FIQH AL-JIHĀD IN THE CONTEMPORARY WORLD: ADDRESSING THE GAPS IN THE REGULATIONS ON THE MEANS AND METHODS OF WARFARE

BY

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ABSTRACT

Since the perfection of Islam through the revelations to Prophet Muḥammad ﷺ, Muslims have always been engaged in wars until this day, and the *aḥadīth* indicate that war will continue will until near the end of times. Throughout the ages, the trends of warfare has always developed in scale, means, and methods. Mostly through customary laws, rules regulating warfare have always been set and developed. While modern international humanitarian law (IHL) seems to have developed very rapidly within the past century to meet the new challenges of war, *fiqh al-jihād* seems to instead experience lethargy. It seems to be very difficult to find comprehensive and accurate rulings of *fiqh* regarding various aspects of modern warfare, especially in the means and methods. This research employs a doctrinal legal research to fill in the gap of scholarship specifically in the rulings related to the means and methods of warfare. It first explores the extent to which *fiqh* can develop, and whether it could be affected by the development of science and technology and international law. Second, this research examines three areas of the recent developments on the means and methods of warfare: (i) proportionality and precaution in attacks, (ii) means and methods which may cause unnecessary suffering and superfluous injuries, and (iii) treachery and perfidy; and explores the options to develop *fiqh al-jihād* rulings to cover what has yet to be covered or covered inaccurately. This research finds that certain areas of *fiqh*, especially rules related to *maṣlaḥat* such as which include much of *fiqh al-jihād*, can, to some extent, change depending on the circumstances which include developments of science, technology, and international law. However, these developments are only considered to the extent that it fulfils, and does not contradict, the principles and purposes of the *Sharī'ah*. It is also found that the development of international law regarding means and methods of warfare in the aforementioned three areas can, to a large extent (but not all), be adopted into *fiqh al-jihād*.

خلاصة البحث

منذ أن اكتمل الإسلام بنزول الوحي على النبي محمد صلى الله عليه وسلم، ظلّ المسلمون منخرطين في الحروب إلى وقتنا الحاضر، وقد جاء في أحاديث نبوية عديدة أن ذلك سيستمر حتى قيام الساعة. وعلى مر العصور، تطورت فنون الحرب من حيث الحجم والوسائل والأساليب، حتى تم وضع قواعد لتنظيم الحرب وتطويرها على شكل قوانين عرفية. في حين نجد أن القانون الدولي الإنساني الحديث International Humanitarian Law (IHL) قد تطور أيضًا بشكل سريع خلال القرن الماضي لمواجهة التحديات الجديدة للحروب. وعلى نقيض ذلك، يُرى أنّ "فقه الجهاد "يعاني من الركود، حيث يصعب العثور على أحكام فقهية شاملة ودقيقة في مختلف جوانب الحرب الحديثة، خاصة في جانب الوسائل والأساليب. يستخدم هذا البحث طريقة البحوث القانونية الفقهية أو التقليدية لسد نقص البحوث المتعلقة بقواعد ووسائل الحرب وأساليبها على وجه التحديد. ويقوم كذلك باستكشاف عدة محاور، منها :أولاً :مدى إمكانية تطوّر الفقه الإسلامي وتأثّره بتطور العلوم والتكنولوجيا والقانون الدولي. ثانياً، يتناول البحث ثلاث مجالات للتطورات الأخيرة التي شهدتها وسائل وأساليب الحرب وهي (1) :التناسب والحذر في الهجمات، (2) الوسائل والأساليب التي قد تُسبّب معاناة غير ضرورية وإصابات زائدة، (3) الخيانة والغدر. إضافة إلى ذلك، يقوم هذا البحث بالكشف عن خيارات أفضل لتطوير أحكام "فقه الجهاد "ولتغطية ما لم يتم تناوله بشكل دقيق ومفصّل .وخلُص البحث إلى أنّ بعض مجالات الفقه الإسلامي خاصة القواعد المتعلقة بـ "المصالح المرسلة" -والتي يشتمل "فقه الجهاد" على شيء كبير منها- يمكن أن تتغير إلى حد ما تبعًا للظروف المحيطة من تطورات في العلوم والتكنولوجيا وكذلك القانون الدولي؛ غير أن هذه التطورات لا يمكن أن يُعتدّ بها إلا إذا وافقت مبادئ ومقاصد الشريعة الإسلامية ولم تتعارض معها. كما خلُصت الدراسة كذلك إلى أنه من الممكن الاستفادة إلى حد كبير جزئيا من تطور القانون الدولي فيما يتعلق بوسائل الحرب وأساليبها في المجالات الثلاثة المذكورة أعلاه في "فقه الجهاد."

APPROVAL PAGE

The thesis of Fajri Matahati Muhammadin has been approved by the following:

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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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DEDICATED TO ALL THE MUTTAQĪN AROUND THE WORLD,

FROM THE BEGINNING UNTIL NEAR THE END OF TIME

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بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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LIST OF ABBREVIATIONS

ﷺ	Sal Allāhu ‘Alayhi wa Sallam
AD	Anno Domini
AILA	Asosiasi Cinta Keluarga Indonesia
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977)
BBC	The British Broadcasting Corporation
BC	Before Christ
CHR	Commission on Human Rights
CT Scan	Computed Tomography Scan
Da‘esh	Al-Dawlah al-Islāmiyyah fī al-‘Irāqi wa al-Shām
e.g.	exempli gratia
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977
et al	et alia
etc	et cetera
HRC	Human Rights Council
HRW	Human Rights Watch
i.e.	id est
IBFIM	Islamic Banking & Finance Institute Malaysia
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTY	The International Criminal Tribunal for the Former Yugoslavia

IED	Improvised Explosive Devises
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIUM	The International Islamic University of Malaysia
ISIS	The Islamic State of Iraq and Syria
ISS	International Space Station
JIAT	Joint Incidents Assessment Team
JIL	Jaringan Islam Liberal
LESFI	Lembaga Studi Filsafat Islam
MSA	Muslim Student Association
n.d.	No date
NATO	North Atlantic Treaty Organisation
No	Number
Para	Paragraph
PBUH	Peace Be Upon Him
PT	Perseroan Terbatas
RSIS	S. Rajaratnam School of International Studies
SAS	Special Air Service
SC	Security Council
Sdn Bhd	Sendiri Berhad
UDHR	Universal Declaration of Human Rights (1948)
UK	United Kingdom
UN	United Nations
UNICEF	The United Nations Children's Fund
USA/US	United States of America
v.	Versus
Vol	Volume

WMD	Weapons of Mass Destruction
WWII	World War II

CHAPTER ONE

GENERAL INTRODUCTION

1.1 RESEARCH BACKGROUND

In its historical origins, the international laws regulating the conduct of armed conflict have been coloured by very rich contributions from various civilisations, and *fiqh al-jihād* (the Islamic law of war) was indeed a part of it since the time of Prophet Muḥammad ﷺ . As Jean Pictet notes, the Muslims did contribute very positive practices in the ethical conduct of war unlike their Christian opponents, among them are giving humane treatment towards war captives and having high standards of chivary in honouring agreements.[1] But, as International Humanitarian Law (IHL) develops, one should question whether *fiqh al-jihād* keeps up.

As time goes by, IHL is crystalised from all these customary practices from various civilisations into international treaties and the Geneva Convention 1864 is seen as the birth of modern IHL. As a branch of international law, IHL aims to mitigate or limit the effects of armed conflicts, by covering two areas:[2]

i. The protection of those not or no longer taking part in hostilities, and
ii. Restrictions on the means and methods of warfare.

The early sources of modern IHL are streamed into two branches to deal with each of those areas. For the protection of those not or no longer taking part in hostilities, IHL has what is known as the 'Geneva Laws'. These are made by the Geneva Conventions and typically specialise in providing rights and protections

[1] Jean Pictet, *Development and Principles of International Humanitarian Law*, (Geneva: Henry Dunant Institute, 1985), 16–17.
[2] Advisory Services on International Humanitarian Law, "What is International Humanitarian Law?", ICRC, <https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> (accessed 4 May, 2017). See pages: 1-2.

towards certain persons during war, such as: the wounded and sick in war (land or in shipwrecks), prisoners of war, and civilians. For the second area, i.e. the limitation of the means and methods of warfare, IHL has what is known as the 'Hague Laws'. Consisting mostly of the Hague Regulations, they focus on the regulation of weaponry and tactics of warfare; limiting their harmful effects. The Geneva Laws and Hague Laws then merged when the Additional Protocols to the Geneva Conventions 1949 were made in 1977 (hereinafter, AP).[3]

This research focuses on the second area, i.e. the limitation on the means and methods of warfare. The goal of IHL is to limit the harmful effects of war which do not go well with the reality of human creativity for destruction. While war has been going on since the beginning of human history, it has evolved from being destructive to becoming worse: from bare hands to swords and then to guns, from crossbows to mangonels then to cannons, from horses to tanks then to bomber jets. When one weapon is used to be a danger within a radius of a few meters, now they can be a danger within a radius of hundreds of miles.

Sassoli and Bouvier noted that IHL treaties always try to catch up with the developments in warfare, but usually lag one step behind.[4] This is true for all laws, as per the Dutch saying *het recht hink achter de feiten aan*.[5] However, the Hague Regulations were made in the best way possible to meet the challenges of its time. In addition, numerous other conventions such as the Convention of Certain Conventional Weapons, the Convention on Cluster Munitions, and so many others, were also made for this very purpose. A simple assessment is that although there may be areas where IHL lags behind, it is catching up pretty good.

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[3] See generally: Richard John Erickson, "Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict", *Virginia Journal of International Law*, vol. 19, no. 3 (1979): 557–592.
[4] Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect In War?*, vol. 1 (The International Committee of the Red Cross, 2006), 131.
[5] Loosely translated as 'law always limps behind the development of things', see: Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, (Yogyakarta: Liberty, 3rd edn., 1991), 93.

Fiqh al-jihād, on the other hand, does not seem to be doing too well on this field. This is despite the fact that *jihād* is supposed to be an important part of Islamic teachings. It is so important to note that Prophet Muḥammad ﷺ said that a Muslim never participating in or desiring *jihād* is a hypocrite:[6]

This is why since the time of the early scholars, complete *fiqh* books will always have a chapter on *jihād,* such as *Al-Umm* of Al-Shāfi'ī, and treatises of international law will always have a *jihād* part in it too such as *Al-Siyār* of Imam Al-Shaybānī. There were even special books on *jihād* such as *Mashari al-Ashwaq* by Imam Ibn Nuhās. Works on comparative *fiqh* of different schools of jurisprudence (*madhhab*) also have a chapter on *jihād,* such as *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* by Imam ibn Rushd.

It is then a wonder why the current scholarship of *fiqh* barely discusses the topic of *jihād* sufficiently incorporating the very rapid development of means and methods of warfare – even in the recent decades. Some works seem to be oblivious of this problem, such as the work of Zayd bin 'Abd al-Karīm al-Zayd.[7] Al-Zayd discusses IHL in Islam, but in doing so only speaks of the protection of persons not or no longer involved in armed conflicts. This is of course a very important topic, however by not mentioning the limitation of the means and methods of warfare at all, Al-Zayd is missing out on a very important topic. Other works may seem to incorrectly and inaccurately identify the issue, such as the works of Yūsuf al-Qaraḍāwī.[8] There are a lot to be discussed on his approach, which is no doubt a scholarly masterpiece. However, there are some issues that may need further revisiting. For example, putting any explosive devices (from hand grenades to nuclear

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[6] The Prophet ﷺ said:

مَنْ مَاتَ وَلَمْ يَغْزُ وَلَمْ يُحَدِّثْ بِهِ نَفْسَهُ مَاتَ عَلَى شُعْبَةٍ مِنْ نِفَاقٍ

"One who died but did not fight in the way of Allah nor did he express any desire (or determination) for Jihād died the death of a hypocrite." See: Muslim ibn al-Ḥajjāj al-Naysābūrī, *Sahih Muslim*, *Vol. 5*, (Riyadh: Darussalam, 2007), ḥadīth no.4931.

[7] Zayd bin 'Abd al-Karīm Al-Zayd, *Muqaddimah fī al-Qānūn al-Duwalī al-Insānī fī al-Islām*, (Kuwait: The International Committee of the Red Cross, Kuwait Delegation, 2004).

[8] Yusuf Al-Qardhawy, *Fiqih Jihād* (Bandung: Mizan, 2010).

weapons) under the same category and therefore applying the same ruling would be unreasonable.

Therefore, there is a great need to fill the gap in *fiqh al-jihād.* It is hoped that these gaps can be filled to adapt to the new developments in warfare. Doing so is the objective of this research. To start with, there are a number of questions which would need to be asked in order to address this problem properly.

The first question is on the relationship between the rules set in IHL and *fiqh al-jihād* in limiting the means and methods of warfare to achieve the similar goal of mitigating the harmful effects of war. The reality is that most, if not all, Islamic or Muslim-Majority Nations (hereinafter referred to as Muslim Nations) are parties to the major IHL conventions, or at least are considered to have acquiesced to them as customary international law. Did the Muslim nations concede to modern IHL because of *fiqh al-jihād*? Or is it despite of *fiqh al-jihād*? Therefore, a comprehensive comparative analysis has to be made between the two bodies of law (IHL and *fiqh al-jihād*).

One must map the issues out, and see whether there are problems and if yes, where they are. Once the problems have been identified, a solution must be devised.

When the premise of Islam is to have a solution towards all problems and that all problems must be solved with Islamic sources, the current works of *fiqh* does not seem to cover certain areas or they do so improperly, and there may be a need for a new *ijtihād* (i.e. juristic reasoning)[9] on the matter. This becomes the next question to be answered.

The extent of which re-*ijtihād* is possible is also a question in itself, and how to implement this re-*ijtihād* is another question. The sources and justification from which changes of rules can be made can be subjected to tough debates. This has not considered the extent of which it is possible to adopt rules which are not taken from

[9] This term is elaborated more in Chapter Two.

Islamic sources, bearing in mind numerous verses in the Qur'ān mentioning that ones who take laws other than from those revealed by Allah is either *kāfir* (Al-Mā'idah verse 44), *ẓālim (*Al-Mā'idah verse 45), or *fāsiq* (Al-Mā'idah verse 47).[10] The complexity of this issue will raise exponentially when taking international law into account.

1.2 STATEMENT OF THE PROBLEM

The problem which this research intends to explore is, as explained in the introduction, the lethargy in the *ijtihād* on *fiqh al-jihād*. This is mostly caused by contemporary jurists insufficiently addressing the contemporary issues regarding the means and methods of warfare. For example, on proportionality in attacks, scholars say that civilian casualties are acceptable if they happened by accident. The above results in an uncertainty and inadequacy of *fiqh* in the limitation of the means and methods of warfare in face of the challenges of modern warfare. Additionally, there are also differences of opinion in certain matters of *fiqh* where some opinions may potentially cause problems especially in their application towards modern challenges in warfare. Such uncertainty and inadequacy may result in Muslim fighters making decisions causing *muḍarat* (detriments) which is potentially devastating and contradicting the *Sharī'ah* (i.e. Qur'ān and the Sunnah).

[10] Although of course it is not that plain, as there are some sources which are not strictly speaking 'from Allah' but there are revelations in the Qur'ān justifying or even instructing references towards these sources. An example to this would be the recognition of contracts as a source of law, as per the Qur'ān, 5:1. This is further explained in another chapter.

1.3 RESEARCH QUESTIONS

From the previously mentioned statement of problem, this research aims to answer the general research question: to what extent can *fiqh al-jihad* adapt to modern necessities in regulating the means and methods of warfare? This question can be enumerated into the following research questions:

i. To what extent can *fiqh* adapt to modern necessities?
ii. To what extent should *fiqh al-jihād* adjust its rulings in the limitation of the means and methods of war in developing principles of proportionality, precaution, and protection towards the environment?
iii. To what extent should *fiqh al-jihād* adjust its rulings in the limitation of the means and methods of war in developing a prohibition from causing unnecessary suffering and superfluous injuries?
iv. To what extent should *fiqh al-jihād* adjust its rulings in the limitation of the means and methods of war in prohibiting treachery and perfidy?

1.4 OBJECTIVES OF THE RESEARCH

To advance researches on *fiqh al-jihād*, identifying what the current scholarship lacks and providing feedback on how to fill the gaps in the literature particularly in the following:

i. To explore the extent to which *fiqh* can adapt to modern necessities
    a. To find the line between what can be changed and what cannot.
    b. To see if *fiqh* can adopt rules taken from non-Islamic sources.
ii. To discuss the extent to which *fiqh al-jihād* needs to adjust its rulings in the limitation of the means and methods of war in developing principles of proportionality, precaution, and protection towards the environment.

iii. To seek the extent to which *fiqh al-jihād* needs to adjust its rulings in the limitation of the means and methods of war in developing a prohibition from causing unnecessary suffering and superfluous injuries.

iv. To discuss the extent to which *fiqh al-jihād* needs to adjust its rulings in the limitation of the means and methods of war in separating between lawful and unlawful deception.

1.5 HYPOTHESES

The hypothesis of this research can be summarised in two points. First, there are some room for *fiqh* to adapt modern necessities, but with a number of 'terms and conditions'. Second, f*iqh al-jihād* needs a number of adjustments in its rulings in the limitation of the means and methods of war. It is not that there are any problems on the principle level, as both IHL and *fiqh* have similar aims as per the first hypothesis. The problem lies in the elaboration and enumeration of these principles into technical rules, which can be solved with *ijtihād*.

1.6 RESEARCH METHODOLOGY

This research is primarily a normative one, mostly searching data via literature research and review. It employs a doctrinal legal research method, which concerns "…the formulation of legal 'doctrines' through the analysis of legal rules."[11] The authority from where Islamic law originates is from the *Sharī'ah*. This means that all analysis of Islamic law in this thesis are derived from the Qur'ān and the Sunnah. To do that, this thesis analyses the works of the classical and contemporary Islamic scholars in order to develop a new formulation of legal rulings. This analysis will not only refer to the works of the jurists (*fuqaha*). Rather, reference to the scholars of

[11] Paul Chynoweth, "Legal Research" in *Advanced Research Methods in the Built Environment*, edited by Andrew Knight and Les Ruddock (West Sussex: Wiley-Blackwell, 2008), 29.

ḥadīth (prophetic narrations), *tafsīr* (interpretation of the Qur'ān), and other fields of Islamic sciences are also consulted. This is done to have a more holistic understanding as basis from which to perform the necessary analysis.

As comparison, the IHL sources and practices are also examined. These include international treaties (e.g. the AP I), commentaries, as well as scholarly works. The purpose of examining IHL sources is as a reference point to see how international law elaborates rulings related to relevant matters, and they may be adopted into *fiqh al-jihād* in certain conditions as argued by this thesis.

1.7 SCOPE AND LIMITATION

This research focuses on the rules pertaining the limitation towards the means and methods of warfare. While there is a wide array of issues under that theme, this research limits itself to discuss three issues: proportionality and precaution in attacks, avoiding unnecessary suffering and superfluous injuries, and deception. In doing so, references are made to relevant principles of modern IHL, for example the Principle of Proportionality and the Principle of Precaution.

However, there are instances where other areas of modern IHL related to principles beyond the mentioned scope are discussed when it is necessary and inevitable while analysing certain matters related to principles which are within the scope of this research. For example, Chapter Three inevitably discusses certain aspects of the Principle of Distinction as it is necessary to explain elements of the Principle of Proportionality.

Also, there are instances where certain subjects are within the scope of this research but are excluded due to time constraint as these subjects would require very extensive researches. For example, a full analysis concerning the threat and the use of

nuclear weapons would require an extensive *fiqh al-siyāsah* analysis which would consequently involve theories of international relations and geopolitics.[12]

The Islamic scholarship used are that of the *ahl al-sunnah wa al-jamā'ah,* understood broadly in the sense that it does not limit itself to any particular *madhhab* of *fiqh*. The literature used are primarily Arabic literature already translated into English and Indonesian, and Arabic ones with the assistance of those who are experts in the Arabic language.

The greatest limitation impeding this thesis was that it was intended to have a field research but was deemed as not feasible due to Malaysia's State Policy. Initially, the method of this thesis was proposed to include interviews towards actors who have participated or are currently participating in an armed conflict as part of a group claiming to be guided by the *Sharī'ah* (regardless the truth of that claim, which would have been part of the analysis).

However, some of these groups are listed as terrorist groups by the United Nations or by some states, while others are in the 'gray area' in this regard. It is against Malaysia's State Policy (and is a crime) to even communicate with the former, and it is at least a risk to interview the latter. Therefore, the field research plan had to be discarded and, as the Sub-Chapter 1.6 now shows, this thesis uses only literature research.

1.8 LITERATURE REVIEW

1.8.1 Classical Scholarship

Almost all major general *fiqh* works would have a chapter on *jihād* in it, and some scholars even wrote special books on *jihād.* What may be the earliest work discussing

[12] However, brief references to nuclear weapons are made in Chapter Three insofar as it is relevant to the discussion within the chapter.

jihād would be the works of Imam Al-Shaybānī from the Hanafi *madhhab*. He mentions, for example, that breaking treaties without fair warning to the opponent has been considered as an unacceptable act of treachery, even during war.[13] All *madhāhib* of *fiqh* later have their fair share of contribution towards the scholarship, agreeing to some and disagreeing on other matters.

One source that may be best to represent much of the classical scholarship of *fiqh* together with the agreements and disagreements among the scholars would be ibn Rushd's *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid,* especially the chapter of *Jihād*.[14] Certainly, the question of modern developments of warfare is not one that is included in this, as ibn Rushd died in 1198 AD. Ibn Rushd's work provides a comparative study of *fiqh* from all the *madhāhib,* so it may be the best literature to start from when analysing classical *fiqh* scholarship. In doing so, one can trace back what classical *fiqh* scholars have said on the issue of means and methods of warfare.

Ibn Rushd points out a number of issues regarding means and methods of warfare. They include cutting and burning trees and the use of fire against enemies. While identifying the discourses between the classical scholars, which contributes a great deal in understanding the issue, there are a number of things required to be stressed out.

First, ibn Rushd does not mention his position when there are differences of opinion between the scholars without analysing which position is the strongest. It seems that it is the point of his book *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* to do so. This may cause uncertainty in *fiqh.* Therefore, it is imperative to examine the different opinions and find the strongest among them. It is therefore incumbent upon the later scholars to make such analysis, and this research aims to do so.

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[13] Muḥammad ibn Aḥmad ibn Abi Sahl Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, *Vol. 1*, (Beirut: Dār al-Kutub 'Ilmiya, 1997b), 185.
[14] Ibn Rushd, *The Distinguished Jurist's Primer*, *Vol. 1*, translated by Imran Ahsan Nyazee Khan, (Reading: Garnet Publishing, 2000a), 455–482.

Second, which may be the most important point, is that the issues on the means and methods of warfare mentioned are usually confined to very specific rulings on specific matters. It does not yet indicate some general principles from which one can work to adapt to new developments. For example, ibn Rushd mentions the discourses on the prohibition from using fire against the enemy.[15] This prohibition is derived from a *ḥadīth* which seemingly has an unambiguous meaning that needs no interpretation.[16]

However, it seems that one of the *ḥikmah* (understood separately from *illat*)[17] of this prohibition is to avoid torturous killing because there is a general prohibition of torture in Islam.[18] Ibn Rushd, and many other classical scholars of *fiqh,* unfortunately did not develop this *hikmah* into a special ruling as to specifically prohibit inflicting unnecessary suffering in warfare.

On the issue of cutting and burning trees, ibn Rushd mentions the difference in opinion as Prophet Muḥammad ﷺ practised it during the battle against Banū Al-Naḍīr on one hand but Abū Bakr al-Ṣiddīq later issued a prohibition of it on the other hand.[19] One of the opinions mentioned by ibn Rushd is one that compromises the difference in opinions, which is to say that cutting and burning trees are generally prohibited except when there is a very particular necessity at hand. Not only that this may be the first time in history that environmental protection in warfare is mentioned

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[15] Ibid., 460.

[16] The Prophet ﷺ said:

إِنِّي أَمَرْتُكُمْ أَنْ تُحْرِقُوا فُلاَنًا وَفُلاَنًا، وَإِنَّ النَّارَ لاَ يُعَذِّبُ بِهَا إِلاَّ اللَّهُ، فَإِنْ وَجَدْتُمُوهُمَا فَاقْتُلُوهُمَا

"I have ordered you to burn so-and-so and so-and-so, and it is none but Allah Who punishes with fire, so, if you find them, kill them (i.e., don't burn them)."See: Muḥammad ibn Ismā'īl Al-Bukhārī, *Sahih Al-Bukhari*, *Vol. 4*, (Riyadh: Darussalam, 1997a), ḥadīth no.2964, 3016. Scholars do have different opinions concerning the ruling taken from this ḥadīth, however, and this is discussed in Chapter Four.

[17] Some scholars say that *hikmah* of a rule is same as the *illat.* Bear in mind that the *illat* of the prohibition in the aforementioned *ḥadīth* is 'Not to punish with Allah's punishment', as is the name of chapter in Sahih Al Bukhari where that *ḥadīth* is written.

[18] See *ḥadīth* in: Muslim ibn al-Ḥajjāj Al-Naysābūrī, *Sahih Muslim*, *Vol. 6*, (Riyadh: Darussalam, 2nd edn., 2007a), ḥadīth no.6657-6658.

[19] Ibn Rushd, *The Distinguished Jurist's Primer*, 461.

as a rule,[20] but this also seems to hint to the existence of an Islamic version of the Principle of Proportionality.

Some issues that are not mentioned in *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* include the case of deception. On one hand, classical scholars such as Imam Nawawi do recognise that deception can be used in war.[21] On the other hand, there are limits to deception which can be used. However, like the problem with the previous matters, there are yet to be principles derived from all these individual rulings.

It is then incumbent upon modern *fiqh* scholarship to extract these principles and apply them in making rules in adapting to modern development in warfare. This research intends to contribute to this.

1.8.2 Modern Scholarship

The first modern scholarship on *fiqh al-jihād* worthy of mentioning would be that of the scholars who are not just famous for their knowledge of *fiqh* but also of their experience open warfare. The best to represent this type of scholarship would be the works of ‘Abdullah ‘Azzām, who was a *jihād* theologian and a battle commander, and fought together with the Afghanistan fighters (aided by the USA and other Muslim nations) against the Russian invaders in Afghanistan.[22] There were a number of points very relevant to the means and methods of warfare that has some significances. ‘Azzām has a good mix of citing old issues addressed by classical scholars[23] while also starting to point out modern warfare issues.[24] He also has views to be against

[20] Compare this to modern IHL which has treaties since 1864, but nothing on environmental protection until AP I in 1977.
[21] Cited from Al-Qardhawy, *Fiqih Jihād*, 635. Is discussed in more details in Chapter 5.
[22] Abdullah Azzam, *Jihād: Adab Dan Hukumnya* (Jakarta: Gema Insani Press, 1993).
[23] See for example a discussion on the rule of cutting trees, at: Ibid., 33–39.
[24] See for example a discussion on the ruling of cannons, warships, rockets, *etc,* at: Ibid., 42–43.

suicide but promoting 'daring operations'[25] and against treachery towards treaties made with the enemy.[26]

What could be improved from 'Azzām's work is to address more pressing issues and advance them as necessary. For example, the permissibility of the use of modern weapons comes with the recognition of collateral damage due to necessity. Yet, one is yet to find the distinction between inevitable collateral damage and reckless ones. Such distinction has been recognised by IHL scholars for decades, but seemingly not so much by scholars of *fiqh*. 'Azzām also limits his explanation on lawful or unlawful treachery by examples, such as a visa which is considered as 'safety agreement' and must be respected. These are areas which this research intends to fill in. Adding to this furthermore, 'Azzām dismisses the previously mentioned narration from Abu Bakr prohibiting the cutting and burning of trees (which could be the basis to derive a 'principle of proportionality') due to questions on the authenticity of the said narration.[27] This issue must also be responded to.

The second type of scholarship that needs to be explored is that of the 'moderate' group, who have not experienced warfare or experiencing it but not as one who directs and manages the conduct of war (i.e. as footsoldier only, not as commander).

Yūsuf al-Qaraḍāwī is a good jurist to observe first.[28] His book *Fiqih Jihād* is a monumental one which comprehensively discusses numerous aspects of *fiqh al-jihād* and also incorporating modern developments. He writes a section on modern weapons, particularly on three categories: modern war machines, weapons of mass

[25] Ibid., 37–38.
[26] Muhammad Haniff Hassan and Mohamed Redzuan Salleh, "Abdullah Azzam: Would He Have Endorsed 9/11?", *RSIS Commentaries*, (2009): 1–2.
[27] Azzam, Jihad: Adab dan Hukumnya, 33–39.
[28] It shall be noted that Al-Qardhawi actually participated in the 'Six Day War' as part of the Ikhwanul Muslimin militia, but did not hold any commanding role.

destruction, and chemical weapon[29] as well as another one on lawful and unlawful deceptions in war.[30]

What can be developed more from his works are a number of things. First, the rulings on weapons of mass destruction may need some revisiting as a noticeable number of items are inaccurate. It is mentioned before, that it is impossible to put small explosives such as grenades under the same category and ruling as nuclear bombs. It also bears the same weakness as 'Abdullah 'Azzām's works, in the sense that it does not discuss the mitigation of reckless collateral damage yet. Second, the discussion on lawful and unlawful deceptions in war may need to adapt to the '*urf* of the age. Al-Qaraḍāwī mentions a few classic examples, but lack the illustration on modern trends of perfidy such as disguising soldiers as ICRC delegates *etc*.[31]

One more issue that may need improvement is having comparative views with scholars who have experience in fighting and commanding in open warfare like 'Abdullah 'Azzām whose works are used by groups who are actively engaged in warfare especially in the recent years.[32] On the other hand, there is no Islamist fighting group known for using the works of Al-Qaraḍāwī (or other 'moderate' scholars). It may be more persuasive for the 'jihadist' (or even 'extremist') groups if a more moderate scholar appreciates their work and cites it for positive use (not just refuting). Or, at least from an academic standpoint, missing out on these combat-experienced scholars who have actual combat experience as commander is missing out on a lot of important materials. This research uses arguments from both '*jihādi*' and 'moderates'.

A second scholar in this group is Wahbah Al-Zuḥaylī, especially in his book *Āthār al-Ḥarb Fi al-Fiqh al-Islāmī.* Wahbah Al-Zuḥaylī argues similarly with 'Abdullah 'Azzām when it comes to modern weapons. He essentially says that any

[29] Al-Qardhawy, *Fiqih Jihād*, 489–99.
[30] Ibid., 632–636.
[31] Some with 'modern flavors', such as 'information on secret locations of missile caches' (Ibid., 635.), but in substance makes no difference with 'location of mangonel/spear storage'.
[32] This is despite some of his rulings abandoned by the Al-Qaeda in some terror attacks they allegedly committed. See generally : Hassan, M.H. and Salleh, Abdullah Azzam: Would He Have Endorsed 9/11?

sort of destruction with whatever weapon, even in case of a human shield, is permissible as long as there is an imperative necessity for it.[33] However, Wahbah Al-Zuḥaylī is one step ahead when he mentions that in carrying out attacks risking the lives of Muslims taken as human shield, the attacker should make intentions for the attacks to be conducted to the non-Muslim enemy rather than the Muslim human shield, to ensure that any Muslim casualties are not deliberate.[34] This is a reference to a prohibition of indiscriminate attacks. However, Wahbah Al-Zuḥaylī does not mention a scenario of non-Muslim collateral damage, which may not be killed either if they are non-combatants. He only highlights that there has to be some form of effort to avoid the deliberate killing of persons not lawful to be killed. It lacks detail, which this research aims to make, but Al-Zuḥaylī's work contributes some progress.

The next scholar in this group is Muhammad Haniff Hassan. His book, *The Father of Jihād:'Abd Allāh 'Azzām's Jihād Ideas and Implications to National Security*, is not exactly a book focusing on *fiqh al-jihād,* rather it explores the thoughts of 'Abdullah 'Azzām on *jihād*.[35] However, before exploring 'Azzām's thoughts on *jihād* he first elaborates the rules of *jihād* in Islam.[36] There are a number of points of interest to this research.

Hassan argues that there should be active measures taken to minimise collateral deaths of non-combatants, while also noting a similar notion that destruction of property and the environment are only acceptable when necessary.[37] This research furthers Hassan's argument by exploring what lacks from his work, including: where does the obligation to minimise collateral deaths come from, and what kind of

[33] Wahbah Al-Zuḥaylī, *Āthār al-Ḥarb Fi al-Fiqh al-Islāmī*, (Damascus: Dar Al-Fikr, 1419), 506–507.
[34] Ibid. See also: Wahbah Al-Zuḥaylī, *Fiqh al-Islām wa Adillatuhu*, *Vol. 8*, (Damascus: Dar al-Fikr, 1428), 5857–5858.
[35] Muhammad Haniff Hassan, *The Father of Jihād:'Abd Allāh'Azzām's Jihād Ideas and Implications to National Security* (Singapore: World Scientific, 2014).
[36] Ibid., 43–61.
[37] Ibid., 52–53.

'measures' that should be taken[38] and that these 'measures' should be done not only in the case of human shield but in other kinds of military operations.

Another argument that Hassan puts forward is the obligation to consider modern IHL instruments. He says that IHL instruments can be applied either as a treaty or as 'customary law' (*'urf*).[39] While such a proposition may be a popular one, more should be explored of its actual justification as well as nature. When and to what extent can (or must) a treaty be binding on all Muslims? How would treaties apply to non-state actors, especially to ones who have abandoned their nationalities (as is the case of *Da'esh* fighters),[40] is another question. Whether *'urf* and customary international laws could be equated is yet another trickier question to handle. The primary question, though, is why should *fiqh* adopt the non-Islamic laws in the first place. Regardless of its permissibility, which is argued separately, can *fiqh al-jihād* not derive its own solutions to the new challenges of modernity? This last argument of Hassan opens the door to the question of reform in *fiqh,* which is an important part of this research and is developed herein.

Another important work stream worth mentioning are those facilitated by the International Committee of the Red Cross (the ICRC), albeit these works not necessarily representing the views of the ICRC. There are a number of books published by the ICRC which are dedicated to Islam and IHL, among them is the work of Zayd bin 'Abd al-Karīm al-Zayd cited in the introduction of this thesis. Another work worth mentioning is a chapter book on Islam and IHL edited by Ameur Zemmali.[41] The ICRC projects are very positive in the sense that they initiate the 'building of bridges' to help reduce what Huntington calls the 'clash of civilisations'. Considering ICRC's interests to promote and proliferate the faithful application of

[38] Hassan gives an example i.e. aiming at enemies instead of cvilians. However, this is hardly a representation towards the complexities.
[39] Hassan, M.H., The Father of Jihad:'Abd Allāh'Azzām's Jihad Ideas and Implications to National Security, 139.
[40] Note that Da'esh established what is claimed to be a state, and different theories on statehood may result in different responses to such claim.
[41] Ameur Zemmali (ed.), *Islam dan Hukum Humaniter Internasional*, (Jakarta: Mizan, 2012).

IHL, having Islamic scholars and IHL scholars share and compare and find some common grounds is certainly a good thing.

However, a common feature among these ICRC-published works is that they usually focus on the general common grounds and do not address the various details which are problematic and controversial. As explained in the introduction of this thesis and the problem statement, there is a lethargy of *fiqh al-jihad* and neither of these ICRC works seem to address them. Admittedly, there should be much appreciation towards very recent works related to the management of the dead in Islam which are, no doubt, very useful and urgent.[42] However, in a majority of other issues, discussions are unfortunately too repetitive and general. For example, in the previously mentioned book edited by Zemmali, multiple chapters seem to very repetitively discuss the same subject over and over again,[43] while various other detailed issues (including those which are in the scope of this thesis) are not dealt with.

For example, with regards to the use of modern weapons, Al-Ghunaymi's chapter discusses it either in context of weapons of mass destruction[44] or the historical *manjaniq* but only from a 'principle of distinction' perspective.[45] Yet it must be noted that Al-Ghunaymi hints at an acknowledgement that there are little works of *fiqh* available analysing the modern weapons, although alike al-Qaraḍāwī he seems to

[42] See: Ahmed Al-Dawoody, "Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics", *International Review of the Red Cross*, vol. 99, no. 905 (2017): 759–784; Mohammad Azharul Islam and Maulana Obaid Ullah Hamzah, *Respect for the Dead: From The Perspective of International Humanitarian Law and Islam*, (Dhaka: The International Committee of the Red Cross, 2016).

[43] For example: Chapter 7 by 'Abd al-Salām Muḥammad Al-Sharīf is fully dedicated to discuss the humane treatment of war captives. But this does not deter Chapters 2, 3, 4, 5, 6, 8, 9, and 15 from also discussing this same subject. See: Zemmali (ed.), Islam dan Hukum Humaniter Internasional.

[44] Which causes total annihilation: Muhammad Thala'at Al-Ghunaymi, "Tinjauan Umum Tentang Hukum Humaniter Internasional Islam" in *Islam dan Hukum Humaniter Internasional*, edited by Ameur Zemmali (Jakarta: Mizan, 2012), 66.

[45] He explains about how the *manjaniq* should be directed to the enemy fort instead of the civilian buildings. Nothing about proportionality and only implicitly about precaution: Ibid., 67.

(inaccurately) generalise them all under one criteria of 'weapons of mass destruction'.[46]

A final note regarding ICRC's contribution is the Expert Workshop on Islam and IHL, held in Geneva in 2018.[47] This workshop is not a literature *per se,* but it may be a precursor towards a potential important step in the development of literature. The scholars involved in the Expert Workshop pointed out various issues, but two most relevant to this thesis: First, that there are common grounds between Islam and IHL in very important matters (such as the protection of civilians and non-combatants), and Second, that further research and cooperation is needed to explore the subject further.[48]

Ahmed Al-Dawoody is a scholar who perhaps advances most topics of *fiqh al-jihād* through his book *The Islamic Law of War*.[49] With respect to the means and methods of warfare, he highlights four things: human shields, night attack, weapons, and property destruction.[50] Most comprehensive of all, considering the works of classical and modern scholars of *fiqh* alike, he considers the aspects of modern warfare. He thoroughly examines how most of the cases of potential collateral damage in the scholarship are all considered by virtue of necessity, providing blanket justification towards what may seem like any form of collateral damage. He identifies that there are numerous conflicting rulings by numerous scholars, which leaves it into the hand of the individual Muslims to choose from among them.[51] It is noted that scholars are content in providing all the different opinions and not resolving them,[52] and this leads to an uncertainty of *fiqh.*

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[46] Ibid.
[47] Which the author and supervisor of this thesis was fortunate to be part of, representing our respective states.
[48] For the full report of the Expert Workshop, see: Ahmed Al-Dawoody, *IHL and Islamic Law in Contemporary Armed Conflict: Expert Workshop, Geneva 29-30 October 2018*, (Genev, 2019).
[49] Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, (New York: Palgrave Macmillan, 2011).
[50] Ibid., 116–129.
[51] Ibid., 118.
[52] Ibid., 143.

Even in the modern era, there are indeed jurists who have authored works to identify the strongest opinion across the differences such as ‘Abdullah ‘Azzām, Wahbah Al-Zuḥaylī, Al-Qaraḍāwī, and others. However, they too are individual scholar works (albeit very prominent ones) spread across libraries. The only one point where there seems to be some sort of ‘global level codification’ in *fiqh al-jihād* is Article 3 of the Cairo Declaration of Human Rights in Islam 1990, mentioning only the following:

i. In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate or dismember dead bodies. It is required to exchange prisoners of war and to arrange visits or reunions of families separated by circumstances of war.
ii. It is prohibited to cut down trees, to destroy crops or livestock, to destroy the enemy’s civilian buildings and installations by shelling, blasting or any other means.

The above Article may represent the core of *fiqh al-jihād* in the ethical conducts of warfare, but clearly it severely lacks the necessary details. Al-Dawoody points out the necessity to codify *fiqh al-jihād,* which may indeed be a solution to the problem of conflicting rulings. What he has not mentioned yet, though, is the problem that lies in the lack of incorporation of certain modern realities, which the other previous scholars lack too. There were mentions on the need of Muslim army to aim at the enemy instead of non-combatants in case of human shield. Yet, the lack of comprehensiveness in enumerating these efforts to minimise casualties may also be a paramount problem in the current state of *fiqh*. The solution that this research offers to

derive these details (i.e. the issues that are not yet discussed) to further complete *fiqh al-jihād* will work very well with Al-Dawoody's proposal of codification.

Finally, it may be necessary to mention materials comparing *fiqh al-jihād* and IHL. The works in this field include the previously mentioned book of Zayd bin 'Abd al-Karīm al-Zayd as well as that of 'Abd al-Ghanī 'Abd al-Ḥamīd Maḥmūd.[53] These works provide good general information to the public as to how *fiqh al-jihād* (which they term as Islamic Laws of War, possibly to make it more 'reader friendly' to the common reader) is consistent with the rules of modern IHL.

The comparison of *fiqh al-jihād* with IHL is a potential solution to the lack of detail in *fiqh al-jihād* because modern IHL is very comprehensive in terms of the extent of its detail, very much more than that of *fiqh al-jihād*. There may be discourses on whether or not (and to what extent) can *fiqh* consider non-Islamic sources. However, at the very least, an observation on modern IHL could serve as a reference point as to how far can the conduct of war be regulated in order to mitigate its damage. However, it is quite unfortunate that these works comparing *fiqh al-jihād* and IHL lack depth in detail and do not cover much of the limitation towards the means and methods of warfare.[54]

The last work to discuss about is that of Fajri M. Muhammadin.[55] His article makes a general comparison between *fiqh al-jihād* and modern IHL, pointing out the similarities and differences in some selected principles. Relevant to the limitation towards the means and methods of warfare, this work is the most advanced compared to the rest. The first reason is because it identifies not only that the current works of

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[53] Abdul Ghani Abdul Hamid Mahmud, *Perlindungan Korban Konflik Bersenjata dalam Perspektif Hukum Humaniter Internasional dan Hukum Islam*, (Jakarta: International Committee of the Red Cross (ICRC) - Delegasi Regional Indonesia, 2008).

[54] Numerous other works in this field lack in the same way, see for examples: Anisseh Van Engeland, "The differences and similarities between international humanitarian law and Islamic humanitarian law: Is there ground for reconciliation? 1", *Journal of Islamic Law and Culture*, vol. 10, no. 1 (2008): 81–99. See also: Etim E Okon, "Islam, War, and International Humanitarian Law", *European Scientific Journal*, vol. 10, no. 14 (2014).

[55] Fajri Matahati Muhammadin, "Achieving an Honest Reconciliation: Islamic and International Humanitarian Law", *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, vol. 27, no. 3 (2015): 579–597.

fiqh fail to explicitly mention the necessity to mitigate incidental losses, and secondly because he elaborates how there are basis in Islamic teachings from which such necessities can be derived, like an 'Islamic version' of IHL's Principle of Proportionality.[56] He also argues the need and possibility to create a modern *ijmā'*[57] which could complement Al-Dawoody's proposal. What needs improvement in Fajri's works is his use of inductive reasoning in deriving principles, which at this point is still lacking, as well as more details from which such principles can be applied in the entire rules related to the limitation of the means and methods of warfare.

1.9 CHAPTERISATION

This research is divided into six chapters. Chapter One, titled "General Introduction", begins with an introduction to the background of the problem and ends with a particular Sub-Chapter which is the chapterization of this research.

Chapters Two to Five each discusses one research question. Chapter Two discusses the extent to which *fiqh* should be affected by the development of science and technology as well as international law. This chapter serves a basis to perceive developments of new trends in modern warfare and international laws of armed conflict which are discussed in Chapters Three to Five.

Chapter Three first examines how the modern IHL principles of Proportionality and Precaution attempts to prevent excessive unintentional damage and loss towards non-combatants and civilian objects as a result of new trends in modern warfare, including *inter alia* more destructive weapons. This Chapter then proceeds to discusses the extent to which *fiqh al-jihād* can incorporate that principle to achieve the same purpose.

[56] Ibid., 585–586.
[57] Ibid., 591–593.

Chapter Four highlights that excessive harm can also affect combatants, specifically harm that causes unnecessary suffering and superfluous injuries. The rules of modern IHL prohibiting the infliction of unnecessary suffering and superfluous injuries mainly consist of a list of weapons which are prohibited as they are deemed to cause such effect. This chapter proceeds to discuss what Islam says generally about the infliction of such harm to combatants and specifically about the particular weapons discussed in modern IHL, and also how much *fiqh al-jihād* can accept, adopt, or reject modern IHL rules.

Chapter Five centers around the issue of deception and treason which is, at face-value, a very old yet everlasting part of warfare. However, modern IHL shifts the paradigm of treachery to not only include 'dishonorable acts' but more especially 'feigning protected status', coining the new legal term 'perfidy'. This final substantive chapter proceeds by discussing the *fiqh al-jihād* notion of deception and treachery, then sees the extent to which (if any) the developments in modern IHL should be adopted.

This research is closed by Chapter Six which provides a general conclusion and answers all the research questions. Also, some recommendations are offered as a follow up from that general conclusion.

CHAPTER TWO

THE ROLE OF *IJTIHĀD* IN THE MODERN DEVELOPMENT OF *FIQH AL-JIHĀD*

2.1 INTRODUCTION

Change is inevitable. It seems that change is both natural and necessary as humankind evolves. This change affects the smallest things of human behaviour, and also a large-scale inter-nation relation. Together with that, war also changes not only the means and methods of war, but also the world's attitude towards it. This chapter observes Islamic law (*fiqh*) and the extent to which it can change together with the development of humankind. Such observation is necessary before the next chapters explain how *fiqh al-jihād* can or should keep up with the developments of humankind in the practise of war.

This chapter starts by discussing the basics of *ijtihād,* how it can be done, and to what extent *ijtihād* can change. Next, since science heavily affects the development of humankind in general (and warfare in particular), Sub-chapter 2.3 is dedicated to discussing the effects of science towards *fiqh*. Then, the relevance of the development of international law towards *fiqh* is explored. After all, international law has changed the ways humankind sees the world a lot. Finally, this chapter explains the difference between how Islam and modern international law perceive war, which is essential because law must be seen in the light of its objectives.

It shall be noted that many non-*fiqh al-jihād* examples will be used. This is because much of this chapter discusses the evolution of *fiqh* in modern discourse, therefore the existing literature and rulings are discussed concerning this modern development. It has been explained in the previous chapter how there is a problem of lethargy in the development of *fiqh al-jihād* in the *jus in bello* level*,* thus consequently it is very difficult to find good examples from this topic. However, on the other hand,

this chapter is essential to set out how *uṣūl al-fiqh* has and should respond to modernity. For example, as this chapter shows, there are incorrect and deviant methods developed recently (i.e. the misuse of hermeneutics by 'Liberal Islam').

2.2 *IJTIHĀD* AND RE-*IJTIHĀD*

This subchapter discusses the way *ijtihād* is made and also whether and how changes of rulings can be done with *ijtihād*. It also explains a method that has been used to fundamentally alter the nature of *ijtihād* despite its deviance within Islamic teachings, i.e. hermeneutics, used by proponents of 'Liberal Islam'.

2.2.1 *Fiqh* and *Ijtihād*

What is usually popular as 'Islamic law' which is, in Islamic terminology, referred to as '*fiqh*'. *Fiqh* is defined as the following: "the knowledge of legal rules pertaining to conduct which have been derived from specific evidences'."[58] This definition used the term *adillah* derived from the word dalīl, which refers specifically to the Qur'ān and the Sunnah. These are what are referred to as divine or revealed sources of Islamic law.

In a general sense, there can be no other source of Islamic law. There are a number of bases for this, such as what is said in the Qur'ān in Surah Al-Nisā (4) verse 59:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اَطِيْعُوا اللّٰهَ وَاَطِيْعُوا الرَّسُوْلَ وَاُولِى الْاَمْرِ مِنْكُمْۚ فَاِنْ تَنَازَعْتُمْ فِيْ شَيْءٍ فَرُدُّوْهُ اِلَى اللّٰهِ وَالرَّسُوْلِ اِنْ كُنْتُمْ تُؤْمِنُوْنَ بِاللّٰهِ وَالْيَوْمِ الْاٰخِرِۗ ذٰلِكَ خَيْرٌ وَّاَحْسَنُ تَأْوِيْلًا

[58] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, (Selangor: The Other Press, 2003), 20. See also: Wahbah al-Zuḥaylī, *Uṣūl al-Fiqh Al-Islāmī*, *Vol. 1*, (Tehran: Dar Ihsan, 1997), 19.

"O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result."

Further said in Surah Al-Mā'idah (5) verse 44:

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الْكٰفِرُوْنَ

"...And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers."[59]

Further also in Surah Al-Mā'idah (5) verse 50:

يُوقِنُونَ لِقَوْمٍ حُكْمًا اللَّهِ مِنَ أَحْسَنُ وَمَنْ ۚ يَبْغُونَ الْجَاهِلِيَّةِ أَفَحُكْمَ

"Then is it the judgement of [the time of] ignorance they desire? But who is better than Allah in judgement for a people who are certain [in faith]."

From these verses, jurists rule that believing that there are any guidance or law better than the Qur'ān and the Sunnah is an act of disbelief and is a nullifier of Iman.[60] This is how serious the matter can be.

However, there are other sources of Islamic law, such as *ijmā'* ('consensus'), *qiyās* ('analogy'), *'urf* ('custom'), *maṣlaḥat* ('benefits'), and others.[61] However, these

[59] The end of Surah Al-Mā'idah verses 45 and 47 contains a similar rule but each ends differently: ٱلظَّٰلِمُونَ … (verse 45: wrongdoers) and ٱلْفَٰسِقُونَ … (verse 47: defiantly disobedient), which emphasises on the prohibition to use laws other than those revealed by Allah.

[60] Muhammad bin 'Abd al-Wahhab, *Nawaqidhul Islam - Pembatal Islam (Matan dan Terjemah)*, (Surabaya: Pustaka Syabab, 2015), 4; Ibn Abī 'Alī Al-Ḥanafi, *Sharḥ al-'Aqīdah Al-Ṭaḥawiyyah*, *Vol. 2*, (Beirut: Mu'assasah al-Risalah, 1997), 446. See also this compilation of *fatwā*s on the same matter from 200 scholars, classical and contemporary, and from various *madhhab*s: Abū Ṣuhayb 'Abd Al-'Azīz ibn Ṣuhayb Al-Mālikī, *Aqwālu Al-Ā'immah wa Al-Du'āt Fī Bayāni Riddati Man Baddala Sharī'ah Min al-Ḥukkam Al-Ṭughāt*, (Ilmway (Online), 2000).

[61] Nyazee, Islamic Jurisprudence, 213–60; Mawil Izzi Dien, Islamic Law: From Historical Foundations to Contemporary Practise (Notre Dame: University of Notre Dame Press, 2004), 57–63.

are not to be understood as 'using other than what is revealed by Allah' as is explained in the following passage.

When a problem arises and there is no direct and express ruling on the particular matter in the Qur'ān or the Sunnah, only then the jurists may do *ijtihād*. The word *ijtihād* is understood as "…the effort made by the mujtahid in seeking knowledge of the ahkam (rules) of the *Sharī'ah* through interpretation."[62] However, it may be important to also see how Imam Al-Shāfi'ī sees *ijtihād.* When questioned about *ijtihād* and *qiyās*, he said the following: "they are two words of the same meaning."[63] Note that *qiyās* means:

> "The assignment of a hukm of an existing case found in the text of the Quran, Sunnah, or Ijma, to a new case whose hukm is not found in these sources on the basis of a common underlying attribute called the 'illah of the hukm."[64]

From here, one can conclude that *ijtihād* is not 'using other than what is revealed by Allah' but rather the way of trying to apply the *Qur'ān* and the Sunnah to matters not directly ruled in the two sources. After all, all the other methods from which *ijtihād* is made are all based on the Qur'ān or the Sunnah.

Qiyās is one among these methods. As indicated in the definition cited above, *qiyās* is used under the assumption that two issues (one clearly regulated in the *Qur'ān*, Sunnah, or *ijmā'*, while the other is not), if they share the same *'illah* (underlying cause), should have the same rule. It must be noted that the determination of the '*illah*, as noted by Muslehuddin, is the most difficult part.[65] It can be a tricky

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[62] Nyazee, Islamic Jurisprudence, 263. See also: Muhammad bin Shalih Al-Utsaimin, *Ushul Fiqih*, (Yogyakarta: Media Hidayah, 2008), 128.
[63] Imam Al-Shafi'i, *Shafi'is Risalah: Treatise on the Foundations of Islamic Jurisprudence (Translated with an Introduction, Notes, and Appendices by Majid Khadduri)*, (Cambridge: The Islamic Texts Society, 2nd edn., 1987), 288.
[64] Nyazee, Islamic Jurisprudence, 214. Or, simply, analogical deduction. See: Abu Ameenah Bilal Philips, *The Evolution of Fiqh (Islamic Law and the Madh-habs)*, (Riyadh: Tawheed Publication, 1990), 60.
[65] Muhammad Muslehuddin, *Philosophy of Islamic law and Orientalists*, (Lahore: Kazi Publications, 1985), 135.

work to truly ensure that the *'illah* of both issues are really similar, and failure to do so will result in *qiyās ma'a al-fāriq* (analogy of two different things, or an incorrect analogy).

Among the examples of *qiyās* relevant to this thesis is the ruling of some contemporary jurists allowing the use of tanks and bombs because the Prophet ﷺ was reported to allow the use of *manjaniq*.[66] It seems that the common *'illah* identified by these jurists is that both the *manjaniq* and modern weapons (tanks and bombs) are tools of war of their era which are means to an end in war.[67]

'*Urf* (customs) is also a source of law used when they do not go against the *Sharī'ah*, which is derived also from various verses in the Qur'ān *inter alia* in Surah Al-Nisā' (4) verse 19:

... وَعَاشِرُوْهُنَّ بِالْمَعْرُوْفِ...

"... And live with them in kindness ..."

The word مَعْرُوفِ used in the verse roots is the same with *'urf,* and its meaning includes what is good and familiar or known among the people.[68]

Also, it is very common to consider the *ijtihād* of other jurists as a consideration. The first and foremost is usually to consider the *al-salaf al-ṣālih* or Islamic jurists of the three early generations of Muslims, especially the companions who witnessed the revelations and learned directly from Prophet Muḥammad ﷺ .[69]

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[66] Azzam, Jihad: Adab dan Hukumnya, 43.Azzam 43

[67] As explained in Chapter Three, this analogy is not entirely correct and cannot be the sole determiner of this issue.

[68] Amir Syarifuddin, *Ushul Fiqih*, *Vol. 2*, (Jakarta: PT Logos Wacana Ilmu, 1999), 363–364.

[69] Abu Ammar Yasir Qadhi, *An Introduction to the Sciences of the Qur'aan*, (Birmingham: Al Hidaayah Publishing and Distribution, 1999), 332; 'Abd al-Mālik Aḥmad Ramaḍānī, *Sittu Durar Min Uṣūli Ahl al-Āthār*, (al-Riyāḍ: Maktabah Al-Malik Fahd, 1420), 66–67.

This is the reason, for example, jurists like Ibn Rushd consider the narration attributed to Abū Bakr in their rulings concerning the permissibility of burning trees in war.[70]

Maṣlaḥat has become an important source of Islamic law. It is understood literally to mean "to acquire benefits and to reject harm", and technically in *uṣūl al-fiqh* as to preserve the aims and purposes of the *Sharī'ah* in the settlement of legal issues.[71] It must be understood that the harms and benefits considered in *maṣlaḥat* are not the ones found through human reason but rather from the *Sharī'ah*.[72]

Jurists have also noted that *maṣlaḥat* is rejected when it is in contravention to the *Sharī'ah* (i.e. Qur'ān, Sunnah, *ijmā'*, and *qiyās*),[73] as it should be obvious from the fact that the *Sharī'ah* is where *maṣlaḥat* should be derived from. This is the reason, as a general notion, while certain groups view that killing the enemy women and children may apparently have some benefits,[74] such view is disagreeable because such acts cannot be seen as part of *maṣlaḥat* as they are in direct contravention to the *Sharī'ah*.[75]

To further explain *maṣlaḥat,* the jurists have identified that there are five purposes of the *Sharī'ah*, which are as follow:[76]

i. Preservation of the *dīn* (religion),
ii. Preservation of life,
iii. Preservation of lineage/family,
iv. Preservation of intellect, and
v. Preservation of wealth.

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[70] Ibn Rushd, *The Distinguished Jurist's Primer*, 461.
[71] Abū Ḥāmid Muḥammad Al-Ghazālī, *Al-Muṣtaṣfa Min 'Ilm al-Uṣūl*, *Vol. 1*, (al-Qāhirah: Al-Amiriya Press, 1324), 286.
[72] Although human reason and Sharī'ah reasons are always seen as not contradictory. Nyazee, Islamic Jurisprudence, 197.
[73] Muḥammad Sa'īd Ramaḍān Al-Būthī, *Ḍawābiṭ Al-Maṣlaḥat fī al-Sharī'ah Al-Islāmiyyah*, (Bayrūt: Mu'assasah al-Risalah, 1973), 129, 161, and 216; Nyazee, Islamic Jurisprudence, 198–199; Bakr bin Abdullah and Muhammad bin Shalih Al-Utsaimin, *Syarah Hilyah Thalibil Ilmi (Akhlak Pencari Ilmu)*, (Jakarta: Akbar Media, 2013), 215.
[74] UNICEF, "Children In War", UNICEF, <https://www.unicef.org/sowc96/1cinwar.htm> (accessed 19 February, 2018).
[75] Although there may be other situations which will need some more exploration later.
[76] Al-Ghazālī, Al-Muṣtaṣfa Min 'Ilm al-Uṣūl, 174. See also: Nyazee, Islamic Jurisprudence, 202.

The aforementioned list is also according to the order of their precedence, although there may be other considerations such as in the context of public interest versus personal interest, *etc*.[77]

However, a discussion concerning the relations between *maṣlaḥat* and *jihād* may, at face value, be tricky. It is obvious that fighting in a war could very likely cost the lives of at least some of the Muslim fighters. On one hand, there can be no religion without life, but on the other hand sometimes life may need to be sacrificed for the religion[78] and running away due to fear is considered a sin, as the Qur'ān provides in Surah Al-Anfāl (8) verse 15-16:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اِذَا لَقِيْتُمُ الَّذِيْنَ كَفَرُوْا زَحْفًا فَلَا تُوَلُّوْهُمُ الْاَدْبَارَۚ(١٥) وَمَنْ يُّوَلِّهِمْ يَوْمَىِٕذٍ دُبُرَهٗٓ اِلَّا مُتَحَرِّفًا لِّقِتَالٍ اَوْ مُتَحَيِّزًا اِلٰى فِئَةٍ فَقَدْ بَآءَ بِغَضَبٍ مِّنَ اللّٰهِ وَمَأْوٰىهُ جَهَنَّمُ ۗوَبِئْسَ الْمَصِيْرُ (١٦)

> "O you who have believed, when you meet those who disbelieve advancing [for battle], do not turn to them your backs [in flight]. And whoever turns his back to them on such a day, unless swerving [as a strategy] for war or joining [another] company, has certainly returned with anger [upon him] from Allah, and his refuge is Hell - and wretched is the destination."

It is probably a common knowledge and simple logic that the purpose to wage war is to achieve victory instead of defeat, or at least to mitigate losses when the latter is inevitable. When jihad is fought in an offensive manner, then the purpose is certainly so that Allah's religion is victorious.[79] When *jihād* is fought in a defensive manner, then the purpose is to avoid or mitigate the destruction of the Muslims.[80]

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[77] Nyazee, Islamic Jurisprudence, 208–212.
[78] Ibid., 205.
[79] Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *The Religious and Moral Doctrine of Jihaad*, (Birmingham: Maktabah Al Ansaar, 2001), 28.
[80] Al-Qardhawy, Fiqih Jihad, 341–342.

The previous paragraph implies the strong relation between *jihād* and *maṣlaḥat-muḍarat.* Various aspects of *fiqh al-jihād* depend on *maṣlaḥat,* as is explained in the following Sub-Chapter 2.2.2. After all, *fiqh al-jihād* is a part of *fiqh al-siyar* (Islamic international law),[81] which is part of *siyāsah shar'iyyah*. Often referred to as 'Islamic politics', *siyāsah shar'iyyah* discusses how a government should rule over and manage the affairs of the society in accordance with the *Sharī'ah* to achieve common *maṣlaḥat.*[82]

The last topic to discuss under this sub-chapter is the *qawā'id fiqhiyyah*, known also as the Islamic legal maxims. Unlike *fiqh* rulings which rule on specific matters, the Islamic legal maxims are more general rules or principles derived from the Qur'ān and Sunnah which can be applied to find detailed rulings regarding more specific matters which are not regulated specifically in the Qur'ān and Sunnah.[83]

Among the Islamic legal maxims are 'hardship begets facility' and 'when a matter is constricted, it is expanded'.[84] These maxims can be applied to various situations, such as: the accidental deaths of civilians may be justified if it is absolutely inevitable to achieve very a urgent military necessity.[85]

2.2.2 Is The Door to *Ijtihād* Closed?

The first few centuries after the Migration was considered as a time when the Muslim world was rich with *mujtahid*. *Fiqh* is developed so much as a science after the demise of the Companions of the Prophet ﷺ , and reached a 'golden era' or the 'era of the

[81] Many works of *fiqh al-siyar* put *jihād* as a first and central topic. See: Muḥammad ibn Aḥmad ibn Abi Sahl Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, (Egypt: Al-Shirkah al-Sharqiyyah li l-I'lānāt, 1971a).
[82] Abdul Wahab Khallaf, *Ilmu Ushul Fiqih*, (Jakarta: PT Rineka Cipta, 1993), 123.
[83] Zayn al-'Ābidīn ibn Ibrāhīm ibn Muḥammad Al-Shahīr ibn Nujaym, *Al-Ashbah wa Al-Naẓā'ir 'ala 'alā Madhhab Abi Ḥanīfah*, (Beirut: Dar al-Kutub 'Ilmiya, 1999), 22; Abdul Karim Zaidan, *Al-Wajiz: 100 Kaidah Fikih Dalam Kehidupan Sehari-Hari*, (Jakarta: Pustaka Al-Kautsar, 2008), 1.
[84] 'Abd al-Karim Zaydan, *Synopsis on the Elucidation of Legal Maxims in Islamic Law*, translated by Md. Habibur Rahman and Azman Ismail, (Kuala Lumpur: IBFIM, 2015), 57–74.
[85] This example is part of an analysis in Chapter Three.

mujtahidīn' at the start of the second to mid-fourth century Hijri.[86] However, after that era passed (forth century Hijri), the development of *fiqh* seemed to be followed by a decline, and many jurists of that time believed that the doors to *ijtihād* were closed.[87] It was not until the seventh century Hijri when Imam Ibn Taymiyyah and his student Imam Ibn Al-Qayyim Al-Jawziyyah declared that the door to *ijtihād* was never closed.[88] It was after them that the studies of comparative *fiqh* began to develop.[89]

During the period of stagnancy, rather than developing *ijtihād,* the jurists at that time preferred instead to summarize (i.e. making *mukhtasar*s) or further elaborate (i.e. making *sharḥ*s) previous works of *fiqh* of their own *madhhab,* or even to beautify their works with language just to cover the weakness of their works.[90]

There were many causes to this. Some see that part of the problem is that the four great Imams of the *madhāhib* (i.e. Imam Abū Ḥanīfah, Imam Mālik, Imam Al-Shāfi'ī, and Imam Aḥmad ibn Ḥanbal) set a very high bar on how qualified one must be in order to be considered as a proper *mujtahid.*[91] Therefore, after the demise of the Imams, their successors felt that nobody left was qualified.[92] This is why, then, some argue that the opinion that 'doors to *ijtihād* are closed' were made to prevent unqualified people from making *ijtihād*.[93]

Some others see that part of the problem was 'fanatism' towards one's *madhhab*. This became quite bad, so much as different *madhhab*s made *takfīr* of each other and they did not allow marriages of their women with men of other *madhhab*s,

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[86] Abdus Salam, *Pembaharuan Pemikiran Hukum Islam*, (Yogyakarta: LESFI, 2003), 25.
[87] Abdul Aziz Dahlan, *Ensiklopedi Hukum Islam*, *Vol. 2*, (Jakarta: PT. Ichtiar Baru van Hoeve, 1996), 671.
[88] Rahmawati, *Istinbath Hukum Teungku Muhammad Hasbi Ash-Shiddieqy*, (Yogyakarta: Deepublish Publisher, 2015), 11.
[89] Ibid., 11–12.
[90] Muhammad Sayyid Al-Wakil, *Wajah Dunia Islam*, (Jakarta: Pustaka Al-Kautsar, 2005), 127–129.
[91] Amir Husin Mohd Nor, "Penutupan Pintu Ijtihad: Satu Kajian Semula", *Jurnal Syariah*, vol. 8, no. 1 (2000): 45.
[92] Ibid.
[93] See: al-Zuḥaylī, Uṣūl al-Fiqh Al-Islāmī, 1085.

and Masjid Al-Ḥarām (Makkah) even had four different pulpits from which each *madhhabs* conduct their ṣalāt separately.[94]

Either ways, as al-Zuḥaylī notes, there is simply no basis to claim that the door to *ijtihād* is closed.[95] The concerns are not valid. While it maybe true that nobody else has attained the qualifications at the level of the four Imams after their demise (i.e. *Mujtahid Muṭlaq Musta'qil*), there are levels below it which later jurists may qualify for, and they may do *ijtihād*, e.g. *Mujtahid Muṭlaq Ghayr Musta'qil, Mujtahid Muqayyad*, *Mujtahid al-Tarjīḥ, etc*.[96] In short, as stated by a *fatwā* of Shalih al-Fawzān, the doors to *ijtihād mutlaq* may be closed but the door for other *ijtihād* are still open.[97]

Furthermore, 'fanatism' towards the *madhhab*s may instead betray the Imāms. After all, the four Imāms have stressed the possibility that they may be wrong and, in such cases, their opinions must be abandoned.[98] This is in accordance with the passage in the Qur'ān, Surah Al-Nisā' (4) verse 59:

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[94] Philips, The Evolution of Fiqh (Islamic Law and the Madh-habs), 107–108. Even today we have cases of people arguing or even fighting over differences on the ruling of qunut, or whether *basmallah* is recited aloud in shalat, etc.

[95] al-Zuḥaylī, Uṣūl al-Fiqh Al-Islāmī, 1086.

[96] Nor, Penutupan Pintu Ijtihad: Satu Kajian Semula, 45–46. The terms *Mujtahid Muṭlaq Musta'qil, Mujtahid Muṭlaq Ghayr Musta'qil, Mujtahid Muqayyad*, and *Mujtahid al-Tarjīḥ* means, respectively: a *mujtahid* who derives his rulings directly from the Qur'ān and Sunnah with his own methodology, a *mujtahid* qualified as *Mujtahid Muṭlaq Musta'qil* but decides to follow the methodology of another Imam, a *mujtahid* who makes rulings on matters not yet discussed in the books of his own *madhhab,* and a *mujtahid* who compares and chooses the strongest opinions amongst multiple Imams or *madhhabs*.

[97] Shalih bin Fawzan Al-Fawzan, "Apakah Pintu Ijtihad Sudah Tertutup?", Muslim.Or.Id, <https://muslim.or.id/26820-apakah-pintu-ijtihad-sudah-tertutup.html> (accessed 27 November, 2017).

[98] See: Imam Abu Hanifah in Yūsuf Ibn 'Abd Allah ibn 'Abd Al-Barr, *al-Intiqā fī Faḍā'il al-Thalāthat al-A'immat al-Fuqahā*, (al-Qāhirah: Maktab al-Qudsi, 1931), 145., Imam Malik in Yūsuf Ibn 'Abd Allah ibn 'Abd Al-Barr, *Jāmi' Bayān Al-'Ilm wamā Yanbaghī fī Riwayātihi wa Hamlih*, *Vol. 2*, (al-Qāhirah: Al-Muniriyah, 1927), 32., Imam Al-Shāfi'ī in 'Alī ibn Al-Ḥasan Ibn 'Asākir, *Tārīkh Dimishq Al-Kabīr*, (Damascus: Rawdah al-Shām), 3., and Imam Ahmad in Yūsuf Ibn 'Abd Allah Ibn 'Abd Al-Barr, *Jami' Bayān Al-'Ilm*, *Vol. 2*, (al-Qāhirah: Al-Muniriyah, 1927), 149. These jurists emphasise also that they should not be followed blindly, rather the Muslims must follow their source i.e. the Qur'ān and the Sunnah.

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اَطِيْعُوا اللّٰهَ وَاَطِيْعُوا الرَّسُوْلَ وَاُولِى الْاَمْرِ مِنْكُمْۚ فَاِنْ تَنَازَعْتُمْ فِيْ شَيْءٍ فَرُدُّوْهُ اِلَى اللّٰهِ وَالرَّسُوْلِ اِنْ كُنْتُمْ تُؤْمِنُوْنَ بِاللّٰهِ وَالْيَوْمِ الْاٰخِرِۗ ذٰلِكَ خَيْرٌ وَّاَحْسَنُ تَأْوِيْلًا

"O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result."

