

Islamic law and international humanitarian law: An introduction to the main principles

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Abstract

This article gives an overview of the principles regulating the use of force under the Islamic law of war in the four Sunni schools of Islamic law. By way of introducing the topic, it briefly discusses the origins, sources and characteristics of the Islamic law of war. The discussion reveals the degree of compatibility between these Islamic principles and the modern principles of international humanitarian law, and offers insights into how these Islamic principles can help in limiting the devastation and suffering caused by contemporary armed conflicts in Muslim contexts, particularly those conflicts in which Islamic law is invoked as the source of reference.

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Introduction

The effects of armed conflicts such as those currently raging in Syria and Yemen have been shown to spread beyond the Middle East region and reach over to the West. Moreover, their impact can in fact be greater on countries outside the region where the conflict is taking place than on those within it. What this shows, first of all, is that the impact of armed conflicts, including non-international armed conflicts (NIACs), is no longer local or regional, but global. Moreover, NIACs, especially those in the Middle East, can signal the outbreak of war on a regional or global scale, or at the very least cause severe damage to the world economy. In that regard, a reported 80% of the humanitarian crises currently afflicting mankind are attributable to armed conflicts.¹ On that basis, greater efforts are needed not only to enforce the provisions of international humanitarian law (IHL) but also to do everything possible to prevent the occurrence of armed conflicts in the first place, and then, once conflicts have ended, to take the necessary measures to ensure that post-conflict justice is carried out in order to prevent conflicts from re-igniting.

Respect for IHL in Muslim countries is one of the most pressing issues faced by our world today. This is because the majority of conflicts take place in Muslim countries, for reasons including historical and colonial factors and a deficit of good governance, which lead, among other consequences, to a lack of democracy and respect for human rights. It is widely acknowledged that respect for IHL is important because of its capacity to reduce the scale of destruction or to introduce a degree of humanity into situations of armed conflict, where acts of brutality, barbarity and destruction occur.

In addition, the vast majority of ongoing conflicts fall into the category of NIACs. Furthermore, in many of the conflicts that we are currently witnessing, parties to the conflict, usually non-State armed groups, justify their acts of hostility by referring to certain rules of the Islamic law of war developed by the Muslim jurists of the second and third centuries of the Islamic calendar (roughly equivalent to the eighth and ninth centuries AD) and certain opinions of Qur’anic exegetes and Hadith scholars. This is why it is especially important – as this article attempts – to study the primary sources on the Islamic law of war, because of the significant and tangible role it plays in influencing the behaviour of the warring parties who use its provisions to justify their acts of hostility. From an academic perspective, it can also be an interesting topic in its own right to

1 United Nations, “Secretary-General’s Opening Remarks at World Humanitarian Summit”, 23 May 2016, available at: www.un.org/sg/en/content/sg/statement/2016-05-23/secretary-general%E2%80%99s-opening-remarks-world-humanitarian-summit (all internet references were accessed in May 2018) .

research how the Islamic legal system can help to limit the devastation caused by armed conflicts and reduce the plight of victims, by comparing its provisions with those of contemporary IHL. On this topic, Loukas Petridis, head of the International Committee of the Red Cross (ICRC) delegation in Niger, said on 25 November 2015:

Given the increase in armed conflicts and violence, dialogue on these issues is more necessary than ever. We need to make more people aware of international humanitarian law and how it ties in with other standards, such as Islamic law and jurisprudence. This is about making sure that people have the widest possible protection.²

Moreover, in a meeting between Dr Ahmed al-Tayyeb (the Grand Imam of Al-Azhar, the highest religious authority in the Sunni world), Ronald Ofteringer (head of the ICRC delegation in Cairo) and the present author, Dr al-Tayyeb affirmed the role that Islamic institutions can play in enhancing protection for victims of armed conflict.³ To that end, this article sets out a brief overview of the principles regulating the use of force in armed conflict under Islamic law and discusses both the challenges in applying them and the extent to which they align with the modern principles of IHL, with a view to identifying how effective these Islamic principles can be in limiting the devastation and suffering caused by armed conflict.

Origins of the Islamic law of war

Over the course of history, most legal systems have devised rules to govern the use of armed force, stipulating both the legitimate reasons for war and the rules governing the conduct of hostilities. IHL does not specifically address the former of these two areas, regarding the justifications for resorting to armed force. This matter is covered by public international law under the Charter of the United Nations (UN), which prohibits the use of armed force except in self-defence or with authorization from the UN Security Council, as set out in Article 42 of the Charter. The function of IHL is to set rules and restrictions on the behaviour of combatants in both international and non-international armed conflicts, with a view to preventing or limiting the effects of armed conflict, minimizing the suffering of victims and protecting individuals who are either not taking part or have ceased their participation in the hostilities, as well as protecting movable and immovable property not being used in military operations. This branch of law is also known as the law of war or the law of armed conflict, but over recent decades it has

2 ICRC, “Niger: Seminar on Islamic Law and Humanitarianism”, news release, 25 November 2015, available at: www.icrc.org/en/document/niger-seminar-islamic-law-humanitarianism.

3 ICRC, “Egypt: Continuous Humanitarian Dialogue between the ICRC and Al-Azhar”, news release, 24 October 2017, available at: www.icrc.org/en/document/egypt-grand-imam-dr-ahmed-al-tayyeb-al-azhar-willing-support-humanitarians.

become more commonly known as international humanitarian law, emphasizing the humanitarian motives that underpin this newly developed branch of law.

The question is, has the Islamic legal system incorporated this comparatively recent branch of law? What is certain is that the classical Muslim jurists did not use this term to refer to armed conflict situations, nor did they use other modern-day terminology associated with IHL. Nonetheless, the provisions of Islamic law – as developed and documented by Muslim jurists since at least the second Islamic century (eighth century AD) – show unequivocally that many of the issues covered by IHL were addressed by the Muslim jurists in order 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. Before moving on to illustrate this point, at this stage it is worth referring to the sources and characteristics of the Islamic law of war before discussing the core principles regulating the use of force under Islamic law.

Sources of Islamic law

The sources of Islamic law are divided into two main groups: primary sources and secondary sources. Primary sources (also known as “agreed-upon” sources) include the Qur’an, the Sunnah (tradition) of the Prophet, *ijmā’* (legal literature representing consensus of opinion) and *qiyās* (rules of analogy developed via deductive reasoning). Secondary sources (also known as “disputed” sources) are a number of jurisprudential methods for developing Islamic laws which come in varying order of authority, including *istihsān* (juristic/public preference), *maṣlahah mursalah* (public interest), *urf* (custom), *shar’ man qablanā* (sharī’ahs of religions before Islam), *madhhab al-ṣaḥābī* (the opinions of the Companions of the Prophet), *sadd al-dharā’i’* (“blocking the means” – i.e., preventing the occurrence of something evil, though it also extends to include facilitating the occurrence of something good) and *istiṣhāb* (the continuation of the applicability of a rule that was accepted in the past, unless new evidence supports a change in its applicability).

The defining factor that differentiates Islamic law from most other legal systems is the fact that it includes rules on worship, beliefs and morality, as well as rules governing numerous other areas of life such as family law, financial transactions, criminal law, governance, and international relations in peacetime and wartime. Based on the religious aspects of Islamic law, some people mistakenly conclude that all provisions of Islamic law are unchangeable. In reality, however, while it is true that the rules on worship, creed and morality or unanimously agreed-upon rules are fixed and unchangeable, there are other provisions which may be changed, as long as this is done to achieve the objective of the legislator. As described by Ibn Qayyim al-Jawziyyah (d. 1350), serving the public interest is the objective of every single rule in Islam, because

sharī’ah is founded on the divine command and the public good of the people in this world and the next. It is all justice, all compassion, all public good, and all

wisdom. If any ruling changes justice into injustice, or mercy into its opposite, or the public good into corruption, or wisdom into folly, then it cannot be part of the *sharī‘ah*, even if an interpretation of the *sharī‘ah* is invoked, for *sharī‘ah* is God’s justice among His worshippers, and His mercy amongst His creation, and His shadow on his earth.⁴

This definitive statement by Ibn Qayyim al-Jawziyyah shows that the fundamental objective of Islamic law is to achieve justice and serve the public interest, always and everywhere.

