

## ***FIQH AL-JIHĀD* IN MODERN WARFARE: ANALYZING ITS PROSPECTS AND CHALLENGES WITH SPECIAL REFERENCE TO INTERNATIONAL HUMANITARIAN LAW\***

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### **ABSTRACT**

In discussing the compatibility of the Islamic concept of *jihād* and international law, most researches focus on the *jus ad bellum* (justifications of war) of *fiqh al-jihād* and less on the *jus in bello* (lawful conducts of war). This article observes the relation between *fiqh al-jihād* and modern international humanitarian law, and sets out both the prospects and challenges of such a concept in modern times. It is argued that some challenges are due to the lack of emphasis on the principles of *fiqh al-jihād* that are shared with modern International Humanitarian Law, or the existence of differing opinions between Islamic scholars. Using a literature research, this article finds that the way to address this is to make a unified code of *fiqh al-jihād*, involving scholars from all schools of thoughts, to agree on a common set of rules.

**Keywords:** *jihād*, *fiqh*, international humanitarian law, war, Islam.

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## FEKAH JIHAD DALAM PEPERANGAN MODEN: ANALISA TERHADAP PROSPEK DAN CABARANNYA DENGAN RUJUKAN KHUSUS KEPADA UNDANG-UNDANG KEMANUSIAAN ANTARABANGSA

### ABSTRAK

Dalam membincangkan keserasian antara konsep jihad dalam Islam dan undang-undang antarabangsa, kebanyakan penyelidikan menumpukan perhatian kepada *jus ad bellum* (justifikasi perang) dalam fekah jihad dan hanya sedikit tumpuan diberikan kepada *jus in bello* (perilaku perang). Artikel ini mengkaji hubungan antara fekah jihad dan undang-undang kemanusiaan antarabangsa moden, dan menemui prospek dan cabaran. Dihujahkan di dalam artikel ini bahawa beberapa cabaran adalah disebabkan oleh kurang penekanan pada prinsip-prinsip yang dikongsi dengan undang-undang kemanusiaan antarabangsa moden, ataupun disebabkan perbezaan pendapat di kalangan ulama-ulama Islam. Dengan menggunakan penyelidikan kepustakaan, artikel ini mengenalpasti bahawa cara untuk mengatasi perkara ini adalah dengan menyediakan satu kanun fekah jihad yang seragam, yang melibatkan para ulama dari semua pemikiran, untuk menyepakati satu set peraturan yang sama.

**Kata kunci:** jihad, fekah, undang-undang kemanusiaan antarabangsa, peperangan, Islam.

### INTRODUCTION

The Islamic civilization has contributed significantly to the history of International Humanitarian Law (“IHL”) by becoming part of customary law since the medieval times.<sup>1</sup> Due to the development of Islamic civilization, which has coloured many wars, chapters on *jihād* has always existed in various works of *fiqh* (‘Islamic law’) since early Muslim scholarship. Some examples include the Book of *al-Siyār al-Kabīr* of al-

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<sup>1</sup> Jean Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute, 1985), 15–16.

Shaybānī<sup>2</sup> and *Mashāri‘ Al-Ashwāq ilā Maṣāri‘ al-Ushāq* by Imam Ibn Nuhās.<sup>3</sup>

Entering the 20<sup>th</sup> century, the role of *fiqh al-jihād* in international law has substantially faded, among others, due to the centuries-long colonialism in Asia and Africa as well as the fall of the Ottoman Empire.<sup>4</sup> International humanitarian law (hereinafter referred to as IHL) and international law in general, has been imbued with secularistic notions whereby traces of religion are no longer visible. In spite of this, it has grown into one of the most comprehensive and universally accepted branch of international law, despite major problems in its actual compliance.<sup>5</sup>

However, there are still wars that rely on the spirit of *jihād*, for example the history of Indonesia’s struggle for independence.<sup>6</sup> Furthermore, the ongoing Syrian war, acting as one of the greatest battles and considered to be the biggest humanitarian tragedy, involves multiple warring parties that claim to act based on *fiqh* and *jihadist* values.<sup>7</sup> More recently we have witnessed the conflict in Marawi, the Philippines, where

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<sup>2</sup> The original book did not survive until today except in form of a commentary by another scholar i.e. Imam Al-Sarkhasī. See: Imam Al-Sarkhasī, *Sharḥ Al-Siyār Al-Kabīr*, vol. 1 (Beirut: Dar al-Kutub ‘Elmiya, 1997).

<sup>3</sup> Imam Ibn Nuhās, *Mashāri‘ Al-Ashwāq Ilaā Maṣāri‘ Al-Ushāq* (Beirut: Dar al-Basha’ir al-Islamiyyah, 1990).

<sup>4</sup> See how ‘Eurocentrism’ has developed and the legal thoughts in other traditions are ‘set aside’: Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2004).

<sup>5</sup> 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, 2004, [https://www.icrc.org/eng/assets/files/other/improving\\_compliance\\_with\\_international\\_humanitarian\\_law.pdf](https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf).

<sup>6</sup> Muhammad Azizul Ghofar, *Jihad Fil Pancasila* (Yogyakarta: Penerbit Garudhawaca, 2016), 144–46.

<sup>7</sup> Lucy Rodgers et al., “Syria: The Story of the Conflict,” *BBC*, 2014, <http://www.bbc.com/news/world-middle-east-26116868>.

government forces are battling against groups linked to Da'esh (*Al-Dawlah Al-Islāmiyyah*),<sup>8</sup> whom are claiming to be waging *jihad*.

Evidently, these groups had their own guidelines in reference to the law of war, whilst claiming them to be based on Islamic values. Groups affiliated to Al-Qaeda, for example, had used classical texts such as the aforementioned *Mashāri' Al-Ashwāq* as reference.<sup>9</sup> One of the founders of Al-Qaeda, Abdullah Azzam, had even written his own books on *fiqh al-jihād*.<sup>10</sup>

The days have passed when even the third Rambo film<sup>11</sup> specifically credited the 'gallant people of Afghanistan' for their bravery. Now Afghanistan is in ruins after the USA invasion, as a response to the 9/11 World Trade Center attack. Terrorism has become infamous and, for many people, *jihad* is a concept that is seen to be inseparable from terrorism. To add to this bleak scenario, it does not help that more and more wars are waged in many the Islamic countries (Syria, Palestine, Yemen, Sudan and Iraq, to name a few), and '*jihadism*' is always used in negative association to the Islamic fighters.

This is made worse by several sadistic actions conducted by some so called '*jihadist*' groups, claiming that these actions are in line with the Sharī'ah. These acts include the burning of live prisoners by *Da'esh*, an Islamic State terrorist organization.<sup>12</sup> There have been efforts to refute

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<sup>8</sup> Euan McKirdy and Ivan Watson, "Former Abu Sayyaf Fighter Warns Worse to Come in the Philippines," *CNN* July 2, 2017, <http://edition.cnn.com/2017/07/02/asia/former-abu-sayyaf-militant-abu-jihad/index.html>.

<sup>9</sup> Chetan Bhatt, "The Virtues of Violence: The Salafi-Jihadi Political Universe," *Theory, Culture, and Society* 31, no. 1 (2014): 25–48.

<sup>10</sup> There are numerous examples, but one such example is Abdullah Azzam, *Fī Al-Jihād: Fiqh Wa Ijtihād* (Peshawar: Markaz Al-Shahid Azzam Al-Illami, n.d.).

<sup>11</sup> Which was obviously directed to the Taliban fighters, as it was them whom the USA supported during the Soviet invasion to Afghanistan. See: Peter MacDonald, *Rambo III* (United States of America: TriStar Pictures, 1988).

<sup>12</sup> Greg Botelho and Dana Ford, "Jordan Executes Prisoners after ISIS Hostage Burned Alive," *CNN*, February 4, 2015, <http://edition.cnn.com/2015/02/03/world/isis-captive/>.

these ‘*jihadist*’ groups on points where they claim to be based on Islamic law but in reality, is in breach of them.<sup>13</sup>

While some major works on *fiqh al-jihād* contribute to the discourse of when *jihād* can or cannot be waged and relate it to international law principles,<sup>14</sup> it seems that the discourse on lawful conducts of war and modern IHL has received very little attention. Some works include those written by ‘Abd al-Ghanī ‘Abd al-Ḥamīd Maḥmūd<sup>15</sup> and Zayd bin ‘Abd al-Karīm al-Zayd.<sup>16</sup> Other works are specific to certain topics, such as that of perfidy<sup>17</sup> or respect towards the dead.<sup>18</sup>

Alas, most of these works seem to simply reiterate that modern IHL and *fiqh al-jihād* are easily compatible to one another. However, the fact that scholars have to put effort to refute the ‘*jihadist*’ groups (who seem to cite Islamic sources in their actions) need to be highlighted. For

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<sup>13</sup> See for example an analysis on the Taliban’s war manual titled ‘Layha’: 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* 83, no. 881 (2011): 1–22. See also refutation to Da’esh: Fajri Matahati Muhammadin, “Refuting Da’esh Properly: A Critical Review of the ‘Open Letter to Baghdadi,’” *Journal of International Humanitarian Action* 1, no. 1 (2016): 11.