Even more, issuing a *fatwā* is compulsory when a new problem rises,[99] and an *ijtihād* is the method used to make a *fatwā.*[100] New problems will always rise, and old problems may not have been solved properly even by the best jurists.[101] In such a scenario, bearing in mind the maxim that 'if something is essential to fulfil an obligation, then that 'something' is also an obligation',[102] it follows that *ijtihād* is therefore compulsory so that Muslims can fulfil their obligations.

However, many other problems may rise due to the development of time and society which definitely highly affects *maṣlaḥat*. Throughout the discussions on *fiqh al-jihād,* it is found that the discussion of *maṣlaḥat* is a very important one. As Al-Dawoody points out, *maṣlaḥat* has always been an extremely important consideration when it comes to *jihad*.[103] The easiest example is, based completely on common sense, nobody can argue that the very minimum objective of fighting in a war is to win it or at least mitigate the losses. In a more detailed example, when waging offensive jihad itself is considered *farḍ kifāyah,* but it must be considered first whether it will provide

[99] Al-Utsaimin, Ushul Fiqih, 126; Yaḥya ibn Sharaf Al-Nawawī, *Rawdah Al-Ṭālibīn*, *Vol. 8*, (Beirut: Dar al-Kutub 'Elmiya, 1992), 87.
[100] Magaji Chiroma, Mahamad bin Arifin, Abdul Haseeb Ansari, and Mohammad Asmadi Abdullah, "A Jurisprudential Overlap Between Fatwa, Ijtihad, Ijma', Qiyas, Istislah and Istihsan: An Appraisal", *Journal of Islamic Law Review*, vol. 10, no. 2 (2014): 346–347.
[101] As mentioned in footnote 83, even the four great Imams noticed the possibility of them being wrong.
[102] Muḥammad ibn Ṣāliḥ Al-'Uthaymīn, *al-Sharḥ al-Mumti' 'alā Zād al-Mustaqni'*, *Vol. 2*, (Damman: Dar Ibn Al-Jawzi, 2012), 94.
[103] Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 118.

maṣlaḥat for the Muslims.[104] The same is said also by jurists in discussing what the Muslims should do when the enemy uses a human shield.[105]

Sometimes, something lawful can become impermissible due to *maṣlaḥat* considerations. A good example to this is the ruling of taking slaves. The majority of jurists rule that in determining the fate of captives, the captives can be either: executed, released gratuitously, released with ransom, or enslaved, according to what the Muslim leader believes to be in the best interest of the Muslims.[106] However, during the war between Afghanistan and Russia, ‘Abdullah ‘Azzām ruled that it was impermissible to take the Russian women as slaves as it may cause the Russians to retaliate by raping Muslim women, thus causing harm instead of benefit.[107] His concerns were, of course, legitimate, as sexual violence was a grave problem during warfare.[108]

On the contrary, sometimes something unlawful can become impermissible also due to *maṣlaḥat* considerations. An example to this is the ruling on cutting and

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[104] Al-Qardhawy, Fiqih Jihad, 13–33.

[105] Although there are debates on the issue, in the end *maṣlaḥat* does seem to be at the core of it. See: Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 117–118; Ahmed Al-Dawoody, "Al-Sarakhsi’s Contribution to the Islamic Law of War", *Journal of Islamic and Near Eastern Law*, vol. 14 (2015): 33; Benjamin Buchholz, "The Human Shield in Islamic Jurisprudence", *Military Review*, (2013): 48–52.

[106] Ibn Rushd, *The Distinguished Jurist’s Primer*, 456–457. For example, after the battle of Badr, there was *maṣlaḥat* to execute some captives (due to their crimes), to release some by ransom either with wealth or teaching Muslims to read, and to release others gratuitiously due to special circumstances: Ismail ibn Katsir, *Shahih Tafsir Ibnu Katsir*, *Vol. 4*, edited by Safiurrahman Al-Mubarakfuri, (Jakarta: Pustaka Ibnu Katsir, 2016b), 121–122. In case of Banū Qurayẓah, all adult males were executed while the rest were enslaved, and nobody was ransomed: Muḥammad ibn Ismā‘īl Al-Bukhārī, *Sahih Al-Bukhari*, *Vol. 8*, (Riyadh: Beirut, 1997b), ḥadīth no.6262; Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no. 3043. There is heated discussions among contemporary scholars regarding how *maṣlaḥat* is applied to choices of fate of war captives. However, such indepth a discussion is beyond the scope of this thesis.

[107] Abdullah Azzam, *Fī Al-Jihād: Fiqh wa Ijtihād*, (Peshawar: Markaz Al-Shahid Azzam Al-Illamiy), 58.

[108] CHR, *Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Document E/CN.41995/42*, (1994), 64; Alexandra Stiglmayer, "Mass Rape: The War Against Women in Bosnia-Herzegovina", Women Under Siege Project, <http://www.womenundersiegeproject.org/conflicts/profile/colombia#numbers> (accessed 27 May, 2017).

burning trees. Ibn Rushd notes that some jurists rule that generally cutting and burning trees is impermissible, but an exception can be made due to military necessity.[109]

However, while *maṣlaḥat* indicators may only be based on the *Sharī'ah*, its application must consider the reality in order to put the *Sharī'ah* in context. This reality, especially in the context of warfare, has evolved so much throughout the ages. What was once spears has become arrows and then crossbows, the flintlock rifles became M4A1 assault rifles. What was once a boulder tossed by a trebuchet has become a cannonball shot by a howitzer, and what was once a bomb dropped by a Nighthawk is now a missile launched from a remote-controlled drone. This is but a taste of what modern warfare brings. Surely, there is a necessity for new *ijtihād*, and the jurists today seem to have left the opinion that the doors for *ijtihād* are closed.

With the door of *ijtihād* being open, one must be aware of the reality that differences of opinion will always occur. As elaborated earlier in this sub-chapter, differences of opinion have occurred already during the era of the *mujtahidīn.* Such differences can be the result of a number of factors, like the difference of opinions due to different methods of understanding the *dalīl* (either linguistic or other differences), or requirements to accept or reject certain *ḥadīth,* differences of maxims from which to derive laws, *etc*.[110] Furthermore, the way one observes reality in order to measure *maṣlaḥat* will also become more complicated. Therefore, certainly differences of opinion and even developments of methods[111] may occur even more on the questions of *maṣlaḥat*.

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[109] Ibn Rushd, *The Distinguished Jurist's Primer*, 461. There is discourse regarding this matter, which is discussed in Chapter Three.

[110] Philips, The Evolution of Fiqh (Islamic Law and the Madh-habs), 91–100; Nanang Abdillah, "Madzhab dan Faktor Penyebab Terjadinya Perbedaan", *Jurnal Fikroh*, vol. 8, no. 1 (2014): 25–27.

[111] For example, the *maqāṣid Sharī'ah* was thought to have originated –at least in its basic concepts— from the works of Imam Ḥaramayn and Imam Al-Ghazali (11th Century), see: Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah*, (Bandung: Mizan Media Utama, 2005), 33. From that point, the Maqashid *Sharī'ah* has been further developed by scholars such as Imam al-Shāṭibi, Jasser Audah, and so many more, until this day. See also: Ainul Yakin, "Urgensi Teori Maqashid Al-Syari'ah Dalam Penetapan Hukum Islam Dengan Pendekatan Mashlahah Mursalah", *Al-Turas*, vol. 2, no. 1 (2015): 28–29.

However, differences of opinion may only occur and can be respected when there is room for *ijtihād* i.e. when the Qur'ān or the Sunnah makes no clear rulings, and this is only for detailed or 'branch' (*furu'*) matters.[112] There shall be no difference of opinion regarding matters already ruled clearly in the Qur'ān or the Sunnah, or to matters departing from the fundamental foundations of Islamic teachings or 'root' (*uṣūl*) matters.[113] This second type of difference of opinion cannot be tolerated and therefore must be rejected.

The aforementioned is the identifying line between acceptable and non-acceptable *ijtihād*. This serves as a guide for the following chapters on the extent of which new developments can affect Islamic law.

2.2.3 How Open Are The Doors of *Ijtihād*: Liberal Islam

When doors which were previously closed are suddenly open, some people seem to forget that this does not mean that suddenly any guest can enter with any manner they please. While more and more new and rich works of *fiqh* and *uṣūl al-fiqh* have emerged, some may have taken it too far. When restrictions on *ijtihād* were seen as chains of oppression, the opening of the gates of it were seen by some as liberty: and 'liberal Islam' was born.

Proponents of 'liberal Islam' believes that classical Islamic scholarship is no longer relevant in today's world and wishes to reform the fundamental frameworks (*uṣūl*).[114] Liberal Islam is a very long topic to discuss and may deserve its own thesis(s) to analyse. The problems and flaws in the thoughts and methods of Liberal Islam are so deep, systematic, and mutli-layered. However, concerning the way the

[112] 'Umar Sulaymān Al-Ashqar, *Naẓarat fī Uṣūl al-Fiqh*, (Jordan: Dar an-Nafa'is, 1999), 385–386.
[113] Ibid., 387–390; Abuddin Nata, *Studi Islam Komprehensif*, (Jakarta: Kencana, 2011), 534.
[114] Imam Mustofa, "Metode Ijtihad Islam Liberal (Studi Kritis Terhadap Ijtihad Jaringan Islam Liberal)", *Istinbath Jurnal Hukum*, vol. 10, no. 2 (2013): 2.

proponents of Liberal Islam understand Islam and how it should adapt to changes, it may suffice to limit discussions to their general underlying methods.

The idea of hermeneutics as a method of textual analysis and interpretation is to understand that a text is produced by a man, and therefore subject to all the limitations of a man's mind i.e. limited by his cultural background, and anything divine or spiritual is beyond what this method can observe or consider.[115] It holds a basis that no text can be separated from, and therefore substantially 'stays' in, its historical context.[116] In case of religious texts, hermeneutics seem to work well with the religious text of Christianity.[117] However, 'Liberal Islam' scholars apply this to Islam as well.

As a result, Nasr Hamid Abu Zaid, a renowned scholar and important pioneer of 'liberal Islam', claims, "The word of Muhammad reporting what he asserts is the word of god, this is the Qur'ān."[118] and "The text [i.e. the Qur'ān] can only be a cultural and historical product."[119] Even furthermore, Abdul Moqsith Ghazali, a figure of the *Jaringan Islam Liberal* (JIL) in Indonesia, explains that there should be some new principles basing the foundations of *uṣūl al-fiqh*:

i. If there is a conflict between the *naql* (text, in its literal expressions, or *naṣ*) and '*aql* (rationality of the mind), then the '*aql* should take precedent

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[115] Adian Husaini and Abdurrahman Al-Baghdadi, *Hermeneutika & Tafsir Al-Qur'an*, (Jakarta: Gema Insani Press, 2007), 33.
[116] Fahmi Salim, *Kritik Terhadap Studi Al-Qur'an Kaum Liberal*, (Jakarta: Perspektif, 2010), 116.
[117] This is because, as Pope Benedict XVI said, Christianity is a 'divine inspired religion', meaning that the authors of the testaments as human beings were (merely) inspired. Having that said, while divine in inspiration, but the text itself is written by and subject to the limitations of a man and therefore necessitating the use of hermeneutics. It is no surprise why, for example, Christians today believe that they are not bound by the Old Testament laws. See: Husaini and Al-Baghdadi, Hermeneutika & Tafsir Al-Qur'an, 10–12. See also: Joseph Tkach, "Are Old Testament Laws Still Binding on Christians?", Grace Communion International, <https://www.gci.org/law/otlaws> (accessed 29 November, 2017). Note their liberal interpretation of the Gospel of Mathew, 5:17 which reads "*Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil.*" The word in that verse 'law' refers to Mosaic laws, yet the Christians managed to find their way to understand that verse to mean something else.
[118] Nasr Hamid Abu Zaid and Aster R. Nilson, *Voice of an Exile: Reflections on Islam*, (London: Westport Connecticut, 2004), 96.
[119] Nasr Hamid Abu Zaid, *Critique of Islamic Discourse*, (Paris and Arles: Sinbad Actes Sud, 1999), 27.

over the *naql* by virtue of *takhṣīṣ* (making specific ruling from a generality) and *bayān* (rational explanation).[120]

ii. Law is taken from the intent of the *maqāṣid* and not from what is written in the letters of the text.[121]

iii. The text (*naṣ*) can be erased by *maṣlaḥat*.[122]

It is obvious that Ghazali's views are influenced not only by hermeneutics but also by rationalism,[123] which believes that reason (i.e. from the human intellect) is the chief source and test of knowledge.[124] It may be easily deduced also how rationalism (and also empiricism) is used easily together with hermeneutics, as those beliefs are also what takes part in discovery and advancement, therefore contributing to the 'new realities' which will affect how one reads a text.

From this ideology, one can see numerous positions on Islamic law which are very intriguing. Some say Islamic law is something purely of a historical phenomenon of an 'Islamic society' which has no difference with others.[125] They have no slightest interest in the divine nature from which the law takes its source and derives its methodology from.

The Liberal Islam method therefore inevitably has to be suspicious towards the classical jurists, and accuse them of negative things in order to prove the alleged flaws of the said classical jurists. For example, Musdah Mulia argues that Islamic laws are

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[120] Abdul Moqsith Ghazali, *Ijtihad Islam Liberal: Upaya Merumuskan Keragaman yang Dinamis*, (Jakarta: Penerbit Jaringan Islam Liberal, 2005), xi.

[121] Abdul Moqsith Ghazali, "Membangun Ushul Fikih Alternatif", Jaringan Islam Liberal, <http://islamlib.com/kajian/fikih/membangun-ushul-fikih-alternatif/> (accessed 30 November, 2017, a).

[122] Abdul Moqsith Ghazali, "Membangun Ushul Fikih Alternatif", Jaringan Islam Liberal.

[123] Mustofa, Metode Ijtihad Islam Liberal (Studi Kritis Terhadap Ijtihad Jaringan Islam Liberal), 10.

[124] Brand Blanshard, "Rationalism", Encyclopædia Britannica, <https://www.britannica.com/topic/rationalism> (accessed 30 November, 2017). See also: Asmoro Achmadi, *Filsafat Umum*, (Jakarta: Rajawali Press, 2011), 115.

[125] See for example: Ebrahim Afsah, "Contested Universalities of International Law. Islam's Struggle with Modernity", *Journal of the History of International Law*, vol. 10 (2008): 259–307; Abdullahi Ahmed An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenge and Response", *Cornell International Law Journal*, vol. 20, no. 2 (1987): 317–335.

highly biased against women because the classical jurists were influenced by a strong Arabic patriarchal society and therefore established very male-centred Islamic family laws.[126] Amina Wadud pushes it further by declaring that women may lead *ṣalāt* with men praying behind.[127] There are also others like Kholibul Adib Ach who accused Imām Al-Shāfi'ī of defending the '*Uthmāni Muṣḥaf* of the Qur'ān simply because of the Imām's pride of being a Qurayshi tribesman,[128] and so much more.

However, this Liberal Islam method is deviant and distorted from the very core. The use of hermeneutics is on an incorrect assumption that Islam is also a 'divinely inspired religion' (alike Christianity), thus making hermeneutics relevant.[129]

The Qur'ān is the literal and verbatim of Allah's Words conveyed to Prophet Muḥammad ﷺ ,[130] and not written or made by the latter.[131] These Words of Allah are preserved and unaltered to this date through oral memory traditions and text.[132] Equating the Qur'ān to a text written by man is incorrect, and therefore hermeneutics cannot be used. Doing so is a desacralisation towards religion, which is a trait of

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[126] See: Musdah Mulia, *Islam & hak asasi manusia: konsep dan implementasi*, (Yogyakarta: Naufan Pustaka, 2010), 168; Musdah Mulia, *Muslimah Sejati: Menempuh Jalan Islami Meraih Ridha Illahi*, (Bandung: Penerbit Maja, 2011), 98.

[127] To add, the men and women were praying together in one line. *Al-Jazeera*, "Woman leads controversial US prayer", <http://www.aljazeera.com/archive/2005/03/200849145527855944.html> (accessed 1 December, 2017).

[128] Husaini and Al-Baghdadi, Hermeneutika & Tafsir Al-Qur'an, 27–28.

[129] See for example those who made this mistake: E Sumaryono, *Hermeneutika: Sebuah Metode Filsafat*, (Yogyakarta: Penerbit Kanisius, 1999), 28. Sumaryono puts Islam, Christianity, and Judaism, together under 'divinely inspired religions' and therefore putting the holy books of those religions as subject to text analysis of the hermeneutics method. Unlike what the Christians believe about their own religion, the holy book of Islam was not written by a divinely inspired man. Islam does not share Christianity's problems of inter alia: certainty in the truth as well as authenticity of the early texts of the bible, lack of agreement in generally accepted rules of interpretation, and that nobody memorises the texts which have been lost throughout the course of history. See: Salim, Kritik Terhadap Studi Al-Qur'an Kaum Liberal, 80.

[130] Ahmad von Denffer, *Ulum al-Quran: An Introduction to the Sciences of the Quran*, (Leicestershire: The Islamic Foundation, 2014), 6–7.

[131] Even scholars of computer science, using author discrimination, have proven that Prophet Muḥammad ﷺ did not compose or make up the Qur'ān. See: Halim Sayoud, "Author Discrimination between the Holy Quran and Prophet's Statement", *Literary and Linguistic Computing*, vol. 27, no. 4 (2012): 427–444.

[132] Denffer, Ulum al-Quran: An Introduction to the Sciences of the Quran, 97–102; Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers (Vol 3: The Qur'aan and It's Sciences)*, (London: MSA Publication Limited, 2003), 42–49.

secularism that is against Islam in some of its very fundamental points.[133] There is no wonder that there are numerous *fatwā*s against Liberal Islam in numerous Islamic countries either by *fatwā* committees or individual jurists.[134] There is no wonder also that in 1995 the Cairo Court of Appeal declared Nasr Hamid Abu Zayd as an apostate from Islam because his views are constituted as *kufr* (disbelief).[135]

Therefore, even from a very fundamental level, hermeneutics and whatever other methods that come from it, cannot be used as a method of *ijtihād* to adapt Islam to change. Even if the end product of an '*ijtihād*' using hermeneutics can arrive at a ruling that coincides with what may be correct according to the Qur'ān and the Sunnah in their literal form (or other proper methods of *ijtihād*), it is practically useless. What stems from disbelief (*kufr*), even if it looks good, means nothing. This is as what is stated in the Qur'ān in Surah Al-Furqān (25) verse 23:

وَقَدِمْنَا إِلَى مَا عَمِلُوا مِنْ عَمَلٍ فَجَعَلْنَاهُ هَبَاء مَّنثُوراً

> "And We will regard what they have done of deeds and make them as dust dispersed."

Furthermore, the method that follows is flawed also. If hermeneutics use an underlying assumption that a text cannot escape a man's limitation of cultural and historical context, then it is colossally irrelevant faced with the Qur'ān which is not a human-made text.

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[133] For further discussion, see: Syed Muhammad Naquib Al-Attas, *Islam and Secularism*, (Kuala Lumpur: ISTAC, 1993).

[134] See for example, Malaysia : *Kompilasi Pandangan Hukum: Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia*, (Putrajaya: Jabatan Kemajuan Islam Malaysia (Bahagian Pengurusan Fatwa), 2015), 18–20. And Indonesia : *Fatwa Majelis Ulama Indonesia No. 7/MUNAS VII/MUI/11/2005 tentang Pluralisme, Liberalisme dan Sekulerisme Agama*, (Jakarta: Majelis Ulama Indonesia, 2005). And Saudi Arabia: Shalih bin Fawzan Al-Fawzan, "Fatwa Al-Libraliyyah", Alfawzan, <http://www.alfawzan.af.org.sa/ar/node/2350> (accessed 1 December, 2017).

[135] Mona Abaza, "Civil society and Islam in Egypt: the case of Nasr Hamid Abu Zayd", *Journal of Arabic, Islamic and Middle Eastern Studies*, vol. 2, no. 2 (1995): 29.

In response to Ghazali's view, putting the '*aql* above *naql* makes no sense. It should be common sense that Allah's Knowledge is infinitely more superior to that of a human, as written in the Qur'ān, in Surah Al-Baqarah (2) verse 216:

نَو مُلَعْتَ لاَ مْتُنْأَوَ مُلَعْيَ للَّهاوَ ۖ مْكَلَ ٌّرَشَ وَهُوَ ائَيْشَ اوبُحِتُ نْأَ سَىَعَ

"… But perhaps you hate a thing and it is good for you; and perhaps you love a thing and it is bad for you. And Allah Knows, while you know not."

While a human's knowledge is inferior, Allah is *Al-'Alīm* (The Alknowing), and as stated in Surah Al-Anfāl (8) verse 75:

مٌيلِعَ ءٍيشَ لِّكُبِ للَّهاَ نَّإِ

"… Indeed, Allah is Knowing of all things."

Therefore, when the following question rises: 'which should take precedence if a divine text seems to contradict the human mind?', the answer would seem very rhetorical that it is obvious how mindless it is to take a rationalist stance in context of Islam. It is therefore incorrect to put the '*aql* above the *naql* in understanding the *dalīl.*

This is the reason why Imam ibn al-Subki said that a *dalīl* can be understood in a non-literal meaning only when such a meaning is enforced by other dalīl. If *ta'wīl* is not done with *dalīl,* then it is nonsense and rejected.[136] This is also why Imām Ibn Taymiyyah said "the root of deviance of the deviant is putting his own intellect above the *naṣ* from Allah, and he inclines to his own personal desires rather than the principle which is to follow Allah's commands."[137]

[136] Taj al-Dīn Ibn Al-Subkī, *Mattan Jam'u Al-Jawāmi'*, (Beirut: Dar al-Kutub 'Elmiya, 2003), 54. See also: Sayf al- Dīn Al-Āmidī, *Al-Iḥkām Fī Uṣūl Al-Aḥkām*, *Vol. 3*, (Bayrūt: Dar al-Fikr, 1996), 38.
[137] Hasan Al-Halabi, *Muslim Rasionalis*, (Jakarta: Pustaka Al-Kautsar, 1995), 54.

The same goes to considerations of *maṣlaḥat.* As mentioned in Subchapter 2.2.2, the indicator of *maṣlaḥat* is not found through human reason but rather from the *Sharī'ah*.[138] So, when the Qur'ān and the Sunnah are themselves the standard of *maṣlaḥat,* it consequently makes no sense for the Qur'ān and the Sunnah to be revised due to *maṣlaḥat.*

Therefore, it can be concluded that, despite its prevalence in Islamic discourse (especially in the West or in Western-influenced scholarship), hermeneutics and all its derivatives cannot be used to develop *fiqh* and *uṣūl al-fiqh*. This is due to its deviance from the very basic core, which implicates its derivatives also.[139]

2.3 DEVELOPMENT OF SCIENCE AND TECHNOLOGY, AND HOW IT AFFECTS *FIQH*

The development of science and technology is a reality, and it changes the way humans live and behave. For example, writing a thesis with a computer (instead of a typewriter) presents its own prospects and challenges.[140]

In a more serious note, while it is clear that science and technology change the way people live, one may note how it fares when encountered with religion.

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[138] Nyazee, Islamic Jurisprudence, 197. In addition, Al-Qardhawy noted that Imam Ibn Taymiyyah ruled that *maṣlaḥat* cannot contradict the *Sharī'ah*, whether it is the text or by *qiyas,* and should only be used in matters not ruled explicitly by Allah. See: Yūsuf Al-Qarḍāwi, *Naẓariyyah maqāṣid as-Syarī'ah 'inda Ibni Taimiyah wa Jumhūr al-Uṣūliyyin*, (al-Qāhirah: Jāmi'ah al-Qāhirah, 2000), 203.

[139] For further detailed analysis on hermeneutics and the 'liberal Islam' methodology, see: Salim, Kritik Terhadap Studi Al-Qur'an Kaum Liberal; Adian Husaini, *Wajah Peradaban Barat: Dari Hegemoni Kristen Ke Dominasi Sekular-Liberal*, (Jakarta: Gema Insani Pres, 2005); Husaini and Al-Baghdadi, Hermeneutika & Tafsir Al-Qur'an; Asmu'i, "Studi Kritis Atas Konsep Nâsikh-Mansûkh Abdullahi Ahmed An-Na'im", *Kalimah: Jurnal Studi Agama dan Pemikiran Islam*, vol. 11, no. 1 (2013): 151–174; Mustofa, Metode Ijtihad Islam Liberal (Studi Kritis Terhadap Ijtihad Jaringan Islam Liberal); Nirwan Syafrin, "Kritik Terhadap Paham Liberalisasi Syariat Islam", *Jurnal Tsaqafah*, vol. 5, no. 1 (2009): 51–78; Mohd Anuar Ramli, Muhammad Ikhlas Rosele, Mohd Farhan Md Ariffin, and Muhammad Izzul Syahmi Zulkepli, "Tafsir Feminis: Antara Rekonstruksi Tafsiran Mesra-Gender atau Huraian Pseudo-Ilmiah", *Journal of Ma'alim al-Quran wa al-Sunnah*, vol. 14, no. 1 (2018): 81–90; Dinar Dewi Kania (ed.), *Delusi Kesetaraan Gender: Tinjauan Kritis Konsep Gender*, (Jakarta: Yayasan AILA Indonesia, 2018).

[140] Research may be faster and more convenient, but may cause stress due to internet lag. See: *The Telegraph*, "Stressed out? It could be your slow internet", <http://www.telegraph.co.uk/technology/2016/03/17/stressed-out-it-could-be-your-slow-internet/> (accessed 1 December, 2017).

Christianity, for example, has been infamous for its rejection of science when science seems contradictory towards its doctrines.[141]

Islam, on the other hand, as a religion encourages humankind to explore as Allah says in the Qur'ān in Surah Al-Raḥmān (55) verse 33:

يٰمَعْشَرَ الْجِنِّ وَالْاِنْسِ اِنِ اسْتَطَعْتُمْ اَنْ تَنْفُذُوْا مِنْ اَقْطَارِ السَّمٰوٰتِ وَالْاَرْضِ فَانْفُذُوْاۗ لَا تَنْفُذُوْنَ اِلَّا بِسُلْطٰنٍ

"O company of jinn and mankind, if you are able to pass beyond the regions of the heavens and the earth, then pass. You will not pass except by authority [from Allah]."

Further in Surah Al-Qaṣaṣ (28) verse 77:

امَكَ نْسِحْأَوَ ۖ امَيْنُّدلا نَمِ كَبَيصِنَ سَنْتَ لاَوَ ۖ ةَرِخِلآْا رَادَّلا للهُ امُكَاتَآ امَيفِ غِتَبْاوَ نَيدِسِفْمُلْا بُحِيُ لاَ للهَ نَّإِ ۖ ضِرَلأْا فِي دَاسَفَلْا غِبْتَ لاَوَ ۖ كَيْلَإِ للهُ نَسَحْأَ

"But seek, through that which Allah has given you, the home of the Hereafter; and [yet], do not forget your share of the world. And do good as Allah has done good to you. And desire not corruption in the land. Indeed, Allah does not like corrupters."

Islam has contributed so much to the development of science and technology,[142] and the scientific method originated from an epistemology from Islamic teachings itself.[143]

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[141] Nicholas P Leveillee, "Copernicus, Galileo, and the church: Science in a religious world", *Inquiries Journal*, vol. 3, no. 05 (2011).

[142] There is no doubt to this. See for example: Muhammad Adil Afridi, "Contribution of Muslim scientists to the world: An overview of some selected fields", *Revelation and Science*, vol. 3, no. 01 (2013): 40–49; Firas Alkhateeb, *Lost Islamic History: Reclaiming Muslim Civilization from the Past*, (London: C. Hurst & Co, 2014), 5.

[143] Greek Philosophy was imported and developed but only in tools that did not contradict Islam according to the jurists at the medieval times. For further analysis on this, see: Mohammad Hashim Kamali, "Islam, rationality and science", *Islam and Science*, vol. 1, no. 1 (2003); Muhammad Mumtaz Ali and Muhammad Junaid, "The Views of Seyyed Hossein Nasr on Islamic Science: A Critical Analysis" in *Proceedings of the International Seminar on Islamic Civilization and Thoughts (INSIST)*

However, science and technology would have its limitations. The Oxford Dictionary defines science as "The intellectual and practical activity encompassing the systematic study of the structure and behaviour of the physical and natural world through observation and experiment."[144] (emphasis added). It therefore cannot observe the unseen realities. Some people end up ascribing the totality of reality upon that limitation and assume that anything beyond that observable and physical reality does not exist and this the atheist belief of philosophical naturalism, as believed by the likes of Richard Dawkins and Stephen Hawking.[145] This is a similar mindset that brings hermeneutics.

Meanwhile, in Islam, the first time that *taqwā* (consciousness of Allah) is mentioned in the Qur'ān i.e. in Surah Al Baqarah (2) verse 2,[146] the characteristics are elaborated in the following verses 3-5 but the very first mentioned characteristic mentioned is:

بِٱلْغَيْبِ يُؤْمِنُونَ ...

"Who believe in the unseen…"

It is clear that Islam does not restrict itself only to the observable and physical reality of existence, and doing so is against the fundamentals of the Islamic *aqīdah*.[147]

2017: Towards Civilization Sustainability and Universal Peace, (Pulau Pinang: School of Humanities, Universiti Sains Malaysia, 2017), 100–117; Alias Azhar, "Sains Islam vs Sains Barat: Analisis Amalan dan Perbandingan", *Ulum Islamiyyah*, vol. 21 (2017): 25–41.

[144] *Oxford Dictionaries*, "Science", <https://en.oxforddictionaries.com/definition/science> (accessed 1 December, 2017). The word 'technology' is easily the application of science for practical purposes, linking it back to science again. See: *Oxford Dictionaries*, "Technology", <https://en.oxforddictionaries.com/definition/technology> (accessed 1 December, 2017).

[145] Richard Dawkins, *The God Delusion*, (London: Bantam Press, 2006); Stephen Hawking and Leonard Mlodinow, *The Grand Design*, (New York: Bantam Books, 2010).

[146] In form of *muttaqin* or 'those (persons) conscious of Allah'

[147] For a deeper discussion, see generally: Syed Muhammad Naquib Al-Attas, *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam*, (Kuala Lumpur: Institute for the Study of Islamic Thought and Civilizations, 1995). See also: Hamza Andreas Tzortzis, *The Divine Reality: God, Islam and the Mirage of Atheism*, (San Clemente: FB Publishing, 2016), 12.

This is why the Islamic epistemology of knowledge does not restrict itself to rational findings of scientific experimentation, but also *khabar ṣādiq* which includes revelation (revealed knowledge).[148]

Therefore, Islam positions science for humans to achieve improvement and perfection in faith and worship, and in conducting other Islamic values such as *khilāfah, amānah,* justice, and public interest.[149] Science is never meant to replace any Islamic teachings, rather it improves the way Islam is practised.

The case of smoking tobacco may be a good first example. As mentioned earlier in sub-chapter 2.2.1, the general idea of *maṣlaḥat* is to acquire benefits and reject harm. Jurists of Islam have declared that smoking is *ḥarām*, but they are all based on the harms of smoking towards health.[150] It logically follows that this ruling will come only after the harms of smoking are identified, and the early scientific researches to identify this was first done in 1928.[151] Meanwhile, humans have been smoking tobacco for over a millennium, earliest records seem to show it has been at least since the ninth century AD.[152] This shows how new scientific discoveries can help Muslims practise their faith by revealing an *'illah'* previously unknown, in this case, the *'illah* is the potential harm caused by smoking.

More recent scientific advancement, such as space exploration, also brings other issues which would require *ijtihād,* such as how does one determine the times of *ṣalāt* in the outer space? The times are normally determined by the sun positions

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[148] Adian Husaini, "Pengantar Editor" in *Filsafat Ilmu: Perspektif Barat dan Islam*, edited by Adian Husaini and Dinar Dewi Kania (Jakarta: Gema Insani Press, 2013), xvi–xviii.
[149] Azhar, Sains Islam vs Sains Barat: Analisis Amalan dan Perbandingan, 33.
[150] Abdul Aziz ibn Baz, "Ruling of Smoking and Trading in Tobacco", Al Lajnah ad-Da'imah, <http://www.alifta.net/Fatawa/FatawaChapters.aspx?languagename=en&View=Page&PageID=4559&PageNo=1&BookID=14> (accessed 1 December, 2017); Kompilasi Pandangan Hukum: Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia.
[151] George Davey Smith and Matthias Egger, "The first reports on smoking and lung cancer: why are they consistently ignored?", *Bulletin of the World Health Organization*, vol. 83, no. 10 (2005): 799–800.
[152] Francis Robicsek, "Ritual Smoking in Central America" in *Smoke: A Global History of Smoking*, edited by Sander L. Gilman and Zhou Xun (London: Reaktion Books, 2004), 31.

towards the land, and the colour of the sky that follows,[153] but this will be very difficult in the outer space. However, the *Fatwā* Committee of Malaysia have ruled that: "The times of the daily five prayers is defined within a period of 24 hours (1 day on Earth) and shall follow the prayer times of the astronaut's point of departure (in this case, Baikonur, Kazakhstan)."[154]

War should be affected just as much. As Alex Roland notes: "Warfare has changed technology as much as technology has changed warfare."[155] Scholars of IHL are very conscious of this, noting how the law must always try to catch up despite the very fast development of technology.[156] If the *maṣlaḥat* issues of warfare are affected by the development of science and technology, then *fiqh al-jihād* too must adapt. However, as mentioned in sub-chapter 2.3, such adaptation due to technology is not meant to replace Islamic teachings but only to improve and perfect the practise of the teaching itself.

As explained earlier in this Chapter, there is a severe shortage of *fiqh al-jihād* examples despite the very rapid development of war technology. There are only a few rulings simply saying that it is either permissible or impermissible without further explaining, which is a problem that is further discussed in Chapter Three. However, as it stands, *fiqh* should adapt to meet the new challenges that technology brings, but it seems that *fiqh al-jihād* is left behind as this thesis shows.

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[153] Abū Mālik Kamal bin Sayyid Salīm, *Ṣaḥīḥ Fiqh Sunnah*, *Vol. 1*, (al-Qāhirah: Maktabah Tawqifiyah, 2003), 237–249.

[154] *Guideline for Performing Islamic Rites at the International Space Station (ISS)*, (Putrajaya: Department of Islamic Development Malaysia, 2007), 11. See also generally on other aspects of shalat in outer space, e.g. determination of *qibla, taharah, etc.*

[155] Alex Roland, *War and Technology: A Very Short Introduction*, (New York: Oxford University Press, 2016), 4.

[156] Rain Liivoja, "Technological change and the evolution of the law of war", *International Review of the Red Cross*, vol. 97, no. 900 (2015): 1157–1177.

2.4 TO WHAT EXTENT SHOULD THE DEVELOPMENT OF INTERNATIONAL LAW AFFECT *FIQH*?

International law has always developed, and we have seen a large number of developments within the past centuries. The establishment of the United Nations, for example, has changed the world order so much. International human rights law is also another example. While human rights used to be within the realm of national laws, the UN Charter brought it to the realm of international law.[157] How should this development affect *fiqh*?

2.4.1 Islam and International Law

The interaction between Islam and international law has been as early as the propagation of Islam by Prophet Muḥammad ﷺ . It has even been argued by Mohd Hisham that Prophet Muḥammad ﷺ , not just as the head of state of Madinah but also as a Prophet, enjoyed international legal personality in the conduct of international relations.[158] The establishment of the Caliphate afterwards also inevitably engaged with the international world both in peaceful and confrontative manners.

Thus, *fiqh al-siyar* (Islamic international law) became part of the corpus of *fiqh,* regulating the conduct of international relations whether in a peaceful or confrontative manner.[159] As it was a sub-category of *fiqh,* it would also correspond to the general sources of Islamic law as well as *ijtihād* as previously elaborated in sub-chapter 2.2. However, in conduct of international relations, two additional items must be considered: agreements with other nations and reciprocity.[160]

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[157] Malcolm N Shaw, *International Law*, (New York: Cambridge University Press, 6th edn., 2008), 270.
[158] Mohd Hisham Mohd Kamal, "International Legal Personality of Prophet Muhammad (pbuh)", *IIUM Law Journal*, vol. 25, no. 2 (2017): 161–178.
[159] Muḥammad ibn al-Ḥasan Al-Shaybānī, *The Islamic Law of Nations: Shaybani's Siyar*, translated by Majid Khadduri, (Maryland: John Hopkins Press, 1966), 5–6.
[160] Ibid., 8.

Agreements are binding under Islamic law, which strictly demands compliance. As Allah says in the Qur'ān, Surah Al-Tawbah (9) verse 4:

إِلَّا الَّذِينَ عَاهَدْتُمْ مِنَ الْمُشْرِكِينَ ثُمَّ لَمْ يَنْقُصُوكُمْ شَيْئًا وَلَمْ يُظَاهِرُوا عَلَيْكُمْ أَحَدًا فَأَتِمُّوا إِلَيْهِمْ عَهْدَهُمْ إِلَىٰ مُدَّتِهِمْ ۚ إِنَّ اللَّهَ يُحِبُّ الْمُتَّقِينَ

"Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him]."[161]

Certainly, there are requirements that agreements are only valid when the agreements do not violate the *Sharī'ah*. Prophet Muḥammad ﷺ said:

مما بَالُ أَقْوَامٍ يَشْتَرِطُونَ شُرُوطًا لَيْسَتْ فِي كِتَابِ اللَّهِ مَنِ اشْتَرَطَ شَرْطًا لَيْسَ فِي كِتَابِ اللَّهِ فَلَيْسَ لَهُ، وَإِنِ اشْتَرَطَ مِائَةَ شَرْطٍ

"What about those people who stipulate conditions which are not in Allah's Laws? Whoever stipulates such conditions as are not in Allah's Laws, then those conditions are invalid even if he stipulated a hundred such conditions."[162]

The above *ḥadīth* means that contracts with terms that violate the *Sharī'ah* are invalid.[163] It is important to note that, in international law, the general principle of

[161] See also Surah Al-Mā'idah verse 5:
يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ أَوۡفُواْ بِٱلۡعُقُودِۚ
"O you who have believed, fulfill [all] contracts."

[162] Muḥammad ibn Ismā'īl Al-Bukhārī, *Sahih al-Bukhari*, *Vol. 3*, (Riyadh: Darussalam, 1997a), ḥadīth no.2735; Muslim ibn al-Ḥajjāj Al-Naysābūrī, *Sahih Muslim*, *Vol. 4*, (Riyadh: Darussalam, 2007b), ḥadīth no.3777.

[163] Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Majmu' Al-Fatāwa*, *Vol. 31*, (Dar al-Wafa, 1426a), 19; Ahmad Azhar Basyir, *Asas-Asas Hukum Muamalat (Hukum Perdata Islam)*, (Yogyakarta: UII Press, 2000), 108–109; Abdul Rahman Ghazaly, Ghufron Ihsan, and Sapiudin Shidiq, *Fiqh Muamalat*, (Jakarta: Kencana and Prenada Media Group, 2010), 54–55.

invalidity of agreements due to 'conflict with higher laws' are also known.[164] When an agreement is entered into by the leader of an Islamic nation, including IHL-related conventions (which is most relevant to this thesis), then the Muslims there are bound also insofar as its' contents does not violate the *Sharī'ah*.[165]

Reciprocity is another matter. Customary international law is essentially built on a large scale of reciprocities between multiple states.[166] While international law would say that the elements of customary international law are (i) the uniformity of state practices and (ii) *opinio juris* or essentially 'a sense of legal obligation',[167] the truth of the latter may be much less idealistic. In terms of international relations theory, compliance is explained more by coincidence of interests, bilateral coordination, and other means, essentially practised within each state's own dimension to maximise its own interest rather than a 'sense of legal obligation'.[168]

Islamic law also sees the same. *Maṣlaḥat* governs the conduct of international relations and may call for reciprocity in dealing with other nations. After all, it does seem that acting in reciprocity[169] may seem to generally produce more benefits to one's interest as opposed to not reciprocating.[170]

A first example would be the case of agreements with other nations. While it is true that agreements must be honoured, treaties may be cancelled when there is fear of breach by the other party. As Allah says in Surah Al-Anfāl (8) verse 58:

وَإِمَّا تَخَافَنَّ مِنْ قَوْمٍ خِيَانَةً فَانْبِذْ إِلَيْهِمْ عَلَىٰ سَوَاءٍ ۚ إِنَّ اللَّهَ لَا يُحِبُّ الْخَائِنِينَ

[164] Treaties in breach of the *jus cogens* are null and void, as per Article 53 of the Vienna Convention on the Law of Treaties between States (1969).
[165] Muhammad Haniff Hassan, "Contextualising the Fiqh or Law of Jihad", *RSIS Commentaries*, vol. 25 (2007): 2.
[166] Jack L Goldsmith and Eric A Posner, *The Limits of International Law*, (New York: Oxford University Press, 2005), 56.
[167] Shaw, International Law, 72–93.
[168] Goldsmith and Posner, The Limits of International Law, 40–42.
[169] Or, in political game theory terms: 'tit for tat'
[170] Oona A Hathaway and Scott J Shapiro, "Outcasting: Enforcement in Domestic and International Law", *Yale Law Journal*, vol. 121, no. 2 (2011): 302.

> "If you [have reason to] fear from a people betrayal, throw [their treaty] back to them, [putting you] on equal terms. Indeed, Allah does not like traitors."

Furthermore, reciprocity is practised in many other aspects too, such as diplomatic immunity and customs duty to foreign merchants even during times of war.[171] This may also be true in the case of enslavement. The majority of jurists hold that the Muslim leader may choose to *inter alia* enslave war captives if it is of the best interest of the Muslims.[172] However, it has been argued that in the modern day there is no more *maṣlaḥat* in enslavement, because in the past the Muslims may also be enslaved if they are taken as captive so that the Muslims must have similar options in their arsenal.[173] Furthermore, 'Abd Allah 'Azzām ruled that while generally enslavement can be an option by the Muslim leader towards war captives but doing so during the Afghanistan war was impermissible because it may trigger retaliation by the Russian armies who would in turn rape Muslim women.[174]

2.4.2 Developing *Fiqh* based on International Law

Abdullahi An-Na'im argues simplistically that Islam should adjust to international law standards.[175] Developing his arguments in context of international human rights law and *jus ad bellum*, he points out that Islam and international human rights law are largely consistent except for a few points on the rights of women and rights of religion

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[171] Al-Shaybānī, The Islamic Law of Nations: Shaybani's Siyar, 53.
[172] Ibn Rushd, *The Distinguished Jurist's Primer*, 456–457; Azzam, Jihad: Adab dan Hukumnya, 61 and 64; Al-Lajnah Daimah, *Fatwa No. 515: Third Question*, (Saudi Arabia); Musthafa Al-Khin and Musthafa Al-Bugha, *Konsep Kepemimpinan dan Jihad dalam Islam: Menurut Madzhab Syafi'i*, (Jakarta: Darul Haq, 2014), 44.
[173] See for example: Al-Khin and Al-Bugha, Konsep Kepemimpinan dan Jihad dalam Islam: Menurut Madzhab Syafi'i, 48.
[174] Azzam, Fī Al-Jihād: Fiqh wa Ijtihād, 58. His worries were legitimate, as sexual violence during warfare is a big problem. See *inter alia*: CHR, Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Document E/CN.41995/42, 64; Stiglmayer, Mass Rape: The War Against Women in Bosnia-Herzegovina, 54.
[175] An-Na'im, Islamic Law, International Relations, and Human Rights: Challenge and Response.

and belief.[176] He says also, "Had Muslims not temporarily abandoned public *Shari'ah* during secular rule, there would have been massive violations of the most basic human rights."[177] Then, under a chapter titled 'Solutions from Within Islam', he explains that the best way to solve the problem of the gap between Islam and international law development is to put the 'Medina model' of the *Sharī'ah* in its own historical context, which allows for a lot of leeway in order to introduce modern developments.[178] With that, he argues that Islam can adopt new developments in international law with 'mechanisms within Islam'.

However, there are several problems that we can identify in An-Na'im's proposition.[179] An early suspicion can start from his argument to 'consider historical context'. Under a chapter titled 'Historical *Shari'ah*: The Medina Model of the Islamic State', he says "*Shari'ah* is often mistakenly equated with Islam. In fact, it only represents the early Muslim's understanding of the two fundamental sources of Islam: the Qur'ān, and … the Sunnah."[180]

To begin with, the early Muslims (*al-salaf al-ṣālih*) are the best generations from which Muslims should take example from.[181] This will not be discussed deeper, as the discussion on this matter is very deep and may stray too far from the topic.

However, another statement by An-Na'im, "…any interpretation of *Sharī'ah* is the product of human agency, in a specific time and place, it can change through the same process, over time"[182] makes it clear that his arguments use hermeneutics. He clearly points to the thoughts of Maḥmūd Muḥammad Ṭaha[183] who calls to emphazie

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[176] Abdullahi Ahmed An-Na'im, "Why should Muslims abandon Jihad? Human rights and the future of international law", *Third World Quarterly*, vol. 27, no. 5 (2006): 791.
[177] An-Na'im, Islamic Law, International Relations, and Human Rights: Challenge and Response, 328.
[178] Ibid., 333–334.
[179] This part will give just a brief discussion on the flaws of An-Na'im's thoughts. He has a number of other works on Islam and international law, a proper and in-depth analysis may be fit for another forum.
[180] An-Na'im, Islamic Law, International Relations, and Human Rights: Challenge and Response, 320.
[181] Ibn Al-Qayyim Al-Jawziyah, *I'lāmu al-Muwaqqi'īn*, *Vol. 4*, (Daarul Jiil: Beirut, 1973), 136. Qadhi, An Introduction to the Sciences of the Qur'aan, 332; Ramaḍānī, Sittu Durar Min Uṣūli Ahl al-Āthār, 66–67.
[182] An-Na'im, Why should Muslims abandon Jihad? Human rights and the future of international law, 792.
[183] An-Na'im, Islamic Law, International Relations, and Human Rights: Challenge and Response, 334.

on the Makkah period of Islam, and abandon teachings of the Medina period and his thoughts are given a chapter in the book *Liberal Islam: A Sourcebook*.[184] The discussion in Subchapter 2.2.3 has shown how hermeneutics is an invalid method and also definitely not 'from within Islam'.

As a consequence, the flaws of An-Na'im's proposition can be seen from its core assumption. Saying that the *Sharī'ah* only contains the understanding of the early Muslims is to assume that every single practise of the *al-salaf al-ṣālih* is *ijtihād,* and then according to An-Na'im easily re-*ijtihād*-able. What An-Na'im and other users of hermeneutics always ignore is that *ijtihād* is only done in the absence of text in ruling on a certain matter. When he says that the Qur'ān and the Sunnah do not provide a comprehensive system of law,[185] this is an understatement because there is still quite some law to begin with which are *qaṭ'i* [186] and the use of hermeneutics would put disregard all of them anyways.

This is not to mention An-Na'im's dismissal of the problems within the construct of modern international law in general. While he acknowledges that the pre-UN international law may have been full of Western hegemony and being unfair to the non-Western world, he takes for granted and assumes that post-UN and post-decolonialisation international law is fairer and more inclusive.[187] It has been argued that the Western hegemony continues to operate even post-UN, as the pre-UN platform of international law persists to survive through both World War II as well as

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[184] Mahmoud Mohamed Taha, "The Second Message of Islam" in *Liberal Islam: a Sourcebook*, edited by Charles Kurzman (New York: Oxford University Press, 1996), 270–283. Furthermore, Taha has been declared as an apostate by the Muslim jurists, *inter alia* the Muslim World League and the Islamic Research Academy of Al-Azhar. See: Sāmī Al-Dhīb, "Tawaruṭ Al-Azhar Fī Shanaq Muḥammad Ṭaha", Ahewar.org, <http://www.m.ahewar.org/s.asp?aid=454296&r=0> (accessed 7 March, 2018).

[185] An-Na'im, Islamic Law, International Relations, and Human Rights: Challenge and Response, 321.

[186] Take, for example, criminal law. There are quite a number of punishable crimes which are set explicitly in the Qur'ān and the Sunnah. See: Al-Yasa Abubakar, *Hukum Pidana Islam di Aceh: Penafsiran dan Pedoman Pelaksanaan Qanun tentang Perbuatan Pidana*, (Banda Aceh: Dinas Syariat Islam Aceh, 2011), 36.

[187] An-Na'im, Why should Muslims abandon Jihad? Human rights and the future of international law, 787.

neo-colonialism.[188] This matter cannot be given justice if discussed in a mere subchapter like this. However, it is needed to be pointed out that An-Na'im's 'idealised universal standard' is a construct established by Western hegemony through physical and economic imposition, and certainly not fit to be labelled as 'within Islam' as An-Na'im did.

However, it must be admitted that one cannot say that no development in international law can be taken into account in developing *fiqh* especially *fiqh al-jihād*. The treatment towards war captives can be a good example. Muhammadin argues that it is *sunnah* for the Muslim army to treat and provide for the war captives better than what they provide for themselves.[189] He based his argument on the well treatment of the captives of the Battle of Badr by the Companions of Prophet Muḥammad ﷺ which is found in the *sīrah*.[190] 'Well treatment', in the narration, in 7th century Madinah meant *inter alia* giving bread to the captives while the Muslim captors themselves only ate dates. In today's age and probably in a culture and geographical terrain different than early Islamic Arabia, what may constitute as 'better quarters and food' may certainly be different. The general 'treating captives well' can be understood in many ways, so there may not be any problem with adopting international standards on the matter.

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[188] See generally: Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law*, (New York: Cambridge University Press, 2004).

[189] Muhammadin, Achieving an Honest Reconciliation: Islamic and International Humanitarian Law, 587.

[190] Ismail ibn Katsir, *Shahih Tafsir Ibnu Katsir*, *Vol. 9*, edited by Safiurrahman Al-Mubarakfuri, (Jakarta: Pustaka Ibnu Katsir, 2016c), 404; M. Adil Salahi, *Muhammad: Man and Prophet*, (Dorset: Element Books, 1995), 257. This narration seems to be taken from *inter alia* the work of Al-Ṭabarānī: Abu al-Qāsim Sulaymān ibn Ayyūb Al-Ṭabarānī, *Mu'jam Al-Ṣaghīr*, *Vol. 1*, (Beirut: Dar al-Kutub al-'Ilmiyyah), 146. However, Ibn Ḥajar Al-ʿAsqalānī cites the same narration of Al-Ṭabarānī but indicates that there is a missing narrator and therefore a broken chain: Ibn Ḥajar Al-ʿAsqalānī, *Al-Iṣābah Fī Tamyīz al-Ṣaḥābah*, *Vol. 7*, (Beirut: Dar al-Kutub al-'Ilmiyyah), 130. There is also a debate on the credibility of Muḥammad Ibn Isḥāq (discussed further in Sub-Chapter 5.4) who is also a narrator in the chain in this narration. Al-Albānī then declared this narration to be *Ḍa'īf* (weak, not authentic): Muḥammad Nāṣiruddīn Al-Albānī, *Ḍa'īf al-Al-Jāmi' Al-Ṣaghīr*, (Beirut: Al-Maktab al-Islami, 1988), 119. Nonetheless, in terms of substance, as Ibn Kathir explains in the same reference in this footnote, this narration is corroborated by Surah Al-Insān (76) verse 8 which essentially says that captives must be treated and fed well despite one's love for their own wealth. Therefore, the rule in question is still based on authentic *dalīl*.

While discussing particularly IHL, Muhammad Haniff Hassan brings another proposition to incorporate development of international law into the corpus of Islamic law. His proposition takes the approach of positioning Muslim nations towards the system of international law, making parallels between sources of international law and Islamic law. He says that Islamic nations should easily follow modern IHL through two channels: treaty laws and customary laws.[191] After all, the Muslims now all live in nation states. To the extent of his scope i.e. Muslim nations, Hassan's proposition is very appealing and has some truth. However, such proposition is not without problems.

The first issue would be that of the content i.e. whether IHL is really compatible with the *Sharī'ah*. Answering this question is required to judge whether a particular treaty or custom can be recognised in an Islamic context, unlike what An-Na'im seems to propose (i.e. to just accept every international human rights treaty altogether). A careful observation must be made not only on the general principles but also the detailed provisions. This is what this research aims to do, in the context of the limitation towards the means and methods of warfare.

A second issue to note is that treaties and customary international law, in international law theory, would generally apply to States. Whether they apply to non-State groups has its own discourse, because whether non-State groups are bound by international law can still be debated. While, at a glance, it may seem too obvious that all belligerents (state and non-state) to an armed conflict is bound by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) (AP II) and other customary international law, a more critical observation would prove more difficult both from the Islamic law and international law perspectives.

[191] Hassan, M.H., Contextualising the Fiqh or Law of Jihad, 2.

From an Islamic law side, there are *fiqh* literature mentioning how the legitimacy of authority of a leader is subject to whether or not the leader in question applies the *Sharī'ah*. Jurists have spoken about the obligation to disobey sinful instructions and, depending on the severity of the case, even loss of legitimacy which may lead to disposing such a leader.[192] If the IHL treaties are indeed against the *Sharī'ah*, then either the IHL treaties are not binding upon the Muslims, or the leader loses his legitimacy altogether. This is why some groups such as Da'esh have broken out of their respective countries of origin and established a self-proclaimed Caliphate. Certainly, this issue of leadership, *uli al-amr*, and *bay'ah* is more complex and is not dwelled on further. It is only mentioned to indicate how tricky the issue can get and how treaty laws may not help explain the incorporation of IHL to the corpus of *fiqh al-jihād*.

Even on international law side, there are intriguing arguments on the legitimacy of international law claim of the governance over non-state armed groups since they have not expressed consent to any international agreements or other sources of international law. According to Kotlik, there are four equally problematic arguments as to how international law can claim rule over non-state armed groups as well as questions on legal personality:[193]

i. *Effective sovereignty over territory, as the armed group succeeds over areas of land which* was previously controlled by the governments.

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[192] This is not limited to 'extremist literature', rather spread through all *madhhab*s. See *inter alia*: Muḥammad ibn 'Alī Al-Shawkānī, *Fatḥ al-Qadīr*, *Vol. 5*, (Beirut: Darul Ma'rifah, 2007), 308; 'Alī bin Khalaf al-Manūfī Al-Mālikī, *Kifāyah al-Ṭālib Al-Rabbānī 'Alā Risālah Ibn Abi Zayd al-Qayruwānī*, *Vol. 1*, (Bayrūt: Dar al-Fikr, 1994), 122; Yaḥya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, *Vol. 12*, (Damascus: Dar al-Khayr, 1416c), 229; Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Al-Uqud*, (al-Qāhirah: Maktabah Al-Sunnah Al-Muhammadiyyah, 1386), 17; Muhammad ibn Adam, "Going Against Unjust Muslim Rulers", Darul Iftaa, <https://islamqa.org/hanafi/daruliftaa/7879> (accessed 2 December, 2017).

[193] Marcos D. Kotlik, "Towards Equality of Belligerents: Why Are Armed Groups Bound by IHL?" in *Experts Conference on International Humanitarian Law: Emerging Issues in the Law of Armed Conflict*, (American University Washington College of Law and the American Society of International Law's Lieber Society, 2012), 6–14.

The problem with this argument is that this only works for groups who claim succession over governments, while many rebels do not claim so, for example: the Syrian Rebels and Da'esh.

ii. *Domestic legislative jurisdiction, as the rebels are citizens of a state which has applied IHL into its national laws*.

The problem with this is that there is an unlikeliness of rebels to obey domestic laws, or even they may declare the invalidity of the government's law altogether.

iii. *Customary status of the obligation to comply, since the obligations in the Geneva Conventions Common Article 3 is universally accepted*.

The problem is that when customary law finds its binding power through the consent of the states involved in the formulation of the said customs,[194] none of these non-State actors was ever involved in the formulation of customary international law on IHL anyways.[195]

iv. *Effects of treaty to third parties, since at the end of conflicts the 'authority in power' has certain obligations.*

The idea of this argument is that if the rebels want to be the 'authority in power' when they win the war, so legal obligations afforded to them after such a victory should also apply to when the hostilities are still in progress. This argument sounds dubious, unless when added with one element i.e. the requirement of consent of the third party to be bound by AP II.[196] However, this reveals another problem: not all belligerents are

[194] Anghie, Imperialism, Sovereignty, and the Making of International Law, 44.
[195] See generally: Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, *Vol. 2*, (Cambridge: Cambridge University Press, 2005)., note how not one single practise documented is from a non-State armed group.
[196] Kotlik, Towards Equality of Belligerents: Why Are Armed Groups Bound by IHL?, 12. Note that this also seems strange considering that if the rebels win the war they would then be a state actor which is bound by AP I instead of AP II. This means that the legal obligation they are aspiring to achieve does not match the one they are allegedly extending to prior to winning the war.

willing to give such consent especially those who go by a slogan of 'do not follow the laws of the *kuffār*'.[197]

Furthermore, if reciprocity is indeed the foundation of customs, then it would be very difficult to maintain that customary international law is applicable totally when there is a trend showing a grave lack of compliance towards IHL.[198] As far as reciprocity is concerned, one must therefore dwell on a case per case basis to see the level of compliance of the opposing party to see whether or not Islamic law should adjust.

It is noted that IHL requires compliance of one regardless of the compliance of the other.[199] However, this is an example of how the general reciprocity is superseded by something of a higher principle. Likewise, one can only further investigate and hope if there are higher principles that would make the rules binding in Islamic law regardless of the compliance of the other states.

Either ways, the ideas brought by Hassan may not be able to fully address the possibility of incorporating developments of international law into the corpus of Islamic law, and An-Na'im's proposition is so much worse. It may seem that the only possibility to truly incorporate new developments in international law into Islamic law is to treat it in the same way the development of science and technology is incorporated into Islamic law as previously explained in sub-chapter 2.2, alike science and technology, may only be taken into account when they can serve as a medium to improve or perfect the practise of Islamic teachings.

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[197] This is not meant to be demeaning *per se.* As explained before, there is a general prohibition to follow laws other than those revealed by Allah, and there has to be careful examination to accept rules from other sources.

[198] ICRC, "Improving Compliance with International Humanitarian Law: Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004", ICRC, <https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf> (accessed 1 January, 2017).

[199] ICTY, *Prosecutor v Kupreskic et. al. (IT-95-16-T) Trial Judgment*, (The Hague: ICTY, 2000), 515–520.

2.5 ISLAM, INTERNATIONAL LAW, AND THE LAWS OF ARMED CONFLICT

War and killing has become a reality in the history of humankind, even back to the beginning. The first act of killing is found in the story of Qābīl and Hābīl as told in Surah Al-Mā'idah (5) verses 27-31. With regards to warfare, in terms of archaeological evidences, there are signs of homicide and war dating back from 24.000 to 34.000 years ago.[200]

As the maxim goes, *ibi societas ibi ius*,[201] it is but natural that regulations are made and developed to rule over the conduct of war.

2.5.1 An Islamic Law Perspective on the Attitude towards War

War has its own special meaning in Islam, and war has been a central part in the Islamic history. The Qur'ān notes that waging war may be something to be disliked, but continues to say that it may actually be good despite the dislike of it. The verse reads the following:

كُتِبَ عَلَيْكُمُ الْقِتَالُ وَهُوَ كُرْهٌ لَكُمْ ۖ وَعَسَىٰ أَنْ تَكْرَهُوا شَيْئًا وَهُوَ خَيْرٌ لَكُمْ ۖ
وَعَسَىٰ أَنْ تُحِبُّوا شَيْئًا وَهُوَ شَرٌّ لَكُمْ ۗ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ

> "Fighting has been enjoined upon you while it is hateful to you. But perhaps you hate a thing and it is good for you; and perhaps you love a thing and it is bad for you. And Allah Knows, while you know not."[202]

Prophet Muḥammad ﷺ even said:

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[200] Lawrence H. Keeley, *War Before Civilization: the Myth of the Peaceful Savage*, (New York: Oxford University Press, 1996), 37.
[201] Loosely translated as 'Wherever there is society there is law'. See: Mertokusumo, Mengenal Hukum (Suatu Pengantar), 27.
[202] Full verse of Surah Al-Baqarah (2) verse 216.

أُمِرْتُ أَنْ أُقَاتِلَ النَّاسَ حَتَّى يَشْهَدُوا أَنْ لاَ إِلَهَ إِلاَّ اللَّهُ وَأَنَّ مُحَمَّدًا رَسُولُ اللَّهِ، وَيُقِيمُوا الصَّلاَةَ، وَيُؤْتُوا الزَّكَاةَ، فَإِذَا فَعَلُوا ذَلِكَ عَصَمُوا مِنِّي دِمَاءَهُمْ وَأَمْوَالَهُمْ إِلاَّ بِحَقِّ الإِسْلاَمِ، وَحِسَابُهُمْ عَلَى اللَّهِ

"I have been ordered (by Allah) to fight against the people until they testify that none has the right to be worshipped but Allah and that Muhammad is Allah's Messenger ﷺ , and offer the prayers perfectly and give the obligatory charity, so if they perform that, then they save their lives and property from me except for Islamic laws and then their reckoning (accounts) will be done by Allah."[203]

The Prophet ﷺ also said in another narration:

مَنْ مَاتَ وَلَمْ يَغْزُ وَلَمْ يُحَدِّثْ بِهِ نَفْسَهُ مَاتَ عَلَى شُعْبَةٍ مِنْ نِفَاقٍ

"One who died but did not fight in the way of Allah nor did he express any desire (or determination) for Jihad died the death of a hypocrite."[204]

Furthermore, Islam teaches that there are so many promises given to the Muslims. To those who wage war in the name of Islam, the Qur'ān reads the following:

وَلَا تَحْسَبَنَّ الَّذِيْنَ قُتِلُوْا فِيْ سَبِيْلِ اللّٰهِ اَمْوَاتًاۗ بَلْ اَحْيَاۤءٌ عِنْدَ رَبِّهِمْ يُرْزَقُوْنَۙ (١٦٩) فَرِحِيْنَ بِمَآ اٰتٰىهُمُ اللّٰهُ مِنْ فَضْلِهٖۙ وَيَسْتَبْشِرُوْنَ بِالَّذِيْنَ لَمْ يَلْحَقُوْا بِهِمْ مِّنْ خَلْفِهِمْۙ اَلَّا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ يَحْزَنُوْنَ (١٧٠) يَسْتَبْشِرُوْنَ بِنِعْمَةٍ مِّنَ اللّٰهِ وَفَضْلٍۙ وَّاَنَّ اللّٰهَ لَا يُضِيْعُ اَجْرَ الْمُؤْمِنِيْنَ (١٧١)

"And never think of those who have been killed in the cause of Allah as dead. Rather, they are alive with their Lord, receiving provision, Rejoicing in what Allah has bestowed upon them of His bounty, and they receive good tidings about those [to be martyred] after them who have not yet joined them - that there will be no fear concerning them, nor will they grieve. They receive good tidings of favour from Allah

[203] Muḥammad ibn Ismā'īl Al-Bukhārī, *Sahih Al-Bukhari*, *Vol. 1*, (Riyadh: Darussalam, 1997c), ḥadīth no.25.
[204] al-Naysābūrī, Sahih Muslim, ḥadīth no.4931.

and bounty and [of the fact] that Allah does not allow the reward of believers to be lost."[205]

Prophet Muḥammad ﷺ also explained further of the rewards given to those who were martyred:

نَعَمْ وَأَنْتَ صَابِرٌ مُحْتَسِبٌ مُقْبِلٌ غَيْرُ مُدْبِرٍ إِلاَّ الدَّيْنَ فَإِنَّ جِبْرِيلَ عَلَيْهِ السَّلاَمُ قَالَ لِي ذَلِكَ

"Yes, it you were patient and sincere and always fought facing the enemy and never turning your back upon him, (all your lapses would be forgiven) except debt. Gabriel has told me this."[206]

Killing is generally seen as a grave sin, and the default ruling of a life is that it is forbidden to be taken –whether Muslim or otherwise.[207] There are many evidences for this, one of them is the Qur'ān in Surah Al-Mā'idah (5) verse 32:

مِنْ أَجْلِ ذَٰلِكَ كَتَبْنَا عَلَىٰ بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا ۚ وَلَقَدْ جَاءَتْهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِنْهُمْ بَعْدَ ذَٰلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ

"Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors."

The evidence that this applies also towards non-Muslims is the statement of Prophet Muḥammad ﷺ :

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[205] Surah Ali Imrān (3) verses 169-171.
[206] al-Naysābūrī, Sahih Muslim, ḥadīth no.4880.
[207] Sa'd bin Nāṣir Al-Shathri, *Sharḥ Al-Manẓumatu Al-Sa'diyah Fî al-Qawā'id al-Fiqhiyyah*, (al-Riyāḍ: Dar Kanuz Ishbiliya, 2nd edn., 1426), 82–83.

مَنْ قَتَلَ مُعَاهَدًا لَمْ يَرَحْ رَائِحَةَ الْجَنَّةِ، وَإِنَّ رِيحَهَا تُوجَدُ مِنْ مَسِيرَةِ أَرْبَعِينَ عَامًا

"Whoever killed a person having a treaty with the Muslims, shall not smell the smell of Paradise though its smell is perceived from a distance of forty years."[208]

However, when war breaks out, this is an entirely different story. In the famous verse of Jihad, Surah Al-Tawbah (9) verse 5, Allah says:

فَإِذَا انْسَلَخَ الْأَشْهُرُ الْحُرُمُ فَاقْتُلُوا الْمُشْرِكِينَ حَيْثُ وَجَدْتُمُوهُمْ وَخُذُوهُمْ وَاحْصُرُوهُمْ وَاقْعُدُوا لَهُمْ كُلَّ مَرْصَدٍ

"And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush."

Furthermore, Prophet Muḥammad ﷺ said:

" لاَ يَجْتَمِعَانِ فِي النَّارِ اجْتِمَاعًا يَضُرُّ أَحَدُهُمَا الآخَرَ" . قِيلَ مَنْ هُمْ يَا رَسُولَ اللَّهِ قَالَ " مُؤْمِنٌ قَتَلَ كَافِرًا ثُمَّ سَدَّدَ "

"No two such persons shall be together in Hell as if one of them is such that his presence hurts the other." It was asked: "Messenger of Allah, who are they?" He said: "A believer who killed a disbeliever and (then) kept to the right path.""[209]

The aforementioned *ḥadīth* indicates that there is a reward for a Muslim combatant when he kills an enemy combatant during warfare. However, this is not to say that Islam in general loves violence. The word 'Islām' itself shares the same root

[208] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3166.
[209] al-Naysābūrī, Sahih Muslim, ḥadīth no.4896. See also: Yaḥya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, *Vol. 4*, (Damascus: Dar al-Khayr, 1416d), 35.

words (سلم) with 'peace' and 'safety'.[210] Islam inclines more to peace and prefers it if the enemy also inclines to it.[211]

This is why in the discipline of *fiqh* it could be found that there is a special discipline of *fiqh al-jihād,* to regulate warfare in Islam. Other than explaining how important *jihād* is to a Muslim, it also covers the regulations on when, why, and how to conduct warfare. It also speaks of the obligations after the fighting subsides, e.g. dividing spoils of war.

Waging war is indeed ordained but not without conditions that must be met and restrictions to be mindful of. Jurists have ruled that waging war is an individual obligation in a defensive context.[212] In an offensive context, on the other hand, the majority of jurists mention that it becomes *farḍ kifāyyah* (collective obligation),[213] and even then with strict requirements, still it can be set aside when it is politically more beneficial for the Muslims not to wage war.[214]

Furthermore, the Qur'ān also provides limitation in waging war, in Surah Al-Baqarah, 2: verse 190 which reads:

وَقَٰتِلُواْ فِي سَبِيلِ ٱللَّهِ ٱلَّذِينَ يُقَٰتِلُونَكُمۡ وَلَا تَعۡتَدُوٓاْۚ إِنَّ ٱللَّهَ لَا يُحِبُّ ٱلۡمُعۡتَدِينَ

"Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors."

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[210] Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, *Vol. 4*, (Beirut: Librairie du Liban, 1968a), 1412–1413.
[211] See the Quran in Surah al-Anfāl (8), verses 61-62.
[212] Al-Qardhawy, Fiqih Jihad, 39–44.
[213] If one or more Muslims can fulfill it then the others are no longer obliged, but if nobody fulfills it then the blame is to everyone. Nyazee, Islamic Jurisprudence, 64.
[214] Al-Qardhawy, Fiqih Jihad, 13–33. Note that some jurists even argue that Islam does not allow offensive warfare altogether (See: Mohd Hisham Mohd Kamal, "Meaning and Method of the Interpretation of Sunnah in the Field of Siyar: A Reappraisal" in *Islam and International law: Engaging Self-Centrism from a Plurality of Perspectives*, edited by Marie-Luisa Frick and Andreas Th. Muller (Leiden-Boston: Martinus Nijhoff Publishers, 2013), 70–75.) See also the general narrative (repetitively) built by all different authors in: Ghazi bin Muhammad, Ibrahim Kalin, and Mohammad Hashim Kamali (eds.), *War and Peace in Islam: The Uses and Abuses of Jihad*, (Cambridge: Islamic Texts Society, 2013).

There are many ways to understand the above verse, especially on what it means not to transgress. Limitations towards *jihād* can be understood as limitations as to when jihad can be waged.[215] There are times to fight and there are times to stop. For example, as explained in Surah Muḥammad (47) verse 4:

فَإِذَا لَقِيتُمُ ٱلَّذِينَ كَفَرُواْ فَضَرۡبَ ٱلرِّقَابِ حَتَّىٰٓ إِذَآ أَثۡخَنتُمُوهُمۡ فَشُدُّواْ ٱلۡوَثَاقَ فَإِمَّا مَنَّۢا بَعۡدُ وَإِمَّا فِدَآءً حَتَّىٰ تَضَعَ ٱلۡحَرۡبُ أَوۡزَارَهَاۚ

> "So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either [confer] favour afterwards or ransom [them] until the war lays down its burdens."