Most Islamic law regulations on the use of force are derived from the Holy Qur’an and Sunnah, as well as the early historical precedents of the Islamic state⁵ since the seventh and eighth centuries, or what are known in the Ḥanafī school of law as the *siyar* (approach) – i.e., the ways and methods followed by the Islamic state in its dealings with non-Muslims in times of peace and war, specifically in the era of the Prophet Muhammad and the Rightly Guided Caliphs. The term *siyar* is also used by some Ḥanafī jurists to refer to the rules governing certain types of NIAC that occurred in the first half of the first Islamic century, such as what are known in Islamic jurisprudence as *qitāl al-bughāh* (fighting against rebels or secessionists) and *ḥurūb al-riddah* (wars of apostasy).⁶ Muslim jurists established legal limits on the use of force using those sources and their own *ijtihād* (reasoning or judgment in making laws), based on both the sources themselves and the above-mentioned tools such as *qiyās*, *maṣlaḥah mursalah* and *madhhab al-ṣaḥabī*. We can therefore conclude that these regulations were developed under a different model of international relations and in a specific context during the lifetime of the Prophet between 624 and 634 AD, in which military engagements were less brutal and deadly than those seen today.⁷

Characteristics of the Islamic law of war

Therefore, because of the uniqueness of its sources and contexts, the Islamic law of war is defined by the following characteristics: its religious dimension, the instinct of Muslims to comply with it out of a desire to obey God, its lack of consistent codification, and the specificity of its context and sources.

There is a religious dimension to the Islamic law of war in the sense that compliance with the Islamic regulations on the use of force is an act of worship which brings a Muslim soldier closer to God. This classical juristic endeavour for humanizing armed conflicts led to contradictory rulings because in deliberating these rulings individual jurists sometimes prioritized humanitarian concerns and

4 See Ṣubḥī al-Ṣāliḥ, *Ma‘ālim al-Sharī‘ah al-Islāmiyyah*, Dār al-‘Ilm lil-Malāyīn, Beirut, 1975, p. 62.

5 Editor’s note: For the purposes of this article, the term “the Islamic state” refers to the State founded by the Muslims during the seventh century.

6 See Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 10, Dār al-Ma‘rifah, Beirut, p. 2.

7 See Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, pp. 11–41.

at other times prioritized the military necessity of winning the war, even if this was in contravention of humanitarian principles.⁸

Respect for the Islamic regulations on the use of force was something that a Muslim instinctively complied with and imposed on himself through his desire to obey God, regardless of whether or not his enemy adhered to the same rules, rather than stemming from the obligation to comply with international conventions, as is the case in the modern age. This characteristic forms a strong basis for the argument that Islamic law has a great power to influence the conduct of the Muslim parties to conflicts that are currently under way, especially in the case of non-governmental combatants who claim to follow Islamic rules of armed conflict as their source of reference. Most of the attention of the Muslim jurists was directed towards drawing a distinction between those acts that were permissible and those that were non-permissible for a Muslim during a war, and as any scholar of Islamic law will find, the jurists painstakingly drew up jurisprudence governing the mandatory conduct of a Muslim soldier, taking into account both the need to comply with the above-mentioned sources and the necessity of winning the war. Many Western academics and experts in the Islamic just war theory have therefore noted that the classical Muslim jurists focused in great detail on the Islamic *jus in bello*, while neglecting the Islamic *jus ad bellum*.⁹

Given that the task of establishing these rules was carried out by independent, individual classical Muslim jurists, and the fact that the rules were neither codified by the Islamic state nor enshrined in signed agreements between the warring parties, it is only natural that many contradictory rules should arise, firstly as a result of varying interpretations of the texts from which the rules are derived, and secondly because of the variation in the priorities of the jurists, some of whom emphasized humanitarian concerns and compliance with the rules contained in the sources of Islamic law, and others for whom the need to win the war outweighed those concerns. This feature of Islamic law forms one of the main obstacles when it comes to humanizing armed conflicts in the modern era, as will be explained in greater depth later.

The philosophy and principles of IHL were not only developed in recent times; on the contrary, these concepts are as old as human civilization itself, having been recognized long ago by ancient cultures and religions. In his book *The Contemporary Law of Armed Conflict*, L. C. Green shows that Judaism and ancient Chinese, Indian and Greek civilizations developed some restraints that

8 As discussed below, the jurists gave conflicting rulings regarding the permissibility of, for example, targeting women, children or the aged if they engage in hostilities, and the use of certain means and methods of warfare.

9 Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Wiener, Princeton, NJ, 1996, p. 119; Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources", *The Muslim World*, Vol. 89, No. 2, 1999, p. 150; Khaled Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, No. 221, Winter 2001, p. 30; Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition and International Law", in John Kelsay and James Turner Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, Greenwood Press, Westport, CT, 1991, p. 197; Sohail H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views", *The Muslim World*, Vol. 89, No. 2, 1999, p. 158.

should be observed during armed conflict. The Old Testament states that it is prohibited to destroy trees (Deuteronomy 20:19–20) or kill captives, and that food and water should be provided to captives until they are set free. In ancient Chinese civilization, the general and military strategist Sun Tzu (d. 496 BC) stressed that only enemy armies are to be attacked and that cities are to be attacked only where there is no alternative. In ancient India, the list of prohibitions during armed conflict includes attacking a sleeping enemy, desecration of corpses, killing those who are physically or mentally incapacitated and, similar to the Greek civilization, the use of poisoned weapons.¹⁰

Obviously, the sources of the Islamic law of war relate to a war context in which the weapons and tactics, and consequently the destructive capacity of wars, were very different from those of modern armed conflicts. The application of the Islamic law of war in the modern era therefore presents another challenge, given that some armed groups employ military tactics and weapons that are prohibited under IHL and justify their actions by measuring them against the opinions of some classical Muslim jurists who endorsed the use of similar weapons and military tactics in the context of their own primitive wars, as will be illustrated later in this article. With this in mind, rules such as these inevitably need to be reviewed and reconsidered in order to take account of ongoing developments in military weapons and tactics over time.

Principles of the Islamic rules of war

Classical Muslim jurists discussed a set of issues that, in essence, reflect the philosophy and principles of IHL, but are set in a different context to that of the wars we are currently witnessing. It is worth noting that specific rules were established on each of these issues in relation to the wars waged between Muslims and their non-Muslim enemies during the lifetime of the Prophet Muhammad, and consequently the teachings of the Prophet form the basis of much of the regulations developed by the jurists. Islamic law also drew a distinction between international and non-international conflicts, despite not using the same terms. According to Islam, international armed conflicts are generally called *jihād*, a term which refers to wars between the Islamic state and non-Muslim belligerents. NIACs are divided into four categories according to the Muslim jurists: *ḥurūb al-riddah* (wars of apostasy), *qitāl al-bughāh* (fighting against rebels or secessionists), *ḥirābah* (fighting against bandits, highway robbers, terrorists or pirates) and *qitāl al-khawārij* (fighting against violent religious fanatics). In Islamic law, the distinction between these types of war is important because the rules of war differ from one category to another.¹¹

10 See L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, pp. 18 ff.

11 For further information see, A. Al-Dawoody, above note 7, pp. 149–183; Ahmed Al-Dawoody, “Al-Sarakhsi’s Contribution to the Islamic Law of War”, *UCLA Journal of Islamic and Near Eastern Law*, Vol. 14, No. 1, 2015, pp. 37–43.

When developing the Islamic law of war in international armed conflicts, the Muslim jurists paid the greater part of their attention to the following eight issues.

Protection of civilians and non-combatants

The sources of Islamic law guarantee protection of civilians and non-combatants, stating that fighting on the battlefield must be directed solely against enemy combatants. Civilians and non-combatants must not be deliberately harmed during the course of hostilities. This principle is clearly set out in the verse that states: “And fight in the way of God those who fight against you and do not transgress, indeed God does not like transgressors.”¹² According to Qur’anic interpreters, this verse commands that non-combatant enemies should not be fought, and that an attack on non-combatants such as women and children is an act of aggression which angers God. Al-Rāzī (d. 1209) defines *al-muqātilīn* (combatants), as understood by him from this verse, as follows: “They must be taking part in the fighting; anyone who is willing or prepared to fight cannot be described as a combatant, except in metaphor, until they enter into combat.”¹³ Thus, based on many reports attributed to the Prophet Muhammad, Islamic law protects civilians and non-combatants against military attack. Moreover, if an enemy withdraws from combat or enters Muslim territory and requests protection, whether explicitly or implicitly, they may not be targeted, as will be shown later in the discussion of *amān* (protection, safety).