<sup>14</sup> See for example: 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). It is interesting to note that this chapter book has multiple chapters discussing the same topic of *Jus Ad Bellum* in Islam.

<sup>15</sup> ‘Abd al-Ghanī ‘Abd al-Ḥamīd Maḥmūd, *Ḥimāyah Ḍaḥāyā Al-Nizā’āt Al-Musallahah Fī Al-Qānūn Al-Duwalī Al-Insānī Wa Al-Sharī’ah Al-Islāmiyyah* (Cairo: The International Committee of the Red Cross, Cairo Delegation, 2000).

<sup>16</sup> 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).

<sup>17</sup> Muhammad Munir, “Suicide Attacks and Islamic Law,” *International Review of the Red Cross* 90, no. 869 (2008): 71–89.

<sup>18</sup> 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).

example, some scholars argue that the Taliban's war manual entitled "Layha" on how to execute prisoners of war actually has no basis in Islamic law.<sup>19</sup> On the other hand, it is the ruling of the majority of Islamic scholars that the Muslim leader may choose, on the basis of *maṣlahat*, to execute the prisoners.<sup>20</sup> It is not to say that the majority of scholars are always correct,<sup>21</sup> and we can actually dispute what is meant by *maṣlahat* in this context (which will be explained later). Notably, the different positions arise due to the different interpretation of the acts of Prophet Muḥammad (pbuh).<sup>22</sup> The same is true with the Open Letter to Baghdadi<sup>23</sup> on the case of slavery.

The reality is that the relation between *fiqh al-jihād* and modern IHL might, after all, not be as fine and dandy as some may have argued it to be. This article observes that while there are general compatibilities between *fiqh al-jihād* and modern IHL, there are also areas where they are incompatible.

These are the challenges which the *fuqahā* (Islamic scholars of *fiqh* – plural) needs to address in a way that is acceptable in the framework of Islamic teachings and not in subordination towards modern IHL.

## SOURCES OF ISLAMIC LAW

In order to allow readers a better understanding of the position of *fiqh al-jihād* under the Shari'ah, there is a need to give a brief exposition on the sources of Islamic Law. The primary sources from which *fiqh* or Islamic rulings are derived from are the Qur'ān and *Sunnah*. This is why Islamic scholars define *fiqh* in the following way; "the knowledge of legal rules

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<sup>19</sup> Munir, "The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law," 22.

<sup>20</sup> Imam Ibn Rushd, *The Distinguished Jurist's Primer*, trans. Imran Ahsan Nyazee Khan, vol. 1 (Reading: Garnet Publishing, 2000), 456.

<sup>21</sup> Only an *ijmā'* or consensus can be absolutely correct. See: Muhammad bin Shalih Al-Utsaimin, *Ushul Fiqih* (Yogyakarta: Media Hidayah, 2008), 101–2.

<sup>22</sup> Ibid.

<sup>23</sup> "Open Letter To Dr. Ibrahim Awwad Al-Badri, Alias 'Abu Bakr Al-Baghdadi," September 19, 2014, <http://www.lettertobaghdadi.com/>.

pertaining to conduct which have been derived from specific evidences”.<sup>24</sup> In addition to the primary sources, i.e. the Qur’ān and *Sunnah*, there are numerous other secondary sources from which Islamic rulings are derived. Among them are *ijmā* (‘consensus’), *qiyās* (‘analogy’), *urf* (‘custom’), and others.<sup>25</sup>

However, it shall be noted that the sources other than the Qur’ān and *Sunnah* are not to be seen, strictly speaking, as separate sources, because essentially Islam does not allow formation of laws not from Allah, as Allah mentions in the Qur’ān, Surah Al-Mā’idah, 5:44-45 and 47. Secondary sources (i.e. non-binding, only to explain the primary sources) gain their legitimacy from the Qur’ān and *Sunnah* and act as a further elaboration on how to understand them. It is important to note what Imam Al-Shāfi‘ī had said when asked about *ijtihad* (independent reasoning) and *qiyās* (analogy): “they are two words of the same meaning”.<sup>26</sup>

Undeniably, this may invite criticism from other Islamic scholars as there are other sources, but at least two important lessons of *ijtihad* can be taken from such statement, namely:

- 1) *Ijtihād* is only exercised towards matters not specifically mentioned in the Qur’ān and *Sunnah*.<sup>27</sup>
- 2) Even in situations mentioned above, *ijtihad* is still an application of the principles derived from the Qur’ān and *Sunnah*.

<sup>24</sup> This definition used the term *adillah* derived from the word *dalīl*, which refers specifically to the Qur’ān and *Sunnah*. See: Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor: The Other Press, 2003), 20.

<sup>25</sup> *Ibid.*, 213–60.

<sup>26</sup> Imam Al-Shafi‘ī, *Shafi‘is Risalah: Treatise on the Foundations of Islamic Jurisprudence (Translated with an Introduction, Notes, and Appendices by Majid Khadduri)*, 2nd ed. (Cambridge: The Islamic Texts Society, 1987), 288.

<sup>27</sup> Compare the previously mentioned statement of Al-Shāfi‘ī on *ijtihad* and *qiyās* to the definition of *qiyās*:

“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*’. See: Nyazee, *Islamic Jurisprudence*, 214.

As a comparative view, it is also important to see the opinion of Ibn Ḥazm, who rejects the use of *qiyās* but argues that the Qur’ān, *Sunnah*, and *ijmā’* are enough to derive any sort of rule either directly or indirectly through *al-Dalīl* (‘evidence’).<sup>28</sup>

In undertaking *ijtihād*, interpreting and shaping the law, the Islamic scholars, while referring to primary sources, will also refer to the interpretations of other Muslim scholars. Among others, the highly preferred scholarly interpretations are the ones derived from *al-salaf al-ṣāliḥ* or pious predecessors from the three early generations of Muslims.<sup>29</sup> Rules, such as *al-qawā’id al-fiqhiyyah* (‘principles of law’), have also been established to assist in ‘judging’ a concrete event. Examples of *al-qawā’id al-fiqhiyyah* include ‘*al-aṣlu fī al-ashyā’ al-ibāḥah*’ (the default rule for everything is permissible) and ‘*al-’adātu muḥakkamah*’ (customs can be law).<sup>30</sup>

In this respect, how does one perceive Islamic law from the perspective of other non-Islamic laws, such as international law? As a general rule, based on the Qur’ān in *Surah Al-Mā’idah*, 5: 44, 45, 47, and 50, it simply makes no sense to use non-Islamic rules as a standard to see whether rules of *fiqh al-jihād* are problematic. After all, the main sources of Islamic law are the Qur’ān and *Sunnah*. Those who aspire towards any form of reconciliation must bear this in mind.

However, in deriving law from the sources, a *fāqih* (expert of *fiqh* – singular) should consider his/her arguments and also *wāqi’* (‘concrete

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<sup>28</sup> It must be noted that Ibn Ḥazm rejects rational interpretations to connect issues not ruled in the text (i.e. Qur’ān and Sunnah), and it may especially be because he rejects the idea that there is anything not ruled in the text. This is an important point in his *Zāhirī* (literalist) *fiqh*, and is also his basis of using *al-Dalīl* as source of Islamic law. See Generally: Ratu Haika, “Konsep Qiyas Dan Ad-Dalil Dalam Istimbat Hukum Ibn Hazm (Studi Komparatif),” *Jurnal Fenomena* 4, no. 1 (2012): 91–107.

<sup>29</sup> Abu Ammar Yasir Qadhi, *An Introduction to the Sciences of the Qur’aan* (Birmingham: Al Hidaayah Publishing and Distribution, 1999), 332.

