

# ISLAMIC LAW AND INTERNATIONAL HUMANITARIAN LAW

**PROCEEDINGS**



**FACULTY OF  
ISLAMIC STUDIES**



**ICRC**



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Sarajevo, 2020.



**ICRC**

**IMPRESSUM**

Islamic Law and International Humanitarian Law

**Original title:**

Islamsko pravo i međunarodno humanitarno pravo

**Published by:**

Faculty of Islamic Studies – University in Sarajevo

**Editor:**

Dr Zuhdija Hasanović

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**Translation:**

Semir Delibašić/ ICRC

**Design:**

Adin Pinjo

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CIP – Katalogizacija u publikaciji  
Nacionalna i univerzitetska biblioteka  
Bosne i Hercegovine, Sarajevo

28-74-428.3:341.3](082)

ISLAMIC law and international humanitarian law / Ahmed al-Dawoody ... [et al.] ; [translation Semir Delibašić]. – Sarajevo : Fakultet islamskih nauka Univerziteta, 2020. – 95 str. ; 23 cm

Prijevod djela: Islamsko pravo i međunarodno humanitarno pravo. – Biographies: str. 92-94. – Bibliografija uz sve radove ; bibliografske i druge bilješke uz tekst.

ISBN 978-9958-622-86-1

1. al-Dawoody, Ahmed

COBISS.BH-ID 40946438  
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# FOREWORD

Dear Readers,

I am greatly pleased that the International Committee of the Red Cross (ICRC) and the Faculty of Islamic Studies of the University of Sarajevo are able to offer you these proceedings dedicated to Islamic law of armed conflict and international humanitarian law (IHL). The proceedings are a result of the scientific conference jointly organized by the Faculty of Islamic Studies and the ICRC in cooperation with the Military Muftiship of the Islamic community in Bosnia-Herzegovina on 26 and 27 September 2018, in Sarajevo. The conference was an opportunity to discuss numerous issues related to armed conflict from two perspectives, that of secular humanitarian law and of the Islamic law of armed conflict.

I see the participation of teachers, associates and doctoral students at the Faculty of Islamic Studies (University of Sarajevo) as an expression of awareness of our obligation as those who are aware of God, one of whose beautiful names is Selam (peace), to constantly seek and persistently try to establish peace, primarily in us, in our souls, and then in our communities and society around us.

To achieve this goal, the University of Sarajevo, as an institution of higher education of the Islamic community, launched a joint study programme in 2017-18 with the other two theological faculties, the Faculty of Catholic Theology in Sarajevo and the Faculty of Orthodox Theology of St Vasilije Ostroski in Foča. The programme was entitled Inter-Religious Studies and Peacebuilding.

Due to their unprecedented powers, religious feelings and beliefs are often abused in our region. Some of the cruellest crimes have been committed in the name of religion and under religious symbols. We considered it a social responsibility that the study programme point out a legitimate, authentic and meritorious understanding of the issues of peace and armed conflict in basic religious sources and emphasize that one cannot truly love God while hating His creation.

True religion goes beyond all the misunderstandings and cultural or social prejudices of a limited human mind. We want to build lasting peace in this region through authentic spirituality, a correct understanding of faith and its consistent living, changing both man and the world for the better.

Although there are animal instincts in man that cause him to subjugate others, seize someone else's property, shed blood and indulge in many other evils, what makes him human are his spirit, morality and intellect. These develop in him a consciousness of God, human dignity and the necessity of equal rights for every human being across the globe.

A healthy spirit, strong morals and an indomitable intellect open a person to other people, to other living beings, to the world around him. They create in him the need to establish connections and bridges, which imply the desire of people to be together and connected, because then they can do anything.

If they are separated and move away from each other, the obstacles will overcome them and they will be defeated. So, bridges, wherever they are, whether material, cultural, scientific or ideological, remain to express a human desire for community and union and to fight conflict and separation.

It is extremely important to talk about armed conflicts from an Islamic perspective, especially today, because of the overbearing, offensive and completely unfounded linking of militancy and violent extremism with Islam.

It is necessary to emphasize constantly and persistently that Islam advocates love and obedience to God above all, followed by love, understanding and appreciation of His creatures, especially His most well-chosen creation, man. Through the Quran, Allah condemns not only the unlawful taking of life by another human being, but also the excessive use of force in response to violence. "If you [believers] have to respond to an attack, make your response proportionate, but it is best to stand fast." (Al-Nahl 126).

How much wisdom this verse holds! Much later, this principle of reciprocal force was applied in humanitarian law as the principle of proportional use of force in defence. For even when one defends himself against an attack his defence can only be commensurate with the attack, never so much as to develop into a new attack.

I am glad that the papers of meritorious authors such as Dr Ahmed al-Dawoody, Prof. (Dr) Mustafa Hasani, Associate Professor (Dr) Nedim Begović, Associate Professor (Dr) Zehra Alispahić, Dr Senad Ćeman and Amir Mahić (MSc) are included in this volume. It is a privilege that you, dear readers, will be able to read about armed conflicts from the perspective of secular humanitarian law and Islamic law of armed conflict, seeing the similarities between the two approaches, but also the clear differences between them.

Finally, I once again thank the representatives of the ICRC in Bosnia-Herzegovina and all the participants of the two-day scientific conference in Sarajevo. My special thanks also to the authors, who have conveyed to us the very strong message that a Muslim is conscious of God during war and armed conflict and strictly adheres to the norms of warfare, respecting human dignity. And if he has this consciousness during war, how can he not have so during peace?

Dr Zuhdija Hasanović,  
Dean, Faculty of Islamic Studies, University of Sarajevo





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## INTRODUCTION

Even wars have limits. They are defined by International Humanitarian Law which obliges protection of all people not taking part in the conflict, as well as limiting the means and methods of warfare. These boundaries must be known and respected to ensure human dignity and alleviate human suffering in armed conflict.

The International Committee of the Red Cross (ICRC) is a neutral and independent organization operating for over 150 years, and our main humanitarian mission is to protect the lives and dignity of victims of armed conflict around the world. The ICRC is also the initiator of the idea of the Geneva Conventions, which are the basis of today's International Humanitarian Law. For this reason, the ICRC is often called its guardian. By advocating the respect of IHL and strengthening universal humanitarian principles, we seek to prevent human suffering.

The rules and laws of war undoubtedly have deeper historical roots. They are derived from elementary human values that are an integral part of all the world's philosophies and religions. Islamic law guarantees victims of armed conflict (for example, the wounded, the sick, prisoners of war, and civilians) the right to protection, respect, and dignified humane treatment. It also calls for the protection of civilian facilities and property. Islamic law limits the methods and means of warfare to the limits of military necessity. All this is in full compliance with the provisions of International Humanitarian Law and the Geneva Conventions. Thus, the similarities between IHL and Islamic law are not coincidental, but evidence that there are values that are universal and an important part of most religious and other worldviews.

The ICRC maintains a regular dialogue with Islamic intellectuals and academics around the world, as we carry out most of our humanitarian activities in Muslim-majority countries. This ongoing dialogue is not only of a theoretical and abstract nature, but it also has concrete results. Its main goal is to emphasize the common principles and values that apply to all humankind. We must emphasize these values in all communities to ensure that they are respected by new generations.

The dialogue also aims to overcome particular prejudices that, unfortunately, we all face at times. It is crucial for the ICRC to be accepted as a neutral and independent humanitarian organization by all parties to armed conflicts, no matter where they are taking place. Only in this way can we ensure secure access to all victims and vulnerable populations and provide them with assistance. In other words, the success of our humanitarian action, but also the security of our workers in the

field, is entirely based on the question of whether we are accepted by all parties in our true form: as neutral, impartial and independent humanitarian organization.

The ICRC proved this role and our sincere commitment to these values during the war in Bosnia and Herzegovina, when the center of our global activities was in this region. Given the values represented by the Islamic Community in Bosnia and Herzegovina and the Faculty of Islamic Studies in Sarajevo, their historical significance and reputation enjoyed throughout the Islamic world and beyond, we are convinced that we have found a strong and lasting partner in this global dialogue.

For this reason, in the past two years we have organized several joint events, workshops and seminars on the common values of Islamic, and International Humanitarian Law, but also some specific humanitarian issues related to this topic, such as the issue of missing persons. Representatives of the Islamic Community in Bosnia and Herzegovina and the Faculty of Islamic Studies of the University of Sarajevo regularly attend similar events in Tunisia and Geneva.

This collection contains papers that arose from jointly organized meetings, primarily from the scientific conference held in September 2018 in Sarajevo. We are convinced that the collection will serve as a basis for raising awareness and further exchange on the importance of respecting the universal humanitarian principles that have guided us all so far.

We would like to thank the Faculty of Islamic Studies in Sarajevo for the excellent cooperation, not only in publishing this collection of papers, but also for the sincere will and interest to continue this dialogue.

We are convinced that, by emphasizing the common values of Islamic, and International Humanitarian Law in Bosnia and Herzegovina, we can contribute to our mutual understanding and to improving humanitarian action throughout the world.

Delegation of the International Committee  
of Red Cross in Bosnia and Herzegovina

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# Islamic law and international humanitarian law: An introduction to the main principles<sup>1</sup>

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

**Keywords:** Islam, Islamic law, Islamic law and IHL, jihad, Islamic law of armed conflict, protection of civilians, PoWs in Islam, human shield, war in Islamic law.