A number of the Prophet’s Hadiths specifically prohibit the targeting of women, children, the elderly, *‘usafā’* and *aṣḥāb al-ṣawāmi’* (monks or religious hermits). The word *‘usafā’* is the plural of the word *‘asīf*, which means hired man or employee, and in the context of war it refers to anyone who works for, or is paid by, the enemy to perform services on the battlefield, as was common practice in wars in the past. These individuals would perform tasks such as minding belongings and animals, but would not engage in the fighting and therefore could not be classified as combatants. By drawing a parallel with the prohibition on attacking *‘usafā’* on the battlefield, it follows that attacking medical personnel (both civilian and military) accompanying enemy armies is also prohibited, as are attacks on military reporters or anyone else who provides services to enemy armies, as long as these individuals do not take part in military operations. This principle is conveyed by various Hadiths of the Prophet, including: “Do not kill an aged person, a young child or a woman”,¹⁴ “Do not kill children or the clergy”¹⁵ and “Do not kill children or *‘usafā’*”.¹⁶ On that

12 Qur’an 2:190.

13 Muḥammad ibn ‘Umar al-Rāzī, *Tafsīr al-Fakhr al-Rāzī: Al-Mushtahar bi-al-Tafsīr al-Kabīr wa-Mafātīh al-Ghayb*, Vol. 5, Dār al-Fikr, 1981, p. 138.

14 Aḥmad ‘Abd al-Raḥmān al-Bannā al-Sā’atī, *Badā’i’ al-Manan fi Jami’ wa Tartīb Musannad al-Shafi’i wa al-Sanan: Mudhayla bi-al-Qawl al-Ḥasan Sharāḥ Badā’i’ al-Manan*, 2nd ed., Vol. 2, Maktabah al-Furqān, Cairo, 1983, p. 12.

15 Sadiq ibn Hasan ibn ‘Ali al-Husseini al-Qannūji al-Bukhārī Abū al-Ṭayyib, *Al-Rawḍah al-Nadiyyah Sharāḥ al-Durar al-Munīryyah*, Vol. 2, Idārah al-Ṭibā’ah al-Munīryyah, Cairo, p. 339.

16 *Ibid.*

basis, when it came to protecting non-combatants, the Companions followed the Prophet's example; for instance, the first caliph Abū Bakr (d. 634) instructed his army commander thusly: "Do not kill a child or a woman; or an aged person; do not cut down fruit-bearing trees or destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or drown palm trees; do not loot; and do not be cowardly."¹⁷ In addition, 'Umar ibn al-Khaṭṭāb issued written instructions to his soldiers ordering them to fear God and not to kill farmers: "Fear God in farmers; do not kill them unless they fight against you."¹⁸ This warning to fear God reaffirms the religious imperative to respect the Islamic law of war.

The jurists also specified various other types of non-combatants who must not be targeted in a war, including the blind, the incapacitated and the insane, as well as craftsmen and traders. Ibn Qayyim al-Jawziyyah concisely indicated the Islamic position regarding those who can be targeted during war as follows: "Muslims must fight those who attack them, but not those who do not attack them."¹⁹ This brief statement unequivocally affirms the principle of non-combatant immunity in Islam,²⁰ and thus aligns with article 48 of Additional Protocol I (AP I), which stipulates:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.²¹

This does not mean, however, that this protection is absolute; beneficiaries forfeit the right to non-combatant immunity if they engage in combat. Islamic legal scholars studied these issues in depth, specifying the cases in which the aforementioned non-combatant parties can forfeit the protection afforded to them by Islam against military attack. For example, jurists discussed the permissibility of killing a woman if she kills Muslim soldiers, throws stones at them to kill them or stands guard over enemy armies or strongholds, or if she is queen of her country or a wealthy woman and spends her money to incite the army to fight on the battlefield, and similarly if a child is king or queen of his or her country and does the same. On this issue the jurists disagreed, with some authorizing the targeting of women and children in the aforementioned cases,

17 'Abdullah ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār*, Vol. 6, Dār al-Kutub al-'Ilmiyyah, Beirut, 1995, p. 478.

18 Aḥmed ibn al-Ḥussein ibn 'Alī al-Bayhaqī, *Al-Sunan al-Kubrā*, 2nd ed., Vol. 9, Dār al-Kutub al-'Ilmiyyah, Beirut, 2003, p. 155.

19 See Wahbah al-Zuhaylī, *Mawsū'ah al-Fiqh al-Islāmī wa al-Qaḍāyā al-Mu'āṣirah*, Vol. 7, Dār al-Fikr, Damascus, 2010, p. 511.

20 For further information on the principle of distinction between combatants and non-combatants, see Ameer Zemmali, *Islam and International Humanitarian Law: Principles on the Conduct of Military Operations*, 4th ed., ICRC, 2010, pp. 162–163.

21 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 48, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4>.

and others classifying it as undesirable.²² They also disagreed on whether or not an aged person could be targeted if they entered the battlefield to support the enemy in planning war operations.²³

In summary, Islamic law advocates the principle of distinction between combatants and non-combatants, meaning protection of civilians and non-combatants from being targeted during military operations, provided that they do not participate in military operations.

Permissible weapons in war

Although the weapons and military tactics used by Muslims in the early Islamic period – and therefore those addressed by Islamic law – were extremely primitive in terms of their simplicity and limited capacity to inflict severe damage on enemy individuals and property as compared to those available today, the establishment of rules on weapons demonstrates that the Muslim jurists were dedicated to two objectives: firstly, not to endanger the lives of civilians and non-combatants, and secondly, to spare the property of the enemy unless otherwise dictated by military necessity. The rules developed by classical Muslim jurists show that at the time, “war” was made up of two scenarios. The first of these was direct or one-to-one combat with enemy fighters, in which case the most commonly used weapon was the sword (a weapon of high status in Arab culture and heritage), followed to a lesser extent by the lance, bow and spear. In cases where civilians and non-combatants are present among enemy combatants, sword fighting does not endanger the lives of bystanders or risk incidentally destroying their property. It should be noted here that the jurists, in particular those of the Mālikī school, discussed the permissibility of shooting the enemy with poison-tipped arrows. On this issue, as on many others, the jurists disagreed; some prohibited the use of poison-tipped arrows, while others merely disliked the idea of it, on the basis that the enemy could shoot the arrows back at the Muslims and also because there was no precedent for this action in the age of

- 22 See Ahmad al-Dardīr, *Al-Sharḥ al-Kabīr*, ed. Muḥammad ‘Allīsh, Vol. 2, Dār al-Fikr, Beirut, p. 176; Ahmad ibn Idrīs al-Qarāfi, *Al-Dhakhīrah*, ed. Muḥammad Būkhūbzah, Vol. 3, Dār al-Gharb al-Islāmī, Beirut, 1994, p. 399; Muḥammad ibn Jarīr al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Ahkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā’ li-Abī Ja’far Muḥammad Ibn Jarīr al-Ṭabarī*, ed. Joseph Schacht, Brill, Leiden, 1933, p. 9; ‘Alā’ al-Dīn al-Samarqandī, *Tuḥfah al-Fuqahā’*, Vol. 3, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1984, p. 295; ‘Abd al-‘Azīz Ṣaqr, *‘Al-‘Alāqāt al-Dawliyyah fī al-Islām Waqt al-Harb: Dirāsah lil-Qawā’id al-Munaz’z’imah li-Sayr al-Qitāl*, Mashrū’ al-‘Alāqāt al-Dawliyyah fī al-Islām, No. 6, Al-Ma’had al-‘Ālamī lil-Fikr al-Islāmī, Cairo, 1996, pp. 46–48; al-Shaykh Nizām al-Dīn al-Balkhī *et al.*, *Al-Fatāwā al-Hindīyyah: Fī Madhhab al-Imām al-A’z’am Abī Ḥanīfah al-Nu’mān*, Vol. 2, Dār al-Fikr, 1991, p. 194.
- 23 See Muḥammad ibn Ismā‘īl al-Ṣana‘ānī, *Subul al-Salām: Sharḥ Bulūgh al-Marām min Adillah al-Ahkām*, ed. Muḥammad ‘Abd al-‘Azīz al-Khūlī, 4th ed., Vol. 4, Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1959, p. 50; Ibrāhīm ibn ‘Alī ibn Yūsuf al-Shirāzī, *Al-Muḥadhdhab: Fī Fiqh al-Imām al-Shāfi‘ī*, ed. Zakariyyā ‘Imrātī, Vol. 3, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1995, pp. 277 ff.; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’*: *Sharḥ al-Muḥadhdhab*, ed. Mahmūd Matraji, Vol. 21, Dār al-Fikr, Beirut, 2000, p. 55; Wahbah al-Zuhaylī, *Al-‘Alāqāt al-Dawliyyah fī al-Islām: Muqāranah bi-al-Qānūn al-Dawli al-Hadith*, Mu’assasah al-Risālah, Beirut, 1981, p. 71; A. Al-Dawoody, above note 7, pp. 112–114.