<sup>30</sup> Luqman Zakariyah, “Custom and Society in Islamic Criminal Law: A Critical Appraisal of the Maxim ‘Al-’Adah Muḥakkamah’ (Custom Is Authoritative) and Its Sisters in Islamic Legal Procedures,” *Arab Law Quarterly* 26, no. 1 (2012): 75–77.



events'). Different realities may require the law to be applied differently. Further, much of *fiqh al-jihād* is highly influenced by *maṣlaḥat* or necessities<sup>31</sup> such as the necessities of war. However, it shall be noted that the use of *maṣlaḥat* considerations will only be acceptable when they do not contradict the Qur'ān and *Sunnah*.<sup>32</sup> A comparative perspective towards other laws may therefore possibly be used to understand reality better to implement Islamic law in the context of *maṣlaḥat*.

## THE MEANING OF WAR AND REASONS FOR ITS LIMITATION

War has been known in the history of man since time immemorial. Some people love to wage war, whether it is for religion or wealth or other reasons.<sup>33</sup> Others do not like it but find nevertheless themselves fighting due to attacks from others.<sup>34</sup> However, since the ancient times there have always been some sorts of ethics or even laws to regulate the conduct of war.<sup>35</sup> While law always comes along with mankind,<sup>36</sup> how does law perceive war as a reality of man? This section explores the perspectives of international law and Islam, as core themes in this article.

### International Law

In international law, it is common to perceive war as a very terrible thing, and is not something to look forward to. With the United Nations (UN) at

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<sup>31</sup> Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave Macmillan, 2011), 118.

<sup>32</sup> Nyazee, *Islamic Jurisprudence*, 198.

<sup>33</sup> See generally: Robert L O'Connell, *Of Arms and Men: A History of War, Weapons, and Aggression* (New York: Oxford University Press, 1990).

<sup>34</sup> *Ibid.*

<sup>35</sup> Pictet, *Development and Principles of International Humanitarian Law*, chap. 1.

<sup>36</sup> Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 3rd ed. (Yogyakarta: Liberty, 1991), 1.

the center of modern post-world war international law,<sup>37</sup> its charter reads at the first paragraph of the 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 main purpose of the UN in Article 1(1) and an organ as powerful as the Security Council (SC) has also been established in the Charter.<sup>38</sup> Bassiouni notes that the *Jus Cogens* norms—the highest and non-derogable norms in international law<sup>39</sup>—have a doctrinal characteristic of "...threaten[ing] international peace and security and shock the conscience of humanity".<sup>40</sup> Furthermore, scholars argue that the prohibition against the use of armed forces is the most undoubted part of the *jus cogens* principle.<sup>41</sup>

When war does eventually occur, modern IHL aims to mitigate the horrors of it by protecting the persons who are no longer involved in the hostilities and limiting the means and methods of warfare.<sup>42</sup> Historically, modern IHL marked by the Geneva Convention 1864 was founded out of the horrors of war and then sought to bring as much humanity as possible during times of war.<sup>43</sup> There have been numerous IHL conventions

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<sup>37</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007), 108–9.

<sup>38</sup> 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

<sup>39</sup> Albeit some debates on the matter, see for example: Ulf Linderfalk, "Normative Conflict and the Fuzziness of the International *Jus Cogens* Regime," *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 69 (2009): 961–77.

<sup>40</sup> M Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*," *Law & Contemporary Problems* 59 (1996): 63.

<sup>41</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 50.

<sup>42</sup> ICRC, "What Is International Humanitarian Law?," *Advisory Services on International Humanitarian Law, the International Committee of the Red Cross*, July 2004, [https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

<sup>43</sup> Started from a Christian-related motivation of Hendry Dunant, but developed into what is claimed to be a secular and universal 'principle of humanity'. See:

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

From all these we can see that the killing and destruction is war is simply an inevitable thing, so that what the law can do is simply mitigate the harm and contain the damage.

## Islam and War

Islam, on the other hand, seems to impart a different understanding on the matter. While the Qur’ān notes that waging war may be disliked as in Surah Al-Baqarah, 2: 216 which reads “..it is hateful to you...”, a full reading towards the verse implies otherwise; jihad is ordained upon the Muslims and that it is good as shown in the following verse:

“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.”<sup>44</sup>

Prophet Muḥammad (pbuh) even said “One who died but did not ... express any desire (or determination) for Jihad died the death of a hypocrite.”<sup>45</sup> There are many virtues in waging war, such as promise of heaven for a Muslim who kills a disbeliever in war,<sup>46</sup> and the martyred would receive many rewards, receive *jannah*, and have all sins forgiven except debts.<sup>47</sup>

However, it is to be emphasised that Islam in general does not promote violence. The word ‘Islam’ itself shares the same root words (س ل م) with ‘peace’ and ‘safety’.<sup>48</sup> Islam inclines more to resorting to peace

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Eva Wortel, “Humanitarians and Their Moral Stance in War: The Underlying Values,” *International Review of the Red Cross* 91, no. 876 (2009): 782–87.

<sup>44</sup> Full verse of Surah Al-Baqarah, 2:216.

<sup>45</sup> Imam Muslim, *Sahih Muslim*, vol. 2 (Lahore: Ashraf Press, 1972), para. 1910.

<sup>46</sup> *Ibid.*, vol. 2, para. 1891.

<sup>47</sup> Surah Al-Imran, 3:169-171, and *Ibid.*, vol. 2, para. 1886.

<sup>48</sup> Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, vol. 4 (Beirut: Librairie du Liban, 1968), 1412–13.

and prefers the enemy to also be inclined to it,<sup>49</sup> and to wage war is not ordained except with conditions and restrictions. To wage war is an individual obligation in a defensive context.<sup>50</sup> In an offensive context, the majority of scholars mention that it becomes *farḍ kifāyyah* (a collective obligation),<sup>51</sup> and even then with strict requirements and still can be set aside when it is politically more beneficial for the Muslims not to enter into war.<sup>52</sup>

Moreover, the Qur'ān also provides limitation in waging war, in *Surah Al-Baqarah*, 2:190 it is stated, "Fight in the way of Allah those who fight you but do not transgress limits". It is at this point where it can be seen that, despite the different ways of perceiving war, Islamic law also recognizes that there has to be some limitations towards the violence inflicted.

It is therefore established that the desire to limit violence exists in both laws, and that there is at least some level of mutual understanding. The next question that should be asked: do they have the same level of tolerance - and therefore intolerance - levels to the amount of violence permitted during war? It will later be shown that Islamic law does have some level of restrictions on (i) who may and who may not be killed during war, (ii) there are means and methods of war that may not be used. This is what will be examined in the following section, from which will be found that there are both prospects and challenges.

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<sup>49</sup> See the Quran in 8:61-62

<sup>50</sup> Yusuf Al-Qardhawy, *Fiqh Jihad* (Bandung: Mizan, 2010), 39–44.

<sup>51</sup> If some sufficiently fulfills it then the others are no longer obliged, otherwise sin is unto everyone. See: Nyazee, *Islamic Jurisprudence*, 64.

<sup>52</sup> Al-Qardhawy, *Fiqh Jihad*, 13–33. Note that some scholars even argue that Islam does not allow offensive warfare altogether, except in the early Muslim wars against the Romans and Persians which were based on very specific and particular commands by Prophet Muḥammad (pbuh) himself ( 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*, ed. Marie-Luisa Frick and Andreas Th. Muller (Leiden-Boston: Martinus Nijhoff Publishers, 2013), 70–75.

## COMPATIBILITY BETWEEN *FIQH AL-JIHAD* AND IHL: PROSPECTS AND CHALLENGES

The main purpose of IHL is to protect persons not or no longer taking part in hostilities and to restrict the means and methods of warfare.<sup>53</sup> In regulating the conduct of warfare, there are numerous areas where *fiqh al-jihād* and IHL are compatible. However, together with these compatibilities, there are some challenges which need to be addressed.

### The Principle of Distinction

Within IHL, a group of people that is prohibited from being attacked are those who do not actively participate in the conflict, they are referred to as non-combatants.<sup>54</sup> Among others in this category are civilians not taking part in hostilities, or combatants who have surrendered as per Article 3, Geneva Convention Relative to the Treatment of Prisoners of War (GC III) 1949.

### *Prospects*

In general, *fiqh al-jihād* rules in the same way. The Prophet Muḥammad's (pbuh) Companion, Abū Bakr Al-Ṣiddīq, while sending troops to Al-Shām, issued an order which summarizes The Prophet (pbuh)'s commands relating to conduct of warfare, "I instruct you [...], do not kill women, do not kill children, do not kill helpless elders [...]"<sup>55</sup>

There is a problem of authenticity of this narration, which will be explained in a later part of this article. However, the aforementioned narration has been used as a basis to prohibit the killing of women, children and helpless elders by Islamic scholars, maybe because it can act as an easy summary to some authentic instructions directly stated by The

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<sup>53</sup> ICRC, "What Is International Humanitarian Law?"