## Introduction

The effects of armed conflicts such as those currently raging in Syria and Yemen have been shown to spread beyond the Middle East region and reach over to the West. Moreover, their impact can in fact be greater on countries outside the region where the conflict is taking place than on those within it. What this shows, first of all, is that the impact of armed conflicts, including noninternational armed conflicts (NIACs), is no longer local or regional, but global. Moreover, NIACs, especially those in the Middle East, can signal the outbreak of war on a regional or global scale, or at the very least cause severe damage to the world economy. In that regard, a reported 80% of the humanitarian crises currently afflicting mankind are attributable to armed conflicts.<sup>2</sup> On that basis, greater efforts are needed not only to enforce the provisions of international humanitarian law (IHL) but also to do everything possible to prevent the occurrence of armed conflicts in the first place,

<sup>1</sup> The views expressed in this article are those of the author and should not be interpreted as official positions of the ICRC. The author would like to thank Ellen Policinski for her meticulous reading, comments and suggestions for this article, as well as the anonymous peer reviewers.

<sup>2</sup> United Nations, "Secretary-General's Opening Remarks at World Humanitarian Summit", 23 May 2016, available at: [www.un.org/sg/en/content/sg/statement/2016-05-23/secretary-general%E2%80%99s-openingremarks-world-humanitarian-summit](http://www.un.org/sg/en/content/sg/statement/2016-05-23/secretary-general%E2%80%99s-openingremarks-world-humanitarian-summit), all internet references were accessed in May 2018.

and then, once conflicts have ended, to take the necessary measures to ensure that post-conflict justice is carried out in order to prevent conflicts from re-igniting.

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

In addition, the vast majority of ongoing conflicts fall into the category of NIACs. Furthermore, in many of the conflicts that we are currently witnessing, parties to the conflict, usually non-State armed groups, justify their acts of hostility by referring to certain rules of the Islamic law of war developed by the Muslim jurists of the second and third centuries of the Islamic calendar (roughly equivalent to the eighth and ninth centuries AD) and certain opinions of Qur'anic exegetes and Hadith scholars. This is why it is especially important – as this article attempts – to study the primary sources on the Islamic law of war, because of the significant and tangible role it plays in influencing the behaviour of the warring parties who use its provisions to justify their acts of hostility. From an academic perspective, it can also be an interesting topic in its own right to research how the Islamic legal system can help to limit the devastation caused by armed conflicts and reduce the plight of victims, by comparing its provisions with those of contemporary IHL. On this topic, Loukas Petridis, head of the International Committee of the Red Cross (ICRC) delegation in Niger, said on 25 November 2015:

*Given the increase in armed conflicts and violence, dialogue on these issues is more necessary than ever. We need to make more people aware of international humanitarian law and how it ties in with other standards, such as Islamic law and jurisprudence. This is about making sure that people have the widest possible protection.<sup>3</sup>*

Moreover, in a meeting between Dr Ahmed al-Tayyeb (the Grand Imam of Al-Azhar, the highest religious authority in the Sunni world), Ronald Ofteringer (head of the ICRC delegation in Cairo) and the present author, Dr al-Tayyeb affirmed the role that Islamic institutions can play in enhancing protection for victims of armed conflict.<sup>4</sup> To that end, this article sets out a brief overview of

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

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

the principles regulating the use of force in armed conflict under Islamic law and discusses both the challenges in applying them and the extent to which they align with the modern principles of IHL, with a view to identifying how effective these Islamic principles can be in limiting the devastation and suffering caused by armed conflict.

## **Origins of the Islamic law of war**

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

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

## Sources of Islamic law

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

The defining factor that differentiates Islamic law from most other legal systems is the fact that it includes rules on worship, beliefs and morality, as well as rules governing numerous other areas of life such as family law, financial transactions, criminal law, governance, and international relations in peacetime and wartime. Based on the religious aspects of Islamic law, some people mistakenly conclude that all provisions of Islamic law are unchangeable. In reality, however, while it is true that the rules on worship, creed and morality or unanimously agreed-upon rules are fixed and unchangeable, there are other provisions which may be changed, as long as this is done to achieve the objective of the legislator. As described by Ibn Qayyim al-Jawziyyah (d. 1350), serving the public interest is the objective of every single rule in Islam, because shari‘ah is founded on the divine command and the public good of the people in this world and the next. It is all justice, all compassion, all public good, and all wisdom. If any ruling changes justice into injustice, or mercy into its opposite, or the public good into corruption, or wisdom into folly, then it cannot be part of the shari‘ah, even if an interpretation of the shari‘ah is invoked, for shari‘ah is God’s justice among His worshippers, and His mercy amongst His creation, and His shadow on his earth.<sup>5</sup>

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

Most Islamic law regulations on the use of force are derived from the Holy Qur’an

5 See Ṣubḥīal-Ṣāliḥ, *Ma’ālim al-Shari‘ah al-Islāmiyyah* (Beirut: Dār al-‘Ilm lil-Malāyīn, 1975), p. 62. Dār al-‘Ilm lil-Malāyīn, Beirut, 1975, p. 62.



and Sunnah, as well as the early historical precedents of the Islamic state<sup>6</sup> since the seventh and eighth centuries, or what are known in the Ḥanafī school of law as the *siyar* (approach) – i.e., the ways and methods followed by the Islamic state in its dealings with non-Muslims in times of peace and war, specifically in the era of the Prophet Muhammad and the Rightly Guided Caliphs. The term *siyar* is also used by some Ḥanafī jurists to refer to the rules governing certain types of NIAC that occurred in the first half of the first Islamic century, such as what are known in Islamic jurisprudence as *qitāl al-bughāh* (fighting against rebels or secessionists) and *ḥurūb al-riddah* (wars of apostasy).<sup>7</sup> Muslim jurists established legal limits on the use of force using those sources and their own *ijtihād* (reasoning or judgment in making laws), based on both the sources themselves and the above-mentioned tools such as *qiyās*, *maslahah mursalah* and *madhhab al-ṣaḥābī*. We can therefore conclude that these regulations were developed under a different model of international relations and in a specific context during the lifetime of the Prophet between 624 and 634 AD, in which military engagements were less brutal and deadly than those seen today.<sup>8</sup>

## Characteristics of the Islamic law of war

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

There is a religious dimension to the Islamic law of war in the sense that compliance with the Islamic regulations on the use of force is an act of worship which brings a Muslim soldier closer to God. This classical juristic endeavour for humanizing armed conflicts led to contradictory rulings because in deliberating these rulings individual jurists sometimes prioritized humanitarian concerns and at other times prioritized the military necessity of winning the war, even if this was in contravention of humanitarian principles.<sup>9</sup>

Respect for the Islamic regulations on the use of force was something that a Muslim instinctively complied with and imposed on himself through his desire to obey God, regardless of whether or not his enemy adhered to the same rules, rather than stemming from the obligation to comply with international conventions,

6 Editor's note: For the purposes of this article, the term "the Islamic state" refers to the State founded by the Muslims during the seventh century.

7 See Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-Mabsūt Vol. 10* (Beirut: Dār al-Ma'rifah), p. 2. Vol. 10, Dār al-Ma'rifah, Beirut, p. 2.

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

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

as is the case in the modern age. This characteristic forms a strong basis for the argument that Islamic law has a great power to influence the conduct of the Muslim parties to conflicts that are currently under way, especially in the case of non-governmental combatants who claim to follow Islamic rules of armed conflict as their source of reference. Most of the attention of the Muslim jurists was directed towards drawing a distinction between those acts that were permissible and those that were non-permissible for a Muslim during a war, and as any scholar of Islamic law will find, the jurists painstakingly drew up jurisprudence governing the mandatory conduct of a Muslim soldier, taking into account both the need to comply with the above-mentioned sources and the necessity of winning the war. Many Western academics and experts in the Islamic just war theory have therefore noted that the classical Muslim jurists focused in great detail on the Islamic *jus in bello*, while neglecting the Islamic *jus ad bellum*.<sup>10</sup>

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

The philosophy and principles of IHL were not only developed in recent times; on the contrary, these concepts are as old as human civilization itself, having been recognized long ago by ancient cultures and religions. In his book *The Contemporary Law of Armed Conflict*, L. C. Green shows that Judaism and ancient Chinese, Indian and Greek civilizations developed some restraints that should be observed during armed conflict. The Old Testament states that it is prohibited to destroy trees (Deuteronomy 20:19–20) or kill captives, and that food and water should be provided to captives until they are set free. In ancient Chinese civilization, the general and military strategist Sun Tzu (d. 496 BC) stressed that only enemy armies are to be attacked and that cities are to be attacked only where

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<sup>10</sup> Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Wiener, Princeton, NJ, 1996, p. 119; Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources", *The Muslim World*, Vol. 89, No. 2, 1999, p. 150; Khaled Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, No. 221, Winter 2001, p. 30; Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition and International Law", in John Kelsay and James Turner Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, Greenwood Press, Westport, CT, 1991, p. 197; Sohail H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views", *The Muslim World*, Vol. 89, No. 2, 1999, p. 158.

there is no alternative. In ancient India, the list of prohibitions during armed conflict includes attacking a sleeping enemy, desecration of corpses, killing those who are physically or mentally incapacitated and, similar to the Greek civilization, the use of poisoned weapons.<sup>11</sup>

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

## Principles of the Islamic rules of war

Classical Muslim jurists discussed a set of issues that, in essence, reflect the philosophy and principles of IHL, but are set in a different context to that of the wars we are currently witnessing. It is worth noting that specific rules were established on each of these issues in relation to the wars waged between Muslims and their non-Muslim enemies during the lifetime of the Prophet Muhammad, and consequently the teachings of the Prophet form the basis of much of the regulations developed by the jurists. Islamic law also drew a distinction between international and non-international conflicts, despite not using the same terms. According to Islam, international armed conflicts are generally called *jihad*, a term which refers to wars between the Islamic state and non-Muslim belligerents. NIACs are divided into four categories according to the Muslim jurists: *ḥurūb al-riddah* (wars of apostasy), *qitāl al-bughāh* (fighting against rebels or secessionists), *ḥirābah* (fighting against bandits, highway robbers, terrorists or pirates) and *qitāl al-khawārij* (fighting against violent religious fanatics). In Islamic law, the distinction between these types of war is important because the rules of war differ from one category to another.<sup>12</sup>

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

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11 See L. C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993), p. 18.