the Prophet.²⁴ However, the great Ḥanafī jurist al-Shaybānī (d. 805) permitted the use of poison-tipped arrows because they were more effective in defeating the enemy.²⁵

The second type of war scenario is one in which the enemy retreats inside fortifications and one-to-one combat is not an option. In regard to such cases, the jurists discussed the use of mangonels (a weapon for catapulting large stones), fire, flooding and even siege as weapons to force the enemy to surrender.²⁶ In the pre-Islamic period, the ancient Greeks and Persians used mangonels to attack enemies sheltering in citadels or fortresses, by loading the weapons with fire or large rocks and bombarding the enemy with them. Moreover, during the battle of al-Ṭā'if in the eighth year of the Islamic calendar (630 AD), Salmān al-Fārisī introduced the mangonel to the Prophet Muhammad. Regardless of whether or not the mangonel was actually used in that battle, this serves as evidence that attacks by Muslims against their enemies using mangonels had the potential not only to damage the enemy's military and civilian property but also to cause incidental casualties among civilians. It should nonetheless be taken into account that, at that time, when an enemy retreated inside fortifications it was impossible to distinguish between military and civilian property. The jurists unanimously permitted the use of mangonels against an enemy fortress if required by military necessity, but opinions differed on whether it was permissible to use fire as a weapon against the enemy: some prohibited it, some disapproved of it, and others permitted it either as a military necessity or in reciprocity.

The Muslim jurists' deliberations and discussions over the use of these weapons show that indiscriminate attacks or excessive use of military force beyond that required by military necessity were inconceivable, even in the context of the detailed discussions over which types of weapons and tactics were permissible and which were prohibited. Nonetheless, the aforementioned differences of opinion among jurists once again illustrate the challenges that arise when applying the provisions of the Islamic law of war both historically and in the modern era, firstly because the rules that permitted the use of those primitive forms of indiscriminate attack in that specific era and war context are now exploited to justify attacks against civilians, and secondly because some people draw parallels with those primitive weapons to justify the use of chemical weapons and other weapons of mass destruction.

24 Sohail Hashmi, "Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation", in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004, p. 329; Khalīl ibn Ishāq ibn Musā al-Jundī, *Mukhtaṣar Khalīl fi Fiqh Imām Dār al-Hijrah*, ed. Aḥmad 'Alī Ḥarakāt, Dār al-Fikr, Beirut, 1994, p. 102; A. al-Dardīr, above note 22, p. 178; Muḥammad ibn Muḥammad ibn 'Abd al-Raḥman al-Ḥattāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 2nd ed., Vol. 3, Dār al-Fikr, Beirut, 1977, p. 352.

25 Muḥammad ibn al-Ḥassan al-Shaybānī, *Sharḥ Kitāb al-Siyar al-Kabīr*, commentary by Muḥammad ibn Aḥmad al-Sarakhsī, ed. Abī Abdullah Muḥammad Ḥassan Muḥammad Hassan Ismā'il al-Shafī'ī, Vol. 4, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, p. 277.

26 See Muḥammad ibn Idrīs al-Shāfi'ī, *Al-Umm*, 2nd ed., Vol. 4, Dār al-Ma'rifah, Beirut, 1973, pp. 243, 257; S. Hashmi, above note 24, p. 328; A. al-Qarāfī, above note 22, pp. 208 ff.; M. al-Shaybānī, above note 25, Vol. 4, p. 154; A. Al-Dawoody, above note 7, pp. 122–126.

Human shields and night attacks

Based on the distinction between combatants and non-combatants, Islamic law jurists set out detailed provisions on two key methods of warfare that were used in the primitive wars described above: these are *al-tatarrus* (human shields) and *al-bayāt* (night attacks), both of which were first deliberated during the time of the Prophet. In their discussion of human shields, most jurists distinguished between two cases: first, if enemy combatants take women, children, the aged, etc., as human shields in order to force Muslims to cease fighting; and second, if the enemy takes any Muslim individuals in general, or individuals from *ahl al-dhimmah* (non-Muslim citizens of the *dār al-Islām* (the Islamic state)), as human shields for the same purpose. The difficulty here is that attacking a human shield carries the risk of killing these non-combatants, Muslims or *ahl al-dhimmah* through the use of indiscriminate weapons such as mangonels. Broadly speaking, all of the jurists permit shooting at the human shields in these two cases if required by military necessity, provided that Muslims aim to direct their attack at the combatants and avoid hitting non-combatants as far as possible,²⁷ although this does seem impossible from a practical point of view. The jurists strongly disagree over what exactly constitutes the military necessity that would justify an attack on human shields in this context. For al-Māwardī and al-Shirāzī, the military necessity in this case would arise from the risk of a Muslim defeat.²⁸ On this point, certain jurists add that attacking human shields in this case is a matter of protecting the rest of the Muslims, because if Muslims did not attack the shield and the Muslim army was defeated as a result, many Muslims would be killed. In the view of al-Qurtubī, military necessity in this instance meant avoiding “the collapse of the entire Muslim nation into the hands of the enemy”.²⁹ As for the second case, a minority of the jurists prohibit attacks against human shields based on the following verse: “had they [believing Muslim men and women] been separated, We would have inflicted a severe chastisement on those who disbelieved from among them [the Meccans]”.³⁰

With respect to *bayāt*, fighting at night meant that the two armies were unable to fight hand to hand because they could not see one another in the darkness, which rendered it necessary in such cases to target the enemy using mangonels or other types of indiscriminate weapon. On that basis, according to the Hadith narrated by Anas ibn Mālik, the Prophet avoided attacking the enemy at night. Moreover, according to another Hadith narrated by al-Ṣa‘b ibn Jaththāmah, when the Prophet was questioned about the permissibility of

27 M. al-Nawawī, above note 23, p. 59; I. al-Shirāzī, above note 23, p. 278; Najīb al-Armanāzī, *Al-Shar‘ al-Dawli fi al-Islām*, 2nd ed., Riad El-Rayyes Books, London, 1990 (first published 1930), p. 124.

28 ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Aḥmad Mubārak al-Baghdādī, Maktabah Dār ibn Qutaybah, Kuwait, 1989, p. 57; I. al-Shirāzī, above note 23, p. 278.

29 Muḥammad ibn Aḥmad al-Anṣārī al-Qurtubī, *Al-Jāmi‘ li-Aḥkām al-Qur‘ān*, Vol. 16, Dār al-Sha‘b, Cairo, pp. 287 ff.

30 Qur‘an 48:25. See N. al-Armanāzī, above note 27, p. 124; A. Al-Dawoody, above note 7, pp. 116–118.

attacking the enemy at night, which could result in casualties among women and children, he did not declare it prohibited.³¹ Jurists therefore took varying stances, with some permitting night attack on enemies, and others disapproving of it. Nonetheless, the jurists justified any casualties that might occur among women and children in such cases as collateral damage.³²

With that in mind, it must be underlined at this point that Islamic law places strong emphasis on the sanctity of the life of non-combatants and the importance of avoiding endangering the lives and property of non-combatants except in cases of military necessity. It should also be noted that the provisions established by the Muslim jurists were designed to regulate the conduct of the army during fighting on the battlefield in the context of the primitive wars waged between the Muslim army and its enemies in the time of the Prophet. These provisions also impose restrictions on military operations, in spite of the fact that enemy armies were not bound by the same rules and had not signed any form of agreement to be so.