It can also be understood to mean that there are things that may not be done during the times of war. This, to a great extent, is the Islamic version of 'international humanitarian law' or IHL. There are numerous elaborations of this, which includes also the prohibition of mutilating the dead and stealing the captured goods.[216]

2.5.2 An International Law Perspective on the Conduct of War

As a matter of principle, international law, or at least the modern international law, seems to not favour war too much. While a lot of wars are fought with courageous yells from the persons fighting, even in the modern day, international law dreads the event of war. War is loathed at and is preferred to be avoided.

The international law of war starts with *jus ad bellum* which regulates the lawful reasons to wage war. With the United Nations (UN) at the centre of modern post-world war international law,[217] its' charter reads at the first paragraph of the

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[215] Ismail ibn Katsir, *Shahih Tafsir Ibnu Katsir*, *Vol. 1*, edited by Safiurrahman Al-Mubarakfuri, (Jakarta: Pustaka Ibnu Katsir, 2016d), 617.
[216] Ibid., 616.
[217] Alan Boyle and Christine Chinkin, *The Making of International Law*, (New York: Oxford University Press, 2007), 108–109.

preamble: "…to save succeeding generations from the scourge of war, which twice in our lifetime, has brought untold sorrow to mankind...." Because of this, maintaining international peace has become the number one purpose of the UN in Article 1(1). Furthermore, for this same purpose, this Charter even established a very powerful organ, which is the Security Council (SC).[218] Article 2(4) of the UN Charter is famous for being the centre of a general rule of prohibiting the use of force.[219] Article 33 of the UN Charter further emphasises that states must prioritise peaceful means to settle disputes.

Furthermore, scholars argue that the prohibition against the use of armed forces is the most undoubted part of the *jus cogens* which is the highest and non-derogable norms in international law.[220] As Bassiouni notes, one of the characteristics of a *jus cogens* norm is that its violation "..threaten[s] international peace and security and shock[s] the conscience of humanity", and an act of aggression would amount to of a *jus cogens* norm.[221]

If an act of war eventually occurs despite the efforts to avoid it, the next area of international laws of armed conflict will apply: *jus in bello*. This is IHL, which aims to mitigate the horrors of war by protecting the persons not or no longer involved in the hostilities and limiting the means and methods of warfare.[222]

Historically, modern IHL marked by the Geneva Convention 1864 was founded out of the horrors of war and then has sought to bring as much humanity as possible during times of war.[223] From there, numerous other IHL conventions emerged

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[218] This is beyond question. The UN SC's decisions under Chapter VII are binding and can trespass sovereignty as per Article 2(7) of the UN Charter

[219] Unless the exceptions are met, e.g. self-defense or UN Security Council sanctioned military operations at Articles 57 and 42 respectively.

[220] Alexander Orakhelashvili, *Peremptory norms in international law*, (Oxford: Oxford University Press, 2006), 50.

[221] M Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes", *Law & Contemporary Problems*, vol. 59 (1996): 69.

[222] Advisory Services on International Humanitarian Law, What is International Humanitarian Law?, 1–2.

[223] Started from a Christian-related motivation of Hendry Dunant, but developed into what is claimed to be a secular and universal 'principle of humanity'. Eva Wortel, "Humanitarians and their moral stance

including the Geneva Conventions, Hague Regulations, Additional Protocols, and so many others.

Considering all these matters, international law sees that the killing and destruction in war is simply an inevitable reality of humankind. What the law can do is merely to mitigate the harm and contain the damage when it inevitably occurs.

Life, too, has its own sanctity in international law. The right to life is among the most cardinal of human rights and is enshrined in Article 3 of the Universal Declaration of Human Rights (1948) (UDHR). In the International Covenant on Civil and Political Rights (ICCPR), the right to life is the first right mentioned under Chapter III i.e. in Article 6. To take a life lawfully, death penalty must be sanctioned by a proper court and only at a final court of appeal as per Article 6(2) of the ICCPR. Furthermore, there is even a special protocol set up to abolish the death penalty i.e. the Second Optional Protocol to the ICCPR. Some other exceptions are that lives may be taken in certain emergency situation, such as in self-defence.[224]

In times of war, however, things are different. While it may be interesting to note that no international instrument says, in an explicit and straightforward manner, that it is allowed to kill, we find that the rules are set in the negative. Meaning, there are rules regulating who may not be killed. This can be seen from the general purposes of IHL as mentioned earlier:[225]

i. To protect persons who are not or no longer participating in the hostilities: as mentioned, listing persons who must not or no longer be targeted, and
ii. To limit the means and methods of warfare: which only talks about how not to attack.

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in war: the underlying values", *International Review of the Red Cross*, vol. 91, no. 876 (2009): 782–787.

[224] Even the most serious crimes of international law have exceptions, such as: self-defence, duress, *etc.* See the Rome Statute of the International Criminal Court (1998), Article 31.

[225] Advisory Services on International Humanitarian Law, What is International Humanitarian Law?, 1.

There are rules regulating 'military objectives' which gives a general concept of what objects may be destroyed or captured.[226] However, here, the connotation does not directly point at killing.

This, seen together with the previous explanation, simply adds to the evidence that international law does not favour at all the idea of killing and destruction. It is just that killing during war has become an inevitability. Therefore, the best thing that could be done is to minimise its harmful effects to the furthest extent that it is possible.

As a small observation, one can reasonably conclude that international law does not share the virtuous perception towards some kinds of war as *fiqh al-jihād* may seem to indicate. However, there may be some general similarities in the way rules are set in the conduct of war. In terms of *jus ad bellum,* at least legally both laws do have regulations limiting when wars can be waged. This can be and has been its own discourse, however this is beyond the scope of what this thesis discusses.

In terms of *jus in bello,* which is in the area which the scope of this thesis is part of, both laws seem to share some similar principles. The next sub-chapter gives a general overview on this.

2.5.3 Common Principles Between *Fiqh al-jihād* and International Humanitarian Law: A General Overview

In order to lay out the ground in discussing how *fiqh al-jihād* can or cannot adapt to modernity (which may be represented by the development of technology as well as

[226] Article 52(2) of the Additional Protocol I to the Geneva Conventions 1977 (hereinafter the AP I) explains the following:
"Attacks shall be limited strictly to military objectives. Insofar as objects are concerned, military objectives are limited to 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."

international law), one should have a general overview on how the two bodies of law would approach the conduct of armed conflict.

As mentioned in sub-chapter 1.1, the Muslim civilisation with its *fiqh al-jihād* did contribute in the historical development of IHL. There are several points which should be highlighted.

The first to note would be the compliance to a good international relations system, particularly in honouring agreements. Jean Pictet noted that, since the medieval times, Muslims would respect pacts and would only unilaterally terminate them when they see a potential breach from the other party.[227] In addition, in doing so, Islamic law prohibits such termination without fair prior warning, and this prohibition applies even during times of war and even when the opponent does otherwise.[228] This is an example how even when reciprocity is one of the principles governing the Islamic conduct of international relations, rules and ethics emerging from the *Sharī'ah* should still hold supreme.

Note that, on the other hand, the European nations made pacts and betrayed them at their own will.[229] This was inherent with their view that the European-Christian nations were the only civilised nations, and that international law only applied amongst themselves.[230] While, on the other hand, the Muslims were way ahead of their time for respecting pacts whomever they entered with.[231] This mindset persisted at least until post World War II when the decolonialisation of former colonies begun.[232]

The second issue to note is that both would share the common idea that certain persons must not be attacked. Articles 48, 51, and 52 of AP I makes it clear under IHL

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[227] Pictet, Development and Principles of International Humanitarian Law, 16.
[228] Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, 185.
[229] Pictet, Development and Principles of International Humanitarian Law, 16.
[230] This transcends through the ages of natural law and positivism with different but interconnected justifications. This is why today we witness a 'European model of international law'. See: Anghie, Imperialism, Sovereignty, and the Making of International Law, 1–2.
[231] Pictet, Development and Principles of International Humanitarian Law, 16.
[232] However, this is not without critic. See generally Anghie, Imperialism, Sovereignty, and the Making of International Law, 3–5.

that non-combatants must not be subject to attack. This is while *Fiqh al-jihād* also acknowledges that there are some persons who must not be attacked. A discussion on this matter would be very long, but a good summary can be made by citing a narration attributed to Abū Bakr al-Ṣiddīq who made the following instructions to his army:

> لاَ تَقْتُلَنَّ امْرَأَةً وَلاَ صَبِيًّا وَلاَ كَبِيرًا هَرِمًا وَلاَ تَقْطَعَنَّ شَجَرًا مُثْمِرًا وَلاَ تُخَرِّبَنَّ عَامِرًا وَلاَ تَعْقِرَنَّ شَاةً وَلاَ بَعِيرًا إِلاَّ لِمَأْكُلَةٍ وَلاَ تَحْرِقَنَّ نَحْلاً وَلاَ تُفَرِّقَنَّهُ وَلاَ تَغْلُلْ وَلاَ تَجْبُنْ
>
> "Do not kill women or children or an aged, infirm person. Do not cut down fruit-bearing trees. Do not destroy an inhabited place. Do not slaughter sheep or camels except for food. Do not burn bees and do not scatter them. Do not steal from the booty, and do not be cowardly."[233]

A third issue to note concerns the humane treatment of war captives. IHL even dedicates an entire convention on the protection and humane treatment of war captives, i.e. the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention). It has been explained earlier in Sub-Chapter 2.4.2 how *fiqh al-jihād* also commands humane treatment towards war captives. However, *fiqh al-jihād* may provide a somewhat higher standard throughout the ages because it not only prescribes humane treatment but also encourages Muslims to treat the captives better than they treat themselves.[234]

The fourth and the last issue to note is that the means and methods of warfare are not unlimited. It has been mentioned that one of the purposes of IHL is to put a limitation towards the means and methods of warfare. There are certain means of warfare prohibited in *fiqh al-jihād* which are also prohibited in modern IHL such as the acts of treachery and torture.

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[233] Malik bin Anas, *Muwatta Al-Malik*, (Granada: Madinah Press, 1992), 21/10. However, this narration is not authentic as explaned in Sub-Chapter 3.3.5.
[234] Fajri Matahati Muhammadin, "Comparing International Humanitarian Law and Islamic Law on War Captives: Observing ISIS", *Jurnal Dauliyah*, vol. 1, no. 2 (2016): 15–16.

Therefore, especially in light of current events, comparative studies between the two laws have become imminently important. Especially in the recent decades, the International Committee of the Red Cross (ICRC) has encouraged dialogues with the Islamic communities to meet minds on this issue. A number of works written by Islamic jurists and published by the ICRC have found similarities between the two.[235] This is not without challenge, as Muhammadin points out.[236] There still are, apparently, some discrepancies between modern IHL and *fiqh al-jihād.* These matters must be dealt with. This is what is further explored throughout this thesis.

2.6 CONCLUSION

This chapter begins with an explanation on how *fiqh* and *ijtihād* are conducted. It explains the sources of *fiqh* and *ijtihād*, and how they are limited by the primary sources i.e. the Qur'ān and the Sunnah. Even *maṣlaḥat*-based *ijtihād* which is very fluid and adaptable throughout the times and ages should also follow this. This is why although in many areas *fiqh* cannot be static and instead must develop, there are limits which may not be trespassed. Even differences of opinion may only occur in *furu'* matters and not uṣūl matters. This is why the 'liberal Islam' method is explained as an example of a modern method in *ijtihād* which is unacceptable as it departs from the aforementioned limitations i.e. the Qur'ān and the Sunnah on the *uṣūl* matters.

The chapter continues by explaining the roles of science and technology and of international law in developing *fiqh.* Developments in these areas can and to some level, should influence *fiqh* to the extent that it helps understand and fulfil *maṣlaḥat* within the framework of legitimate *ijtihād*.

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[235] See for example: Mahmud, Perlindungan Korban Konflik Bersenjata dalam Perspektif Hukum Humaniter Internasional dan Hukum Islam; Al-Zayd, Muqaddimah fī al-Qānūn al-Duwalī al-Insānī fī al-Islām.

[236] See generally: Muhammadin, Achieving an Honest Reconciliation: Islamic and International Humanitarian Law.

The chapter ends by explaining war and peace in the eyes of Islam and international law. Science and technology and international law have affected the international laws of war, and Islam too has contributed towards international law in its historical development. There are some differences in mindset towards war between the two bodies of law, but to some extent there is a similar purpose. When *fiqh al-jihād* became rather stagnant, IHL developed more rapidly. Maybe some references towards modern IHL can be used to help develop *fiqh al-jihād* within frameworks acceptable within Islamic law, at least as a comparative perspective. This serves as foundation for the next chapters.

CHAPTER THREE

THE PRINCIPLES OF PROPORTIONALITY AND PRECAUTION IN *FIQH AL-JIHĀD*

3.1 INTRODUCTION

It has been mentioned much earlier in sub-chapter 2.5.2., the primary purpose of modern IHL is to mitigate the harmful effects of war. This is why, for example, the principle of distinction is set to distinguish between those who may and those who must not be targeted during war, and making sure that no harm should happen to the latter.[237] In other words, one must not deliberately attack non-combatants or non-military objects. This corresponds to the first area of purpose of IHL which is to protect those not or no longer taking part in hostilities. This principle, as Jean Pictet notes, has to some extent dated far back to the earliest history of warfare[238] and is today considered the 'cardinal principle of IHL'.[239] This principle, at least in its general idea, is recognised in *fiqh al-jihād*.[240]

However, not all killings of non-combatants are deliberate.[241] Some of the targeting of non-military objects could be by accidental. The question is: would these accidental incidents be tolerated? This is where the principles of proportionality and

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[237] Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War?*, *Vol. 1*, (Geneva: ICRC, 3rd edn., 2011), 5/1-2.
[238] Pictet, Development and Principles of International Humanitarian Law, 1.
[239] The ICRC puts it at the very first rule of customary IHL. See: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law*, *Vol. 1*, (Cambridge University Press, 2005), 3.
[240] Pictet notes also how Islamic law took part in the history of the formulation of this principle (see: Pictet, Development and Principles of International Humanitarian Law, 16–17.). This principle is not part of the focus of this research, but further reading can be found in the following: Mahmud, Perlindungan Korban Konflik Bersenjata dalam Perspektif Hukum Humaniter Internasional dan Hukum Islam; Al-Zayd, Muqaddimah fī al-Qānūn al-Duwalī al-Insānī fī al-Islām; Muhammadin, Achieving an Honest Reconciliation: Islamic and International Humanitarian Law.
[241] Note that deliberate killing of civilians are prohibited.

precautions under IHL come in. This chapter explores whether or not *fiqh al-jihād* recognises these principles and to what extent it does.

3.2 AN IHL CONCEPT OF THE PRINCIPLES OF PROPORTIONALITY AND PRECAUTION

In the basics of criminal law, there is a basic principle of *actus reus non facit reum nisi mens sit rea* or *geen straf zonder schuld,* meaning that, together with a criminal act, one would be required to have a criminal intent.[242] It then follows that the lack of intent should not warrant criminalisation. However, intent takes form not only in deliberate actions but also in the forms of recklessness and negligence where crimes happen due to unjustified risk taking or failing to take reasonable measures to prevent the occurrence of the criminal act.[243] Meaning that, although the commissioning of such a crime is not deliberate *per se,* fault can still be attributed in those circumstances.

Likewise, IHL does not condone accidental damage while recognising that such damage may also be without fault. However, rather than making recklessness and negligence merely as modes of criminal liabilities, IHL develops an entire principle i.e. the principle of proportionality. This principle is also one of the cardinal principles of IHL, defined by the ICRC as a principle where:

> "[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

[242] Antonio Cassese, *The Oxford companion to international criminal justice*, (New York: Oxford University Press, 2009), 57; Noel Cross, *Criminal Law & Criminal Justice: An Introduction*, (London: Sage Publications, 2009), 33. Although of course there can be exceptions to this, such as in cases of strict and absolute liability, but these are not discussed in this research.
[243] Cross, Criminal Law & Criminal Justice: An Introduction, 36 and 38; Cassese, The Oxford companion to international criminal justice, 57.

> combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." [244]

The idea of the principle of proportionality is to limit "… the acceptable amount of destructive secondary (non-targeted) effects an attack can produce given the anticipated military advantage from the attack."[245] In other words, this principle intends to minimise unintentional damage (especially towards non-combatants and non-military objects) caused by attacks. Therefore, this is part of the purpose of IHL to limit the means and methods of warfare.

Unlike the principle of distinction, this principle of proportionality is a relatively new one. In classical warfare up until the 19th century, it seemed that civilians were not usually under the risk of accidental harm, while it was so afterwards.[246] Especially after the world wars (most especially the second), the extent of damage caused were colossal, with the risk of accidental deaths being exponentially larger than ever especially due to aerial bombardments as a new technique of warfare.[247] Statistics also show that the combined deaths due to war from 3000 BC to the 19th century AD is very significantly below the deaths due to war in the 20th century alone.[248]

It was only then that the principle of proportionality was formulised in the modern IHL version we see today, and that was in the 1970s.[249] It was essentially enshrined[250] in Article 51(5)(b) of AP I, which reads the following:

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[244] Henckaerts and Doswald-Beck, Customary international humanitarian law, 46.
[245] James Kilcup, "Proportionality in Customary International Law: An Argument Against Aspirational Laws of War", *Chicago Journal of International Law*, vol. 17 (2016): 248.
[246] Judith Gail Gardam, "Proportionality and force in international law", *American Journal of International Law*, vol. 87, no. 3 (1993): 397.
[247] Ibid., 399–402.
[248] William Eckhardt, "War-Related Deaths Since 3000 BC", *Bulletin of Peace Proposals*, vol. 22, no. 4 (1991): 438. See also the statistics of civilian deaths in wars of the past three centuries: William Eckhardt, "Civilian Deaths in Wartime", *Bulletin of Peace Proposals*, vol. 20, no. 1 (1989): 89–98. Note that these statistics were published in 1991 and 1989 respectively, not yet counting the major wars coming thereafter e.g. the Yugoslav wars, USA invasions of Afghanistan and Iraq, the Syrian War, *etc.*
[249] Kilcup, Proportionality in Customary International Law: An Argument Against Aspirational Laws of War, 250.
[250] Henckaerts and Doswald-Beck, Customary international humanitarian law, 46.

> "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[251]

The two parts are underlined in the above because the Rome Statute of 1998, in its provision on the War Crimes of Excessive Damage (Article 8[2][b][iv]), seems to have some slight but important differences: it says 'clearly excessive' instead of just 'excessive', and 'overall military advantage' rather than just 'military advantage'. Although the idea of a principle of proportionality is reflected in customary international law, but there seems to be no uniformity with regards to the details in the definition.[252]

With respect to the 'military advantage anticipated' part, one must speak of the principle of necessity which is also an IHL principle. The idea is that military attacks may be conducted when such actions provide advantages towards the military purposes of the war in general.[253] It must be noted that this does not justify deliberately targeting non-combatants or certain cases of property destruction, as the judges of the Galic Case noted: "…attacking civilians or the civilian population as such cannot be justified by invoking military necessity."[254]

The 'excessive' part of Article 51(5)(b) of AP I brings us to the principle of precaution. This principle, according to the ICRC, contains the obligation to: " ... take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks."[255]

The Kupreskic trial of the ICTY links the indicator of excessiveness to the use of precautionary measures in Articles 57 and 58 of AP I.[256] This shows how the

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[251] Emphasis added.
[252] Kilcup, Proportionality in Customary International Law: An Argument Against Aspirational Laws of War, 252–253.
[253] Henckaerts and Doswald-Beck, Customary international humanitarian law, 49–50.
[254] *Prosecutor v Galic (IT-98-29-T)*, (The Hague, 2003), 76.
[255] Henckaerts and Doswald-Beck, Customary international humanitarian law, 68.
[256] ICTY, Prosecutor v Kupreskic et. al. (IT-95-16-T) Trial Judgment, 528.

indicator of excessiveness (i.e. essential to the principle of proportionality), while being mindful of the military necessity at hand, is on the efforts to avoid collateral damage as much as possible (i.e. the main idea of the principle of precaution). In order to further cement the link between the principles of proportionality and precaution, some scholars, noting the difficulty of making a proper absolute determination of proportionality,[257] suggest that there should be a 'procedural requirement' in conducting attacks.[258]

The articles read as follows:

> *Article 57 : Precautions in attack*
>
> *1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.*
>
> *2. With respect to attacks, the following precautions shall be taken:*
>
> *(a) those who plan or decide upon an attack shall:*
>
> *(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;*
>
> *(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;*
>
> *(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;*
>
> *(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination*

[257] Janina Dill, "Applying the principle of proportionality in combat operations", Oxford Institute for Ethics, Law, and Armed Conflict, <http://www.elac.ox.ac.uk/downloads/proportionality_policybrief_dec_2010.pdf> (accessed 25 March, 2019).

[258] i.e. the precautionary measures. See: Ibid., 7. Further connections between the principles of proportionality and precaution: Knut Dormann, Louise Doswald-Beck, and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, (Cambridge: Cambridge University Press, 2004), 167–169.

thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 58 : Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Relevant especially to the means and methods of warfare in taking precautions to avoid disproportionate attacks as per Article 57(2)(a)(ii) of AP I, one should also refer to the concept of 'indiscriminate attacks'. Article 51(4)-(5) of AP I explains what an indiscriminate attack is and gives examples of attacks which may be indiscriminate as follows:

4. ...Indiscriminate attacks are:

(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.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

The general idea is that a value judgement must be made. Attackers (or those expecting attacks) must make an assessment on the situation at hand by verifying the target (and value), the potential extent of harm that might be inflicted, and with that in mind make a choice of means and methods of conducting such attack – or whether to proceed with such attack at all.

A little more would need to be addressed when speaking of environmental protection during warfare. It needs to be noted that there seems to be almost nothing in the historical development of IHL that particularly ruled the need to protect the environment in times of war until finally AP I came in 1977 and included such rule.[259] The AP I puts two almost similar articles concerning environmental protection. The first is in Article 35(3) under the 'means and methods of warfare' section, and the second is in Article 55(1) under the 'civilian objects' chapter. Therefore, especially considering the latter, the environment deserves a *prima facie* protection as civilian objects do, and "... no longer just a valueless part of the scenery in which a battle takes

[259] Undoubtedly as an effect just a few years after the very first international law instrument concerning environmental protection, i.e. the Declaration of the United Nations Conference on the Human Environment (known as the Stockholm Declaration) in 1972. Note also that *fiqh al-jihād* since hundreds of years ago has addressed this issue, albeit some controversies which is explained in Subchapter 3.3.5.

place."[260] However, as per Principle 24 of the Rio Declaration on Environment and Development (1992), "[w]*arfare is inherently destructive of sustainable development*."

Both articles note that environmental damage which needs to be avoided is to the level of 'widespread, long-term, and severe', and this can also be seen reflected in Article 8(2)(b)(iv) of the Rome Statute.[261] The terms 'widespread, long-term, and severe' are explained by the extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage.[262] The Understanding annexed to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977 (ENMOD) elaborates these terms to mean the following:

i. "widespread": encompassing an area on the scale of several hundred square kilometres;
ii. "long-lasting": lasting for a period of months, or approximately a season;[263]
iii. "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

However, note the language of Article 8(2)(b)(iv) describing the War Crime of Excessive Damage:

> "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian

[260] Karen Hulme, "Taking care to protect the environment against damage: a meaningless obligation?", *International Review of the Red Cross*, vol. 92, no. 879 (2010): 678.
[261] It may be worth noting that the AP I and the Rome Statute use the conjunction **and**, while the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977 (ENMOD) in Article I(1) uses the conjunction **or**.
[262] Dormann, Doswald-Beck, and Kolb, Elements of War Crimes under the Rome Statute of the International Criminal Court, 175.
[263] Note that the ENMOD uses the term 'long-lasting' instead of 'long-term' which AP I does, but these two terms are easily synonymous.

objects or **widespread, long-term and severe damage to the natural environment <u>which would be</u> clearly excessive in relation to the concrete and direct overall military advantage anticipated**;"[264]

It may be suggested that 'widespread, long-term and severe damage to the natural environment' may be justified by military necessity.[265] This means that an expected massive environmental damage can be justified when it can be proven that the expected military advantage would be massive as well.

On the other hand, the AP I may seem to suggest otherwise as Articles 35(3) and 55(1)[266] suggest general prohibition to inflict 'widespread, long-term and severe damage to the natural environment' and do not relate it to military advantage.[267] This position might be endorsed by the ICRC Commentary, in discussing Articles 35(3) and 55, which mentions nothing about military necessity or advantage, but rather only the general necessity to protect the environment and prohibition to cause such level of damage.[268] This means that no military advantage would be acceptable if an attack is expected to cause such a massive damage. Although, in cases of environmental destruction due to necessary acts of self-defense or duress, one may arguably escape individual criminal responsibility.[269]

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[264] With emphasis added.

[265] See: ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (2000), 22; Dormann, Doswald-Beck, and Kolb, Elements of War Crimes under the Rome Statute of the International Criminal Court, 175–176.

[266] Article 35(3) : " It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.", and Article 55: "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

[267] Compare this to Article 57(2)(a)(iii) of AP I which directly relates the two, i.e. by prohibiting incidental damage specifically when disproportionate towards expected military advantage.

[268] Jean Pictet, Hans-Peter Gasser, Sylvie-S Junod, Claude Pilloud, Jean De-Preux, Yves Sandoz, Christophe Swinarski, Claude F. Wenger, and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949*, edited by Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, (Geneva: International Committee of the Red Cross and Martinus Nijhoff Publishers, 1987), 1440–1462 and 2124–2141.

[269] See Article 31(1)(c) of the Rome Statute:
"The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is

However, the three articles (i.e. Article 8[2][b][iv] of the Rome Statute together with Articles 35[3] and 55[1] of the AP I) can be read together if 'widespread, long-term, and severe damages to the environment' can be assumed to be always excessive compared to any military advantage whatsoever. Such an understanding is supported by the Islamic legal maxim 'the avoidance of harm has primacy over the acquisition of benefits',[270] especially considering that the interest of the environment is a global one and military advantage usually is felt only by one party to an armed conflict.

3.3 IN SEARCH FOR PRINCIPLES OF PROPORTIONALITY AND PRECAUTION IN *FIQH AL-JIHĀD*

This sub-chapter explores how *fiqh al-jihād* attempts to decrease the amount of accidental deaths or damages in times of war. It first provides a more comprehensive examination on the existing scholarship to find out the current situation, and then further exploration is made to examine the extent to which such principles can be derived from Islamic teachings.

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essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected….."

Also, Article 31(1)(d) of the Rome Statute:

"The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control."

[270] This principle is derived from an Islamic legal maxim, see: Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 115. It has been argued by Awn Al-Khasawneh in the International Law Commission as well as Marcelo Kohen that this maxim should be applied in international law, and this proposition was made in context of environmental protection. See: ILC, *Yearbook of the International Law Commission, Vol. 1, Summary records of the meetings of the forty-first session 2 May-21 July 1989*, (New York, 1989), 126; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Oral Proceedings, CRT 2009/14*, (The Hague, 1989), 12; Awn S. Al-Khasawneh, "Islam and International Law" in *Islam and international law: engaging self-centrism from a plurality of perspectives*, edited by Marie-Luisa Frick and Andreas Th Müller (Martinus Nijhoff Publishers, 2013), 39–40.

3.3.1 The Current State of Scholarship: A More Comprehensive Survey

Finding the principle of distinction in the works of the jurists of *fiqh* seems to be easy, as one can find the scholarly discussions on the topic in many works even since the classical era as compiled and compared by Ibn Rushd.[271] However, in case of the principle of proportionality it may seem to be quite difficult, especially in the classical scholarship.

A reference that may be a hint would be that there are some classical jurists mentioning that only an imperative military necessity could justify an attack towards enemy combatants when commingling with non-combatants.[272] This includes not just weapons, but also the manipulation of environment for the purpose of war e.g. cutting down trees or flooding enemy forts when other means to defeat the enemy have been exhausted.[273] Necessity[274] or *maṣlaḥat*, as mentioned in the previous chapter, is essentially achieving benefits and rejecting harm. However, it seems that the discourse by the classical jurists was merely to see whether the use of particular weapons or tactics may result in too much accidental losses.[275] There seems to be no discussion on the necessity to take precautions to avoid these accidental losses.

In the works of modern jurists, most of the discussions on modern weaponry relates mostly on its general permissibility. Some jurists allow the use of modern weaponry on the basis of reciprocity (i.e. because the opposing forces uses it too), as per some verses of the Qur'ān such as Surah Al-Baqarah (2) verse 194, which is as follow:

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[271] Ibn Rushd, *The Distinguished Jurist's Primer*, 458–460.
[272] See for example: ʿAbd Allāh b. Aḥmad ibn Qudāmah Al-Maqdīsī, *Fiqh al-Kāfī al-Imām Aḥmad ibn Ḥanbal*, *Vol. 4*, (Beirut: Dar al-Kutub 'Elmiya, 2004), 126; Ibrāhīm ibn 'Alī Al-Shīrāzī, *Al-Muhadhdhab fī Fiqh al-Imām Al-Shāfi'ī*, *Vol. 3*, (Beirut: Dar al-Kutub 'Elmiya, 1995), 278.
[273] Muḥammad ibn al-Ḥasan Al-Shaybānī, *al-Siyār al-Kabīr*, *Vol. 4*, (al-Qāhirah: Mahad Al-Makhtutat), 1554.
[274] The term 'necessity' here is used broadly to indicate *maṣlaḥat,* while the term '*ḍarūrah*' will be translated into 'emergency'.
[275] Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 124.

فَمَنِ اعْتَدَىٰ عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اعْتَدَىٰ
عَلَيْكُمْ

> "… So whoever has assaulted you, then assault him in the same way that he has assaulted you…"

In this line of argument, it is argued that if the enemy uses a particular weapon, then the Muslims should also use it against the enemy.[276] One of the rationale, other than the aforementioned *dalīl*, is tied back to *maṣlaḥat* also: not using a destructive weapon used first by the enemy is tantamount to suicide – which is prohibited.[277]

Some jurists employed *qiyās* to justify the use of such weapons. These jurists, 'Abdullah 'Azzām among them, say that Prophet Muḥammad ﷺ used the modern weapons of his time (i.e. the *manjanīq* or mangonel) as a means to achieve the necessities of war, therefore by *qiyās* modern weapons also can be used in today's context as they serve the same purpose.[278] To some extent, this application of *qiyās* may seem reasonable. The issue that must be noted here is that *qiyās* may only be done when there is a common underlying attribute or '*illah* between the case found in the *dalīl* and the new case.[279] Did this *ijtihad* employ the correct '*illah*?

It is apparent that the jurists who use *qiyās* with mangonels to justify the use of modern weapons identify 'using modern weapons of the time' as the '*illah*. Meaning, that they were both means to an end in achieving the necessity of war. If this really is the *'illah,* then the *qiyās* may be correct.

However, as explained in Chapter Two, *maṣlaḥat* is the governing rule of various issues in *fiqh al-jihād.* There are numerous means and methods of war which can help achieve the necessities of war, but are nonetheless prohibited by the *Sharī'ah*

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[276] This argument has been used to justify using weapons which would be otherwise prohibited, such as –according to some opinions fire. See: Ibn Rushd, *The Distinguished Jurist's Primer*, 460.
[277] Mohamed Mokbel Mahmud Elbakry, cited in Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 126.
[278] Azzam, Jihad: Adab dan Hukumnya, 43.
[279] Nyazee, Islamic Jurisprudence, 214.

whether because it contravenes the Qur'ān and Sunnah directly or by causing *muḍarat*.[280] Therefore, the permissibility of any weapons (and most things, really) would depend not only the existence of *maṣlaḥat* but also on whether it contravenes the *Sharī'ah.*

A more careful comparison between the potential damage inflicted by the two weapons (i.e. the *manjanīq* and modern bombs), certainly one may reach a different conclusion. The mangonel hurls rocks towards enemy fortresses which is no doubt a big threat. However, such threat pales in the face of modern bombs which, depending on size and method, may destroy very large areas and kill tens of thousands in one blast. This was clearly not considered while conducting this *qiyās*, especially when the ruling of these jurists did not put additional safe requirements i.e. proportionality and precaution measures or at least warnings.[281] Therefore, this *qiyās* seems to be an inaccurate one.

There is a minority of jurists who take a more extreme position by prohibiting bombs and explosives altogether. This jurist is Ismail Ibrahim Abu Sharifah who gives five reasons. Three of these reasons are unrelated to the proportionality issues, i.e. the command to do *iḥsān* (good) to all,[282] and the prohibitions to mutilate and to use fire.[283]

The other two reasons he cited are relevant to proportionality, i.e. that women and children would certainly be killed, while it is prohibited to kill them; and the principle of *fiqh* 'rejecting harm takes precedence over achieving *maṣlaḥat*', considering that using such weapons will cause immense harm.[284] A similar argument with a lesser tone is forwarded by Al-Qaraḍāwī who argues that, due to similar

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[280] This is explained throughout Chapters Three, Four, and Five of this thesis.
[281] This mistake was pointed out by Al-Qaraḍāwī. See: Al-Qardhawy, Fiqih Jihad, 497.
[282] And that killing with 'weapons of mass destruction' (as he terms it) is not *iḥsan.* The topic of 'killing with *iḥsan*' is discussed Chapter Four.
[283] Abu Sharifah's *fatwa* is cited in Alkhoirot, "Hukum Penggunaan Bom dan Bahan Peledak Dalam Perang", Pesantren Alkhoirot, <http://www.alkhoirot.net/2015/03/hukum-bom-dalam-islam.html?m=1> (accessed 7 January, 2018). Note that Abu Sharifah considers that 'weapons of mass destruction' will burn and mutilate as his reason to prohibit, which is an issue discussed further in Chapter Four.
[284] Ibid.

reasons, these weapons are by default prohibited to be used but then may only be used in urgent situations during defensive *jihād*.[285]

These points are disagreeable for a number of reasons. First, it is not always the case that women and children would definitely be killed. A scenario where only combatants were present – or at least very little non-combatants — is not entirely inconceivable.[286] In such a scenario, bombing should be permissible.

Second, the principle of *fiqh* 'rejecting harm takes precedence over achieving *maṣlaḥat*', as per Elbakry's submission above in this Sub-Chapter, will take a different tone considering the reality: what might be the fate of an army who refuses to use explosive-type weapons, when their opponent uses their full arsenal of it? Granted, it is true that the quality of weapons and technology possessed by an army are not necessarily always ultimate determining factors of victory, rather there are many other essential factors i.e. policy, strategy, 'the man behind the gun', geographical terrain, and so much more others.[287] However, certainly it is a contributing factor and there is no shortage of possibilities where weapons and technology difference have actually caused wars to be won.[288] With regards to Al-Qaraḍāwī's position, one may wonder how can one hold a position where on one hand ,agrees that offensive *jihād* can be justified in some circumstances[289] while on the

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[285] Al-Qardhawy, Fiqih Jihad, 498.

[286] See, for example, the battle of the Falklands. Only three civilian losses, and even that is due to accidental friendly-fire: *History is Now*, "Civilian Deaths in the Falklands War and the Decline of the British Empire", <http://www.historyisnowmagazine.com/blog/2019/1/13/civilian-deaths-in-the-falklands-war-and-the-decline-of-the-british-empire#.XJrjSJgzbIU=> (accessed 27 March, 2019).

[287] Colin S Gray, "Weapons for Strategic Effect How Important Is Technology?" (Alabama: AIR WAR COLL MAXWELL AFB AL, 2001), 31–34, and generally. Some even argue that small weapons may be the ultimate weapon of war in the modern day, as they easily fuel conflicts all around the world, and being easy and cheap the conflicts are very difficult to stop. See: Alex Ward, "Why "Small Arms" Might Just Be the Ultimate Weapon of War", *The National Interest*, 2015, June 8; Elias Groll, "Where the Insurgent Groups of the World Get Their Weapons", *Foreign Policy*, 2015, June 1.

[288] Surely there is no telling how essential it is in war to gain as much advantage as it is possible. There are multiple evidences in history where weaponry and technological advantage has provided important advantage in war. Gray, Weapons for Strategic Effect How Important is Technology?, 34–36; Bevin Alexander, *How Wars Are Won: The 13 Rules of War from Ancient Greece to the War on Terror*, (New York: Three Rivers Press, 2002), 151–179.

[289] Al-Qardhawy, Fiqih Jihad, 39–44.

other hand, dooms offensive *jihād* to fail by prohibiting the Muslim army from using explosive weapons.

It seems that when some jurists speak of weapons of mass destruction, they seem to speak of all sorts of explosives – any bombs, nuclear, and biological weapons — in one same category and ruling.[290] The reality is that one cannot compare the potential damage of a hand grenade to that of a nuclear bomb. The damage caused by most explosive weapons are not unlawful *per se* as their use can still be controlled, while a nuclear bomb is without question indiscriminate and massively widespread.[291] Making the same rule between them is as incorrect as an analogy between the mangonel and explosive weapons.[292]

The issue of proportionality is indeed an important one in modern warfare, as the need to limit the means and methods of warfare does seem paramount. Yet, it seems that it is hard to find an explicit mention of it in the works of *fiqh al-jihād*. The stance of jurists, as explained earlier in this sub-chapter, takes two extremes. Some jurists (such as 'Abdullah 'Azzām and Elbakry) categorically allow any methods of attack without any restraint 'as long as such attack is necessary', which leads to the problem that triggered concern that brought the principle of proportionality in the first place. Other jurists (such as Ismail Ibrahim Abu Sharifah) take positions which may be a virtuous but not a realistic one: categorical prohibition towards bombs and missiles. It is difficult to imagine fighting battles without using these modern weapons while the enemy uses instead uses them. A middle ground needs to be found, which is, to come back to the point of this chapter, proportional.

Al-Zuḥaylī seems to make a hint at the issue of proportionality and precaution in his case on Muslims taken as human shield by the non-Muslim enemy. He mentions

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[290] Ibid., 489–499; Alkhoirot, Hukum Penggunaan Bom dan Bahan Peledak Dalam Perang. Especially in the case of Al-Qardhawy, he seems to only mention nuclear, chemical, and bacteria weapons. At full face, it seems that he does not talk anything about other modern weapons. However, a careful examination to his analysis will show that he means all kinds of modern destructive weapons.
[291] Except, of course, when detonated in the middle of the desert or the sea during testings.
[292] This is the reason why nuclear weapons would require a separate discussion and thus not included in this thesis.

that when a Muslim army wishes to attack the enemy in such situation, this army should make an intention to attack the enemy rather than the Muslim human shields just to make sure that the Muslim casualties are not deliberate.[293] This may imply that at least collateral damages may happen but only when they are non-intentional. When intentions are set (in this case, to not attack the non-combatants), surely one may infer that such intentions must be manifested through actions in one way or another such as by being careful.

Be that as it may, all of this is nothing but extremely implicit references to what may be construed as an idea of principles of proportionality and precaution. The classical jurists did not specifically refer to much ideas – let alone detailed ones — on the need to reduce accidental deaths. The fact that the classical jurists lived centuries before the previously mentioned urgencies for a principle of proportionality arose[294] may be an explanation as to the absence of discussion on this topic.

One can only guess the reason why the modern jurists are yet to explore this topic in depth. Al-Dawoody suggests two reasons as to why jurists have not discussed much of this:[295]

i. First, the Muslim world has yet to be affected by the use of modern weapons, especially weapons of mass destruction (WMD).
ii. Second, the massive westernisation in the Islamic world's legal systems which put the Islamic jurists far from policy making.

The first reason may be disagreeable because Muslims have participated in wars in various times and places in the modern day, including: the Ottoman Empire in the First World War, Indonesia in the wars of independence, the Gulf Wars, the

[293] Al-Zuḥaylī, Fiqh al-Islām wa Adillatuhu, 5857–5858; Al-Zuḥaylī, Āthār al-Ḥarb Fi al-Fiqh al-Islāmī, 506–507.
[294] With the exception of fire, which may set a large area ablaze. As a matter of proportionality, the question of fire affecting large areas follows the principles discussed in this chapter. However, on the use of fire in itself, the jurists have their own discussion which is explained in the next chapter.
[295] Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 125.

Russian invasion of Afghanistan, and the civil wars in Sudan and Somalia. Some works on *fiqh al-jihād* have been written by Muslim scholars or Islamist groups who have participated in wars, such as ‘Abdullah ‘Azzām, Abdul Qadir bin Abdul Aziz, and the Taliban.[296] This is not to mention that although there seems to be no record of nuclear bombs exploding in the Muslim world, but WMDs are no stranger to the Muslim World. Pakistan has nuclear weapons,[297] Iraq tried to develop them albeit unsuccessful,[298] and the Muslim world has joined their efforts to support Palestine who is under the threat of the Zionist state Israel who is strongly believed to have nuclear weapons.[299]

The second reason, on the other hand, may have merit as the acts of leaders – including the international treaty negotiations — are done by politicians.[300] Al-Dawoody correctly points out that the acts of individual Muslim dictators (or any Muslim leader, that is) do not necessarily reflect the Islamic law position.[301] Nevertheless, some states apply the *Sharī‘ah* and the jurists are closely linked to the government such as in Saudi Arabia and Malaysia. Therefore, it is possible that the acts of some Muslim states may be advised by their Islamic jurists.[302]

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[296] These individuals and groups have authored books on *fiqh al-jihād* which is discussed in the chapters of this thesis, with the exception of the Taliban’s *Layha.* The *Layha* could not be found in full version other than in the Pashtun language except for a very general overview of it by Muḥammad Munir. However, most of the issues analysed by Munir are not within this thesis’s scope Muhammad Munir, "The Layha for the Mujahideen: an Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law", *International Review of the Red Cross*, vol. 83, no. 881 (2011): 1–22.

[297] Erin Creegan, "India, Pakistan Sign Missile Notification Pact", Arms Control Association, <https://www.armscontrol.org/act/2005_11/NOV-IndiaPak> (accessed 28 January, 2019).

[298] David Albright and Mark Hibbs, "Iraq and the Bomb: Were They Even Close?", *Bulletin of the Atomic Scientists*, vol. 47, no. 2 (1991): 16–25.

[299] Hans M. Kristensen and Robert S. Norris, "Israeli Nuclear Weapons, 2014", *Bulletin of the Atomic Scientists*, vol. 70, no. 6 (2014): 97–115.

[300] See Article 7(2) of the Vienna Convention on the Law of Treaties 1969.

[301] Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 125.

[302] Some observers claim that some changes are undergoing in Saudi Arabia and Malaysia which may affect the relation between Islam and the governance. However, at the time of the completion of this research, these two states have governments that are very closely linked and advised by the Islamic jurists.

3.3.2 A General Principle of Proportionality

Islam has quite a lot to say about setting a balance and proportionate measure of things in this religion in general. Allah says in the Qur'ān, Surah Al-Baqarah (2) verse 143:

وَكَذَٰلِكَ جَعَلْنَاكُمْ أُمَّةً **وَسَطًا** لِتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ وَيَكُونَ الرَّسُولُ عَلَيْكُمْ شَهِيدًا

> "And thus we have made you a **just** community that you will be witnesses over the people and the Messenger will be a witness over you." (emphasis added)

As seen above, the Sahih International translation of the Qur'ān used in this thesis defines وَسَطًا as 'just'. However, a further look into the root و س ط will find much deeper meanings, such as 'best', 'middle', 'justly balanced', 'average'.[303]

Allah further says in Surah Al-Raḥmān (55) verse 7-9:

نَلَزِمِلْا عَضَوَوَ اهَعَفَوَ عَامَسَّلاوَ (٧) نِلزَمِلْا فِي لوْغَطْتَ لاَّأَ(٨) نَزْوَلْا لوُمِيقِأَوَ نَلزَمِلْا اوسُرخُدُ لاَوَ طِسْقِلْابِ (٩)

> "And the heaven He raised and imposed the balance. That you not transgress within the balance. And establish weight in justice and do not make deficient the balance."

The word ٱلْمِيزَانَ or 'the balance' is repeated in three verses in a row, really emphasising the importance of keeping it. Regarding this word in these verses, Ibn Kathīr explains how Allah creates everything upon truth and justice so we shall do so as well.[304] Furthermore, Al-Sa'di explains these verses stating that this balance must be established by justice in accordance with the capacities and capabilities of

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[303] Edward William Lane, *An Arabic-English Lexicon: in Eight Parts*, *Vol. 8*, (Beirut: Librairie du Liban, 1968), 2940–2942.
[304] Ismail ibn Katsir, *Shahih Tafsir Ibnu Katsir*, *Vol. 8*, edited by Safiurrahman Al-Mubarakfuri, (Jakarta: Pustaka Ibnu Katsir, 2016e), 664–665.

humankind, and it should not be belittled by committing transgressions and oppressions – or else it may lead to corruption of the heavens and earths.[305]

The aforementioned verses are testimonies how important it is for everything to be in a balance. Allah also says that it is not a good thing to exceed the balance, using different terms for it. For example, in Surah Al-Mā'idah (5) verse 77 Allah says:

قُلْ يَا أَهْلَ الْكِتَابِ لَا تَغْلُوا فِي دِينِكُمْ غَيْرَ الْحَقِّ وَلَا تَتَّبِعُوا أَهْوَاءَ قَوْمٍ قَدْ ضَلُّوا مِنْ قَبْلُ وَأَضَلُّوا كَثِيرًا وَضَلُّوا عَنْ سَوَاءِ السَّبِيلِ

"Say, 'O People of the Scripture, do not exceed limits in your religion beyond the truth and do not follow the inclinations of a people who had gone astray before and misled many and have strayed from the soundness of the way.'"

Here the Qur'ān uses the term لَا تَغْلُواْ which roots from غ ل و , meaning one who "…exceeded the proper, due, or common limit, was excessive, immoderate, or beyond measure…"[306] The Qur'ān continues in Surah Al-A'rāf (7) verse 31:

يَا بَنِي آدَمَ خُذُوا زِينَتَكُمْ عِنْدَ كُلِّ مَسْجِدٍ وَكُلُوا وَاشْرَبُوا **وَلَا تُسْرِفُوا ۚ إِنَّهُ لَا يُحِبُّ الْمُسْرِفِينَ**

"O children of Adam, take your adornment at every *masjid*, and eat and drink, **but be not excessive. Indeed, He likes not those who commit excess**." (emphasis added)

This verse, at full face, talks about encouraging humankind to take adornments, eating, and drinking, but ends by providing a limit as emphasised above: do not be

[305] 'Abd al-Raḥmān Al-Sa'di, *Taysiru al-Karīma al-Raḥmān Fī Tafsīri Kalāmi al-Mannān*, (al-Qāhirah: Dar al-Hadith, 2002), 921. See also Surah Al-Rūm verse 41 as an example of verse indicating corruption in the lands and seas due to the acts of mankind.
[306] Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, *Vol. 3*, (Beirut: Librairie du Liban, 1968b), 2287.

excessive. The next and final part of the verse is a further emphasis on how excessiveness is disliked.

In Surah Al-A'rāf (7) verse 31 above, a different term is used which is ٱلْمُسْرِفِينَ which roots from س ر ف which means *inter alia* excess, ignorant, exceeding the undue bounds or just limits, commit many faults/offences/crimes/sins, and transgress.[307] Commenting on this verse, Ibn Kathīr cites Ibn Jarīr on this verse explaining Allah's dislike towards excessiveness which includes going beyond what is allowed (or to prohibit what are made permissible by Allah, or otherwise to allow what are made prohibited by Allah, including matters of *ḥalāl* and *ḥarām*).[308]

In the context of *jihād*, as cited before in sub-chapter 2.5.1 i.e. Surah Al-Baqarah (2) verse 190, the Qur'ān explains "those who transgress limits" by using the term ٱلْمُعْتَدِينَ which roots from عدو, which means *inter alia* overlook, transgress, wickedly, unjustly, wrongfully, transgress, and violate.[309] The meaning of this is to adhere to the limitations of war, i.e. to stop fighting when one must, and to refrain from committing things prohibited during warfare.[310]

These are only a few of the *dalīl* to speak of the need to set a balance and limit and to prohibit the transgression of it. This does indeed show that Islamic law, in general, does require proportional and non-excessive actions for everything in life. Therefore, a general principle of proportionality does exist in Islam. This should apply too in the context of *jihād* for at least two reasons.

First, a general rule applies to all conditions unless there is an exception found in the *dalīl*.[311] Second, because one of the bases from which the principle of

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[307] Lane, *An Arabic-English Lexicon: In Eight Parts*, 1350–1352.
[308] Imam ibn Katsir, *Shahih Tafsir Ibnu Katsir*, *Vol. 3*, edited by Safiurrahman Al-Mubarakfuri, (Jakarta: Pustaka Ibnu Katsir, 2016a), 554. Note also how Allah illustrates that a person committing a sin is like transgressing upon oneself, and using this word also. See Surah Al-Zumar verse 53.
[309] Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, *Vol. 5*, (Beirut: Librairie du Liban, 1968c), 1977–1981.
[310] ibn Katsir, Ismail, *Shahih Tafsir Ibnu Katsir*, 617.
[311] Al-Utsaimin, Ushul Fiqih, 58–59.

proportionality is derived from is actually talking about *jihād,* namely: Surah Al-Baqarah verse 190.

3.3.3 'The Limit'

The principle of proportionality will not fulfil itself. It is just common sense that one must strive to not exceed the balance. As cited in the previous sub-chapter from Surah Al-Raḥmān (55) verses 8-9 and explained by Al-Sa'di, Allah has set the limit and then humankind must endeavour to not go past that limit. Before one proceeds to the next part, it may be essential to set first the 'limit' which is applicable to *jihād*.

The first to be considered is the purpose of *jihād*. There are numerous verses of the Qur'ān on this matter, one of them is Surah Al-Anfāl (8) verse 39:

وَقَاتِلُوهُمْ حَتَّىٰ لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ كُلُّهُ لِلَّهِ ۚ فَإِنِ انْتَهَوْا فَإِنَّ اللَّهَ بِمَا يَعْمَلُونَ بَصِيرٌ

"And fight them until there is no *fitnah* and [until] the religion, all of it, is for Allah. And if they cease - then indeed, Allah is Seeing of what they do."

Allah also says in Surah Al Baqarah (2) verse 193:

وَقَاتِلُوهُمْ حَتَّىٰ لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ لِلَّهِ ۖ فَإِنِ انْتَهَوْا فَلَا عُدْوَانَ إِلَّا عَلَى الظَّالِمِينَ

"Fight them until there is no [more] *fitnah* and [until] worship is [acknowledged to be] for Allah. But if they cease, then there is to be no aggression except against the oppressors."

There are numerous verses with similar meanings in the Qur'ān. Ibn Taymiyyah noted that this means that *jihād* is to uphold high the *kalimah* of Allah[312] and so that religion is only for Allah.[313] Al-Sa'di explains further by classifying *jihād* into two:[314]

i. *Jihād* with the purpose of goodness and improving the believers in *aqīdah, akhlāq, adab,* and all matters (worldly or otherwise) of the religion, and
ii. *Jihād* to repel those who attack Islam and the Muslims and to defy them.

In fulfilling these purposes, there are limits to satisfy. The first, as mentioned earlier, would be the lawful reasons to wage *jihād,* which is not the topic of this research. The second, which is the topic of this research, relates to the lawful conducts of war. The limits in this context, is best explained in the context of limitation of extent of harm that may be inflicted. During war, there are some who may be harmed and others who must not be harmed.

Ibn Taymiyyah and the majority of jurists explain that the general limit is that harm may be inflicted during war due to the disbelief (*kufr*) of the enemy and also more importantly — their participation in hostilities.[315] Ibn Taymiyyah's arguments are *inter alia*:[316]

i. The injunctions of the Qur'ān on war (2: 190-193) commands the Muslims to stop fighting when the enemy stops attacking (instead of when the enemy enters Islam),

[312] This means the religion of Allah, i.e. Islam.
[313] Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Majmu' Al-Fatāwa*, *Vol. 15*, (Madīnah: Majma' Mālik Fahd Li Ṭibā'ah Al-Muṣḥaf Al-Sharīf, 1995b), 170.
[314] 'Abd al-Raḥmān Al-Sa'di, *Majmuh Kamilah*, *Vol. 13*, (Unaizah: Markaz Shalih bin Shalih Al-Thaqafi, 1987), 186.
[315] Imam ibn Taymiyah's work is titled *Qā'idah fī Qitāl al-Kuffār: Hal Sababuh Al-Muqātalah aw al-Kufr?,* summarised in: Al-Qardhawy, Fiqih Jihad, 290–291.
[316] Ibid., 291–296.

ii. When the Prophet ﷺ regretted the killing of a woman, he said "she did not participate in the war" and then prohibited the killing of women in war,

iii. The Qur'ān in 2:256 prohibits compulsion in religion, in 47:4 allows ransom and gratuitous release of prisoners, and has a general purpose of preferring not to kill in 5:32, and there are more arguments which will not be discussed in detail.

This too is the position of the contemporary jurists.[317] This falls under the principle of distinction and will not be explored deeper.[318]

However, the whole point of this sub-chapter is to identify that *jihād* has its purpose as well as its limitations. The conduct of *jihād* shall be mindful of its purposes so that it does not transgress its limitations.

3.3.4 A General Principle of Precaution

Given the aforementioned general limit, it should be clear that in the context of *jihād,* those not meant to be harmed (i.e. non-combatants or others) must not be harmed. However, the reality of modern warfare is that civilian deaths are inevitable due to the available weapons (with their inherent destructive capabilities and the other circumstances). When war is already upon the Muslims and fighting is inevitable, but civilian deaths are indeed also inevitable, then Muslims should apply Surah Al-Baqarah (2) verse 286:

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[317] See for example: Azzam, Jihad: Adab dan Hukumnya, 24 and 30. The minority opinion is that of Al-Shāfi'ī who says that harm is inflicted due to the enemy's mere state of disbelief (kufr), except those who are given exception from the dalīl e.g. women and children. He ruled so as the Qur'ān says in 9: 5 : "*…kill the polytheists wherever you find them…*" which is a general command, which should be obeyed in its generality unless exceptions are found. See: Rushd, *The Distingished Jurist's Primer*, 1:458–59.

[318] See generally: 'Abd al-Ghanī 'Abd al-Ḥamīd Maḥmūd, *Ḥimāyah Ḍaḥāyā al-Nizā'āt al-Musallaḥah fī al-Qānūn al-Duwalī al-Insānī wa al-Sharī'ah al-Islāmiyyah*, (al-Qāhirah: The International Committee of the Red Cross, Cairo Delegation, 2000).

لاَ يُكَلِّفُ اللَّهُ نَفْسًا إِلاَّ وُسْعَهَا

“Allah does not charge a soul except [with that within] its capacity.”

Furthermore, Allah also says in Surah Al-Baqarah (2) verse 185:

يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ

“Allah intends for you ease and does not intend for you hardship...”

This verse is one of the basis in deriving the Islamic legal maxims ‘hardship begets facility’ and ‘when a matter is constricted, it is expanded’.[319] It means that when there is certain difficulty in fulfilling a particular rule, then facilitation is made. Applied to the context of *jihād,* it means that unintentional civilian deaths can be overlooked.

This is corroborated with an authentic *ḥadīth* narrated by Ṣa‘b bin Jaththama when some women and children were accidentally killed in a cavalry raid during the night, to which Prophet Muḥammad ﷺ remarked: هُمْ مِنْهُمْ (“They were from them.”).[320]

However, it does not end there. Just because emergencies are present, it does not mean that there is a blanket ‘green light’ to just indulge in transgression. Allah says in Surah Al Baqarah (2) verse 173:

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنزِيرِ وَمَا أُهِلَّ بِهِ لِغَيْرِ اللَّهِ ۖ فَمَنِ اضْطُرَّ
غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ ۚ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

“He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is

[319] Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 57–74.
[320] al-Naysābūrī, Sahih Muslim, ḥadīth no.4549-4950.

> forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful."

While this verse shows that emergencies may justify eating what is otherwise prohibited, such justification is not unqualified. Thus, another Islamic legal maxim dictates 'during emergency, prohibited things can be permissible only to the extent of which the emergency requires', and 'harm must be removed to the furthest extent possible'.[321] Another maxim states 'what cannot be achieved in its entirety may not be abandoned in its entirety'.[322]

This is further corroborated with what Allah says in Surah Fuṣṣilat verse 30:

إِنَّ الَّذِينَ قَالُوا رَبُّنَا اللَّهُ ثُمَّ اسْتَقَامُوا تَتَنَزَّلُ عَلَيْهِمُ الْمَلَائِكَةُ أَلَّا تَخَافُوا وَلَا تَحْزَنُوا وَأَبْشِرُوا بِالْجَنَّةِ الَّتِي كُنْتُمْ تُوعَدُونَ

> "Indeed, those who have said, 'Our Lord is Allah' and then remained on a right course - the angels will descend upon them, [saying], 'Do not fear and do not grieve but receive good tidings of Paradise, which you were promised."

This verse points out the importance of *istiqāmah,* which means 'to stand firm in religion and to strive to fulfil the law in the best way possible'.[323]

In context of *jihād,* this means one thing. It is true that the situation of modern warfare may call for some level of tolerance towards unintentional or accidental harm towards those who must not be harmed. However, it also means that there is a duty to strive to reduce the harm as much to the furthest extent that it is possible. Or, in other words, there is a duty to take precautions as to avoid excessive inevitable harm.

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[321] Azman Ismail and Md. Habibur Rahman, *Islamic Legal Maxims: Essentials and Applications*, (Kuala Lumpur: IBFIM, 2013), 175 and 189; Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 81 and 105.
[322] Muhammad Khayr Haykal, *Al-Jihād wa al-Qitāl fī al-Siyāsah al-Shar'iyyah*, *Vol. 1*, (Beirut: Dar al-Bayariq, 1996), 735.
[323] Musthafa Al-Bugha and Musthafa Al-Khin, *Syarah Riyadus Shalihin*, (Yogyakarta: Darul Uswah, 2006), 181–183.

There is some precedence from the *Sunnah* to indicate this. The first precedence is found in some narrations concerning the prohibition to kill women in war. Numerous narrations corroborate this rule,[324] but two among them add that Prophet Muḥammad ﷺ , after prohibiting the killing of women not involved in fighting, told a messenger:

قُلْ لِخَالِدٍ لاَ يَقْتُلَنَّ امْرَأَةً وَلاَ عَسِيفًا

"Tell Khālid: do not kill any women or any (farm) labourer." [325]

Also, during *Fath al-Makkah, '*Abdullah ibn Rabah narrated that Prophet Muḥammad ﷺ said:

مَنْ دَخَلَ دَارَ أَبِي سُفْيَانَ فَهُوَ آمِنٌ وَمَنْ أَلْقَى السِّلاَحَ فَهُوَ آمِنٌ وَمَنْ أَغْلَقَ بَابَهُ فَهُوَ آمِنٌ

"Who enters the house of Abu Sufyan will be safe, who lays down arms will be safe, who locks his door will be safe." [326]

From the aforementioned narrations, it can be inferred how Prophet Muḥammad ﷺ has set a precedence on how precautions must be taken to avoid unintended losses to non-combatants.[327]

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[324] For example: Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3014-3015.
[325] This is the wordings narrated by Rabah ibn Rabi', as reported by Imam Abu Dawud. See: Abu Dawud Sulaymān ibn al-Ash'ath Al-Sijistānī, *Sunan Abu Dawud*, *Vol. 2*, (Riyadh: Darussalam, 2008a), ḥadīth no.2669. The other narration was narrated from different companion i.e. Hanzalah Al-Katib, who narrated something similar but in different wordings, as reported by Imam Ibn Majah. See: Muḥammad ibn Yazīd Ibn Mājah, *Sunan Ibn Mājah*, *Vol. 4*, (Riyadh: Darussalam, 2007), ḥadīth no.2842.
[326] al-Naysābūrī, Sahih Muslim, ḥadīth no.4622.
[327] Mohd Hisham Mohd Kamal, "Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: the Perspective of Islamic Law" in *Revisiting the Geneva Conventions: 1949-2019*, edited by Borhan Uddin Khan and Md Jahid Hossain Bhuiyan (Leiden: BRILL and Martinus Nijhoff, 2019), 251–252.

One may also see that the lack of precaution as a criminal act from the perspective of a criminal intent analysis. To begin with, the intentional causing of harm such as by killing is unquestionably a crime under Islamic law, as mentioned earlier in sub-chapter 2.5.1. However, while attributing fault, it is then necessary to also determine whether there was any intention behind the crime. As mentioned in the Qur'ān, Surah Al-Nisā' (4) verse 92:

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً ۚ وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ إِلَّا أَنْ يَصَّدَّقُوا ۚ فَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ ۖ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ ۖ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ ۗ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا

"And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] unless they give [up their right as] charity. But if the deceased was from a people at war with you and he was a believer - then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty - then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."

Prophet Muḥammad ﷺ also said:

إِنَّمَا الأَعْمَالُ بِالنِّيَّاتِ

"(The value of) an action depends on the intention behind it."[328]

[328] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.1; al-Naysābūrī, Sahih Muslim, ḥadīth no.4927.

Truly, there are many more bases to show that mistakes or even crimes committed without intention would bear no fault. However, just because there is no particular intention to commit a mistake it does not necessarily mean that there is no blameworthy intention altogether.

The jurists have explained that intention can be deduced from objective indicators. For example, in case of murder, intent can be found when the perpetrator of a crime commits a particular action using instruments most likely to cause death in the ordinary courses of events.[329] It is also possible for quasi-intentional murder to occur, when the perpetrator inflicts harm without intention to kill but somehow it results in death.[330]

Fiqh also recognises a category of accidental causing of death, where the perpetrator conducts a particular action which is intended to cause harm but to someone (or something) other than the victim but it hits the victim by mistake.[331] The last category of causing of death is 'indirect killing', where a typically harmless act intentionally committed somehow causes death.[332]

Bringing the case into war, it would be rather tricky. Assume a situation where the commander of the Muslims is faced with an enemy army based in a city. The enemy position is situated in such a way, that it is the gateway for enemy reinforcements and that they may attack the Muslims at ease. It is therefore imperative to conduct a military operation to attack and conquer this city. However, the city also

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[329] Sayed Sikandar Shah Haneef, *Homicide in Islam*, (Kuala Lumpur: A. S. Noordeen, 2000), 1; Aḥmad ibn Muḥammad Al-Ṭaḥāwī, *Sharih Ma'ni al-Athar*, *Vol. 3*, (Beirut: Dar al-Kutub 'Elmiya, 2013), 186; Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, (Islamabad: Advanced Islamic Studies Institute, 2000), 98; ʿAbd Allāh b. Aḥmad ibn Qudāmah Al-Maqdīsī, *Al-Mughni*, *Vol. 11*, (al-Qāhirah: Hajir, 1992), 447.

[330] Al-Maqdīsī, Al-Mughni, 462–463; Abdul Qadir Oudah, *Criminal Law of Islam*, *Vol. 4*, (New Delhi: Kitab Bhavan, 2005), 89–90; Ibn Rushd, *The Distinguished Jurist's Primer*, 481.

[331] Classic examples include striking an animal while hunting, but killing a nearby person instead. The perpetrator here is liable to pay blood money. See: 'Abd Allah ibn Muḥammad Al-Mūṣilī, *Al-Ikhtiyār Li Tal'īl Al-Mukhtār*, *Vol. 5*, (Beirut: Dar al-Kutub 'Elmiya), 25; Burhān al-Dīn Al-Marghīnānī, *Al-Hidāyah Fī Sharḥ Bidāyat al-Mubtadī*, *Vol. 4*, (Beirut: Dar al-Kutub 'Elmiya, 2000), 502.

[332] An example to this would be playing football, then the ball somehow is kicked far and causes a mortal accident nearby. Victim's family may be liable to compensation. See: Al-Maqdīsī, Al-Mughni, 445; Al-Mūṣilī, Al-Ikhtiyār Li Tal'īl Al-Mukhtār, 26; Al-Marghīnānī, Al-Hidāyah Fī Sharḥ Bidāyat al-Mubtadī, 503.

has civilians living in it. While the civilians do not live particularly inside the enemy base located in the city, let us assume a typical modern urban warfare situation where any kind of attack will have at least some effect to the civilian population. Then, the best thing one can do is to choose the lesser of the two harms. It is under these kinds of circumstances that modern IHL scholars speak of the principles of proportionality and precaution.

There are a number of layers to discuss in this scenario. The first layer is that there are civilians who would be killed in the operations. While the true intention is not really to attack those civilians *per se,* but the commander of this operation accepts and acknowledges that civilians would get killed and the weapons used are very likely to cause death of non-combatants. At a glance, it can then be argued that this may be equivalent to intentional killing.

However, this particular layer falls under an exception. As explained in the sub-chapter 3.3.4, it may seem that causing civilian casualties which are inevitable in conducting legitimate military operations are free from fault. Causing such casualties is considered acceptable in exchange of the *maṣlaḥat* which may be anticipated from the military operation in question.

The second layer speaks of the civilian casualties that can be avoided. Meaning, there may be a number of different choices the commander can make in the strategy and weaponry involved in conducting the said operation. Between these choices, there are different potential risks and opportunities. For example, let us assume that there is a chemical factory near the enemy stronghold. Considering where the wind is strongly blowing, attacking that factory with a well-placed artillery shot would make it emit a very strong poisonous fog which blows towards the enemy and kill many of them. However, considering the density of the poisonous fog and the strength of the wind, it is very likely that half the city will also be poisoned. On the other hand, the enemy ammunition storage is also identified. An artillery shot to that spot may trigger a colossal explosion within the enemy base also killing a lot of

enemies and maybe some civilians, but the effect is contained only within the blast radius of the explosion.

The above is a display of two methods of attack which may achieve similar advantages and kill civilians,[333] but one of them is anticipated to cause more civilian damages than the other. Then, a chain of deduction can be made as is explained below.

It has been explained before how causing civilian losses may be acceptable in exchange of *maṣlaḥat* in terms of anticipating a military advantage. Therefore, if the commander in the above scenario chooses to attack the chemical factory with a higher anticipated civilian casualty rather than the ammunition storage with a lower anticipated civilian casualty, while similar *maṣlaḥat* could be achieved, then it follows that there is no *maṣlaḥat* in the excess of the potential civilian casualties caused by this choice. If there is no *maṣlaḥat* in terms of military advantage justifying these civilian casualties, then such a choice may fall under unlawful intentional killing.

On the other hand, assuming there are no other options with lesser potential civilian losses, had the commander choose the option to attack the ammunition storage instead then there may be no blame on him.[334] Given the other option being obviously

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[333] One may argue that there is more *maṣlaḥat* in destroying the enemy ammunition, but let us set this aside for a while and assume that the enemy has many more ammunition storages so that in general this does not cripple their arsenal much.

[334] The closest to recent practice would be in the Yemen civil war. A Joint Incidents Assessment Team (JIAT) was established by the Saudi-led Coalition to investigate potential war crimes. Cases of civilian damages were investigated. In some of these cases, the Coalition was ruled as reckless (e.g. disobeying certain military procedures) and had to pay compensation. In other cases, it was deemed that the damages were lawful collateral damage, yet the JIAT still urged the Coalition to apologise and pay compensation. See: *Middle East Monitor*, "Saudi to Compensate Yemen Funeral Strike", 2016, October 15; *Royal Embasy of Saudi Arabia for United Kingdom*, "Joint Incidents Assessment Team Inquiry into Yemen", <https://saudiembassyuk.co.uk/joint-incidents-assessment-team-inquiry-into-yemen/> (accessed 5 April, 2018); *Saudi Press Agency*, "Joint Incidents Assessment Team (JIAT) on Yemen Holds Press Conference", 2017, April 2. It is highly questionable whether JIAT operates under Islamic law as the findings suggests that it works under international law instead (see Nayef Al-Rasheed, "Joint Incidents Assessment Team: Arab Coalition Abiding by Military Rules of Engagement", Asharq Al-Awsat, <https://eng-archive.aawsat.com/n-al-rasheed/news-middle-east/joint-incidents-assessment-team-arab-coalition-abiding-military-rules-engagement> (accessed 5 April, 2018).), not to mention there are critics towards the work of this body (see: Sarah Leah Whitson, "Letter to Saudi-Led Coalition Joint Incidents Assessment Team Regarding Yemen Investigations", Human Rights Watch, <https://www.hrw.org/news/2017/01/16/letter-saudi-led-coalition-joint-incidents-assessment-team-regarding-yemen> (accessed 5 April, 2018).). However, the Coalition is comprised of states which are

unlawful, it follows that the lesser guilty intent – i.e. choosing the lesser harm, should be opted for as an obligation.

Surely, in a real battlefield the circumstances cannot be as simple as the previously mentioned scenarios. There can be multiple issues, such as the different types of weapons used by both sides, the actual positioning of the forces (which is very unlikely to just sit and gather on one dense spot), level of training and discipline of both forces, and so much more. Even in the above scenario, the situation can be made more realistically difficult. What if the city is largely vacated and the remaining civilians mostly reside in areas where the wind would not blow to, while the enemy deliberately put their ammunition storage very close to a fully functional hospital?

What this sub-chapter really intends to point out is that a commander would have a duty to observe and make choices while considering the possibility of harm towards civilians. Choices must be made in the strategies of war to reduce the risk of civilian casualties. From the perspective of criminal intent, failure to do so would result in the classification of these deaths as intentional killing.