12 For further information see, A. Al-Dawoody, above note 7, pp. 149–183; Ahmed Al-Dawoody, “Al-Sarakhsi’s Contribution to the Islamic Law of War”, *UCLA: Journal of Islamic and Near Eastern Law*, Vol. 14, nb. 1 (2015): p. 37–43.

## 1. Protection of civilians and non-combatants

The sources of Islamic law guarantee protection of civilians and non-combatants, stating that fighting on the battlefield must be directed solely against enemy combatants. Civilians and non-combatants must not be deliberately harmed during the course of hostilities. This principle is clearly set out in the verse that states: “And fight in the way of God those who fight against you and do not transgress, indeed God does not like transgressors.”<sup>13</sup> According to Qur’anic interpreters, this verse commands that non-combatant enemies should not be fought, and that an attack on non-combatants such as women and children is an act of aggression which angers God. Al-Rāzī (d. 1209) defines *al-muqātilin* (combatants), as understood by him from this verse, as follows: “They must be taking part in the fighting; anyone who is willing or prepared to fight cannot be described as a combatant, except in metaphor, until they enter into combat.”<sup>14</sup> Thus, based on many reports attributed to the Prophet Muhammad, Islamic law protects civilians and non-combatants against military attack. Moreover, if an enemy withdraws from combat or enters Muslim territory and requests protection, whether explicitly or implicitly, they may not be targeted, as will be shown later in the discussion of *amān* (protection, safety).

A number of the Prophet’s Hadiths specifically prohibit the targeting of women, children, the elderly, ‘usafā’ and aṣḥāb al-ṣawāmi‘ (monks or religious hermits). The word ‘usafā’ is the plural of the word ‘asif’, which means hired man or employee, and in the context of war it refers to anyone who works for, or is paid by, the enemy to perform services on the battlefield, as was common practice in wars in the past. These individuals would perform tasks such as minding belongings and animals, but would not engage in the fighting and therefore could not be classified as combatants. By drawing a parallel with the prohibition on attacking ‘usafā’ on the battlefield, it follows that attacking medical personnel (both civilian and military) accompanying enemy armies is also prohibited, as are attacks on military reporters or anyone else who provides services to enemy armies, as long as these individuals do not take part in military operations. This principle is conveyed by various Hadiths of the Prophet, including: “Do not kill an aged person, a young child or a woman”,<sup>15</sup> “Do not kill children or the clergy”<sup>16</sup> and “Do not kill children or ‘usafā’”.<sup>17</sup> On that basis, when it came to protecting non-

13 Qur’an 2:190.

14 Muḥammad ibn ‘Umar al-Rāzī, *Tafsīr al-Fakhr al-Rāzī: Al-Mushtahar bi-al-Tafsīr al-Kabīr wa-Mafātiḥ al-Ghayb*, Vol. 5 (Dār al-Fikr, 1981), 138.

15 Aḥmad ‘Abd al-Rahmān al-Bannā al-Sā’atī, *Badā’i’ al-Manan fi Jamī’ wa Tartīb Musannad al-Shafi’i wa al-Sunan: Mudhayla bi-al-Qawl al-Hasan Sharah Badā’i’ al-Manan*, 2. izd., Vol. 2 (Cairo: Maktabah al-Furqān, 1983), 12.

16 Sadiq ibn Hasan ibn ‘Ali al-Husseini al-Qannūji al-Bukhārī Abū al-Ṭayyib, *Al-Rawdah al-Nadiyyah Sharah al-Durar al-Muniriyah*, Vol. 2 (Cairo: Idārah al-Tibā’ah al-Muniriyah), 339.

17 *Ibid.*

combatants, the Companions followed the Prophet's example; for instance, the first caliph Abū Bakr (d. 634) instructed his army commander thusly: "Do not kill a child or a woman; or an aged person; do not cut down fruit-bearing trees or destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or drown palm trees; do not loot; and do not be cowardly."<sup>18</sup> In addition, 'Umar ibn al-Khaṭṭāb issued written instructions to his soldiers ordering them to fear God and not to kill farmers: "Fear God in farmers; do not kill them unless they fight against you."<sup>19</sup> This warning to fear God reaffirms the religious imperative to respect the Islamic law of war.

The jurists also specified various other types of non-combatants who must not be targeted in a war, including the blind, the incapacitated and the insane, as well as craftsmen and traders. Ibn Qayyim al-Jawziyyah concisely indicated the Islamic position regarding those who can be targeted during war as follows: "Muslims must fight those who attack them, but not those who do not attack them."<sup>20</sup> This brief statement unequivocally affirms the principle of non-combatant immunity in Islam,<sup>21</sup> and thus aligns with article 48 of Additional Protocol I (AP I), which stipulates:

*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*<sup>22</sup>

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

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

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

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

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

22 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 48, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563C002D6CE4>.

the same. On this issue the jurists disagreed, with some authorizing the targeting of women and children in the aforementioned cases, and others classifying it as undesirable.<sup>23</sup> They also disagreed on whether or not an aged person could be targeted if they entered the battlefield to support the enemy in planning war operations.<sup>24</sup>

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

## 2. Permissible weapons in war

Although the weapons and military tactics used by Muslims in the early Islamic period – and therefore those addressed by Islamic law – were extremely primitive in terms of their simplicity and limited capacity to inflict severe damage on enemy individuals and property as compared to those available today, the establishment of rules on weapons demonstrates that the Muslim jurists were dedicated to two objectives: firstly, not to endanger the lives of civilians and noncombatants, and secondly, to spare the property of the enemy unless otherwise dictated by military necessity. The rules developed by classical Muslim jurists show that at the time, “war” was made up of two scenarios. The first of these was direct or one-to-one combat with enemy fighters, in which case the most commonly used weapon was the sword (a weapon of high status in Arab culture and heritage), followed to a lesser extent by the lance, bow and spear. In cases where civilians and non-combatants are present among enemy combatants, sword fighting does not endanger the lives of bystanders or risk incidentally destroying their property. It should be noted here that the jurists, in particular those of the Mālikī school, discussed the permissibility of shooting the enemy with poison-tipped arrows. On this issue, as on many others, the jurists disagreed; some prohibited the use of poison-tipped arrows, while others merely disliked the idea of it, on the basis that

- 23 V. Ahmad al-Dardīr, *Al-Sharh al-Kabir*, ur. Muhammad ‘Alīsh, Vol. 2 (Beirut: Dār al-Fikr), 176; Ahmad ibn Idrīs al-Qarāfi, *Al-Dhakhīrah*, ur. Muhammad Būkhūbzah, Vol. 3 (Beirut: Dār al-Gharb al-Islāmī, 1994), 399; Muhammad ibn Jarīr al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Ahkām al-Muhārībīn min Kitāb Ikhtilāf al-Fuqahā’ li-Abī Ja’far Muhammad Ibn Jarīr al-Ṭabarī*, ur. Joseph Schacht (Lajden: Brill, 1933), 9; ‘Alā’ al-Dīn al-Samarqandī, *Tuhfah al-Fuqahā’*, Vol. 3 (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1984), 295; ‘Abd al-‘Azīz Ṣaqr, *‘Al-‘Alāqāt al-Dawliyyah fī al-Islām Waqt al-Harb*: Dirāsah lil-Qawā’id al-Munaz’z’imah li-Sayr al-Qitāl, (Cairo: Mashrū’ al-‘Alāqāt al-Dawliyyah fī al-Islām, nb. 6., Al-Ma’had al-‘Ālamī lil-Fikr al-Islāmī, 1996), 46–48; al-Shaykh Niz’ām al-Dīn al-Balkhī et al., *Al-Fatāwā al-Hindiyyah*: Fī Madhhab al-Imām al-A’zam Abī Hanīfah al-Nu’mān, Vol. 2 (Dār al-Fikr, 1991), 194.
- 24 V. Muḥammad ibn Ismā’īl al-Ṣana’ānī, *Subul al-Salām: Sharḥ Bulūgh al-Marām min Adillah al-Ahkām*, ur. Muḥammad ‘Abd al-‘Azīz al-Khūlī, 4. izd., Vol. 4 (Beirut: Iḥyā’ al-Turāth al-‘Arabī, 1959), 50; Ibrāhīm ibn ‘Alī ibn Yūsuf al-Shirāzī, *Al-Muhadhdhab: Fī Fiqh al-Imām al-Shāfi’ī*, ur. Zakariyyā ‘Imīrat, Vol. 3, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1995), 277; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’: Sharḥ al-Muhadhdhab*, ur. Maḥmūd Matrajī, Vol. 21 (Beirut: Dār al-Fikr, 2000), 55; Wahbah al-Zuhaylī, *Al-‘Alāqāt al-Dawliyyah fī al-Islām: Muqārannah bi-al-Qānūn al-Dawī al-Ḥadīth* (Beirut: Mu’assasah al-Risālah, 1981), 71; Ahmed al-Dawoody, note 7, 112–114.