Protection of property

Through the study of the wars that took place between Muslims and their enemies during the lifetime of the Prophet and the permissible weapons and methods of warfare as discussed above, it is clear that in Islam, war is not an indiscriminate free-for-all in which anyone and anything can be targeted. The use of military force is only permissible if required by military necessity, and the wanton destruction of enemy property is not covered by this condition; such acts instead constitute a crime of “*al-fasād* (destruction, damage) in the land”. This position was advocated by Imām al-Awzā’ī (d. 774), who said that “it is prohibited for Muslims to commit any sort of *takhrīb*, wanton destruction, [during the course of hostilities] in enemy territories because that is *fasād* and God does not like *fasād*”, and referred to the following Qur’anic verse: “when he turns his back, he hastens about the earth, to do corruption there and to destroy the tillage and the stock”.³³ This is because according to the Islamic worldview, everything in this world belongs to God, and human beings – as His vicegerents on earth – are entrusted with the responsibility of protecting His property and contributing to human civilization.

Moreover, not only does Islamic law require protection of civilian property during military operations, it also states that even when targeting military property, the objective is merely to force the enemy to surrender or cease fighting, not to destroy or sabotage enemy property. On that basis, Most Muslim jurists permit

31 See, for example, Hadith 1745 in Muslim ibn al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fū’ād ‘Abd al-Bāqī, Vol. 3, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, pp. 1364 ff.

32 Muḥammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awtār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akḥbār*, Vol. 8, Dār al-Jīl, Beirut, 1973, p. 71; A. Al-Dawoody, above note 7, pp. 118–119.

33 Qur’an 2:205; M. al-Shaybānī, above note 25, Vol. 1, pp. 32–33.

the destruction of enemy property if required by military necessity.³⁴ It should also be noted that some jurists such as al-Shāfi'ī (d. 820) and Ibn Ḥazm (d. 1064) drew a distinction between inanimate objects and living property such as horses, cattle and bees, and ruled that inflicting damage on living property such as livestock for any reason other than for food was tantamount to torture, which is prohibited in Islam.³⁵ Notwithstanding, the jurists did permit the targeting of enemy horses when enemy warriors were fighting on horseback, because in this case the horse was being used as military equipment.³⁶ All of these provisions are in line with Article 51(4) of AP I, which prohibits indiscriminate attacks, defined as:

(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.³⁷

Article 52(2) defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.³⁸

Prohibition of mutilation of the enemy

Among the many Prophetic Hadiths that prohibit mutilation of the enemy is the following: “Do not loot, do not be treacherous and do not mutilate” [“lā taghlū wa lā taghdurū wa lā tumathilū”].³⁹ The prohibition of those three acts illustrates the principle of humanity during armed conflicts. The first of them, *ghulūl* (looting), refers to when a combatant takes or steals an item from the war booty before it is divided up, or allocates part of the war booty to themselves without handing it over to be distributed by the army chief. The establishment of such

34 Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn Muḥammad ibn Qudāmah, *Al-Mughnī*, eds. ‘Abd Allah ibn ‘Abd al-Muḥsin al-Turkī and ‘Abd al-Fattāḥ Muḥammad al-Ḥilu, 3rd ed., Vol. 9, Dār ‘Ālam al-Kutub, Riyadh, 1997, pp. 233 ff.; Muḥammad al-Ghazālī, *Al-Waṣīṭ fi al-Madhḥab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir, Vol. 7, Dār al-Salām, Cairo, 1997, p. 31; M. al-Shawkānī, above note 32, p. 74; I. al-Shirāzī, above note 23, p. 279; ‘A. al-Māwardī, above note 28, p. 71; Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Jāmi’ al-Fiqh*, ed. Yusrī al-Sayyid Muḥammad, Vol. 4, Dār al-Wafā’, Al-Manṣūrah, 2000, p. 97; M. al-Nawawī, above note 23, pp. 60 ff.

35 M. al-Shāfi’ī, above note 26, pp. 257, 259, 287; ‘Alī ibn Aḥmad ibn Sa’id ibn Ḥazm, *Al-Muḥallā*, Vol. 7, Dār al-Āfāq al-Jadīdah, Beirut, p. 294.

36 On protection of property in general, see A. Al-Dawoody, above note 7, pp. 126–129.

37 AP I, Art. 51(4). See also Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 51.

38 AP I, Art. 52(2).

39 Mālik ibn Anas, *Al-Muwatta’a*, ed. Muḥammad Fu’ād ‘Abd al-Bāqī, Vol. 2, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1985, p. 448.

rules and restrictions on dealing with enemy property indicate that it was not simply free for the taking. Even food and animal feed were regulated. In cases where battles drew on for a long time and it was both impractical to carry sufficient food to the battlefield and difficult to buy supplies from the enemy, the jurists determined that, in cases of military necessity, soldiers may take as much of the enemy's supplies as they require to feed themselves and their animals, provided that no more than the required quantity is taken.⁴⁰ Although at the time it was customary practice for enemy possessions to be distributed among the members of the winning side of the battle, these strict rules on the treatment of enemy possessions prohibit the theft of movable enemy property, especially in the case of Muslim soldiers of religious compunction in the present day.

While the Islamic prohibition of *ghadr* (perfidy, treachery) obliges Muslims to respect their contracts and agreements, this does not mean that ruses are prohibited in war, as the Prophet held that “war is ruse”.⁴¹ The same sentiment is reaffirmed in Article 37 of AP I, which prohibits perfidy but permits military ruses such as “the use of camouflage, decoys, mock operations and misinformation”.⁴²

As for the provisions of Islamic law prohibiting the mutilation of enemy corpses, these demonstrate respect for dignity and humanity, given that even though the two sides are at war and attempting to kill each other, the enemy is nonetheless a human being honoured by God, as stated in the Qur'an: “We have honoured the Children of Adam.”⁴³ The Prophet also instructed the Muslims to avoid injuring the enemy's face during fighting,⁴⁴ out of respect for human beings and in order to preserve the dignity bestowed upon them by God in the aforementioned verse. In addition, Islam prohibits the torture and mutilation of animals, on the basis that the Prophet forbade mutilation even of the body of *al-kalb al-'aqūr* (a rabid dog).⁴⁵

The principle of human dignity requires respect for human bodies, not only during life but also after death. For that reason, Islam forbids the mutilation of enemy corpses and instead requires them to be returned to the enemy people, or buried if this is not possible. At the Battle of Badr in 624 AD, the first battle in Islamic history, the Muslims buried the corpses of all enemies killed.⁴⁶ According to the narration of Ya'lā ibn Murrah:

I travelled with the Prophet (peace be upon him) on more than one occasion, and I did not see him leave a human corpse behind; whenever he came

40 M. al-Nawawī, above note 23, p. 109; M. al-Shawkānī, above note 32, p. 131.

41 Muḥammad bin Isma'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Bayt al-Afkār al-Dawliyyah lil-Nashr, Riyadh, 1998, p. 579.

42 AP I, Art. 37.

43 Qur'an 17:70.

44 See Hadith 2458 in Muḥammad ibn Fattūḥ al-Ḥumaydī, *Al-Jam' bayn al-Ṣaḥīḥayn al-Bukhārī wa Muslim*, ed. 'Alī Ḥusayn al-Bawwāb, 2nd ed., Vol. 3, Dār ibn Ḥazm, Beirut, 2002, pp. 210 ff.; Sobhi Mahmassani, “The Principles of International Law in the Light of Islamic Doctrine”, *Recueil des Cours*, Vol. 117, 1966, p. 303; A. Al-Dawoody, above note 7, p. 120.

