him there awaits a painful chastisement”.³¹

5.3.3. Justice

Justice is one of the main essential principles. Almighty God says: “Surely God bids to justice and good-doing”;³² and also, “O believers, be you securers of justice, witnesses for God. Let not detestation for a people move you not to be equitable; be equitable – that is nearer to godfearing. And fear God; surely God is aware of the things you do”.³³ The Divine

²⁸ *Ibid.*, 2:190.

²⁹ *Ibid.*, 16:126.

³⁰ *Ibid.*, 42:40.

³¹ *Ibid.*, 2:178.

³² *Ibid.*, 16:90.

³³ *Ibid.*, 5:8.

Saying related by the Prophet enjoins, “O My subjects! I forbade injustice to myself, and forbade it among you. Do not do others injustice”.³⁴

One of the rare examples of justice in dealing with other nations described in the *Qur’án* is the story of the Samarkand people. They had complained to the Omayyad *Caliph* Omar Ibn Abdul Azíz (717–720) about the Muslim commander Qutayba’s injustice and discrimination when he conquered their country without any prior warning. Omar sent his judge to settle the matter. His decision was that Arabs had to withdraw from the conquered territory and to go back to their camps, unless a new conciliation pact was concluded or a conquest took place after due warning.³⁵

5.3.4. Amnesty

Islam prescribes tolerance, mercy and the granting of amnesty when dealing with one’s opponents and even enemies, in accordance with the nature of the Islamic Message described by Almighty God addressing the Prophet in these words: “We have not sent thee [Prophet Muḥammad], save as a mercy unto all beings”.³⁶

These principles should be the guidelines for analysing Islamic rules on how Muslim combatants should behave during war. Observation of these principles means an attitude of submission to Islam. Consequently, infringement of them corresponds to transgression against Islam.

5.4. *Jus in Bello* and Islamic Law

International humanitarian law is synonymous with *jus in bello*;³⁷ it seeks to minimise suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible.

There are some important rules in Islamic law related to *jus in bello*; they outline the manner in which Muslim combatants must conduct themselves during an armed conflict. Islamic rules as to the methods, means,

³⁴ Related by Muslim Ibn Al-Hajjaj (according to Abú *D*har Al-*G*haffary), in his *Sahih* (The Genuine).

³⁵ Sheikh Wahbeh Al-Zuhili, “Islam and International Law”, in *International Review of the Red Cross*, 2005, vol. 87, p. 274.

³⁶ The *Qur’án*, 21:107, see *supra* note 19.

³⁷ See International Committee of the Red Cross (‘ICRC’), “What are *jus ad bellum* and *jus in bello*?”, 22 January 2015.

and permissible targets correspond to some degree to the *jus in bello* principles in that both are based on the pillars of proportionality and discrimination.³⁸ There are many other issues related to *jus in bello* in which it is important to understand some of the rules set by Islamic law. Understanding these issues is relevant when discussing contemporary issues, such as targeting non-combatants and killing civilians.

In formulating these rules, the jurists resorted first to the *Qur'án*, and second to the traditions of the Prophet and the practice of the Prophet's companions. They took into consideration two principles: on the one hand the sanctity of life, and on the other hand military necessity.

Because it is based on the *Qur'án*, Islamic law similarly embodies humanitarian principles applicable in warfare: the necessity to exercise patience,³⁹ restraint,⁴⁰ compassion,⁴¹ and justice⁴² towards fellow human beings, who are considered part of the same family, descended from a single person.⁴³

5.4.1. Categories of Enemy Non-Combatant Not to be Targeted

Several *ḥadīth* of the Prophet prohibit targeting very specific categories of enemy non-combatants, namely women, children, the elderly, and the clergy. A non-combatant, who is not taking part in warfare, whether by action, opinion, planning or supplies, must not be attacked.⁴⁴

³⁸ Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook", in Hisham M. Ramadan (ed.), *Understanding Islamic Law: from Classical to Contemporary*, Altamira Press, Oxford, 2006, p. 65.