the enemy could shoot the arrows back at the Muslims and also because there was no precedent for this action in the age of the Prophet.<sup>25</sup> However, the great Ḥanafī jurist al-Shaybānī (d. 805) permitted the use of poison-tipped arrows because they were more effective in defeating the enemy.<sup>26</sup>

The second type of war scenario is one in which the enemy retreats inside fortifications and one-to-one combat is not an option. In regard to such cases, the jurists discussed the use of mangonels (a weapon for catapulting large stones), fire, flooding and even siege as weapons to force the enemy to surrender.<sup>27</sup> In the pre-Islamic period, the ancient Greeks and Persians used mangonels to attack enemies sheltering in citadels or fortresses, by loading the weapons with fire or large rocks and bombarding the enemy with them. Moreover, during the battle of al-Ṭā'if in the eighth year of the Islamic calendar (630 AD), Salmān al-Fārisī introduced the mangonel to the Prophet Muhammad. Regardless of whether or not the mangonel was actually used in that battle, this serves as evidence that attacks by Muslims against their enemies using mangonels had the potential not only to damage the enemy's military and civilian property but also to cause incidental casualties among civilians. It should nonetheless be taken into account that, at that time, when an enemy retreated inside fortifications it was impossible to distinguish between military and civilian property. The jurists unanimously permitted the use of mangonels against an enemy fortress if required by military necessity, but opinions differed on whether it was permissible to use fire as a weapon against the enemy: some prohibited it, some disapproved of it, and others permitted it either as a military necessity or in reciprocity.

The Muslim jurists' deliberations and discussions over the use of these weapons show that indiscriminate attacks or excessive use of military force beyond that required by military necessity were inconceivable, even in the context of the detailed discussions over which types of weapons and tactics were permissible and which were prohibited. Nonetheless, the aforementioned differences of opinion among jurists once again illustrate the challenges that arise when applying the provisions of the Islamic law of war both historically and in the modern era, firstly because the rules that permitted the use of those primitive forms of indiscriminate

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

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

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

attack in that specific era and war context are now exploited to justify attacks against civilians, and secondly because some people draw parallels with those primitive weapons to justify the use of chemical weapons and other weapons of mass destruction.

### 3. Human shields and night attacks

Based on the distinction between combatants and non-combatants, Islamic law jurists set out detailed provisions on two key methods of warfare that were used in the primitive wars described above: these are al-tatarrus (human shields) and al-bayāt (night attacks), both of which were first deliberated during the time of the Prophet. In their discussion of human shields, most jurists distinguished between two cases: first, if enemy combatants take women, children, the aged, etc., as human shields in order to force Muslims to cease fighting; and second, if the enemy takes any Muslim individuals in general, or individuals from ahl al-dhimma (non-Muslim citizens of the dār al-Islām (the Islamic state)), as human shields for the same purpose. The difficulty here is that attacking a human shield carries the risk of killing these non-combatants, Muslims or ahl al-dhimma through the use of indiscriminate weapons such as mangonels. Broadly speaking, all of the jurists permit shooting at the human shields in these two cases if required by military necessity, provided that Muslims aim to direct their attack at the combatants and avoid hitting non-combatants as far as possible,<sup>28</sup> although this does seem impossible from a practical point of view. The jurists strongly disagree over what exactly constitutes the military necessity that would justify an attack on human shields in this context. For al-Māwardī and al-Shirāzī, the military necessity in this case would arise from the risk of a Muslim defeat.<sup>29</sup> On this point, certain jurists add that attacking human shields in this case is a matter of protecting the rest of the Muslims, because if Muslims did not attack the shield and the Muslim army was defeated as a result, many Muslims would be killed. In the view of al-Qurtubī, military necessity in this instance meant avoiding “the collapse of the entire Muslim nation into the hands of the enemy”<sup>30</sup> As for the second case, a minority of the jurists prohibit attacks against human shields based on the following verse: “had they [believing Muslim men and women] been separated, We would have inflicted a severe chastisement on those who disbelieved from among them [the Meccans]”<sup>31</sup>

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

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

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

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



With respect to bayāt, fighting at night meant that the two armies were unable to fight hand to hand because they could not see one another in the darkness, which rendered it necessary in such cases to target the enemy using mangonels or other types of indiscriminate weapon. On that basis, according to the Hadith narrated by Anas ibn Mālik, the Prophet avoided attacking the enemy at night. Moreover, according to another Hadith narrated by al-Ṣa'b ibn Jaththāmah, when the Prophet was questioned about the permissibility of attacking the enemy at night, which could result in casualties among women and children, he did not declare it prohibited.<sup>32</sup> Jurists therefore took varying stances, with some permitting night attack on enemies, and others disapproving of it. Nonetheless, the jurists justified any casualties that might occur among women and children in such cases as collateral damage.<sup>33</sup>

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

#### 4. Protection of property

Through the study of the wars that took place between Muslims and their enemies during the lifetime of the Prophet and the permissible weapons and methods of warfare as discussed above, it is clear that in Islam, war is not an indiscriminate free-for-all in which anyone and anything can be targeted. The use of military force is only permissible if required by military necessity, and the wanton destruction of enemy property is not covered by this condition; such acts instead constitute a crime of “*al-fasād* (destruction, damage) in the land”. This position was advocated by Imam al-Awzā'ī (d. 774), who said that “it is prohibited for Muslims to commit any sort of *takhrīb*, wanton destruction, [during the course of hostilities] in enemy territories because that is *fasād* and God does not like *fasād*”, and referred to the following Qur'anic verse: “when he turns his back, he hastens about the earth, to do corruption there and to destroy the tillage and the stock”<sup>34</sup> This is because according to the Islamic worldview, everything in this world belongs to God, and

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

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

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

human beings – as His vicegerents on earth – are entrusted with the responsibility of protecting His property and contributing to human civilization.

Moreover, not only does Islamic law require protection of civilian property during military operations, it also states that even when targeting military property, the objective is merely to force the enemy to surrender or cease fighting, not to destroy or sabotage enemy property. On that basis, Most Muslim jurists permit the destruction of enemy property if required by military necessity.<sup>35</sup> It should also be noted that some jurists such as al-Shāfi‘ī (d. 820) and Ibn Ḥazm (d. 1064) drew a distinction between inanimate objects and living property such as horses, cattle and bees, and ruled that inflicting damage on living property such as livestock for any reason other than for food was tantamount to torture, which is prohibited in Islam.<sup>36</sup> Notwithstanding, the jurists did permit the targeting of enemy horses when enemy warriors were fighting on horseback, because in this case the horse was being used as military equipment.<sup>37</sup> All of these provisions are in line with Article 51(4) of AP I, which prohibits indiscriminate attacks, defined as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>38</sup>

Article 52(2) defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.<sup>39</sup>

35 Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn Muḥammad ibn Qudāmah, *Al-Mughnī*, eds. ‘Abd Allah ibn ‘Abd al-Muḥsin al-Turkī and ‘Abd al-Fattāḥ Muḥammad al-Ḥīlu, 3rd ed., Vol. 9, Dār ‘Ālam al-Kutub, Riyadh, 1997, pp. 233 ff.; Muḥammad al-Ghazālī, *Al-Waṣī t fī al-Madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmīr, Vol. 7, Dār al-Salām, Cairo, 1997, p. 31; M. al-Shawkānī, above note 32, p. 74; I. al-Shirāzī, above note 23, p. 279; ‘A. al-Māwardī, above note 28, p. 71; Muḥammad ibn Abi Bakr ibn Qayyim al-Jawziyyah, *Jāmi‘ al-Fiqh*, ed. Yusrī al-Sayyid Muḥammad, Vol. 4, Dār al-Wafā‘, Al-Mansūrah, 2000, p. 97; M. al-Nawawī, above note 23, pp. 60 ff.

36 M. al-Shāfi‘ī, above note 26, pp. 257, 259, 287; ‘Alī ibn Aḥmad ibn Sa‘īd ibn Ḥazm, *Al-Muḥallā*, Vol. 7, Dār al-Āfaq al-Jadidah, Beirut, p. 294.