<sup>54</sup> Jean-Marie Henckaerts, Louise Doswald-Beck and Carolin Alvermann, *Customary International Humanitarian Law*, vol. 1 (Cambridge University Press, 2005), 3.

<sup>55</sup> Malik bin Anas, *Muwatta Al-Malik* (Granada: Madinah Press, 1992), chap. 12, para. 10.

Prophet (pbuh) through authentic *aḥadīth* –e.g. prohibition of killing women, children, and monks.<sup>56</sup>

To further add to this, there are also narrations where The Prophet (pbuh) prohibits the killing of serfs (or hired workers), which is not mentioned in the narration of Abū Bakr, but can be found in another authentic *ḥadīth*.<sup>57</sup> Thus, can we conclude an existence of a ‘principle of distinction’, which dictates that a person may be targeted only when they actively participate in hostilities?

It is interesting to start from the opinion of the great scholar Al-Shāfi‘ī. He opines that the command to kill the disbelievers during war is a general command, as the Qur’ān says in 9:5 : “...kill the polytheists wherever you find them...”, and finds exception only for women and children.<sup>58</sup> Consequently, any persons other than those in the exception may be killed –whether or not they were participating in the hostilities e.g. priests, the elderly, chronically ill, *etc.* due to their state of being a disbeliever.<sup>59</sup> It is important to note that the method he used to draw conclusions is correct; a general command should be complied with in its generality, until there are evidences (*dalīl*) of specific exclusions from that general command.<sup>60</sup>

However, the majority of scholars disagree with this. Ibn Taymiyyah wrote a refutation towards Al-Shāfi‘ī’s position and in favor of the majority, to say it is not mere disbelief but also participation in hostilities that becomes the reason for someone to be a legitimate target in war.<sup>61</sup> Ibn Taymiyyah’s arguments are *inter alia*:<sup>62</sup>

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<sup>56</sup> Imam Ibn Rushd, *The Distinguished Jurist’s Primer*, 1:458–60.

<sup>57</sup> *Ibid.*

<sup>58</sup> Abdullah Azzam, *Jihad: Adab Dan Hukumnya* (Jakarta: Gema Insani Press, 1993), 26; Imam Ibn Rushd, *The Distinguished Jurist’s Primer*, 1:458–59.

<sup>59</sup> *Ibid.*

<sup>60</sup> Al-Utsaimin, *Ushul Fiqih*, 58–59.

<sup>61</sup> Imam Ibn Taymiyyah’s work is titled *Qā‘idah fī Qitāl al-Kuffār: Hal Sababuh Al-Muqāṭalah aw al-Kufr?*, summarized in: Al-Qardhawy, *Fiqh Jihad*, 290–91.

<sup>62</sup> *Ibid.*, 291–96.

- The Quranic injunctions on war (2: 190-193) command to stop fighting, not when the enemy embraces Islam but when they stop attacking,
- When the Prophet (pbuh) prohibited the killing of a woman, he said “she did not participate in the war”,
- The Qur’ān in 2:256 prohibits compulsion in religion, in 47:4 allows ransom and gratuitous release towards prisoners, and has a general purpose of preferring not to kill in 5:32, *etc.*

It is interesting to point out that the opinion of Al-Shāfi‘ī in this matter is not followed by many. So much so that even the Al-Qaeda founder Abdullah Azzam agrees with the majority in this case.<sup>63</sup> Islamic law therefore has a principle of distinction similar to that of modern IHL.

Jean Pictet states that since the 13<sup>th</sup> century, Muslims are familiar with this principle of distinction and apply them to whomever they fight against, whereas Christians do not comply with this law unless engaging with other Christians.<sup>64</sup> This shows how much Islam has faithfully recognized this principle since a long time ago. Therefore, in the case of principle of distinction, there seems to be no substantial inconsistencies between *fiqh al-jihād* and IHL.

### Challenges

There are a few details, however, that may potentially raise some issues. The first issue would be the case of civilians directly participating in hostilities. In IHL, civilians who are not organized into armed groups (or *levee en masse*) may now be legitimate targets insofar as they participate in hostilities. The moment they retreat or stop fighting they may no longer be targeted, although they may be prosecuted.<sup>65</sup> This is different

<sup>63</sup> Azzam, *Jihad: Adab Dan Hukumnya*, 24 and 30.

<sup>64</sup> Pictet, *Development and Principles of International Humanitarian Law*, 14–16.

<sup>65</sup> Nils Melzer, *ICRC’s Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC (Geneva: The International Committee of the Red Cross, 2009), 17, <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

from the case of members of the armed forces, who can be targeted until they are *hors de combat* or wounded.

No works on *fiqh al-jihād* seem to distinguish between these types of combatants together with their different rights and obligations. The benefits of this rule should be further studied, although it may seem that civilians who are easily running away and re-participating in battles can be very troublesome in dire and confusing times of urban war. At a glance, it seems that it will be hard for *fiqh al-jihād* to concur with modern IHL on this point.

The second issue would be the case of combatant insignia, where combatants are expected to make themselves distinguishable from civilians and carry arms openly (as per Article 44(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of International Armed Conflicts [Protocol I] 1977). This rule can cause confusion as to who is a combatant and who is not, especially in the context of urban warfare. When such confusion is deliberately caused, it will then be a crime of perfidy. This issue will be discussed in more in depth later.

But otherwise, on the basis of *maṣlahat* (i.e. to avoid accidental deaths of non-combatants), it may be ruled that such regulation should apply in *fiqh al-jihād* as well. It can also be considered as customs of war, which can be a basis from which to derive *fiqh* i.e. under the principle *al-‘adātu muḥakkamah* (customs can be law).

The third case is a problem related albeit indirectly to the principle of distinction. It speaks not of civilians deliberately targeted, but those accidentally so. This relates more to the principles of proportionality, and will be discussed in the next section.

### **The Principle of Proportionality**

The principle of proportionality essentially dictates that the damage inflicted should not exceed what is necessary as per Article 51(5)(b), Protocol I. This complements the principle of distinction because numerous civilian casualties are not only caused by deliberate attacks towards them, but also incidental damage caused by attacks intended to



be directed at legitimate targets. As cruel as it may sound, but the reality is that these damages can be tolerated if they were truly accidental.<sup>66</sup> However, they can only be truly accidental if they were inevitable which is certainly understood as civilian casualties after making sincere efforts to avoid them, i.e. by applying precautionary measures.<sup>67</sup>

### *Prospects*

In general, Islamic law requires wars to be fought proportionally. The Qur’ān explicitly says in 2: 190: “Fight in the way of Allah those who fight you but do not transgress limits.” There are persons that may not be killed in war, and one must strive to fulfill the law in the best way possible.<sup>68</sup> Further, some *al-qawā’id al-fiqhiyyah* exists which states ‘*al-ḍararu yuzāl*’ (harm must be avoided), *mā lā yudraku kulluh lā yutraku kulluh* (what cannot be achieved in its entirety, may not be left in its entirety),<sup>69</sup> *mā ubīḥa liḍarūrati yuqadar biqadariha* (during emergency, prohibited things can be permissible only to the extent of which the emergency requires), and *al-ḍararu yudfa ‘u biqadri al-imbkān* (harm must be removed to the furthest extent possible).<sup>70</sup>

Basic common sense would then require one to be careful to avoid civilian casualties as much as possible and apply as much measures as can be done. Scholars have allowed the use of modern weaponry

<sup>66</sup> ICTY, “*Prosecutor v Kupreskic et. Al.* (IT-95-16-T)” (The Hague: ICTY, 2000), paras. 524–525.

<sup>67</sup> *Ibid.*, para. 528. See also Articles 57 and 58 of Protocol I.

<sup>68</sup> ‘Striving to fulfill the law in the best way possible’ is known as *Istiḡamah*. See: Musthafa Al-Bugha and Musthafa Al-Khin, *Syarah Riyadus Shalihin* (Yogyakarta: Darul Uswah, 2006), 181–83.

<sup>69</sup> Muhammad Khayr Haykal, *Al-Jihād Wa Al-Qitāl Fī Al-Siyāsah Al-Shar‘iyyah*, vol. 1 (Beirut: Dar al-Bayariq, 1996), 735.