³⁹ The *Qur'án*, 16:126–127, see *supra* note 19.

⁴⁰ *Ibid.*, 16:128.

⁴¹ *Ibid.*, 5:32.

⁴² *Ibid.*, 16:90.

⁴³ *Ibid.*, 4:1.

⁴⁴ Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubrá*, Turath for Solutions, 2013, *ḥadīths* 17932, 17933, 17934, 17935, 17936, 17937, 2613 and 2614; Sulaymán Ibn Al-Ash'ath Abú Dáwūd, *Sunan Abi Dáwūd*, Dar Us-Salám Publications, 2008, *ḥadīths* 2608 and 2663. See also Mohammad Abú Nimer, "A Framework for Nonviolence and Peace-building in Islam", in *Journal of Law and Religion*, 2000–2001, vol. 15, pp. 217–65; Ali Ahmad, "The Role of Islamic Law in the Contemporary World Order", in *Journal of Islamic Law and Culture*, 2001, vol. 6, pp. 157–72.

5.4.1.1. Women and Children

Muslim jurists unanimously agree that it is impermissible to target women and children in war.⁴⁵ They classify anyone who has not reached puberty or is under the age of fifteen as a child, and thus the beneficiary of non-combatant immunity.⁴⁶ Jurists deduce this age limit from *ḥadīth* that show that the Prophet refused to accept some Muslim male volunteers aged fourteen at the battles of Badr (March 624) and Uhud (March 625). He accepted them only when they reached the age of fifteen.⁴⁷

The jurists justified not targeting women and children because women and children are not fit for fighting.⁴⁸ Some jurists further justified this prohibition by the principle of *al-maṣlaḥah* as women and children could be exchanged for Muslims prisoners or for ransom.⁴⁹ However, jurists deferred cases when women and children took part in hostilities. Some jurists advocate that if a woman attacks a man, it is permissible for him to kill her, although only in a situation of self-defence.⁵⁰ They deduce the wisdom of this prohibition from the incident when a woman was killed in the battle of Hunayn (630). When the Prophet found her killed in the battlefield, he stated that she was not the one who would initially have fought. When the

⁴⁵ Muḥammad Ibn Idris Al-Shāfi'ī, *Al-Qum*, vol. 4, Dār Al-Ma'rifa, Beirut, 1973, p. 240.

⁴⁶ See Maryam Elahi, "The Rights of the Child under Islamic Law: Prohibition of the Child Soldier", in *Columbian Human Rights Law Review*, 1988, vol. 19, pp. 265–79.

⁴⁷ Muhi Al-Dīn Ibn Ashraf Al-Nawawī, *Al-Majmu: Sharh Al-Muḥadḍḥab*, Dār Al-Fikr, Beirut, 2000, vol. 21, p. 20.

⁴⁸ Muḥammad Al-Ghazālī, *Al-Wasit Fi Al-Madḥḥab*, Dār Al-Salām, Cairo 1997, vol. 7, p. 19, cited in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, Basingstoke, 2011; Ibn Qudāma, "Al-Mughnī", in Sayed S. Haneef, *Homicide in Islam: Legal Structure and the Evidence Requirements*, A.S. Nordeen, Kuala Lumpur, 2000; Ahmad Z. Yamani, "Humanitarian International Law: A General Outlook", in *Michigan Yearbook of International Legal Studies*, 1985, vol. 7, pp. 189–215.

⁴⁹ Muḥammad Al-Ghazālī, *Al-Wasit*, vol. 7, p. 19, cited in Al-Dawoody, 2011, see *supra* note 48.