3.3.5 Environmental Protection During War: Setting the Record Straight

With respect to the effect of war to the environment, an important issue needs to be addressed. Some modern jurists such as Nahed Samour and Hilmi M. Zawati claim that Prophet Muḥammad ﷺ, during the Battle of Mu'tah, specifically and categorically prohibited the Muslim army from cutting down trees.[335] They conclude that, therefore, Islam recognizes the significance of protecting the environment

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constitutionally based on the Shariah (e.g. Saudi Arabia), so this precedent may be the closest that can be found relevant to this subject.

[335] Nahed Samour, "Is there a Role for Islamic International Law in the History of International Law?", *European journal of international law*, vol. 25, no. 1 (2014): 317; Hilmi M. Zawati, "Jus ad Bellum and the Rules of Engagement in the Islamic. Law of Nations—Shaybānī's Siyar" in *2nd Conference in The Hague on Islam, Politics and Law, Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy*, (2009), 40.

specifically during times of war.[336] This alleged narration seems to be quite famous. The Cairo Declaration of Human Rights in Islam (1990) in Article 3(b), which says: "It is prohibited to cut down trees, to destroy crops or livestock, to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means" seems to be inspired or based on the said narration.

However, the reality is that it is quite difficult to trace from where the narration was originally obtained from. In her article, Samour cites Zawati as the basis. Looking to Zawati's work, he says that in the battle against the Byzantines (i.e. the Battle of Mu'tah) Prophet Muḥammad ﷺ ordered the following:

> "[S]pare the weakness of the female sex; injure not the infants or those who are ill in bed; refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit-trees and touch not the palm; and do not mutilate bodies and do not kill children."[337]

The problem is that Zawati does not cite from where he got this narration. A further search would find a very similar narration in the work of Al-Mubarakfuri who wrote that Prophet Muḥammad ﷺ said:

> اغزوا باسم الله في سبيل الله من كفر بالله، لاتغدروا، ولا تغيروا، ولا تقتلوا وليدا ولا امرأة، ولا كبيرا فانيا، ولا منعزلا بصومعة، ولا تقطعوا نخلا ولا شجرة، ولا تهدموا بناء
>
> "Fight the disbelievers in the Name of Allah, neither breach a covenant nor entertain treachery, and under no circumstances a new-born,

[336] Samour, Is there a Role for Islamic International Law in the History of International Law?, 317; Zawati, Jus ad Bellum and the Rules of Engagement in the Islamic. Law of Nations—Shaybānī's Siyar, 40. More scholarly references to this narration is discussed in the following paragraphs.
[337] Zawati, Jus ad Bellum and the Rules of Engagement in the Islamic. Law of Nations—Shaybānī's Siyar, 40.

> woman, an ageing man or a hermit should be killed; **moreover neither trees should be cut down** nor homes demolished."[338] (emphasis added)

Al-Mubarakfuri, as source for this narration, cites scholars who are not contemporary *per se* but relatively recent in comparison to the tradition of Islamic scholarship. He cited Imām Muḥammad ibn ‘Abd al-Wahhāb (18th century) and Al-Qāḍī Muḥammad Sulaymān Al-Mansurfuri (19th Century). Unfortunately, the track goes cold because the cited work of Imām ibn ‘Abd al-Wahhāb does not seem to mention the narration at all[339] while Al-Mansurfuri does mention it but does not provide any source or *sanad*.[340]

A further search leads to an even more curious result. There are scholars who cite this narration without source or *sanad*,[341] and there are others who do provide source. However, the scholars who provide source when citing the narration have problems also in their citation very problematic also. Ahmad Hatta cites this narration and claimed *Ṣaḥīḥ Muslim* and *Sunnan Abi Dāwud* as references, but does not mention any particular *ḥadīth* number.[342] Amru Muhammad Khalid also writes this narration and cites *Sunnan Abi Dāwud* and mentions the *ḥadīth* number as 2614.[343] There are no other narrations similar to No. 2614, which records that Prophet Muḥammad ﷺ said:

> انْطَلِقُوا بِاسْمِ اللَّهِ وَبِاللَّهِ وَعَلَى مِلَّةِ رَسُولِ اللَّهِ وَلاَ تَقْتُلُوا شَيْخًا فَانِيًا وَلاَ طِفْلاً وَلاَ صَغِيرًا وَلاَ امْرَأَةً وَلاَ تَغُلُّوا وَضُمُّوا غَنَائِمَكُمْ وَأَصْلِحُوا وَأَحْسِنُوا إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ

[338] Ṣafi al-Raḥmān Al-Mubārakfūrī, *Al-Rahik Makhtum*, *Vol. 1*, (Damascus: Dar al-’Ushama, 1427), 327.
[339] The pages of Imam ibn ‘Abd al-Waḥḥab’s work which retells the Battle of Mu’tah is as follows: Muḥammad ibn ‘Abd Al-Waḥḥab, *Mukhtasar Sirah al-Rasul*, (KSA: Wizarah al-Shu’un Al-Islamiyyah wa al-Awqaf Wa al-Da’wah wa al-Irsyad, 1418), 191–194. There is no mention of such a narration.
[340] Al-Qaḍi Muḥammad Sulaymān Al-Manṣurfūrī, *Rahmatun lil ’Alamin*, (al-Riyāḍ: Dar al-Salam li al-Nashr wa al-Tauzi’), 485–486.
[341] Such as: Zawati as mentioned earlier, and also Haya Muhammad Ahmad Eid, *Muhammad the Prophet of Mercy*, (Cairo: New Vision, 2011), 231.
[342] Ahmad Hatta, *The Great Story of Muhammad*, (Selangor: Maghfirah Pustaka, 2011), 469.
[343] Amru Muhammad Khalid, *Indah dan Mulia: Panduan Sederhana Menjadi Pribadi Bijaksana*, (Jakarta: Serambi Ilmu Semesta, 2007), 74.

> "Go in Allah's name, trusting in Allah, and adhering to the religion of Allah's Apostle. Do not kill a decrepit old man, or a young infant, or a child, or a woman; do not be dishonest about booty, but collect your spoils, do right and act well, for Allah loves those who do well."[344]

There is one narration similar to this in *Ṣaḥīḥ Muslim*, says that Prophet Muḥammad ﷺ said the following:

> اغْزُوا بِاسْمِ اللَّهِ فِي سَبِيلِ اللَّهِ قَاتِلُوا مَنْ كَفَرَ بِاللَّهِ اغْزُوا وَ لاَ تَغُلُّوا وَلاَ تَغْدِرُوا وَلاَ تَمْثُلُوا وَلاَ تَقْتُلُوا وَلِيدًا

> "Fight in the name of Allah and in the way of Allah. Fight against those who disbelieve in Allah. Make a holy war, do not embezzle the spoils; do not break your pledge; and do not mutilate (the dead) bodies; do not kill the children."[345]

As is obvious from the texts directly taken from *Sunnan Abi Dāwud* and *Ṣaḥīḥ Muslim* above, there is no mention of cutting trees. One can only guess how the narration suddenly included 'cutting trees' in the works of Eid, Hatta, and Khalid. The only obvious fact is that the trace is, once again, cold.

However, it turns out that one can find a very similar narration to this in the work of Imām Aḥmad. It is narrated by Thawbān that Prophet Muḥammad ﷺ said:

> مَنْ قَتَلَ صَغِيرًا أَوْ كَبِيرًا أَوْ أَحْرَقَ نَخْلًا أَوْ قَطَعَ شَجَرَةً مُثْمِرَةً أَوْ ذَبَحَ شَاةً لِإِهَابِهَا لَمْ يَرْجِعْ كَفَافًا

> "Whoever killed a child, an elderly, burns a palm tree, cuts a fruit-bearing tree, slaughters livestock just to terrorize (i.e. not to be eaten), then he will return empty-handed (i.e. without the rewards of *jihad*)."[346]

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[344] Abu Dawud Sulaymān ibn al-Ash'ath Al-Sijistānī, *Sunan Abu Dawud*, *Vol. 3*, (Riyadh: Darussalam, 2008b), ḥadīth no.2614.
[345] al-Naysābūrī, Sahih Muslim, ḥadīth no.4522.
[346] Aḥmad ibn Ḥanbal, *Musnad Imām Aḥmad*, *Vol. 32*, edited by Shu'ayb Al-Arnawth (Taḥqīq), (Beirut: Mu'assasah al-Risalah, 1421a), ḥadīth no.22368.

Imam Ahmad narrates this ḥadīth from Yaḥya ibn Isḥāq, from ‘Abdullah ibn Lahī‘ah, from ‘a Sheikh’, from Thawbān.[347] Thawbān was a companion of Prophet Muḥammad ﷺ , and Yaḥya ibn Isḥāq was a credible narrator.[348] However, the other narrators are not credible. ‘The Sheikh’ is unknown (*majhul*) and ibn Lahī‘ah is weak so this narration must be rejected.[349]

Therefore, there is no known narration which is authentically attributed to Prophet Muḥammad ﷺ regarding this alleged prohibition to cut or burn trees. There are two other narrations attributed to Abū Bakr al-Ṣiddīq allegedly providing instructions to the Muslim army to *inter alia* not cut or burn trees. The first narration is Abū Bakr’s command to Yazīd ibn Abi Sufyān as cited in Sub-Chapter 2.5.3 and the second narration is Abū Bakr’s instruction to ‘Usāmah ibn Zayd.[350] These narrations are also cited by numerous contemporary jurists,[351] however both narrations are not authentic.

The purported instructions of Abū Bakr to Yazīd ibn Abi Sufyān in *Al-Muwaṭṭa* was reported by Imām Mālik from Yaḥyā ibn Sa‘īd who narrated from Abū Bakr.[352] The problem is that Yaḥyā ibn Sa‘īd passed away in 144 H aged 75[353] meaning that he never met Abū Bakr who passed away in 13 H.[354] Therefore, this narration is *munqaṭi‘*[355] and cannot be used as a basis.[356]

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[347] Ibid.
[348] Ibn Ḥajar Al-ʿAsqalānī, *Taqrib al-Tahdhib*, (Syria: Dar al-Rashid, 1406), 7491.
[349] This is the ruling of Imam Ahmad and Al-Haythami on the aforementioned narration. ibn Ḥanbal, *Musnad Imām Aḥmad*, 52; Abū Ḥasan Nūr Al-Dīn Al-Haythamī, *Al-Majma‘ Al-Zawā’id*, *Vol. 5*, (Beirut: Dar al-Fikr, 1412), 572.
[350] First narration: Anas, Muwatta Al-Malik, 21/10. Second narration: Muḥammad ibn Jarīr Al-Ṭabari, *Tārîkh al-Umam wa al-Muluk*, *Vol. 2*, (Beirut: Dar al-Turath, 1387), 463. Both have similar content.
[351] Sayed Sikandar Shah Haneef, "Principles of Environmental Law in Islam", *Arab Law Quarterly*, vol. 17, no. 3 (2002): 249; Al-Qardhawy, Fiqih Jihad, 495–496; Raghib Al-Sirjani, *Sumbangan Peradaban Islam Pada Dunia*, (Jakarta: Pustaka Al-Kautsar, 2011), 172–173; Muhammad Hamidullah, *Muslim Conduct of State*, (Lahore: Sh. Muhammad Ashraf, 2011), 300–301.
[352] Anas, Muwatta Al-Malik, 21/10.
[353] Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Siyar A‘lām al-Nubalā’*, *Vol. 5*, (Beirut: Mu’assasah al-Risalah, 1422a), 486.
[354] Ahmad Zidan and Dina Zidan, *The Rightly Guided Caliphs*, (Cairo: Islamic Inc. Publising & Distribution, 1998), 81.
[355] Aḥmad al-‘Uthmānī Al-Tahānawī, *I‘lā Al-Sunnan*, *Vol. 12*, (Karachi: Iradah Al-Qur’an wal-’Ulum al-Islamiyah, 1418), 25; Azzam, Jihad: Adab dan Hukumnya, 37.
[356] Anshari Taslim, *Thariqus Shalihin*, (Bekasi: Toga Pustaka, 2015), 8–9.

As for the purported instructions of Abū Bakr to ‘Usāmah ibn Zayd, Al-Ṭabari reported the narration through the following chain: ‘Ubayd Allah, from Saif ibn ‘Umar, from Al-Sārī, from Shu‘ayb ibn Ibrāhīm, from Abu Dhamrah, from Abu Amrī, from Ḥasan al-Baṣrī.[357] There are problems with four of the mentioned narrators in this chain are problematic, as elaborated in the following passage.

Ḥasan al-Baṣrī is a great Imām who is well known to be *thiqah,* but at times commits *irsal* (i.e. narrating without mentioning narrators)[358] which seems to include the narration in question. He was born after the death of Abū Bakr during the reign of ‘Umar ibn Al-Khaṭṭāb as Caliph,[359] therefore could not have witnessed the event. Another narrator, Saif ibn ‘Umar, is a *ḥadīth* forger according to Ibn Ḥibbān, is *matrūk* according to Al-Dāraquṭnī, and accused as a *zindīq* by Al-Ḥakīm, as cited by Ibn Ḥajar Al-ʿAsqalānī.[360] There is also Shu‘ayb ibn Ibrāhīm which is *majhul* according to Al-Dhahabi, Ibn ‘Adī, and Ibn Ḥajar.[361] In addition, Abu Amrī is known to be *thiqah* but is noted to sometimes make mistakes.[362] Therefore, this narration is not authentic and cannot be a basis from which legal rulings can be derived.

This is not to mention that, on the other hand, there are other narrations which are authentically attributed to Prophet Muḥammad ﷺ himself who ordered the cutting and burning of trees while fighting against Banū Al-Naḍīr at Al-Buwayrah.[363] It is important to note that this incident is also mentioned and praised by Allah in the Qur’ān in Surah Al-Hashr (59) verse 5:

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[357] Al-Ṭabari, Tārîkh al-Umam wa al-Muluk, 463.
[358] Al-ʿAsqalānī, Taqrib al-Tahdhib, 160.
[359] Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Siyar A‘lām al-Nubalā’*, *Vol. 4*, (Beirut: Mu’assasah al-Risalah, 1422b), 565.
[360] Ibn Ḥajar Al-ʿAsqalānī, *Tahdhib al-Tahdhib*, *Vol. 4*, (India: Dā’irah Al-Ma‘ārif Al-Niẓamiyah, 1326a), 295.
[361] Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Mīzān al-I’tidāl*, *Vol. 2*, (Beirut: Dār al-Ma’rifah li al-Thibā’ah wa al-Nashr, 1382a), 275; Ibn Ḥajar Al-ʿAsqalānī, *Līsān al-Mīzån*, *Vol. 3*, (Beirut: Mu’assasah al-A’lami li al-Mathbu’at, 1390), 145.
[362] Al-ʿAsqalānī, Taqrib al-Tahdhib, 174.
[363] Muḥammad ibn Ismā‘īl Al-Bukhārī, *Sahih Al-Bukhari*, *Vol. 6*, (Riyadh: Darussalam, 1997d), ḥadīth no.4884.

مَا قَطَعْتُمْ مِنْ لِينَةٍ أَوْ تَرَكْتُمُوهَا قَائِمَةً عَلَىٰ أُصُولِهَا فَبِإِذْنِ اللَّهِ وَلِيُخْزِيَ الْفَاسِقِينَ

> "Whatever you have cut down of [their] palm trees or left standing on their trunks - it was by permission of Allah and so He would disgrace the defiantly disobedient."

Therefore, it is very difficult to argue that there is a categorical and specific prohibition to cut trees as claimed by some contemporary jurists as explained earlier in this sub-chapter. The aforementioned narration of the Battle of Mu'tah is not authentic, so abrogation cannot be claimed. Some jurists such as Al-Qaraḍāwī claim that the narrations attributed to Abū Bakr indicates that the permissibility of cutting trees in war must have been abrogated as Abū Bakr could not have disobeyed the Prophet's command.[364] However, the problem of this narration does not end at its lack of authenticity (although such a problem is sufficient to seal the fate of this argument altogether). Additionally, it is difficult to make such an assumption from an overwhelming evidence on the permissibility of cutting trees, while the Companions were not infallible and could make mistakes. As is shown in sub-chapter 4.4, particularly under the discussion of incendiary weapons, there are evidences of the Companions of Prophet Muḥammad ﷺ making mistakes. This includes even 'Alī ibn Abi Ṭālib who was among the most knowledgeable among them.

This is why 'Abdullah 'Azzām then rules it permissible to cut and burn trees due to the necessities of war.[365] By virtue of *qiyās*, then, under 'Azzām's opinion, the destruction towards the environment is also permitted if justified by the necessity of war.

However, a general ruling applies to all situations unless there is any exception found in the *dalīl*.[366] Therefore, in this matter one may have to refer back to the general rule on the interaction between humankind and the environment. It has always

[364] Al-Qardhawy, Fiqih Jihad, 495–496.
[365] Azzam, Jihad: Adab dan Hukumnya, 37.
[366] Al-Utsaimin, Ushul Fiqih, 58–59.

been indicated that the riches of earth are to be enjoyed, but at the same time the enjoyment shall not cause destruction. This is as mentioned in the Quran, Surah Al-Baqarah (2) verse 60:

كُلُواْ وَاشْرَبُواْ مِن رِّزْقِ اللَّهِ وَلاَ تَعْثَوْاْ فِي الأَرْضِ مُفْسِدِينَ

"Eat and drink from the provision of Allah, and do not commit abuse on the earth, spreading corruption."

Furthermore, previously in Subchapter 3.3.2, Surah Al-Raḥmān (55) verses 7-9 have been cited which indicate a multiple heavy emphasis on balance and justice. This should also be seen together with what follows next in verses 10-13:

وَالأَرْضَ وَضَعَهَا لِلأَنَامِ (١٠) فِيهَا فَاكِهَةٌ وَالنَّخْلُ ذَاتُ الأَكْمَامِ (١١) وَالْحَبُّ ذُو الْعَصْفِ وَالرَّيْحَانُ (١٢)فَبِأَيِّ آلاءِ رَبِّكُمَا تُكَذِّبَانِ (١٣)

“And the earth He laid [out] for the creatures. Therein is fruit and palm trees having sheaths [of dates]. And grain having husks and scented plants. So which of the favors of your Lord would you deny?”

All these verses bring us back to the idea that collateral damage may be inflicted when it is necessary, but it shall be proportional. Therefore, as a matter of principle, rules on environmental protection shall go back to the principles of proportionality and precaution concluded in sub-chapters 3.3.2 to 3.3.4. The default rule shall be that no damage to the environment shall be permissible, except when there is military necessity and also bearing in mind the principles of proportionality and precaution.

It shall be noted that arguably this standard is somewhat higher than what modern IHL prescribes. As mentioned in sub-chapter 3.2, what is prohibited in modern IHL as per the AP I in Articles 35(3) and 55(1) and what is a war crime in the

Rome Statute in Article 8(2)(b)(iv) is environmental damage which is not merely disproportionate towards the military advantage but such damage is also 'widespread, long-term and severe'.[367] In *fiqh al-jihād,* following the general principles laid out here, it is sufficient for the environmental damage to be disproportionate for it to be deemed unlawful – even if the effects are not necessarily widespread, long-term, and severe.

This may suggest, however, that widespread, long-term, and severe damage can be justified by military necessity. Such suggestion may be true in theory, as the general principle of proportionality in Islam does dictate that *maṣlaḥat* is the main rule when speaking of environmental damage. However, this may only be a hypothetical truth which may not materialise because, as explained in Subchapter 3.2, it is hard to imagine any military advantage which may be worth inflicting such damage to the environment. This must also consider that it may be possible for such acts to be justified under extreme self-defence or duress, which is also an exclusion of fault under Islamic law.[368]

3.4 DERIVING MORE DETAILED RULES CONCERNING PROPORTIONALITY AND PRECAUTION

After general principles of proportionality and precaution have been established, the next important task to undergo is to deduce more detailed rules of *fiqh al-jihād* concerning those principles. While the general principles may be similar to that of modern IHL, some details may not be the same. It is proposed that Articles 57 and 58

[367] Using the conjunction 'and'. As mentioned also in Subchapter 3.2, the ENMOD uses a lower standard by using the conjunction 'or' instead.

[368] Numerous verses of the Qur'ān indicate this, such as Surah Al-Baqarah verse 173, Surah Al-Mā'idah verse 1, Surah Al-Nūr verse 33, and thus the exclusion of fault due to self defense or duress becomes a principle derived by the jurists. See: 'Abd al-Kareem Al-Khudayr, "Fatwa 21932", islamqa, <https://islamqa.info/en/21932> (accessed 25 April, 2018); Muḥammad ibn Aḥmad Al-Ramlī, *Nihāyah Al-Muhtāj*, *Vol. 7*, (Beirut: Dar Ahya al-Taras Al-'Arabi, 2nd Editio edn., 1992), 239.

of the AP I can be a model from which to work with, and there are a few reasons for this.

The first reason is that, as explained in sub-chapter 2.4.2, one may adopt provisions of international law into *fiqh* when they can serve as a medium to improve or perfect the practice of Islamic teachings. As explained in sub-chapter 2.5, while there may be some differences between Islam and International law in perceiving war but the laws and regulations concerning conduct of war – especially in the context of reducing potential casualties, as shown in this Chapter — have a general compatibility and general aim.

The second reason is that these two articles probably are the centre and represents the principles of proportionality and precaution altogether in one piece.[369] It may therefore be productive to start from these articles.

3.4.1 Article 57(1)

Article 57(1) reads the following: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

The ICRC commentary explains that this article is a reiteration of the principle of distinction (as per Article 48 of the AP I), and further explains: "...it is good that it is included at the beginning of this article in black and white, as the other paragraphs are devoted to the practical application of this principle."[370] This shows how the principle of precaution[371] is an extension in order to achieve the principle of distinction.

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[369] The articles themselves are literally titled 'Precautions', and reference to proportionality is particularly strong in Article 57. See: Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2189, 2200, 2204–2221.

[370] Ibid., 2191.

[371] This includes the Principle of Proportionality also, bearing in mind what is explained above on how Article 57 contains the principle of proportionality too (and also how the two are tied together).

This is why Article 57(5) reads "No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

It has been explained in sub-chapter 3.3.3 earlier how important the 'limit' is in *fiqh al-jihād,* so that the Muslim army should not transgress it while waging war. This limit, discussed slightly in Subchapter 3.3.3, includes rules on who may or must not be attacked i.e. an 'Islamic principle of distinction'.[372] Therefore, *fiqh al-jihād* could also recognise such a rule as a starter, as it does not go against, and even is consistent, with Islamic teachings.

3.4.2 Article 57(2)(a)(i)

Article 57(2) outlines some general precautions that should be taken. The first one is Article 57(2)(a)(i) which regulates that attackers must:

> "...do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them."

This article was inserted to make sure that attacks do not erroneously target non-military targets, or otherwise target legitimate military targets but with a disproportionate military advantage in comparison towards the potential civilian losses.[373] Reference shall also be made to Articles 50(1) and 52(3) of AP I which rule that in case of doubt on whether a person or object is civilian then the default presumption should be that such person or object is civilian and therefore immune

[372] Although, as explained also in Subchapter 3.2.3, this topic is not explored further as it falls beyond the scope of this research.
[373] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2192–2193.

from being attacked until proven otherwise.[374] These articles are also important as it explains further on the general rules on verifying targets and then deciding.

It is certainly common sense that it is a necessity of war to properly identify the nature, location, and strength of the enemy forces. This is essential to decide where and how to attack and, consequently, where and how not to attack. Furthermore, the 'everything feasible' phrase in this article means to consider what is practically possible owing to the circumstances at the time, which should be interpreted with common sense and in good faith.[375] Understood this far, it is plain *maṣlaḥat* for *fiqh al-jihād* to agree and adopt this meaning as a general obligation. However, the cross reference to Articles 50(1) and 52(3) would need to be discussed further.

The opinion of Ibn Taymiyyah explained in sub-chapter 3.3.3 is a refutation towards Imam Al-Shāfi'ī. The latter argues that the command to kill the disbelievers during war is a general command, as the Qur'ān says in Surah Al-Tawbah (9) verse 5 : "…kill the polytheists wherever you find them…." and finds exception only for women and children.[376] With the '*illah* being 'status of disbelief',[377] consequently, any persons other than those in the exception may be killed – whether or not they are participating in the hostilities e.g. priests, the elderly, chronically ill, *etc*.[378]

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[374] Article 50(1) : "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. **In case of doubt whether a person is a civilian, that person shall be considered to be a civilian**." (emphasis added)
Article 52(3): "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

[375] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2198.

[376] See: Azzam, Jihad: Adab dan Hukumnya, 26; Ibn Rushd, *The Distinguished Jurist's Primer*, 458–459.

[377] Instead of the majority's opinion which includes not just disbelief but also participation in hostilities as reason to justify killing.

[378] The Shafi'i scholars did not find the *dalīl* to specifically put these categories of persons as an exception. While other scholars have found some *dalīl* excluding priests and elderly from being targeted (see: Ibn Rushd, *The Distinguished Jurist's Primer*, 458–459.) which makes it possible for the Shafi'i school to then include them as exceptions too, but the point is that having 'participation in hostilities' as '*illah* to be targeted in war (as the majority position rules) would broaden the scope of who may be targeted and who must not.

The significance of mentioning Imām Al-Shāfi'ī's position here is to see how we perceive the default rule. If the default rule for enemy persons and objects are that they may be targeted, then in case of doubt we return to the default rule: i.e. that it may be targeted. As one of the Islamic legal maxims goes: "certainty is not overruled by doubt."[379] Under the position of Al-Shāfi'ī, this means that if there is doubt as to whether a person or object is a combatant or military objective during times of war then it can be argued that it should be presumed that such person or object can be targeted as this is the default rule.

However, under the opinion of Imam Ibn Taymiyyah, it is shown otherwise. The general notion in Islamic law is that the default rule of a life is that it is impermissible to be taken.[380] While the position of Imam Al-Shāfi'ī requires only a state of war to alter the default presumption of a disbeliever to be targetable, the consequence of Imam Ibn Taymiyyah's position is that a state of war is not sufficient to make a disbeliever by default targetable. Therefore, the default presumption remains as non-targetable. Under this position of Imam Ibn Taymiyyah, which represents the majority (as explained in Subchapter 3.2.3), the default rule set by Articles 50(1) and 52(3) as an extension of Article 57(2)(a)(i) can be adopted.

3.4.3 Article 57(2)(a)(ii)

This article requires the combatants to "...take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."

This shares some similarity in principle with Article 57(4) which reads: "…In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable

[379] Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 35.
[380] See Subchapter 2.5.1, also: Al-Shathri, Sharḥ Al-Manẓumatu Al-Sa'diyah Fî al-Qawā'id al-Fiqhiyyah, 82–83.

in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects."

Implemented in the battlefield, this is like the scenario provided in sub-chapter 3.3.4 where there may be more than one choice of means and methods in achieving a particular goal, while some of these choices are expected to cause more civilian damages than the others. It has been explained in that sub-chapter how the losses of lives, if avoidable yet occurred nonetheless, are prohibited. Therefore, the means and methods which lead to more civilian damages are also prohibited as per the Islamic legal maxim 'the ruling of the means is same as the ruling of the purpose'.[381]

As this reflects the general principle of precaution, which is recognised in Islam as explained in Subchapter 3.3.4, there seems nothing wrong for *fiqh al-jihād* to adopt this article in its entirety.

3.4.4 Article 57(2)(a)(iii)

This article requires the combatants to "…refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

The general idea of this article is that when a particular attack is known to be disproportionate in comparison to the military advantage, then the attack should not be done. This far, there seems to be no difference with Islamic law. Naturally, if a particular action is expected to have greater detriment than benefit, then it makes very

[381] Al-'Uthaymīn, al-Sharḥ al-Mumti' 'alā Zād al-Mustaqni', 203; Abul Hayy Abdul 'Al, *Pengantar Ushul Fikih*, (Jakarta: Pustaka Al-Kautsar, 2014), 327; Abū Muḥammad Al-Qahṭani, *Majmū'ah al-Fawā'id al-Bahiyyah 'Alā Manẓūmah al-Qawā'id al-Fiqhiyyah*, (KSA: Dar al-Shami'i li al-Nasyr wa al-Tauzi', 1420), 79.

little sense to proceed. It cannot be emphasised enough how *fiqh al-jihād* is based on *maṣlaḥat.*[382]

Reference must also be made to Article 51(4) and (5) of the AP I concerning indiscriminate attacks, as they are – by definition — disproportionate.[383] *Fiqh al-jihād* would also agree with this, by the reasons already stated in the aforementioned paragraph.

The 'concrete and direct' part of the article essentially means that doubtful or indeterminate advantages should be disregarded.[384] Especially when faced with more definite potential civilian casualties, proceeding with an attack under such situation is naturally disproportionate. This is also acceptable under *fiqh al-jihād* under the same principle as above, with the additional consideration of the Islamic legal maxim: "certainty is not overruled by doubt."[385]

The difficulty would lie on the assessment on whether the military advantage outweighs the potential losses. Alike *fiqh al-jihād,* modern IHL does accept the reality that some collateral damage can be tolerated to achieve a military advantage so long as such collateral damage are still proportionate.[386] However, there may be some challenges in determining what 'military advantage' means.

Modern IHL sees 'military advantage' to be limited to tactical military needs only, i.e. the destruction of enemy military capabilities and the likes, meaning that the general other motives of waging war (i.e. political goals *etc*) are not relevant.[387] This is

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[382] Note also the Islamic legal maxim: "Repelling evil is preferable to securing benefits", although this must be seen together with another legal maxim "in the presence of two evils, the one whose harm is greater is avoided by the commission of the lesser." See: Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 115 and 111.

[383] See Subchapter 3.2.

[384] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2204 and 2209. The words 'long term' and 'potential' are also used by the ICRC commentary. This is disagreeable, as a long term or potential advantage can be concrete and direct. An example would be to blockade a potential enemy reinforcement route before attacking an enemy fort. The enemy reinforcement will not come before this fort is attacked, so the advantage is technically not direct *per se.*

[385] Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 35.

[386] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2209–2219.

[387] Dill, Applying the principle of proportionality in combat operations, 3. See Article 52(2) of AP I:

why, for example, in determining military objectives, modern IHL always reiterates the term 'military advantage'.[388]

On the other hand, *fiqh al-jihād* – as are other branches of *fiqh* or even *fiqh* itself in general — is a part of the Sharī'ah and Islamic teachings in general. A general command should be complied to in its generality, until there are *dalīl*s of specific exclusions from that general command.[389] This is also the same reason why the general principles of proportionality and care for the environment apply both in general situations and in times of war also (even before considering specific *dalīl* on proportionality in warfare which further emphasises it) as this Chapter displays. Even politics has its place inside Islamic law as an instrument used to achieve the goals of Islam in implementing the obligations of the religion and achieving success in this life and the hereafter.[390] In the context of *fiqh al-jihād,* politics are very relevant in determination of *jihād*.[391]

Therefore, one cannot simply limit the definition of necessity or *maṣlaḥat* in *fiqh al-jihād* to only specific military ones. Unless there are specific commands dictating otherwise, general obligations towards a Muslim would always apply and

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"… military objectives are limited to 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." (emphasis added)
The emphasised part above indicates that what may be targeted are only objects directly used by an armed force in conducting their military operations, and also including members of the armed forces themselves. See: Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2017 and 2020.

[388] See also the ICRC commentary on this article: Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 1994–2005.

[389] Al-Utsaimin, Ushul Fiqih, 58–59; Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 25.

[390] Syamsuddin Arif, *Islam dan Diabolisme Intelektual*, (Jakarta: Institute for the Study of Islamic Thought and Civilizations, 2017), 49–50. Orientalist scholars too have noted how Islam, in contrast to Christianity and Judaism, has historically participated in politics as a religion. See: Bernard Lewis, *Islam: The Religion and the People*, (New Jersey: Pearson, 2009), 81. This is despite the clear role of the Papacy in the politics of the middle ages, probably indicating Lewis's opinion that the Papacy's role at the time was more secular (despite the nature of its institution) unlike the case of Islam.

[391] Such as the determination of offensive warfare. See: Al-Qardhawy, Fiqih Jihad, 13–33. Other cases discussed by scholars would be concerning truces. See: Ibn Rushd, *The Distinguished Jurist's Primer*, 463–464.

shall be considered – and these would necessarily include political issues which commanders or high-ranking leaders are burdened with. Any leader in a State or group would necessarily have similar burden. However, *fiqh al-jihād* and Islam are structured in such a way that they cannot be divorced from each other, unlike how modern IHL disregards other non-military advantages.

This may result in either discrepancies or compatibilities between *fiqh al-jihād* and modern IHL. Sometimes, the need to appeal to the public and preserve the image of Islam for propagation purposes would necessitate extra caution in conducting attacks, and in such a case this is a compatibility with modern IHL. In other instances, the implementation of *Sharī'ah* in occupied areas may be incompatible with modern IHL.[392]

However, this is a case where *fiqh al-jihād* must have its own reservations. Applying modern IHL in its entirety in this issue would mean that the Muslims must be detached from the application of some general commands which are not excluded by specific *dalīl* in context of war. Thus, *fiqh al-jihād* would recognise not just military advantage but also *maṣlaḥat* in general in calculating the proportionality of attacks and when to refrain from disproportionate attacks.

Article 57(2)(a)(iii) of AP I does not include the protection towards the environment. However, in the Rome Statute, particularly in the War Crime of Excessive Damage as per Article 8(2)(b)(iv), the concept of 'excessive damage' does not only include the general notion of excessiveness as per Article 57(2)(a)(iii) of AP I, but also a specific mention of excessive damage to the environment.[393] Therefore, it

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[392] The Third Geneva Convention 1949, Article 100, rules that an occupying force must continue applying the penal law applicable in that area prior to the occupation. If the area was previously not governed by the Shariah, then applying the Shariah would be a breach of IHL. See also: Muhammadin, Comparing International Humanitarian Law and Islamic Law on War Captives: Observing ISIS, 9.

[393] The wordings of Article 8(2)(b)(iv) of the Rome Statute clearly indicates so:

> "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"

may also seem proper to discuss regulations regarding environmental protection under this part.

As explained in sub-chapter 3.2, in regulating the potential harm towards the environment, modern IHL departs from the general principle of proportionality into what may be called a more specialised kind of proportionality. As per Article 35(3) of AP I, causing environmental damage is prohibited, not when it is simply disproportionate but rather only when it causes 'widespread, long-term and severe damage to the natural environment'.[394] As explained in sub-chapter 3.3.5, *fiqh al-jihād* cannot adopt this special standard. Rather, in *fiqh al-jihād,* causing any disproportionate damage towards the environment would be unlawful even when such damage is still below the standard of 'widespread, long-term, and severe'.

3.4.5 Article 57(2)(b)

This article provides that "…an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

This article is just to emphasise that the principles of proportionality and precaution are not only considered during preparation stage of an attack, but also during the execution of it.[395] This requires an active role of the commanders. On this point, certain narrations from the *Sunnah* must be recalled, particularly the ones where Prophet Muhammad's ﷺ commandment to Commander Khālid ibn Al-Walīd to avoid killing women and his instructions prior to *Fatḥ al-Makkah*, as discussed in sub-

[394] Which reads "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Article 55(1) contains the same rule.
[395] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2220–2221.

chapter 3.3.4. Therefore, the rule in this article is acceptable except the 'military advantage' part which should be added with *maṣlaḥat* in general, for reasons already explained in this sub-chapter.

3.4.6 Article 57(2)(c)

Article 57(2)(c) reads "…effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."

What is meant by 'unless circumstances do not permit' would be when the element of surprise is essential towards the success of the attack, or for other security reasons.[396] Warnings could be in many ways, such as by radio announcements or spreading pamphlets or other means.[397]

What the construction of the sentence of the article suggests is that to provide warning is the default rule, unless an exception can be found. The exception is *inter alia* when surprise is essential to the success of the attack, therefore if surprise is a great advantage but not necessarily essential then it cannot serve as an exception. This may be against the need of *maṣlaḥat,* as it limits the option of a commander.

The reason behind the need for warning is so that steps can be taken by the enemy forces to keep the civilians out of harms' way. Even the ICRC admits that there are numerous factors that may determine the level of civilian losses, such as the accuracy of weapons, weather, technical skills of combatants, location, *etc*.[398] Providing warning is merely one out of many methods to achieve the same purpose. When every other method is always subject to choice depending on the situation at hand, it only makes sense for warnings to also be treated the same. Therefore, as a generality, *fiqh al-jihād* may recognise the necessity of warning. However, it should

[396] Henckaerts and Doswald-Beck, Customary international humanitarian law, 64.
[397] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2225.
[398] Ibid., 2212.

not be a default rule 'unless surprise is an essential necessity' but rather one of the methods of precaution which can (or even must) be chosen depending on the situation at hand – just like other methods of precaution.

A special consideration must be made in the context of existing international law. It must be noted that this is a mere matter of margin of attainable *maṣlaḥat*. This may or even must be subject to compromise in context of a Muslim nation who are parties to the AP I. This is because entering a treaty is also based on *maṣlaḥat* and obeying it is compulsory.[399] This provision of the AP I, since it does not violate the Sharī'ah and even helps fulfil it, is Islamically valid and therefore binding when agreed upon.[400] Similarly, if this rule is a rule of customary international law which is effectively practiced, then any Muslim fighting group must also obey this due to reciprocity.

3.4.7 Article 57(3)

Article 57(3) reads "…When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."

The ICRC gives an example of an application of this rule. Suppose the objective is to disable the enemy train routes, it is preferable to attack crucial points of the railway lines rather than the train stations – the latter is usually located within heavily populated cities thus increasing the risk of collateral damage. The former, on

[399] Al-Shaybānī, The Islamic Law of Nations: Shaybani's Siyar, 8. See also Surah Al-Mā'idah (5) verse 1, and there is a consensus among the jurists of the *salaf* on the matter of treaties: ibn Katsir, Imam, *Shahih Tafsir Ibnu Katsir*, 4.

[400] This is unlike the previous case of 'military advantage' which may detach a Muslim from certain Islamic teachings as explained in the discussion on Article 57(2)(iii) of the AP I in Subchapter 2.4.1

the other hand, may pass through remote areas and destroying them would also disable the enemy train routes just the same.[401]

The 'lesser of two evils' principle is reflected in this rule,[402] and this is also an Islamic legal maxim 'in the presence of two evils, the one whose harm is greater is avoided by the commission of the lesser'.[403] This rule can be adopted into *fiqh al-jihād*.

3.4.8 Article 58(a)

Article 58(a) reads: "[The Parties to the conflict shall, to the maximum extent feasible:] … without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives."

The general idea of Article 58, titled "Precautions Against the Effects of Attacks", is so that the defender too must do whatever possible to avoid collateral damage.[404] Article 58(a) is specifically urgent as during war time the enemy is expected to attempt attacking military facilities essential to the armed forces, while such locations may normally be passed by civilians.[405]

The general aim is one that is acceptable and should be made compulsory under Islamic law. In its generality, among the purposes of Islamic law are to protect life and wealth.[406] Therefore this is also an obligation towards Islamic leaders

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[401] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2227.
[402] Ibid., 2226.
[403] Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 111.
[404] This is because such precaution would include the positioning of military bases and other possible targets, many of which are constructed before wartime. See: Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2241.
[405] As an example, the Indonesian Armed Forces has a District Command Post in Kelapa Gading, North Jakarta, Indonesia. Right next to it on the west side is a *masjid*, on the east and north side are civilian settlements, and right across (i.e. south) is one of the largest malls in Jakarta and more civilian settlements.
[406] Al-Ghazālī, Al-Muṣtaṣfa Min 'Ilm al-Uṣūl, 174. See also: Nyazee, Islamic Jurisprudence, 202.

applicable while waging war.[407] Under the same reasons as to why a Muslim army is obliged to take precautions to avoid civilian casualties from the enemy in conducting attacks as explained under this Chapter, certainly the Muslim army should also take precautions to save civilians under their care from the effects of incoming attacks. Under this line of reason, it needs only basic common sense to derive a rule that the ones needing protection should – as much as possible — not be within the vicinity of locations which are very likely to be targets of enemy attack. This rule is easily adaptable by *fiqh al-jihād*.

3.4.9 Article 58(b)

Article 58(b) reads: "[The Parties to the conflict shall, to the maximum extent feasible:] … avoid locating military objectives within or near densely populated areas."

The ICRC, in its commentary, notes that this means that precautions must not only be taken during war time, but also during peacetime[408] as some military objects are constructed during peace time such as military bases or weapons factories. This may seem to be the flip-side of Article 58(a) as avoiding civilians to be near military objects can be done in two ways: putting the civilians away from military objects and putting the military objects away from the civilian population. Article 58(b) presses on the latter and urges states to consider constructing military facilities away from densely populated areas.

The ICRC also notes that during the drafting of this article, some participants of the negotiations felt that this obligation is difficult to be applied by densely

[407] Muhammad Asad, *The Principles of State and Government in Islam*, (Kuala Lumpur: Islamic Book Trust, 2009), 84; Al-Qardhawy, Fiqih Jihad, 40–41 and 341–342; Al-Khin and Al-Bugha, Konsep Kepemimpinan dan Jihad dalam Islam: Menurut Madzhab Syafi'i, 110–111.
[408] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2251.

populated countries.[409] One may find wisdom behind the "to the maximum extent feasible" phrase at the beginning of the article as an answer to such concern.

Applying this provision during armed conflicts is adoptable to *fiqh al-jihād* for the same reason as to why Article 58(a) is adoptable. As for its application during peace time, there are more bases to consider.

Islamic teachings concerning jihād do not only include the *jus ad bellum* and *jus in bello,* but also what to do in the time of peace in preparation for jihād. Surah Al-Anfāl (8) verse 60 reads:

> وَأَعِدُّوا لَهُمْ مَا اسْتَطَعْتُمْ مِنْ قُوَّةٍ وَمِنْ رِبَاطِ الْخَيْلِ تُرْهِبُونَ بِهِ عَدُوَّ اللَّهِ وَعَدُوَّكُمْ وَآخَرِينَ مِنْ دُونِهِمْ لَا تَعْلَمُونَهُمُ اللَّهُ يَعْلَمُهُمْ ۚ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فِي سَبِيلِ اللَّهِ يُوَفَّ إِلَيْكُمْ وَأَنْتُمْ لَا تُظْلَمُونَ
>
> "And prepare against them whatever you are able of power and of steeds of war by which you may terrify the enemy of Allah and your enemy and others besides them whom you do not know [but] whom Allah knows. And whatever you spend in the cause of Allah will be fully repaid to you, and you will not be wronged."

Imam Al-Rāzī comments that this verse shows that to make preparations for *jihād* is *farḍ kifāyah*.[410] Numerous jurists also dedicate portions of their works on jihād to discuss preparations for *jihād* before war is upon the Muslims, such as preparing weapons and facilities, building up the mentality to be prepared for war, training, espionage, resources, and many more.[411] Most of these speak of preparations for the Muslim army to enter combat against the enemy, yet very little speak of what to do to prepare against the effects of attack before the war starts. Among the few discussed

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[409] Ibid., 2256. This may be also the case of Kelapa Gading District Command post in footnote 405, as Jakarta is one of the most densely populated cities. See: Bill Tarrant, "Special Report: In Jakarta, that sinking feeling is all too real", *Reuters*, 2014, December 22.

[410] Fakhr al-Dīn Al-Rāzī, *Al-Tafsīr Al-Kabīr*, *Vol. 15*, (al-Qāhirah: Al-Mathba'ah Al-Bahiyyah Al-Mishriyyah, 1938), 185.

[411] Al-Qardhawy, Fiqih Jihad, 438–536; Abū Zakariyā Muḥī Al-Dīn Ibn Nuhās, *Mashāri' Al-Ashwāq ilaā Maṣāri' al-Ushāq*, (Beirut: Dār al-Bashā'ir al-Islamiyyah, 1990), 1075.

would be that of espionage, but even then, this discussion is mostly concerning the strength of the enemy as well as their strategy.[412] In a defensive context, the idea of espionage is so that if the enemy plans to attack the civilians, the Muslims would be aware of it. The 'what next', in these works, is as explained above: mostly about how to prepare military powers to attack the enemy.

It is difficult to find the need to take specific precautions to avoid non-combatants being targeted by enemy attacks in the literature. Although, indirect reference can be found to indicate that, during The Prophet's time, there was a custom to build castles or other fortifications where civilians would hide in when the enemy attacks. An example of this was the Battle of Khandaq, where the Muslim army were busy at the trenches while the women and children were hiding in castles or fortifications.[413] One can also find a reference to women and children hiding in fortresses in the works of Ibn Rushd when discussing the Battle of Khaybar.[414]

The idea of using castles would be intriguing at this point: the best place for civilians to hide is also the object which the enemy needs to conquer as they are military defensive positions too.[415] However, the point why castles are mentioned here is to indicate that since ancient practice there were some level of preparations made in order to protect civilians against effects of attacks, and the Muslims have practised this as shown in the Battle of Khandaq example above.[416]

Therefore, Islam also recognises the obligation to prepare protection for civilians by planning things since peacetime. This would include policies in construction of military facilities in a way that would serve that purpose, such as

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[412] For example: Al-Qardhawy, Fiqih Jihad, 504–510.
[413] Ismail Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, *Vol. 3*, (Reading: Garnet Publishing, 2005a), 147–148.
[414] Ibn Rushd, *The Distinguished Jurist's Primer*, 460.
[415] Castles were built to withstand attacks and would mean that they would be a good place for civilians to hide, while at the same time they were also places where the defending army would make their stand against attacks. Although, granted, not all castles were built to protect civilians. See: Bengt Kristian Molin, "The Role of Castles in the Political and Military History of the Crusader States and the Levant 1187 to 1380", (The University of Leeds, 1995), 248–249, 338–339, and generally.
[416] Albeit not necessarily making it into books of *fiqh al-jihād*.

constructing facilities essential to the protection of the civilians. Consequently, construction policies which can be foreseen to potentially endanger civilians during wartime (e.g. building military facilities which would most definitely become targets of the enemy) should be reconstructed and adjusted to avoid such danger. Article 58(b) is adoptable to *fiqh al-jihād*.

3.4.10 Article 58(c)

Article 58(c) reads: "[The Parties to the conflict shall, to the maximum extent feasible:] … take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."

The previous paragraphs speak of either putting civilians out of harms way or putting potential harms out of the civilians' way. This paragraph intends to include other possible ways apart from the aforementioned ways, essentially if anything can be done to secure the civilians then it should be done. The ICRC, in explaining this article, speaks of constructing shelters to where civilians may seek refuge and training a civil defence service ready to assist civilians.[417] The former example is similar to constructing castles as the previously mentioned example of the Battle of Khandaq shows, although it may be more preferable in modern warfare to make the civilian shelters separate and as distant as possible from the military targets (unlike in the case of castles). The latter example is surely a good addition, bearing in mind that panicking civilians running around in a disorderly manner is the last thing a defending army needs when an incoming attack is expected, thus having trained officers to help coordinate them would surely help.

[417] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 2257.

This too is adoptable in *fiqh al-jihād* due to the generality of the rule that any feasible steps that could be taken to avoid civilians from the effects of attacks should be taken. What may be adopted through article 58(a) and (b) would be mere examples under the general rule requiring the Muslims to do all feasible precautions to protect civilians against the effects of attack. The more precautions possible owing to the circumstances at the time, the more they must be done as per the Islamic legal maxim 'harm must be removed as far as possible'.[418]

3.5 CONCLUSION

This chapter starts by explaining how important it is for the principles of proportionality and precaution to exist especially in the context of modern warfare. While modern IHL has quite a comprehensive set of rules incorporating the principles of proportionality and precaution, it is found that *fiqh al-jihād* does not have the same. The Chapter continues by explaining that there is enough material in Islamic law and teachings from which to derive these principles to govern the conduct of warfare, similar to that of modern IHL at least in the general understanding. In deducing more detailed rulings under these principles, it is found that there are general compatibilities which allow *fiqh al-jihād* to adopt many rules from modern IHL.

However, in certain aspects, modern IHL and *fiqh al-jihād* would differ. One such cases may be circumvented by virtue of treaty law (i.e. the case of warnings), while other cases would result in *fiqh al-jihād* not adopting modern IHL rules (i.e. rules concerning the environment and the scope of *maṣlaḥat*).

This chapter speaks of proportionality in the extent of damage caused towards the target of attacks or its surroundings. The next chapter discusses a different kind of 'proportionality'. Chapter Four on 'Prohibition From Causing Unnecessary Suffering

[418] Ismail and Rahman, Islamic Legal Maxims: Essentials and Applications, 189; Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 105.

and Superfluous Injuries' discusses 'proportionality' in the sense that there is a limit of types and extent of violence that may be inflicted towards enemy individuals.

CHAPTER FOUR

THE PROHIBITION FROM CAUSING UNNECESSARY SUFFERING AND SUPERFLUOUS INJURIES IN *FIQH AL-JIHĀD*

4.1 INTRODUCTION

This chapter discusses a rule that may seem peculiar in the eyes of a layman. When a person has entered war with the intention of fighting in it, then this person has accepted the possibility to kill as well as to be killed – although he/she would surely do what is possible to avoid the latter. If death seems to be the worst fate possible to a combatant, and such fate can lawfully be inflicted, how is it possible for something lesser than death to be illegal?

It is explained first in this chapter how unnecessary suffering and superfluous injuries is prohibited in IHL, and second how it stands in *fiqh al-jihād*.

4.2 THE I.H.L. CONCEPT OF THE PROHIBITION FROM CAUSING UNNECESSARY SUFFERING AND SUPERFLUOUS INJURIES

In order to truly understand why it is allowed to kill the enemy but not cause unnecessary suffering or superfluous injuries to the enemy, one must go back to the basic philosophy of modern IHL. As discussed in Sub-Chapter 2.5.2, also as the name of the law suggests (i.e. international 'humanitarian' law), the whole point of modern IHL is to bring humanity as much as possible in times of war. Humanity, through IHL, is intended to mitigate the horrors of war. This is why damage may only be inflicted to

the extent that it is absolutely necessary for military purposes.[419] This is best reflected in the St. Petersburg Declaration 1868 which reads *inter alia*:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;

The St. Petersburg Declaration continues with the following passage:

> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity;

From the aforementioned passage it could be inferred that, albeit the inevitability of harming the enemies in war, it is both legally and factually possible for certain infliction of harm to be excessive and unnecessary towards achieving the aim of war.

Decades after that general declaration, the Hague Regulations 1907 in Article 23 stipulates "... it is especially forbidden ... (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering" which has become a rule of customary international law.[420] Furthermore, realising that the aforementioned article only restricts methods of warfare (i.e. weapons), an expansion was made to the rule through Article 35(2) of AP I which reads: "It is prohibited to employ weapons,

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[419] Advisory Services on International Humanitarian Law, What is International Humanitarian Law?, 1–2.

[420] Henri Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering", *International Review of the Red Cross*, vol. 34, no. 299 (1994): 103; Henckaerts and Doswald-Beck, Customary international humanitarian law, 237–244.

projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

From such principle, there is a discussion on whether or not the aforementioned rule itself is sufficient to render a weapon that causes superfluous injury or necessary suffering unlawful because some states argue that only specific weapons that are prohibited by treaties could fall under the prohibition.[421] The latter position would feel a bit absurd, because, while the two types of weapons cause equally unnecessary suffering, not both of them are prohibited. It is only the weapon restricted by a treaty that is prohibited. Nevertheless, it may be important to discuss the specific weapon types that have been under the spotlight as causing 'unnecessary suffering and superfluous injuries'.

It is however important to mention that one aspect of 'unnecessary suffering and superfluous injuries' is the possibilities to cause harm to non-combatants. Some weapons are included within the discussion of this aspect, such as: antipersonnel landmines and booby traps.[422] Biological, chemical, and nuclear weapons[423] also fall under the same discussion. The aforementioned weapons, when discussed, would involve references to both precautions in conducting attacks as well as precautions against effects of attacks. After all, in its plain and ordinary meaning, 'unnecessary suffering' certainly includes 'incidental civilian losses'. However, these matters are within the scope of Chapter Three and not here in Chapter Four.

This chapter focuses on the unnecessary suffering and superfluous injuries inflicted towards the combatants. The whole idea of this 'unnecessary suffering and superfluous injuries' would mean, as reflected in the weapons discussed in the following pargraphs, that when the enemy could be incapacitated even without such

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[421] Henckaerts and Doswald-Beck, Customary international humanitarian law, 242–243.
[422] See the Preamble to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997 (Ottawa Treaty); also see Rules 81-83 of the works of ICRC on Customary International Humanitarian Law, Ibid., Chapters 28–29. All of these rules discuss the impermissibility of landmines or certain booby traps due to the likeliness to maim or kill non-combatants.
[423] Ibid., 243.

amount of suffering and injury, the additional suffering and injuries are excessive and, in the language of IHL, inhumane.

Having that in mind, the first weapon to mention would be laser weapons. What one must bear in mind is that the prohibition of laser weapons does not refer to those used as guide or aim for other weapons or those used for burning, but rather those that are used to render the eyesight of the targets permanently blind.[424] The ICRC argues that, despite the Protocol on Blinding Laser Weapons of 1995 to the Convention on Certain Conventional Weapons 1980 not being universally ratified, there is enough evidence to claim a customary prohibition on such weapons as even non-parties to the Protocol have ceased using the said weapons.[425]

The second weapon to mention would be expanding bullets, which refer to bullets that will expand or flatten after it pierces the human body. This is prohibited since 1899 through the Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body (The Expanding Bullet Declaration) inspired by the Declaration of St. Petersburg.[426] Since then, the ICRC explains how the prohibition of such weapon has been recognised in customary law[427] and has become a war crime under Article 8(2)(b)(xix) of the Rome Statute 1998. Needless to say, it is too painful to even imagine how much pain is caused by extracting a bullet that has expanded after it has entered the body. Although, it is essential to note that such bullets are not prohibited to be used in context of domestic law enforcement.[428]

With regard to expanding bullets, there are some arguments criticising the prohibition, including arguments offered by Joshua F. Berry. In his article, Berry argues that there should be a re-evaluation towards the Expanding Bullet

[424] Blinding laser weapons are prohibited by the Protocol on Blinding Laser Weapons of 1995 to the Convention on Certain Conventional Weapons 1980.
[425] Henckaerts and Doswald-Beck, Customary international humanitarian law, 293.
[426] As per the second line of the Expanding Bullet Declaration.
[427] Henckaerts and Doswald-Beck, Customary international humanitarian law, 25.
[428] The Declaration and customary international law prohibit the use in armed conflicts.

Declaration.[429] Among other things, he criticises how there has not really been sufficient scientific evaluation to properly assess whether or not expanding bullets do cause unnecessary suffering and superfluous injuries.[430] Most importantly, he notes three features of expanding bullets (or also referred to as hollow-point bullets) other than 'that it expands when it pierces the body':[431]

i. There is a reduction of ricochets, reducing the possibility of injuring others,
ii. A decrease of bullets passing through the body and injuring others behind the target, and
iii. Higher stopping power, so that less ammunition is needed to incapacitate a target.

Berry may have a point, especially considering the context of urban warfare where civilians and combatants may comingle, there is a necessity for such a weapon. After all, the ICRC has noted that many states had argued that the principle of prohibiting unnecessary suffering and superfluous injury must be considered in a balance with military necessity.[432]

However, the law as it stands still prohibit the use of expanding bullets. Therefore, until the re-evaluation of the rule as proposed by Berry, the use of expanding bullets remain unlawful under modern IHL.

The third weapon to discuss is poison (which includes poisoned weapons). There are claims that the use of poison as a method of war has been long prohibited

[429] See generally: Joshua F. Berry, "Hollow-Point Bullets: How History Has Hijacked Their Use in Combat and Why It Is Time to Reexamine the 1899 Hague Declaration Concerning Expanding Bullets", *Military Law Review*, vol. 206 (2010): 88–156.
[430] Ibid., 137–144, 149–150.
[431] Ibid., 132.
[432] Henckaerts and Doswald-Beck, Customary international humanitarian law, 240.

since ancient times.[433] However, there is also evidence of the wide use of poison in warfare throughout different civilisations.[434] A clear rule prohibiting the use of poison and poisoned weapons can be found since the Lieber Code 1863 (Article 70), then the Hague Regulations 1907 (Article 23[a]), and their use is now a war crime under the Rome Statute 1998.[435] This prohibition is also related to the prohibition from using chemical weapons because such chemical weapons would use poisonous substances as well.[436]

The ICRC notes that some military manuals have attributed the use of poison and poisoned weapons to 'inhumane' and 'indiscriminate', and that no state has opposed such a rule or practised using such weapons.[437] However, it should be noted that the Allied forces during World War II did consider and started to develop weapons that would shower the enemy with poisoned darts which would kill or heavily injure them.[438] However, it was noted that the project was halted because it was projected that the economic cost to produce was not proportionate to the damage it was able to inflict.[439]

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[433] Henckaerts and Doswald-Beck (eds.), Customary International Humanitarian Law, 1593; Dormann, Doswald-Beck, and Kolb, Elements of War Crimes under the Rome Statute of the International Criminal Court, 281.

[434] James W. Martin, George W. Christopher, and Edward M. Eitzen, "History of Biological Weapons: From Poisoned Darts to Intentional Epidemics" in *Medical Aspects of Biological Warfare*, "History of Biological Weapons: From Poisoned Darts to Intentional Epidemics" (Washington DC: Office of the Surgeon General, TMM Publications, Borden Institute, 2007), 2. See also Sub-Chapter 4.2.1 where the rulings of the Muslim jurists concerning poison are mentioned.

[435] Article 8(2)(b)(xvii), and see also Article 8(2)(b)(xviii).

[436] Henckaerts and Doswald-Beck, Customary international humanitarian law, 251, 259–265. Although it is always bewildering to see how anti-riot equipment such as tear gas are unlawful to be used in war but lawful in domestic law enforcement in case of riots.

[437] Ibid., 252–253.

[438] Michael E. Haskew, "Poison Darts in World War II", Warfare History Network, <https://warfarehistorynetwork.com/daily/wwii/poison-darts-in-world-war-ii/> (accessed 15 January, 2019); *BBC*, "WWII poison darts secret emerges", <http://news.bbc.co.uk/2/hi/uk_news/8119653.stm> (accessed 15 January, 2019).

[439] BBC writes that this is what the official files show. See: WWII poison darts secret emerges. Michael E. Haskew argues that the potential civilian losses was what stopped the development of this weapon. See: Haskew, Poison Darts in World War II.

The potential indiscriminate feature of this type of weapon, such as the poisoning of food and drink of the enemies,[440] is not within the scope of the discussion in this chapter as explained previously. As for 'inhumane', the ICRC notes that the nurses in World War I unanimously noted how the suffering caused by poisonous gasses was exceptionally terrible.[441] In addition, some States note how this prohibition is partly based on the 'inevitability of death'.[442]

The next weapon to discuss are weapons with the primary purpose of which is to injure with fragments not detectable by X-Ray. The prohibition is found first in Protocol I to the Convention on Certain Conventional Weapons 1980. The use of such weapons is considered inhumane because they make injuries very difficult to treat.[443] However, there may be a question regarding the actual customary international law regarding the matter because the ICRC notes that this type of weapon does not seem to exist.[444] On the other hand, the practises of some states in their military manuals do include some examples such as projectiles filled with broken glass or clear plastic, as cited also by the ICRC.[445]

Another weapon to discuss is anti-personnel explosive weapons, which is prohibited by paragraph 7 of the Declaration of St. Petersburg 1868. Anti-personnel explosive munition would explode upon contact, while without explosion such munition would already incapacitate the enemy. States have therefore noted that using explosive munition towards enemy personnel would cause unnecessary suffering,[446] and the ICRC writes that there is a customary international law rule against the use of this type of munitions.[447] It must be noted that anti-personnel explosive munitions are

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[440] These are examples set out by the ICRC. See: Henckaerts and Doswald-Beck, Customary international humanitarian law, 254.
[441] *ICRC*, "World War I: the ICRC's appeal against the use of poisonous gases", <https://www.icrc.org/en/doc/resources/documents/statement/57jnqh.htm> (accessed 1 January, 2018).
[442] Henckaerts and Doswald-Beck, Customary international humanitarian law, 241.
[443] Ibid., 277.
[444] Ibid.
[445] Henckaerts and Doswald-Beck (eds.), Customary International Humanitarian Law, 1796–1799.
[446] Henckaerts and Doswald-Beck, Customary international humanitarian law, 272–274.
[447] Ibid.

different from the normal bombardments or explosive weapons, because the latter category would kill or injure because of the explosion when anything less than that would not be sufficient for the particular military operation.[448]

The last weapon to discuss is the use of incendiary weapons, including napalm, White Phosphorous, and flame throwers. The use of incendiary weapons is not prohibited *per se,* but rather only restricted. Article 2 of Protocol III of the Convention on Certain Conventional Weapons of 1980 prohibits the use of incendiary weapons only when it: (i) deliberately targets civilians, (ii) is used disproportionally towards military objectives which may affect civilian objects, or (iii) is used towards trees or plants except when necessary to target military objectives covering behind or under the said trees or plants.

The above Article does not regulate the anti-personnel use of incendiary weapons, while death by burning is a very painful one. A burning person would experience excruciating pain until the nerves are burnt, and if he/she survives that then he/she will suffocate either quickly due to the burnt respiratory system or slowly when his/her "… lungs' alveoli fill with water and they stop breathing."[449] The ICRC notes that there is a customary law prohibition from using incendiary weapons towards enemy personnel unless it is not feasible to use a less harmful weapon.[450] For example, enemies hiding behind structures and closed fortifications with small openings would be hard to target except with flamethrowers, in addition to the higher possibility of enemies (in those fortifications) surrendering due to being terrified of the

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[448] In case of bombardment, the indicator of legality is proportionality as explained in Sub-Chapter 3.2.

[449] *The Guardian*, "What does death by burning mean?", <https://www.theguardian.com/theguardian/2003/apr/26/theeditorpressreview> (accessed 1 January, 2018). This article explains death by self-immolation where the person is exposed to the full wrath of the fire they set to themselves without barriers. However, when a structure is burnt with people inside, they may also die by suffocation due to the smoke. Perkkio notes that the enemy soldiers would "… either burns or asphyxiates…" see: N. T. Perkkio, *Bring On The Flamethrower*, (Quantico, 2015), 8. In addition, Alarifi, Phylaktou, and Andrews suggested that, in such a case, suffocation is actually a much likelier cause of death than the burning itself. See: Abdulaziz A Alarifi, Herodotos N Phylaktou, and Gordon E Andrews, "What Kills People in a Fire? Heat or Smoke?" in *The 9th Saudi Students Conference*, (Birmingham: University of Birmingham, 2016), 1–9.

[450] Henckaerts and Doswald-Beck, Customary international humanitarian law, 289.

flamethrowers.[451] In such cases, it maybe lawful to use flamethrowers and incendiary weapons out of necessity.

4.3 DOES *FIQH AL-JIHĀD* HAVE A PROHIBITION FROM CAUSING UNNECESSARY SUFFERING AND SUPERFLUOUS INJURIES?

This Sub-Chapter first explores the existing literature to see the jurists' perspective on causing unnecessary suffering and superfluous injuries. Then, the second aspect to discuss is to see whether one can derive such principle from the sources of Islamic law.

4.3.1 Rules on Unnecessary Suffering and Superfluous Injuries in the Existing Islamic Scholarship

Browsing through *fiqh al-jihād* literature, there seems to be no mention of any such obligation to avoid inflicting unnecessary suffering and superfluous injuries. What could be found are usually general notions, for example Ibn Rushd mentions that harm could be inflicted towards the enemy's life, wealth, etc.[452] Another matter discussed by jurists is the classification of who can and cannot be harmed,[453] but there is usually no mention of any form of limitation of what type of harm that may or must not be inflicted. As Al-Dawoody mentions: "The classical jurists did not devote separate parts of their discussions to the permissibility of particular weapons."[454]

However, there are certain methods of killing which according to common sense seem to be exceptionally painful which the jurists have discussed about. These

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[451] Perkkio, Bring On The Flamethrower, 8–9; Theo Boutruche, "The legality of flamethrowers: Taking unnecessary suffering seriously", ICRC Humanitarian Law and Policy, <http://blogs.icrc.org/law-and-policy/2018/02/22/the-legality-of-flamethrowers-taking-unnecessary-suffering-seriously/> (accessed 12 July, 2018).
[452] Ibn Rushd, *The Distinguished Jurist's Primer*, *Vol. 2*, (Reading: Garnet Publishing, 2000b), 456.
[453] See Subchapter 3.2.3.
[454] Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 122.

methods include mutilation, burning, throwing pebbles, and poisoned arrows, and there is discourse among the different opinions.

4.3.1.1 The Issue of Mutilation (al-Muthlah)

With regard to the issue of *al-muthlah*, the term has been translated to different English words such as 'mutilation' and 'disfigure' as shown in some narrations in this sub-chapter. In Arabic, Lane writes that مُثْلَةْ means "*He mutilated him; castrated him;* namely, a sheep or goat."[455] Ibn Manẓur explains that this word means to cut the nose, ear, genital, or anything from a body part.[456] Therefore, while the term 'mutilation' is used, one should not imagine it to necessarily indicate the mutilation of one body into multiple parts. Cutting off just one part is enough to call it *muthlah*. It is noteworthy that it has been narrated that the Companions of Prophet Muḥammad ﷺ has classified the act of burning an animal as mutilation,[457] but the juristic discourse is different as explained in Subchapter 4.3.1.2.

There is a clear *ḥadīth* which speaks against such acts. Buraydah narrates that Prophet Muḥammad ﷺ said:

> اغْزُوا بِاسْمِ اللَّهِ وَفِي سَبِيلِ اللَّهِ وَقَاتِلُوا مَنْ كَفَرَ بِاللَّهِ اغْزُوا وَلاَ تَغْدِرُوا وَلاَ تَغُلُّوا وَلاَ تُمَثِّلُوا وَلاَ تَقْتُلُوا وَلِيدًا
>
> "Fight in the Name of Allah in the cause of Allah. Fight those who disbelieve in Allah. Fight, but do not steal from the spoils of war, and do not break your promises, and do not mutilate, and do not kill children.[458]

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[455] Lane, An Arabic-English Lexicon: in Eight Parts, 3017.
[456] Muḥammad ibn Mukarram ibn `Alī ibn Aḥmad Ibn Manẓūr, *Lisān Al-'Arab*, *Vol. 11*, (Beirut: Dār al-Shadir, 1414a), 615.
[457] 'Abd Allah ibn Muḥammad Ibn Abī Shaybah, *Mushannaf Ibn Abī Shaybah*, *Vol. 7*, (Beirut: Dār al-Fikr, 1409a), ḥadīth no. 660.
[458] Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2613.

However, there is a difference of opinion on the context of prohibition of mutilation. For example, in order to to illustrate how not all acts of cutting limbs would constitute as mutilation as prohibited by the aforementioned *ḥadīth*, Ibn Ḥazm noted that the implementation of Islamic penalties (for offenses such as *qiṣāṣ* and *sarīqah*) do not fall under the category of mutilation.[459]

In context of *jihād*, the *sīrah* mostly notes how the act of *muthlah* is seen as some form of exceptional cruelty and hatred towards enemy dead bodies.[460] The *ḥadīth* text and juristic works do not explicitly mention this 'dark tone' behind acts of *muthlah,* but considering the historical context, it should be clear that such an act is considered as unacceptable cruelty.

As a matter of ruling, there is a difference of opinion concerning the law of *muthlah*. Some jurists say that the prohibition only concerns *muthlah* towards dead enemies, but when the enemy is yet to be defeated then it is permitted. This is the opinion of *inter alia* Ibnu 'Ābidīn and Ibn 'Abd al-Barr.[461] However, this opinion is further specified. These jurists say that mutilation towards enemies who are still not defeated are permissible when there is *maṣlaḥat*. In this context, the jurists explain *maṣlaḥat* to mean especially to shock the morale of the enemy but only in very exceptional circumstances, such as in a ceremonial duel.[462]

On the other hand, other jurists prohibit *muthlah* except for retaliation (i.e. if the enemy mutilates first). The reason is that these jurists find that Sūrah Al-Nahl verse 126 provides an exception towards the aforementioned prohibition from commiting *muthlah,* which is in case of retaliation. This is the opinion of *inter alia* Al-

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[459] ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muhallā bil-Āthār*, *Vol. 12*, (Beirut: Dār al-Fikr), 288.
[460] Safiurrahman Al-Mubarakfuri, *The Sealed Nectar: Biography of the Noble Prophet*, (Riyadh: Dar-us-Salam Publications, 1996), 279–281.
[461] Muḥammad Amīn Ibn 'Ābidīn, *Al-Dur al-Mukhtār wa Ḥāshiyah*, *Vol. 4*, (Beirut: Dār al-Fikr, 1412), 131. See also: Muḥammad Abū 'Abd Allah ibn Muḥammad Al-Ḥaṭṭab, *Mawāhib al-Jalīl*, *Vol. 3*, (Beirut: Dār al-Kutub 'Ilmiya, 1416), 548.
[462] See *inter alia*: Manṣūr Ibn Yūnus Al-Bahūtī, *Sharḥ Muntahā al-Irādat*, *Vol. 1*, (al-Qāhirah: 'Alam al-Kutub), 625; Al-Majdu ibn Taymiyyah, *Al-Muntaqā fi al-Aḥkām Al-Shar'iyyah*, (Dar al-Ibn al-Jawzi), 742; Ibn 'Ābidīn, Al-Dur al-Mukhtār wa Ḥāshiyah, 307; Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, 110.