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

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

39 AP I, Art. 52(2).

## 5. Prohibition of mutilation of the enemy

Among the many Prophetic Hadiths that prohibit mutilation of the enemy is the following: “Do not loot, do not be treacherous and do not mutilate” [“lā taghlū wa lā taghdurū wa lā tumathilū”].<sup>40</sup> The prohibition of those three acts illustrates the principle of humanity during armed conflicts. The first of them, *ghulūl* (looting), refers to when a combatant takes or steals an item from the war booty before it is divided up, or allocates part of the war booty to themselves without handing it over to be distributed by the army chief. The establishment of such rules and restrictions on dealing with enemy property indicate that it was not simply free for the taking. Even food and animal feed were regulated. In cases where battles drew on for a long time and it was both impractical to carry sufficient food to the battlefield and difficult to buy supplies from the enemy, the jurists determined that, in cases of military necessity, soldiers may take as much of the enemy’s supplies as they require to feed themselves and their animals, provided that no more than the required quantity is taken.<sup>41</sup> Although at the time it was customary practice for enemy possessions to be distributed among the members of the winning side of the battle, these strict rules on the treatment of enemy possessions prohibit the theft of movable enemy property, especially in the case of Muslim soldiers of religious compunction in the present day.

While the Islamic prohibition of *ghadr* (perfidy, treachery) obliges Muslims to respect their contracts and agreements, this does not mean that ruses are prohibited in war, as the Prophet held that “war is ruse”.<sup>42</sup> The same sentiment is reaffirmed in Article 37 of AP I, which prohibits perfidy but permits military ruses such as “the use of camouflage, decoys, mock operations and misinformation”.<sup>43</sup>

As for the provisions of Islamic law prohibiting the mutilation of enemy corpses, these demonstrate respect for dignity and humanity, given that even though the two sides are at war and attempting to kill each other, the enemy is nonetheless a human being honoured by God, as stated in the Qur’an: “We have honoured the Children of Adam.”<sup>44</sup> The Prophet also instructed the Muslims to avoid injuring the enemy’s face during fighting,<sup>45</sup> out of respect for human beings and in order to preserve the dignity bestowed upon them by God in the aforementioned verse. In

40 Mālik ibn Anas, *Al-Muwattaʿa*, ed. Muḥammad Fūʿād ‘Abd al-Bāqī, Vol. 2, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1985, p. 448.

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

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

43 AP I, Art. 37.

44 Qur’an 17:70.

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

addition, Islam prohibits the torture and mutilation of animals, on the basis that the Prophet forbade mutilation even of the body of al-kalb al-‘aqūr (a rabid dog).<sup>46</sup>

The principle of human dignity requires respect for human bodies, not only during life but also after death. For that reason, Islam forbids the mutilation of enemy corpses and instead requires them to be returned to the enemy people, or buried if this is not possible. At the Battle of Badr in 624 AD, the first battle in Islamic history, the Muslims buried the corpses of all enemies killed.<sup>47</sup> According to the narration of Ya‘lā ibn Murrah:

*I travelled with the Prophet (peace be upon him) on more than one occasion, and I did not see him leave a human corpse behind; whenever he came across one, he ordered its burial, without asking whether the person was a Muslim or an unbeliever.*<sup>48</sup>

Furthermore, at the Battle of the Trench in 627 AD, when the enemies of the Muslims requested the return of the corpse of Nawfal ibn ‘Abd Allah ibn al-Mughīrah in exchange for 10,000 dirhams, the Prophet ordered for the body to be returned and refused to accept the money.<sup>49</sup> As well as respect for humanity and preservation of the dignity of the dead, another reason why Muslims ensured the burial of enemy corpses was to prevent them from decomposing in the open.<sup>50</sup> On that basis, Ibn Ḥāzīm (d. 1064) instructed Muslims to bury the bodies of their deceased enemies because if they did not, the bodies would end up rotting and could be eaten by predatory animals; this would be tantamount to mutilation, which is forbidden in Islam.<sup>51</sup> Article 17 of Geneva Convention I (GC I) also stipulates that the parties to a conflict must first carry out a medical examination of corpses to verify the identity of the deceased, then bury the body according to the applicable religious rites if possible.

It is also worth noting that in wars between the Persians and the Romans, it was common practice to carry the heads of enemy army commanders on the tips of spears to celebrate and boast of victory over the enemy.<sup>52</sup> According to books of Islamic jurisprudence, when the head of the commander of the Levantine army Yannāq al-Bīṭrīq was brought to Abū Bakr (d. 634), he became enraged and condemned this as an abominable act, calling it a sunnah al-‘ajam (a practice followed among the non-Muslims, literally foreigners). When he was told that

46 M. al-Sarakhsī, above note 6, Vol. 9, pp. 135, 196; Vol. 10, pp. 129, 131; Vol. 16, p. 145; Vol. 26, p. 145. 46 W. al-Zuḥaylī, above note 19, p. 495.

47 W. al-Zuḥaylī, above note 19, p. 495.

48 ‘Alī ibn ‘Umar al-Dāraqutnī, *Sunan al-Dāraqutnī*, eds Shā‘ib al-Arnu‘ūd, Ḥassan ‘Abd al-Munā‘im Shalabī and Sa‘id al-Laḥām, Vol. 5, Mu‘assasah al-Risālah, Beirut, 2004, p. 204.

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

50 W. al-Zuḥaylī, above note 19, p. 495.

51 ‘A. Ibn Ḥāzīm, above note 35, Vol. 5, p. 117.

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

it was an act of reciprocity because the enemy had done the same to Muslims, Caliph Abū Bakr replied disapprovingly, “Are we going to follow the Persians and the Romans? We have what is enough: the book [the Qur’an] and the reports [i.e., tradition of the Prophet].”<sup>53</sup> In this statement, he reaffirms the aforementioned notion that the laws of Islam are binding, regardless of the conduct of the enemy, and that reciprocity does not justify criminal acts.

## 6. Treatment of prisoners

The Islamic approach to the issue of prisoners of war reflects many typical features of the Islamic legal system and shows the vital need to reinterpret certain legal provisions in order to respond to the requirements of the modern age. Most of the rules on prisoners of war (PoWs) according to Islamic law were based on the treatment of prisoners in the battle of Badr in the second year of the Islamic calendar (624 AD). In addition, the term “prisoners of war” was only used to refer to male combatants, since the custom at the time was for women or children who were captured to be enslaved or exchanged for Muslim prisoners. At the battle of Badr, the Muslims managed to capture seventy enemy combatant men; this posed a challenge for the nascent Islamic state, which had yet to establish legislation on the legal status of PoWs. The Prophet therefore consulted his Companions on the issue. To solve the additional challenge of providing shelter for the seventy prisoners, since nowhere specific had been prepared for this purpose, some of the prisoners were held in the mosque and the rest were divided up to be housed with the Companions of the Prophet. The Prophet instructed for the prisoners to be treated well, saying: “Observe good treatment towards the prisoners.”<sup>54</sup>

To establish the Islamic law on prisoners in Islam, the jurists referred to the following two verses of the Qur’an, as well as the Sunnah of the Prophet. The first of these verses is: “When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly – later you can release them by grace or by ransom – until the toils of war have ended.”<sup>55</sup> The second is: “When the Sacred Months have passed, kill the polytheists wherever you find them and capture them and besiege them and await for them in every place of ambush.”<sup>56</sup> Given that the second of these two texts does not specifically relate to the issue of prisoners, the jurists were split into three camps over the law on PoWs in Islam. In the first camp was Ibn ‘Abbās (d. 668), ‘Abd Allah ibn ‘Umar (d. 693), al-Ḥasan al-Basrī (d. 728) and Sa‘īd ibn Jubayr (d. 714), who argued that the law on prisoners in Islam required them to be freed by “grace” or “ransom” according to the first of

<sup>53</sup> *Ibid.*, Vol. 1, p. 79.

<sup>54</sup> Muḥammad ibn Jarīr al-Tabarī, *Tārīkh al-Tabarī: Tārīkh al-Umam wa al-Mulūk*, Vol. 2, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2001, p. 39.

<sup>55</sup> Qur’an 47:4.

<sup>56</sup> Qur’an 9:5.

these texts.<sup>57</sup> The second camp, made up of some of the Ḥanafī jurists, advocated that the head of State was entitled to either execute the prisoners or enslave them, according to what best served the public interest, while Al-Shaybānī, one of the great Ḥanafī jurists, deemed it permissible to exchange enemy prisoners. The remaining Ḥanafī jurists advocated that the head of State was entitled to release prisoners as long as they remained in the Islamic state and paid the *jizyah* (tax levied to exempt eligible males from conscription). According to the Ḥanafī jurists, prisoners should not be allowed to return to their country because they would strengthen the enemy.<sup>58</sup> The third camp, comprised of the majority of Muslim jurists, including the Shāfi‘īs, the Mālikīs and the Ḥanbalīs, as well as al-Awzā‘ī (d. 774) and Sufyān al-Thawrī (d. 778), advocated that the head of State was entitled to choose one of the following four options, depending on what he deemed to best serve the public interest: to execute some or all of the prisoners, to enslave them, to set them free, or to exchange them for Muslim prisoners. The Mālikīs also added the argument of some of the Ḥanafīs that the prisoners could remain in the Islamic state as long as they paid the *jizyah*.<sup>59</sup>

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

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

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

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

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

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

simply because they were PoWs, otherwise the rest of the prisoners captured at this battle and others would have also been killed.<sup>62</sup>

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

Islamic law guarantees the humane treatment of prisoners, as clearly illustrated by the fact that prisoners were distributed among the homes of the Companions of the Prophet and their instructions to treat the prisoners well.<sup>63</sup> Prisons or camps had not yet been built to shelter prisoners, and it would not have been an option, for example, to tie up the prisoners and leave them outside, as this could have exposed them to harm. The biography (*sīrah*) of the Prophet provides evidence of the humane treatment of prisoners at the Battle of Badr,<sup>64</sup> which went on to form the general basis for the rules on PoWs in Islam; these are also in line with the requirements of Geneva Convention III (GC III), such as the requirement to provide prisoners with shelter, food and clothing and to maintain family links, and the prohibition against torturing prisoners to obtain military information.