⁵⁰ Muhammed Ibn Al-Hassan Al-Shaybānī, *As-Siyar Al-Kabir*, Matba'at Jami'at, Cairo, 1958, vol. 4, p. 1416; Mohamed A. Dayem and Fatima Ayub, "In The Path of Allah: Evolving Interpretations of Jihad and Its Challenges", in *UCLA Journal of Islamic & Near Eastern Law*, 2008, vol. 7, pp. 67–120; Ahmad Z. Yamani, "Humanitarian International Law: A General Outlook", in *Michigan Yearbook of International Legal Studies*, 1985, vol. 7, pp. 189–215; Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", in *Recueil des Cours*, 1966, vol. 117, pp. 205–328.

Prophet questioned the man who killed her, the man replied that he had killed her because she tried to snatch his sword in order to kill him.⁵¹

5.4.1.2. The Elderly

Most jurists prohibit targeting the elderly. However, they agree that if the elderly support the enemy in planning war operations, they can be targeted during the war.⁵² The jurists based this ruling on the incident of the killing of Durayd Ibn Al-Summah, who was brought to the battlefield to plan operations for the battle of Hunayn, even though he was over one hundred years of age.⁵³ Since the Prophet knew about the killing and did not condemn it, the jurist deduced that it was permissible to target the aged in such cases.⁵⁴

5.4.1.3. The Blind, the Sick and the Incapacitated

The jurists are in agreement that it is impermissible for a Muslim army to target the blind, the sick, the incapacitated, and the insane, unless they are still physically able to fight or to support the enemy.⁵⁵ There is no Qur'anic proscription or precedent set by the Prophet in this matter; it is therefore for the jurists to decide whether it is permissible to target specific individuals in this situation on the basis of the harm they can cause to a Muslim army.

5.4.1.4. The Clergy

The jurists unanimously grant non-combatant immunity to all hermits. This prohibition is based on the Prophet's commands and also on his ten commands to Yazid Ibn Sufyan, an army leader. Abú Bakr reiterated the

⁵¹ Abdrazizq Ibn Hammam Al-Sanani, *Al-Mousanaf*, vol. 5, Al-Maktab Al-Islami, Beirut, 1982, *hadith* 9383, p. 201.

⁵² Ahmed Abou-El-Wafa, *Islam and The West: Coexistence or Clash?*, Dar An-Nahda, Cairo, 2006, pp. 263–78.

⁵³ Muḥammad Ibn Ali Muḥammad Al-Shawkani, *Nayl Al-Awtar*, Dār Al-Jalil, Beirut, 1973, vol. 8, p. 73.

⁵⁴ Muḥammad Ibn Ali Muḥammad Al-Shawkani, *As-Sayl Al-Jarrar Al-Mutadaffiq 'Ala Hadá'iq Al-Azhar*, Beirut, 1984, vol. 4, p. 533; Anke I. Bouzanita, "The *Siyar*: An Islamic Law of Nations", in *Asian Journal of Social Sciences*, 2007, vol. 35, pp. 17–46.

⁵⁵ Ala Al-Dín Al-Kasani, *Badá'i' al Ṣaná'i' fī Tartīb As-Sará'i'*, Dār Al-Kutub Al-Arabi, Beirut, 1982, vol. 7, p. 101. See also Dayem and Ayub, 2008, pp. 67–120, see *supra* note 50.

Prophet's prohibition against targeting hermits.⁵⁶ However, jurists agree that if hermits support the army of the enemy they can be fought.⁵⁷