Bājī Al-Mālikī and Imām Aḥmad.[463] Ibn Taymiyyah also holds this opinion and notes that some scholars say that Sūrah Al-Nahl verse 126 was revealed *inter alia* in response to the *muthlah* towards the martyrs of the battle of Uhud, but (based also on a *ḥadīth*) mentions that it is better to be patient than to retaliate.[464]

Considering the evidence, what seems to be prohibited is mutilation out of hatred and cruelty[465] beyond what is necessary and feasible (according to the combatant) to overtake the enemy. Therefore, although the cruelty does not seem to be at the centre of the juristic discourse, it may seem that there are still hints from which to infer a prohibition from causing unnecessary suffering or superfluous injuries.

4.3.1.2 The Issue of Burning

The issue of burning the enemy is also discussed by the jurists. It has been explained in sub-chapter 4.2 how death by burning can be such a painful death. There is a difference of opinion on the permissibility to use fire in Islam. The discussion starts with some authentic *ḥadīth* with a wide variation of wordings, but essentially it could be summarised by the following passage as narrated by Abū Hurayrah that Prophet Muḥammad ﷺ said:

> إِنِّي أَمَرْتُكُمْ أَنْ تُحْرِقُوا فُلاَنًا وَفُلاَنًا، وَإِنَّ النَّارَ لاَ يُعَذِّبُ بِهَا إِلاَّ اللَّهُ، فَإِنْ وَجَدْتُمُوهُمَا فَاقْتُلُوهُمَا

> "I have ordered you to burn so-and-so and so-and-so, and it is none but Allah Who punishes with fire, so, if you find them, kill them."[466]

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[463] Abū Al-Walīd Al-Bājī Al-Mālikī, *Al-Muntaqa Sharḥ Al-Muwaṭṭa*, *Vol. 3*, (al-Qāhirah: Mathba'ah al-Sa'adah, 1332), 172; Muḥammad Ibn Mufliḥ, *Al-Furu'*, *Vol. 10*, (Beirut: Mu'assasah al-Risalah, 1424), 218. See also: Salim bin 'Ied Al-Hilali, *Ensiklopedi Larangan menurut Al-Qur'an dan As-Sunnah*, *Vol. 2*, (Jakarta: Pustaka Imam Syafi'i, 2006), 496–497.

[464] Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Majmu' Al-Fatāwa*, *Vol. 28*, (Madīnah: Majma' Mālik Fahd Li Ṭibā'ah Al-Muṣḥaf Al-Sharīf, 1995c), 314.

[465] As the historical background of *muthlah* indicates.

[466] Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih Al-Bukhari*, *Vol. 4*, (Lahore: Kazi Publications, 1979), ḥadīth no.202 and 259.

Imam Al-Shawkānī notes that there is a difference of opinion among the Companions of Prophet Muḥammad ﷺ concerning the matter. He said that ‘Umar ibn Al-Khaṭṭāb and Ibn ‘Abbās were among the companions who categorically disliked burning whether in battle or for other purposes, and the ones who allowed it (either in battle or for other purposes) included ‘Alī ibn Abi Ṭālib and Khālid ibn Al-Walīd.[467] Al-Shawkānī also notes that Abū Bakr, Khālid ibn Al-Walīd, and ‘Alī ibn Abi Ṭālib actually practised burning the enemy (in context of the Riddah wars), while Prophet Muḥammad ﷺ himself has stuffed the eyes of the ‘Uraniyyīn with hot steel.[468]

The diversity of opinions of the companions of Prophet Muḥammad ﷺ shows, as Al-Muhallab also notes, that this prohibition is not a *ḥarām* ruling but rather a mere act of humbleness.[469] Al-‘Aynī notes that the majority of the Madinah jurists (at the time) allow the use of fire to burn forts together with whoever inside it, while Al-Awzā‘ī rules the same and adds burning ships in the same category but makes a disclaimer that one must be sure that only combatants are on board.[470]

Ibn Rushd mentions that the difference of opinion concerning the use of fire is where some jurists see that the general meaning in Sūrah Al-Tawbah verse 9 means that any means could be used in warfare including fire, while the other jurists find an exception i.e. the *ḥadīth* cited above in this Sub-Chapter which, in their view, prohibits the use of fire in war.[471] Ibn Ḥajar also notes that Imam Al-Bukhārī seems to hold that the prohibition from using fire excludes acts of retaliation if the enemy does it first.[472] Ibn Rushd also cites that al-Thawrī rules in favour of the opinion prohibiting it, but adds that fire may be used in retaliation if the enemy uses it first.[473]

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[467] Muḥammad ibn ‘Alī Al-Shawkānī, *Nail al-Authar*, *Vol. 7*, (Misr: Dār al-Ḥadīth, 1412), 294.
[468] Ibid.
[469] Ibid.
[470] Badruddin Al-‘Aynī, *’Umdah Al-Qārī*, *Vol. 6*, (Beirut: Dār Ihya Al-Turath Al-‘Arabi), 81; Badruddin Al-‘Aynī, *’Umdah Al-Qārī*, *Vol. 14*, (Beirut: Dār Ihya Al-Turath Al-‘Arabi), 264.
[471] See: Ibn Rushd, *The Distinguished Jurist’s Primer*, 460.
[472] Ibn Ḥajar Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, *Vol. 2*, (Beirut: Dar al-Ma’rifah, 1379a), 178. This is also the opinion of Sufyan Al-Thawri. See: Ibn Rushd, *The Distinguished Jurist’s Primer*, 460.
[473] Ibn Rushd, *The Distinguished Jurist’s Primer*, 460.

However, the jurists who allow the use of fire in combat usually do not speak of burning human beings directly. As cited from Al-Awzā'ī earlier in this sub-chapter, he rules that it is permissible to attack fortresses or ships containing enemies: these acts do not necessarily result in a torturous death by burning (albeit not entirely impossible). Note that, in general, people caught inside blazing structures tend to die by smoke or carbon monoxide intoxication rather than by the burning itself.[474] This is not to mention that people with common sense would normally try to vacate a burning fortress or ship rather than fighting from inside such a flaming enclosed location, taking their chances by either continuing the fight (from other spots which are not engulfed in flames) or surrendering. Therefore, this type of use of fire may seem to not necessarily fall under the prohibition discussed under this Sub-Chapter.

In context of modern warfare, as mentioned earlier in sub-chapter 3.3.1, there is an opinion (i.e. by Ismail Ibrahim Abu Sharifah) that prohibits the use of bombs and missiles because *inter alia* it contradicts the prohibition from using fire and from mutilating.[475] As mentioned in the earlier sub-chapter, Abu Sharifah provides five reasons as to why bombs and missiles must be prohibited, and two among them have been discussed also in the same sub-chapter. Two other reasons he mentions (i.e. the prohibition from using fire and from mutilating), as per the discussion under this sub-chapter, are answered due to the fact that both of those prohibitions are overridden in context of retaliation. Most if not all wars in modern warfare use such weapons as a custom. His last reason, i.e. using such weapon is against the command to do *iḥsān,* is discussed in the following sub-chapter.

However, the cited narrations that indicate the impermissibility of the use of fire seem to do so not because of the torturous nature of fire. Rather, it is because only Allah may use fire to punish and the juristic discourse is whether that implies a

[474] See: Alarifi, Phylaktou, and Andrews, What Kills People in a Fire? Heat or Smoke?; H Gormsen, N Jeppesen, and A Lund, "The causes of death in fire victims", *Forensic science international*, vol. 24, no. 2 (1984): 107–111.
[475] Cited in Alkhoirot, Hukum Penggunaan Bom dan Bahan Peledak Dalam Perang.

makrūḥ or *ḥarām* rule. Al-Qaraḍāwī, who is a contemporary jurist, may be an exception and he argues that one of the virtues behind this prohibition is to avoid cruel and torturous deaths.[476] However, such inference is rather difficult to make from the text of the *ḥadīth* by itself. The inference may be more reasonable considering the general rule of *iḥsān* in killing which is discussed in the next Sub-Chapter.

Moreover, the *ḥadīth* prohibiting from burning may imply that, *a contrario*, if a particular torture is not imitating Allah's torture then it might be permissible. This is similar to the conclusion towards the ruling on mutilation explained previously. In the end, it is very difficult to find any references, explicit or implicit, on the prohibition from causing unnecessary suffering or superfluous injuries in the literature of *fiqh al-jihād*.

4.3.1.3 The Issue of Pebbles

The discussion on pelting pebbles at the enemy starts with the *ḥadīth* of Sa'id ibn Jubayr who reported that Prophet Muḥammad ﷺ prohibited the throwing of pebbles saying:

> إِنَّ رَسُولَ اللَّهِ صلى الله عليه وسلم نَهَى عَنِ الْخَذْفِ وَقَالَ ' إِنَّهَا لاَ تَصِيدُ صَيْدًا وَلاَ تَنْكَأُ عَدُوًّا وَلَكِنَّهَا تَكْسِرُ السِّنَّ وَتَفْقَأُ الْعَيْنَ

> "Allah's Messenger (ﷺ) had prohibited the throwing of pebbles by saying: 'It does not catch the game, nor does it inflict defeat on the enemy, but breaks the tooth and puts the eye out.'"[477]

This *ḥadīth* is usually put under books of food and hunting in the *ḥadīth* literature.[478] However, the *ḥadīth* contains the word عَدُوًّا(enemy) also. Imām Muslim

[476]. See: Al-Qardhawy, Fiqih Jihad, 496.
[477] al-Naysābūrī, Sahih Muslim, ḥadīth no.5050.

puts this *ḥadīth* under 'The Book of Hunting, Slaughter, and what may be Eaten', but under a chapter entitled 'The permissibility of using things that help in hunting and pursuing the enemy, but throwing small pebbles is disliked'. Therefore, while the general *ḥadīth* may not be understood generally by the scholars to be about war, it still seems to have some relation to war.

Jurists then differ in the ruling of using slings which is a device that pelts pebbles or stones towards the enemy. Some scholars including Al-Qāḍī 'Iyāḍ rule that the sling is a prohibited means of war and hunting, while others including Al-Nawawī allows it because in war, there is *maṣlaḥat* to use such a weapon."[479]

It must also be noted that, regardless the differences, in general both positions seem to indicate that injuries that are caused unnecessarily without *maṣlaḥat* cannot be allowed. Therefore, in this case we may find some hints of a principle to prohibit the causing of unnecessary suffering and superfluous injuries in *fiqh al-jihād*.

4.3.1.4 The Issue of Poison

The jurists have discussed and disagreed on the use of poisoned arrows in war. Some jurists, such as al-Jundi, Al-Abardī, and al-Dardir either prohibit or dislike its use either because the enemy could retrieve the arrows and shoot them back at the Muslims or because there was no known use of such weapon among the early Muslims.[480] The first argument is purely based on *maṣlaḥat*, and one must note that the same could be said for normal arrows but only poisoned ones are discussed here probably because they are noticeably more dangerous. The second argument is

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[478] See: Ibid., 291; Ibn Ḥajar Al-ʿAsqalānī, *Bulugh al-Maram*, (Al-Mansoura: Dar al-Manarah, 2003), 494–491.

[479] *Al-Mawsūʻah al-Fiqhiyyah*, *Vol. 19*, (Kuwait: Wizarah al-Awqaf wa al-Shu'un al-Islāmiyyah, 1410), 47–48.

[480] Khalīl ibn Ishāq ibn Musā Al-Jundī, *Mukhtasar Khalīl fī Fiqh Imām Dār al- Hijrah Imam Mālik*, (Beirut: Dar al-Fikr, 1415), 102; Muhammad ibn Yūsuf ibn Abī al-Qāsim Al-Abdarī, *Al- Tāj wa al-Iklīl: Sharḥ Mukhtasar Khalīl*, *Vol. 3*, (Beirut: Dar al-Fikr, 1398), 352; Ahmad Al-Dardir, *Al-Sharḥ al-Kabir*, *Vol. 2*, (Beirut: Dar al-Fikr), 178.

something to think about too because it has been shown earlier that poison has been used by the enemy of Islam since the time of Prophet Muḥammad ﷺ , yet the early Muslims did not use it despite its effectiveness, which is something to ponder upon. On the other hand, one must consider that, for matters other than ritual worship, the Islamic legal maxim dictates that 'the original rule is permissibility, unless it can be proven otherwise'.[481]

Al-Shaybānī, on the other hand, permits it because it is more effective than normal arrows.[482] In addition, he also permits the use of poison to spoil enemy water supplies.[483] These are opinions purely based on *maṣlaḥat*. However, especially on the permissibility of spoiling enemy water supplies, the aforementioned opinion of Al-Shaybānī must be taken with a grain of salt. Such a matter is an issue of proportionality since the problem is possible disproportionate damage, which is a discussion not relevant to this chapter. In short, such an opinion must be taken while considering proportionality with the potential environmental damage.

On the whole, the discourse on the use of poison among the jurists does not seem to discuss anything about creating too much suffering towards the enemy. Rather, it mostly revolves around *maṣlaḥat* in context of whether or not it would harm the enemy more than it would potentially harm the Muslim army.

4.3.2 In Search for A Principle to Prohibit Unnecessary Suffering and Superfluous Injuries

It is important to note that one of the terms used for war in Islam is قِتَال most noticeably in the famous verse on jihad (i.e. Sūrah Al-Tawbah [9] verse 5) which reads:

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[481] Al-Shathri, Sharḥ Al-Manẓumatu Al-Sa'diyah Fî al-Qawā'id al-Fiqhiyyah, 90; Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, 80.
[482] Al-Shaybānī, al-Siyār al-Kabīr, 1475.
[483] Ibid., 1467.

...**فَاقْتُلُوا** الْمُشْرِكِينَ حَيْثُ وَجَدْتُمُوهُمْ وَخُذُوهُمْ وَاحْصُرُوهُمْ وَاقْعُدُوا لَهُمْ كُلَّ مَرْصَدٍ ...

"…then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush."

The word قِتَال comes from the root قتلthe meaning of which include 'deadly', 'combat', 'battle', 'kill', etc.[484] Therefore, by nature, in the Islamic concept of war (if not by common sense) then mortal harm towards the enemy seems to be a very important thing to achieve on the field. Note that sub-chapter 2.5.1 also cites a narration on the virtue of killing an enemy in battle. Although, of course, there can be *maṣlaḥat* in leaving some enemy alive such as the possibility of the enemy later converting to Islam, gaining captives, or the possibility of the enemy retreating to a position which is unfavourable for them, *etc*.[485] Therefore, to this extent, Islam does not seem to share the view of IHL that 'rendering death inevitable' in warfare is prohibited and inhumane.

If killing is permitted in war, or even encouraged as a necessity, is there any importance to limit anything lesser? How much, really, should the manner of killing matter?

While it is difficult to find any such reference in the literature of *fiqh al-jihād,* a search through the general teachings of Islam may provide some leads towards what may prohibit the infliction of unnecessary suffering and superfluous injuries. There are three *dalīl*s to be further discussed in this case.

The first *dalīl* to discuss is a narration where Prophet Muḥammad ﷺ said:

إِنَّ اللَّهَ يُعَذِّبُ الَّذِينَ يُعَذِّبُونَ النَّاسَ فِي الدُّنْيَا

[484] Lane, An Arabic-English Lexicon: in Eight Parts, 2984. See also: *Almaany*, "Translation and Meaning of قتل in Almaany English Arabic Dictionary".

[485] There are examples of these scenarios in the battles fought and won by Prophet Muḥammad ﷺ . See generally: Ismail ibn Kathir, *The Battles of the Prophet*, (El-Mansoura: Dar al-Manarah, 2001).

"Indeed, Allah would torment those who torment people in the world."[486]

This *ḥadīth* shows a general prohibition from commiting torture towards humankind. The second *dalīl* is another *ḥadīth* which prohibits torturing animals,[487] and by virtue of *qiyās al-awlā* surely torturing humankind is more deserving of prohibition. The wordings are very clear. The scholars, when commenting on this *ḥadīth,* do not speak of war contexts. 'Alī Al-Qārī explains that this *ḥadīth* refers to the prohibition of unlawful torturing.[488] Al-Nawawī says the same as Al-Qārī, and adds that the pain arising from the implementation of *qiṣāṣ*, *ḥudūd*, and *ta'zīr* punishments does not fall under this prohibition.[489] This means that, other than pain resulting from pains prescribed by Islam, any acts of infliction of pain would be unlawful. One could derive an understanding which explains that the pain caused during combat would also fall under this exception, because even during legitimate jihad one cannot avoid hurting the enemy.

Some jurists like Ibn al-Qayyim, Ibn Taymiyyah and Ibn Ḥazm seem to provide an exception towards this rule. They say that torture may be committed to extract information from thieves regarding the whereabouts of their stolen items. The coerced information, according to these scholars, are still inadmissible before courts but the items that may be found as result of this information may be admissible as

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[486] Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.6657-6658.

[487] Prophet Muḥammad ﷺ said:
عُذِّبَتِ امْرَأَةٌ فِي هِرَّةٍ سَجَنَتْهَا حَتَّى مَاتَتْ، فَدَخَلَتْ فِيهَا النَّارَ، لاَ هِيَ أَطْعَمَتْهَا وَلاَ سَقَتْهَا إِذْ حَبَسَتْهَا، وَلاَ هِيَ تَرَكَتْهَا تَأْكُلُ مِنْ خَشَاشِ الأَرْضِ
"A woman was tormented because of a cat which she had confined until it died and she had to get into Hell. She did not allow it either to eat or drink as it was confined, nor did she free it so that it might eat the vermin of the earth."
See: Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3482; Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.6675-6679.

[488] 'Alī Al-Qārī, *Mirqah al-Mafatih Sharh Mishkah al-Mashabih*, *Vol. 7*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1422a), 76.

[489] Yaḥya ibn Sharaf Al-Nawawī, *Sharḥ Al-Nawawī 'Ala Muslim*, *Vol. 16*, (Dar al-Khayr, 1416), 128.

evidence.[490] The line of reasoning of this argument may be used to justify torture to search for information from war captives. However, the argument of Ibn Taymiyyah and Ibn Ḥazm goes against the opinion of the majority of jurists and appears to contradict the *dalīl*.[491]

The third *dalīl* to be discussed is Sūrah al-Baqarah verse 195 which reads:

وَأَنْفِقُوا فِي سَبِيلِ اللَّهِ وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى **التَّهْلُكَةِ وَأَحْسِنُوا إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ**

"And spend in the way of Allah and do not throw [yourselves] with your [own] hands into destruction [by refraining]. And do good; indeed, Allah loves the doers of good."

This verse is one out of numerous verses and *ḥadīth* to mention the command and value of doing *iḥsān*, a word derived from the root حسن which means: To be handsome, make good, seem good/beautiful/comely/pleasing, be excellent, make or render a thing good or goodly, to beautify/embellish/adorn a thing, strive or compete in goodness, to do good or act well, act or behave with goodness or in a pleasing manner towards a person, confer a benefit or benefits upon a person, act graciously with a person, know a thing well, beautify/embellish/adorn oneself, reckon/account/esteem a person to be good/beautiful/pleasing.[492] However, the *tafsīr* of this verse is also something to be discussed further.

Numerous *mufassir* among the companions and *tābi'īn* note that this verse is about spending (in charity), among them Ibn 'Abbās specifically noting that this verse

[490] ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muhallā bil-Āthār*, *Vol. 11*, (Beirut: Dār al-Fikr), 142; Ibn Al-Qayyim Al-Jawziyah, *Al-Turuq Al-Hukmiyyah Fi al-Siyasah al-Shar'iyyah*, (Jeddah: Dar al-Madani, 1985), 104.
[491] See also: Ṭāhā J al'Alwānī and Yusuf Talal DeLorenzo, "The Rights of the Accused in Islam (Part Two)", *Arab Law Quarterly*, (1995): 245.
[492] Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, *Vol. 2*, (Beirut: Librairie du Liban, 1968d), 570–572.

is not about *jihād*.[493] But the companion Abū Ayyūb and some other *mufassir* seem to connect this verse towards *jihād*.[494] Most discussion on the relation between this verse and *jihād* is usually regarding the first part of the verse.[495] However, both of these opinions do not really contradict. As cited in sub-chapter 3.3.2 and other parts of this research, general commands should be complied to in its generality until there are *dalīl*s that excludes some cases from that general command.[496] Even if the reason of revelation of the verse in question was not regarding *jihād,* the wording indicate a general command to do *iḥsān* in all things.

A further discussion on the command to do *iḥsān* is found in a *ḥadīth* narrated by Abu Ya'lā Shaddād ibn Aws where Prophet Muḥammad ﷺ said:

إِنَّ اللَّهَ كَتَبَ الْإِحْسَانَ عَلَى كُلِّ شَيْءٍ، فَإِذَا قَتَلْتُمْ فَأَحْسِنُوا الْقِتْلَةَ، وَإِذَا ذَبَحْتُمْ فَأَحْسِنُوا الذِّبْحَةَ، وَلْيُحِدَّ أَحَدُكُمْ شَفْرَتَهُ، وَلْيُرِحْ ذَبِيحَتَهُ

> "Verily Allah has prescribed *iḥsān* (proficiency, perfection) in all things. So if you kill then kill well; and if you slaughter, then slaughter well. Let each one of you sharpen his blade and let him spare suffering to the animal he slaughters."[497]

Most *ḥadīth* books categorise this *ḥadīth* under chapters concerning food or sacrifice,[498] while some others classify it under chapters of blood money (*diyāt*).[499]

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[493] ibn Katsir, Ismail, *Shahih Tafsir Ibnu Katsir*, 628–631.
[494] Ibid.; Jalāl al-Dīn Al-Maḥallī and Jalāl al-Dīn Al-Suyūṭī, *Tafsīr al-Jalālayn*, edited by Ghazi bin Muhammad ibn Talal, (Amman: Royal Aal al-Bayt Institute for Islamic Thought, 2007), 35. Al-Qurtubi, also among the *mufassir* relating this verse to *jihad,* noted that the phrase سَبيلِ اللَّهِ in this verse means *jihād*. See: Muḥammad ibn Aḥmad Al-Qurṭubī, *Tafsir al-Qurtubi*, *Vol. 1*, (London: Dar Al Taqwa, 2003), 499–501.
[495] In the previous references, most of the discussion surrounding this verse is about spending for *jihād* as well as the permissibility of attacking the enemy alone (or a much stronger enemy).
[496] Al-Utsaimin, Ushul Fiqih, 58–59; Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 25.
[497] al-Naysābūrī, Sahih Muslim, ḥadīth no.5055.
[498] See: Ibid., 293; Al-ʿAsqalānī, Bulugh al-Maram, 501; Al-Sijistānī, *Sunan Abu Dawud*, 387; Abu 'Abd Al-Raḥmān Al-Nasā'ī, *Sunan al-Nasa'i*, *Vol. 5*, (Riyadh: Darussalam, 2007a), 235; Ibn Mājah, Sunan Ibn Mājah, 278.
[499] Muḥammad ibn ʿĪsā al-Sulamī Al-Tirmidhī, *Jami al-Tirmidhi*, *Vol. 3*, (Riyadh: Darussalam, 2007a), 194.

Furthermore, the classical scholars seem to explain this *ḥadīth* only in relation to slaughtering animals and death penalty on how the killing must be as painless and as humane as possible,[500] while some speak of killing in general.[501] It is very difficult to find any discussion of the aforementioned *ḥadīth* in context of *jihād* in the works of the classical scholars.

However, the phrase الْإِحْسَانَ عَلَى كُلِّ شَيْءٍ means that *iḥsān* is prescribed or ordained towards 'all things' due to the word كُلِّ, which would naturally include *jihād* (unless there are any reason to exclude it).[502] One can only wonder why *jihād* is not within the classical scholars' discussion, considering how *jihād* has been a topic discussed by the scholars including Al-Nawawī who does not include *jihād* under the discussion of this *ḥadīth*.[503] On the other hand, the contemporary scholars are the ones who seem to make the connection. Jamaal al-Din Zarabozo, for example, understands *iḥsān* in killing to include the prohibition from using weapons of mass destruction.[504] Yūsuf Al-Qaraḍāwī notes that opinions that allow to kill with fire, throw scorpions and snakes to civilian houses, kill women and children, use atomic bombs, are against *iḥsān* in killing as mentioned in the discussed *ḥadīth*.[505] Jamal Ahmed Badi is more comprehensive when he explains that *iḥsān* in killing means not killing non-

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[500] Yaḥya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, *Vol. 13*, (Beirut: Dār Ihya Al-Turath Al-'Arabi, 1392a), 107; 'Alī ibn Muwaffaq ibn Al-ʿAṭṭār, *Sharḥ Al-Arba'īn Al-Nawawiyyah*, (Dār al-Bashā'ir al-Islamiyyah, 1433), 112.

[501] Ibn Daqīq Al-'Īd, *Sharḥ Al-Arba'īn Nawawiyyah*, *Vol. 1*, (Mu'assasah al-Rayyan, 1424), 72.

[502] Some scholars of Arabic language and *ḥadīth* noted that كُلِّ may sometimes mean 'some'. See: al-Murtaḍá al-Husaynī Al-Zabīdī, *Taj al-'Arus Min Jawahir al-Qamus*, *Vol. 30*, (Dar al-Hidayah), 339; Yaḥya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, *Vol. 6*, (Beirut: Dār Ihya Al-Turath Al-'Arabi, 1392b), 154. The evidences of this from the Qur'an and Sunnah would include the word كُلِّ followed by an explicit exception afterwards. Among these examples is Sūrah al-Ahqaf (46) which starts with تُدَمِّرُ كُلَّ شَيْءٍ (destroying everything) but then followed by إِلَّا مَسَاكِنُهُمْ (except their dwellings). Another example is Sūrah Al-Anbiya (21) verse 30 which states that كُلَّ شَيْءٍ حَيٍّ (every living thing) was created from water, while Sūrah al-Raḥmān (55) verse 15 mentioned that the *jinn* were created from smokeless fire.

[503] This research has cited Al-Nawawi's rulings on certain matters of jihad in other discussions.

[504] Jamaal al-Din M. Zarabozo, *Commentary on the Forty Hadith of Al-Nawawi*, *Vol. 1*, (Boulder: AL-Basheer Publications and Translations, 1999), 569–570.

[505] Al-Qardhawy, Fiqih Jihad, 496.

combatants, not using weapons of mass destruction, treating captives well, and most relevant to this chapter: "…not to cause harm or suffering to anyone we kill."[506]

Badi's exact terms must be taken with a grain of salt, because 'not causing harm or suffering' makes little sense when the context is 'how to kill someone'. Taken from the context in general, it may seem to mean that the method of killing should not cause more suffering than what is necessary to kill. Such understanding could be taken from the general phrase الْإِحْسَانَ عَلَى كُلِّ شَيْءٍ as well as *qiyās al-awlā:*[507] if even animals should be slaughtered with as little suffering as possible, then surely it should be more so when killing humankind.

It is probably in this context where Abu Sharifah says that using bombs would be violating the command to do *iḥsān*. Putting together the explanations above, killing without *iḥsān* may mean massive or indiscriminate killing or killing in a manner which creates too much suffering in its process. The issue of massive or indiscriminate killing is discussed in the previous chapter, so it is repetitive to be discussed here.

As for the context of prohibiting the causing of unnecessary suffering and superfluous injuries, one may possibly infer it from the aforementioned *dalīl*. There is a general prohibition from causing harm, suffering, and torture towards anyone and everything including even animals. On the contrary, there is a general command to do *iḥsān* which would seem like an opposite of causing unnecessary suffering. As has been noted under this Sub-Chapter, there are exceptions where some acts of inflicting harm and suffering are necessary and prescribed by the *Sharī'ah*.

However, as displayed by the *ḥadīth* of Abu Ya'lā Shaddād ibn Aws, one may also find that *iḥsān* must still be applied even in times when harm and suffering must be inflicted by reducing the harm and suffering to the furthest extent possible. As mentioned in Sub-Chapter 4.2, there is an intersection between this chapter and the

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[506] Jamal Ahmed Badi, *Sharh Arba'een an Nawawî : Commentary of Forty Hadiths of An-Nawawi*, (fortyhadith.com, 2002), 88–89.

[507] Analogy of a higher order. See: Nurhayati and Ali Imran Sinaga, *Fiqh dan Ushul Fiqh*, (Jakarta: Prenadamedia Group, 2018), 34; Abd Latif Muda and Rosmawati Ali @ Mat Zin, *Pengantar Usul Fiqh*, (Kuala Lumpur: Pustaka Salam Sdn. Bhd., 1997), 103.

previous chapter because ‘unnecessary suffering’ would include ‘incidental civilian (or collateral) losses’.

In such a case, the maxims related to the minimising of harm cited in the previous chapter are relevant here. These maxims include: ‘during emergency, prohibited things can be permissible only to the extent of which the emergency requires’, ‘harm must be removed to the furthest extent possible’[508] and ‘what cannot be achieved in its entirety must not be abandoned in its entirety’.[509] Therefore, one can conclude that *fiqh al-jihād* recognises a general principle to prohibit unnecessary suffering and superfluous injuries.

4.4 DERIVING DETAILED RULES ON THE PROHIBITION FROM CAUSING UNNECESSARY SUFFERING AND SUPERFLUOUS INJURIES IN *FIQH AL-JIHĀD*

After a general principle to prohibit causing unnecessary and superfluous injuries is deduced, one should discuss how this principle should be manifested in detailed rules of *fiqh al-jihād*. However, while Chapter Three elaborates a detailed set of rules as requirement to fulfill the principles of proportionality and precaution, this Chapter does not. Rather, the rules relevant to this chapter, as sub-chapter 4.2 suggests, constitute mainly only one general principle and a possible listing of means and methods of warfare which may cause unnecessary suffering and superfluous injuries. Therefore, this sub-chapter is structured in such a way as well.

[508] Ismail and Rahman, Islamic Legal Maxims: Essentials and Applications, 175 and 189; Zaydan, Synopsis on the Elucidation of Legal Maxims in Islamic Law, 81 and 105.
[509] Haykal, Al-Jihād wa al-Qitāl fī al-Siyāsah al-Shar‘iyyah, 735.

4.4.1 The General Rule: Article 35(2) of AP I

Article 35(2) of AP I states: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

The content of this article is basically a statement of general principles. As explained in sub-chapter 4.3, *fiqh al-jihād* also recognises this principle. Therefore, there is no problem for *fiqh al-jihād* to adopt this rule. The debate may arise on the extent to which suffering is classified as 'necessary', especially on the specific means and methods of war.

4.4.2 Laser Weapons

For obvious reasons,[510] there is no work of the classical jurists that discusses the ruling on laser weapons specifically. Therefore, if no prohibition is found while there is a general permissibility to attack the enemy,[511] the original rule shall be that permissibility unless proven otherwise.

However, one can approach this in a different way. The problem of laser weapons, as mentioned in sub-chapter 4.2, is that it causes permanent blinding. Blinding is one of the *'adhāb* of Allah as shown in Sūrah Al-Mā'idah verse 71, and unlike the case of fire as discussed in sub-chapter 4.3.1, there is no *dalīl* indicating prohibition to imitate this particular kind of *'adhāb* of Allah. Furthermore, a companion of Prophet Muḥammad ﷺ named Sa'īd ibn Zayd once made a prayer to make a criminal blind, and it was granted.[512] In sub-chapter 4.3.1 also, the *ḥadīth* of the 'Uraniyyīn, Prophet Muḥammad ﷺ blinded the criminals by piercing their eyes with hot iron. Especially in the context of *jihād*, it is narrated that Prophet Muḥammad

[510] i.e. no such weapons existed in the classical era.
[511] See: Sūrah al-Tawbah verse 5.
[512] This incident occurred during the Umayyad regime. Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.4133.

ﷺ temporarily blinded the enemy forces in the Battle of Ḥunayn with a handful of dust, causing them to run away.[513]

Therefore, at least so far, blindness is a known form of violence which has precedence in the *dalīl* of its use towards those who deserve it.[514] Although, admittedly, the aforementioned *dalīl* are not necessarily always clear in explaining why the violence inflicted has to be specifically in the form of blinding, except for retaliation in the 'Uraniyyīn case. This may seem to suggest that there does not seem to be anything wrong intrinsically in blinding specifically as a particular method of violence. This is unlike fire and torture which has their specific prohibition.[515]

In modern IHL, there are actually other lawful means and methods which cause a temporary inability to see, such as flashbangs.[516] The main problem of the laser weapon is that the blindness is permanent[517] while, in comparison, the effects of a flashbang is only a few seconds to provide some tactical advantage.[518] What seems to be the distinction in IHL is that there are (i) weapons which do not necessarily but can cause unnecessary permanent effects, and (ii) weapons that, by design, is meant to cause unnecessary permanent effects. The latter is considered as a weapon that, by design, would cause superfluous injury because temporary blindness would have been enough to incapacitate the enemy.

From an Islamic perspective, it may be difficult to find anything wrong with permanent effects of damages *per se*. Many weapons of war could potentially cause permanent effects towards the combatants including death. As explained earlier in this

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[513] This is one of the miracles of Prophet Muḥammad ﷺ . See: al-Naysābūrī, Sahih Muslim, ḥadīth no.4619.
[514] Needless to say also that, *a contrario,* blinding someone who does not deserve it is certainly an act of violence which is a crime.
[515] This does not necessarily suggest blanket prohibition, as discussed in 4.3.1.
[516] Or turning off the lights.
[517] Henckaerts and Doswald-Beck, Customary international humanitarian law, 241.
[518] Also referred to as a 'stun grenade', this weapon not only blinds but causes severe dizziness for a few seconds. See: *Elite UK Forces*, "SAS Weapons - Stun Grenade", <http://www.eliteukforces.info/special-air-service/weapons/stun-grenade.php> (accessed 14 January, 2019).

sub-chapter, it is difficult to find anything to prohibit blinding as a form of harming the enemy and in fact there is precedence from Prophet Muḥammad ﷺ . Such effect is very helpful in combat, as the enemy are temporarily disabled from fighting and could be demoralised as the aforementioned narration in *Sahih Muslim* illustrates.

The effect of Prophet Muḥammad ﷺ 's blinding dust attack was temporary instead of permanent does not necessarily imply that causing permanent effects is prohibited. On the other hand, causing permanent damage is not something unfamiliar in war and is not necessarily prohibited *per se*.

In addition, the effects of a flashbang only last for a few seconds. That would be sufficient for the tactical short-distance (and indoors) military operation, as described in the Elite Force UK website earlier under this *'Laser Weapons'* part. However, a long-range operation would surely benefit from longer effects. In fact, the US military is developing flashbangs with longer effects (from 3-5 seconds to 9-25 seconds) while even that is used for the same type of operation.[519] Permanency is simply the infinitive extension of that length.

It should be noted too that blindness does not seem to constitute as 'torture' or 'suffering' as sub-chapter 4.3.2 discusses, which seems to imply prolonged agony and actual pain. Unless one adopts a rather liberal (and overstretching) understanding of the term, which may stretch as far as to include 'broken hearts'. It does not cause constant pain or suffering in the way that every single other means and methods of war discussed in this chapter does. The inconvenience caused by permanent blindness is significantly dwarfed compared to, for example, the agony caused while being burned alive.

Therefore, it does not seem that causing permanent blindness would constitute as a breach of the principle to not cause unnecessary suffering and superfluous injuries

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[519] *TechLink*, "Brighter, safer flash-bang stun grenade", <https://techlinkcenter.org/technologies/brighter-safer-flash-bang-stun-grenade/> (accessed 14 January, 2019).

as understood in the Islamic context as per sub-chapter 4.3.2 It would also be difficult to argue that the availability of temporary blinding would render permanent blinding necessarily unlawful. This is because, as explained earlier, one can find a military advantage within a longer effect of blindness as compared to a shorter one. In fact, what one may imply something from the TechLink website above: if the increase of 3-5 seconds effect to 9-25 seconds blindness effect of a flashbang is a new technology, it may seem that there is no technology to cause blindness lasting between that and permanent blindness (i.e. by laser weapons).[520] Therefore, it can be argued that there is *maṣlaḥat* to use laser weapons when the military operation requires the enemy to be blinded for any length of time longer than what the flashbang may cause. Therefore, as a general rule, *fiqh al-jihād* cannot adopt the IHL prohibition of laser weapons.

However, the existing rules of international law must be considered. If a Muslim nation is a party to the Protocol on Blinding Laser Weapons of 1995 to the Convention on Certain Conventional Weapons 1980, then it is impermissible for the Muslim nation to use such weapons due to the contractual obligation. Furthermore, if this is an effectively practised rule of customary international law, then all Muslim fighting groups must also act in reciprocity and not use this weapon.

4.4.3 Expanding Bullets

It is very hard to find any reference to expanding bullets in the works of the Muslim jurists. However, if the problem of expanding bullets is the difficulty and inhumaneness of the process of bullet extraction, then this is not a new problem. Since thousands of years ago, some arrows used by archers are actually designed to be difficult to be extracted which necessitates specific medical equipment developments

[520] The existing literature does not seem to discuss any weapon specifically designed to blind the target except laser weapons and stun grenades.

on arrow extraction throughout the centuries.[521] Archery is a weapon all too familiar to ancient to middle-age warfare, estimated to have killed the highest number of people in the history of warfare,[522] and even Prophet Muḥammad ﷺ cannot emphasise enough on the importance of mastering archery in the following *ḥadīth*:

أَلاَ إِنَّ الْقُوَّةَ الرَّمْيُ أَلاَ إِنَّ الْقُوَّةَ الرَّمْيُ أَلاَ إِنَّ الْقُوَّةَ الرَّمْيُ

> "Verily, power is shooting (arrows), verily power is shooting (arrows), verily power is shooting (arrows)."[523]

Therefore, it is unimaginable that the jurists would be unfamiliar with such types of arrows. Yet, it is very difficult to find any scholar criticising the use of the types of arrows which are difficult to be extracted. Rather, it seems that the only type of arrow that has been discussed are only poisoned ones as discussed in sub-chapter 4.3.1.

Considering also that the stoppage power of expanding bullets is stronger than its non-expanding counterparts, then it may seem that there is more *maṣlaḥat* in its use too. In addition, the arguments set out by Joshua F. Berry in sub-chapter 4.2 does have merit. The entirety of Chapter Three explains the necessity and rules in both *fiqh al-jihād* and IHL to reduce incidental losses and expanding bullets does seem to help achieve that by reducing risks of ricochet and pass-through bullets.

In addition, Berry also argues how the prohibition from using expanding bullets was a product of the past which had its own political context to curb the power

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[521] Rafik Shereen, Rod J. Oskouian, Marios Loukas, and R. Shane Tubbs, "Treatment of Arrow Wounds: A Review", *Cureus*, vol. 10, no. 4 (2018): 1, and also see generally.
[522] Ibid., 1.
[523] al-Naysābūrī, Sahih Muslim, 52. The cited *ḥadīth* is the first *ḥadīth* under this chapter, and the other *ḥadīth* under this same chapter mention the virtue of archery and the sin of learning archery and then abandoning it. Note that the word used for archery in the cited *ḥadīth* is الرَّمْيُ from the root ر م ي which could mean to throw, to cast, to shoot, or to flung something. See: Lane, *An Arabic-English Lexicon: In Eight Parts*, 1161. Therefore, this *ḥadīth* may also extend to any long range weapon.

of the British military.[524] After all, it is quite mind boggling as to why a particular weapon is too inhumane to be used in war but there is no call for banning it for non-war contexts.

As a matter of rule, it may be concluded that it is permissible to use expanding bullets in *fiqh al-jihād* as it seems that it is not obstructed by any prohibition of any sort. In addition, Joshua F. Berry's critic should be really taken into consideration. There should be a further comprehensive empirical research on the extent to which expanding bullets can actually reduce incidental casualties especially in urban warfare. If the inhumaneness of the expanding bullet is insignificant[525] in comparison to the incidental casualties that could be spared, then perhaps the state parties of the Rome Statute must consider amending the relevant provision. Furthermore, if the research results indicate so, perhaps it is time to change the international law regarding the use of expanding bullets.

However, until such research is materialised and followed by the proper international response, the Muslim states which are parties of the Rome Statute must still refrain from using expanding bullets. Similarly, if the prohibition of using expanding bullets is an effective customary international law, then by virtue of reciprocity any Muslim fighting group should not use them.

4.4.4 Poison and Poisonous Weapons

A further discussion on the ruling of using poison must refer to an authentic *ḥadīth*. As explained in sub-chapter 4.3.1, some jurists argue the impermissibility of using poisoned arrows because the early Muslims did not use them. However, poison is not something entirely foreign to the early Muslims.

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[524] Berry, Hollow-Point Bullets: How History Has Hijacked Their Use in Combat and Why It Is Time to Reexamine the 1899 Hague Declaration Concerning Expanding Bullets, see generally.
[525] As Berry notes, there is no actual proper assessment on the alleged inhumane effects of expanding bullets. See: Ibid., 137–144, 149–150.

There is some reference towards poison, especially in discussing the aftermath of the Battle of Khaybar between the Muslims and the Jews where the latter was defeated. It was a Jewish woman who, after the battle was over, poisoned a piece of roasted lamb to be presented to Prophet Muḥammad ﷺ and the Companions, and the latter ate but then spat it out and prevented most of the companions from eating.[526] Prophet Muḥammad ﷺ refused to execute her for such an act (which al-Mubarakfuri described as 'treacherous'), except later when Bishr ibn al-Barāʾ, who took a bite off the poisoned meat before the Prophet ﷺ managed to warn him, died because of that poison.[527] This incident occurred after the battle but considered to still be associated with it which is why Imām al-Bukhārī put this *ḥadīth* under 'the Book of Al-Maghazi'.[528]

The incident itself does not necessarily display whether the act of poisoning is *per se* prohibited. Imām Abū Dāwud, for example, adds all these relevant narrations under the 'Book of al-Diyat' but specifically under the chapter 'If A Person Gives A Man Poison To Drink Or Eat, And He Dies, Is He Subject To Retaliation?'.[529] As explained earlier also, it was only when Bishr ibn al- Barāʾ died that the Jewish woman was killed. It may thus be seem that the result (death) is the stronger highlight than the means.

In addition, there may be a vague and slight hint towards the use of poison in a narration in *Ṣaḥīḥ Muslim*. A companion witnessed a rider attacking a *mushrik* fighter, resulting in the following:

فَنَظَرَ إِلَى الْمُشْرِكِ أَمَامَهُ فَخَرَّ مُسْتَلْقِيًا فَنَظَرَ إِلَيْهِ فَإِذَا هُوَ قَدْ خُطِمَ أَنْفُهُ وَشُقَّ وَجْهُهُ كَضَرْبَةِ السَّوْطِ فَاخْضَرَّ ذَلِكَ أَجْمَعُ

[526] Muḥammad ibn Ismāʻīl Al-Bukhārī, *Sahih al-Bukhari*, *Vol. 5*, (Riyadh: Darussalam, 1997b), ḥadīth no.4249; Al-Mubarakfuri, The Sealed Nectar: Biography of the Noble Prophet, 374.
[527] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.2617; Abu Dawud Sulaymān ibn al-Ashʻath Al-Sijistānī, *Sunan Abu Dawud*, *Vol. 5*, (Riyadh: Darussalam, 2008c), ḥadīth no.4508, 4511-12, and 4514; Al-Mubarakfuri, The Sealed Nectar: Biography of the Noble Prophet, 374.
[528] Al-Bukhārī, *Sahih al-Bukhari*, 336.
[529] Al-Sijistānī, *Sunan Abu Dawud*, 107–109.

> "He looked at the *Mushrik* in front of him, who had falled down on his back, and saw that he had been struck on the nose, and his face was cut as if with a whip, and it had **turned green**."[530] (emphasis added)

However, some translators have added "…it had turned green **with its poison**" (emphasis added).[531] The Arabic text of the *ḥadīth* does not mention poison at all, and the scholars do not seem to discuss it in the works of *sharḥ*.[532] After all, skin turning green can be a sign of poisoning so perhaps it was inferred from that.[533] Yet, referring to the full text of the *ḥadīth*, the rider causing such wound to the enemy turned out to be an Angel sent by Allah to aid the Muslims. Angels are creatures that are incapable of disobeying Allah but acts of angels are not included as a source of law in Islam in any books.[534]

Be that as it may, the reality is that it seems that it is difficult to find anything explicit and specific in condemning or prohibiting the use of poison in itself. This is why the focus of the disagreements among the jurists mentioned in sub-chapter 4.3.1 are mostly on the issue of *maṣlaḥat*. In fact, as mentioned also in that sub-chapter, there seems to be no remark on the inhumaneness of the use of poison.

On the other hand, as Al-Shaybānī notes (cited in sub-chapter 4.3.1), there does seem to be *maṣlaḥat* in the use of poison. When poisoning the water or food supplies

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[530] See also the full narration for the full story: al-Naysābūrī, Sahih Muslim, ḥadīth no.4588.

[531] Translation of Wa'il 'Abdul Mut'aal Shihab: Ismail ibn Kathir, *Battles of the Prophet*, (El-Mansoura: Dar al-Manarah, 2001), 42. See also the translation of Abdul Hamid Siddiqui: Muslim ibn al-Ḥajjāj Al-Naysābūrī, "Chapter: The support of the angels during the Battle of Badr, and the permissibility of the spoils", sunnah.com, <https://sunnah.com/muslim/32/69> (accessed 7 January, 2019).

[532] Yaḥya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, *Vol. 3*, (Damascus: Dar al-Khayr, 1416e), 344–434; 'Alī Al-Qārī, *Mirqah al-Mafatih Sharh Mishkah al-Mashabih*, *Vol. 11*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1422b), 12. It may be important to mention that Al-Nawawi does not mention anything about the 'green' part, while 'Alī Al-Qārī explains that all of the parts that was hit turned into green or black because "green can also mean black."

[533] This is not to mention numerous depictions of people turning green as result of poisoning in popular entertainment.

[534] This is except when they carry revelation and instructions from Allah. For example, other than the revelation of verses of the Qur'ān, there were specific instances where the angel Jibril taught Prophet Muḥammad ﷺ how to make *wuḍū'* and *ṣalāt*, but teaching the Muslims was specifically the purpose of Jibril being sent by Allah for this. See: Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3221; Muslim ibn al-Ḥajjāj Al-Naysābūrī, *Sahih Muslim*, *Vol. 2*, (Riyadh: Darussalam, 2007c), ḥadīth no.1379.

of the enemy, more of them can be incapacitated at once.[535] When darts or bullets are tipped with poison, there is a greater chance for the enemy to be incapacitated if the said darts or bullets hit places which normally do not cause fatal wounds.[536] It has been mentioned in sub-chapter 4.2 how 'rendering death inevitable' is part of unnecessary suffering as per the St. Petersburg Declaration and is the reason why some states prohibit the use of poison. However, not only that Islam does not necessarily see this as a problem as per sub-chapter 4.3.2, it is also not necessarily true. The reality is that even the deadliest poisons do not always result in death, and there are ways to treat and cure them although some are more difficult than others.[537]

Is the use of poison inhumane? Does it cause unnecessary suffering? In sub-chapter 4.2, it has been noted by the ICRC how the nurses of World War I shared stories of the terrible suffering of those who were injured by poisonous gasses. One may wonder to what extent is this any different from the suffering of those injured in war from other (lawful) weapons, considering how war medics would typically share similar stories.[538] However, different poisons seem to affect people differently. The poisonous gasses in the World War I nurses testimony did seem to cause a very terrible amount of suffering. Trichothecene mycotoxins Ricin, and Botulinum neurotoxin may take time and much pain.[539] In these cases, it may be more convincing to argue that the deaths are inhumane. On the other hand, other poisons such as the VX agent have been noted to cause a very painful death of Kim Jong Nam but within

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[535] Although the army must bear in mind the principle of proportionality if there is risk of civilian losses or environmental destruction, as per Chapter Three.
[536] For example: a finger, an ear, *etc*.
[537] See: Hans Bigalke and Andreas Rummel, "Medical aspects of toxin weapons", *Toxicology*, vol. 214, no. 3 (2005): 210–220. See also: WWII poison darts secret emerges.
[538] See, for example, the experience of Michael Bailey who served as a combat medic in the Iraq war: Michael Bailey, "Tortured Insight Into The Life Of A Combat Medic", Business Insider, <https://www.businessinsider.com/confession-of-a-combat-medic-by-the-mad-medic-2012-8/?IR=T> (accessed 15 January, 2019). Bailey has a special blog explaining the terror he experienced during war. See: Michael Bailey, "the Madness of the Combat Medic", Blogspot, <http://themadmedic.blogspot.com/> (accessed 15 January, 2019).
[539] Bigalke and Rummel, Medical aspects of toxin weapons.

a short period of 20 minutes.[540] Cyanide is popular for causing swift and painless deaths, although painful and slow deaths have been reported and it would depend on how it is administered.[541] Arsenic can also cause either slow or swift death depending on how it is administered.[542]

What may be concluded is that there cannot be a general rule on the use of poison in *fiqh al-jihād*. It may seem that different types of poisons and poisonous weapons must be examined and ruled based on the amount of unnecessary suffering that the individual types would cause. The poisons which are intended to cause slow and painful deaths are likely to be ruled as impermissible, while those intended to cause swift and possibly painless deaths are likely to be ruled as permissible.

However, as in the case of the previous weapons, Muslim states which are parties to the relevant treaties (e.g. the Rome Statute which stipulates that the use of poison and poisonous weapons as a war crime) may not use poisons due to their treaty obligations. Likewise, if this prohibition is an effective rule of customary international law, then any Muslim group may not use poisons by virtue of reciprocity.

4.4.5 Anti-Personnel Explosive Weapons

This type of weapon explodes upon contact with the human body. Therefore, the issue that may arise is mutilation (*al-muthlah*) because such an explosion within a human body will destroy parts or the totality of the human body. As explained in the sub-chapter 4.3.1, there seems to be an agreement that *al-muthlah* is impermissible

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[540] Anna Fifield, "North Korean leader's half brother suffered a 'very painful death,'Malaysian officials say", *The Washington Post*, 2017, February 26. Note that this particular poison is one among the prohibited substances in the Annex on Chemicals of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1992). Note that the preamble of this Convention seems to imply that the biggest fear as background to this Convention is the possible use of these chemicals as a weapons of mass destruction.

[541] Derek Humphry, *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for teh Dying*, (New York: Dell Publishing, 2002), 28–35.

[542] Compare: Andrew Duncan, Andrew Taylor, Elizabeth Leese, Sam Allen, Jackie Morton, and Julie McAdam, "Homicidal Arsenic Poisoning", *Annals of Clinical Biochemistry*, vol. 52, no. 4 (2015): 510–515; Tiarma Siboro and Muninggar Sri Saraswati, "Rights Campaigner Munir Dies on Plane", *The Jakarta Post*, 2004, September 8.

towards dead enemies and permissible in the case of retaliation. However, the disagreement on the ruling of *al-muthlah* towards a living enemy is the crux of this matter.

When comparing the different views, what seems to be stronger is the opinion prohibiting *muthlah* towards a living enemy except through retaliation, as the *dalīl* is clear and it is difficult to find a basis to conclude any non-emergency exception as explained above. One may add another narration from Ibn 'Umar that Prophet Muḥammad ﷺ said:

لَعَنَ اللَّهُ مَنْ مَثَّلَ بِالْحَيَوَانِ

"May Allah curse the one who disfigures an animal"[543]

The aforementioned *ḥadīth* is discussed as one of the narrations to show how there is a general command to treat animals well instead of torturing and hurting them unnecessarily.[544] Surely, when even animals deserve such a treatment, humankind should deserve more of it. This adds a bit more weight to the general prohibition to mutilate a living enemy, in addition to the command to kill with *iḥsān* as explained in sub-chapter 4.3.2. Although, certainly, further specification is necessary because most acts of killing will generally constitute as mutilation or *al-muthlah* in its general meaning as discussed earlier in sub-chapter 4.3.1.1.[545]

Having all that said, what may seem to be the general rule is that weapons which may have effects of *al-muthlah* should be impermissible. Among the weapons that may fall under this category would be explosive weapons in general as per the previously mentioned opinion of Ismail Ibrahim Abu Sharifah in sub-chapter 3.3.1.

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[543] Al-Nasā'ī, *Sunan al-Nasa'i*, ḥadīth no.4447.
[544] Muhammad Saalih Al-Munajjid, *How He Treated Them?*, (Riyadh: Zad Publishing, 2014), 6, especially at 532.
[545] Slashing an enemy with a sword would inevitably mutilate at least some parts of their limbs, and so will modern weaponry especially firearms with higher calibers.

Therefore, this discussion will affect not only anti-personnel explosive weapons but also any explosive weapons when their use would affect enemy personnel.

As explained in Chapter Three, the use of explosive weapons in general are necessary considering the nature of modern warfare. Therefore, the *muthlah* which may be caused can be considered necessary; meaning that it does not seem to fall under the 'unnecessary *muthlah*' which is prohibited. Furthermore, since most parties to armed conflicts in the modern era uses these types of weapons, then its use may be also justified by virtue of reciprocity. Although, as also outlined in Chapter Three, the use of this type of weapons must bear in mind the principles of proportionality and precaution in order to reduce the incidental losses as much as possible.

As for the case of anti-personnel exploding bullets, at a glance, it may seem that it is similar to the case of poison because they may cause more damage even when hitting non-vital body parts. In that sense, such a weapon is more effective. However, unlike poison which is not specifically prohibited in any *dalīl,* this additional damage caused by the bullet is attained by something prohibited i.e. *al-muthlah*. Therefore, if this additional damage is one that is not permitted, then it also amounts to unnecessary suffering and superfluous injury as understood in Islam.

In addition, if this is an effective customary international law, then any Muslim group may not use this type of weapon by virtue of reciprocity. In any case, any Muslim fighting group must never use anti-personnel weapons which are designed to explode on impact with the human body.

4.4.6 Bullets with Fragments Not Detectable by X-Ray

This particular kind of weapon is perhaps the most peculiar in this list. The reason is because it is very difficult to find an actual example of weapon of this nature. The ICRC notes that the adoption of such a prohibition in a number of conventions is not controversial and it can be found in numerous military manuals, but the ICRC adds

that "[n]o weapons the primary effect of which is to injure by non-detectable fragments appear to exist."[546]

As discussed in sub-chapter 4.2, glass and clear plastic are mentioned as examples. In such a case, perhaps the Improvised Explosive Devises (IED) as used by some terrorists or militias may be in this category because sometimes they insert glass to cause additional injury to the blast.[547] However, considering that the main issue in this rule is the undetectability of the shrapnel, glass should not really be a problem. Glass (and numerous other non-metallic) pieces can actually be detected by X-Ray or other medical devices such as the CT Scan, albeit being more difficult than detecting metallic pieces.[548]

Having said that, it is difficult to see why this particular weapon has to stand out from the rest. Despite it being quite difficult to even find an example of this type of weapon to begin with, it is easy to imagine a situation with similar *'illah*. Even with weapons that shoot bullets with fragments that are detectable with X-Rays, not all parties to a war would have the technology. It is easy to imagine that, when battles rage across wide areas of lands, not all injured soldiers will have access to such equipment. Following the same logic, weapons detectable by X-Ray would also be

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[546] Henckaerts and Doswald-Beck, Customary international humanitarian law, 276.

[547] Ajay K. Singh, Noah G. Ditkofsky, John D. York, Hani H. Abujudeh, Laura A. Avery, John F. Brunner, Aaron D. Sodickson, and Michael H. Lev, "Blast Injuries: From Improvised Explosive Device Blasts to the Boston Marathon Bombing", *Radio Graphics*, vol. 36, no. 1 (2016): 296; José A Centeno, Duane A Rogers, Gijsbert B van der Voet, Elisa Fornero, Lingsu Zhang, Florabel G Mullick, Gail D Chapman, Ayodele O Olabisi, Dean J Wagner, and Alexander Stojadinovic, "Embedded fragments from US military personnel—chemical analysis and potential health implications", *International Journal of Environmental Research and Public Health*, vol. 11, no. 2 (2014): 1274.

[548] Tomohisa Shoko, "Accidental chest penetration of glass foreign bodies in a 53 year old lady—The challenges with video assisted thoracoscopic extraction", *International journal of surgery case reports*, vol. 23 (2016): 124–127; Murat Ozsarac, Ahmet Demircan, and Serkan Sener, "Glass foreign body in soft tissue: possibility of high morbidity due to delayed migration", *The Journal of emergency medicine*, vol. 41, no. 6 (2011): e125–e128; Centeno, Rogers, van der Voet, Fornero, Zhang, Mullick, Chapman, Olabisi, Wagner, and Stojadinovic, Embedded fragments from US military personnel—chemical analysis and potential health implications; Frank Ashall, *Remarkable Discoveries!*, (Cambridge: Cambridge University Press, 1994), 28; Farzaneh Kaviani, Reza Javad Rashid, Zahra Shahmoradi, and Masoud Gholamian, "Detection of foreign bodies by spiral computed tomography and cone beam computed tomography in maxillofacial regions", *Journal of dental research, dental clinics, dental prospects*, vol. 8, no. 3 (2014): 166; Miguel Saps, John M Rosen, and Jacob Ecanow, "X-ray detection of ingested non-metallic foreign bodies", *World journal of clinical pediatrics*, vol. 3, no. 2 (2014): 14.

outlawed in the event that there is no access to X-Ray. Yet, there is no such prohibition. While it is true that perhaps non-metallic wounds may present more difficulty in detection, but difficulty of treatment is multi-factored and can happen to any type of wound caused by any kind of material. After all, the difficulties experienced by war medics in the field are very complex. In fact, having a glass shrapnel remaining might not necessarily cause much pain and the victim may proceed normal activities, although long term implications may exist.[549] However, one may ask: why is this noticeably different from any other long-term injuries which war may cause to surviving combatants?

A proper empirical research is needed to examine the reasons why some IEDs use such materials. It is of course possible that the crafters of such weapons really did intend for an undetectable fragment injury. However, it is equally possible that the crafters did not have access to other materials at the time. From an Islamic standpoint, this may be relevant to arrive on rulings on individual cases, but such an empirical research is beyond the scope of this thesis.

As far as *fiqh al-jihād* is concerned with the information at hand, causing maximum harm to the enemy would mean a greater chance of incapacitation. Modern IHL does not seem to be concerned of the additional harm of the weapons of this nature, except when the shrapnel cannot be detected with X-Rays. One may wonder if there are any proper empiric researches to show whether, truly, glass shrapnel causes significantly more suffering than its metallic counterparts considering the circumstances. Even then, another research must follow: how does it compare to the military advantage? Perhaps one can only wonder because, alas, such a research is difficult to find. With so much uncertainty and imagination of the situation, one can only revert back to the original rule of permissibility.

[549] Ozsarac, Demircan, and Sener, Glass foreign body in soft tissue: possibility of high morbidity due to delayed migration.

Be that as it may, modern IHL prohibits it. As it stands, it is prohibited by international treaties such as the Protocol I to the Convention on Certain Conventional Weapons 1980, and Muslim nations who are parties to it are definitely bound. Also, the ICRC noted that this is an effective customary international law. If that is so, then all Muslim groups may not use it by virtue of reciprocity.

4.4.7 Incendiary Weapons

In order to discuss the ruling towards incendiary weapons, one must first critically examine the juristic opinions regarding the use of fire in war. While the *ḥadīth* seems clear, but the way the companions allegedly understood it are different, but this warrants further examination. As it turns out, one must criticise the nature or authenticity of the narrations pertaining the opinions of the companions.

The narration attributed to ‘Alī ibn Abi Ṭālib is authentic, but then its nature must be further examined. There are a number of narrations indicating how ‘Alī ibn Abi Ṭālib practised burning and ‘Abd Allah ibn ‘Abbās protesting against it, indicating the difference of opinions between them. However, some of these narrations indicate that ‘Alī, upon hearing Ibn ‘Abbās’s protest, acknowledges his mistake by saying صَدَقَ ابْنُ عَبَّاسٍ (how truthful is Ibn ‘Abbās) in different narrations.[550]

Furthermore, whether Abū Bakr truly allowed the act of burning is also subject to further research. The first basis that could be found on this matter is the alleged burning towards Fuja’ah al-Sulamī who allegedly requested an army and weaponry to fight against the apostates in the *Riddah* wars, but then ended up robbing and pillaging

[550] Al-Tirmidhī, *Jami al-Tirmidhi*, ḥadīth no.1458. Note that pointing out mistakes of *ijtihād* of the companions indicated in this thesis is with all due respect and should not be understood as to degrade or insult them in any way. Only Prophet Muḥammad ﷺ is free from error. Anyone other than him is not free from flaw, without undermining their contributions towards the glory of Islam. For a person who does *ijtihad* there are two rewards when they are correct and one reward when they are incorrect. See: Muḥammad ibn Ismā‘īl Al-Bukhārī, *Sahih Al-Bukhari*, *Vol. 9*, (Riyadh: Darussalam, 1997e), ḥadīth no.7352. Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.4487-4489. These *aḥadīth* mention judge rulings, but they are understood to apply also to *ijtihad* in general. See: Al-Utsaimin, Ushul Fiqih, 129–130.

both the Muslims and the apostates.[551] This story is narrated in various early sources, but none of them is without problem, as explained below in two groups.

The first group consists of scholars who have reported the aforementioned narration in their famous works but neither provide the chain of narrators and therefore the narration cannot be examined for their authenticity. Those in this group are Imām Ibn Kathīr, Ibn Athīr, and Ibn Khaldūn.[552] Therefore, their narration cannot be used as a consideration.

The second group is those who do provide the chain of narrators. This group consists of Imām al-Ṭabarī, Ibn ʻAbd al-Barr, Al-Baladhuri, and Ḥumayd ibn Zanjawayh. They have reported this story but with problematic chains, with the explanation as follows.

Imam al-Ṭabari provides two narrations concerning this matter.[553] The first narration (492) in its chain has quite a lot of problematic narrators: Shuʻayb ibn Ibrāhīm Al-Kūfī (*majhūl*[554] and problematic),[555] Saif ibn ʻUmar (*ḍaʻīf*, accused of fabrication and *zandaqa*, and *matrūk al-ḥadīth*[556]),[557] and Sahl bin Yūsuf (*majhūl*).[558] The second narration (493) also has problematic narrators: Ibn Ḥumayd al-Rāzī (a liar),[559] Ibn Isḥāq (*mudallis*[560]),[561] and Salamah ibn al-Faḍl (*munkar*[562]).[563]

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[551] There are a number of sources of this incident, which is discussed below.
[552] Ismāʻīl ibn Kathīr, *Al-Bidāyah wa al-Nihāyah*, *Vol. 9*, (Beirut: Dār Hijr lil-Thibāʼah wa al-Nashr, 1418), 456; ʻAlī ibn Muḥammad ibn Athīr, *Al-Kāmil fi al-Tārīkh*, *Vol. 2*, (Beirut: Dar al-Kitab Al-ʻArabi, 1417), 352; ʻAbd al-Raḥmān ibn Muḥammad Ibn Khaldūn, *Tārīkh Ibn Khaldūn*, *Vol. 2*, (Beirut: Dar al-Fikr, 1408), 72.
[553] Al-Ṭabari, Tārîkh al-Umam wa al-Muluk, 492–493.
[554] *Majhul* means that the narrator is unknown, and thus it cannot be verified whether she/he is reliable.
[555] Al-ʿAsqalānī, Līsān al-Mīzån, 517; Al-Dhahabī, *Mīzān al-I'tidāl*, 275.
[556] To be accused with *zandaqa* means to be accused of deviant tendencies of belief, making the person unreliable to transmit narrations. *Matrūk al-ḥadīth* means that the narrator's narrations must be discarded.
[557] Al-ʿAsqalānī, *Tahdhib al-Tahdhib*, 295.
[558] Al-Dhahabī, *Mīzān al-I'tidāl*, 255.
[559] Muḥammad ibn Ismāʻīl Al-Bukhārī, *Al-Tārīkh al-Kabīr*, *Vol. 1*, (Hyderabad: Dār al-Maʼārif al-ʻUthmaniyyah), 69.
[560] *Mudallis* means that the narrator often hides the person from which she/he narrates from, making the missing narrator impossible to be verified. As for Ibn Isḥāq in particular, there is more discussion about him. He is discussed more in Chapter Five.
[561] Ibn Ḥajar Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, *Vol. 11*, (Beirut: Dar al-Ma'rifah, 1379b), 163.
[562] A *munkar* narrator is a narrator who errs too much.

The narration of this story of Abū Bakr from the work of Ibn ‘Abd al-Barr has Saif ibn ‘Umar in the chain,[564] who cannot be accepted as per the reasons explained above. As for the narration of Imām al-Baladhuri, it is also weak because the chain of narrators include Dāwud al-Asadi (his biography cannot be found in the main books of biographies of *ḥadīth* narrators) and he narrated from unnamed teachers.[565] Finally, the work of Imām Ḥumayd ibn Zanjawayh is not authentic either because in its chain there is ‘Ulwan ibn Dāwud al-Bajali (*munkar al-ḥadīth*).[566] Therefore, neither narrations in this group can be considered.

Another narration on Abū Bakr also involves Khālid ibn Al-Walīd, where the latter requests the former to be given permission to burn the homosexuals, and this was granted by the former. This is not related to war so it will not be discussed in detail, but it should be at least mentioned because it builds up the claim that Abū Bakr and Khālid ibn Al-Walīd felt to be permissible to use fire.[567] This narration is not authentic because most of the chain of narrators have a missing link (i.e. the person who narrated from Abū Bakr), and others contain an unknown narrator as well as a *matrūk* narrator.[568]

The last narration that could be found regarding Abū Bakr and the use of fire in context of war involves ‘Umar ibn Al-Khaṭṭāb and Khālid ibn Al-Walīd. The narration retells how ‘Umar ibn Al-Khaṭṭāb demanded Abū Bakr to sack Khālid ibn Al-Walīd for burning some apostates because he was imposing Allah’s punishment, but Abū

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[563] Muḥammad ibn Ismā‘īl Al-Bukhārī, *Al-Tārīkh al-Kabīr*, *Vol. 4*, (Hyderabad: Dār al-Ma’ārif al-‘Utsmaniyyah), 84.
[564] Yūsuf Ibn ‘Abd Allah ibn ‘Abd Al-Barr, *Al-Istî’āb fi Ma’rifah al-Aṣḥāb*, *Vol. 2*, (Beirut: Dar al-Jayl, 1412), 776.
[565] Aḥmad ibn Yaḥyā Al-Balādhurī, *Futūh al-Buldān*, (Beirut: Dār wa Maktabah al-Hilāl, 1988), 282.
[566] Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Mīzān al-I’tidāl*, *Vol. 5*, (Beirut: Dar al-Ma’rifah li al-Thiba’ah wa al-Nashr, 1382b), 135; Ibn Ḥajar Al-ʿAsqalānī, *Līsān al-Mīzān*, *Vol. 4*, (Beirut: Mu’assasah al-A’lami li al-Mathbu’at, 1390), 218; Muḥammad ibn ‘Amr Al-’Uqaylī, *Al-Dhu’afā’ al-Kabīr*, *Vol. 2*, (Beirut: Dar al-Maktabah al-’Ilmiyyah, 1404), 190.
[567] This contributes to the general understanding of the *ḥadīth*, because it speaks of giving *adhhab* with fire and this element exists whenever fire is used towards someone: whether in context of war or otherwise.
[568] ibn Ḥazm, *Al-Muhallā bil-Āthār*, 383; Ibn Ḥajar Al-ʿAsqalānī, *Al-Dirāyah fi Takhrīj Ahādīth al-Hidāyah*, *Vol. 2*, (Beirut: Dar al-Ma’rifah), 103.

Bakr refused because he will not stop the sword that Allah has brandished towards the polytheists.[569] Unlike the previously discussed narrations on Abū Bakr, this one is narrated through very credible and unbroken chains of narrators i.e. Abū Muʻāwiyah Muḥammad ibn Khāzim from Hishām ibn ʿUrwah from ʻUrwah ibn al-Zubayr ibn al-ʻAwwām.[570]

However, while this seems to be the only narration which is authentic towards the attitude of Abū Bakr towards the use of fire, it does not seem to really show his positive support towards it. The words of Abū Bakr did not indicate whether he was in favour (or otherwise) of Khālid's action. Rather, it merely seems to rebuke ʻUmar's opinion as something that may not be advantageous in the existing war situation. In fact, Abū Bakr's silent towards ʻUmar's argument might indicate his agreement towards ʻUmar. It must be noted that this was not the first time that Abū Bakr did not punish or sack Khālid ibn Al-Walīd despite the mistake he committed. Another example of such a case was when he executed Malik ibn Nuwayrah. In that case, both ʻUmar ibn Al-Khaṭṭāb and Abū Bakr al-Ṣiddīq agreed that Khālid made a mistake but Abū Bakr did not punish or sack Khālid due to the necessities of war.[571] Note that Khālid ibn Al-Walīd was a very important commander in the *Riddah* war, which, at the time of that conversation,[572] was still ongoing.