<sup>70</sup> Azman Ismail and Md. Habibur Rahman, *Islamic Legal Maxims: Essentials and Applications* (Kuala Lumpur: IBFIM, 2013), 175 and 189.

including bombs, tanks, rockets, *etc*, and have said that civilian deaths are acceptable only when they are accidental.<sup>71</sup>

Further, Muslim scholars are developing a new branch of *fiqh* which specializes particularly on the environment, known as *fiqh al-bi'ah*.<sup>72</sup> A discussion on environmental protection during times of war is also normally part of the discussion of the principle of proportionality, but for the purpose of ensuring clarity of this paper, the issue will be discussed separately in another section

To this extent, it is clear—at least in general—that *fiqh al-jihād* is in line with modern IHL.

### *Challenges*

The problem with the current state of *fiqh al-jihād* is when we know that ‘accidental’ and ‘reckless’ are two different things, yet the obligation to be careful is barely—if ever—mentioned. The best that could be found (other than ‘civilian deaths, if accidental, is acceptable’) is that scholars like Al-Shīrāzī mentioning that, in the event that the enemy combatants and non-combatants coming, one should not attack unless for an imperative military necessity.<sup>73</sup> Such a simple rule is not incorrect, yet is not nearly as comprehensive as what would be required to reduce civilian casualties of modern warfare.

In addition, one of the arguments used by the scholars to justify using modern weaponry seems rather questionable: they say that Prophet

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<sup>71</sup> Al-Qardhawy, *Fiqh Jihad*, 489–99; Azzam, *Jihad: Adab Dan Hukumnya*, 42–43; Wahbah Al-Zuhaylī, *Fiqh Al-Islām Wa Adillatuhu*, vol. 8 (Damascus: Dar al-Fikr, 1428), 5857–58; Abdul Qadir bin Abdul Aziz, *Panduan Fikih Jihad Fii Sabilillaah* (Unknown: Maktab Nidaa ulJihad, 2005), 139–43, <http://kopet.pun.bz/files/syaikh-abdulqadir-abdul.pdf>.

<sup>72</sup> See for example: Sayed Sikandar Shah Haneef, “Principles of Environmental Law in Islam,” *Arab Law Quarterly* 17, no. 3 (2002): 241–54.

<sup>73</sup> See for example: Imam Ibn Qudāmah, *Fiqh Al-Kāfi Al-Imām Ahmad Ibn Hanbal*, vol. 4 (Beirut: Dar al-Kutub 'Elmiya, 2004), 126; Imam Al-Shīrāzī, *Al-Muhadhdhab Fī Fiqh Al-Imām Al-Shāfi 'Ī*, vol. 3 (Beirut: Dar al-Kutub 'Elmiya, 1995), 278.

Muḥammad (pbuh) used the modern weapons of his time i.e. the *al-manjanīq* or mangonel, therefore by *qiyās* modern weapons also can be used in today's context.<sup>74</sup> As explained much earlier, *qiyās* may be done when there is a common underlying attribute or *'illah* between the case found in the *dalīl* and the new case.<sup>75</sup> What is the *'illah* in this case? If it is 'the use of a modern weapon of the time', then the use of the *al-manjanīq* and modern weapons are easily analogous. However, if we look at the main purpose of the weapons, which is to inflict damage to the enemy, can we say that the extent of damage caused are analogous? Is it logical to equate the damage inflicted by a device that simply tosses rocks –albeit quite big and heavy ones—at enemy castles, with what bombs and missiles can do? Is this really an acceptable analogy?

Even if the aforementioned analogy is accepted to be a proper one, an argument based on *istiḥsān* (juristic preference) can be strongly submitted. *Istiḥsān* can be understood as “moving away from the implications of analogy to an analogy that is stronger than it, or it is the restriction of analogy by evidence that is stronger than it.”<sup>76</sup> Simply making *qiyās* from the *al-manjanīq* to modern weapons may result in so many accidental deaths, which is not something that Islamic law aspires to see. It should be therefore clear that one should not make such an easy *qiyās* with the *al-manjanīq* in ruling on modern weapons.

However, not using these weapons altogether is also unrealistic. So a middle ground is certainly needed, where the modern weapons can be used (both by *qiyās* with *al-manjanīq* and also by necessity), but the permissibility should come with a requirement to be careful in avoiding accidental deaths as much as it is possible.

Unfortunately, we do not find a set of required precautions in the works of *fiqh al-jihād* as we do in modern IHL. Looking at modern IHL, as explained earlier, for civilian deaths to be truly accidental in modern IHL, a series of precautions should be applied and there are detailed rules on this.

<sup>74</sup> See for example: Azzam, *Jihad: Adab Dan Hukumnya*, 43.

<sup>75</sup> Nyazee, *Islamic Jurisprudence*, 214.

<sup>76</sup> *Ibid.*, 231.

For example, in modern IHL, we have article 57 of Protocol I requiring *inter alia*, commanders to verify the targets of their combatant status and risk of civilian losses while determining the proper means and method to use in their attacks. A commander must do a value judgment to assess whether it is possible to avoid excessive losses, and whether the end decision has a military advantage worthy of the risk of collateral damage.<sup>77</sup> This is easily a much more comprehensive version of the ‘attackers should aim at the enemy instead of the civilians’ rule mentioned earlier.<sup>78</sup>

The materials to derive the principle of proportionality are all there. *Fiqh al-jihād* aspires to reduce accidental casualties as much as it is possible, just like modern IHL, lacking ‘only’ a detailed set of required precautionary measures. Hence, there should be no reason to prevent *fiqh al-jihād* from adopting what modern IHL regulates. These rulings find their ways into books of *fiqh al-jihād*.

### **Treatment of Prisoners of War**

In general, IHL has obligated the humane treatment of prisoners of war, as described in Article 13-14 of the Third Geneva Convention Relative to the Treatment of Prisoners of War 1949. This is further elaborated in the minimum standards in terms of food and clothing, hygiene and sterility of the detention, and so forth as per Article 25-29 of GC III. Prisoners may be executed, but under the condition that they have committed a crime of not only fighting for the opposition and has been predetermined by a judicial judgment as per Article 3 of GC III.

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<sup>77</sup> 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), 153–64.

<sup>78</sup> And this is just one article of Protocol I. There are so much more comprehensive rules of precaution in modern IHL which can be adopted too.

### *Prospects*

In the Islamic law, generally there is a standard command to treat prisoners humanely, as has been stated by The Prophet (pbuh).<sup>79</sup> The latter evinces the congruency between IHL and *fiqh al-jihād*. However, *fiqh al-ihād* does not provide details in treating the prisoners ‘well’, thus such could be interpreted with using the applicable standards under *‘urf* (or customs considered to be ‘good’). Therefore, in this respect, it may be possible to refer to the standards of treatment required in IHL to fill in the gaps.

However, the *Sunnah* contains a slight advantage towards Islamic law, which provides a higher standard than IHL. The Qur’ān in 76:8 says, “And they give food, in spite of their love for it (or for the love of Him), to the poor, the orphan and the captive”. Equating acts of charity towards prisoners towards that of the poor and the orphan is a highly noble act. This was practiced after the Battle of *Badr*, whereby, not only did The Prophet (pbuh) and his companions treat the prisoners well, but they prioritized the prisoners over themselves.<sup>80</sup> The prisoners were shocked when they were offered bread and milk, while the Muslim army had only eaten dates.<sup>81</sup>

It is therefore clear that while it is compulsory to treat the prisoners well as a minimum standard, it is encouraged *mandūb* to actually go beyond that standard and treat them even better than the Muslim army would treat themselves.<sup>82</sup> This is not regulated, although certainly will be much appreciated, in modern IHL.

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<sup>79</sup> Ismail ibn Kathir, *Tafsir Ibn Kathir*, vol. 10 (Riyadh: Darussalam, 2000), 289 and 212.

<sup>80</sup> *Ibid.*

<sup>81</sup> M. Adil Salahi, *Muhammad: Man and Prophet* (Dorset: Element Books, 1995), 257.

<sup>82</sup> *Fiqh* knows five injunctions on rules: *wājib/farḍ* (compulsory), *mandūb* (encouraged), *mubāh* (no obligation/prohibition), *makrūh* (disliked), and *ḥarām* (prohibited). Acts of *mandūb* are highly rewarded, despite no punishment for abandoning. See: Nyazee, *Islamic Jurisprudence*, 51 and 67.