5.4.2. Further Prohibitions and Rules of Conduct in War

5.4.2.1. Mutilation

The Prophet would brief his soldiers on their responsibilities, instructing them thus: "Do not handcuff or tie up the prisoners. Do not mutilate. Do not kill the wounded. Do not pursue one retreating or one who throws down his weapon. Do not kill the old, the young or their women. Do not cut down trees, unless you are forced to do so. Do not deploy poison in lands. Do not cut off the water supply".⁵⁸ At the battle of Uhud, the bodies of many Muslims, including the Prophet's uncle, were horrifyingly mutilated; the Prophet and other Muslims vowed to mutilate the enemies' bodies if they had the chance. The Prophet exclaimed: "If God gives him power over Quraysh, he will mutilate thirty or seventy of their men in the next confrontation".⁵⁹ Yet soon afterwards, the Prophet received a revelation that indisputably prohibited disproportionate violence in the delivery of punishment and commended patience towards the enemy:⁶⁰ "And if you chastise, chastise even as you have been chastised; and yet assuredly if you are patient, better it is for those patient".⁶¹ Following the Qur'anic revelation,⁶² as maintained by the majority of exegetes and jurists, the Prophet prohibited mutilation.⁶³

Abú Bakr and Umar Ibn Al-Kha'ab passed the instruction of the Prophet to their armies. Abú Bakr wrote to one of his governors in Hadramawt in Yemen: "Beware of mutilation, because it is a sin and disgusting act".

⁵⁶ Málík Ibn Anas, *Muwatta', ḥadīth* 965.

⁵⁷ Ahmed Ibn Taymiyyah, *Majmú' Fatáwa Shaykh Al-Islami Ibn Taymiyya*, Cairo, vol. 28, p. 660.

⁵⁸ Majid Khadduri, *War and Peace in the Law of Islam*, Johns Hopkins Press, Baltimore, 1955, p. 106.

⁵⁹ Mahmoud Ayoub, *Quran and its Interpreter*, State University of New York Press, Albany, 1992, p. 369.

⁶⁰ Yadh Ben Achour. "Islam and International Humanitarian Law", in *International Review of the Red Cross*, 1980, vol. 20, pp. 64–65. See also, *ibid*.

⁶¹ The *Qur'an*, 16:126, see *supra* note 19.

⁶² *Ibid.*, 16:126; 16:128.

⁶³ Málík Ibn Anas, *Muwatta' Al-Imám Málík*, Dár Al-Fikr, Beirut, vol. 2, p. 447, *ḥadīth* 966.

According to a *ḥadīth* reported by Abú Hurayrah, the Prophet instructed Muslims to avoid the enemy's face during the fighting.⁶⁴ In fact, the Prophet even prohibited the torture and mutilation of animals. According to *ḥadīth*, when the Prophet once passed a group of people shooting arrows at a sheep, he disliked their action and added to the text, "do not mutilate animals".⁶⁵

At end of the fighting, the bodies of enemy fighters should be handed over to the enemy if they require it; otherwise, Muslims are to bury them. According to several reports, the Prophet always ensured the burial of the dead, irrespective of whether the bodies belonged to the Muslims or their enemy. It was obligatory for Muslims to bury enemy dead bodies.⁶⁶

5.4.2.2. Property Destruction

The classical jurists debated the issue of destruction of the enemy property during the course of fighting. They based their discussion on two reports. The first of these was the Prophet's order for Muslims to cut down the palm trees of the tribe of Banu Al-Nadir in 625; according to the Qur'anic reference to this incident,⁶⁷ the Prophet gave this order to force Al-Nadir to surrender during a bloodless siege. The second report is related to Abú Bakr's ten commands to his army commander, which included: do not destroy buildings, do not slaughter sheep or a camel except for food, do not burn or chop down palm trees.⁶⁸ The jurists tried to reconcile the two reports by saying that it is forbidden for the Muslim army to impose destruction on enemy property and that Abú Bakr gave these instructions based on his knowledge that the Prophet's order to cut down the palm tree was later abrogated.⁶⁹ Some jurists prefer to say that the Muslim army may impose damage on the lifeless property of the enemy only when the enemy is powerful.⁷⁰ The majority of the jurists agree that it is permitted to kill horses or other animals when the enemy are fighting while riding them,

⁶⁴ Mahmassani, 1966, p. 303, see *supra* note 51.

⁶⁵ Al-Dawoody, 2011, p. 120, see *supra* note 48.