Another narration which is authentic and necessary to be mentioned is the *ḥadīth* of the ʻUraniyyīn:

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[569] ʻAbd Allah ibn Muḥammad Ibn Abī Shaybah, *Mushannaf Ibn Abī Shaybah*, *Vol. 6*, (Riyadh: Maktabah al-Rushd, 1409b), 547.
[570] See respectively: Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Siyar A'lām al-Nubalā'*, *Vol. 9*, (Beirut: Mu'assasah al-Risalah, 1422c), 73; Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Siyar A'lām al-Nubalā'*, *Vol. 6*, (Beirut: Mu'assasah al-Risalah, 1422d), 35; Al-Dhahabī, *Siyar A'lām al-Nubalā'*, 422.
[571] Ibn Ḥajar Al-ʿAsqalānī, *Al-Iṣābah Fī Tamyīz al-Ṣaḥābah*, *Vol. 5*, (Beirut: Dar al-Jayl, 1412b), 755; Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Minhaj al-Sunnah al-Nabawiyyah*, *Vol. 5*, (al-Qāhirah: Maktabah Ibn Taymiyyah, 1406), 518–519.
[572] As the narration clearly implies.

قَدِمَ رَهْطٌ مِنْ عُكْلٍ عَلَى النَّبِيِّ صلى الله عليه وسلم كَانُوا فِي الصُّفَّةِ، فَاجْتَوَوُا الْمَدِينَةَ فَقَالُوا يَا رَسُولَ اللَّهِ أَبْغِنَا رِسْلاً. فَقَالَ " مَا أَجِدُ لَكُمْ إِلاَّ أَنْ تَلْحَقُوا بِإِبِلِ رَسُولِ اللَّهِ صلى الله عليه وسلم ". فَأَتَوْهَا فَشَرِبُوا مِنْ أَلْبَانِهَا وَأَبْوَالِهَا حَتَّى صَحُّوا وَسَمِنُوا، وَقَتَلُوا الرَّاعِيَ وَاسْتَاقُوا الذَّوْدَ، فَأَتَى النَّبِيَّ صلى الله عليه وسلم الصَّرِيخُ، فَبَعَثَ الطَّلَبَ فِي آثَارِهِمْ، فَمَا تَرَجَّلَ النَّهَارُ حَتَّى أُتِيَ بِهِمْ، فَأَمَرَ بِمَسَامِيرَ فَأُحْمِيَتْ فَكَحَلَهُمْ وَقَطَعَ أَيْدِيَهُمْ وَأَرْجُلَهُمْ، وَمَا حَسَمَهُمْ، ثُمَّ أُلْقُوا فِي الْحَرَّةِ يَسْتَسْقُونَ فَمَا سُقُوا حَتَّى مَاتُوا

"A group of people from `Ukl (tribe) came to the Prophet (ﷺ) and they were living with the people of As-Suffa, but they became ill as the climate of Medina did not suit them, so they said, "O Allah's Messenger (ﷺ)! Provide us with milk." The Prophet (ﷺ) said, I see no other way for you than to use the camels of Allah's Apostle." So they went and drank the milk and urine of the camels, (as medicine) and became healthy and fat. Then they killed the shepherd and took the camels away. When a help-seeker came to Allah's Apostle, he sent some men in their pursuit, and they were captured and brought before mid-day. The Prophet ordered for some iron pieces to be made red hot, and their eyes were branded with them and their hands and feet were cut off and were not cauterized. Then they were put at a place called Al- Harra, and when they asked for water to drink they were not given till they died."[573]

This narration does not necessarily speak of a war context, therefore it is not directly relevant. However, as mentioned much earlier in this sub-chapter, this was used as one of the justification to use fire. Furthermore, the virtue of this *ḥadīth* may be relevant in a different way. When narrating the *ḥadīth*, the companion Anas ibn Mālik stated that Prophet Muḥammad ﷺ pierced the eyes of those people because they had done the same towards the shepherd first.[574] The scholars of *ḥadīth* then explain that the use of burned metal towards the eyes in that *ḥadīth* means that the use of fire may be used for retaliation (*qiṣāṣ*).[575] Applied in war, this understanding is supported also by the Qur'an in Sūrah Al-Tawbah (9) verse 36. This is what may have

[573] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.6804-6805.
[574] Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.4360.
[575] Ibn Ḥajar Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, *Vol. 1*, (Beirut: Dar al-Ma'rifah, 1379c), 341; 'Abdullāh bin Muḥammad Al-Amīn Al-Shinqīṭī, *Adwa' al-Bayan*, *Vol. 2*, (Beirut: Dar al-Fikr, 1415), 115–116; Ibn Al-Qayyim Al-Jawziyah, *Zad al-Ma'ad*, *Vol. 3*, (Beirut: Mu'assasah al-Risalah, 1415), 255.

become the basis of the opinion of the jurists (e.g. al-Thawrī) who allow the use of fire in retaliation when the enemy uses it first, as mentioned earlier in this sub-chapter.

Judging from the aforementioned *aḥadīth* and narrations, including that of the companions, there are a few things that could be learned. The first lesson is that it may seem that the strongest opinion is the one disfavouring the use of fire except for retaliation. As shown in the analysis above, such opinion is closer to the apparent meaning of the text of the *sunnah* and supported by companions who were known as *fāqih*, e.g. 'Umar ibn Al-Khaṭṭāb and Ibn 'Abbās. The narrations indicating Abū Bakr's position are either not authentic or does not truly indicate his favour towards burning. The narrations concerning 'Alī ibn Abi Ṭālib eventually show that he acknowledges his mistake, and the only remaining opinion is that of Khālid ibn Al-Walīd.

With much respect towards Khālid ibn Al-Walīd who was a noble Companion and was famous for his prowess in the battlefield as well as piety. Ibn al-Qayyim al-Jawziyyah has identified that, while the Companions seemed to generally have a very strong understanding towards Islam, not all companions were *mujtahid*, rather there were only 130 of them who were.[576] These 130 companions are classified in three categories: those who made a lot of *ijtihād* (*Al-Mukthirūn*), those who made a medium amount of ijtihad (*Al-Mutawassiṭūn*), and those who made only a few *ijtihād* (*Al-Muqillūn*).[577] 'Umar, Ibn 'Abbās, and 'Alī are in the list of *Al-Mukthirūn*, and they are known for being among the *fuqahā'* and *mufassirūn* among the Companions.[578] On the other hand, Khālid ibn Al-Walīd is among the *Al-Muqillūn* in that list. While he is

[576] Imam Ibn Al-Qayyim Al-Jawziyah, *I'lamul Muwaqqi'in: Panduan Hukum Islam (4 Jilid Lengkap)*, (Jakarta: Pustaka Azzam, 2000), 29. 29-31

[577] Abdullaah Jalil, "Sumbangan Ilmuan Fiqah dalam Pemikiran Al-Ash'ariyyah" in *Prosiding Seminar Kebangsaan Asyairah Ahli Sunah Waljamaah 2.0: Mengukuhkan Pemikiran Masyarakat Melalui Khazanah Ilmuwan Umat*, (Selangor: Pusat Akidah dan Keamanan Global, Fakulti Pengajian Islam, Universiti Kebangsaan Malaysia, 2018), 4; Al-Jawziyah, I.I.A.-Q., I'lamul Muwaqqi'in: Panduan Hukum Islam (4 Jilid Lengkap), 29–31.

[578] Al-Jawziyah, I.I.A.-Q., I'lamul Muwaqqi'in: Panduan Hukum Islam (4 Jilid Lengkap), 29–30, 32–33; Jalil, Sumbangan Ilmuan Fiqah dalam Pemikiran Al-Ash'ariyyah, 4; Sa'ad Abdul Wahid, *Studi Ulang Ilmu Al-Qur'an & Ilmu Tafsir*, *Vol. 2*, (Yogyakarta: Suara Muhammadiyah, 2012), 65.

very well known for his prowess in battle as a fighter, commander, and tactician, there are some memorable mistakes in *ijtihād* related to war that he has made.

For example, during the time of Prophet Muḥammad ﷺ , Khālid ibn Al-Walīd was known to have been mistaken in making *ijtihād* including in the laws of war. In authentic narrations, Khālid killed some prisoners and told other companions to also kill them, and when hearing this Prophet Muḥammad ﷺ said the following statement twice:

اللَّهُمَّ إِنِّي أَبْرَأُ إِلَيْكَ مِمَّا صَنَعَ خَالِدُ بْنُ الْوَلِيدِ

"O Allah! I am free from what Khālid ibn Al-Walīd has done."

This *ḥadīth* was recorded by Imām Al-Bukhārī in his *Ṣaḥīḥ* in a few places, *inter alia* under the chapter of 'If a judge passes an unjust judgement or a judgement which differs from that of the learned religious men, such a judgement is to be rejected'.[579] This is in addition to the incident of the execution of Malik ibn Nuwayrah as explained earlier in this sub-chapter. Therefore, other than the fact that 'Umar, Ibn 'Abbās and 'Alī (after he acknowledged his mistake) were more consistent towards the *Sunnah*, they were stronger in *ijtihād* as compared to Khālid ibn Al-Walīd.

The second lesson is that, in the context of war, it seems that the narrations of companions who allegedly condone the use of fire mostly focus on burning as a form of punishment (in the companion's cases cited above: punishment for apostasy and *al-liwāṭ*). Following the first lesson, one may draw a conclusion that punishing with fire is generally impermissible except in retaliation cases. However, more must be considered.

What is apparent is that the anti-personnel use of incendiary weapons is impermissible except in case of retaliation. The question remains on whether or not it

[579] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.7189. Imam Nasa'i placed this *ḥadīth* under the chapter of "Refuting a Judge if He Passes an Incorrect Judgment", see: Abu 'Abd Al-Raḥmān Al-Nasā'ī, *Sunan al-Nasa'i*, *Vol. 6*, (Riyadh: Darussalam, 2007b), ḥadīth no.5407.

is permissible to use it for other purposes, such as flushing out enemy bunkers or to destroy enemy buildings. The generality of the prohibition may seem to indicate that all are included. However, there are jurists who allow the use of fire not necessarily directed towards the enemy individuals but the structures in which they are in, such as forts and ships.[580] This may indicate that when a military objective cannot be attained unless with the use of fire, then perhaps *ḍarūrah* may justify its use. After all, an enemy positioned in a bunker can easily shoot at the incoming army while the latter would have much difficulty in shooting back.

Having all that said, it seems that *fiqh al-jihād* and modern IHL would be mostly compatible. The general prohibition from using fire and only using so proportionally[581] and during times of imperative necessity is understood by both laws. However, the issue of retaliation is where there may be an issue.

In general, modern IHL allows reprisals as long as they are: (a) conducted towards an enemy who has already committed a violation, with a purpose to stop them from doing so, (b) conducted as last resort, (c) proportional, (d) decided by the highest level of government, and (e) stopped when the enemy has ceased the violation.[582] In addition, civilians may not be the object of reprisals as per Article 51(6) of AP I.[583]

There may be some discussions on whether *fiqh al-jihād* allows reprisals towards protected persons, and this deserves a separate discussion which is beyond the scope of this thesis as it is a topic related to the principle of distinction. However, relevant to this chapter, the requirements (b) and (d) do not seem to be required in any works of *fiqh al-jihād*. Yet, the ICRC cites that these requirements are based on customary international law.[584] In such a case, although reprisals is part of reciprocity which is considered in *fiqh al-jihād,* the Muslims would still have to bear in mind the

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[580] As mentioned in Sub-Chapter 4.3.1, this includes Al-Awzā'ī and the Madinah jurists as cited by al-'Ayni.
[581] As per Chapter Three.
[582] Henckaerts and Doswald-Beck, Customary international humanitarian law, 515–519.
[583] See also: Ibid., 520.
[584] Ibid., 516–518. See also Article 52 of the Articles on the Responsibility of States for Internationally Wrongful Acts (2001), also ICTY, Prosecutor v Kupreskic et. al. (IT-95-16-T) Trial Judgment, 535.

other rules of customary laws (in this case, the aforementioned elements [b] and [d] of reciprocity in IHL). Therefore, if this is an effective rule of customary international law, then the Muslims must also adhere to it.

4.4.8 Pebbles

The slingshot has become one of the most iconic famous weapons of choice among the Palestinian resistance, both in the '*Intifāḍah*' movement as well as during protests.[585] While this weapon is not discussed in modern IHL, it must be discussed in the context of *fiqh al-jihād*. This is because, as mentioned in sub-chapter 4.3.1, some jurists prohibit it based on an authentic *ḥadīth*, while in reality it is being used by the Palestinian resistance.

What seems to be the conclusion of the *ḥadīth* on pebbles is that when the true interest is to kill, using a weapon that merely hurts the target seems to be unnecessary and therefore prohibited. One may argue that even just hurting the enemy is helpful enough to slow them down and reduce their fighting capacity. However, similar logic also applies in hunting because an injured animal is slower and therefore easier to hunt. Yet, the *ḥadīth* still reads the way it does. It may be concluded, then, that using pebbles which are unable to do any further than wounding the enemy is impermissible.

It is possible that the aforementioned opinions of the jurists may differ due to the fact that there are different types of weapons which throws pebbles or stones. There are weapons that throws stones at enemies, such as the *manjanīq* or slingshots. However, from its wordings, the *ḥadīth* seems to prohibit stones which are small

[585] *Palestine Chronicle*, "The Slingshot: A Symbol of Palestinian Resistance Throughout History (VIDEO)", <http://www.palestinechronicle.com/the-slingshot-a-symbol-of-palestinian-resistance-throughout-history-video/> (accessed 17 January, 2019); Nidal Al-Mughrabi, "Israeli troops fire shots, tear gas at Gaza protesters, 1,100 Palestinians hurt", *Reuters*, 2018, May 4; *Aljazeera*, "“Iconic” image of Palestinian protester in Gaza goes viral", 2018, October 25.

enough and which are pelted slow enough that it merely injures the target.[586] The *manjaniq* is unquestionably deadly as it hurls large boulders which can destroy walls and castles, so definitely a poor human body would fare less lucky when hit by that. Some types of slingshots can be actually very deadly towards enemy forces,[587] so the *ḥadīth* does not seem to talk about prohibiting these.

When examined more carefully, the wordings of the *ḥadīth* does not seem to suggest the use of weapons at all, rather it sounds like throwing by hand. However, hand thrown rocks can actually kill as in the case of *al-rajm* penalties.[588] Therefore, given the wording of the *ḥadīth* in its entirety, it must be speaking of the throwing of pebbles which are small and slow enough to only cause such kinds of injuries and nothing more than that. Therefore, a reasonable conclusion is that the use of slingshots that are capable of killing the enemy is permissible, but those unable to do so are impermissible.

However, it is essential to note that the jurists do not speak of situations where no other weapons are available. Such situations may be classified as emergency, where things which are normally impermissible will become temporarily permissible to the extent of that emergency.[589] Bearing in mind the Palestinian *Intifāḍah* as a strong example, when no other weapons are available in facing an incoming enemy force, items incapable to kill but can merely injure may surely be used rather than having no weapon at all. Surely the choice of some Palestinians to fight the heavily and modern armed Zionist forces with mere slingshots is not based on their personal preference.

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[586] Note that if a tiny stone is shot with a very high speed, it can pierce and kill. Firearms work this way.
[587] Heather Pringle, "Ancient Slingshot Was as Deadly as a .44 Magnum", National Geographic, <https://news.nationalgeographic.com/2017/05/ancient-slingshot-lethal-44-magnum-scotland/> (accessed 21 December, 2018).
[588] A description of *al-rajm* can be found in the following narrations: al-Naysābūrī, Sahih Muslim, ḥadīth no.4418-4436; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no.4419-4421.
[589] Ismail and Rahman, Islamic Legal Maxims: Essentials and Applications, 175.

4.4.9 Non-Weapon Specific Acts of Cruelty

Other than using specific means of warfare, unnecessary suffering and superfluous injuries can also be inflicted by the methods of wielding weapons which are not necessarily prohibited. The easiest example would be *al-muthlah* which could be done with any weapon. As mentioned in sub-chapter 4.3.1, some jurists allow this when there is *maṣlaḥat* such as to shock the morale of the enemy. A specific case provided by Al-Sarkhasī was to do *muthlah* towards the enemy commander or prominent figure, which may demoralise the enemy and boost the morale of the Muslim army.[590]

As explained in sub-chapter 4.4.5 earlier, the aforementioned opinion of Al-Sarkhasī (and others who have similar opinion)[591] is not the preferred opinion. However, that sub-chapter only discusses *al-muthlah* in context of explosive weapons. Other than the situation of explosive weapons, there are other possible scenario involving a combatant deliberately taking his time to torture his opponent before ultimately killing them.

There have been numerous instances where such a scenario has occurred. A popular example was shown in the miniseries 'The Pacific' which was a very realistic depiction of the Pacific front of World War II as noted by the veterans of that war.[592] The depiction of the Battle of Okinawa showed a group of American soldiers making fun of a lone Japanese soldier wielding a Katana sword (his comrades had been killed). The American soldiers shot the lone Japanese soldier multiple times to harass, humiliate, and injuring him without the intention to kill him (until an American soldier

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[590] Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, 110.

[591] It is important to remember that these jurists still agree with the general prohibition of *muthlah* even towards living enemies. However, they find the aforementioned situation as another exception other than retaliation. As mentioned in 4.2.1, ceremonial duels are included in this category. See: Al-Bahūtī, Sharḥ Muntahā al-Irādat, 625; ibn Taymiyyah, Al-Muntaqā fi al-Aḥkām Al-Shar'iyyah, 742; Ibn 'Ābidīn, Al-Dur al-Mukhtār wa Ḥāshiyah, 307; Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, 110.

[592] Heather Fishel, "7 Surprising Facts About the HBO Miniseries The Pacific", War History Online, <https://www.warhistoryonline.com/featured/7-surprising-facts-hbo-miniseries-pacific.html/2> (accessed 22 January, 2019).

finally decided to killed him to end his misery).[593] Although this is not exactly a case which Al-Sarkhasī would have approved,[594] but this illustrates that torturous killing is sometimes a reality of war. While such cruelty may happen during captivity (which is beyond the scope of this thesis), it may also occur in the battlefield as illustrated above.

From an Islamic perspective, depending on the method, it may constitute as *al-muthlah* or, in cases where it does not involve *al-muthlah*, it would at least be an act of cruelty. Such an act is prohibited in *fiqh al-jihād* due to the prohibition of *al-muthlah,* or otherwise, at least it is prohibited due to the command to kill with *iḥsān*.

4.5 CONCLUSION

After starting by explaining the prohibition from causing unnecessary suffering and superfluous injuries, this chapter then explores the Islamic jurists' perspectives. It may seem that the classical jurists do not discuss any such principle in context of war, but they do discuss specific weapons which are deemed to cause unnecessary suffering and superfluous injuries. However, the modern jurists seem to start discussing such a principle in context of war. Furthermore, as sub-chapter 4.4 finds, there is sufficient evidence from which to derive such a principle to prohibit causing unnecessary suffering and superfluous injuries.

However, as it is shown throughout the remainder of the Chapter, the Islamic version of the principle is not entirely similar with modern IHL. In fact, in comparison to chapter three, there seems to be a slightly larger ratio of incompatibilities between *fiqh al-jihād* and modern IHL. There are a number of weapons prohibited under IHL which are difficult to prohibit under *fiqh al-jihād* in terms of original rule, whether via

[593] Such an act was a manifestation of immense hatred that grew towards the opponent, which led to the commissioning of a number of possible war crimes. See: Tim Van Patten, *The Pacific, Episode 9 "Okinawa"*, (United States of America: DreamWorks Television, 2010).
[594] It is very difficult to find a scene that fits exactly that scenario.

qiyās towards specific prohibitions or through general principles. Yet, as concluded in all weapons mentioned under sub-chapter 4.4, these incompatibilities can be easily addressed via treaty law or reciprocity.

Chapters three and four are similar in the sense that the centre of the discussion is the destructive powers that the means and methods of warfare can be inflicted. The discourse is on how to limit them only to what is necessary. The next chapter, i.e. chapter five, discusses specifically a method of warfare which does not revolve around the direct damage that it causes, but rather the slyness of which such damage is achieved. Deception has been a long-standing part of warfare, and modern IHL as well as *fiqh al-jihād* seem to make a distinction between acceptable and non-acceptable deceptions.

CHAPTER FIVE

THE PROHIBITION FROM COMMITTING TREACHERY AND PERFIDY IN *FIQH AL-JIHĀD*

5.1 INTRODUCTION

To those who understand at least a little about how war is waged and how battles are fought, it is clear for them that war is more than just a competition of weapons and manpower. The play of planning and strategy is very vital, so much that they have caused large and strong armies to be defeated by weaker and smaller counterparts. A very famous example of this war was the Battle of Yarmouk, where the Muslim army of around 36,000 to 46,000 defeated a massive Roman (Byzantine) army of around 120,000 to 240,000.[595] Owing to *inter alia* Khālid ibn Al-Walīd's tactical genius, the Muslims not only won but also managed to kill from 50,000 to 120,000 Romans while themselves losing only 3000.[596]

An important part of war strategy involves the use of deception, the use of which has been all over the pages of the history of warfare. Sometimes armies use tricks in such a way that enemies, sometimes ones they cannot normally defeat, are caught off guard and defeated. A very famous example of this is when the Greek alliance sneaked a small force into a giant wooden horse sent to the Trojans who took the 'gift' inside their previously impenetrable city walls.[597] Even Sun Tzu, the famous

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[595] The numbers are contested, but the sources are unanimous that it was a small army defeating a much larger one. See: Ismail ibn Katsir, *Al-Bidayah wa Nihayah: Masa Kulafa'ur Rasyidin*, edited by Muhammad bin Shamil As-Sulami, (Jakarta: Darul Haq, 2004), 157–160; Muḥammad ibn Jarīr Al-Ṭabari, *The History of Al-Tabari*, *Vol. 11*, translated by Khalid Yahya Blankinship, (New York: State University of New York Press, 1993a), 86–87, 98, 100–102; Agha Ibrahim Akram, *The Sword of Allah: Khalid bin al-Waleed*, (Oxford: Oxford University Press, 2004), 425.

[596] ibn Katsir, Ismail, Al-Bidayah wa Nihayah: Masa Kulafa'ur Rasyidin, 157–160; Al-Ṭabari, *The History of Al-Tabari*, 86–87, 98, 100–102; Akram, The Sword of Allah: Khalid bin al-Waleed, 425.

[597] See generally: Homer, *The Iliad*, (New York: Penguin Group, 1990).

strategist from ancient China, cannot emphasise enough on the importance of deception in warfare.[598]

However, even throughout history, there are certain kinds of deception which are shunned and seen as an unacceptable method of warfare. Such kinds of deception, in the terminology of modern IHL, is referred to as 'perfidy'.

This chapter first discusses the concept of perfidy in modern IHL. It then proceeds to explore the rules related to deception during warfare in *fiqh al-jihād* to see how it stands in comparison to the IHL rules on perfidy.

5.2 PERFIDY AND TREASON IN MODERN IHL

As explained above, deception has been a long-standing essential element of warfare throughout history. However, there have always been certain acts considered too treacherous to be acceptable. For example, Emer de Vattel and Hugo Grotius, in context of the legality of assassination towards enemy leaders, have argued on the extent of which such acts may be treasonous.[599] Patricia Zengel gives some examples of early commentators of the laws of war such as Alberico Gentili, Emer de Vattel (as aforementioned), Hugo Grotius, and C. Van Bynkershoek arguing the same thing.[600] Zengel concludes that, according to the aforementioned commentators and reflective of the law of nations at the time, the term 'treachery' meant "… betrayal by one owing an obligation of good faith to the intended victim."[601]

In modern IHL, the rule to allow deception in general except when they are treasonous still persists as, in the words of the Jean-Maria Henckaerts and Louise

[598] Sun Tzu, *The Art of War (Restored Translation)*, (Pax Librorum Publishing House, 2009), 4–5.
[599] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*, (PH Nicklin & T. Johnson, 1835), 358–359, 363,.
[600] Patricia Zengel, "Assassination and the Law of Armed Conflict", (The Judge Advocate General's School, United States Army, 1991), 6–14.
[601] Ibid., 14.

Doswald-Beck, "a long-standing rule of customary international law."[602] Generally, treasonous deception is usually termed as perfidy[603] which is defined as follows:

> "…acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence..."[604]

It may seem that modern IHL prohibits perfidy specifically only in combat situations, as Article 37(1) reads as follows: "It is prohibited to kill, injure or capture an adversary by resort to perfidy." However, this is not to suggest that treachery is permitted in other situations. Rather, good faith (which treachery and deceit are breaches of)[605] is a general principle of international law applicable in all situations.[606]

It must be noted that there seems to be a shift of paradigm between treachery before and upon the arrival of modern IHL. As Zengel notes, the modern IHL concept of perfidy shifts from protecting the victim of treachery towards protecting a greater interest of the international community. She says:

> "In this context that means that the continued potency of protections established for civilian noncombatants depends upon those protections not being available to shield those who are combatants. The object to be protected is not the targeted adversary, but rather the safety of the

[602] Henckaerts and Doswald-Beck, Customary international humanitarian law, 203. See also Article 37(2) of AP I.
[603] Although not all acts of unlawful deception necessarily fall under the definition perfidy, as shown in the later paragraphs.
[604] Article 37(1) of AP I.
[605] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 1483.
[606] See: Robert Kolb, "Principles As Sources Of International Law (With Special Reference to Good Faith)", *Netherlands International Law Review*, vol. 53, no. 1 (2006): 1–36; Michael P Van Alstine, "The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection", *The Georgetown Law Journal*, vol. 93 (2005): 1885–1945; Tariq Hassan, "Good faith in treaty formation", *Vancouver Journal of International Law*, vol. 21 (1980): 443.

civilian population and, more generally, continued confidence in law and international agreements."[607]

Especially Article 37(1) of AP I provides some examples of acts of perfidy:

i. the feigning of an intent to negotiate under a flag of truce or of a surrender;
ii. the feigning of an incapacitation by wounds or sickness;
iii. the feigning of civilian, non-combatant status; and
iv. the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

AP I further regulates these acts of perfidy and other treacherous acts in the following articles, some of them are already mentioned as examples in Article 37(1):

Article 38 -- Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Article 39 -- Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

[607] Zengel, Assassination and the Law of Armed Conflict, 36.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

In addition, Article 15 of the Lieber Code needs to be mentioned: "…such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist."

With regard to the points mentioned above, there are a number of comments that need to be made. While Article 37(1)(c) prohibits feigning as civilians, there are situations where it is difficult for combatants not to distinguish themselves from civilians such as in guerilla warfare.[608] Therefore, an exception is made from this rule in Article 44(3) of AP I.[609] However, in order to avoid such exception ending up as a justification of perfidy, Article 44(3) of AP I adds that combatants in this situation must carry their arms openly during each military engagement and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."

Continuing to Article 39(1), the ICRC Commentary noted that the prohibition from using the flags, emblems, insignia of neutral states does not include civil administration and police force if not incorporated in armed forces and not fighting.[610]

Especially regarding Article 39(2) of AP I, Henckaerts and Doswald-Beck remarked that customary international law prohibits the 'improper use' of enemy

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[608] See: Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 1696.
[609] This is because "… situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself [from the civilian population] throughout his military operations and still retain any chance of success." See: Ibid., 1698.
[610] Ibid., 1565.

insignia and uniforms, and specifically only during combat operations.[611] There seems to be a variety of ways by which this rule is understood by states. For example, some states consider this act of improper use of enemy identifications as acts of perfidy despite the fact that there are no protection *per se* for persons wearing such identifications.[612]

Other divergences lie on the extent to which using enemy identification is impermissible. Some states say that open firing while using such identification is impermissible, but there is no consensus on whether it is also impermissible to use such identifications while approaching and withdrawing the enemy.[613] Others say that infiltrating enemy lines wearing enemy uniform to: cause panic, collect intelligence, and conduct sabotage missions, are not improper uses of enemy uniform.[614] Some others say that the proper use of enemy uniforms may only include personal protection such as against extreme weather to provide warmth.[615] Others say that it is impermissible to commit such act while attacking, but it is permissible to shield, protect, or impede military operations with it.[616] As for naval and aerial warfare, there seems to be a practice that naval forces may use enemy marks to deceive the enemy but must revert to their original when just about to engage enemy forces, while it is totally prohibited to use enemy marks in air warfare.[617] This is relevant also in discussing part of Article 39(3) of AP I.

Another matter relevant to Article 39 paragraphs (2) and (3) is the matter of espionage. Espionage is generally understood as gathering (or attempting to do so) in

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[611] Henckaerts and Doswald-Beck, Customary international humanitarian law, 213–214.
[612] Note that the definition of perfidy also necessitates the perpetrator to mislead the target to believe that she/he deserves protection under IHL. Ibid., 214–215.
[613] This is the stance of the United Kingdom. Ibid., 215.
[614] This is the stance of Belgium. Ibid.
[615] This is the stance of Sweden. Ibid., 216.
[616] This is the stance of Canada, who made reservations to this effect. Ibid.
[617] Naturally, for aerial warfare, it is almost impossible for fighter jets to change marks while mid-air. Ibid., 216–217. Having that said, it may be suggested that the similar rule regarding using enemy marks for naval warfare may one day be applicable to aerial warfare also when exists a technology of changing identification marks mid-air.

the territory of the enemy while acting on false pretenses or in a clandestine manner.[618] With that understanding in mind, combatants committing such an act while wearing the uniform of her/his own armed forces is not considered as espionage.[619] On the contrary, combatants sneaking into the enemy base using civilian clothing or enemy outfit would be considered as espionage.[620] As the discussion above indicates, it is not unlawful for combatants to engage in espionage using enemy outfit but then if captured they are not entitled to the Prisoner of War status as per Article 46(1) of AP I.[621] However, espionage using the uniform or symbols of a neutral state is prohibited.[622]

It may also seem that it is not an act of perfidy to engage in espionage with civilian outfit, as espionage does not in itself involve any acts of killing, injuring, or capturing as Article 37(1) defines. But when the combatant conducting espionage in civilian outfits ends up killing or injuring the enemy, one must move to discuss treacherous attempts on the enemy life and assassinations.

Zengel has noted how assassination has been –for a long time—considered as an act of treachery.[623] However, when commenting the assassination of Reinhard Heydrich by members of the free Czechoslovak Army in 1942, Zengel points out how the logic of 'treachery' does not work in such a case. Treachery requires betrayal, and the killers owed no obligation, duty, or allegiance to Germany or Heydrich.[624] She proceeds to argue that rather than using the historic concept of treason to approach the legality of assassination, it is better to approach it using the rules against perfidy

[618] See the Article 88 of the Lieber Code, also Article 29 of the Hague Regulations 1907.
[619] Although, one must admit, there is perhaps not many situations where committing espionage is practical in this way. See: Article 46(2) of AP I.
[620] Henckaerts and Doswald-Beck, Customary international humanitarian law, 390.
[621] They may be tried and punished for espionage by the enemy, but they still must undergo fair trial as per Article 45(3) of AP I. See also: Ibid., 390–391.
[622] Pictet, Gasser, Junod, Pilloud, De-Preux, Sandoz, Swinarski, Wenger, and Zimmermann, Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949, 1569.
[623] Zengel, Assassination and the Law of Armed Conflict, 6–14.
[624] Ibid., 30.

instead.[625] Simply put, assassinations when committed in civilian or enemy outfit is an act of perfidy as explained in this Subchapter.

Regarding the general issue of perfidy and Article 38(1) of AP I (and potentially affecting other articles as well), an incident occurred in 2008. This incident was important as it brings about a big debate on whether the prohibition from committing perfidy may have excetions. In Columbia that year, the government forces successfully rescued some people taken as hostages by insurgents by faking a humanitarian mission, including soldiers posing as humanitarian workers.[626] This, at a glance, does seem to be like a blatant act of perfidy. Jonathan Crowe and Kylie Weston-Scheuber, without hesitation, straightly claim that the Columbian mission was clearly an impermissible act of perfidy irrespective of why it was done.[627]

However, a closer examination would make matters a bit more difficult. The ICRC expressed its concern on one aspect of the incident which is how one of the disguised soldiers used a Red Cross symbol.[628] However, the ICRC expressed nothing but silence regarding the entire fake humanitarian mission. Richard Jackson points out that the Red Cross symbol was unintended,[629] and that the act of perfidy would require an act of killing or wounding (which the fake humanitarian mission did not commit during the incident).[630]

More importantly, the law on this particular situation seems to be unclear. The Articles discussed in this subchapter are applicable in international armed conflicts,

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[625] Ibid., 32–36.
[626] *CNN*, "Old-fashioned fake-out results in freedom for hostages", 2008, July 3.
[627] Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law*, (Massachusetts: Edward Elgar Publishing, 2013), 66–67.
[628] *ICRC*, "Colombia: ICRC Underlines Importance of Respect for Red Cross Emblem", <https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/colombia-news-160708.htm> (accessed 14 March, 2019).
[629] Although the idea of 'accidentally wearing a red cross symbol in a fake humanitarian mission' sounds quite comical.
[630] Richard Jackson, "Perfidy in Non-International Armed Conflicts" in *Non-International Armed Conflict in the Twenty-First Century*, edited by Kenneth Watkin and Andrew J. Norris (Newport, Rhode Island: Naval War College, 2012), 247. Although it can be argued that there is an intention to kill or injure, because any rescue operations by soldiers to combatant territory may very possibly lead to that possibility. See also: Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (New York: Cambridge University Press, 2010), 422.

while the Columbian mission occurred in a non-international armed conflict. Gary Solis argues that there is a lack of actual state practice to support ICRC's claim that the prohibition of perfidy in international armed conflicts applies equally to non-international armed conflicts.[631] Although, there is still a breach of Article 12 of AP II, yet Solis says that it might be argued that it may be a 'lesser of two evils' situation where such a minor violation is chosen to prevent a terrible crime.[632]

However, it is John C. Dehn who provides an important reflection towards the incident. He notes that the world's positive response towards Columbia's actions was not due to rigorous legal analysis, but simply based on instinctive right or wrong.[633] After all, the 'victim' of the perfidy was a group which is not easy to sympathise: the insurgents had an infamous track record of breaching IHL and committing crimes.[634]

He says that Columbia's act was deception which breached at least the spirit and possibly also the rules of modern IHL, and risked jeopardising humanitarian missions in the future.[635] However, Dehn concludes, the incident of the Columbian mission may be a case where the law does not reflect the world's intuitive sense of justice.[636]

The argument of Dehn to allow a 'minor violation to remedy a criminal violation', which is supported also by Solis, might need to be subject to further evaluation. The situation of the hostages may be very dangerous, and there is exoneration from blame under extreme circumstances like this.[637] However, to generalise this case as a general rule would require a proper study to measure how

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[631] Solis, The Law of Armed Conflict: International Humanitarian Law in War, 422.
[632] Ibid. Solis cited an argument made by John C. Dehn. See: John C. Dehn, "Permissible Perfidy? Analysing the Columbian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction", *Journal of International Criminal Justice*, vol. 6 (2018): 651.
[633] Dehn, Permissible Perfidy? Analysing the Columbian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction, 652.
[634] Ibid., 652–653.
[635] Ibid., 653.
[636] Ibid.
[637] See Articles 24 and 25 of the Articles on the Responsibility of States for Internationally Wrongful Act (2001), or Articles 31(1) sub-sections (c) and (d) of the Rome Statute (1998) in context of international criminal responsibility.

Columbia's mission compares to the potential threat towards humanitarian missions in the future. One must also consider how to draft a rule which accommodates all interests while minimising risk of abuse.

However, the above may require a separate study. What is clear is that the law still stands as it is, but there is room for exceptions to be globally accepted (irrespective of its legality) in special circumstances.

What may perhaps be an exception towards the prohibition of perfidy is when it is committed as an act of reprisals. When an enemy force commits perfidy as a tactic of war, it may be argued that some cases of perfidy may be committed towards that enemy force in order to stop them from committing perfidy. In such an event, acts of perfidy may be permissible but it must follow the restrictions on reprisals as regulated in modern IHL as discussed in sub-chapter 4.4.

5.3 WAR AND DECEPTION IN THE ISLAMIC SCHOLARSHIP

The relation between war and deception in Islamic literature can perhaps be represented by the famous *ḥadīth* narrated through various companions of Prophet Muḥammad ﷺ :

الْحَرْبُ خُدْعَةٌ

"War is deceit."[638]

Numerous Islamic scholars and jurists have written about the permissibility of deceit during warfare. Imam al-Ṭabari notes that there is a difference of opinion regarding the permissibility of lying during warfare. Al-Ṭabari says that some jurists rule that in warfare only 'misleading' is permitted (perhaps the equivalent of 'white

[638] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3028-3030; al-Naysābūrī, Sahih Muslim, ḥadīth no.4539-4540.

lying'), but he says that the correct opinion is to say that 'full lying' is permissible during warfare.[639] In this issue, Al-Nawawī holds the opinion that 'white-lying' is preferable to full lying, but both are permissible.[640] He argues that lying is permissible in times of war or any similar situation which requires such a lie to save one's own life or that of others.[641]

It shall be noted that 'white lying' is usually understood as telling a truthful fact but in a manner that deceives the listener. An example of deception in form of a 'white lie' is when it was narrated that Prophet Muḥammad ﷺ , prior to the Battle of Badr, promised to tell a Bedouin where he was from if the Bedouin would provide information regarding the enemy. Then, in this narration, Prophet Muḥammad ﷺ said 'we are from water' which could mean either 'the rivers of Iraq' or human creation (which, according to numerous verses of the Qur'ān including Surah Al-Furqān [25] verse 54, humans are created from water).[642] This example shows how, in this narration, Prophet Muḥammad ﷺ was truthful in what he said, but left the Bedouin confused and still not knowing what he wished to know.[643]

Ibn Ḥajar explains that the idea of deception is to display something which is different from the truth. Or, in other words, masking reality with illusion.[644] He notes that one should always beware of deception and do one's best to deceive the enemy, because one who is unaware of deception would be at great loss.[645] Ibn Ḥajar further cites other jurists such as Ibn al-'Arabi who has said that deception can be done by deceiving the enemy or ambushing.[646] He also cites Ibn al-Munīr who has explained

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[639] Cited in: Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, 404.
[640] Cited in: Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, 184.
[641] Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, 420.
[642] Muḥammad ibn Jarīr Al-Ṭabari, *The History of Al-Tabari*, *Vol. 7*, (New York: State University of New York Press, 1993b), 43; 'Abd al-Mālik ibn Hishām, *Al-Sīrah Al-Nabawiyyah*, *Vol. 2*, (Beirut: Dar al-Ma'rifah), 127–128; Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 263; Muḥammad ibn Isḥāq, *The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah*, (Karachi: Oxford University Press, 1998), 294.
[643] There is a discussion with regards to the authenticity of this narration which will be presented in the next Subchapter.
[644] Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, 183.
[645] Ibid.
[646] Ibid.

that the best way to fight a war is to skillfully deceive the enemy, and not merely relying on face-to-face confrontation which may risk more casualties on one's own forces rather than using deception properly.[647] As it can be seen in this explanation, there is a strong sense of *maṣlaḥat* in this rule.

The warrior and jurist Imam Ibn Nuhās explains more kinds of deception which could and should be done by the Muslims in preparation for and during war. He mentions the importance of sending spies to infiltrate the enemy ranks: to find out as much as possible about the enemy's strength, causing disruption among their ranks, and to feed the enemy with false information about the Muslim army.[648] He also mentions the importance of using hidden traps or other methods of psychological warfare that may affect the enemy morale.[649]

With regards to the limitation of permissible deception, Imam Al-Nawawi mentions that there is a consensus among the jurists that it is permissible to commit deception of any kind towards the enemy, except if it results in violating agreements or *amān* (safety guarantee).[650] There also seems to be no disagreement that *amān,* if granted, is binding upon all Muslims.[651] It has also been narrated that during the reign of 'Umar as caliph, he declared that hinting safe passage towards an enemy soldier only to trick and then kill that enemy soldier was an act of treachery and punishable by death.[652] This situation may seem to be analogous to any other scenario where the enemy is promised safety from attack (e.g. truces and negotiation), where making such invitation or promise only to betray it would likewise be considered as treachery.

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[647] Ibid.
[648] Ibn Nuhās, Mashāri' Al-Ashwāq ilaā Maṣāri' al-Ushāq, 1075–1077.
[649] Ibid., 1078–1079.
[650] Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, 404.
[651] Ibn Rushd, *The Distinguished Jurist's Primer*, 457–458.There is a difference of opinion on some issues: whether a free Muslim male may grant *amān* without the permission of the leader (the majority says that they may), and whether a female Muslim may grant *amān* (ibn Rushd did not indicate which view is majority).
[652] Badruddin Al-'Aynī, *'Umdah Al-Qārī*, *Vol. 15*, (al-Qāhirah: Idarat Al-Taba'at Al-Muniriya), 94. As cited in Muhammad Munir, "Suicide Attacks and Islamic Law", *International Review of the Red Cross*, vol. 90, no. 869 (2008): 83.

Al-Shaybānī explains that even Muslims who have treacherously obtained permission to enter the enemy territory (e.g. pretending to be an ambassador or emissary, forging documents, *etc*) must still honour that entry permission.[653] Meaning, that they must not commit harm in the territory of the enemy because the entry permission is like a safety guarantee agreement. This position is also endorsed by Al-Sarkhasī who rules that even in situations where the Muslims may end a peace treaty with the enemy unilaterally, fair warning must be given towards that enemy that such treaty is to be ended or else it is considered as an act of treachery which is unacceptable.[654]

Modern jurists seem to echo the same ruling. ʻAbdullah ʻAzzām, for example, rules that using peace agreements as part of an act of deception towards the enemy is an unlawful act of treachery.[655] He adds also that, in a modern context, visas are similar to *amān.* Therefore, Muslims who have obtained visas to enter the enemy state must respect the *amān* and committing any acts of violence therein is considered as treachery.[656] This is why some scholars suggest that, although ʻAzzām was the founder of Al-Qaeda, he would not have approved of the infamous 9/11 attack on the World Trade Center had he still been alive at the time.[657]

In addition, ʻAzzām permits the conduct of assassination towards important figures of the enemies.[658] It must be noted that assassination is relevant in this chapter because, unlike killing face-to-face in the battlefield, it is usually conducted in deceptive manners and sometimes possibly treacherous. In the Islamic context, as the

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[653] Cited in: Muḥammad ibn Aḥmad ibn Abi Sahl Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, *Vol. 2*, (Beirut: Dār al-Kutub ʾIlmiya, 1997c), 66–67.
[654] Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, 185.
[655] ʻAbdullah ʻAzzām, *Fī Ẓilāl Sūrah al-Tawbah*, (Peshawar: Markaz al-Shahīd ʻAzzām Al-Iʻlamī), 17.
[656] Ibid., 14–18, 50.
[657] However, ʻAzzām theological and operational positions are different from Osama bin Laden (and, consequently, different from the Al-Qaeda we know today). See: Hassan, M.H. and Salleh, Abdullah Azzam: Would He Have Endorsed 9/11?
[658] ʻAzzām, Fī Ẓilāl Sūrah al-Tawbah, 15.

next sub-chapter shows, among the narrations used to justify deception in warfare is one about assassination.[659]

Muhammad Hamidullah notes that it is permissible to commit deception to mislead the enemy, sowing discord among the enemy, as well as to destroy the enemy morale with false information.[660] At the same time, he mentions that it is impermissible to commit acts of 'treachery and perfidy' (he does not define these two terms),[661] and also that treaties which prohibit certain acts during war must be obeyed as long as the treaty lasts.[662] In addition, alike 'Azzām, Hamidullah says that it is permitted to commit assassination towards the enemy.[663]

Yūsuf Al-Qaraḍāwī explains the importance of deception in warfare. This includes even making sure that essential information is not spread unnecessarily, sometimes even requiring to limit information towards one's own forces.[664] He explains how it is essential to send out spies to infiltrate the enemy and engage in 'psywar'.[665] Furthermore, it is permissible to lie during warfare and commit other deception towards the enemy but it is prohibited to do so in a manner that breaches agreements or *amān*.[666]

An issue discussed exclusively by modern jurists is suicide bombing, because it is a relatively recent phenomenon. The issue of suicide bombing, from a *fiqh* standpoint, can be approached through various angles. The first angle is on rules related to suicide, where jurists disagree on whether suicide bombings fall under the

[659] In a modern IHL context, assassination is also discussed under the chapter of 'Deception', and under the 'Treacherous attempt upon the life of an enemy' sub-chapter. This is because assassinations are typically committed by means of deception which can possibly also be perfidious or treacherous depending on its method. See: Henckaerts and Doswald-Beck, Customary international humanitarian law, 225–226.
[660] Hamidullah, Muslim Conduct of State, 224–225.
[661] Ibid., 205.
[662] Ibid., 208.
[663] Ibid., 226–227.
[664] Al-Qardhawy, Fiqih Jihad, 518–519.
[665] Ibid., 504, 517–518.
[666] Ibid., 632–636.

category of *'amaliyyah istishhadiyyah* (martyrdom operations).[667] A second angle is related to the selection of targets, where jurists who are in favour of suicide attacks would generally agree that the targets are only the enemy forces.[668] However, these two angles are not within the scope of this research and are therefore not discussed further.

The angle to approach the case of suicide bombing which is relevant towards this research is related to the issue of perfidy. Considering how numerous cases of suicide bombings are committed by persons disguising as civilians, Muhammad Munir has argued that *fiqh al-jihād* would deem such actions as falling under impermissible treachery.[669] However, the full extent of Munir's argument would reveal what seems to be lacking in the current literature. In discussing the difference between acceptable and unacceptable acts of deception, Munir cites the false granting of *amān* or betrayal towards agreements as evidence of unacceptable acts of deception in Islamic law.[670] It may be rather difficult, at least at face value, to claim that disguising as civilians would be analogous or even remotely similar with *amān* or agreement-related treachery. This is therefore an issue which requires further examination.

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[667] Further reading on the subject: Yūsuf Al-Qarḍāwi, *Min Hadyi al-Islâm Fatâwâ al-Mu'âshirah*, *Vol. 3*, (Beirut: Dar al-Ma'rifah, 2001), 503–505; Muhammad Afifi Al-Akiti, *Defending the Transgressed by Censuring the Reckless against the Killing of Civilians*, (Germany and United Kingdom: Warda Publications and Aqsa Press, 2005); Nawaf Hail Takruri, *Al-'Amaliyyat Al-Istishhadiyyah fi Al-Mizan Al-Fiqhiy*, (Beirut: Dar al-Fikr, 1997); Muhammad Saalih Al-Munajjid, "Ruling on blowing oneself up", islamqa, <https://islamqa.info/en/answers/217995/ruling-on-blowing-oneself-up> (accessed 14 March, 2019); Mufti Siraj Desai, "Are what the western media calls "suicide bombings" allowed in Islam?", islamqa.org, <https://islamqa.org/hanafi/askmufti/44811> (accessed 14 March, 2019).

[668] They either specifically mention that civilians may not be targeted, or they say that the suicide bombings may be targeted to enemy forces. See: Al-Qarḍāwi, Min Hadyi al-Islâm Fatâwâ al-Mu'âshirah, 503–505; Takruri, Al-'Amaliyyat Al-Istishhadiyyah fi Al-Mizan Al-Fiqhiy; Al-Munajjid, Ruling on blowing oneself up; Desai, Are what the western media calls "suicide bombings" allowed in Islam?. Afifi Akiti, who does not approve suicide bombing due to suicide, also emphasized on the civilian targets as well in his fatwa: Al-Akiti, Defending the Transgressed by Censuring the Reckless against the Killing of Civilians, 20, see also the title which clearly emphasizes this aspect.

[669] Muhammad Munir, "Suicide Attacks: Martyrdom Operations or Acts of Perfidy?" in *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, edited by Marie-Luisa Frick and Andreas Th. Muller (Leiden-Boston: Martinus Nijhoff Publishers, 2013), 83–84; Munir, Suicide Attacks and Islamic Law, 82–84.

[670] Munir, Suicide Attacks: Martyrdom Operations or Acts of Perfidy?, 83–84; Munir, Suicide Attacks and Islamic Law, 82–84.

5.4 AN ISLAMIC PRINCIPLE TO PROHIBIT TREACHERY AND PERFIDY

With regard to the matter of treachery and perfidy, Islam has always been clear. After all, honesty and trustworthiness are among the most basic traits of a Muslim. In fact, they are among the four characteristics necessary of the prophets: *faṭānah* (intelligent), *tabligh* (conveys the message), and relevant to this Chapter: *ṣiddīq* (truthful) and *amānah* (trustworthy).[671]

There is endless evidence in the Qur'ān and Sunnah on the importance of truthfulness. Allah says in the Qur'ān, Surah al-Tawbah (9) verse 119:

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَكُونُوا مَعَ الصَّادِقِينَ

"O you who have believed, fear Allah and be with those who are true."

Allah also says in Surah Al-Azhab (33) verse 24:

لِيَجْزِيَ اللَّهُ الصَّادِقِينَ بِصِدْقِهِمْ وَيُعَذِّبَ الْمُنَافِقِينَ إِنْ شَاءَ أَوْ يَتُوبَ عَلَيْهِمْ ۚ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

"That Allah may reward the truthful for their truth and punish the hypocrites if He wills or accept their repentance. Indeed, Allah is ever Forgiving and Merciful."

There are endless verses on this subject providing similar praises towards truthfulness. In addition, Prophet Muḥammad ﷺ also mentioned the following, as narrated by 'Abdullah ibn Mas'ūd:

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[671] Miftaḥ ibn Ma'mūn ibn 'Abdillah Al-Shianjūr, *al-Ḥāshiyah al-Martiyah 'alā Tijān al-Durārī*, (Cianjur: Ma'had al-Islāmī al-Salafī), 15–16; Imam Zarkasyi, *Usuluddin ('Aqa'id) Ala Madzhab Ahlu al-Sunna wa al-Jama'ah*, (Gontor: Trimurti Press, 2014), 58–59; Sayid Ahmad Al-Marzuki, *Ilmu Tauhid Tingkat Dasar: Terjemah Aqidatul Awam Makna Pegon dan Terjemah Indonesia*, translated by Achmad Sunarto, (Surabaya: Al-Miftah, 2012), 24; Muḥammad al-Nawawī Al-Jāwī, *Tijan A-Darari*, (Surabaya: Mutiara Ilmu, 2010), 30–35.

عَلَيْكُمْ بِالصِّدْقِ فَإِنَّ الصِّدْقَ يَهْدِي إِلَى الْبِرِّ وَإِنَّ الْبِرَّ يَهْدِي إِلَى الْجَنَّةِ وَمَا يَزَالُ الرَّجُلُ يَصْدُقُ وَيَتَحَرَّى الصِّدْقَ حَتَّى يُكْتَبَ عِنْدَ اللَّهِ صِدِّيقًا وَإِيَّاكُمْ وَالْكَذِبَ فَإِنَّ الْكَذِبَ يَهْدِي إِلَى الْفُجُورِ وَإِنَّ الْفُجُورَ يَهْدِي إِلَى النَّارِ وَمَا يَزَالُ الرَّجُلُ يَكْذِبُ وَيَتَحَرَّى الْكَذِبَ حَتَّى يُكْتَبَ عِنْدَ اللَّهِ كَذَّابًا

" It is obligatory for you to tell the truth, for truth leads to virtue and virtue leads to Paradise, and the man who continues to speak the truth and endeavours to tell the truth is eventually recorded as truthful with Allah, and beware of telling of a lie for telling of a lie leads to obscenity and obscenity leads to Hell-Fire, and the person who keeps telling lies and endeavours to tell a lie is recorded as a liar with Allah."[672]

The aforementioned *ḥadīth* shows not only how important truthfulness is, but also how lying is seen as something very negative. In fact, 'the liar' (*al-kadhdhāb*) is seen as the direct opposite of the character *ṣiddīq*.[673] In another narration, Abu Hurayra reported that Prophet Muḥammad ﷺ said:

مَنْ غَشَّ فَلَيْسَ مِنِّى

"Whoever deceives (people) does not belong to me."[674]

However, there are a number of exceptions towards this rule. There are three known exceptions towards the prohibition of lying. It is reported that Asma' binti Yazīd narrated that Prophet Muḥammad ﷺ said:

لاَ يَحِلُّ الْكَذِبُ إِلاَّ فِى ثَلاَثٍ يُحَدِّثُ الرَّجُلُ امْرَأَتَهُ لِيُرْضِيَهَا وَالْكَذِبُ فِى الْحَرْبِ وَالْكَذِبُ لِيُصْلِحَ بَيْنَ النَّاسِ

"It is not lawful to lie except in three cases: Something the man tells his wife to please her, to lie during war, and to lie in order to bring peace between the people."[675]

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[672] Al-Naysābūrī, *Sahih Muslim*, ḥadīth no. 6637-6639.
[673] Al-Jāwī, Tijan A-Darari, 30; Al-Shianjūr, al-Ḥāshiyah al-Martiyah 'alā Tijān al-Durārī, 15.
[674] Muslim ibn al-Ḥajjāj Al-Naysābūrī, *Sahih Muslim*, *Vol. 1*, (Riyadh: Darussalam, 2007d), ḥadīth no. 284. Another narration with similar meanings can be found in the same reference, ḥadīth no. 284.

Especially in context of war, there is a famous narration authentically reported by various companions of Prophet Muḥammad ﷺ as mentioned in the previous sub-chapter:

الْحَرْبُ خُدْعَةٌ

"War is deceit."[676]

There are a number of instances where Prophet Muḥammad ﷺ has been narrated to have committed deception during war, such as the 'we are from water' narration mentioned in sub-chapter 5.3. The problem with this narration is that all sources seem to lead towards Ibn Isḥāq.[677] Scholars differ with regard to Ibn Isḥāq's credibility. Some are very harsh towards him: Hishām ibn 'Urwah said he was a liar, and Imam Malik even called him "the *Dajjāl* amongst the *Dajjāl*s."[678] Others are more moderate by saying that he is good and honest but may have some weaknesses (i.e. he lacks thoroughness and preciseness).[679] Some even add that Ibn Isḥāq has some strength especially in narrating about Prophet Muḥammad ﷺ 's battles (which is the

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[675] Muḥammad ibn ʿĪsā al-Sulamī Al-Tirmidhī, *Jami al-Tirmidhi*, *Vol. 4*, (Riyadh: Darussalam, 2007b), ḥadīth no. 1939. Imam al-Tirmidhi in that same ḥadīth commented that such a narration is *ḥasan gharib* (the chain is good, but one narrator is alone in narrating it), and Al-Albani said it is authentic: Muḥammad Nāṣiruddīn Al-Albānī, *Ṣaḥīḥ wa Ḍa'īf Sunan al-Tirmidhi*, *Vol. 2*, (Riyadh: Maktabah al-Ma'arif, 1419), 356–357. In the chain of narrators there is Shahar ibn Hawshab, and the scholars differ about him but it seems that most of them say he is honest but weak and Ibn Hajr seems to agree with this latter view. See: Al-ʿAsqalānī, Taqrib al-Tahdhib, 269. However, at least the *mattan* seems to be correct because it is corroborated by an authentic *ḥadīth* in Sahih Muslim: Al-Naysābūrī, *Sahih Muslim*, ḥadīth no. 6633-6634.

[676] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3028-3030; al-Naysābūrī, Sahih Muslim, ḥadīth no.4539-4540.

[677] Al-Ṭabari, *The History of Al-Tabari*, 43; ibn Hishām, Al-Sīrah Al-Nabawiyyah, 127–128; Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 263. Even modern scholars too, such as Al-Qaraḍāwī: Al-Qardhawy, Fiqih Jihad, 633.They all narrate from Ibn Isḥāq. See: ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 294.

[678] See: 'Alī ibn Thābit al-Khaṭīb Al-Baghdādī, *Tārīkh Madīnah al-Salam wa Akhbar Muḥaddithiha wa Dhikr Quttaniha al-'Ulamā' min Ghayr Ahliha wa Waridiha*, *Vol. 2*, (Beirut: Dar al-Gharb al-Islami, 2001), 19; 'Abd Allah ibn 'Adī Al-Jarjānī, *Al-Kāmil fī Ḍu'afā' al-Rijāl*, *Vol. 6*, (Beirut: Dar al-Fikr, 1988), 103.

[679] See: Al-ʿAsqalānī, *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, 163; Al-Jarjānī, Al-Kāmil fī Ḍu'afā' al-Rijāl, 112; Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Mīzān al-I'tidāl*, *Vol. 3*, (Beirut: Dār al-Ma'rifah li al-Thibā'ah wa al-Nashr, 1382c), 475.

subject at hand), such as Imam al-Shāfi'ī and Imam al-Dhahabi.[680] It seems that the latter view, which suggests that one cannot give a blanket acceptance or rejection towards Ibn Isḥāq's narrations, is the most fair.

Be that as it may, in this particular narration Ibn Isḥāq only offered Muḥammad ibn Yaḥya ibn Habbān who was a strong narrator but was not alive at the time of the narrated event.[681] While it is famous, based on the aforementioned evidences this narration is *munqaṭi'*. However, this narration serves as a mere example of what deception during warfare might look like.[682]

An example of a more authentic narration regarding the Prophet's act of deception is reported by Ka'b ibn Mālik who said that: when the Prophet intended to go on an expedition, he always pretended to be going somewhere else.[683] This seems to indicate one of the ways that Prophet Muḥammad ﷺ used to deceive the enemy by deceiving his own men in the process.

Another famous and authentic narration displaying deception committed under the auspicies of Prophet Muḥammad ﷺ is the assassination of Ka'b ibn Ashraf by Muḥammad ibn Maslamah. Ka'b ibn Ashraf was a Jewish man from the tribe of Banū Al-Naḍīr who, after the battle of Badr, slandered Prophet Muḥammad ﷺ and went to Makkah to provoke the Quraysh.[684] It shall be noted that the tribe of Banū Al-Naḍīr were not, as a clan, in war with the Muslims at the time when the assassination of

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[680] See: Al-Baghdādī, Tārīkh Madīnah al-Salam wa Akhbar Muḥaddithiha wa Dhikr Quttaniha al-'Ulamā' min Ghayr Ahliha wa Waridiha, 15; Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Tadhkirah al-Huffādh*, *Vol. 1*, (Beirut: Dar al-Kutub 'Ilmiya, 1419), 130.

[681] Muḥammad ibn 'Abdillah Al-'Awshan, *Maa Sha'a Wa Lam Yathbutu fi al-Sīrah al-Nabawiyyah*, (Riyadh: Dar al-Thibah), 105.

[682] For example, Al-Qardhawi uses it to illustrate deception in warfare: Al-Qardhawy, Fiqih Jihad, 633. Weak narrations may be used as reference, as long as: the narration is not too weak, it contains only *faḍā'il al-'amāl* (not matters of law or *aqīdah*), and the uncertainty of its authenticity must be indicated in how it is cited (e.g. to say 'it was narrated that the Prophet said' rather than 'the Prophet said'). See: Taslim, Thariqus Shalihin, 8–9.

[683] Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2637. This *ḥadīth* includes the *mattn* الْحَرْبُ خُدْعَةٌ which, as displayed earlier in this and also the previous Subchapter, is cited by multiple authentic *ḥadīth* books. But other than that particular phrase, it seems that only this narration in Sunan Abi Dawud where the narrators report Ka'b ibn Malik sharing one of the deception tactics which Prophet Muḥammad ﷺ did during warfare.

[684] Al-Mubarakfuri, The Sealed Nectar: Biography of the Noble Prophet, 241; Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 5–7; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 3000.

Ka‘b ibn Ashraf took place. However, the Muslims who had just fought in the battle of Badr were still in a state of war with the Quraysh and this assassination was related to Ka‘b bin Ashraf’s assistance to and provocations of the Quraysh. This is why Imam Bukhari, Imam Muslim, and Imam Abu Dawud recorded the narration of the assassination in chapters titled ‘Book of Jihad’, ‘Book of Military Expeditions’ and the ‘Book of Jihad and Expeditions’ respectively. [685]

The narration starts with Muḥammad ibn Maslamah volunteering to kill Ka‘b ibn Ashraf after requested by Prophet Muḥammad ﷺ .[686] Ibn Maslamah requested the permission to lie and deceive, and Prophet Muḥammad ﷺ gave the permission. Then, Ibn Maslamah approached Ka‘b ibn Ashraf, requesting help and conversing with him to get closer. Eventually, Ibn Maslamah tricked Ka‘b until he was allowed to be very close to then strongly hold him allowing Ibn Maslamah’s companions to commit the mortal strike.[687] This is an example of deception which was approved by Prophet Muḥammad ﷺ .

With respect to trustworthiness, there are also endless evidence of its importance. In fact, the term *amānah* is derived from the root word امن, from which the word *īmān* (faith) is also derived from.[688] Allah says in the Qur’ān, Surah Al-Anfāl (8) verse 27:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَخُونُوا اللَّهَ وَالرَّسُولَ وَتَخُونُوا أَمَانَاتِكُمْ وَأَنْتُمْ تَعْلَمُونَ

[685] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.4037; Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3031-3032; al-Naysābūrī, Sahih Muslim, ḥadīth no. 4664; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2768. Although Imam Al-Bukhari and Imam Abu Dawud also recorded the same narration in a different chapter in their works, i.e. ‘The Book of Mortgaging’ and ‘The Book Of Kharāj, Fai', and Imarah’ respectively. See: Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no. 2510; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no.2786.

[686] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.4037; Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3031-3032; al-Naysābūrī, Sahih Muslim, ḥadīth no. 4664; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2768.

[687] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.4037; Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3031-3032; al-Naysābūrī, Sahih Muslim, ḥadīth no. 4664; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2768.

[688] Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, *Vol. 1*, (Beirut: Librairie du Liban, 1968e), 102.

"O you who have believed, do not betray Allah and the Messenger or betray your trusts while you know [the consequence]."

Allah also decrees in Surah al-Nisā' (4) verse 58:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۚ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing."

Ibn Kathīr explains in his *tafsīr* regarding this verse that the obligation to fulfil trusts apply both to the rights of Allah (e.g. *ṣalāt, zakāt, shawm, etc*) as well as the rights of fellow humans which include whatever has been trusted towards each other.[689] He further cites[690] a narration where Prophet Muḥammad ﷺ is reported to have said:

أَدِّ الأَمَانَةَ إِلَى مَنِ ائْتَمَنَكَ وَلاَ تَخُنْ مَنْ خَانَكَ

"Render the trust back to the one who entrusted it to you, and do not betray the one who betrayed you."[691]

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[689] Ismail ibn Katsir, *Shahih Tafsir Ibnu Katsir*, *Vol. 2*, edited by Safiurrahman Al-Mubarakfuri, (Jakarta: Pustaka Ibnu Katsir, 2016f), 559.

[690] Ibid.

[691] These narrations are from two different chains i.e. Yusuf bin Mahk and Abu Hurayrah respectively in: Abu Dawud Sulaymān ibn al-Ash'ath Al-Sijistānī, *Sunan Abu Dawud*, *Vol. 4*, (Riyadh: Darussalam, 2008d), ḥadīth no. 3534-3535. Darussalam, the publisher of this book, mentioned that those narrations are not authentic: Ibid., 154. Afterall, the Abu Hurayrah chain has a narrator named Sharik ibn 'Abdullah who is noted as honest by the scholars of *ḥadīth,* but some say he has bad memory while Imam Bukhari and Muslim lists him as a supporting (not main) narrator. See: Yūsuf ibn 'Abd al-Raḥman Al-Mizzī, *Tahdhib al-Kamal*, *Vol. 12*, (Beirut: Mu'assasah al-Risalah, 1400), 462; Al-ʿAsqalānī, Taqrib al-Tahdhib, 266. The other chain (i.e. Yusuf bin Mahk) seems to have no issue except Yusuf bin Mahk himself who is a Tābi'īn and did not meet the Prophet himself. However, Al-Albani ruled both narrations to be authentic because of the different chains of narrators which may corroborate each other: Muḥammad Nāṣiruddīn Al-Albānī, *Irwa al-Ghalil*, *Vol. 5*, (Beirut: Al-Maktab al-Islami,

Prophet Muḥammad ﷺ , as reported by Abu Hurayrah, said in the famous *ḥadīth* on the hypocrites:

آيَةُ الْمُنَافِقِ ثَلاَثٌ إِذَا حَدَّثَ كَذَبَ، وَإِذَا وَعَدَ أَخْلَفَ، وَإِذَا اؤْتُمِنَ خَانَ

"The signs of a hypocrite are three: Whenever he speaks, he tells a lie. Whenever he promises, he always breaks it (his promise). Whenever he is entrusted he betrays (proves dishonest). (If you keep something as a trust with him, he will not return it)."[692]

Note that although the aforementioned *ḥadīth* seems to separate betraying trusts and breaking promises, but the two acts are to some extent very related. In term of language, the meaning of الخيانة(treason or betrayal) is "to be entrusted but did not fulfil it faithfully/sincerely, and to betray covenants/agreements."[693] Furthermore, Al-Munawi cites Al-Raghib who has said "*Khiyānat* and *nifāq* are one same thing. However, *khiyānat* applies to covenants, while *amānah* and *nifāq* applies to matters of the religion (*dīn*)… *Khiyānat* is to go against the truth and secretly breach covenants."[694]

In order to support such a relation between treason and treaties, it was narrated that Anas ibn Mālik reported that Prophet Muḥammad ﷺ said:

لَا إِيمَانَ لِمَنْ لَا أَمَانَةَ لَهُ، وَلَا دِينَ لِمَنْ لَا عَهْدَ لَهُ

"There is no faith in one who do not have *amānah,* and there is no religion in one who does not fulfill their covenants/agreements."[695]

1405), 381. At the very least, the *mattn* does not seem to contradict the other basis cited in this Subchapter and can at least be used to corroborate the other basis.

[692] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no. 33.

[693] Abu al-Husayn Ahmad bin Faris, *Mu'jam Maqayis al-Lughah*, *Vol. 1*, (Misr: Muṣṭāfā al-Bāb al-Ḥalab wa Awladuh, 1972), 313.

[694] ʿAbd al-Ra'ūf ibn Tāj al-ʿArifīn Al-Munāwī, *Tawqīf ʿalā Muhammāt al-Taʿārīf*, (al-Qāhirah: 'Alam al-Kutub, 1410), 160.

[695] Narrated in the Musnad of Imam Aḥmad: Aḥmad ibn Ḥanbal, *Musnad Imām Aḥmad*, *Vol. 19*, edited by Shu'ayb Al-Arnawth (Taḥqīq), (Beirut: Mu'assasah al-Risalah, 1421b), ḥadīth no.12383; Aḥmad ibn

It is not that all treaties must always be followed at all times. As explained in sub-chapter 2.3.1, treaties the objects of which conflict with the *Sharī'ah* must not be followed. Furthermore, a treaty may be cancelled as Allah says in Surah Al-Anfāl (8) verse 58:

وَإِمَّا تَخَافَنَّ مِنْ قَوْمٍ خِيَانَةً فَانْبِذْ إِلَيْهِمْ عَلَىٰ سَوَاءٍ ۚ إِنَّ اللَّهَ لَا يُحِبُّ الْخَائِنِينَ

> "If you [have reason to] fear from a people betrayal, throw [their treaty] back to them, [putting you] on equal terms. Indeed, Allah does not like traitors."

Commenting on this verse, Ibn Kathīr mentions that this verse is especially related to peace treaties among nations when there is a fear that the other party might betray the said treaty.[696] The final part of the verse (Indeed, Allah does not like traitors) refers not only generally towards traitors or the other party who wishes to betray but includes treachery against the disbelievers even when there is fear of treachery on their part.[697]

It was narrated that Mu'āwiyah was moving his army towards the Byzantine lands while they had a peace treaty which was about to end, and launched an attack towards them when the peace treaty had just ended. [698] Another companion named 'Amr ibn 'Abasah warned him that such an attack is treasonous, citing a *ḥadīth* where Prophet Muḥammad ﷺ said:

Ḥanbal, *Musnad Imām Aḥmad*, *Vol. 20*, edited by Shu'ayb Al-Arnawth (Taḥqīq), (Beirut: Mu'assasah al-Risalah, 1421c), ḥadīth no.12567 and 13199. All of these narrations have Muḥammad ibn Sulaym in the chain, who is honest but weak according to many scholars: Ibn Ḥajar Al-ʿAsqalānī, *Tahdhib al-Tahdhib*, *Vol. 9*, (India: Dā'irah Al-Ma'ārif Al-Niẓamiyah, 1326b), 195. However, Muḥammad ibn Sulaym is supported by other chains so their status are elevated to *ḥasan* according to al-Arnawth (in the aforementioned citation of the Musnad in this footnote) and authentic according to Al-Albani: Muḥammad Nāṣiruddīn Al-Albānī, *Ṣaḥīḥ Jami' al-Ṣaghir*, *Vol. 2*, (Beirut: Maktab al-Islami, 1988), 1205.

[696] ibn Katsir, Ismail, *Shahih Tafsir Ibnu Katsir*, 107–109.

[697] Ibid.

[698] Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2759; Al-Tirmidhī, *Jami al-Tirmidhi*, ḥadīth no 1580.

مَنْ كَانَ بَيْنَهُ وَبَيْنَ قَوْمٍ عَهْدٌ فَلاَ يَشُدُّ عُقْدَةً وَلاَ يَحُلُّهَا حَتَّى يَنْقَضِيَ أَمَدُهَا أَوْ يَنْبِذَ إِلَيْهِمْ عَلَى سَوَاءٍ

> "Anyone who has a covenant with people, he is not to strengthen it nor loosen it, until the covenant has expired, or both parties bring it to an end."[699]

As Mu'āwiyah accepted 'Amr ibn 'Abasah's warning, he above narration hence shows that two companions of Prophet Muḥammad ﷺ have understood that treaties should be ended fairly even for the enemy.[700] It must be noted that Mu'āwiyah had began his move as a preparation to launch an attack while a peace treaty was still in effect.