### *Challenges*

The challenges in this area would be on the question of execution and slavery, because the majority of classical Islamic scholars ruled that when the war is over, the Muslim leader can decide four possible fates of the captives: release with or without condition, execute (for male captives only), or to enslave, based on *maṣlahat*.<sup>83</sup>

What may also be part of the problem is the lack of acknowledgement or probably denial that such opinions exist and are not entirely baseless as such. An example to this, other than the argument against execution mentioned in the introduction part, is the ‘Open Letter to Baghdadi’ issued against ISIS, signed by 126 Islamic scholars all around the world.<sup>84</sup> This letter claims that there is a consensus on the prohibition of slavery in Islam,<sup>85</sup> while there exist rulings by legitimate scholars against the alleged consensus, for example by the Saudi Arabia Committee of Fatwa and the famous Syrian scholar Wahbah Al-Zuhayli.<sup>86</sup>

The key to resolve this problem is to address the situation fairly without dismissing scholars too easily. To begin with, *maṣlahat* (referring to the public interest of the Muslims) depends on the Muslim leaders. It is therefore legitimate for Muslim leaders to ratify IHL and human rights instruments giving special requirements to execute war captives and prohibiting slavery. Although, of course, this may only apply in the context of Islamic nations and will not affect non-state groups like Al-Qaeda and the likes. Yet, other arguments can still be made.

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<sup>83</sup> Note that this decision can only be made by the leader of the Muslims, after the prisoners were taken into captivity, and during so they deserve humane treatment as explained before. See: Imam Ibn Rushd, *The Distinguished Jurist's Primer*, 1:456–57.

<sup>84</sup> “Open Letter To Dr. Ibrahim Awwad Al-Badri, Alias ‘Abu Bakr Al-Baghdadi.’”

<sup>85</sup> *Ibid.*, pt. 12.

<sup>86</sup> Muhammadin, “Refuting Da’esh Properly: A Critical Review of the ‘Open Letter to Baghdadi,’” pt. 4.

In the case of slavery, some Muslim scholars argued that there is no more *maşlahat* for it nowadays.<sup>87</sup> Even the founder of Al-Qaeda, Abdullah Azzam, mentioned that there is large detriment in enslaving women belonging to the adversary, due to fear that the adversary will rape Muslim women in retaliation.<sup>88</sup> He was right to worry, as history shows that sexual violence is a grave problem during warfare.<sup>89</sup>

Another term, which is important to understand is ‘slavery’, because the concept of slavery in Islam has so much humaneness and regulations which makes it far different from the horrors commonly associated with the term.<sup>90</sup> In fact, it is worth mentioning that in the previously mentioned Qur’ān verse 76:8, the term ‘*captives*’ is understood to also mean and include slaves.<sup>91</sup> A separate discussion is needed to properly discuss the matter of slavery, but probably the concept of slavery in Islam can be shortly described as Prophet Muḥammad (pbuh) says as follows:

“Your slaves are your brothers and Allah has put them under your command. So whoever has a brother under his command should feed him of what he eats and dress him of what he wears. Do not ask them (slaves) to do things beyond their capacity (power) and if you do so, then help them.”<sup>92</sup>

<sup>87</sup> See for example: Musthafa Al-Khin and Musthafa Al-Bugha, *Konsep Kepemimpinan Dan Jihad Dalam Islam: Menurut Madzhab Syafi’i* (Jakarta: Darul Haq, 2014), 48.

<sup>88</sup> Azzam, *Fī Al-Jihād: Fiqh Wa Ijtihād*, 58.

<sup>89</sup> See *inter alia*: CHR, “Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences, UN Document E/CN.4/1995/42,” 1994, 64; Alexandra Stigmayer, “Mass Rape: The War Against Women in Bosnia-Herzegovina,” *Women Under Siege Project*, 2017, 54, <http://www.womenundersiegeproject.org/conflicts/profile/colombia#numbers>.

<sup>90</sup> Jonathan Brown, “Slavery and Islam - Part 1: The Problem of Slavery,” *Yaqeen Institute*, 2016, <https://yaqeeninstitute.org/en/jonathan-brown/the-problem-of-slavery/>.

<sup>91</sup> Kathir, *Tafsir Ibn Kathir*, 10:289 and 212.

<sup>92</sup> Muhammad bin Ismail Al-Bukhari, *Sahih Al-Bukhari*, vol. 3 (Lahore: Kazi Publications, 1979), para. 721.

With regards to the ruling on execution, it is an intriguing case. Some scholars argue that execution can be done onto male prisoners on the basis of *maṣlaḥat* (as generally understood), while some scholars argue that *maṣlaḥat* in this context should be understood as ‘execution only if the prisoner has committed special crimes beyond belligerency’.<sup>93</sup> The latter position seems more compelling as Prophet Muḥammad (pbuh) has never commanded the killing of captives unless for such reasons,<sup>94</sup> however the differences of opinion occurs not due to ignorance towards this fact but rather the differences are due to the differing facts that surround each case. The scholars who rely on *maṣlaḥat* generally opine that Prophet Muḥammad (pbuh) has done execution before, and the reason was understood as simply a matter of *maṣlaḥat* which could be generally interpreted as such.<sup>95</sup>

The cases of slavery and execution towards prisoners of war are therefore a contentious debate amongst very strong scholarly opinions. Eventually, the compatibility towards modern IHL will therefore depend on which opinion to follow.

### **Environmental Protection during Armed Conflict**

During wars, damage to the environment is inevitable. However, laws regulating environmental protection in times of war were absent in the development of modern IHL. This did not happen until after the Declaration of the United Nations Conference on the Human Environment (known as the Stockholm Declaration) in 1972, which was the first international instrument voicing global concern towards environmental protection.<sup>96</sup> Further international protection subsequently

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<sup>93</sup> Al-Qardhawy, *Fiqh Jihad*, 708–10.

<sup>94</sup> *Ibid.*

<sup>95</sup> Imam Ibn Rushd, *The Distinguished Jurist’s Primer*, 1:456–57.

<sup>96</sup> Although between 1900-1972 there were a (very) few agreements related to the environment, it was the Stockholm Declaration which was the mark of a global concern towards the issue. Edith Brown Weiss, “The Evolution of International Environmental Law,” *Japanese Yearbook of International Law* 54, no. 1 (2011): 3–4.



followed, prohibiting warring parties to inflict, "...severe, widespread, and long term..." damage to the environment at Articles 35 and 55, of Protocol I.

### *Prospects*

The responsibility to protect the environment is embedded within the teachings of Islam. Islamic teachings have duly considered concerns towards environmental protection since a long time ago, despite being revealed into the middle of a desert during a time when environmental damage was yet not a concern. Over one thousand years ago, Allah SWT through the Qur'ān in 2:60 mentioned the following, "Eat and drink of that which Allah has provided and do not act corruptly in the earth making mischief." Another verse of the Qur'ān, at 30: 41 says:

"Mischief has appeared in the land and the sea because of what the hands of mankind have earned, that He may make them taste a part of that which they have done, so that they may return [to the right path]."

From here, as mentioned earlier in the discussion relating to the Principle of Proportionality, Islamic scholars are currently developing *fiqh al-bi'ah*. It is not impossible for the studies between the two fields (i.e. *Fiqh al-bi'ah* and *fiqh al-jihād*) to be linked.

Furthermore, Islamic law has specific rules prohibiting wanton destructions towards the environment during times of war. The same narration of Abū Bakr al-Ṣiddīq cited previously in the Distinction section,<sup>97</sup> also continues as the following:

"I instruct you ..., do not cut down fruit-bearing trees .... do not slaughter sheeps and camels except for food, do not destroy palm trees, do not burn palm trees ..."

It is therefore observed that in protecting the environment during war, Islamic law seems to be way ahead of modern IHL, which took decades even after the first Geneva and Hague Conventions to do the same.

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<sup>97</sup> Anas, *Muwatta Al-Malik*, chap. 21 para. 10.

### *Challenges*

The challenge in this respect will be with regards to the differences of opinion concerning the abovementioned argument on the prohibition to destroy and burn palm trees, and the opposition does have very legitimate arguments.

On one hand we have the narration of Abū Bakr al-Ṣiddīq mentioned earlier, but on the other, we have also The Prophet (pbuh) reported to have ordered the logging and burning of trees while fighting against Banū Al-Naḍīr at Al-Buwaira<sup>98</sup> which was also mentioned in the Qur’ān in 59:5 which reads:

“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.”