45 M. al-Sarakhsī, above note 6, Vol. 9, pp. 135, 196; Vol. 10, pp. 129, 131; Vol. 16, p. 145; Vol. 26, p. 145.

46 W. al-Zuhaylī, above note 19, p. 495.

across one, he ordered its burial, without asking whether the person was a Muslim or an unbeliever.⁴⁷

Furthermore, at the Battle of the Trench in 627 AD, when the enemies of the Muslims requested the return of the corpse of Nawfal ibn ‘Abd Allah ibn al-Mughīrah in exchange for 10,000 dirhams, the Prophet ordered for the body to be returned and refused to accept the money.⁴⁸ As well as respect for humanity and preservation of the dignity of the dead, another reason why Muslims ensured the burial of enemy corpses was to prevent them from decomposing in the open.⁴⁹ On that basis, Ibn Ḥazm (d. 1064) instructed Muslims to bury the bodies of their deceased enemies because if they did not, the bodies would end up rotting and could be eaten by predatory animals; this would be tantamount to mutilation, which is forbidden in Islam.⁵⁰ Article 17 of Geneva Convention I (GC I) also stipulates that the parties to a conflict must first carry out a medical examination of corpses to verify the identity of the deceased, then bury the body according to the applicable religious rites if possible.

It is also worth noting that in wars between the Persians and the Romans, it was common practice to carry the heads of enemy army commanders on the tips of spears to celebrate and boast of victory over the enemy.⁵¹ According to books of Islamic jurisprudence, when the head of the commander of the Levantine army Yannāq al-Bīṭrīq was brought to Abū Bakr (d. 634), he became enraged and condemned this as an abominable act, calling it a *sunnah al-‘ajam* (a practice followed among the non-Muslims, literally foreigners). When he was told that it was an act of reciprocity because the enemy had done the same to Muslims, Caliph Abū Bakr replied disapprovingly, “Are we going to follow the Persians and the Romans? We have what is enough: the book [the Qur’an] and the reports [i.e., tradition of the Prophet].”⁵² In this statement, he reaffirms the aforementioned notion that the laws of Islam are binding, regardless of the conduct of the enemy, and that reciprocity does not justify criminal acts.

Treatment of prisoners

The Islamic approach to the issue of prisoners of war reflects many typical features of the Islamic legal system and shows the vital need to reinterpret certain legal provisions in order to respond to the requirements of the modern age. Most of the rules on prisoners of war (PoWs) according to Islamic law were based on the treatment of prisoners in the battle of Badr in the second year of the Islamic calendar (624 AD). In addition, the term “prisoners of war” was only used to

47 ‘Alī ibn ‘Umar al-Dāraqutnī, *Sunan al-Dāraqutnī*, eds Sha‘īb al-Arnu‘ūd, Ḥassan ‘Abd al-Munā‘im Shalabī and Sa‘īd al-Laḥām, Vol. 5, Mu’assasah al-Risālah, Beirut, 2004, p. 204.

48 Aḥmad ibn ‘Alī ibn Hajar al-‘Asqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. Muḥyī al-Dīn al-Khatīb, Vol. 6, Dār al-Ma‘rifah, Beirut, p. 283.

49 W. al-Zuhaylī, above note 19, p. 495.

50 ‘A. Ibn Hazm, above note 35, Vol. 5, p. 117.

51 M. al-Shaybānī, above note 25, Vol. 1, p. 79.

52 *Ibid.*, Vol. 1, p. 79.

refer to male combatants, since the custom at the time was for women or children who were captured to be enslaved or exchanged for Muslim prisoners. At the battle of Badr, the Muslims managed to capture seventy enemy combatant men; this posed a challenge for the nascent Islamic state, which had yet to establish legislation on the legal status of PoWs. The Prophet therefore consulted his Companions on the issue. To solve the additional challenge of providing shelter for the seventy prisoners, since nowhere specific had been prepared for this purpose, some of the prisoners were held in the mosque and the rest were divided up to be housed with the Companions of the Prophet. The Prophet instructed for the prisoners to be treated well, saying: “Observe good treatment towards the prisoners.”⁵³

To establish the Islamic law on prisoners in Islam, the jurists referred to the following two verses of the Qur’an, as well as the Sunnah of the Prophet. The first of these verses is: “When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly – later you can release them by grace or by ransom – until the toils of war have ended.”⁵⁴ The second is: “When the Sacred Months have passed, kill the polytheists wherever you find them and capture them and besiege them and await for them in every place of ambush.”⁵⁵ Given that the second of these two texts does not specifically relate to the issue of prisoners, the jurists were split into three camps over the law on PoWs in Islam. In the first camp was Ibn ‘Abbās (d. 668), ‘Abd Allah ibn ‘Umar (d. 693), al-Ḥasan al-Baṣrī (d. 728) and Sa‘īd ibn Jubayr (d. 714), who argued that the law on prisoners in Islam required them to be freed by “grace” or “ransom” according to the first of these texts.⁵⁶ The second camp, made up of some of the Ḥanafī jurists, advocated that the head of State was entitled to either execute the prisoners or enslave them, according to what best served the public interest, while Al-Shaybānī, one of the great Ḥanafī jurists, deemed it permissible to exchange enemy prisoners. The remaining Ḥanafī jurists advocated that the head of State was entitled to release prisoners as long as they remained in the Islamic state and paid the *jizyah* (tax levied to exempt eligible males from conscription). According to the Ḥanafī jurists, prisoners should not be allowed to return to their country because they would strengthen the enemy.⁵⁷ The third camp, comprised of the majority of Muslim jurists, including the Shāfi‘īs, the Mālikīs and the Ḥanbalīs, as well as al-Awzā‘ī (d. 774) and Sufyān al-Thawrī (d. 778), advocated that the head of State

53 Muḥammad ibn Jarīr al-Ṭabarī, *Tārīkh al-Ṭabarī: Tārīkh al-Umam wa al-Mulūk*, Vol. 2, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2001, p. 39.

54 Qur’an 47:4.

55 Qur’an 9:5.

56 Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fi Daw’ al-Qur’ān wa al-Sunnah*, Vol. 2, Maktabah Wahbah, Cairo, 2009, pp. 854 ff.; Muḥammad Ḥammūdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. and enl. 5th ed., Sh. Muḥammad Ashraf, Lahore, 1968, p. 214; Lena Salaymeh, “Early Islamic Legal-Historical Precedents: Prisoners of War”, *Law and History Review*, Vol. 26, No. 3, 2008, p. 528.

57 See ‘Abd Allah ibn Maḥmūd ibn Mawdūd, *Al-Ikhtiyār li-Ta’lil al-Mukhtār*, ed. ‘Abd al-Laṭīf Muḥammad ‘Abd al-Raḥman, 3rd ed., Vol. 4, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2005, p. 133; S. Mahmassani, above note 44, p. 307.

was entitled to choose one of the following four options, depending on what he deemed to best serve the public interest: to execute some or all of the prisoners, to enslave them, to set them free, or to exchange them for Muslim prisoners. The Mālikīs also added the argument of some of the Ḥanafīs that the prisoners could remain in the Islamic state as long as they paid the *jizyah*.⁵⁸

Here it should be noted that the permissibility of the execution of prisoners in principle, as advocated by some jurists in cases where it serves the Muslim interest, is based on the instances of the execution of just three enemy PoWs during the lifetime of the Prophet: these were al-Naḍir ibn al-Hārith and ‘Uqbah ibn Mu‘ayy at the battle of Badr in March 624 AD,⁵⁹ and Abū ‘Azzah al-Jumahī at the battle of Uḥud in March 625 AD. According to Islamic history books, Abū ‘Azzah was first taken captive at the battle of Badr, then in response to his request to be freed because he was a poor man with a large family, the Prophet released him on condition that he would never fight against the Muslims again – but when he was captured a second time the following year at the battle of Uḥud, he was executed.⁶⁰ Regardless of the authenticity of these accounts, and whether these prisoners were killed during hostilities or after their capture, it is clear that these three individuals were singled out from among the other prisoners for crimes they had committed against Muslims in Mecca before fleeing to Medina, and not simply because they were PoWs, otherwise the rest of the prisoners captured at this battle and others would have also been killed.⁶¹

These contradictory rules on the treatment of prisoners obviously pose a challenge for anyone wishing to apply them in the modern age, because the simple question is, which of these laws represents the true Islam? In other words, which of these provisions best serves the *maṣlahah* (public interest) that forms the basic criterion for the other provisions established by the jurists?