In addition, as cited in sub-chapter 4.3.1, Prophet Muḥammad ﷺ said:

اغْزُوا بِاسْمِ اللَّهِ وَفِي سَبِيلِ اللَّهِ وَقَاتِلُوا مَنْ كَفَرَ بِاللَّهِ اغْزُوا وَلاَ تَغْدِرُوا وَلاَ تَغُلُّوا وَلاَ تُمَثِّلُوا وَلاَ تَقْتُلُوا وَلِيدًا

> "Fight in the Name of Allah in the cause of Allah. Fight those who disbelieve in Allah. Fight, but do not steal from the spoils of war, and do not break your promises, and do not mutilate, and do not kill children.[701]

The phrase وَلاَ تَغْدِرُوا in the above text, as Muḥammad Al-Mubarakfuri note, means *inter alia* not to breach treaties or pacts.[702] Therefore, the relation between treason and treaties or pacts are very clear.

It has been explained in this sub-chapter how both honesty and trustworthiness are essential characteristics, while lying and treachery (i.e. the opposites of honesty

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[699] Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2759; Al-Tirmidhī, *Jami al-Tirmidhi*, ḥadīth no 1580.
[700] This is also the understanding of Ibn Kathīr. See: ibn Katsir, Ismail, *Shahih Tafsir Ibnu Katsir*, 107–109.
[701] Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2613.
[702] Muḥammad ibn 'Abd al-Raḥman Al-Mubārakfūrī, *Tuḥfatu al-Aḥwadhī Sharḥ Sunan al-Tirmidhi*, *Vol. 4*, (Beirut: Dar al-Kutub 'Ilmiya), 552.

and trustworthiness respectively) are seen as very negative. However, as the explanation above develops, one clear distinction is found between the two:

i. On the subject of honesty, one of the explicit and specific exceptions towards the prohibition of lying is war.
ii. On the subject of trustworthiness, there are numerous bases from the Qur'ān and Sunnah explicitly and specifically emphasise on the prohibition of treachery in war.[703]

In addition, with regards to espionage and 'psywar', the opinions of the jurists cited in sub-chapter 5.3 is supported by some narrations during the time of Prophet Muḥammad ﷺ .

The first precedence is related to espionage, which is the narration of Hudhaifah ibn al-Yamān. In the battle of Khandaq, he was sent by Prophet Muḥammad ﷺ to infiltrate the enemy camp to seek out information regarding the enemy.[704] In this case, the Muslims then learned that the confederate army had lost hope and decided to retreat back to where they came from.

The second narration is an example of deception by conducting 'psywar', and this is also concerning the battle of Khandaq. This narration is about Nu'aym ibn Mas'ūd who was a chief among the enemy, who had secretly entered Islam.[705] In this narration, on the instruction of Prophet Muḥammad ﷺ , he managed to perform great deception to cause distrust and chaos between the major allies within the confederate army: Banu Quraysh, Banu Ghatafān, and Banu Qurayẓa, causing them to fall apart from within and eventually cease the offensive against Madinah.[706] Al-Albani notes

[703] As a side note, this does not suggest that treachery outside of war is permitted. Rather, there are some among those basis which are specifically mentioning treachery in war.
[704] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 154–155; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 460; al-Naysābūrī, Sahih Muslim, ḥadīth no.4640.
[705] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 152; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 458–459.
[706] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 152; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 458–459.

that this particular narration was brought by Ibn Isḥāq without any chain of narrators thus is not authentic, but it is authentic that the use of deception is lawful in war.[707] Therefore, perhaps this narration of Nu'aym ibn Mas'ūd can at least be used as illustration of 'psywar' which is permissible during war.

5.5 COMPARING THE GENERAL AND SPECIFIC NOTIONS OF PERFIDY AND UNLAWFUL DECEPTION IN IHL AND *FIQH AL-JIHĀD*

In its most general notion, it may seem that modern IHL shares similar views with *fiqh al-jihād*: deceptions are permissible unless they involve treachery. However, one must compare what both regimes of law truly mean by those terms.

As cited in sub-chapter 5.2, Article 37(1) of AP I terms perfidy as inviting confidence with the intention to betray it. The general idea is much about combatants misleading the opponent (i.e. inviting confidence) to afford protected status while such protection is actually not due to the particular combatant. Additionally, it is required that such act of misleading is committed during combat situations.

On the other hand, at first Islam seems to have a wider scope of understanding of treachery. As explained in sub-chapter 5.4, whatever seems to be a breach of trust would be classified as treachery. At this stage, the impression of having a wider scope may appear because such concept of treachery does not seem to require combat situation and an act of misleading the opponent to afford undue protected status.

The issue is when the element of 'trust' is discussed. How 'trust' is owed in the first place for it to be betrayed is something to ponder on. The jurists' opinion and legal basis cited in sub-chapters 5.3 and 5.4 mostly mention trusts that have been offered, namely: covenants and *amān.* In both situations, pledges are given either

[707] Al-Ghazāli Al-Saqa, *Fiqh al-Sirah*, edited by Muḥammad Nāṣiruddīn Al-Albānī(Takhrij), (Damascus: Dar al-Qalam, 1427), 309.

through an agreement between the parties or a declaration of guarantee in the case of *amān*.

The case of covenants does not seem to be only an issue of IHL specifically (as per Article 15 of the Lieber Code), rather it is an issue of international law in general. To this extent, it may seem that there are compatibilities between modern IHL and *fiqh al-jihād*.

However, as sub-chapter 5.2 elaborates, perfidy and other unlawful deception are not limited only to the matters of surrenders and truces. Rather, there are quite a number of other derivative types of acts of perfidy and unlawful deception which are not yet covered in sub-chapters 5.3 and 5.4. Some of them due to newly emerging developments in modern IHL, others possibly due to potential incompatibilities. This sub-chapter therefore discusses the detailed issues in the following parts.

5.5.1 Treachery towards Agreements and Promises

Most of the past jurists cited in sub-chapter 5.3, in discussing the prohibition to betray (or command to obey) agreements, seem to limit the discussions to only *amān* and non-aggression pacts.[708]

However, sub-chapter 5.3 also cites modern jurists who seem to be more creative in elaborating the extent of this rule. Hamidullah, for example, adds the obligation to obey treaties prohibiting certain acts during war. ‘Azzām goes beyond only discussing peace agreements and goes as far as making *qiyās* between *amān* and visas.

The *ḥadīth* cited in sub-chapter 5.4 regarding agreements and impermissibility to break them use the term عَهْدَ.[709] There are uses of this term referring specifically to

[708] As implied especially in the narration of ‘Amr ibn ‘Abasah and Mu‘āwiyah in Subchapter 5.3.
[709] The one narrated by ‘Amr ibn ‘Abasah to Mu‘āwiyah.

safety guarantees.[710] However, the said term also means agreements or covenants and promises in general.[711] In such a case, a general rule will apply to all conditions unless an exception can be found in the *dalīl*.[712]

The consequence of the aforementioned explanation is that the prohibition of treachery and the command to be trustworthy should apply to all kinds of agreements and pledges unless an exception is found. As established in sub-chapter 5.4, the *dalīl* specifically gives a war-time exception to the prohibition of lying. On the other hand, with regard to treachery, the *dalīl* instead gives additional emphasis towards the prohibition of treachery during warfare.

Therefore, it is impermissible to commit deception in times of war if it involves agreements and breaking promise. Such prohibition applies to all kinds of deceptions falling under the aforementioned categories.

An example is the strategy employed by Teuku Umar, a Muslim lord under the Aceh Sultanate during the war against the Dutch invaders. He famously pretended to cooperate with the Dutch to fight his fellow Aceh people.[713] However, when the Dutch gave him soldiers and weapons for that purpose, Teuku Umar double-crossed the Dutch: he set the Dutch soldiers in an ambush to kill them and seize their weapons and supplies. Albeit the advantage that Teuku Umar's tactic gave in the war, it is essential to evaluate the case from an Islamic standpoint.[714]

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[710] Lane, *An Arabic-English Lexicon: In Eight Parts*, 2183. See also: Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no. 3166.
[711] Lane, *An Arabic-English Lexicon: In Eight Parts*, 2182. See also: Muḥammad ibn Mukarram ibn `Alī ibn Aḥmad Ibn Manẓūr, *Lisān Al-'Arab*, *Vol. 10*, (Beirut: Dār al-Shadir, 1414b), 317–318.
[712] Al-Utsaimin, Ushul Fiqih, 58–59.
[713] Arya Ajisaka, *Mengenal Pahlawan Nasional*, (Jakarta Selatan: PT Kawan Pustaka, 2018), 46.
[714] Ibid. It is important to note that this is without any disrespect to Teuku Umar, which is a national hero of the Republic of Indonesia as per Presidential Decree No. 087/TK/1973. This does not mean to undermine him in any way. Islam teaches that only Prophet Muḥammad ﷺ is free from error. Everyone else can make mistakes, including even the noble Companions of Prophet Muḥammad ﷺ as discussed in Chapter Four. However, as cited also in Chapter Four, one who is correct in their *ijtihād* receives two rewards and those incorrect still receives one reward. It is hoped that any mistake he may have committed would pale before all his efforts, struggle, and martyrdom for the independence of Aceh and Indonesia.

What Teuku Umar agreed and promised to do for the Dutch invaders was not only treason towards the Islamic state (i.e. the Sultanate of Aceh) but a promise to fight against and very likely kill fellow Muslims of the Aceh fighters. Therefore, the agreement that Teuku Umar with the Dutch was invalid and therefore not binding according to Islamic law as the object of the agreement was a violation of the *Sharī'ah*.[715] Consequently, legally under Islamic law, there was no agreement for Teuku Umar to betray. However, nonetheless the Dutch had placed their trust and *amānah* and, regardless of the other factors, the act of Teuku Umar double-crossing them is still a breach of *amānah*. Therefore, this case is an example of impermissible deception.

Having that said, at least part of the Article 15 of the Lieber Code provision related to treachery (as cited in Subchapter 5.2) is in accordance with *fiqh al-jihād*. Although, the "or supposed by the modern law of war to exist" part of that article may need to be evaluated further depending on the situation. There may potentially be instances where obligations "supposed by the modern laws of war" may not be Islamically obligatory, which is if they breach the *Sharī'ah.* Such instances must be judged at a case per case basis.

5.5.2 Feigning of an intent to negotiate under a flag of truce

Previously, treachery towards agreements are shown to be a violation of both IHL and *fiqh al-jihād,* but in the former it is not necessarily classified as perfidy unless it involves killing, injuring, or capturing. However, feigning an intent to negotiate under a flag of truce is perfidy under modern IHL.

As mentioned previously, this is something that is surely equally regulated in *fiqh al-jihād*. Feigning intent to negotiate truces is similar to betraying *amān* and is

[715] Ibn Taymiyyah, *Majmu' Al-Fatāwa*, 19; Basyir, Asas-Asas Hukum Muamalat (Hukum Perdata Islam), 108–109; Ghazaly, Ihsan, and Shidiq, Fiqh Muamalat, 54–55.

therefore impermissible. Likewise, when *amān* and truces are offered by the enemy combatants, it only makes sense to respect it due to the rule of reciprocity.

It must be noted that a different rule also applies in relation to truce negotiations or the invitations to engage in it. While it may not be so in modern IHL in such a case, but Islamic law sees the position of enemy representatives as ambassadors which may not be attacked which is more related towards the principle of distinction which is not within the scope of this thesis.[716] However, relevant to the scope of this thesis, as cited in sub-chapter 5.3, Al-Shaybānī explains that even if one were to be allowed safe passage through enemy territory by *inter alia* impersonating to be an ambassador then one must honor the safe passage.[717] Note that impersonating an ambassador may involve a variety of acts that might be Islamically impermissible anyways such as lying,[718] but Al-Shaybānī's ruling seems to suggest that one must not add treachery to all those other sinful acts already committed. This situation is similar with feigning intent to negotiate truce as in both cases there is no true intent to make any such negotiation or truce while misleading the other party to believe otherwise. Therefore, betraying the other party by taking advantage of the situation to attack would be treason.

Having that said, the modern IHL rules relating to the impermissibility of feigning the intent to negotiate truces are consistent with *fiqh al-jihād*. They are considered as acts of impermissible treachery in both regimes of law.

5.5.3 Feigning surrender

The rationale of the modern IHL prohibition of feigning surrender is because surrendering would normally render someone no longer a combatant as per Article

[716] Further reading on the issue: Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2761; Hamidullah, Muslim Conduct of State, 151–152.
[717] Cited in: Al-Sarkhasī, *Sharḥ al-Siyār al-Kabīr*, 66–67.
[718] Lying (probably multiple times) is the very least, and impersonation may require forging documents which often involves bribing which is yet another sin, and possibly many more.

41(1) and 41(2)(b) of AP I. As explained in sub-chapter 5.2, one of the elements of perfidy is to mislead an opponent to afford undue protected status. As for *fiqh al-jihād,* as explained earlier, treachery would require the owing of trust.

In the case of surrender, it is well understood that an act of surrender means that the surrendering person promises to stop fighting and indicates her/his willingness to be captured by the opponent without any resistance. As it is the case of an enemy combatant expressing her/his intent to negotiate a truce, the reason why a soldier would not attack that enemy combatant is because they trust that such combatant will keep their promise to not attack. When the previous sentence is understood *a contrario,* a soldier feigning surrender only to later attack when the enemy lowers her/his guard (to accept the surrender) would then be considered as treachery. Such act is therefore impermissible in *fiqh al-jihād*.

However, whether the definition of perfidy in IHL can justify the prohibition of feigning surrender is a different question. This is because it is difficult to find an actual basis to deduce that surrendering combatants must be afforded protected status in *fiqh al-jihād*. In various references of *fiqh al-jihād* where the non-combatant categories are listed and/or explained, the surrendering enemies are not mentioned.[719] There are rules concerning captives who must be treated well and not killed wantonly,[720] but these rules speak of the enemy who are already captured. They do not seem to discuss at what point the enemy may no longer be killed and instead taken into captivity or to be imposed *jizyah*.

There are instances where the enemy surrenders and the Muslims accept and cease to attack,[721] but there are instances which may imply that the Muslims do not

[719] Ibn Rushd, *The Distinguished Jurist's Primer*, 456–460; Hamidullah, Muslim Conduct of State, 205; Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 111–116; Azzam, Jihad: Adab dan Hukumnya, 22–32.
[720] Unless the leader of the Muslims decides to execute them. See: Ibn Rushd, *The Distinguished Jurist's Primer*, 456; Azzam, Jihad: Adab dan Hukumnya, 64; Al-Qardhawy, Fiqih Jihad, 708–710; Wahbah Al-Zuḥaylī, *Fiqih Islam Wa al-Adillatuhu*, *Vol. 8*, (Jakarta: Gema Insani Press, 2011), 87–88.
[721] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 268–270; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 515.

have to accept it depending on how the narrations are read. An example of the latter case is when Usāmah ibn Zayd killed a *mushrik* who, after overpowered but before killed, accepted Islam.[722] When Usamah said that he did so because the *mushrik* was not sincere and accepted Islam due to fear alone, Prophet Muḥammad ﷺ rebuked him because he should have taken the *mushrik*'s acceptance of Islam at face value.[723] From this narration, one can conclude that *fiqh al-jihād* no longer considers a person as an enemy combatant when she/he has accepted Islam. One way to read this is that the act of the *mushrik* is not a surrender as this is not an act of submission to the Muslim army (rather, becoming part of the Muslims). Usamah was not explicitly rebuked for attacking a man who was overpowered and no longer wishes to fight, so it may be implied that had the man just surrendered without accepting Islam, then he may have been legitimately killed. Or, at least, this is one way to understand the narration.

From another perspective, as explained in sub-chapter 3.3.3, the stronger opinion is that the enemy is fought not only due to *kufr* but also participation in hostilities. Therefore, it may seem that if surrendering means to cease hostilities then surrendering combatants may no longer be attacked. Having that said, perhaps a more acceptable way to read the above narration of Usāmah ibn Zayd is to see that the *mushrik* was overpowered and clearly expressed an intention to no longer proceed to fight which might seem like a willingness to surrender.

Al-Shaybānī, while discussing whether to swear in the name of Allah, rules that the Muslims should consider the case of enemy surrender based on their judgment.[724] However, Al-Shaybānī ia speaking of a situation when the Muslims are besieging an enemy city and the enemy expresses their wish to surrender which may involve negotiation of terms.[725] Naturally, if the terms are unfavourable towards the Muslims, there is no reason to accept their surrender. However, in cases where the

[722] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no. 4269; Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.277-278.
[723] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no. 4269; Al-Naysābūrī, *Sahih Muslim*, ḥadīth no.277-278.
[724] Al-Shaybānī, The Islamic Law of Nations: Shaybani's Siyar, 76–77.
[725] Al-Shaybānī was not too specific regarding this scenario. See: Ibid.

enemy surrenders unconditionally or otherwise with terms beneficial for the Muslims, there is no reason to reject it.

Having that said, although probably not specifically mentioned in the works of the jurists, a surrendering enemy is in fact no longer a combatant and therefore rules relating to non-combatants would apply. Applying the IHL definition of perfidy within the context of *fiqh al-jihād* seems to also arrive to the same conclusion as it does in IHL. Therefore, at least in the case of feigning surrender, there is some indication that the IHL definition of perfidy may be acceptable in *fiqh al-jihād*. However, one must observe whether this leads to a pattern of coincidences of rulings from which to conclude that the IHL definition of perfidy can indeed be adopted by Islam.

5.5.4 Feigning of an incapacitation by wounds or sickness

The rationale of the modern IHL prohibition from feigning incapacitation stems from the rule that persons who are incapacitated by wounds or sickness may not be attacked as they have protected status. Meanwhile, misleading an opponent to afford undue protected status is an essential element of perfidy. After all, if attacking wounded combatants is legitimate, then feigning to be wounded will not be perfidy because there is no misleading of protected status.

From an Islamic standpoint, the situation may be rather tricky. Unlike the previously discussed cases of surrendering or inviting to negotiate truces, there is no trust-owing involved from which to betray if a combatant feigns incapacitation only to suddenly attack when the enemy guard is down. Rather, incapacitated combatants just lay there harmlessly as a non-threat from which the army will have no urgent need to attack them there and then.

It is very difficult to find precedence of such kind of deception during the time of Prophet Muḥammad ﷺ , therefore it is hard to make a direct rule about it. It is also

very difficult to find jurists discussing this particular method of deception. However, as it does not seem to qualify as an act of treachery or breaking agreements, feigning incapacitation seems to fall under the general permissibility of deception in *fiqh al-jihād*. Therefore, the general rule applies as long as no exception is found.[726] Or, in this case, there is an exception but this case of feigning incapacitation does not fall under it. One can therefore make a conclusion that there is an incompatibility between modern IHL and *fiqh al-jihād* in this case considering the former prohibits the act of feigning incapacitation.

When applying the definition of perfidy to *fiqh al-jihād,* a different conclusion may be achieved. There may be room to argue that there might not even be a prohibition from attacking the wounded or sick at all in the first place. While this is a subject normally not within the scope of this thesis, but to discuss it seems to be inevitable in context of explaining its link to perfidy. Note that this discussion would be regarding those incapacitated but not surrendering and not in captivity, as different rules would apply in such situations.

Abdul Ghani Abdul Hamid Mahmud writes that there is such a prohibition from attacking the wounded or sick in battle, using both a general notion to be kind to enemies as well as citing a narration attributed to Prophet Muḥammad ﷺ during *Fath al-Makkah* which reads: "Do not hurt those who are injured."[727] He cites Abu 'Ubayd for this reference. Abu 'Ubayd, in this narration, provides the following chain of narrators: Hushaym, from Hushayn ibn 'Abd al-Raḥmān, from 'Ubayd Allāh ibn 'Abd Allāh. Hushaym and Hushain are good narrators, albeit the latter having memory problems when he grew old.[728] The problem of this chain is with 'Ubayd Allāh ibn

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[726] Al-Utsaimin, Ushul Fiqih, 58–59. For other refutation towards similar misconceptions regarding apostasy and its punishment, see: Mohd Hisham Mohd Kamal, "Kebebasan Beragama dan Isu Riddah Dari Perspektif Syariah" in *Isu-isu Kebebasan Beragama & Penguatkuasaan Undang-Undang Moral*, edited by Mohd Hisham Mohd Kamal and Shamrahayu A. Aziz (Selangor Darul Ehsan: Department of Islamic Law IIUM & Harun M. Hashim Law Centre, 2009).

[727] Mahmud, Perlindungan Korban Konflik Bersenjata dalam Perspektif Hukum Humaniter Internasional dan Hukum Islam, 20.

[728] Al-ʿAsqalānī, Taqrib al-Tahdhib, 170 and 574.

‘Abd Allāh who is very credible and is a known *fāqih* at the time,[729] but he was a *tābi‘īn* who narrated *mursal* from some Companions and directly from other Companions.[730] In the narration reported by Abu ‘Ubayd in the current discussion, ‘Ubayd Allāh ibn ‘Abd Allāh did not say who he heard from. Therefore, judging from the chain, this narration is *munqaṭi‘* and cannot be used as legal basis.

Muhammad Hamidullah cites a letter attributed to ‘Alī ibn Abi Ṭālib while serving as caliph, who orders his governor (Malik ibn al-Ashraf) not to kill the wounded rebels.[731] However, the text itself, even if it were to be accepted, does not indicate whether such order was meant to be a legal ruling or simply a policy towards that particular war. Note that the ruling on treatment of war captives may differ depending on *maṣlaḥat*.[732]

However, the most important problem regarding ‘Alī’s letter is its authenticity. Hamidullah cited this letter from a scholar by the name Abu al-Ḥasan al-Mas‘ūdī from his book *Muruj al-Dhahab*.[733] The big problem with Al-Mas‘ūdī is that he is both Rāfiḍi Shī‘ah and Mu‘tazilah.[734] Both of those affiliations are deviant sects in Islam and especially being a Rāfiḍi Shī‘a renders a narrator completely untrustworthy according to the scholars of *ḥadīth* due to their extreme deviance and dishonesty in narrating about the Companions of Prophet Muḥammad ﷺ .[735] There is another source for this letter from a scholar of the *ahl al-sunnah wa al-jamā‘ah* which is from the

[729] Ibid., 372.
[730] Al-Dhahabī, *Siyar A‘lām al-Nubalā’*, 475.
[731] Hamidullah, Muslim Conduct of State, 183.
[732] Ibn Rushd, *The Distinguished Jurist’s Primer*, 456; Azzam, Jihad: Adab dan Hukumnya, 64; Al-Qardhawy, Fiqih Jihad, 708–710; Al-Zuḥaylī, Fiqih Islam Wa al-Adillatuhu, 87–88.
[733] Abu al-Ḥasan Al-Mas‘ūdī, *Muruj Al-Dhahab*, *Vol. 4*, (Beirut: Dar al-Kutub ’Ilmiya), 316–317.
[734] Al-ʿAsqalānī, Līsān al-Mīzān, 225. Rāfiḍi Shī‘a scholars list him as among them also. See: Jamāl al-Dīn Ḥasan ibn Yūsuf Al-Ḥillī, *Khulasah al-Aqwal*, (Nashr al-Fiqahah, 1431), 186.
[735] Al-ʿAsqalānī, *Tahdhib al-Tahdhib*, 94; Muḥammad ibn Aḥmad ibn ʿUthmān Ibn Al-Dhahabī, *Mīzān al-I’tidāl*, *Vol. 1*, (Beirut: Dar al-Ma’rifah li al-Thiba’ah wa al-Nashr, 1382d), 5–6. Note that the Imams of the four *madhhab*s have declared that the Rāfiḍi Shī‘a are *kāfir.* Cited in: Aḥmad ibn ‘Alī Al-Maqrīzī, *Imtā’ al-Asmā’ Bi Mā li al-Nabī min al-Aḥwāl wa al-Amwāl*, *Vol. 9*, (Beirut: Dar al-Kutub ’Ilmiya, 1420), 218; ‘Iyāḍ ibn Mūsa, *Tartib al-Madarik wa Taqrib al-Masalik*, *Vol. 2*, (Maghrib: Matba’ah Fudalah), 49; Abu Bakr Al-Khallal, *Al-Sunnah*, *Vol. 3*, (Riyadh: Dar al-Rayah, 1410), 493; Muḥammad Ibn Abi Ya‘lā, *Ṭabaqāt al-Ḥanābilah*, *Vol. 1*, (Beirut: Dar al-Ma’rifah), 13.

work of Ibn Athir, however no chain of narrators are presented,[736] therefore it is hard to use it as a legal basis.

On the other hand, evidence to the contrary can be found in the death of Abu Jahl. During the battle of Badr, Abu Jahl was struck down and fatally wounded by two young Muslim warriors named Mu'ādh ibn 'Amr ibn Jamūh and Mu'ādh ibn 'Afrā' who then thought to have killed him with that attack.[737] However, it turns out that 'Abd Allāh ibn Mas'ūd found Abu Jahl but at the brink of death at the end of the battle.[738] It was then narrated that Abu Jahl was beheaded.[739]

The aforementioned authentic narration concerning Abu Jahl may be evidence that combatants who are wounded in battle are still legitimate objects of attack. However, there may be another way to consider this issue. There are more evidences to consider and the conclusion may be different.

The narration of Abu Jahl must be further scrutinized, as another reading is also possible. One must not forget who Abu Jahl is. He was dubbed as the 'Fir'awn of the time', amongst the worst of the enemies of Islam which were singled out by Prophet Muḥammad ﷺ (together with `Utbah ibn Rabī'ah, Shaybah ibn Rabī'ah, Al-Walīd ibn 'Utbah, Ubay ibn Khalaf and 'Uqba ibn Abi Mu'iṭ) who called upon and prayed for their deaths before the battle of Badr.[740] While the level of humanity displayed by the Muslims in the treatment of the captives of Badr is very famous,[741] there were still a few who were executed due to their crimes.[742] Among the persons

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[736] ibn Athīr, Al-Kāmil fi al-Tārīkh, 645.
[737] al-Naysābūrī, Sahih Muslim, ḥadīth no. 4569.
[738] Ibid., ḥadīth no. 4662; Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.3961-3963, 3988, 4020; Al-Mubarakfuri, The Sealed Nectar: Biography of the Noble Prophet, 223–225; Ismail Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, *Vol. 2*, (Reading: Garnet Publishing, 2005b), 294; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 304.
[739] Al-Mubarakfuri, The Sealed Nectar: Biography of the Noble Prophet, 223–225; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 304.
[740] Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.2934.
[741] ibn Katsir, Ismail, *Shahih Tafsir Ibnu Katsir*, 404–405; Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, *Vol. 10*, (Singapore: Pustaka Nasional PTE Ltd), 7795.
[742] See *inter alia*: Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.4028; al-Naysābūrī, Sahih Muslim, ḥadīth no.4592, 4596-4599; Al-Qardhawy, Fiqih Jihad, 708–709; Ibn Rushd, *The Distinguished Jurist's Primer*, 456.

executed was Al-Naḍr ibn Abi Ḥarith who was not among the ones specifically called for their destruction by Prophet Muḥammad ﷺ prior to the battle as mentioned above. It is therefore also possible to infer that Abu Jahl was killed despite being incapacitated due to the crimes that he had done to the Muslims. This is in addition to the fact that Abu Jahl was already dying when ‘Abd Allāh ibn Mas‘ūd found him.

However, as explained in the previous part regarding surrender as well as sub-chapter 3.3.3, it is impermissible to attack persons who are not or no longer participating in the hostilities. This seems to be the general principle derived from various *dalīl*. The classical jurists do seem to rule that killing the sick is impermissible.[743] The word used by the aforementioned jurists is زمن which refers to prolonged illnesses,[744] and not necessarily wounded soldiers. However, according to Al-Dawoody, the classical jurists do not derive their rulings on the sick due to any *dalīl* (as there are none), rather they derived from the general principle that persons not participating in the hostilities may not be attacked.[745] If that is the case, then similar rulings could and should apply to enemy combatants who are incapacitated due to their wounds, so long as they cease their participation in the hostilities.

It must be noted also that the battle of Badr was the first major battle of the Muslims very early after *hijrah* before many more battles were fought and before much more legal rulings were established. In addition, while it is authentic that Ibn Mas‘ūd found Abu Jahl at the brink of death, the narration where the latter was beheaded by the former is not authentic. The purported beheading of Abu Jahl seemed to be reported by Al-Ṭabarānī who narrated from Sufyān, from Abu Isḥāq, from Abu ‘Ubaydah, and finally from ‘Abd Allāh ibn Mas‘ūd.[746] This narration is *munqaṭi‘* because Abu ‘Ubaydah did not hear the narration directly from Ibn Mas‘ūd.[747] It is

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[743] See *inter alia*: Ibn Mufliḥ, Al-Furu’, 255; ʿAbd Allāh b. Aḥmad ibn Qudāmah Al-Maqdīsī, *’Umdah al-Fiqh*, (Beirut: Maktabah Al-‘Āṣriyyah, 2003), 141.
[744] Lane, *An Arabic-English Lexicon: In Eight Parts*, 1253.
[745] Al-Dawoody, The Islamic Law of War: Justifications and Regulations, 114.
[746] Abu al-Qāsim Sulaymān ibn Ayyūb Al-Ṭabarānī, *Al-Mu’jam Al-Kabīr*, *Vol. 9*, (al-Qāhirah: Maktabah Ibn Taymiyyah), 84.
[747] ‘Abd al-Raḥmān ibn Abī Ḥātim, *Al-Marasil*, (Beirut: Mu’assasah al-Risalah, 1397), 257.

therefore uncertain whether Ibn Mas‘ūd actually ended Abu Jahl’s life or simply waited until the Abu Jahl succumbed to his wounds.

Therefore, it may seem that the more accurate conclusion is that those incapacitated due to sickness and wounds should no longer be considered combatants. Consequently, feigning incapacitation would be an act of perfidy under *fiqh al-jihād* if applying the modern IHL definition of perfidy. Meanwhile, as explained earlier in this sub-chapter, *fiqh al-jihād* does not seem to see the act of feigning incapacitation as treacherous. Therefore, in this case, the definition of perfidy under modern IHL does not seem to fit well with *fiqh al-jihād*.

It must be noted that this is not to say that feigning incapacitation is altogether permissible. As far as deception is concerned, feigning incapacitation does not hit any prohibitions. However, this does not mean that there might be other problems. It goes without saying that the particular method of deception to be chosen by the commander will depend on the particular situation at the time, meaning that it is governed by *maṣlaḥat* as is *fiqh al-jihād* in general. Therefore, other rules may come in. For example, treaty laws. If any Muslim nations are parties to the Geneva Conventions and the Additional Protocols then they would be bound to not employ such tactics. Furthermore, if it is an effective customary international law then it must also be followed by virtue of reciprocity.

Seeing the big picture, albeit the original rule of permissibility of the tactic of feigning incapacitation, it seems that there is little to no room to actually employ it. Even putting the international law instruments aside, feigning incapacitation might have an impact towards those who are actually incapacitated. Soldiers would be wearier when they see the sick and wounded of the opposing forces.

5.5.5 Feigning civilian, non-combatant status

With regards to the question of feigning civilian and non-combatant status, surely the 'non-combatant' term should include only civilians because the other sub-categories of non-combatants are already covered in other sub-chapters here (i.e. surrendered enemies, incapacitated, and persons with distinctive emblems). The answer to it may lie in the case of the assassination of Ka'b ibn Ashraf which has been cited in sub-chapter 5.4.

It is important to note that the assassination occurred not long after the battle of Badr, and Muḥammad ibn Maslamah was a warrior and was among the *ahl al-Badr*.[748] Ka'b ibn Ashraf was from the Banū Al-Naḍīr clan which was in a treaty with the Muslims, but what he did made him to be a legitimate target. Note that although Muḥammad ibn Maslamah was a warrior, but when approaching Ka'b ibn Ashraf, he did not present himself as a combatant but simply as an average Muslim who was (pretending to be) fed up with Prophet Muḥammad ﷺ and seeking for some help. Therefore, at that time, it can be said that Muḥammad ibn Maslamah was pretending to be a normal civilian when approaching Ka'b ibn Ashraf. However, the entire mission was on the orders of Prophet Muḥammad ﷺ , and Muḥammad ibn Maslamah specifically requested permission to lie which was then granted.[749]

Evaluating the narration on the assassination of Ka'b ibn Ashraf, one can see that feigning as a civilian is not seen as something impermissible but rather a legitimate deception. The deception committed by Muḥammad ibn Maslamah not only was specifically instructed by Prophet Muḥammad ﷺ , but also did not involve any sort of breach of agreement or betrayal of *amān*. This can be applied also to the general rules of deception during warfare in *fiqh al-jihād*: deception is lawful as long

[748] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 340; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 330.
[749] Al-Bukhārī, *Sahih al-Bukhari*, ḥadīth no.4037; Al-Bukhārī, *Sahih Al-Bukhari*, ḥadīth no.3031-3032; al-Naysābūrī, Sahih Muslim, ḥadīth no. 4664; Al-Sijistānī, *Sunan Abu Dawud*, ḥadīth no. 2768.

as it is does not involve treason. Feigning as civilians does not seem to be in the exception and is therefore permissible as an original rule.

Applying the definition of *perfidy* in modern IHL towards *fiqh al-jihād,* a different conclusion would be reached. As per sub-chapter 3.3.3, enemy civilians not participating in hostilities are not legitimate targets. Therefore, feigning as civilians using the modern IHL definition of *perfidy* would be considered as unlawful. As of now, there are two cases (together with feigning incapacitation) where the modern IHL definition of perfidy will not properly fit in *fiqh al-jihād*.

However, as was the case of feigning incapacitation, while the original rule may be permissibility, there may be more things necessary to be considered. For example, if any Muslim nations have expressed consent to be bound to the modern IHL treaties prohibiting perfidy, then they must be obeyed and, as a result, feigning as civilians should not be done. Furthermore, if it is an effective customary international law, then such a rule must also be followed by virtue of reciprocity.

In addition, it is essential to consider the situation of the battlefield to see whether making such kind of deception is beneficial. Especially in the era of modern urban warfare, where the risk of civilian losses has increased exponentially and practically inevitable.[750] One can only imagine the psychology of a soldier during urban warfare, and how difficult it will be when a person in civilian outfit approaches or makes sudden movements, while the opponent is known to feign as civilians. Commenting on the war in Afghanistan, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported that, if the Taliban keeps on feigning as civilians while committing suicide bombing, it would be more difficult for the opposing force to determine whether an incoming civilian is really a civilian or a

[750] Nathalie Durhin, "Protecting civilians in urban areas: A military perspective on the application of international humanitarian law", *International Review of the Red Cross*, vol. 98, no. 901 (2016): 178–189; Valerie Epps, "Civilian casualties in modern warfare: The death of the collateral damage rule", *Georgia Journal of International & Comparative Law*, vol. 41 (2012): 307–355.

suicide bomber.[751] Also commenting on Afghanistan, the Human Rights Watch noted that, due to numerous suicide bombers feigning as civilians, the rate of soldiers erroneously shooting actual civilians actually increases.[752]

Therefore, even if the original rule of feigning civilian status may be permissible as an original rule, such a tactic may only be used when the *maṣlaḥat* outweighs the *muḍarat.* Considering the potential civilian losses due to the habit of feigning as civilians, as explained in the previous paragraph, it may be difficult to find any situation where the *maṣlaḥat* is higher than the potential calamities.

It seems that, given the reality of modern warfare, exceptions may be made only in very special circumstances where extreme *maṣlaḥat* is to be attained and massive *muḍarat* is to be avoided. Even in such circumstances it must be conducted only after very careful deliberations by the commanders and only conducted very rarely instead of on a regular basis. Albeit the controversy, the case of Columbia explained in sub-chapter 5.2 may be an example of one such situation where exceptions can be made. Although the case of Columbia is not exactly about feigning civilians, but the logic used is applicable by analogy because it was an act of impermissible deception which was accepted by most nations due to the extreme circumstances.

Another potential exception would perhaps be naval warfare as it does not share the difficulties of urban warfare such as the density of civilian population. Also, civilian ships can be easily detected from miles away, unlike in urban warfare where people can suddenly show up just around the corner giving no time for proper inspection. In this situation, the risk of future civilian casualties would be much less and therefore more chances for feigning civilians to be conducted in a manner that does not cause higher *muḍarat* than *maṣlaḥat*. However, even in this situation, legal

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[751] HRC, *A/HRC/11/2/Add.4, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Mission To Afghanistan, 6 May 2009*, (2009), 14.
[752] HRW, "The Human Cost: The Consequences of Insurgent Attacks in Afghanistan", *Human Rights Watch*, vol. 19, no. 6(c) (2007): 93–94.

obligations from treaties and customary laws must be considered when relevant so the final ruling on specific instances will depend on the circumstances.

Therefore, the position held by Muhammad Munir's regarding suicide bombers disguising themselves as civilians (as mentioned in sub-chapter 5.3) is partly disagreeable because feigning as civilians cannot be qualified as treachery as understood in *fiqh al-jihād*. However, it is at the same time partly agreeable because, in the end, feigning as civilians is more likely to be impermissible but on other grounds. In this case, *fiqh al-jihād* is in conflict with modern IHL.

5.5.6 Using flags, emblems, insignia, or uniform of adverse parties while engaging in attacks or in order to shield, favour, protect, or impede military operations.

As explained in sub-chapter 5.2, this act is considered treasonous under modern IHL but not an act of perfidy as it does not involve misleading the opponent to afford undue protected status. Therefore, the applicability of the modern IHL definition of perfidy might not be relevant in this sub-chapter. It may seem that this rule is more of a treachery or dishonorable-based type.

From an Islamic standpoint, the act of using enemy symbols or uniforms *etc* does not seem to constitute a breach of any agreement or trusts. Therefore, this case may fall under the generality of the permissibility of deception in warfare. This may therefore be yet another case where *fiqh al-jihād* is not compatible with modern IHL.

It is difficult to find an actual explicit *dalīl* or precedence on this particular scenario. However, one may find some lead from inference. The case of Hudhayfah is not only an example of early approvals of espionage, but it also may be similar to taking advantage of enemy uniform. Nothing in the narration indicates anything related to uniforms, rather Hudhayfah covered himself in the darkness to make sure that the enemy did not see him as he slipped into the enemy camp. However, he was

not totally sneaking so nobody could see him. Rather, he snuck through the centre of the camp to see the leader of the Quraysh army i.e. Abu Sufyan, so it seems that he was making himself indistinguishable from the other members of the enemy forces. There are narrations by other scholars of *ḥadīth* which provide more details of the story, which in short show more of what Hudhayfah experienced as he entered the enemy camp and relied on enemy forces thinking he was one of them.[753]

Hudhayfah's action was mere espionage and Prophet Muḥammad ﷺ explicitly prohibited him from attacking, and Hudhayfah almost attacked Abu Sufyan but refrained because of the Prophet's prohibition. However, it may seem that such prohibition was because an attack may hinder the main purpose of the mission which was to obtain information.[754] There is no reason to infer that carrying out attacks during espionage missions is *per se* prohibited, especially considering also the narration of Muḥammad ibn Maslamah and the ruling related to feigning as civilians.

There is no detail on whether there were distinct uniforms worn by the parties while in their camps, and if there were, then there is no information on whether Hudhayfah was wearing the enemy uniform. Rather, one may infer that at least everyone would be wearing blankets or any extra cloth to keep warm as a very cold wind was blowing. The whole point was that Hudhayfah was misleading the enemy to think that he was one of them. This might be similar to the main point of wearing enemy outfit or insignia, so Hudhayfah's narration may be an indirect indication of the permissibility of this type of deception.

However, as is the case with the other sub-chapters, while the original rule is permissibility, the Muslim army must bear in mind their international law obligations

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[753] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 154–155; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 460; al-Naysābūrī, Sahih Muslim, ḥadīth no.4640. While the Sahih Muslim version is authentic, it is short and does not have much detail as the other narrations do. With regards to the details, Al-Arnawth in his *taḥqiq* towards Musnad Imam Ahmad lists numerous narrations which corroborate each other to raise the narrations from *ḥasan* to *ṣaḥīḥ*. See: Aḥmad ibn Ḥanbal, *Musnad Imām Ahmad*, *Vol. 38*, edited by Shu'ayb Al-Arnawth (Taḥqīq), (Beirut: Mu'assasah al-Risalah, 1421), 358.

[754] Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, 154–155; ibn Isḥāq, The Life of Muhammad: A Translation of Ibn Ihsaq's Sirat Rasul Allah, 460; al-Naysābūrī, Sahih Muslim, ḥadīth no.4640.

where applicable. If they are bound by modern IHL treaties prohibiting the misuse of enemy uniform or insignia during attacks, or if there is an effective customary international law containing similar prohibitions, then the Muslims must adjust to it.

5.5.7 Using flags, emblems, insignia, or uniform of states not parties to the conflict or distinctive emblems while engaging in attacks or in order to shield, favour, protect, or impede military operations.

It is very difficult to find direct *dalīl* or precedence regarding deception using the uniform or insignia of states not parties to the conflict or to misuse distinctive emblems. Such acts do not, in themselves, constitute as breach of agreement or betrayal of *amān*. Therefore, this cannot be seen as treachery as such. Having that said, this far, *fiqh al-jihād* may seem to be in conflict with modern IHL.

However, this is not to say that such acts are necessarily permissible, especially the misusing of the insignia or uniform of states not parties to the conflict. Disguising as an army of another state (not party to a conflict) is an act that may implicate that state in the war, and, as Henckaerts and Doswald-Beck notes, is very likely to be condemned by that state.[755] This is not something situational, because if a state does not condemn such an act then it is very likely that this particular state may have some level of support towards one party to the conflict. Such states can be seen as not strictly speaking 'neutral' as such. Therefore, it is difficult to justify this strategy due to the *adab* which must be maintained in international relations.

In case of the use of distinctive emblems, it must be noted that most of these distinctive emblems are used for humanitarian missions such as the emblem of the ICRC. Numerous scholars have warned that the decrease of trust towards humanitarian missions may jeopardise the said missions which may implicate

[755] Henckaerts and Doswald-Beck, Customary international humanitarian law, 219.

numerous lives that these missions usually endeavour to save.[756] Therefore, feigning the use of distinctive emblems may very potentially cause more *muḍarat* than *maṣlaḥat* unless in very special circumstances, similar to what is discussed under sub-chapter 5.5.5 concerning feigning as civilians above.

However, one aspect that is different from sub-chapter 5.5.5 is that humanitarian missions, as long as they exist, will always do humanitarian purposes (as their name suggest) and will always use distinctive emblems. This is why, under this sub-chapter, the *maṣlaḥat* versus *muḍarat* is considered in the original rule as something that is 'unchangeable'.

On the other hand, it may seem that the modern IHL definition of perfidy might work in this sub-chapter. Persons from states who are not parties to the conflict, as well as those wearing distinctive emblems, are not persons who are participating in the hostilities in *fiqh al-jihād* and therefore are not legitimate targets. Consequently, applying the definition of perfidy in modern IHL will result in the impermissibility of such acts of deception. To some extent, this means that, under this sub-chapter, the modern IHL definition of perfidy works as the conclusion coincides with that of the pure *fiqh al-jihād* conclusion above. However, as these acts of deception are not prohibited as they are acts of treachery, this still shows that the Islamic concept of treachery does not coincide with the modern IHL concept of perfidy.

In addition to the explanation given above, it must also be considered that Muslim nations who are bound by modern IHL conventions clearly must not commit such acts of deceptions due to treaty obligation. Furthermore, if such prohibition is an effective customary international law, then they are also prohibited by virtue of reciprocity.

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[756] Dehn, Permissible Perfidy? Analysing the Columbian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction, 653. See also: ICTY, *Prosecutor v Simic (IT-95-9): Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness*, (The Hague, 1999).

5.5.8 Reprisals

In case when there are strong indications that the enemy combatants are about to commit treachery as understood in *fiqh al-jihād,* one must practise caution in deciding how to act. Sub-chapter 5.4 cites a *ḥadīth* prohibiting the Muslims from betraying even those who betrayed the Muslims.[757] While the authenticity of this *ḥadīth* may be disputed,[758] the content is corroborated by the other general Qur'ānic verses and *aḥadīth* regarding the impermissibility of committing treason. One especially relevant verse is Surah Al-Anfāl (8) verse 58 which indicates that betrayal may not be responded by betrayal, although this verse speaks of covenants in particular but the line of reasoning is relevant.

What might seem to be the more proper and safer response towards a strong likelihood of enemy combatants feigning *amān* or truces is firstly to not pretend to believe in the feign. Pretending to believe in the enemy maneuver may indicate acceptance towards an offer (of *amān,* truces, or surrenders) and therefore placing a trust which is intended to be betrayed. The following step would depend on what the commander sees fit, for example to not allow the enemy to approach for their fake truce to begin with or to accept them but with extra caution in order to anticipate (but not attacking or breaking trust first).

Having that said, based on Surah al-Anfal (8) verse 58 and the *hadith* that prohibits Muslims from betraying the betrayers, it seems that *fiqh al-jihād* does not share the rules on reprisals with modern IHL. The latter may seem to allow reprisals in case of treachery and perfidy, while *fiqh al-jihād* seems to be more restrictive to not allow reprisals specifically in this case.

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[757] أَدِّ الأَمَانَةَ إِلَى مَنِ ائْتَمَنَكَ وَلاَ تَخُنْ مَنْ خَانَكَ

[758] As explained in sub-chapter 5.3, Al-Albani said this *ḥadīth* is authentic but the two known existing chain of narrators have issues.

5.6 CONCLUSION

Considering the general rules in both *fiqh al-jihād* and modern IHL, it seems that both bodies of law on one hand recognise the permissibility of some kinds of deception and on the other hand prohibit other kinds of deception. Both bodies of law seem to identify that the type of deception which is prohibited would be those characterised as treasonous.

The modern IHL seems to have a combination of 'no treachery' and 'protecting non-combatants' spirit in its prohibition of perfidy. On the other hand, *fiqh al-jihād* seems to limit acts of deception entirely from the prohibition of treachery as found in several *aḥadīth* discussed in sub-Chapter 5.4. Therefore, regarding the specific rules on limiting deception, both bodies of law seem to have different concepts.

An analysis on the sub-categories of the modern IHL concept of perfidy in sub-chapter 5.5 shows that, as a matter of original rule, there are some compatibilities and incompatibilities between both bodies of law. As a matter of general concept, testing the modern IHL's definition of perfidy to *fiqh al-jihād* seems to work in some cases but not in others. This is merely a consequence of the fact that perfidy in modern IHL and treachery in *fiqh al-jihād* are two concepts that have significant differences.

However, there is much room for reconciliation between the two bodies of law especially considering the perspective of Islam. In some cases of incompatibilities, reconciliation is found by reaching beyond the Islamic concept of treachery into another concept which, as mentioned in Chapter Two, is very essential in *fiqh al-jihād*: *maṣlaḥat*. In other cases, similar to many cases in Chapter Five, reconciliation may be achieved by obligations rising from the branch of *fiqh* that *fiqh al-jihād* seems to be a sub-branch of: *fiqh al-siyār*.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSION

In chapter one, it is elaborated that there is a lethargy in the development of *fiqh al-jihād*. There are new realities in warfare that did not exist at the times of the major *fuqahā'* of the past. Meanwhile, the *fuqahā'*of the present have either not discussed these developments altogether or discussing it but not as accurately or holistically as they needed to be. Chapter three, four, and five, especially, provide a more in-depth overview of the existing literature in specific topics to indicate the gap of literature. Chapter one identifies the main problem which is the lethargy in the *ijtihād* of *fiqh al-jihād* particularly in the means and methods of warfare in face of the challenges of modern warfare.

Following that main problem, this thesis limits itself to examining three branches of rules regarding the means and methods of warfare at a principle level: the principles of proportionality and precaution, the prohibition from causing unnecessary suffering and superfluous injuries, and the prohibition from commiting treachery and perfidy. With that limitation, the problem is divided into four research questions as follows:

The first research question is: To what extent can *fiqh* adapt to modern necessities? The second research question is: To what extent should *fiqh al-jihād* adjust its rulings in the limitation of the means and methods of war in developing a principle of proportionality, precaution, and protection towards the environment? The third research question is: To what extent should *fiqh al-jihād* adjust its rulings in the limitation of the means and methods of war in developing a prohibition to cause unnecessary suffering and superfluous injuries? The fourth research question is: To

what extent should *fiqh al-jihād* adjust its rulings in the limitation of the means and methods of war in prohibiting treachery and perfidy?

The first research question is explored in chapter two, where the literature reveals that there are two extremes in approaching new realities, which make the existing rules of *fiqh* appear to be obsolete. The first extreme includes those who think that the door to *ijtihād* is closed, so that there is no reason to depart in any way from the rulings made by the existing jurists. This extreme is difficult to accept because, after comparing the works of the *fuqaha,* there is always room for *ijtihād* especially regarding rulings which are very heavily tied to *maṣlaḥat* which may change throughout the ages. *Fiqh al-jihād* is one of these areas of *fiqh* which is heavily tied to *maṣlaḥat.* The second extreme includes the 'liberal Muslims' who think that not only the jurist's *ijtihād* but even the *dalīl* can be subject to what is claimed to be 're-interpretation' but is in effect 'revision'. This extreme is also difficult to accept because, based on the critical review by this thesis towards contemporary scholarship of *'aqīdah* and *tafsīr* in their relation to *uṣūl al-fiqh,* the method they use are not in accordance with the *sharī'ah,* rather it contradicts the fundamental principles of the *sharī'ah* and surrendering completely to the secular and non-Islamic international law.

The reality is that *fiqh*, including *fiqh al-jihād,* can indeed catch up with new realities and problems faced by humankind without needing to fall into any of the aforementioned extremes. Developments in technology and international law can be considered, but from the worldview and framework of the *sharī'ah* with the Qur'*ā*n and Sunnah as main sources and through the understanding of the jurists of the *ahl al-sunnah wa al-jamā'ah*. Especially in the context of *fiqh al-jihād*, modern IHL is a good reference point as it is quite holistic and relatively up to date in relation to the development of warfare. This thesis then considers the current state of rules and regulations regarding the means and methods of warfare in modern IHL and examines the extent of which modern IHL can be taken as reference and adapted into the corpus of *fiqh al-jihād*.

In answering the second research question, chapter three shows that there is a rich basis to deduce an obligation in order to abide by principles of proportionality and precaution akin to that of modern IHL. The problem is that the existing literature of *fiqh al-jihād* does not necessarily mention such principles, and there are no rules to further implement these principles in a comprehensive detail in a manner that modern IHL does. Therefore, the comprehensive and detailed guideline provided by modern IHL is examined to see to what extent *fiqh al-jihād* may adopt from it. It is found that there are quite a lot of rules that can be adopted into *fiqh al-jihād* based on general principles and maxims derived from the Qur'ān and Sunnah and existing literature of *fiqh* and *uṣūl al-fiqh*, so that *fiqh al-jihād* can fulfill its purpose better. However, in some minor details of the modern IHL rules, there are some discrepancies with Islamic teachings and therefore cannot be adopted. In fact, some of these discrepancies are due to *fiqh al-jihād* having higher standards such as in the case of protection of the environment during war.

While answering the third research question, chapter four finds a different structure in approaching the problem as compared to chapter three. An examination of the existing literature of *fiqh* and other Islamic sciences (whether classical or contemporary) and modern IHL shows that both bodies of law share similar concerns regarding the humanity in attacking the enemies. Both bodies of law prohibit inhumane acts unnecessarily torturing even those who are enemies. However, in case of prohibiting the infliction of unnecessary suffering and superfluous injuries, modern IHL does not provide a comprehensive detailed guide like the principles of proportionality and precaution. Rather, modern IHL only provides a general rule reflecting the principle and proceeds to outlaw specific weapons. In analysing these specific weapons, it turns out that some of them are inhumane according to modern IHL but not according to *fiqh al-jihād*. However, some of these rules of modern IHL can be argued to be obsolete or questionable such as the case of expanding bullets.

Finally, in answering the fourth research question regarding the prohibition from committing treachery and perfidy, chapter five shows that modern IHL provides: a general principle, some examples, and some prohibitions towards certain types of acts of deception deemed as treacherous or perfidious. The literature of *fiqh* also strictly prohibits the act of treachery in war. However, the concept of treachery in Islam has both similarities and differences with the concept of treachery and perfidy in modern IHL. Hence, after deriving rules of *fiqh* towards a contemporary context, there seems to be a relatively equal mix of compatibilities and incompatibilities between *fiqh al-jihād* and modern IHL at least as far as the concept of treachery and perfidy is concerned. However, some of the incompatibilities are resolved when considering not only the Islamic concept of treachery but also *maṣlaḥat,* considering that some acts of treachery may not be constituted as treachery as such but in practice will cause *muḍarat.*

From the answers found for all the four research questions above, two common features were found as follows. The first common feature to chapter three, four, and five is that modern IHL and *fiqh al-jihād* share very similar principles at least in general. This results in a large number of detailed rules of modern IHL which can be adapted into the corpus of *fiqh al-jihād* on the grounds of *maṣlaḥat,* although there may be certain specific items where there are discrepancies. This is most evident in chapter three, although it can also be seen in chapters four and five. In filtering international norms to be adapted and adopted to *fiqh al-jihād*, it is not necessary to depart from the frameworks and rulings set by the jurists of the past and present. Rather, all it requires is developing existing rulings by the jurists and occasionally choosing stronger opinions between multiple jurists when there is *khilāf* among them.

The second common feature to chapters three, four, and five, is the role of *fiqh al-siyār*. Quite a large number of rules of modern IHL seem incompatible with *fiqh al-jihād* when considering the original rule. However, a large portion of *fiqh al-jihād* do not necessarily speak of specific prohibitions or commands but rather permissibility if

there is *maṣlaḥat.* Therefore, these are areas which can be arranged via treaties and customary laws. Quite a number of incompatibilities between *fiqh al-jihād* and modern IHL, most evident in chapter four but occurs also in chapters three and five, are resolved if the Muslim army is from a state bound by modern IHL treaties and/or customary international laws. However, it must be noted that these instances cannot be inserted into the corpus of *fiqh al-jihād* as original rulings of the matters. This is because not all Muslim armies are necessarily bound by all modern IHL treaties, not all customary laws are necessarily always effective, and treaties and customary laws may change over time.[759]

In the end, the reality is that the development of warfare is difficult to prevent, whether for the better or the worse. The Muslims, since Prophet Muhammad ﷺ came, have always been engaged in wars in some parts of the world throughout the ages. This thesis is written in a time when the Syrian War, Yemen War, Palestine War, Afghanistan War, and a number of other wars are currently ongoing. Considering the *aḥadīth* in *ākhiru al-zamān,* this will continue until approaching the end of times.[760]

Allah says in Surah al-Anfāl (8) verse 60:

وَأَعِدُّوا لَهُمْ مَا اسْتَطَعْتُمْ مِنْ قُوَّةٍ وَمِنْ رِبَاطِ الْخَيْلِ تُرْهِبُونَ بِهِ عَدُوَّ اللَّهِ وَعَدُوَّكُمْ وَآخَرِينَ مِنْ دُونِهِمْ لَا تَعْلَمُونَهُمُ اللَّهُ يَعْلَمُهُمْ

> "And prepare against them whatever you are able of power and of steeds of war by which you may terrify the enemy of Allah and your enemy and others besides them whom you do not know [but] whom Allah knows."

[759] Although modern IHL seems to have, to a large extent, crystalized into solid internationally recognized body of law, at least in theory one can never truly know what may happen and how international laws may change over time.

[760] See: Ismail Ibn Kathir, *Book of the End: Great Trials & Tribulations*, (Riyadh: Darussalam, 2006); Wisnu Sasongko, *Armaggedon: Peperangan Akhir Zaman (Menurut Al-Qur'an, Hadits, Taurat, dan Injil)*, (Jakarta: Gema Insani Press, 2003).

Surely, some of the wars involving Muslims may be questionable in terms of *jus ad bellum*. Additionally, not all Muslims are facing war in their immediate surroundings. Nonetheless, the *Ummah* must be prepared. Surah al-Anfāl (8) verse 60, as cited above, may seem to speak only of the material preparations of war. However, deeds must be proceeded by knowledge.[761] While there is a lethargy in the development of *fiqh al-jihād* in this area, this thesis is hoped, at least in some areas, to have filled the gap of scholarship.

6.2 RECOMMENDATIONS

Upon the completion of this thesis, there are a few recommendations that should be considered by future researchers, jurists, and *mujahidin* of the *Ummah*:

6.2.1 Future Researches

The problem with *fiqh al-jihād* in public discourse is that many people are content with 'Islam is humane in war' as far as lawful conducts of war is concerned. As this thesis shows, there may be general similarities at a principle level but much of the details need to be worked on and sometimes there are incompatibilities. Therefore, there should be more comprehensive researches on other areas of *fiqh al-jihād* in the light of the development of modern warfare. These researches should not stop at the comparisons of general principles as is the case with most works of comparative studies between modern IHL and *fiqh al-jihād*. Rather, detailed rulings should also be derived in order to meet the challenges of modern warfare. These researches should also go beyond the topics related to modern IHL, but also other matters of *fiqh* such as *fiqh al-janāẓah, fiqh al-ṣalāt, etc* which may have specific concerns during times of war.

[761] Al-Bukhārī, *Sahih Al-Bukhari*, 96.

In the research, there should be an emphasis on the effect of asymmetric warfare towards *fiqh al-jihād* as most wars involving Muslims in the present day are characterized so. Asymmetric warfare, when the Muslims are in the disadvantaged positions (e.g. the Syrian rebels and the Palestinian fighters), may cause a lot of constant *ḍarurah* situation. Consequently, especially in context of modern warfare, this may highly affect the 'normal' default *fiqh al-jihād* rulings.

This research should also involve Islamist groups who are experienced in combat. Granted, such endeavor in many cases can be illegal or even unsafe. However, it is quite difficult to comprehensively and properly develop *fiqh al-jihād* without involving those who are experienced in applying them. It is highly possible that all parties involved can learn more from such a constructive engagement where experience sharing could be enlightening.

It is important to make sure that these researches use only methods acceptable in Islam. Methods that breach the fundamental principles of Islam such as hermeneutics or other methods applied by the 'liberal Islam' activists must be avoided. This thesis has shown that, as far as *fiqh al-jihād* is concerned, Islamically accepted methods are sufficient to adapt towards the necessities of time.

Additionally, more researches should be conducted to further develop *fiqh al-siyār* in general to meet the contemporary challenges in international relations among Muslim nations or between them and the non-Muslim world. There was a time when the Islamic world contributed majorly towards the practice and development of international law, but it is much less so today.[762] Muslim jurists, leaders of the Muslim nations, and the Ummah in general should contribute in their own capacity in order to push the Muslim world to develop and practice *fiqh al-siyār*.

[762] Salim Farrar, "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?", *Chinese Journal of International Law*, vol. 13, no. 4 (2014): 787–817.

6.2.2 Establishing International Cooperation and A 'Jihad Code'

It has been explained in the sub-chapter 6.2.1 that there should be further research. This will be difficult to be done without a strong international cooperation. Muslim jurists and researchers from all over the world should provide their input, either to positively contribute researches or to criticize and scrutinize existing ones. The states also should help facilitate such exchange of knowledge, and Islamic international organisations such as the Organisation of Islamic Cooperation or the Arab League must also be involved.

Most importantly, these researches on *fiqh al-jihād* shall not be left scattered in numerous articles and books. They should be compiled into a 'Jihad Code' which could be improved and revised in order to be agreed upon by as many Muslim jurists as possible from various nations. The *fatwa* committees in various nations are also encouraged to promote this 'Jihad Code' (when available) in their respective states, and examine prospects to incorporate it into military manuals.

However, it is also important to separate what the original rulings on *fiqh al-jihād* are and what the current state of IHL. This is due to reasons that are already mentioned in sub-chapter 6.1.

6.2.3 Education of Jihad

Muslims across the globe should be educated with *fiqh al-jihād* as early as possible but proportionate to their age. It is hoped that with proper knowledge regarding *jihād,* it could help not only combat and counter extremism but also to prepare the *Ummah* for the worse. Furthermore, *fiqh al-jihād* should be incorporated into the military school's curriculum of the Muslim nations as well as for training in non-state Islamic

armed groups, wherever they may be fighting.[763] A unified 'Jihad Code' will be an essential material for this purpose.

Muslim law students should allocate more time to study *fiqh al-jihād* specifically and *fiqh al-siyār* generally. This will become a future investment towards the previous recommendations.

[763] This should not be understood to promote terrorism. Non-international armed conflicts can involve non-state Muslim fighters and they would require training internally within their own system.

REFERENCES

‘Azzām, ‘Abdullah. *Fī Ẓilāl Sūrah al-Tawbah*. Peshawar: Markaz al-Shahīd ‘Azzām Al-I‘lamī.

’Abd al-Wahhab, M. bin. (2015). *Nawaqidhul Islam - Pembatal Islam (Matan dan Terjemah)*. Surabaya: Pustaka Syabab.

Abaza, M. (1995). Civil society and Islam in Egypt: the case of Nasr Hamid Abu Zayd, *Journal of Arabic, Islamic and Middle Eastern Studies* vol. 2, no. 2. pp.29–42.

Abdillah, N. (2014). Madzhab dan Faktor Penyebab Terjadinya Perbedaan, *Jurnal Fikroh* vol. 8, no. 1. pp.20–38.

Abdul-Rahman, M.S. (2003). *Islam: Questions and Answers (Vol 3: The Qur’aan and It’s Sciences)*. London: MSA Publication Limited.

Abdul ’Al, A.H. (2014). *Pengantar Ushul Fikih*. Jakarta: Pustaka Al-Kautsar.

Abdullah, B. bin & Al-Utsaimin, M. bin S. (2013). *Syarah Hilyah Thalibil Ilmi (Akhlak Pencari Ilmu)*. Jakarta: Akbar Media.

Abu Zaid, N.H. (1999). *Critique of Islamic Discourse*. Paris and Arles: Sinbad Actes Sud.

Abu Zaid, N.H. & Nilson, A.R. (2004). *Voice of an Exile: Reflections on Islam*. London: Westport Connecticut.

Abubakar, A.-Y. (2011). *Hukum Pidana Islam di Aceh: Penafsiran dan Pedoman Pelaksanaan Qanun tentang Perbuatan Pidana*. Banda Aceh: Dinas Syariat Islam Aceh.

Achmadi, A. (2011). *Filsafat Umum*. Jakarta: Rajawali Press.

Adam, M. ibn. Retrieved 2nd December 2017. Retrieved from https://islamqa.org/hanafi/daruliftaa/7879.

Afridi, M.A. (2013). Contribution of Muslim scientists to the world: An overview of some selected fields, *Revelation and Science* vol. 3, no. 01. pp.40–49.

Afsah, E. (2008). Contested Universalities of International Law. Islam’s Struggle with Modernity, *Journal of the History of International Law* vol. 10. pp.259–307.

Ajisaka, A. (2018). *Mengenal Pahlawan Nasional*. Jakarta Selatan: PT Kawan Pustaka.

Akram, A.I. (2004). *The Sword of Allah: Khalid bin al-Waleed*. Oxford: Oxford University Press.

Al-‘Aynī, B. *’Umdah Al-Qārī* (*Vol. 6*). Beirut: Dār Ihya Al-Turath Al-‘Arabi.

Al-‘Aynī, B. *’Umdah Al-Qārī* (*Vol. 14*). Beirut: Dār Ihya Al-Turath Al-‘Arabi.

Al-‘Aynī, B. *’Umdah Al-Qārī* (*Vol. 15*). al-Qāhirah: Idarat Al-Taba’at Al-Muniriya.

Al-‘Īd, I.D. (1424). *Sharḥ Al-Arba‘īn Nawawiyyah* (*Vol. 1*). Mu’assasah al-Rayyan.

Al-‘Uthaymīn, M. ibn Ṣāliḥ. (2012). *al-Sharḥ al-Mumti‘ ‘alā Zād al-Mustaqni‘* (*Vol. 2*). Damman: Dar Ibn Al-Jawzi.

Al-’Awshan, M. ibn ’Abdillah. *Maa Sha’a Wa Lam Yathbutu fi al-Sīrah al-Nabawiyyah*. Riyadh: Dar al-Thibah.

Al-’Uqaylī, M. ibn ‘Amr. (1404). *Al-Dhu’afā’ al-Kabīr* (*Vol. 2*). Beirut: Dar al-Maktabah al-’Ilmiyyah.

Al-Abdarī, M. ibn Y. ibn A. al-Q. (1398). *Al- Tāj wa al- Iklīl: Sharḥ Mukhtasar Khalīl* (*Vol. 3*). Beirut: Dar al-Fikr.

Al-Akiti, M.A. (2005). *Defending the Transgressed by Censuring the Reckless against the Killing of Civilians*. Germany and United Kingdom: Warda Publications and Aqsa Press.

Al-Albānī, M.N. (1405). *Irwa al-Ghalil* (*Vol. 5*). Beirut: Al-Maktab al-Islami.

Al-Albānī, M.N. (1419). *Ṣaḥīḥ wa Ḍa‘īf Sunan al-Tirmidhi* (*Vol. 2*). Riyadh: Maktabah al-Ma’arif.

Al-Albānī, M.N. (1988). *Ḍa‘īf al-Al-Jāmi‘ Al-Ṣaghīr*. Beirut: Al-Maktab al-Islami.

Al-Albānī, M.N. (1988). *Ṣaḥīḥ Jami’ al-Ṣaghir* (*Vol. 2*). Beirut: Maktab al-Islami.

Al-Āmidī, S. al-D. (1996). *Al-Iḥkām Fî Uṣūl Al-Aḥkām* (*Vol. 3*). Bayrūt: Dar al-Fikr.

Al-Ashqar, ‘Umar Sulaymān. (1999). *Naẓarat fī Uṣūl al-Fiqh*. Jordan: Dar an-Nafa’is.

Al-Attas, S.M.N. (1993). *Islam and Secularism*. Kuala Lumpur: ISTAC.

Al-Attas, S.M.N. (1995). *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam*. Kuala Lumpur: Institute for the Study of Islamic Thought and Civilizations.

Al-Baghdādī, ‘Alī ibn Thābit al-Khaṭīb. (2001). *Tārīkh Madīnah al-Salam wa Akhbar Muḥaddithiha wa Dhikr Quttaniha al-‘Ulamā’ min Ghayr Ahliha wa Waridiha* (*Vol. 2*). Beirut: Dar al-Gharb al-Islami.

Al-Bahūtī, M.I.Y. *Sharḥ Muntahā al-Irādat* (*Vol. 1*). al-Qāhirah: ‘Alam al-Kutub.

Al-Balādhurī, A. ibn Y. (1988). *Futūh al-Buldān*. Beirut: Dār wa Maktabah al-Hilāl.

Al-Bugha, M. & Al-Khin, M. (2006). *Syarah Riyadus Shalihin*. Yogyakarta: Darul Uswah.

Al-Bukhārī, M. ibn I. *Al-Tārīkh al-Kabīr* (*Vol. 1*). Hyderabad: Dār al-Ma'ārif al-'Uthmaniyyah.

Al-Bukhārī, M. ibn I. *Al-Tārīkh al-Kabīr* (*Vol. 4*). Hyderabad: Dār al-Ma'ārif al-'Utsmaniyyah.

Al-Bukhārī, M. ibn I. (1997a). *Sahih Al-Bukhari* (*Vol. 4*). Riyadh: Darussalam.

Al-Bukhārī, M. ibn I. (1997b). *Sahih Al-Bukhari* (*Vol. 8*). Riyadh: Beirut.

Al-Bukhārī, M. ibn I. (1997a). *Sahih al-Bukhari* (*Vol. 3*). Riyadh: Darussalam.

Al-Bukhārī, M. ibn I. (1997c). *Sahih Al-Bukhari* (*Vol. 1*). Riyadh: Darussalam.

Al-Bukhārī, M. ibn I. (1997d). *Sahih Al-Bukhari* (*Vol. 6*). Riyadh: Darussalam.

Al-Bukhārī, M. ibn I. (1997b). *Sahih al-Bukhari* (*Vol. 5*). Riyadh: Darussalam.

Al-Bukhārī, M. ibn I. (1997e). *Sahih Al-Bukhari* (*Vol. 9*). Riyadh: Darussalam.

Al-Būthī, M.S.R. (1973). *Ḍawābiṭ Al-Maṣlaḥat fī al-Sharī'ah Al-Islāmiyyah*. Bayrūt: Mu'assasah al-Risalah.

Al-Dardir, A. *Al-Sharḥ al-Kabir* (*Vol. 2*). Beirut: Dar al-Fikr.

Al-Dawoody, A. (2011). *The Islamic Law of War: Justifications and Regulations*. New York: Palgrave Macmillan.

Al-Dawoody, A. (2015). Al-Sarakhsi's Contribution to the Islamic Law of War, *Journal of Islamic and Near Eastern Law* vol. 14. p.29.

Al-Dawoody, A. (2017). Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics, *International Review of the Red Cross* vol. 99, no. 905. pp.759–784.