They argue, very convincingly and correctly, that it makes no sense to prioritize a ruling of a Companion—even Abū Bakr, the best amongst all Companions—over something that Prophet Muḥammad (pbuh) himself had done.<sup>99</sup>

There are also those who refused to use the narration of Abū Bakr al-Ṣiddīq, claiming that it is not authentic.<sup>100</sup> This claim has merit because the scholars of hadith have known that in the chain of narrators of that narration, Yaḥya ibn Sa‘īd who narrated from Abū Bakr al-Ṣiddīq has never actually met Abū Bakr al-Ṣiddīq to have heard the narration directly.<sup>101</sup> At best, it can be assumed that there is an unknown narrator

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<sup>98</sup> Muhammad bin Ismail Al-Bukhari, *Sahih Al-Bukhari*, vol. 5 (Lahore: Kazi Publications, 1979), para. 365.

<sup>99</sup> Some scholars who insisted in using the ruling of Abū Bakr al-Ṣiddīq retorted that it is impossible and inconceivable that Abū Bakr al-Ṣiddīq (i.e. the best of all the companions) would go against The Prophet’s (pbuh) orders, so there must have been a *nasakh* (abrogation) that we were not aware about. But then this also seems like making up a possibility out of thin air.

<sup>100</sup> Azzam, *Jihad: Adab Dan Hukumnya*, 37.

<sup>101</sup> As noted by Al-Tahānawī. See: Imam Al-Tahānawī, *I‘lā Al-Sunnan*, vol. 12 (Karachi: Iradah Al-Qur’an wal-‘Ulum al-Islamiyah, 1418), 25.

between them,<sup>102</sup> but nonetheless this narration's authenticity becomes *munqaṭi* ('broken') and therefore not authentic.<sup>103</sup> It shall be noted that only from authentic narrations can obligations/prohibitions be derived from.<sup>104</sup>

From the ten commands mentioned in the narrations, some of the commands related to the protection of certain persons were corroborated by authentic *ḥadīth* as explained in the Distinction part before. However, the commands prohibiting to burn and cut trees were not corroborated by any authentic *ḥadīth*, and were instead contradicted by the previously mentioned narrations on the battle against Banū Al-Naḍīr.

Nevertheless, this problem can be resolved. First, the different opinions have been reconciled by scholars who stated that the prohibition to cut and burn trees is the general rule, while exceptions are when doing so is militarily necessary.<sup>105</sup>

Second, even if we accept that this narration is not authentic and cannot be used as basis to derive legal rules, it will end in the same way nonetheless. This is because of the generality of the Qur'ān command in 2:190 (as mentioned above) and other considerations as per the discussion under the 'principle of proportionality' part. Under the generality of the verse and principles in the context of *jihād*, a principle of proportionality should also be applied in the context of environmental preservation in times of war.

Looking at this at a glance might show that *fiqh al-jihād* may actually have higher standards than IHL in protecting the environment, at least in principle. *Fiqh al-jihād* prohibits anything disproportionate, while IHL

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<sup>102</sup> Imam Al-Tahānawī (in Ibid.) also added that this narration is narrated in a different book but with a more complete chain of narrators indicating who narrated to Yahya ibn Sa'īd from Abū Bakr al-Ṣiddīq, but, alas, Al-Tahānawī did not mention where can it be found or who the missing narrator is. At best, there is other chains to this narration which are also *munqaṭi* but of a higher strength, see: Imam Al-Baihaqī, *Ma'rifah Al-Sunnan Wa Al-Athar*, vol. 13 (Karachi: Jami'ah Dirasat Islamiyah, 1412), paras. 18077–18079.

<sup>103</sup> Syuhudi Ismail, *Pengantar Ilmu Hadits* (Bandung: Angkasa, 1991), 171.

<sup>104</sup> Anshari Taslim, *Tharīqus Shalihin* (Bekasi: Toga Pustaka, 2015), 7–8.

<sup>105</sup> Imam Ibn Rushd, *The Distinguished Jurist's Primer*, 1:461.

will wait for the damage to be not just disproportionate but also causing ‘...severe, widespread, and longterm...’ damage to the environment.<sup>106</sup>

Therefore, the challenges can be met. The other challenge would be the same as the principle of proportionality before, i.e. in terms of the lack of details in the ruling. Islamic scholars should be more detailed in deriving rulings pertaining to this matter. As mentioned earlier, further researches of *fiqh al bi’ah* should be made both in its own branch of *fiqh* and also its correlation to *fiqh al-jihād*.

### Perfidy during Times of War

The term ‘perfidy’, originating from the Hague Convention, is defined as:

“...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...”<sup>107</sup>

In short, the prohibition against perfidy essentially prohibits hostile acts committed under the cover of a legal protection.<sup>108</sup> The rationale of it is to eliminate the abuse of legal protection granted to vulnerable groups, such as non-combatants.<sup>109</sup>

Not all deceptions are rendered unlawful under IHL, as acts of perfidy shall be distinguished from ‘ruses of war’. Ruses of war are not prohibited as these actions are intended to merely mislead an adversary

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<sup>106</sup> See Article 8(2)(b)(iv) of the Rome Statute 1998. Although, of course, in practice it should not be understood that Islamic law will outlaw every single instance of disproportionate environmental damage especially when they are insignificant, as this is very impractical and therefore lack *maṣlaḥat* to pursue investigations on.

<sup>107</sup> Article 37(1) of Protocol I

<sup>108</sup> Henckaerts, Doswald-Beck, and Alvermann, *Customary International Humanitarian Law*, 1:223.

<sup>109</sup> Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Massachusetts: Edward Elgar Publishing, 2013), 66.

and do not invite the confidence pertaining to protection to that adversary as per Article 24, Hague Convention II – The Laws and Customs of War on Land of 1899. The aforementioned ruses include camouflage, decoys, mock operations, misinformation, surprise attacks and ambushes, dummy installations and weapons,<sup>110</sup> *etc.* These deceptions were rendered lawful as they do not infringe rules of international law nor do they invite any confidence over a legal protection.

### *Prospects*

In the case of *fiqh al-jihād*, there is a very famous statement of The Prophet (pbuh) saying that, “war is deception.”<sup>111</sup> This may seem that tricks and deceit are something endorsed in times of war. It turns out that *fiqh al-jihād* does not provide a blanket permission for all sorts of deception. The aforementioned statement of the Prophet (pbuh) is to be understood properly, as all sources will show that there are lawful and unlawful types of deception.

The Qur’ān proclaims in *Surah al-Anfāl* verse 58, “If thou fear betrayal from any group, throw back their covenant to them, so as to be on equal terms: for Allah loves not the traitors.” The Prophet (pbuh) has also made several explicit stipulations including the following, “... Yet never commit breach of trust, nor betrayal ...”.<sup>112</sup>

Classical Muslim scholars like Al-Shaybānī have issued rulings that breaking treaties without fair warning to the opponent is considered as an unacceptable act of treachery, even during war.<sup>113</sup> He further opines that in the event a group of Muslims had entered into an enemy’s country

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<sup>110</sup> Jean Pictet et al., *Commentary on the Additional Protocols of 8 June 1977 of 12 August 1949*, ed. Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (Geneva: International Committee of the Red Cross and Martinus Nijhoff Publishers, 1987), 443–44.

<sup>111</sup> Imam Al-Bukhari, *Sahih Al-Bukhari*, vol. 4 (Lahore: Kazi Publications, 1979), 269.

<sup>112</sup> ‘Abd al-Mālik ibn Hishām, *Al-Sīrah Al-Nabawīyyah*, vol. 2 (Bayrūt: Dar al-Ma’rifah, n.d.), 632.

<sup>113</sup> Al-Sarkhasī, *Sharḥ Al-Siyār Al-Kabīr*, 1:185.

feigning to be a representative of the Caliph (chief Muslim civil and religious leader) with forged documents and were granted protection by the State, they must fulfil their obligations under such protection.<sup>114</sup> Breaking peace pacts without giving proper warning to the opponent is also an unacceptable act of treachery, even in war.<sup>115</sup> Even Abdullah Azzam (the founder of Al-Qaeda) does not approve the act of misuse of peaceful entry permits. Further, it is argued by Muhammad Haniff Hassan and Mohamed Redzuan Salleh, that if Abdullah Azzam was alive at the time, he would not have approved the 9/11 attacks.<sup>116</sup>

To this point, it does seem that the acts of deception prohibited in *fiqh al-jihād* are consistent with the general idea of perfidy. Meaning, Muslims may not invite confidence and then break that confidence and commit hostilities under the guise of it. As a matter of principle, there seems to be no discrepancy between Islam and modern IHL.