Islamic law guarantees the humane treatment of prisoners, as clearly illustrated by the fact that prisoners were distributed among the homes of the Companions of the Prophet and their instructions to treat the prisoners well.⁶² Prisons or camps had not yet been built to shelter prisoners, and it would not have been an option, for example, to tie up the prisoners and leave them outside, as this could have exposed them to harm. The biography (*sīrah*) of the Prophet provides evidence of the humane treatment of prisoners at the Battle of Badr,⁶³ which went on to form the general basis for the rules on PoWs in Islam; these

58 See A. al-Qarāfi, above note 22, p. 414; A. Al-Dawoody, above note 7, pp. 136–138.

59 See Muḥammad ibn ‘Umar al-Wāqidi, *Kitāb al-Maghāzī*, ed. Muḥammad ‘Abd al-Qādir ‘Aṭā, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2004, pp. 135, 263.

60 M. al-Nawawī, above note 23, p. 83.

61 Y. al-Qaradāwī, above note 56, pp. 858–860; L. Salaymeh, above note 56, pp. 524 ff.; Muḥammad Ḥusayn Haykal, *The Life of Muḥammad*, trans. from the 8th ed. by Isma‘īl Rāgī A. al-Fārūqī, North American Trust Publication, 1976, pp. 233, 239; Troy S. Thomas, “Jihad’s Captives: Prisoners of War in Islam”, *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12, 2002–03, pp. 94 ff.; Troy S. Thomas, “Prisoners of War in Islam: A Legal Inquiry”, *The Muslim World*, Vol. 87, No. 1, 1997, p. 49.

62 M. al-Ṭabarī, above note 53, p. 39; M. Ḥammīdullāh, above note 56, p. 214; Aḥmad Abū al-Wafā, *Al-Naz‘ariyyah al-‘Ammah lil-Qānūn al-Dawli al-Insāni fi al-Qānūn al-Dawli wa fi al-Sharī‘ah al-Islāmiyyah*, Dār al-Nahḍah al-‘Arabiyyah, Cairo, 2006, p. 179.

63 See the references cited in note 62 above.

are also in line with the requirements of Geneva Convention III (GC III), such as the requirement to provide prisoners with shelter, food and clothing and to maintain family links, and the prohibition against torturing prisoners to obtain military information.

The fact that the prisoners of the battle of Badr were housed in the mosque and at the homes of the Companions indicates the necessity of protecting them from harm. With regard to food, some of the prisoners from the Battle of Badr recounted how the Muslims had given them the best food available in the circumstances, even giving the prisoners priority over themselves, in order to comply with the instructions of the Prophet to treat the prisoners well. According to the narration of Abū ‘Azīz ibn ‘Umayr, as translated by A. Guillaume:

I was with a number of the Anṣār when they [the Muslim captors] brought me from Badr, and when they ate their morning and evening meals they gave me the bread and ate the dates themselves in accordance with the orders that the apostle had given about us. If anyone had a morsel of bread he gave it to me. I felt ashamed and returned it to one of them but he returned it to me untouched.⁶⁴

This altruistic treatment of enemy PoWs, by feeding them good food despite the captors’ own hunger, is described in the Qur’an as follows: “And they feed the needy, the orphans and the captives [from their own] food, despite their love for it [also interpreted as “because of their love for God]”.⁶⁵ According to the history books, when Ṣalāh al-Dīn al-Ayyūbī (d. 1193) was unable to feed the large number of prisoners who had fallen under his control when he reclaimed Al-Aqṣā Mosque, he had no choice but to release them.⁶⁶ With regard to clothing, Jābir ibn ‘Abdullah quotes the following passage from *Ṣaḥīḥ al-Bukhārī*:

When it was the day (of the battle) of Badr, prisoners of war were brought including Al-‘Abbās, who was undressed. The Prophet looked for a shirt for him. It was found that the shirt of ‘Abdullah ibn Ubaī would do, so the Prophet let him wear it.⁶⁷

On the issue of maintaining the contact prisoners have with their families, Islam prohibits the separation of members of the same family, which is classified as parents, grandparents and children.⁶⁸

64 A. Guillaume (trans.), *The Life of Muhammad: A Translation of Ishāq’s Sīrat Rasūl Allāh*, Oxford University Press, Oxford, 1955, p. 309. See also ‘Abd al-Mālik ibn Hishām ibn Ayyūb al-Ḥimyarī, *Al-Sīrah al-Nabawīyyah*, ed. ‘Umar ‘Abd al-Salām Tadmūrī, Vol. 2, Dār al-Kutub al-‘Arabī, Beirut, 1990, p.287.

65 Qur’an 76:8.

66 Dalīlah Mubārīkī, “Ḍawābiṭ al-‘Alāqāt al-Dawliyyah fī al-Islām Zaman al-Ḥarb”, *Majallat Kulliyat al-‘Ulūm*, 4th year, 9th ed., 2004, p. 206.

67 Muḥammad ibn Ismā‘īl al-Bukhārī, *Mukhtaṣar Ṣaḥīḥ al-Imām al-Bukhārī*, ed. Muḥammad Nāsr al-Albānī, Vol. 2, Maktabah al-Ma‘arif, Riyadh, 2002, p. 318.

68 See ‘Abd al-Ghanī Mahmūd, *Ḥimāyat Daḥāyā al-Nizā‘āt al-Musallahah fī al-Qānūn al-Dawli al-Insānī wa al-Sharī‘ah al-Islāmiyyah*, ICRC, Cairo, 2000, p. 39; Zayd ibn ‘Abd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawli al-Insānī fī al-Islām*, ICRC, 2004, pp. 39, 77.

It should also be noted that Islam prohibits the torture of prisoners to obtain military intelligence about the enemy. When Imām Mālik (d. 795) was asked, “Is it possible to torture a prisoner of war in order to obtain military intelligence about the enemy?”, he replied, “I have not heard of that.”⁶⁹ His succinct response clearly illustrates how peculiar this question was, showing that the very idea of discussing the permissibility of torturing prisoners, even to obtain military intelligence, did not even occur to the Muslims and had never before been discussed by Islamic law jurists. Article 17 of GC III stipulates:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.⁷⁰

Quarter and safe conduct

The Islamic system of *amān* (literally, protection, safety) encompasses two main forms of protection. The first of these is safe conduct, which refers to a contract of protection granted to any non-Muslim citizen of an enemy State to enter the historic Islamic state on a temporary basis for peaceful purposes such as business, education or tourism. In this respect, the system of *amān* is similar to the system of entry visas and temporary residence permits in foreign countries, in that it allows the holder to enter a foreign country legitimately, with the authorization of the competent authorities, and comes with certain corresponding rights. In summary, however, what matters here is that an individual in possession of this form of *amān* may not be targeted in an attack. Not only that, but they may not be prosecuted for any crime committed outside the Islamic state, even for the crime of killing a Muslim. This is because the Islamic state does not have jurisdiction over crimes committed by non-Muslims outside its boundaries.⁷¹ It is worth noting here that ambassadors and envoys from foreign States are automatically entitled to the *amān* system by virtue of the nature of their mission. This system of *amān*, which had been practised even in the pre-Islamic period and was preserved by Islam, is a binding contract and cannot be revoked by the Islamic state. Nonetheless, the jurists disagreed over whether *amān* could be revoked if the *musta'min* (person in possession of *amān*) were proven to be a spy; in either case, however, the individual cannot be attacked but must instead be escorted to their own country.⁷²

The second type of *amān* – and the topic of focus here, namely quarter – is individual or collective protection granted to enemy combatants during operations

69 Wahbah al-Zuhaylī, *Āthār al-Ḥarb fī al-Islām: Dirāsah Muqāranah*, 3rd ed., Dār al-Fikr, Damascus, 1998, p. 415.

70 Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 17.

71 See Muḥammad ibn al-Ḥassan al-Shaybānī, *Al-Siyar*, ed. Majīd Khadūrī, Dār al-Fikr, Beirut, 1985, p.179; N. al-Armanāzī, above note 27, pp. 88, 164; ‘A. Ṣaqr, above note 22, p. 89.