⁶⁶ Ali Ibn Ahmed Ibn Hazm, *Al-Mouhalla*, Dār Al-Afaq Al-Jadida, Beirut, vol. 5, p. 117.

⁶⁷ The *Qur'án*, 59:5, see *supra* note 19.

⁶⁸ Karima Bennouna, "As-Salámu Alaykum? Humanitarian Law in Islamic Jurisprudence", in *Michigan Journal of International Law*, 1994, vol. 15, p. 626.

⁶⁹ Khadduri, 1955, p. 103, see *supra* note 59.

⁷⁰ Mohamed Ibn Idris Al-Sháfi'i, *Al-Umm*, Dār Al-Ma'rifa, Beirut, vol. 4, p. 257.

because the horse was used as military equipment.⁷¹ All religious sites are immune from attack.⁷²

5.4.2.3. Prisoners of War

Qur'anic revelation directly addresses the subject of prisoners of war and commands Muslims to "set them free, either by grace or ransom".⁷³ Muslims are obliged after the end of fighting to free their prisoners of war, either freely, or in exchange for Muslim prisoners of war or ransom.⁷⁴

When the Prophet divided the prisoners of war taken at the battle of Badr to be housed with the Companions, he instructed them to "observe very good treatment towards prisoners". Some prisoners narrate the treatment they received during captivity: "[T]he Muslim captors ate their morning and evening meals; they gave me the bread and ate the dates themselves".⁷⁵ This humane treatment was described in the *Qur'án* as follows: "[T]hey give food, for the love of Him, to the needy, the orphan, the captive".⁷⁶

Prisoners should be protected from the heat, cold, hunger, thirst and any kind of torture.⁷⁷ Muslim scholars agreed with regard to the illegality of inflicting degrading or inhumane treatment on enemy prisoners.⁷⁸ Under Islamic rules, prisoners should be granted humane treatment, which is "comparable to an act of charity".⁷⁹

⁷¹ *Ibid.*, p. 244.

⁷² Bedjaoui Mohamed, "The Gulf War of 1980–1988 and the Islamic Conception of International Law", in Iger F. Dekker and Harry H.G. Post (eds.), *The Gulf War of 1980–1988: The Iran-Iraq War in International Legal Perspective*, Nederlands Instituut voor Sociaal en Economisch Recht, The Hague, 1992, p. 289.

⁷³ The *Qur'án*, 47:4, see *supra* note 19.

⁷⁴ Lena Salaymeh, "Early Islamic Legal Historical Precedents: Prisoners of War", in *Law and History Review*, 2008, vol. 26, pp. 521–44.

⁷⁵ Muḥammad Hamidullah, *Muslim Conduct of State*, 4th ed., Ashraf Press, Lahore, 1961, p. 214.

⁷⁶ The *Qur'án*, 76:8, see *supra* note 19; Saleem Marsoof, "Islam and International Humanitarian Law", in *Sri Lanka Journal of International Law*, 2003, vol. 15, pp. 23–28.

⁷⁷ Hamidullah, 1961, p. 214, see *supra* note 75.

⁷⁸ Yadh Ben Ashoor, "Islam and International Humanitarian Law", in *International Review of the Red Cross*, 1980, vol. 20, p. 64.

⁷⁹ Said El-Dakkak, "International Humanitarian Law Between the Islamic Concept and Positive Interactional Law", in *International Review of the Red Cross*, 1990, vol. 275, p. 110.