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

*I was with a number of the Ansār when they [the Muslim captors] brought me from Badr, and when they ate their morning and evening meals they gave me the bread and ate the dates themselves in accordance with the orders that the apostle had given about us. If anyone had a morsel of bread he gave it to me. I felt ashamed and returned it to one of them but he returned it to me untouched.*<sup>65</sup>

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

63 M. al-Ṭabarī, above note 53, p. 39; M. Ḥammīdullāh, above note 56, p. 214; Aḥmad Abū al-Wafā, *Al-Naz'ariyyah al-ʾAmmah lil-Qānūn al-Dawli al-Insāni fi al-Qānūn al-Dawli wa fi al-Shari'ah al-Islāmiyyah*, Dār al-Nahḍah al-ʾArabīyyah, Cairo, 2006, p. 179.

64 See the references cited in note 62 above.

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

This altruistic treatment of enemy PoWs, by feeding them good food despite the captors' own hunger, is described in the Qur'an as follows: "And they feed the needy, the orphans and the captives [from their own] food, despite their love for it [also interpreted as "because of their love for God"]".<sup>66</sup> According to the history books, when Ṣalāh al-Dīn al-Ayyūbī (d. 1193) was unable to feed the large number of prisoners who had fallen under his control when he reclaimed Al-Aqṣā Mosque, he had no choice but to release them.<sup>67</sup> With regard to clothing, Jābir ibn 'Abdullah quotes the following passage from Ṣaḥīḥ al-Bukhārī:

*When it was the day (of the battle) of Badr, prisoners of war were brought including Al-'Abbās, who was undressed. The Prophet looked for a shirt for him. It was found that the shirt of 'Abdullah ibn Ubāi would do, so the Prophet let him wear it.*<sup>68</sup>

On the issue of maintaining the contact prisoners have with their families, Islam prohibits the separation of members of the same family, which is classified as parents, grandparents and children.<sup>69</sup>

It should also be noted that Islam prohibits the torture of prisoners to obtain military intelligence about the enemy. When Imām Mālik (d. 795) was asked, "Is it possible to torture a prisoner of war in order to obtain military intelligence about the enemy?" he replied, "I have not heard of that."<sup>70</sup> His succinct response clearly illustrates how peculiar this question was, showing that the very idea of discussing the permissibility of torturing prisoners, even to obtain military intelligence, did not even occur to the Muslims and had never before been discussed by Islamic law jurists. Article 17 of GC III stipulates:

*No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.*<sup>71</sup>

66 Qur'an 76:8.

67 Dalīlah Mubārīkī, "Ḍawābiḥ al-'Alāqāt al-Dawliyyah fī al-Islām Zaman al-Ḥarb", *Majallat Kulliyat al-'Ulūm*, 4th year, 9th ed., 2004, p. 206.

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

69 See 'Abd al-Ghanī Maḥmūd, *Ḥimāyat Ḍaḥāyā al-Nizā'āt al-Musallaḥah fī al-Qānūn al-Dawli al-Insānī wa al-Sharī'ah al-Islāmiyyah*, ICRC, Cairo, 2000, p. 39; Zayd ibn 'Abd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawli al-Insānī fī al-Islām*, ICRC, 2004, pp. 39, 77.

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

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



## 7. Quarter and safe conduct

The Islamic system of *amān* (literally, protection, safety) encompasses two main forms of protection. The first of these is safe conduct, which refers to a contract of protection granted to any non-Muslim citizen of an enemy State to enter the historic Islamic state on a temporary basis for peaceful purposes such as business, education or tourism. In this respect, the system of *amān* is similar to the system of entry visas and temporary residence permits in foreign countries, in that it allows the holder to enter a foreign country legitimately, with the authorization of the competent authorities, and comes with certain corresponding rights. In summary, however, what matters here is that an individual in possession of this form of *amān* may not be targeted in an attack. Not only that, but they may not be prosecuted for any crime committed outside the Islamic state, even for the crime of killing a Muslim. This is because the Islamic state does not have jurisdiction over crimes committed by non-Muslims outside its boundaries.<sup>72</sup> It is worth noting here that ambassadors and envoys from foreign States are automatically entitled to the *amān* system by virtue of the nature of their mission. This system of *amān*, which had been practised even in the pre-Islamic period and was preserved by Islam, is a binding contract and cannot be revoked by the Islamic state. Nonetheless, the jurists disagreed over whether *amān* could be revoked if the *musta'min* (person in possession of *amān*) were proven to be a spy; in either case, however, the individual cannot be attacked but must instead be escorted to their own country.<sup>73</sup>

The second type of *amān* – and the topic of focus here, namely quarter – is individual or collective protection granted to enemy combatants during operations on the battlefield and requires Muslims to stop fighting against the individual or group and protect them and their property until they return to their country. In this case, they are not considered PoWs and may not be arrested. Quarter is granted if the individual in any way expresses an intention to stop fighting and the desire to claim safety, whether this request is written or verbal, whether in Arabic or in any other language, and whether explicit or implicit, or even by gesture.<sup>74</sup> This concept is somewhat similar to enemies who “clearly express an intention to surrender” and are therefore granted *hors de combat* status in IHL under Article 41 of AP I.<sup>75</sup> Moreover, the jurists extended the application of this type of *amān* to the point where the expression of an intention to surrender is not even required as a condition because the objective of *amān* is *ḥaqq al-dam* (prevention of bloodshed, protection

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

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

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

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

of life).<sup>76</sup> For example, the jurists were unanimous that if an enemy mistakenly assumes that a Muslim has granted him *amān*, then the *amān* is valid, even if the Muslim had no intention of granting it.<sup>77</sup> The jurists disagreed over whether it was permissible to grant *amān* after, or only before, the capture of enemy belligerents. Therefore, the very fact that the jurists disagreed on this point demonstrates that *amān* could be extended to apply to enemy combatants even after their capture. Furthermore, Ibn Qudāmah advocates that the mere fact of an enemy belligerent's attempt to enter Muslim territory by non-violent means entitles him to *amān*.<sup>78</sup> This example is similar to the modern practice of an enemy carrying a white flag during a battle to demonstrate non-violence, in which case the individual may not be targeted in an attack. In practice, what this means is that an enemy belligerent who has laid down their weapons and entered Muslim territory cannot be harmed but must instead be protected until they return to their own country. This small sample of the numerous cases discussed by the jurists unequivocally demonstrates the sanctity of enemy blood and property and demonstrates not only that Islam does not allow attacks against enemies except during combat, but also that if an enemy combatant ceases fighting and expresses a wish for protection under the system of *amān*, Islamic law stipulates that he must be protected in order to prevent bloodshed and limit the suffering and devastation of war.

## 8. Management of dead bodies

Human dignity is a right bestowed by God,<sup>79</sup> and this dignity must be protected whether a person is alive or dead. The Prophet Muhammad's instructions, referred to above, to avoid deliberately injuring enemy combatants in the face is a sign of respecting human dignity. Classical Islamic law regulated the management of dead bodies of Muslims for obvious religious reasons, whether in normal circumstances or during armed conflicts or natural disasters. There are different regulations for Muslims who die in normal circumstances and martyrs who are killed in armed conflicts: in the Islamic tradition, because of their status, martyrs are to be buried without ritual washing, shrouding or even funeral prayer to glorify their sacrifices. Graveyards must be respected; questions related to exhumation of graves, collective graves in cases of necessity (namely, in cases of natural disasters or armed conflicts), and burial at sea were regulated by classical Muslim jurists. In Islam, each body is to be buried in an individual grave except in cases of necessity like natural disasters or armed conflicts. Based on the tradition of the Prophet Muhammad, Muslims must return the dead bodies of the adverse party, and if

76 M. al-Shirbiñī, above note 73, p. 237

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

78 Muwaffaq al-Dīn 'Abd Allah ibn Aḥmad ibn Qudāmah, *Al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Mus'ad 'Abd al-Ḥamid al-Sa'danī, Vol. 4, Dār al-Kutub al-'Ilmiyyah, Beirut, 2004, p. 163.

79 Qur'an 17:70.

that party does not take them and/or bury them, it becomes an obligation of the Muslim army to do so. That is because, as shown above, if Muslims do not bury the dead bodies of their enemy, the bodies will decompose or be eaten by beasts, which would be tantamount to mutilation, as affirmed by the Andalusian jurist Ibn Ḥazm (d. 1064). Therefore, in accordance with Article 17 of GC I and Rule 112 of the ICRC Customary Law Study,<sup>80</sup> it is reported that the Prophet Muhammad used to bury dead bodies without adverse distinction.<sup>81</sup>

## The Islamic law of war between theory and practice

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

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

The second reason is a lack of research by modern Muslim scholars into the areas of Islamic law that govern State affairs, especially with regard to governance systems, war and international relations. This has to do with cultural and political factors relating to the structure of the modern State in Muslim countries, which has moved away from relying on the legal tradition of the classical Muslim jurists and has replaced it with Western legal systems.