72 See ‘A. Ṣaqr, above note 22, p. 88; ‘Abbās Shūmān, *Al-‘Alāqāt al-Dawliyyah fī al-Sharī‘ah al-Islāmiyyah*, Silsilah al-Dirāsāt al-Fiqhīyyah, No. 1, Al-Dār al-Thaqāfiyyah lil-Nashr, Cairo, 1999, p. 106.

on the battlefield and requires Muslims to stop fighting against the individual or group and protect them and their property until they return to their country. In this case, they are not considered PoWs and may not be arrested. Quarter is granted if the individual in any way expresses an intention to stop fighting and the desire to claim safety, whether this request is written or verbal, whether in Arabic or in any other language, and whether explicit or implicit, or even by gesture.⁷³ This concept is somewhat similar to enemies who “clearly express an intention to surrender” and are therefore granted *hors de combat* status in IHL under Article 41 of AP I.⁷⁴ Moreover, the jurists extended the application of this type of *amān* to the point where the expression of an intention to surrender is not even required as a condition because the objective of *amān* is *ḥaḡn al-dam* (prevention of bloodshed, protection of life).⁷⁵ For example, the jurists were unanimous that if an enemy mistakenly assumes that a Muslim has granted him *amān*, then the *amān* is valid, even if the Muslim had no intention of granting it.⁷⁶ The jurists disagreed over whether it was permissible to grant *amān* after, or only before, the capture of enemy belligerents. Therefore, the very fact that the jurists disagreed on this point demonstrates that *amān* could be extended to apply to enemy combatants even after their capture. Furthermore, Ibn Qudāmah advocates that the mere fact of an enemy belligerent’s attempt to enter Muslim territory by non-violent means entitles him to *amān*.⁷⁷ This example is similar to the modern practice of an enemy carrying a white flag during a battle to demonstrate non-violence, in which case the individual may not be targeted in an attack. In practice, what this means is that an enemy belligerent who has laid down their weapons and entered Muslim territory cannot be harmed but must instead be protected until they return to their own country. This small sample of the numerous cases discussed by the jurists unequivocally demonstrates the sanctity of enemy blood and property and demonstrates not only that Islam does not allow attacks against enemies except during combat, but also that if an enemy combatant ceases fighting and expresses a wish for protection under the system of *amān*, Islamic law stipulates that he must be protected in order to prevent bloodshed and limit the suffering and devastation of war.

Management of dead bodies

Human dignity is a right bestowed by God,⁷⁸ and this dignity must be protected whether a person is alive or dead. The Prophet Muhammad’s instructions, referred to above, to avoid deliberately injuring enemy combatants in the face is a

73 See Muḥammad al-Khatīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma’rifah Ma’ānī Alfāz’ al-Minhāj*, Vol. 4, Dār al-Fikr, Beirut, p. 237; ‘A. Ṣaqr, above note 22, p. 83; Y. al-Qaraḏāwī, above note 56, p. 1178.

74 AP I, Art. 41(2)(b).

75 M. al-Shirbīnī, above note 73, p. 237.

76 See *ibid.*, p. 237; A. Al-Dawoody, above note 7, p. 132.

77 Muwaffāq al-Dīn ‘Abd Allah ibn Aḥmad ibn Qudāmah, *Al-Kāfi fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Mus’ad ‘Abd al-Ḥamīd al-Sa’danī, Vol. 4, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2004, p. 163.

78 Qur’an 17:70.

sign of respecting human dignity. Classical Islamic law regulated the management of dead bodies of Muslims for obvious religious reasons, whether in normal circumstances or during armed conflicts or natural disasters. There are different regulations for Muslims who die in normal circumstances and martyrs who are killed in armed conflicts: in the Islamic tradition, because of their status, martyrs are to be buried without ritual washing, shrouding or even funeral prayer to glorify their sacrifices. Graveyards must be respected; questions related to exhumation of graves, collective graves in cases of necessity (namely, in cases of natural disasters or armed conflicts), and burial at sea were regulated by classical Muslim jurists. In Islam, each body is to be buried in an individual grave except in cases of necessity like natural disasters or armed conflicts. Based on the tradition of the Prophet Muhammad, Muslims must return the dead bodies of the adverse party, and if that party does not take them and/or bury them, it becomes an obligation of the Muslim army to do so. That is because, as shown above, if Muslims do not bury the dead bodies of their enemy, the bodies will decompose or be eaten by beasts, which would be tantamount to mutilation, as affirmed by the Andalusian jurist Ibn Ḥazm (d. 1064). Therefore, in accordance with Article 17 of GC I and Rule 112 of the ICRC Customary Law Study,⁷⁹ it is reported that the Prophet Muhammad used to bury dead bodies without adverse distinction.⁸⁰

The Islamic law of war between theory and practice

Gross violations of IHL and Islamic law being committed in Muslim contexts necessitate examination of the causes underlying the perpetrators' behaviour and that a series of adequate measures must be taken by all concerned parties, including Muslim scholars, governments and civil society organizations. The following constitute some of the main reasons for these violations.

The first reason is the wide gap between theory and practice. This arises because the Islamic law of war was a type of jurisprudence developed by classical Muslim jurists and was not codified by the Islamic state over the course of history in the same way as many other areas of Islamic law. Although compliance with Islamic law is rooted first and foremost in a Muslim's own desire to obey God, no rules for its implementation or punishments for transgressions have been established.

The second reason is a lack of research by modern Muslim scholars into the areas of Islamic law that govern State affairs, especially with regard to governance systems, war and international relations. This has to do with cultural and political factors relating to the structure of the modern State in Muslim countries, which

79 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 112, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.

80 Z. al-Zayd, above note 68, pp. 49, 78; A. Abū al-Wafā, above note 62, pp. 206–209.

has moved away from relying on the legal tradition of the classical Muslim jurists and has replaced it with Western legal systems.

The third reason is the existence in many Muslim countries of weak civil society institutions that do not contribute to solving the problems of their societies. The reason for this is that these tasks have become the sole preserve of the State, and this is illustrated by the fact that the academic contributions and scientific achievements of many Muslim countries are very few compared to other regions of the world.

Conclusion

The Islamic regulations on the eight issues discussed above demonstrate that the attention of the classical Muslim jurists was primarily directed towards two considerations: firstly, not to endanger the lives of non-combatants; and secondly, not to destroy enemy property except as a military necessity or as a reprisal. These concerns are of course on top of the primary goal of winning the war. The importance of the sanctity and humanity of the human soul in the Islamic tradition is illustrated in the rules that prohibit attacking non-combatants, using weapons that do not discriminate between combatants and non-combatants, attacking human shields, or attacking the enemy at night. In addition, the humane treatment of prisoners, as ordered by the Prophet Muhammad and mentioned in the Qur'an, underlines the requirement to preserve human dignity in wartime, a concept which is also illustrated by the rules against attacking an enemy in the face or mutilating their body after death. Respect for the enemy also includes the requirement not to destroy enemy property during hostilities except in cases of military necessity, a principle which is also demonstrated by jurists' deliberations over the permissibility of Muslims' animals to eat the fodder of the enemy.

In view of the great gap between theory and practice, the following recommendations are some of most effective methods for promoting respect for IHL in Muslim countries:

1. Conducting research and academic study in the field of IHL and its corresponding topics in Islamic law. This should include, for example, encouraging the teaching of IHL at law schools and military and police academies in the Arab world, at both undergraduate and post-graduate level.
2. Addressing contemporary situations of contemporary armed conflict and the current challenges in this area rather than focusing mainly on the historical challenges treated in classical Muslim legal scholarship. This should be done by religious scholars, researchers, academics and think tanks alike.
3. Raising public awareness in society of the need for reform, and promoting a culture of equality and respect for human rights, while also combating and sanctioning racist and extremist sectarian and ideological beliefs, and opinions that incite xenophobia. These efforts must be initiated across all

facets of society, including through primary education, religious institutions and the media.

In conclusion, many violations of IHL would no longer occur if people lived by the words of Imām ‘Alī ibn Abī Ṭālib, who said: “There are two types of people: your brothers in religion or your peers in humanity.”⁸¹

81 ‘Alī ibn Abī Ṭālib, *Nahj al-Balāghah*, ed. Ṣobḥī Ṣāliḥ, 4th ed., Dār al-Kitāb al-Maṣrī, Cairo, and Dār al-Kitāb al-Lubnānī, Beirut, 2004, p. 427.