At the battle of Badr, the Prophet Muḥammad is said to have recommended goodwill and fair treatment towards prisoners to his fellow fighters.⁸⁰ He ordered that prisoners of war who had been fighting under the heat of the sun be safeguarded from further suffering. They should not experience the heat of the day in addition to the heat of their weapons.⁸¹ Jurists commonly agree that it is prohibited to execute enemy hostages. This prohibition is based on the Qur'ānic instruction: "No person earns any sin except against himself only, and no bearer of burdens shall bear the burden of another".⁸² Jurists also agree that, in captivity, members of the same family should not be separated.⁸³

5.4.3. 'I Give You Ten Rules': Specific Orders for Conduct in War

Muslims are obliged to abide unilaterally by these rules of warfare; irrespective of the enemy's conduct, the obligation is not owed to human beings but to God alone. Abú Bakr reiterated several commandments, inspired by Prophetic Guidance, to his commander Yazid Ibn Abí Sufyan:⁸⁴

Stop, O People, that I may give you ten rules for your guidance, in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people', who had devoted their lives to monastic services, leave them alone.

The practices of the orthodox *Caliphs* serve as a good example to demonstrate the observance of humanity. Al-Shaybání, an eminent scholar, reports in his *Siyar*⁸⁵ that *Caliph* Abú Bakr condemned the practices of

⁸⁰ Yadh Ben Ashoor, 1980, see *supra* note 78.

⁸¹ *Ibid.*

⁸² The *Qur'án*, 6:164, see *supra* note 19.

⁸³ Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", in *The Muslim World*, 1997, vol. 87, p. 50.

⁸⁴ Muslim, *Sahih*, vol. 19, *ḥadīth* 4292.

⁸⁵ *Siyar* is the plural form of the Arabic word *sirah*, which is in turn derived from the verb *sara-yasiru* (to move). *Sirah* is a technical term in the Islamic sciences meaning the biography of the Prophet. Mohammad T. Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, Martinus Nijhoff Publishers, The Hague, 1968, pp. 34–35; Shaheen S. Ali, "Resurrecting *Siyar* through *Fatwás*?", in M. Cherif Bassiouni and Amna Guellali (eds.), *Jihad and its Challenges to International and Domestic Law*, The

mutilation, torture and drowning of combatants, whether in battle or as prisoners. Records indicate that he told the commander of his army:⁸⁶

You will find people who claim that they are safe because they stay inside the mosques. Let them be. [...] I give you ten orders: do not kill children, women or old people; [...] do not be tyrannical towards captives and do not put them in irons.

Ali, the fourth *Caliph* insisted that humanitarian principles be observed during his struggle against the Umayyad and at the battle of Siffin (657). During this first Muslim Civil War, Ali urged his soldiers to distinguish between enemy combatants and innocent civilians. In the battle of the Camel (656), Ali reportedly commanded his followers thus:⁸⁷

When you defeat them, do not kill their wounded, do not behead the prisoners, do not pursue those who return and retreat, do not enslave their women, do not mutilate their dead, do not uncover what is to remain covered, do not approach their property except what you find in their camp of weapons, beasts, male or female slaves: all the rest is to be inherited by their heirs according to the writ of God.

5.5. Conclusion

This chapter has not attempted to draw specific detailed analogies between individual Islamic rules of war and modern international humanitarian law. However, the Islamic principles outlined here are plainly not in contradiction with that law. Integrating the rules of international *jus in bello* into any Islamic system could be justified by the application of *siyāsah al-Sharī'ah* and *maqāsid al-Sharī'ah*;⁸⁸ it could equally be demonstrated that there is

Hague Academic Press, The Hague, 2010, p. 116; Bouzanita, 2007, p. 17–46, see *supra* note 54.

⁸⁶ El-Dakkak, 1990, p. 10, see *supra* note 79.

⁸⁷ Mohamed Hamidullah, *Muslim Conduct of State*, 5th ed., Ashraf Press, Lahore, 1968, p. 363; Hamid Sultan, “The Islamic Concept”, in *International Dimensions of Humanitarian Law*, Pedone, UNESCO, Paris/Henry Dunant Institute, Geneva, 1986, pp. 47–60.