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

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80 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, Rule 112, available at: [https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule112](https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112).

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

## Conclusion

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

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

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

In conclusion, many violations of IHL would no longer occur if people lived by the words of Imām 'Alī ibn Abī Ṭālib, who said: "There are two types of people: your brothers in religion or your peers in humanity."<sup>82</sup>

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82 'Alī ibn Abī Ṭālib, *Nahj al-Balāghah*, ed. Şobhī Şāliḥ, 4th ed., Dār al-Kitāb al-Masrī, Cairo, and Dār al-Kitāb al-Lubnāni, Beirut, 2004, p. 427.

## Bibliography

1. Al-Armanāzī, Najīb. *Al-Shar‘al-Dawli fī al-Islām*. London: Riad El-Rayyes Books, 1990.
2. Al-‘Asqalānī, Aḥmad ibn ‘Alī ibn Hajar. *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*. Editor Muḥyī al-Dīn al-Khatīb, Vol. 6. Beirut: Dār al-Ma‘rifah.
3. Al-Bayhaqī, Aḥmed ibn al-Ḥussein ibn ‘Alī. *Al-Sunan al-Kubrā*. Vol. 9. Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003.
4. Al-Bukhārī, Muḥammad bin Ismā‘il. *Ṣaḥīḥ al-Bukhārī*. Riyadh: Bayt al-Afkār al-Dawliyyah lil-Nashr, 1998.
5. Al-Bukhārī, Muḥammad ibn Ismā‘il. *Mukhtasār Ṣaḥīḥ al-Imām al-Bukhārī*. Editor Muḥammad Nāsir al-Albānī, Vol. 2. Riyadh: Maktabah al-Ma‘arif, 2002.
6. Al-Dāraqutnī, ‘Alī ibn. *‘Umar, Sunan al-Dāraqutnī*. Editor Sha‘ib al-Arnu‘ūd, Ḥassan ‘Abd al-Munā‘m Shalābī and Sa‘id al-Laḥām, Vol. 5. Beirut: Mu‘assasah al-Risālah, 2004.
7. Al-Dardīr, Aḥmad. *Al-Sharḥ al-Kabīr*. Editor Muhammad ‘Alīsh, Vol. 2. Beirut: Dār al-Fikr.
8. Al-Dawoody, Aḥmed. “Al-Sarakhsī’s Contribution to the Islamic Law of War”. *UCLA Journal of Islamic and Near Eastern Law* Vol. 14, (2015): 29–44.
9. Al-Dawoody, Aḥmed. *The Islamic Law of War: Justifications and Regulations*. New York: Palgrave Macmillan, 2011.
10. Al-Ghazālī, Muḥammad. *Al-Wasīf fī al-Madḥab*. Editors Aḥmad Maḥmūd Ibrāhīm i Muḥammad Muḥammad Tāmir, Vol. 7. Cairo: Dār al-Salām, 1997.
11. Al-Ḥimyarī, ‘Abd al-Mālīk ibn Hishām ibn Ayyūb. *Al-Sīrah al-Nabawīyyah*. Editor ‘Umar ‘Abd al-Salām Tadmurī, Vol. 2. Beirut: Dār al-Kutub al-‘Arabī, 1990.
12. Al-Ḥaṭṭāb, Muḥammad ibn Muḥammad ibn ‘Abd al-Raḥman. *Mawāhib al-Jalīl li-Sharḥ Mukhtasār Khalīl*. Vol. 3. Beirut: Dār al-Fikr, 1977.
13. Al-Ḥumaydī, Muḥammad ibn Fattūḥ. *Al-Jam‘ bayn al-Ṣaḥīḥayn al-Bukhārī wa Muslim*. Editor ‘Alī Ḥusayn al-Bawwāb, Vol. 3. Beirut: Dār ibn Ḥazm, 2002.
14. Al-Jawziyyah, Muḥammad ibn Abī Bakr ibn Qayyim. *Jāmi‘ al-Fiqh*. Editor Yusrī al-Sayyid Muḥammad, Vol. 4. Al-Mansūrah: Dār al-Wafā’, 2000.
15. Al-Jundī, Khalīl ibn Ishāq ibn Musā. *Mukhtasar Khalīl fī Fiqh Imām Dār al-Hijrah*. Editor Aḥmad ‘Alī Harakāt. Beirut: Dār al-Fikr, 1994.
16. Al-Māwardī, ‘Alī ibn Muḥammad ibn Ḥabīb. *Kitāb al-Aḥkām al-Sultāniyyah wa al-Wilāyāt al-Dīnīyyah*. Editor Aḥmad Mubārak al-Baghdādī. Kuwait: Maktabah Dār ibn Qutaybah, 1989.
17. Mālīk ibn Anas, *Al-Muwatṭa’*, ed. Muḥammad Fū‘ād ‘Abd al-Bāqī, Vol. 2, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1985, p. 448.
18. Al-Nawawī, Muḥyī al-Dīn ibn Sharaf, *Al-Majmū: ‘Sharḥ al-Muḥadhdhab*. Editor Maḥmūd Matrajī, Vol. 21. Beirut: Dār al-Fikr, 2000.
19. Al-Qaraḍāwī, Yūsuf. *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fi Ḍaw’ al-Qur’ān wa al-Sunnah*, Vol. 2. Cairo: Maktabah Wahbah, 2009.
20. Al-Qarāfī, Aḥmad ibn Idrīs. *Al-Dhakhīrah*. Editor Muhammad Būkhūbah, Vol. 3. Beirut: Dār al-Gharb al-Islāmī, 1994.
21. Al-Qurtūbī, Muḥammad ibn Aḥmad al-Ansārī. *Al-Jāmi‘ li-Aḥkām al-Qur’ān*. Vol. 16. Cairo: Dār al-Sha‘b.
22. Al-Qushayrī, Muslim ibn al-Ḥajjāj. *Ṣaḥīḥ Muslim*. Editor Muḥammad Fū‘ād ‘Abd al-Bāqī, Vol. 3. Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī.
23. Al-Rāzī, Muḥammad ibn ‘Umar. *Tafsīr al-Fakhr al-Rāzī: Al-Mushtahar bi-al-Tafsīr al-Kabīr wa-Mafātīh al-Ghayb*. Vol. 5. Dār al-Fikr, 1981.

24. Al-Sā'atī, Aḥmad 'Abd al-Rahmān al-Bannā. *Badā'i' al-Manan fi Jami' wa Tartīb Musannad al-Shafi'i wa al-Sanan: Mudhayla bi-al-Qawl al-Hasan Sharah Badā'i' al-Manan*, Vol. 2. Cairo: Maktabah al-Furqān, 1983.
25. Al-Sāliḥ, Subḥī, *Ma'ālim al-Shari'ah al-Islāmiyyah*. Beirut: Dār al-'Ilm lil-Malāyīn, 1975.
26. Al-Samarqandī, 'Alā' al-Dīn, *Tuhfah al-Fuqahā'*, Vol. 3. Beirut: Dār al-Kutub al-'Ilmiyyah, 1984.
27. Al-Ṣana'ānī, Muḥammad ibn Ismā'il. *Subul al-Salām: Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām*. Editor Muḥammad 'Abd al-'Azīz al-Khūlī, 4th ed., Vol. 4. Beirut. Iḥyā' al-Turāth al-'Arabī, 1959.
28. Al-Sarakhsī, Muḥammad ibn Aḥmad. *Kitāb al-Mabsūt*, Vol. 10. Beirut: Dār al-Ma'rifah.
29. Al-Shāfi'i, Muḥammad ibn Idrīs. *Al-Umm*, 2nd ed., Vol. 4. Bjerut: Dār al-Ma'rifah, 1973.
30. Al-Shawkānī, Muḥammad ibn 'Alī ibn Muḥammad. *Nayl al-Awtār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār*, Vol. 8. Beirut: Dār al-Jīl, 1973.
31. Al-Shaybānī, Muḥammad ibn al-Ḥassan. *Al-Siyar*. Editor Majīd Khadūrī. Beirut: Dār al-Fikr, 1985.
32. Al-Shaybānī, Muḥammad ibn al-Ḥassan. *Sharḥ Kitāb al-Siyar al-Kabīr*. Comment Muḥammada ibn Aḥmada al-Sarakhsija, Editor Abī Abdullah Muḥammad Ḥassan Muḥammad Hassan Ismā'il al-Shafi'i, Vol. 4. Beirut: Dār al-Kutub al-'Ilmiyyah, 1997.
33. Al-Shaykh Nizām al-Dīn al-Balkhī et al. *Al-Fatāwā al-Hindiyyah: Fī Madhhab al-Imām al-A'zam Abī Hanīfah al-Nu'mān*, Vol. 2. Dār al-Fikr, 1991.
34. Al-Shirāzī, Ibrāhīm ibn 'Alī ibn Yūsuf. *Al-Muhadhdhab: Fī Fiqh al-Imām al-Shāfi'i*. Editor Zakariyyā 'Imīrat, Vol. 3. Beirut: Dār al-Kutub al-'Ilmiyyah, 1995.
35. Al-Shirbīnī, Muḥammad al-Khatīb. *Mughni al-Muḥtāj ilā Ma'rifah Ma'ānī Alfāz al-Minhāj*, Vol. 4. Beirut: Dār al-Fikr.
36. Al-Ṭabarī, Muḥammad ibn Jarīr. *Kitāb al-Jihād wa Kitāb al-Jizyah wa Ahkām al-Muhāribīn min Kitāb Ikhtilāf al-Fuqahā'* li-Abī Ja'far Muhammad Ibn Jarīr al-Ṭabarī. Editor Joseph Schacht. Leiden: Brill, 1933.
37. Al-Ṭabarī, Muḥammad ibn Jarīr. *Tārīk hal-Ṭabari: Tārīk hal-Umam wa al-Mulūk*, Vol. 2. Beirut: Dār al-Kutub al-'Ilmiyyah, 2001.
38. Al-Ṭayyib, Sadiq ibn Hasan ibn 'Ali al-Husseini al-Qannūji al-Bukhārī Abū. *Al-Rawdah al-Nadiyyah Sharah al-Durar al-Muniryyah*, Vol. 2. Cairo: Idārah al-Tibā'ah al-Munīriyyah.
39. Al-Wafā, Aḥmad Abū. *Al-Naz'ariyyah al-'Āmmah lil-Qānūn al-Dawlī al-Insānī fī al-Qānūn al-Dawlī wa fī al-Shari'ah al-Islāmiyyah*. Cairo: Dār al-Nahḍah al-'Arabiyyah, 2006.
40. Al-Wāqidi, Muḥammad ibn 'Umar. *Kitāb al-Maghāzī*. Editor Muḥammad 'Abd al-Qādir 'Ata, Vol. 1. Beirut: Dār al-Kutub al-'Ilmiyyah, 2004.
41. Al-Zayd, Zayd ibn 'Abd al-Karīm. *Muqaddimah fī al-Qānūn al-Dawlī al-Insānī fī al-Islām*. ICRC, 2004.
42. Al-Zuhaylī, Wahbah. *Al-'Alāqāt al-Dawliyyah fī al-Islam: Muqāranah bi-al-Qānūn al-Dawlī al-Ḥadīth*. Beirut: Mu'assasah al-Risālah, 1981.
43. Al-Zuhaylī, Wahbah. *Āthār al-Ḥarb fī al-Islām: Dir' āsah Muqāranah*, 3rd ed. Damask: Dār al-Fikr, 1998.
44. Al-Zuhaylī, Wahbah. *Mawsū'ah al-Fiqh al-Islāmī wa al-Qadāyā al-Mu'āsīrah*, Vol. 7. Damask: Dār al-Fikr, 2010.
45. El Fadl, Khaled Abou. "Islam and the Theology of Power". Middle East Report, nb. 221 (2001): 28–33.
46. El Fadl, Khaled Abou. "The Rules of Killing at War: An Inquiry into Classical Sources", The Muslim World, Vol. 89, nb. 2 (1999).