Al-Dawoody, A. (2019). *IHL and Islamic Law in Contemporary Armed Conflict: Expert Workshop, Geneva 29-30 October 2018*. Genev.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1382a). *Mīzān al-I'tidāl* (*Vol. 2*). Beirut: Dār al-Ma'rifah li al-Thibā'ah wa al-Nashr.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1382b). *Mīzān al-I'tidāl* (*Vol. 5*). Beirut: Dar al-Ma'rifah li al-Thiba'ah wa al-Nashr.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1382c). *Mīzān al-I'tidāl* (*Vol. 3*). Beirut: Dār al-Ma'rifah li al-Thibā'ah wa al-Nashr.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1382d). *Mīzān al-I'tidāl* (*Vol. 1*). Beirut: Dar al-Ma'rifah li al-Thiba'ah wa al-Nashr.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1419). *Tadhkirah al-Huffādh* (*Vol. 1*). Beirut: Dar al-Kutub ’Ilmiya.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1422a). *Siyar A‘lām al-Nubalā’* (*Vol. 5*). Beirut: Mu’assasah al-Risalah.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1422b). *Siyar A‘lām al-Nubalā’* (*Vol. 4*). Beirut: Mu’assasah al-Risalah.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1422c). *Siyar A‘lām al-Nubalā’* (*Vol. 9*). Beirut: Mu’assasah al-Risalah.

Al-Dhahabī, M. ibn A. ibn ʿUthmān I. (1422d). *Siyar A‘lām al-Nubalā’* (*Vol. 6*). Beirut: Mu’assasah al-Risalah.

Al-Dhīb, S. (2015). Retrieved 7th March 2018. Retrieved from http://www.m.ahewar.org/s.asp?aid=454296&r=0.

Al-Fawzan, S. bin F. Retrieved 1st December 2017. Retrieved from http://www.alfawzan.af.org.sa/ar/node/2350.

Al-Fawzan, S. bin F. (2015). Retrieved 27th November 2017. Retrieved from https://muslim.or.id/26820-apakah-pintu-ijtihad-sudah-tertutup.html.

Al-Ghazālī, A. Ḥāmid M. (1324). *Al-Muṣtaṣfa Min ‘Ilm al-Uṣūl* (*Vol. 1*). al-Qāhirah: Al-Amiriya Press.

Al-Ghunaymi, M.T. (2012). Tinjauan Umum Tentang Hukum Humaniter Internasional Islam. In A. Zemmali (Ed.). *Islam dan Hukum Humaniter Internasional*. Jakarta: Mizan.

Al-Halabi, H. (1995). *Muslim Rasionalis*. Jakarta: Pustaka Al-Kautsar.

Al-Ḥanafi, I.A. ‘Alī. (1997). *Sharḥ al-’Aqīdah Al-Ṭaḥawiyyah* (*Vol. 2*). Beirut: Mu’assasah al-Risalah.

Al-Ḥaṭṭab, M.A. ‘Abd A. ibn M. (1416). *Mawāhib al-Jalīl* (*Vol. 3*). Beirut: Dār al-Kutub ’Ilmiya.

Al-Haythamī, A. Ḥasan N.A.-D. (1412). *Al-Majma‘ Al-Zawā’id* (*Vol. 5*). Beirut: Dar al-Fikr.

Al-Hilali, S. bin ‘Ied. (2006). *Ensiklopedi Larangan menurut Al-Qur’an dan As-Sunnah* (*Vol. 2*). Jakarta: Pustaka Imam Syafi’i.

Al-Ḥillī, J. al-D. Ḥasan ibn Y. (1431). *Khulasah al-Aqwal*. Nashr al-Fiqahah.

Al-Jarjānī, ‘Abd Allah ibn ‘Adī. (1988). *Al-Kāmil fī Ḍu‘afā’ al-Rijāl* (*Vol. 6*). Beirut: Dar al-Fikr.

Al-Jāwī, M. al-N. (2010). *Tijan A-Darari*. Surabaya: Mutiara Ilmu.

Al-Jawziyah, I.A.-Q. (1415). *Zad al-Ma'ad* (*Vol. 3*). Beirut: Mu'assasah al-Risalah.

Al-Jawziyah, I.A.-Q. (1973). *I'lāmu al-Muwaqqi'īn* (*Vol. 4*). Daarul Jiil: Beirut.

Al-Jawziyah, I.A.-Q. (1985). *Al-Turuq Al-Hukmiyyah Fi al-Siyasah al-Shar'iyyah*. Jeddah: Dar al-Madani.

Al-Jawziyah, I.I.A.-Q. (2000). *I'lamul Muwaqqi'in: Panduan Hukum Islam (4 Jilid Lengkap)*. Jakarta: Pustaka Azzam.

Al-Jundī, K. ibn I. ibn M. (1415). *Mukhtasar Khalīl fī Fiqh Imām Dār al- Hijrah Imam Mālik*. Beirut: Dar al-Fikr.

Al-Khallal, A.B. (1410). *Al-Sunnah* (*Vol. 3*). Riyadh: Dar al-Rayah.

Al-Khasawneh, A.S. (2013). Islam and International Law. In M.-L. Frick & A.T. Müller (Eds.). *Islam and international law: engaging self-centrism from a plurality of perspectives* (pp. 29–44). Martinus Nijhoff Publishers.

Al-Khin, M. & Al-Bugha, M. (2014). *Konsep Kepemimpinan dan Jihad dalam Islam: Menurut Madzhab Syafi'i*. Jakarta: Darul Haq.

Al-Khudayr, 'Abd al-Kareem. (2002). Retrieved 25th April 2018. Retrieved from https://islamqa.info/en/21932.

Al-Maḥallī, J. al-D. & Al-Suyūṭī, J. al-D. (2007). *Tafsīr al-Jalālayn* edited by Ghazi bin Muhammad ibn Talal. Amman: Royal Aal al-Bayt Institute for Islamic Thought.

Al-Mālikī, 'Alī bin Khalaf al-Manūfī. (1994). *Kifāyah al-Ṭālib Al-Rabbānī 'Alā Risālah Ibn Abi Zayd al-Qayruwānī* (*Vol. 1*). Bayrūt: Dar al-Fikr.

Al-Mālikī, A.A.-W.A.-B. (1332). *Al-Muntaqa Sharḥ Al-Muwaṭṭa* (*Vol. 3*). al-Qāhirah: Mathba'ah al-Sa'adah.

Al-Mālikī, A. Ṣuhayb 'Abd A.-'Azīz ibn Ṣuhayb. (2000). *Aqwālu Al-Ā'immah wa Al-Du'āt Fī Bayāni Riddati Man Baddala Sharī'ah Min al-Ḥukkam Al-Ṭughāt*. Ilmway (Online).

Al-Manṣurfūrī, A.-Q.M.S. *Rahmatun lil 'Alamin*. al-Riyāḍ: Dar al-Salam li al-Nashr wa al-Tauzi'.

Al-Maqdīsī, ʿAbd Allāh b. Aḥmad ibn Qudāmah. (1992). *Al-Mughni* (*Vol. 11*). al-Qāhirah: Hajir.

Al-Maqdīsī, ʿAbd Allāh b. Aḥmad ibn Qudāmah. (2003). *'Umdah al-Fiqh*. Beirut: Maktabah Al-'Āṣriyyah.

Al-Maqdīsī, ʿAbd Allāh b. Aḥmad ibn Qudāmah. (2004). *Fiqh al-Kāfī al-Imām Aḥmad ibn Ḥanbal* (*Vol. 4*). Beirut: Dar al-Kutub 'Elmiya.

Al-Maqrīzī, A. ibn ‘Alī. (1420). *Imtā’ al-Asmā’ Bi Mā li al-Nabī min al-Aḥwāl wa al-Amwāl* (*Vol. 9*). Beirut: Dar al-Kutub ’Ilmiya.

Al-Marghīnānī, B. al-D. (2000). *Al-Hidāyah Fī Sharḥ Bidāyat al-Mubtadī* (*Vol. 4*). Beirut: Dar al-Kutub ’Elmiya.

Al-Marzuki, S.A. (2012). *Ilmu Tauhid Tingkat Dasar: Terjemah Aqidatul Awam Makna Pegon dan Terjemah Indonesia* translated by Achmad Sunarto. Surabaya: Al-Miftah.

Al-Mas‘ūdī, A. al-Ḥasan. *Muruj Al-Dhahab* (*Vol. 4*). Beirut: Dar al-Kutub ’Ilmiya.

Al-Mizzī, Y. ibn ‘Abd al-R. (1400). *Tahdhib al-Kamal* (*Vol. 12*). Beirut: Mu’assasah al-Risalah.

Al-Mubārakfūrī, M. ibn ’Abd al-R. *Tuḥfatu al-Aḥwadhī Sharḥ Sunan al-Tirmidhi* (*Vol. 4*). Beirut: Dar al-Kutub ’Ilmiya.

Al-Mubārakfūrī, Ṣafi al-Raḥmān. (1427). *Al-Rahik Makhtum* (*Vol. 1*). Damascus: Dar al-’Ushama.

Al-Mubarakfuri, S. (1996). *The Sealed Nectar: Biography of the Noble Prophet*. Riyadh: Dar-us-Salam Publications.

Al-Mughrabi, N. (2018, May 4). "Israeli troops fire shots, tear gas at Gaza protesters, 1,100 Palestinians hurt", *Reuters*.

Al-Munajjid, M.S. Retrieved 14th March 2019. Retrieved from https://islamqa.info/en/answers/217995/ruling-on-blowing-oneself-up.

Al-Munajjid, M.S. (2014). *How He Treated Them?* Riyadh: Zad Publishing.

Al-Munāwī, ʿAbd al-Ra’ūf ibn Tāj al-ʿArifīn. (1410). *Tawqīf ʿalā Muhammāt al-Taʿārīf*. al-Qāhirah: ’Alam al-Kutub.

Al-Mūṣilī, ‘Abd Allah ibn Muḥammad. *Al-Ikhtiyār Li Tal‘īl Al-Mukhtār* (*Vol. 5*). Beirut: Dar al-Kutub ’Elmiya.

Al-Nasā’ī, A. ’Abd A.-R. (2007a). *Sunan al-Nasa’i* (*Vol. 5*). Riyadh: Darussalam.

Al-Nasā’ī, A. ’Abd A.-R. (2007b). *Sunan al-Nasa’i* (*Vol. 6*). Riyadh: Darussalam.

Al-Nawawī, Y. ibn S. (1392a). *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī* (*Vol. 13*). Beirut: Dār Ihya Al-Turath Al-‘Arabi.

Al-Nawawī, Y. ibn S. (1392b). *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī* (*Vol. 6*). Beirut: Dār Ihya Al-Turath Al-‘Arabi.

Al-Nawawī, Y. ibn S. (1416c). *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī* (*Vol. 12*). Damascus: Dar al-Khayr.

Al-Nawawī, Y. ibn S. (1416d). *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī* (*Vol. 4*). Damascus: Dar al-Khayr.

Al-Nawawī, Y. ibn S. (1416). *Sharḥ Al-Nawawī 'Ala Muslim* (*Vol. 16*). Dar al-Khayr.

Al-Nawawī, Y. ibn S. (1416e). *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī* (*Vol. 3*). Damascus: Dar al-Khayr.

Al-Nawawī, Y. ibn S. (1992). *Rawdah Al-Ṭālibīn* (*Vol. 8*). Beirut: Dar al-Kutub 'Elmiya.

al-Naysābūrī, M. ibn al-Ḥajjāj. (2007). *Sahih Muslim* (*Vol. 5*). Riyadh: Darussalam.

Al-Naysābūrī, M. ibn al-Ḥajjāj. Retrieved 7th January 2019. Retrieved from https://sunnah.com/muslim/32/69.

Al-Naysābūrī, M. ibn al-Ḥajjāj. (2007a). *Sahih Muslim* (*Vol. 6*) (2nd edn.). Riyadh: Darussalam.

Al-Naysābūrī, M. ibn al-Ḥajjāj. (2007b). *Sahih Muslim* (*Vol. 4*). Riyadh: Darussalam.

Al-Naysābūrī, M. ibn al-Ḥajjāj. (2007c). *Sahih Muslim* (*Vol. 2*). Riyadh: Darussalam.

Al-Naysābūrī, M. ibn al-Ḥajjāj. (2007d). *Sahih Muslim* (*Vol. 1*). Riyadh: Darussalam.

Al-Qahṭani, A.M. (1420). *Majmū'ah al-Fawā'id al-Bahiyyah 'Alā Manẓūmah al-Qawā'id al-Fiqhiyyah*. KSA: Dar al-Shami'i li al-Nasyr wa al-Tauzi'.

Al-Qarḍāwi, Y. (2000). *Naẓariyyah maqāṣid as-Syarī'ah 'inda Ibni Taimiyah wa Jumhūr al-Uṣūliyyin*. al-Qāhirah: Jāmi'ah al-Qāhirah.

Al-Qarḍāwi, Y. (2001). *Min Hadyi al-Islâm Fatâwâ al-Mu'âshirah* (*Vol. 3*). Beirut: Dar al-Ma'rifah.

Al-Qardhawy, Y. (2010). *Fiqih Jihad*. Bandung: Mizan.

Al-Qārī, 'Alī. (1422a). *Mirqah al-Mafatih Sharh Mishkah al-Mashabih* (*Vol. 7*). Beirut: Dar al-Kutub al-'Ilmiyyah.

Al-Qārī, 'Alī. (1422b). *Mirqah al-Mafatih Sharh Mishkah al-Mashabih* (*Vol. 11*). Beirut: Dar al-Kutub al-'Ilmiyyah.

Al-Qurṭubī, M. ibn A. (2003). *Tafsir al-Qurtubi* (*Vol. 1*). London: Dar Al Taqwa.

Al-Ramlī, M. ibn A. (1992). *Nihāyah Al-Muhtāj* (*Vol. 7*) (2nd Editio edn.). Beirut: Dar Ahya al-Taras Al-'Arabi.

Al-Rasheed, N. (2016). Retrieved 5th April 2018. Retrieved from https://eng-archive.aawsat.com/n-al-rasheed/news-middle-east/joint-incidents-assessment-team-arab-coalition-abiding-military-rules-engagement.

Al-Rāzī, F. al-D. (1938). *Al-Tafsīr Al-Kabīr* (*Vol. 15*). al-Qāhirah: Al-Mathba'ah Al-Bahiyyah Al-Mishriyyah.

Al-Sa'di, 'Abd al-Raḥmān. (1987). *Majmuh Kamilah* (*Vol. 13*). Unaizah: Markaz Shalih bin Shalih Al-Thaqafi.

Al-Sa'di, 'Abd al-Raḥmān. (2002). *Taysiru al-Karīma al-Raḥmān Fī Tafsīri Kalāmi al-Mannān*. al-Qāhirah: Dar al-Hadith.

Al-Saqa, A.-G. (1427). *Fiqh al-Sirah* edited by Muḥammad Nāṣiruddīn Al-Albānī(Takhrij). Damascus: Dar al-Qalam.

Al-Sarkhasī, M. ibn A. ibn A.S. (1971a). *Sharḥ al-Siyār al-Kabīr*. Egypt: Al-Shirkah al-Sharqiyyah li l-I'lānāt.

Al-Sarkhasī, M. ibn A. ibn A.S. (1997b). *Sharḥ al-Siyār al-Kabīr* (*Vol. 1*). Beirut: Dār al-Kutub 'Ilmiya.

Al-Sarkhasī, M. ibn A. ibn A.S. (1997c). *Sharḥ al-Siyār al-Kabīr* (*Vol. 2*). Beirut: Dār al-Kutub 'Ilmiya.

Al-Shafi'i, I. (1987). *Shafi'is Risalah: Treatise on the Foundations of Islamic Jurisprudence (Translated with an Introduction, Notes, and Appendices by Majid Khadduri)* (2nd edn.). Cambridge: The Islamic Texts Society.

Al-Shathri, S. bin N. (1426). *Sharḥ Al-Manẓumatu Al-Sa'diyah Fî al-Qawā'id al-Fiqhiyyah* (2nd edn.). al-Riyāḍ: Dar Kanuz Ishbiliya.

Al-Shawkānī, M. ibn 'Alī. (1412). *Nail al-Authar* (*Vol. 7*). Misr: Dār al-Ḥadīth.

Al-Shawkānī, M. ibn 'Alī. (2007). *Fatḥ al-Qadīr* (*Vol. 5*). Beirut: Darul Ma'rifah.

Al-Shaybānī, M. ibn al-Ḥasan. *al-Siyār al-Kabīr* (*Vol. 4*). al-Qāhirah: Mahad Al-Makhtutat.

Al-Shaybānī, M. ibn al-Ḥasan. (1966). *The Islamic Law of Nations: Shaybani's Siyar* translated by Majid Khadduri. Maryland: John Hopkins Press.

Al-Shianjūr, M. ibn M. ibn 'Abdillah. *al-Ḥāshiyah al-Martiyah 'alā Tijān al-Durārī*. Cianjur: Ma'had al-Islāmī al-Salafī.

Al-Shinqīṭī, 'Abdullāh bin Muḥammad Al-Amīn. (1415). *Adwa' al-Bayan* (*Vol. 2*). Beirut: Dar al-Fikr.

Al-Shīrāzī, I. ibn 'Alī. (1995). *Al-Muhadhdhab fī Fiqh al-Imām Al-Shāfi'ī* (*Vol. 3*). Beirut: Dar al-Kutub 'Elmiya.

Al-Sijistānī, A.D.S. ibn al-A. (2008a). *Sunan Abu Dawud* (*Vol. 2*). Riyadh: Darussalam.

Al-Sijistānī, A.D.S. ibn al-A. (2008b). *Sunan Abu Dawud* (*Vol. 3*). Riyadh: Darussalam.

Al-Sijistānī, A.D.S. ibn al-A. (2008c). *Sunan Abu Dawud* (*Vol. 5*). Riyadh: Darussalam.

Al-Sijistānī, A.D.S. ibn al-A. (2008d). *Sunan Abu Dawud* (*Vol. 4*). Riyadh: Darussalam.

Al-Sirjani, R. (2011). *Sumbangan Peradaban Islam Pada Dunia*. Jakarta: Pustaka Al-Kautsar.

Al-Ṭabarānī, A. al-Q.S. ibn A. *Mu'jam Al-Ṣaghīr* (*Vol. 1*). Beirut: Dar al-Kutub al-'Ilmiyyah.

Al-Ṭabarānī, A. al-Q.S. ibn A. *Al-Mu'jam Al-Kabīr* (*Vol. 9*). al-Qāhirah: Maktabah Ibn Taymiyyah.

Al-Ṭabari, M. ibn J. (1387). *Tārîkh al-Umam wa al-Muluk* (*Vol. 2*). Beirut: Dar al-Turath.

Al-Ṭabari, M. ibn J. (1993a). *The History of Al-Tabari* (*Vol. 11*) translated by Khalid Yahya Blankinship. New York: State University of New York Press.

Al-Ṭabari, M. ibn J. (1993b). *The History of Al-Tabari* (*Vol. 7*). New York: State University of New York Press.

Al-Tahānawī, A. al-'Uthmānī. (1418). *I'lā Al-Sunnan* (*Vol. 12*). Karachi: Iradah Al-Qur'an wal-'Ulum al-Islamiyah.

Al-Ṭaḥāwī, A. ibn M. (2013). *Sharih Ma'ni al-Athar* (*Vol. 3*). Beirut: Dar al-Kutub 'Elmiya.

Al-Tirmidhī, M. ibn ʿĪsā al-S. (2007a). *Jami al-Tirmidhi* (*Vol. 3*). Riyadh: Darussalam.

Al-Tirmidhī, M. ibn ʿĪsā al-S. (2007b). *Jami al-Tirmidhi* (*Vol. 4*). Riyadh: Darussalam.

Al-Utsaimin, M. bin S. (2008). *Ushul Fiqih*. Yogyakarta: Media Hidayah.

Al-Waḥḥab, M. ibn 'Abd. (1418). *Mukhtasar Sirah al-Rasul*. KSA: Wizarah al-Shu'un Al-Islamiyyah wa al-Awqaf Wa al-Da'wah wa al-Irsyad.

Al-Wakil, M.S. (2005). *Wajah Dunia Islam*. Jakarta: Pustaka Al-Kautsar.

Al-Zabīdī, al-M. al-H. *Taj al-'Arus Min Jawahir al-Qamus* (*Vol. 30*). Dar al-Hidayah.

Al-Zayd, Z. bin 'Abd al-K. (2004). *Muqaddimah fī al-Qānūn al-Duwalī al-Insānī fī al-Islām*. Kuwait: The International Committee of the Red Cross, Kuwait Delegation.

al-Zuḥaylī, W. (1997). *Uṣūl al-Fiqh Al-Islāmī* (*Vol. 1*). Tehran: Dar Ihsan.

Al-Zuḥaylī, W. (1419). *Āthār al-Ḥarb Fi al-Fiqh al-Islāmī*. Damascus: Dar Al-Fikr.

Al-Zuḥaylī, W. (1428). *Fiqh al-Islām wa Adillatuhu* (*Vol. 8*). Damascus: Dar al-Fikr.

Al-Zuḥaylī, W. (2011). *Fiqih Islam Wa al-Adillatuhu* (*Vol. 8*). Jakarta: Gema Insani Press.

Al-ʿAsqalānī, I. Ḥajar. *Al-Iṣābah Fī Tamyīz al-Ṣaḥābah* (*Vol. 7*). Beirut: Dar al-Kutub al-'Ilmiyyah.

Al-ʿAsqalānī, I. Ḥajar. *Al-Dirāyah fi Takhrīj Ahādīth al-Hidāyah* (*Vol. 2*). Beirut: Dar al-Ma'rifah.

Al-ʿAsqalānī, I. Ḥajar. (1326a). *Tahdhib al-Tahdhib* (*Vol. 4*). India: Dā'irah Al-Ma'ārif Al-Niẓamiyah.

Al-ʿAsqalānī, I. Ḥajar. (1326b). *Tahdhib al-Tahdhib* (*Vol. 9*). India: Dā'irah Al-Ma'ārif Al-Niẓamiyah.

Al-ʿAsqalānī, I. Ḥajar. (1379a). *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (*Vol. 2*). Beirut: Dar al-Ma'rifah.

Al-ʿAsqalānī, I. Ḥajar. (1379b). *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (*Vol. 11*). Beirut: Dar al-Ma'rifah.

Al-ʿAsqalānī, I. Ḥajar. (1379c). *Fatḥ al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (*Vol. 1*). Beirut: Dar al-Ma'rifah.

Al-ʿAsqalānī, I. Ḥajar. (1390). *Līsān al-Mīzån* (*Vol. 3*). Beirut: Mu'assasah al-A'lami li al-Mathbu'at.

Al-ʿAsqalānī, I. Ḥajar. (1390). *Līsān al-Mīzān* (*Vol. 4*). Beirut: Mu'assasah al-A'lami li al-Mathbu'at.

Al-ʿAsqalānī, I. Ḥajar. (1406). *Taqrib al-Tahdhib*. Syria: Dar al-Rashid.

Al-ʿAsqalānī, I. Ḥajar. (1412b). *Al-Iṣābah Fī Tamyīz al-Ṣaḥābah* (*Vol. 5*). Beirut: Dar al-Jayl.

Al-ʿAsqalānī, I. Ḥajar. (2003). *Bulugh al-Maram*. Al-Mansoura: Dar al-Manarah.

al'Alwānī, Ṭāhā J & DeLorenzo, Y.T. (1995). The Rights of the Accused in Islam (Part Two), *Arab Law Quarterly* pp.238–249.

Alarifi, A.A., Phylaktou, H.N., & Andrews, G.E. (2016). What Kills People in a Fire? Heat or Smoke? Paper presented at The 9th Saudi Students Conference, Birmingham.

Albright, D. & Hibbs, M. (1991). Iraq and the Bomb: Were They Even Close?, *Bulletin of the Atomic Scientists* vol. 47, no. 2. pp.16–25.

Alexander, B. (2002). *How Wars Are Won: The 13 Rules of War from Ancient Greece to the War on Terror*. New York: Three Rivers Press.

Ali, M.M. & Junaid, M. (2017). The Views of Seyyed Hossein Nasr on Islamic Science: A Critical Analysis. Paper presented at Proceedings of the International Seminar on Islamic Civilization and Thoughts (INSIST) 2017: Towards Civilization Sustainability and Universal Peace, Pulau Pinang.

Alkhateeb, F. (2014). *Lost Islamic History: Reclaiming Muslim Civilization from the Past*. London: C. Hurst & Co.

Alkhoirot. (2015). Retrieved 7th January 2018. Retrieved from http://www.alkhoirot.net/2015/03/hukum-bom-dalam-islam.html?m=1.

Amrullah, H.A.A. *Tafsir Al-Azhar* (*Vol. 10*). Singapore: Pustaka Nasional PTE Ltd.

An-Na'im, A.A. (1987). Islamic Law, International Relations, and Human Rights: Challenge and Response, *Cornell International Law Journal* vol. 20, no. 2. pp.317–335.

An-Na'im, A.A. (2006). Why should Muslims abandon Jihad? Human rights and the future of international law, *Third World Quarterly* vol. 27, no. 5. pp.785–797.

Anas, M. bin. (1992). *Muwatta Al-Malik*. Granada: Madinah Press.

Anghie, A. (2004). *Imperialism, Sovereignty, and the Making of International Law*. New York: Cambridge University Press.

Arif, S. (2017). *Islam dan Diabolisme Intelektual*. Jakarta: Institute for the Study of Islamic Thought and Civilizations.

Asad, M. (2009). *The Principles of State and Government in Islam*. Kuala Lumpur: Islamic Book Trust.

Ashall, F. (1994). *Remarkable Discoveries!* Cambridge: Cambridge University Press.

Asmu'i. (2013). Studi Kritis Atas Konsep Nâsikh-Mansûkh Abdullahi Ahmed An-Na'im, *Kalimah: Jurnal Studi Agama dan Pemikiran Islam* vol. 11, no. 1. pp.151–174.

Auda, J. (2005). *Membumikan Hukum Islam Melalui Maqasid Syariah*. Bandung: Mizan Media Utama.

Azhar, A. (2017). Sains Islam vs Sains Barat: Analisis Amalan dan Perbandingan, *Ulum Islamiyyah* vol. 21. pp.25–41.

Azzam, A. *Fī Al-Jihād: Fiqh wa Ijtihād*. Peshawar: Markaz Al-Shahid Azzam Al-Illamiy.

Azzam, A. (1993). *Jihad: Adab dan Hukumnya*. Jakarta: Gema Insani Press.

Badi, J.A. (2002). *Sharh Arba'een an Nawawî : Commentary of Forty Hadiths of An-Nawawi*. fortyhadith.com.

Bailey, M. Retrieved 15th January 2019. Retrieved from http://themadmedic.blogspot.com/.

Bailey, M. (2012). Retrieved 15th January 2019. Retrieved from https://www.businessinsider.com/confession-of-a-combat-medic-by-the-mad-medic-2012-8/?IR=T.

Bassiouni, M.C. (1996). International Crimes: Jus Cogens and Obligatio Erga Omnes, *Law & Contemporary Problems* vol. 59. p.63.

Basyir, A.A. (2000). *Asas-Asas Hukum Muamalat (Hukum Perdata Islam)*. Yogyakarta: UII Press.

Berry, J.F. (2010). Hollow-Point Bullets: How History Has Hijacked Their Use in Combat and Why It Is Time to Reexamine the 1899 Hague Declaration Concerning Expanding Bullets, *Military Law Review* vol. 206. pp.88–156.

Bigalke, H. & Rummel, A. (2005). Medical aspects of toxin weapons, *Toxicology* vol. 214, no. 3. pp.210–220.

Blanshard, B. Retrieved 30th November 2017. Retrieved from https://www.britannica.com/topic/rationalism.

Boutruche, T. (2018). Retrieved 12th July 2018. Retrieved from http://blogs.icrc.org/law-and-policy/2018/02/22/the-legality-of-flamethrowers-taking-unnecessary-suffering-seriously/.

Boyle, A. & Chinkin, C. (2007). *The Making of International Law*. New York: Oxford University Press.

Buchholz, B. (2013). The Human Shield in Islamic Jurisprudence, *Military Review* pp.48–52.

Cassese, A. (2009). *The Oxford companion to international criminal justice*. New York: Oxford University Press.

Centeno, J.A., Rogers, D.A., van der Voet, G.B., Fornero, E., Zhang, L., Mullick, F.G., Chapman, G.D., Olabisi, A.O., Wagner, D.J., & Stojadinovic, A. (2014). Embedded fragments from US military personnel—chemical analysis and potential health implications, *International Journal of Environmental Research and Public Health* vol. 11, no. 2. pp.1261–1278.

Chiroma, M., Arifin, M. bin, Ansari, A.H., & Abdullah, M.A. (2014). A Jurisprudential Overlap Between Fatwa, Ijtihad, Ijma', Qiyas, Istislah and Istihsan: An Appraisal, *Journal of Islamic Law Review* vol. 10, no. 2. pp.341–357.

CHR. (1994). *Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Document E/CN.41995/42*.

Chynoweth, P. (2008). Legal Research. In A. Knight & L. Ruddock (Eds.). *Advanced Research Methods in the Built Environment* (pp. 28–38). West Sussex: Wiley-Blackwell.

Creegan, E. (2005). Retrieved 28th January 2019. Retrieved from https://www.armscontrol.org/act/2005_11/NOV-IndiaPak.

Cross, N. (2009). *Criminal Law & Criminal Justice: An Introduction*. London: Sage Publications.

Crowe, J. & Weston-Scheuber, K. (2013). *Principles of International Humanitarian Law*. Massachusetts: Edward Elgar Publishing.

Dahlan, A.A. (1996). *Ensiklopedi Hukum Islam* (*Vol. 2*). Jakarta: PT. Ichtiar Baru van Hoeve.

Daimah, A.-L. *Fatwa No. 515: Third Question*. Saudi Arabia.

Dawkins, R. (2006). *The God Delusion*. London: Bantam Press.

De Vattel, E. & Chitty, J. (1835). *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*. PH Nicklin & T. Johnson.

Dehn, J.C. (2018). Permissible Perfidy? Analysing the Columbian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction, *Journal of International Criminal Justice* vol. 6. pp.627–653.

Denffer, A. von. (2014). *Ulum al-Quran: An Introduction to the Sciences of the Quran*. Leicestershire: The Islamic Foundation.

Desai, M.S. Retrieved 14th March 2019. Retrieved from https://islamqa.org/hanafi/askmufti/44811.

Dien, M.I. (2004). *Islamic Law: From Historical Foundations to Contemporary Practice*. Notre Dame: University of Notre Dame Press.

Dill, J. (2010). Retrieved 25th March 2019. Retrieved from http://www.elac.ox.ac.uk/downloads/proportionality_policybrief_ dec_2010.pdf.

Dormann, K., Doswald-Beck, L., & Kolb, R. (2004). *Elements of War Crimes under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press.

Duncan, A., Taylor, A., Leese, E., Allen, S., Morton, J., & McAdam, J. (2015). Homicidal Arsenic Poisoning, *Annals of Clinical Biochemistry* vol. 52, no. 4. pp.510–515.

Durhin, N. (2016). Protecting civilians in urban areas: A military perspective on the application of international humanitarian law, *International Review of the Red Cross* vol. 98, no. 901. pp.177–199.

Eckhardt, W. (1989). Civilian Deaths in Wartime, *Bulletin of Peace Proposals* vol. 20, no. 1. pp.89–98.

Eckhardt, W. (1991). War-Related Deaths Since 3000 BC, *Bulletin of Peace Proposals* vol. 22, no. 4. pp.437–443.

Eid, H.M.A. (2011). *Muhammad the Prophet of Mercy*. Cairo: New Vision.

Epps, V. (2012). Civilian casualties in modern warfare: The death of the collateral damage rule, *Georgia Journal of International & Comparative Law* vol. 41. pp.307–355.

Erickson, R.J. (1979). Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict, *Virginia Journal of International Law* vol. 19, no. 3. pp.557–592.

Faris, A. al-H.A. bin. (1972). *Mu'jam Maqayis al-Lughah* (*Vol. 1*). Misr: Muṣṭāfā al-Bāb al-Ḥalab wa Awladuh.

Farrar, S. (2014). The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?, *Chinese Journal of International Law* vol. 13, no. 4. pp.787–817.

Fifield, A. (2017, February 26). "North Korean leader's half brother suffered a 'very painful death,'Malaysian officials say", *The Washington Post*.

Fishel, H. (2016). Retrieved 22nd January 2019. Retrieved from https://www.warhistoryonline.com/featured/7-surprising-facts-hbo-miniseries-pacific.html/2.

Gardam, J.G. (1993). Proportionality and force in international law, *American Journal of International Law* vol. 87, no. 3. pp.391–413.

Ghazali, A.M. (2003a). Retrieved 30th November 2017. Retrieved from http://islamlib.com/kajian/fikih/membangun-ushul-fikih-alternatif/.

Ghazali, A.M. (2003b). from Jaringan Islam Liberal.

Ghazali, A.M. (2005). *Ijtihad Islam Liberal: Upaya Merumuskan Keragaman yang Dinamis*. Jakarta: Penerbit Jaringan Islam Liberal.

Ghazaly, A.R., Ihsan, G., & Shidiq, S. (2010). *Fiqh Muamalat*. Jakarta: Kencana and Prenada Media Group.

Goldsmith, J.L. & Posner, E.A. (2005). *The Limits of International Law*. New York: Oxford University Press.

Gormsen, H., Jeppesen, N., & Lund, A. (1984). The causes of death in fire victims, *Forensic science international* vol. 24, no. 2. pp.107–111.

Gray, C.S. (2001). *Weapons for Strategic Effect How Important is Technology?* Alabama: AIR WAR COLL MAXWELL AIR FORCE BASE.

Groll, E. (2015, June 1). "Where the Insurgent Groups of the World Get Their Weapons", *Foreign Policy*.

Hamidullah, M. (2011). *Muslim Conduct of State*. Lahore: Sh. Muhammad Ashraf.

Haneef, S.S.S. (2000). *Homicide in Islam*. Kuala Lumpur: A. S. Noordeen.

Haneef, S.S.S. (2002). Principles of Environmental Law in Islam, *Arab Law Quarterly* vol. 17, no. 3. pp.241–254.

Haskew, M.E. (2018). Retrieved 15th January 2019. Retrieved from https://warfarehistorynetwork.com/daily/wwii/poison-darts-in-world-war-ii/.

Hassan, M.H. (2007). Contextualising the Fiqh or Law of Jihad, *RSIS Commentaries* vol. 25.

Hassan, M.H. (2014). *The Father of Jihad:'Abd Allāh'Azzām's Jihad Ideas and Implications to National Security*. Singapore: World Scientific.

Hassan, M.H. & Salleh, M.R. (2009). Abdullah Azzam: Would He Have Endorsed 9/11?, *RSIS Commentaries*.

Hassan, T. (1980). Good faith in treaty formation, *Vancouver Journal of International Law* vol. 21. p.443.

Hathaway, O.A. & Shapiro, S.J. (2011). Outcasting: Enforcement in Domestic and International Law, *Yale Law Journal* vol. 121, no. 2. pp.252–349.

Hatta, A. (2011). *The Great Story of Muhammad*. Selangor: Maghfirah Pustaka.

Hawking, S. & Mlodinow, L. (2010). *The Grand Design*. New York: Bantam Books.

Haykal, M.K. (1996). *Al-Jihād wa al-Qitāl fī al-Siyāsah al-Shar'iyyah* (*Vol. 1*). Beirut: Dar al-Bayariq.

Henckaerts, J.-M. & Doswald-Beck, L. (2005). *Customary international humanitarian law* (*Vol. 1*). Cambridge University Press.

Homer. (1990). *The Iliad*. New York: Penguin Group.

HRC. (2009). *A/HRC/11/2/Add.4, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Mission To Afghanistan, 6 May 2009*.

HRW. (2007). The Human Cost: The Consequences of Insurgent Attacks in Afghanistan, *Human Rights Watch* vol. 19, no. 6(c).

Hulme, K. (2010). Taking care to protect the environment against damage: a meaningless obligation?, *International Review of the Red Cross* vol. 92, no. 879. pp.675–691.

Humphry, D. (2002). *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for teh Dying*. New York: Dell Publishing.

Husaini, A. (2005). *Wajah Peradaban Barat: Dari Hegemoni Kristen Ke Dominasi Sekular-Liberal*. Jakarta: Gema Insani Pres.

Husaini, A. (2013). Pengantar Editor. In A. Husaini & D.D. Kania (Eds.). *Filsafat Ilmu: Perspektif Barat dan Islam* (pp. xv–xxviii). Jakarta: Gema Insani Press.

Husaini, A. & Al-Baghdadi, A. (2007). *Hermeneutika & Tafsir Al-Qur'an*. Jakarta: Gema Insani Press.

ibn 'Abd Al-Barr, Y.I. 'Abd A. (1412). *Al-Istî'āb fi Ma'rifah al-Aṣḥāb* (*Vol. 2*). Beirut: Dar al-Jayl.

ibn 'Abd Al-Barr, Y.I. 'Abd A. (1927). *Jāmi' Bayān Al-'Ilm wamā Yanbaghī fī Riwayātihi wa Hamlih* (*Vol. 2*). al-Qāhirah: Al-Muniriyah.

ibn 'Abd Al-Barr, Y.I. 'Abd A. (1931). *al-Intiqā fī Faḍā'il al-Thalāthat al-A'immat al-Fuqahā*. al-Qāhirah: Maktab al-Qudsi.

Ibn 'Abd Al-Barr, Y.I. 'Abd A. (1927). *Jami' Bayān Al-'Ilm* (*Vol. 2*). al-Qāhirah: Al-Muniriyah.

Ibn 'Ābidīn, M.A. (1412). *Al-Dur al-Mukhtār wa Ḥāshiyah* (*Vol. 4*). Beirut: Dār al-Fikr.

Ibn 'Asākir, 'Alī ibn Al-Ḥasan. *Tārīkh Dimishq Al-Kabīr*. Damascus: Rawdah al-Shām.

ibn Abī Ḥātim, 'Abd al-Raḥmān. (1397). *Al-Marasil*. Beirut: Mu'assasah al-Risalah.

Ibn Abī Shaybah, 'Abd Allah ibn Muḥammad. (1409a). *Mushannaf Ibn Abī Shaybah* (*Vol. 7*). Beirut: Dār al-Fikr.

Ibn Abī Shaybah, 'Abd Allah ibn Muḥammad. (1409b). *Mushannaf Ibn Abī Shaybah* (*Vol. 6*). Riyadh: Maktabah al-Rushd.

Ibn Abi Ya'lā, M. *Ṭabaqāt al-Ḥanābilah* (*Vol. 1*). Beirut: Dar al-Ma'rifah.

Ibn Al-Subkī, T. al-D. (2003). *Mattan Jam'u Al-Jawāmi'*. Beirut: Dar al-Kutub 'Elmiya.

ibn Al-ʿAṭṭār, 'Alī ibn Muwaffaq. (1433). *Sharḥ Al-Arba'īn Al-Nawawiyyah*. Dār al-Bashā'ir al-Islamiyyah.

ibn Athīr, ‘Alī ibn Muḥammad. (1417). *Al-Kāmil fi al-Tārīkh* (*Vol. 2*). Beirut: Dar al-Kitab Al-‘Arabi.

ibn Baz, A.A. Retrieved 1st December 2017. Retrieved from http://www.alifta.net/Fatawa/FatawaChapters.aspx?languagename=en&View=Page&PageID=4559&PageNo=1&BookID=14.

ibn Ḥanbal, A. (1421a). *Musnad Imām Aḥmad* (*Vol. 32*) edited by Shu’ayb Al-Arnawth (Taḥqīq). Beirut: Mu‘assasah al-Risalah.

ibn Ḥanbal, A. (1421b). *Musnad Imām Aḥmad* (*Vol. 19*) edited by Shu’ayb Al-Arnawth (Taḥqīq). Beirut: Mu‘assasah al-Risalah.

ibn Ḥanbal, A. (1421c). *Musnad Imām Aḥmad* (*Vol. 20*) edited by Shu’ayb Al-Arnawth (Taḥqīq). Beirut: Mu‘assasah al-Risalah.

ibn Ḥanbal, A. (1421). *Musnad Imām Ahmad* (*Vol. 38*) edited by Shu’ayb Al-Arnawth (Taḥqīq). Beirut: Mu’assasah al-Risalah.

ibn Ḥazm, ʿAlī ibn Aḥmad ibn Saʿīd. *Al-Muhallā bil-Āthār* (*Vol. 12*). Beirut: Dār al-Fikr.

ibn Ḥazm, ʿAlī ibn Aḥmad ibn Saʿīd. *Al-Muhallā bil-Āthār* (*Vol. 11*). Beirut: Dār al-Fikr.

ibn Hishām, ‘Abd al-Mālik. *Al-Sīrah Al-Nabawiyyah* (*Vol. 2*). Beirut: Dar al-Ma’rifah.

ibn Isḥāq, M. (1998). *The Life of Muhammad: A Translation of Ibn Ihsaq’s Sirat Rasul Allah*. Karachi: Oxford University Press.

ibn Kathīr, I. (1418). *Al-Bidāyah wa al-Nihāyah* (*Vol. 9*). Beirut: Dār Hijr lil-Thibā’ah wa al-Nashr.

ibn Kathir, I. (2001). *The Battles of the Prophet*. El-Mansoura: Dar al-Manarah.

ibn Kathir, I. (2001). *Battles of the Prophet*. El-Mansoura: Dar al-Manarah.

Ibn Kathir, I. (2005a). *The Life of the Prophet by Ibn Kathir* (*Vol. 3*). Reading: Garnet Publishing.

Ibn Kathir, I. (2005b). *The Life of the Prophet by Ibn Kathir* (*Vol. 2*). Reading: Garnet Publishing.

Ibn Kathir, I. (2006). *Book of the End: Great Trials & Tribulations*. Riyadh: Darussalam.

ibn Katsir, Imam. (2016a). *Shahih Tafsir Ibnu Katsir* (*Vol. 3*) edited by Safiurrahman Al-Mubarakfuri. Jakarta: Pustaka Ibnu Katsir.

ibn Katsir, Ismail. (2004). *Al-Bidayah wa Nihayah: Masa Kulafa’ur Rasyidin* edited by Muhammad bin Shamil As-Sulami. Jakarta: Darul Haq.

ibn Katsir, Ismail. (2016b). *Shahih Tafsir Ibnu Katsir* (*Vol. 4*) edited by Safiurrahman Al-Mubarakfuri. Jakarta: Pustaka Ibnu Katsir.

ibn Katsir, Ismail. (2016c). *Shahih Tafsir Ibnu Katsir* (*Vol. 9*) edited by Safiurrahman Al-Mubarakfuri. Jakarta: Pustaka Ibnu Katsir.

ibn Katsir, Ismail. (2016d). *Shahih Tafsir Ibnu Katsir* (*Vol. 1*) edited by Safiurrahman Al-Mubarakfuri. Jakarta: Pustaka Ibnu Katsir.

ibn Katsir, Ismail. (2016e). *Shahih Tafsir Ibnu Katsir* (*Vol. 8*) edited by Safiurrahman Al-Mubarakfuri. Jakarta: Pustaka Ibnu Katsir.

ibn Katsir, Ismail. (2016f). *Shahih Tafsir Ibnu Katsir* (*Vol. 2*) edited by Safiurrahman Al-Mubarakfuri. Jakarta: Pustaka Ibnu Katsir.

Ibn Khaldūn, ‘Abd al-Raḥmān ibn Muḥammad. (1408). *Tārīkh Ibn Khaldūn* (*Vol. 2*). Beirut: Dar al-Fikr.

Ibn Mājah, M. ibn Y. (2007). *Sunan Ibn Mājah* (*Vol. 4*). Riyadh: Darussalam.

Ibn Manẓūr, M. ibn M. ibn `Alī ibn A. (1414a). *Lisān Al-‘Arab* (*Vol. 11*). Beirut: Dār al-Shadir.

Ibn Manẓūr, M. ibn M. ibn `Alī ibn A. (1414b). *Lisān Al-‘Arab* (*Vol. 10*). Beirut: Dār al-Shadir.

Ibn Mufliḥ, M. (1424). *Al-Furu’* (*Vol. 10*). Beirut: Mu’assasah al-Risalah.

ibn Mūsa, ‘Iyāḍ. *Tartib al-Madarik wa Taqrib al-Masalik* (*Vol. 2*). Maghrib: Matba’ah Fudalah.

Ibn Nuhās, A.Z.M.A.-D. (1990). *Mashāri‘ Al-Ashwāq ilaā Maṣāri‘ al-Ushāq*. Beirut: Dār al-Bashā’ir al-Islamiyyah.

ibn Nujaym, Z. al-‘Ābidīn ibn I. ibn M.A.-S. (1999). *Al-Ashbah wa Al-Naẓā’ir ’ala ’alā Madhhab Abi Ḥanīfah*. Beirut: Dar al-Kutub ’Ilmiya.

Ibn Rushd. (2000a). *The Distinguished Jurist’s Primer* (*Vol. 1*) translated by Imran Ahsan Nyazee Khan. Reading: Garnet Publishing.

Ibn Rushd. (2000b). *The Distinguished Jurist’s Primer* (*Vol. 2*). Reading: Garnet Publishing.

Ibn Taymiyyah, A. ibn `Abd al-Ḥalīm. (1386). *Al-Uqud*. al-Qāhirah: Maktabah Al-Sunnah Al-Muhammadiyyah.

Ibn Taymiyyah, A. ibn `Abd al-Ḥalīm. (1406). *Minhaj al-Sunnah al-Nabawiyyah* (*Vol. 5*). al-Qāhirah: Maktabah Ibn Taymiyyah.

Ibn Taymiyyah, A. ibn `Abd al-Ḥalīm. (1426a). *Majmu‘ Al-Fatāwa* (*Vol. 31*). Dar al-Wafa.

Ibn Taymiyyah, A. ibn `Abd al-Ḥalīm. (1995b). *Majmu‘ Al-Fatāwa* (*Vol. 15*). Madīnah: Majma‘ Mālik Fahd Li Ṭibā‘ah Al-Muṣḥaf Al-Sharīf.

Ibn Taymiyyah, A. ibn `Abd al-Ḥalīm. (1995c). *Majmu‘ Al-Fatāwa* (*Vol. 28*). Madīnah: Majma‘ Mālik Fahd Li Ṭibā‘ah Al-Muṣḥaf Al-Sharīf.

Ibn Taymiyyah, A. ibn `Abd al-Ḥalīm. (2001). *The Religious and Moral Doctrine of Jihaad*. Birmingham: Maktabah Al Ansaar.

ibn Taymiyyah, A.-M. *Al-Muntaqā fi al-Aḥkām Al-Shar‘iyyah*. Dar al-Ibn al-Jawzi.

ICJ. (1989). *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Oral Proceedings, CRT 2009/14*. The Hague.

Advisory Services on International Humanitarian Law. (2004). Retrieved 4th May 2018. Retrieved from https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

ICRC. (2004). Retrieved 1st January 2017. Retrieved from https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf.

ICTY. (1999). *Prosecutor v Simic (IT-95-9): Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness*. The Hague.

ICTY. (2000). *Prosecutor v Kupreskic et. al. (IT-95-16-T) Trial Judgment*. The Hague: ICTY.

ICTY. (2000). *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.

ILC. (1989). *Yearbook of the International Law Commission, Vol. 1, Summary records of the meetings of the forty-first session 2 May-21 July 1989*. New York.

Islam, M.A. & Hamzah, M.O.U. (2016). *Respect for the Dead: From The Perspective of International Humanitarian Law and Islam*. Dhaka: The International Committee of the Red Cross.

Ismail, A. & Rahman, M.H. (2013). *Islamic Legal Maxims: Essentials and Applications*. Kuala Lumpur: IBFIM.

Jackson, R. (2012). Perfidy in Non-International Armed Conflicts. In K. Watkin & A.J. Norris (Eds.). *Non-International Armed Conflict in the Twenty-First Century*. Newport, Rhode Island: Naval War College.

Jalil, A. (2018). Sumbangan Ilmuan Fiqah dalam Pemikiran Al-Ash’ariyyah. Paper presented at Prosiding Seminar Kebangsaan Asyairah Ahli Sunah Waljamaah 2.0: Mengukuhkan Pemikiran Masyarakat Melalui Khazanah Ilmuwan Umat, Selangor.

Kamali, M.H. (2003). Islam, rationality and science, *Islam and Science* vol. 1, no. 1.

Kaviani, F., Rashid, R.J., Shahmoradi, Z., & Gholamian, M. (2014). Detection of foreign bodies by spiral computed tomography and cone beam computed tomography in maxillofacial regions, *Journal of dental research, dental clinics, dental prospects* vol. 8, no. 3. p.166.

Keeley, L.H. (1996). *War Before Civilization: the Myth of the Peaceful Savage*. New York: Oxford University Press.

Khalid, A.M. (2007). *Indah dan Mulia: Panduan Sederhana Menjadi Pribadi Bijaksana*. Jakarta: Serambi Ilmu Semesta.

Khallaf, A.W. (1993). *Ilmu Ushul Fiqih*. Jakarta: PT Rineka Cipta.

Kilcup, J. (2016). Proportionality in Customary International Law: An Argument Against Aspirational Laws of War, *Chicago Journal of International Law* vol. 17. p.244.

Kolb, R. (2006). Principles As Sources Of International Law (With Special Reference to Good Faith), *Netherlands International Law Review* vol. 53, no. 1. pp.1–36.

Kotlik, M.D. (2012). Towards Equality of Belligerents: Why Are Armed Groups Bound by IHL? Paper presented at Experts Conference on International Humanitarian Law: Emerging Issues in the Law of Armed Conflict.

Kristensen, H.M. & Norris, R.S. (2014). Israeli Nuclear Weapons, 2014, *Bulletin of the Atomic Scientists* vol. 70, no. 6. pp.97–115.

Lane, E.W. (1968a). *An Arabic-English Lexicon: In Eight Parts* (*Vol. 4*). Beirut: Librairie du Liban.

Lane, E.W. (1968). *An Arabic-English Lexicon: in Eight Parts* (*Vol. 8*). Beirut: Librairie du Liban.

Lane, E.W. (1968b). *An Arabic-English Lexicon: In Eight Parts* (*Vol. 3*). Beirut: Librairie du Liban.

Lane, E.W. (1968c). *An Arabic-English Lexicon: In Eight Parts* (*Vol. 5*). Beirut: Librairie du Liban.

Lane, E.W. (1968d). *An Arabic-English Lexicon: In Eight Parts* (*Vol. 2*). Beirut: Librairie du Liban.

Lane, E.W. (1968e). *An Arabic-English Lexicon: In Eight Parts* (*Vol. 1*). Beirut: Librairie du Liban.

Leveillee, N.P. (2011). Copernicus, Galileo, and the church: Science in a religious world, *Inquiries Journal* vol. 3, no. 05.

Lewis, B. (2009). *Islam: The Religion and the People*. New Jersey: Pearson.

Liivoja, R. (2015). Technological change and the evolution of the law of war, *International Review of the Red Cross* vol. 97, no. 900. pp.1157–1177.

Maḥmūd, ʻAbd al-Ghanī ʻAbd al-Ḥamīd. (2000). *Ḥimāyah Ḍaḥāyā al-Nizāʻāt al-Musallaḥah fī al-Qānūn al-Duwalī al-Insānī wa al-Sharīʻah al-Islāmiyyah*. al-Qāhirah: The International Committee of the Red Cross, Cairo Delegation.

Mahmud, A.G.A.H. (2008). *Perlindungan Korban Konflik Bersenjata dalam Perspektif Hukum Humaniter Internasional dan Hukum Islam*. Jakarta: International Committee of the Red Cross (ICRC) - Delegasi Regional Indonesia.

Martin, J.W., Christopher, G.W., & Eitzen, E.M. (2007). History of Biological Weapons: From Poisoned Darts to Intentional Epidemics. In "History of Biological Weapons: From Poisoned Darts to Intentional Epidemics". *Medical Aspects of Biological Warfare*. Washington DC: Office of the Surgeon General, TMM Publications, Borden Institute.

Mertokusumo, S. (1991). *Mengenal Hukum (Suatu Pengantar)* (3rd edn.). Yogyakarta: Liberty.

Meyrowitz, H. (1994). The Principle of Superfluous Injury or Unnecessary Suffering, *International Review of the Red Cross* vol. 34, no. 299. pp.98–122.

Mohd Kamal, M.H. (2009). Kebebasan Beragama dan Isu Riddah Dari Perspektif Syariah. In M.H.M. Kamal & S.A. Aziz (Eds.). *Isu-isu Kebebasan Beragama & Penguatkuasaan Undang-Undang Moral*. Selangor Darul Ehsan: Department of Islamic Law IIUM & Harun M. Hashim Law Centre.

Mohd Kamal, M.H. (2013). Meaning and Method of the Interpretation of Sunnah in the Field of Siyar: A Reappraisal. In M.-L. Frick & A.T. Muller (Eds.). *Islam and International law: Engaging Self-Centrism from a Plurality of Perspectives*. Leiden-Boston: Martinus Nijhoff Publishers.

Mohd Kamal, M.H. (2017). International Legal Personality of Prophet Muhammad (pbuh), *IIUM Law Journal* vol. 25, no. 2. pp.161–178.

Mohd Kamal, M.H. (2019). Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: the Perspective of Islamic Law. In B.U. Khan & M.J.H. Bhuiyan (Eds.). *Revisiting the Geneva Conventions: 1949-2019*. Leiden: BRILL and Martinus Nijhoff.

Molin, B.K. (1995). "The Role of Castles in the Political and Military History of the Crusader States and the Levant 1187 to 1380". The University of Leeds.

Muda, A.L. & Mat Zin, R.A.@. (1997). *Pengantar Usul Fiqh*. Kuala Lumpur: Pustaka Salam Sdn. Bhd.

Muḥammad ibn Ismāʻīl al-Bukhārī. (1979). *Sahih Al-Bukhari* (*Vol. 4*). Lahore: Kazi Publications.

Muhammadin, F.M. (2015). Achieving an Honest Reconciliation: Islamic and International Humanitarian Law, *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* vol. 27, no. 3. pp.579–597.

Muhammadin, F.M. (2016). Comparing International Humanitarian Law and Islamic Law on War Captives: Observing ISIS, *Jurnal Dauliyah* vol. 1, no. 2. pp.1–22.

Mulia, M. (2010). *Islam & hak asasi manusia: konsep dan implementasi*. Yogyakarta: Naufan Pustaka.

Mulia, M. (2011). *Muslimah Sejati: Menempuh Jalan Islami Meraih Ridha Illahi*. Bandung: Penerbit Maja.

Munir, M. (2008). Suicide Attacks and Islamic Law, *International Review of the Red Cross* vol. 90, no. 869. pp.71–89.

Munir, M. (2011). The Layha for the Mujahideen: an Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law, *International Review of the Red Cross* vol. 83, no. 881. pp.1–22.

Munir, M. (2013). Suicide Attacks: Martyrdom Operations or Acts of Perfidy? In M.-L. Frick & A.T. Muller (Eds.). *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*. Leiden-Boston: Martinus Nijhoff Publishers.

Muslehuddin, M. (1985). *Philosophy of Islamic law and Orientalists*. Lahore: Kazi Publications.

Mustofa, I. (2013). Metode Ijtihad Islam Liberal (Studi Kritis Terhadap Ijtihad Jaringan Islam Liberal), *Istinbath Jurnal Hukum* vol. 10, no. 2.

Nata, A. (2011). *Studi Islam Komprehensif*. Jakarta: Kencana.

Nor, A.H.M. (2000). Penutupan Pintu Ijtihad: Satu Kajian Semula, *Jurnal Syariah* vol. 8, no. 1. pp.43–56.

Nurhayati & Sinaga, A.I. (2018). *Fiqh dan Ushul Fiqh*. Jakarta: Prenadamedia Group.

Nyazee, I.A.K. (2000). *General Principles of Criminal Law: Islamic and Western*. Islamabad: Advanced Islamic Studies Institute.

Nyazee, I.A.K. (2003). *Islamic Jurisprudence*. Selangor: The Other Press.

Okon, E.E. (2014). Islam, War, and International Humanitarian Law, *European Scientific Journal* vol. 10, no. 14.

Orakhelashvili, A. (2006). *Peremptory norms in international law*. Oxford: Oxford University Press.

Oudah, A.Q. (2005). *Criminal Law of Islam* (*Vol. 4*). New Delhi: Kitab Bhavan.

Ozsarac, M., Demircan, A., & Sener, S. (2011). Glass foreign body in soft tissue: possibility of high morbidity due to delayed migration, *The Journal of emergency medicine* vol. 41, no. 6. pp.e125–e128.

Perkkio, N.T. (2015). *Bring On The Flamethrower*. Quantico.

Philips, A.A.B. (1990). *The Evolution of Fiqh (Islamic Law and the Madh-habs)*. Riyadh: Tawheed Publication.

Pictet, J. (1985). *Development and Principles of International Humanitarian Law*. Geneva: Henry Dunant Institute.

Pictet, J., Gasser, H.-P., Junod, S.-S., Pilloud, C., De-Preux, J., Sandoz, Y., Swinarski, C., Wenger, C.F., & Zimmermann, B. (1987). *Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949* edited by Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann. Geneva: International Committee of the Red Cross and Martinus Nijhoff Publishers.

Pringle, H. (2017). Retrieved 21st December 2018. Retrieved from https://news.nationalgeographic.com/2017/05/ancient-slingshot-lethal-44-magnum-scotland/.

Qadhi, A.A.Y. (1999). *An Introduction to the Sciences of the Qur'aan*. Birmingham: Al Hidaayah Publishing and Distribution.

Rahmawati. (2015). *Istinbath Hukum Teungku Muhammad Hasbi Ash-Shiddieqy*. Yogyakarta: Deepublish Publisher.

Ramaḍānī, ʻAbd al-Mālik Aḥmad. (1420). *Sittu Durar Min Uṣūli Ahl al-Āthār*. al-Riyāḍ: Maktabah Al-Malik Fahd.

Ramli, M.A., Rosele, M.I., Md Ariffin, M.F., & Zulkepli, M.I.S. (2018). Tafsir Feminis: Antara Rekonstruksi Tafsiran Mesra-Gender atau Huraian Pseudo-Ilmiah, *Journal of Ma'alim al-Quran wa al-Sunnah* vol. 14, no. 1. pp.81–90.

Robicsek, F. (2004). Ritual Smoking in Central America. In S.L. Gilman & Z. Xun (Eds.). *Smoke: A Global History of Smoking* (pp. 30–37). London: Reaktion Books.

Roland, A. (2016). *War and Technology: A Very Short Introduction*. New York: Oxford University Press.

Salahi, M.A. (1995). *Muhammad: Man and Prophet*. Dorset: Element Books.

Salam, A. (2003). *Pembaharuan Pemikiran Hukum Islam*. Yogyakarta: LESFI.

Salīm, A.M.K. bin S. (2003). *Ṣaḥīḥ Fiqh Sunnah* (*Vol. 1*). al-Qāhirah: Maktabah Tawqifiyah.

Salim, F. (2010). *Kritik Terhadap Studi Al-Qur'an Kaum Liberal*. Jakarta: Perspektif.

Samour, N. (2014). Is there a Role for Islamic International Law in the History of International Law?, *European journal of international law* vol. 25, no. 1. pp.313–319.

Saps, M., Rosen, J.M., & Ecanow, J. (2014). X-ray detection of ingested non-metallic foreign bodies, *World journal of clinical pediatrics* vol. 3, no. 2. p.14.

Sasongko, W. (2003). *Armaggedon: Peperangan Akhir Zaman (Menurut Al-Qur'an, Hadits, Taurat, dan Injil)*. Jakarta: Gema Insani Press.

Sassoli, M. & Bouvier, A.A. (2006). *How Does Law Protect In War?* (*Vol. 1*). The International Committee ofthe Red Cross.

Sassòli, M., Bouvier, A.A., & Quintin, A. (2011). *How Does Law Protect in War?* (*Vol. 1*) (3rd edn.). Geneva: ICRC.

Sayoud, H. (2012). Author Discrimination between the Holy Quran and Prophet's Statement, *Literary and Linguistic Computing* vol. 27, no. 4. pp.427–444.

Shaw, M.N. (2008). *International Law* (6th edn.). New York: Cambridge University Press.

Shereen, R., Oskouian, R.J., Loukas, M., & Tubbs, R.S. (2018). Treatment of Arrow Wounds: A Review, *Cureus* vol. 10, no. 4. pp.1–8.

Shoko, T. (2016). Accidental chest penetration of glass foreign bodies in a 53 year old lady—The challenges with video assisted thoracoscopic extraction, *International journal of surgery case reports* vol. 23. pp.124–127.

Siboro, T. & Saraswati, M.S. (2004, September 8). "Rights Campaigner Munir Dies on Plane", *The Jakarta Post*.

Singh, A.K., Ditkofsky, N.G., York, J.D., Abujudeh, H.H., Avery, L.A., Brunner, J.F., Sodickson, A.D., & Lev, M.H. (2016). Blast Injuries: From Improvised Explosive Device Blasts to the Boston Marathon Bombing, *Radio Graphics* vol. 36, no. 1. pp.295–307.

Smith, G.D. & Egger, M. (2005). The first reports on smoking and lung cancer: why are they consistently ignored?, *Bulletin of the World Health Organization* vol. 83, no. 10. pp.799–800.

Solis, G.D. (2010). *The Law of Armed Conflict: International Humanitarian Law in War*. New York: Cambridge University Press.

Stiglmayer, A. (2017). Retrieved 27th May 2017. Retrieved from http://www.womenundersiegeproject.org/conflicts/profile/colombia#numbers.

Sumaryono, E. (1999). *Hermeneutika: Sebuah Metode Filsafat*. Yogyakarta: Penerbit Kanisius.

Syafrin, N. (2009). Kritik Terhadap Paham Liberalisasi Syariat Islam, *Jurnal Tsaqafah* vol. 5, no. 1. pp.51–78.

Syarifuddin, A. (1999). *Ushul Fiqih* (*Vol. 2*). Jakarta: PT Logos Wacana Ilmu.

Taha, M.M. (1996). The Second Message of Islam. In C. Kurzman (Ed.). *Liberal Islam: a Sourcebook* (pp. 270–283). New York: Oxford University Press.

Takruri, N.H. (1997). *Al-'Amaliyyat Al-Istishhadiyyah fi Al-Mizan Al-Fiqhiy*. Beirut: Dar al-Fikr.

Tarrant, B. (2014, December 22). "Special Report: In Jakarta, that sinking feeling is all too real", *Reuters*.

Taslim, A. (2015). *Thariqus Shalihin*. Bekasi: Toga Pustaka.

Tkach, J. Retrieved 29th November 2017. Retrieved from https://www.gci.org/law/otlaws.

Tzortzis, H.A. (2016). *The Divine Reality: God, Islam and the Mirage of Atheism*. San Clemente: FB Publishing.

Tzu, S. (2009). *The Art of War (Restored Translation)*. Pax Librorum Publishing House.

UNICEF. (1996). Retrieved 19th February 2018. Retrieved from https://www.unicef.org/sowc96/1cinwar.htm.

Van Alstine, M.P. (2005). The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection, *The Georgetown Law Journal* vol. 93. pp.1885–1945.

Van Engeland, A. (2008). The differences and similarities between international humanitarian law and Islamic humanitarian law: Is there ground for reconciliation? 1, *Journal of Islamic Law and Culture* vol. 10, no. 1. pp.81–99.

Van Patten, T. (2010). *The Pacific, Episode 9 "Okinawa"*. United States of America: DreamWorks Television.

Wahid, S.A. (2012). *Studi Ulang Ilmu Al-Qur'an & Ilmu Tafsir* (*Vol. 2*). Yogyakarta: Suara Muhammadiyah.

Ward, A. (2015, June 8). "Why "Small Arms" Might Just Be the Ultimate Weapon of War", *The National Interest*.

Whitson, S.L. (2017). Retrieved 5th April 2018. Retrieved from https://www.hrw.org/news/2017/01/16/letter-saudi-led-coalition-joint-incidents-assessment-team-regarding-yemen.

Wortel, E. (2009). Humanitarians and their moral stance in war: the underlying values, *International Review of the Red Cross* vol. 91, no. 876. pp.779–802.

Yakin, A. (2015). Urgensi Teori Maqashid Al-Syari'ah Dalam Penetapan Hukum Islam Dengan Pendekatan Mashlahah Mursalah, *Al-Turas* vol. 2, no. 1. pp.25–45.

Zaidan, A.K. (2008). *Al-Wajiz: 100 Kaidah Fikih Dalam Kehidupan Sehari-Hari*. Jakarta: Pustaka Al-Kautsar.

Zarabozo, J. al-D.M. (1999). *Commentary on the Forty Hadith of Al-Nawawi* (*Vol. 1*). Boulder: AL-Basheer Publications and Translations.

Zarkasyi, I. (2014). *Usuluddin ('Aqa'id) Ala Madzhab Ahlu al-Sunna wa al-Jama'ah*. Gontor: Trimurti Press.

Zawati, H.M. (2009). Jus ad Bellum and the Rules of Engagement in the Islamic. Law of Nations—Shaybānī's Siyar. Paper presented at 2nd Conference in The Hague on Islam, Politics and Law, Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy.

Zaydan, 'Abd al-Karim. (2015). *Synopsis on the Elucidation of Legal Maxims in Islamic Law* translated by Md. Habibur Rahman & Azman Ismail. Kuala Lumpur: IBFIM.

Zengel, P. (1991). "Assassination and the Law of Armed Conflict". The Judge Advocate General's School, United States Army.

Zidan, A. & Zidan, D. (1998). *The Rightly Guided Caliphs*. Cairo: Islamic Inc. Publising & Distribution.

Science. Retrieved December 1, 2017, from Oxford Dictionaries https://en.oxforddictionaries.com/definition/science.

Technology. Retrieved December 1, 2017, from Oxford Dictionaries https://en.oxforddictionaries.com/definition/technology.

Translation and Meaning of قتل in Almaany English Arabic Dictionary. from Almaany.

SAS Weapons - Stun Grenade. Retrieved 14th January 2019. Retrieved from http://www.eliteukforces.info/special-air-service/weapons/stun-grenade.php.

Brighter, safer flash-bang stun grenade. Retrieved January 14, 2019, from TechLink https://techlinkcenter.org/technologies/brighter-safer-flash-bang-stun-grenade/.

Al-Mawsū'ah al-Fiqhiyyah. (1410). (*Vol. 19*). Kuwait: Wizarah al-Awqaf wa al-Shu'un al-Islāmiyyah.

World War I: the ICRC's appeal against the use of poisonous gases. (1918). Retrieved 1st January 2018. Retrieved from https://www.icrc.org/en/doc/resources/documents/statement/57jnqh.htm.

What does death by burning mean? (2003). Retrieved 1st January 2018. Retrieved from https://www.theguardian.com/theguardian/2003/apr/26/theeditorpressreview.

Woman leads controversial US prayer. (2005). Retrieved 1st December 2017. Retrieved from http://www.aljazeera.com/archive/2005/03/200849145527855944.html.

Fatwa Majelis Ulama Indonesia No. 7/MUNAS VII/MUI/11/2005 tentang Pluralisme, Liberalisme dan Sekulerisme Agama. (2005). Jakarta: Majelis Ulama Indonesia.

Henckaerts, J.-M. & Doswald-Beck, L. (eds.). (2005). *Customary International Humanitarian Law* (*Vol. 2*). Cambridge: Cambridge University Press.

Guideline for Performing Islamic Rites at the International Space Station (ISS). (2007). Putrajaya: Department of Islamic Development Malaysia.

Colombia: ICRC Underlines Importance of Respect for Red Cross Emblem. (2008). Retrieved 14th March 2019. Retrieved from https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/colombia-news-160708.htm.

Old-fashioned fake-out results in freedom for hostages. (2008, July 3). *CNN*.

WWII poison darts secret emerges. (2009). Retrieved 15th January 2019. Retrieved from http://news.bbc.co.uk/2/hi/uk_news/8119653.stm.

Zemmali, A. (ed.). (2012). *Islam dan Hukum Humaniter Internasional*. Jakarta: Mizan.

Muhammad, G. bin, Kalin, I., & Kamali, M.H. (eds.). (2013). *War and Peace in Islam: The Uses and Abuses of Jihad*. Cambridge: Islamic Texts Society.

Kompilasi Pandangan Hukum: Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia. (2015). Putrajaya: Jabatan Kemajuan Islam Malaysia (Bahagian Pengurusan Fatwa).

Stressed out? It could be your slow internet. (2016). Retrieved 1st December 2017. Retrieved from http://www.telegraph.co.uk/technology/2016/03/17/stressed-out-it-could-be-your-slow-internet/.

Saudi to Compensate Yemen Funeral Strike. (2016, October 15). *Middle East Monitor*.

Joint Incidents Assessment Team Inquiry into Yemen. (2017). Retrieved 5th April 2018. Retrieved from https://saudiembassyuk.co.uk/joint-incidents-assessment-team-inquiry-into-yemen/.

Joint Incidents Assessment Team (JIAT) on Yemen Holds Press Conference. (2017, April 2). *Saudi Press Agency*.

Kania, D.D. (ed.). (2018). *Delusi Kesetaraan Gender: Tinjauan Kritis Konsep Gender*. Jakarta: Yayasan AILA Indonesia.

The Slingshot: A Symbol of Palestinian Resistance Throughout History (VIDEO). (2018). Retrieved 17th January 2019. Retrieved from http://www.palestinechronicle.com/the-slingshot-a-symbol-of-palestinian-resistance-throughout-history-video/.

"Iconic" image of Palestinian protester in Gaza goes viral. (2018, October 25). *Aljazeera*.

Civilian Deaths in the Falklands War and the Decline of the British Empire. (2019). Retrieved 27th March 2019. Retrieved from http://www.historyisnowmagazine.com/blog/2019/1/13/civilian-deaths-in-the-falklands-war-and-the-decline-of-the-british-empire#.XJrjSJgzbIU=.