⁸⁸ Mustafa Omar Mohammed and Omar Kachka, *Developing Al-Siyasah Al-Shariah Framework for Contemporary Public Policy Analysis*, Department of Economics & Center for Islamic Economics, Kulliyyah of Economics and Management Sciences, International Islamic University Malaysia, 2016; Abdul Wahhab *Khallaf*, *As-Siyasah Ash-Shar'iyah, Muassasah ar-Risalah*, Beirut, 1984, vol. 2; Lukman Thaib, “Concept of Political Authority in the Islamic Political Thought”, in *International Journal of Humanities and Social Science Invention*, 2012, vol. 1, no. 1, pp. 12–19; Al-Zuhili, 2005, p. 274, see *supra* note 35.

considerable basis for adaptation, harmonisation, and integration of contemporary international laws of conduct in wartime and historic Islamic law. However, to ignore the concept of *jus in bello* highlighted in this study, as some groups in the Muslim world have done, or to attribute to Islam acts of terrorism, or to justify violence as permissible in Islam, perverts the spirit and the letter of Islamic rules.

Adoption of international norms through the concept of *siyāsah al-Sharī'ah* and *maqāṣid al-Sharī'ah* is completely compatible with Islam and poses no doctrinal or legal issues. Historically, there has always been an intellectual and legal framework in Islam that is adaptable. Reluctance to provide appropriate responses to international law is due to the negligence of some Muslims with excessive attachment to *taqlīd*, and has absolutely nothing to do with Islam, whose teachings constantly encourage legal research and adaptation to the geographic and temporal context.

To stem the tide of *taqlīd*, Muslims, jurists, '*ulama*' and religious leaders should be united their efforts to re-study the Muslim heritage and seek points of synergy between Islamic law and contemporary international law. Likewise, the West should seek to engage with dynamic Islamic legal scholastic traditions. There are many fields in which Islamic law can easily be read in harmony with national and international rules. David A. Schwartz has argued: "The *Sharī'ah* provides a genuine, workable framework for countering international terrorism [...] the *Sharī'ah* is a resource the West must no longer overlook".⁸⁹ Western academe should welcome interventions from Islamic legal scholars, which can enable intellectual engagement between modern international humanitarian law and international criminal law within the spirit of the Muslim religion and vice-versa. Creative understanding of Islamic law in the modern world is vital.

Rather than simply teaching matters which occurred centuries ago, Muslims need to engage in a combined intellectual effort to rebuild the way they think. How to move forward is a priority for Islam. There should be a clear vision of what is absolute and immutable and what, on the contrary, is subject to change and adaptation, drawing on the traditions that this chapter has presented.⁹⁰

⁸⁹ David A. Schwartz, "International Terrorism and Islamic law", in *Columbia Journal of Transnational Law*, 1990, vol. 29, no. 3, p. 652.

⁹⁰ Tariq Ramadan, 1999, p. 177, see *supra* note 3.

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Islam and International Criminal Law and Justice

Tallyn Gray (editor)

Mindful of alleged and proven core international crimes committed within the mainly-Muslim world, this book explores international criminal law and justice in Islamic legal, social, philosophical and political contexts. Discussing how law and justice can operate across cultural and legal plurality, leading Muslim jurists and scholars emphasize parallels between civilizations and legal traditions, demonstrating how the Islamic 'legal family' finds common ground with international criminal law. The book analyses questions such as: How do Islamic legal traditions impact on state practice? What constitutes authority and legitimacy? Is international criminal law truly universal, or too Western to render this claim sustainable? Which challenges does mass violence in the Islamic world present to the theory and practice of Islamic law and international criminal law? What can be done to encourage mainly-Muslim states to join the International Criminal Court? Offering a way to contemplate law and justice in context, this volume shows that scholarship across 'legal families' is a two-way street that can enrich both traditions. The book is a rare resource for practitioners dealing with accountability for atrocity crimes, and academics interested in opening debates in legal scholarship across the Muslim and non-Muslim worlds.

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