### *Challenges*

A problem to this argument can be seen when Muhammad Munir argued that, when a suicide attack is carried out by a person feigning as a civilian (thus feigning a non-combatant status), it is an act of perfidy and is in violation of Islamic law.<sup>117</sup> Suicide bombers have been feigning as civilians, as they did not carry weapons openly nor wear attire indicating their combatant status in their acts,<sup>118</sup> easily falling under the IHL terms

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<sup>114</sup> Muhammad Munir, "The Prophet (Peace Be Upon Him)'s Merciful Reforms in the Conduct of War: The Prohibited Acts," *Insights, Sirah Special Issue 2*, no. 2–3 (2010): 202.

<sup>115</sup> Al-Sarkhasī, *Sharḥ Al-Siyār Al-Kabīr*, 1:185.

<sup>116</sup> Muhammad Haniff Hassan and Mohamed Redzuan Salleh, "Abdullah Azzam: Would He Have Endorsed 9/11?," *RSIS Commentaries*, March 23, 2009, [https://www.rsis.edu.sg/rsis-publication/rsis/1188-abdullah-azzam-would-he-have/#.WRFL\\_dKGPIU](https://www.rsis.edu.sg/rsis-publication/rsis/1188-abdullah-azzam-would-he-have/#.WRFL_dKGPIU).

<sup>117</sup> Muhammad Munir, "Suicide Attacks and Islamic Law," 83–84.

<sup>118</sup> HRW, "The Human Cost: The Consequences of Insurgent Attacks in Afghanistan," *Human Rights Watch* 19, no. 6(c) (2007), <https://www.hrw.org/reports/2007/afghanistan0407/afghanistan0407webwcover.pdf>.

of perfidy. However, the argument which Munir used cannot be applied to suicide attacks, and instead this example would reveal the gap between *fiqh al-jihād* and modern IHL.

One common characteristic of the acts of treason outlawed in Islamic law in all the aforementioned evidences is that they are all betrayals of some sort of treaty or agreement which the Muslims has entered into with another party; be it peace agreements, or entrance to non-Muslim territories (visas are considered as peace agreements), or the like.

Feigning non-combatant status is not a breach of any sort of agreement, and therefore cannot be classified as an act of treason as understood and prohibited under Islamic law. The only scenario where such acts can be classified as treason under Islamic law is in the context of a Muslim state that has ratified the IHL Conventions including Protocol I. Then, such acts would be in breach of Article 37 of Protocol I and therefore becomes a betrayal of trust.

However, the same argument could not be used against non-State actors by virtue of treaty law. For these non-State actors (most if not all ‘*jihadist*’ being so) feigning non-combatant status is not in breach of any treaty whatsoever. As far as Islamic law is concerned, it may seem that such acts are not classified as impermissible treachery.

Does this mean that Islamic law tolerates such acts? There are arguments that opine feigning combatant status should be ruled impermissible. However, such ruling is not under the grounds of treachery as Munir argued.

The first possible argument would be based on the principle of *al-‘adātu muḥakkamah*. This argument takes basis from the fact that the prohibition against perfidy is seen as customary international law.<sup>119</sup> Hassan argues that customary international law translates into ‘*urf*’ and therefore should be binding under the principle *al-‘adātu muḥakkamah*.<sup>120</sup> This argument is dubious, as it is too simplistic to assume that ‘state practice’ is necessarily equal to ‘*urf*’ (as ‘*urf*’ is

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<sup>119</sup> Henckaerts, Doswald-Beck, and Alvermann, 1:223.

<sup>120</sup> Muhammad Haniff Hassan, *The Father of Jihad: ‘Abd Allāh ‘Azzām’s Jihad Ideas and Implications to National Security* (Singapore: World Scientific, 2014), 139.

traditionally understood), especially when the reality shows that IHL itself has severe compliance problems.<sup>121</sup>

The second possible argument, which may seem more compelling, is to prohibit military actions feigning as non-combatants on the basis of *maṣlahat*. It is a reality that, due to such maneuvers, citizens are under grave risk of mistakenly being attacked as a suicide bomber.<sup>122</sup> Warring parties would have less reliable ways to determine whether an unknown person approaching the army is an innocent civilian or a suicide bomber.<sup>123</sup> Do the civilians and non-combatants really need more risks and dangers brought upon them during such grave times?

It has been mentioned before that *fiqh al-jihād* is majorly based on *maṣlahat*.<sup>124</sup> *Fiqh al-jihād* aspires to reduce civilian casualties, as shown by the previous explanation on the principles of distinction and proportionality. It seems that it makes no sense to allow acts of feigning civilians, which would increase the risk of civilian casualties. The weakness of this argument lies in a situation where the risk of civilian being endangered is at a minimum, but the trend of urban warfare in most—if not all—wars that the ‘*jihadist*’ are in would probably make this weakness barely a reality.

Therefore, although these acts of feigning as civilians cannot fall under the prohibition against treason as Muhammad Munir argued, strong cases can be made to rule against them nonetheless.

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<sup>121</sup> 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.”

<sup>122</sup> HRW, “The Human Cost: The Consequences of Insurgent Attacks in Afghanistan,” 93.

<sup>123</sup> 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,” 2008, 13–14.

<sup>124</sup> Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 118.



## The Way Forward

Current development shows that IHL has established comprehensive rules, and *fiqh al-jihād* generally has the same principles. In many ways, *fiqh al-jihād* actually has similar rules or even sometimes higher standards than IHL. However, there are still disparities between these two areas of law. The *fiqhi* rules seem to lag behind not because there are principle discrepancies, rather it is because the Islamic scholars may have yet to incorporate new realities of modern warfare into the ambit of what they have ruled upon.

It is apparent that currently wars are taking place mostly in the Islamic world. This means that it is imperative that Islamic scholars of *fiqh* carry out their duties well in order to make sure that the guidelines from which the fighters conduct their duties are clear and up to date with the current realities.

It is very essential that works regarding *fiqh al-jihād* are to be updated in a more comprehensive way. Islamic scholars must unite not only reactively but also preventively. Al-Dawoody notes that the current state of *fiqh al-jihād* is a plethora of different rulings and opinions, and most scholars are content in just offering choices for individuals to choose from.<sup>125</sup> Therefore, it is essential to have just one code that everyone can agree upon, and then form an *ijmā'*.<sup>126</sup>

However, making such a code supported by *ijma* has its challenges; how can the Muslims make a consensus without the willingness to listen to each other's opinion? The reality is that the moderate scholars (e.g. al-Qardhawi, *Al-Zuhaylī*, and Al-Dawoody) and the '*jihadi*' scholars (e.g. Abdullah Azzam, Abdul Qadir bin Abdul Aziz, etc) do not even cross refer to each other in their works, even on the points which they agree on.<sup>127</sup> The latter group (the *jihadi* scholars) are the ones with actual combat experience and followers who actively engage in war, and the former mostly having none of those. Even the 'moderate' scholars

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<sup>125</sup> Ibid., 118 and 143.

<sup>126</sup> Fajri Matahati Muhammadin, "Achieving an Honest Reconciliation: Islamic and International Humanitarian Law," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 27, no. 3 (2015): 591–93.

<sup>127</sup> A careful examination on each book's bibliographies would show this.

sometimes exclude each other, such as how The Open Letter to Baghdadi apparently excluded the scholars of the Salafi creed.<sup>128</sup>

Thus, efforts should be made towards making this unified code of *fiqh al-jihād* possible. More and more wars involving ‘*jihadists*’ are evidence of the greater need for it.<sup>129</sup> It is hoped that the attempt to codify *fiqh al-jihād* would be all inclusive to all schools of thoughts and honest in addressing all the issues.

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<sup>128</sup> Muhammadin, “Refuting Da’esh Properly: A Critical Review of the ‘Open Letter to Baghdadi,’” 3. Although some may argue against the ‘moderate’ label towards the Salafi school, but at least they can be classified so since they too are against Al-Qaeda and terrorism. And ‘salafism’ in this context is understood as the Saudi/Kuwait-based ‘mainstream salafism’, not the group commonly labeled as ‘*salafi jihadi*’. See: Yasir Qadhi, *On Salafi Islam* (Muslim Matters, 2013), 6, [http://cdn.muslimmatters.org/wp-content/uploads/On-Salafi-Islam\\_Dr.-Yasir-Qadhi.pdf](http://cdn.muslimmatters.org/wp-content/uploads/On-Salafi-Islam_Dr.-Yasir-Qadhi.pdf).

<sup>129</sup> Most recently the uprisings of the Rohingyans in Myanmar, and the ‘ISIS’ affiliated groups in the Philippines.