47. Green, L. C. *“The Contemporary Law of Armed Conflict”*. Manchester: Manchester University Press, 1993.
48. Guillaume, A., trans. *Life of Muhammad: Translated by Ishāq’s Si rat Rasūl Allāh*. Oxford: Oxford University Press, 1955.
49. Ḥammīdullāh, Muḥammad. *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. and enl. 5th ed., Sh. Muhammad Ashraf, Lahore, 1968, Lahore 1968.
50. Hashmi, Sohail H. *“Saving and Taking Life in War: Three Modern Muslim Views”*, *The Muslim World*, Vol. 89, No. 2, 1999.
51. Hashmi, Sohail. *“Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation”*, in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004.
52. Haykal, Muḥammad Ḥusayn. *The Life of Muḥammad*, trans. from the 8th ed. by Isma‘il Rāqī A. al-Fārūqī. North American: Trust Publication, 1976.
53. Ḥazm, ‘Alī ibn Aḥmad ibn Sa‘id ibn. *Al-Muḥallā*, Vol. 7. Beirut: Dār al-Āfāq al-Jadīdah.
54. Henckaerts, Jean-Marie i Doswald-Beck, Louise (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, Rule 112, available at: [https://ihl.databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule112](https://ihl.databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112).
55. Mahmāsani, Sobhi. *“The Principles of International Law in the Light of Islamic Doctrine”*. Recueil des Cours, Vol. 117. (1966).
56. Maḥmūd, ‘Abd al-Ghanī. *Ḥimāyat Daḥāyā al-Nizā‘āt al-Musallaḥah fī al-Qānūn al-Dawī al-Insānī wa al-Sharī‘ah al-Islāmiyyah*. Cairo: ICRC, 2000.
57. Mawdūd, ‘Abd Allah ibn Maḥmūd ibn, i Al-Mukhtār. *Al-Ikhtiyār li-Ta‘līl*. Editor ‘Abd al-Latif Muḥammad ‘Abd al-Raḥman, 3rd ed., Vol. 4. Beirut: Dār al-Kutub al-‘Ilmiyyah 2005.
58. Mayer, Ann Elizabeth. *“War and Peace in the Islamic Tradition and International Law”*, in John Kelsay and James Turner Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, Greenwood Press, Westport, CT, 1991
59. ICRC, ICRC, *“Egypt: Continuous Humanitarian Dialogue between the ICRC and Al-Azhar”*, news release, 24 October 2017, available at: [www.icrc.org/en/document/egypt-grand-imam-dr-ahmed-al-tayyeb-alazhar-willing-support-humanitarians](http://www.icrc.org/en/document/egypt-grand-imam-dr-ahmed-al-tayyeb-alazhar-willing-support-humanitarians).
60. ICRC, *“Niger: Seminar on Islamic Law and Humanitarianism”*, news release, 25 November 2015, available at: [www.icrc.org/en/document/niger-seminar-islamic-law-humanitarianism](http://www.icrc.org/en/document/niger-seminar-islamic-law-humanitarianism).
61. Mubārīkī, Dalīlah. *“Dawābīt al-‘Alāqāt al-Dawliyyah fī al-Islām Zaman al-Harb”*. Majallat Kulliyat al-‘Ulūm, 4th year, 9th ed., 2004.
62. Peters, Rudolph. *Jihad in Classical and Modern Islam*. New York: Markus Wiener, Princeton, 1996.
63. Qudāmah, Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn Muḥammad ibn. *Al-Mughnī*. Editors ‘Abd Allah ibn ‘Abd al-Muḥsin al-Turkī i ‘Abd al-Fattāḥ Muḥammad al-Ḥīlu, 3rd ed., Vol. 9, Dār ‘Ālam al-Kutub, Riyadh, 1997.
64. Qudāmah, Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn. *Al-Kāfi fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*. Editors Muḥammad Fāris i Mus‘ad ‘Abd al-Ḥamid al-Sa‘danī, Vol. 4. Beirut: Dār al-Kutub al-‘Ilmiyyah, 2004.
65. Salaymeh, Lena. *“Early Islamic Legal-Historical Precedents: Prisoners of War”*, *Law and History Review*, Vol. 26, nb. 3 (2008): 521–544.

66. Şaqr, 'Abd al-'Aziz. *'Al-'Alāqāt al-Dawliyyah fī al-Islām Waqt al-Harb: Dirāsah lil-Qawā'id al-Munaz'zimah li-Sayr al-Qitāl, Mashrū' al-'Alāqāt al-Dawliyyah fī al-Islām*, nb. 6 Cairo: Al-Ma'had al-'Ālami lil-Fikr al-Islāmī, 1996.
67. Shaybah, 'Abdullah ibn Abī. *Al-Kitāb al-Musannaḡ fī al-Aḡādith wa al-Āthār*, Vol. 6. Beirut: Dār al-Kutub al-'Ilmiyyah, 1995.
68. Shūmān, 'Abbās. *Al-'Alāqāt al-Dawliyyah fī al-Sharī'ah al-Islāmiyyah*. Silsilah al-Dirāsāt al-Fiḡhiyyah, nb. 1. Cairo: Al-Dār al-Thaqāfiyyah lil-Nashr, 1999.
69. Ṭālib, 'Alī ibn Abī. *Nahj al-Balāghah*. Editor Şobḡi Şāliḡ, 4. izd. Cairo: Dār al-Kitāb al-Masrī, Beirut: Dār al-Kitāb al-Lubnānī, 2004.
70. Thomas, Troy S. "Prisoners of War in Islam: A Legal Inquiry". *The Muslim World*, Vol. 87, No. 1 (1997).
71. Thomas, Troy S. "Jihad's Captives: Prisoners of War in Islam". *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12. (2002/03).
72. Zemmali, Ameer. *Islam and International Humanitarian Law: Principles on the Conduct of Military Operations*, 4th ed., ICRC, 2010.



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# INTRODUCTION TO ISLAMIC LAW OF ARMED CONFLICTS: SOURCES, DEVELOPMENT AND CHARACTERISTICS

**Abstract:** *With this propaedeutical article, the author wants to briefly outline the origins, historical development and main features of Islamic law of armed conflict. After introductory consideration of the terminology that denotes this legal discipline in classical and contemporary Islamic jurisprudence, it defines its subject matter and elaborates the importance of its study at the beginning of the 21st century. Thereafter the main sources of inspiration of Islamic provisions on conduct of war (jus in bello) are identified and the key features that distinguish Islamic law of armed conflict from secular international humanitarian law have been discussed. Finally, it emphasizes the need for contextual understanding and application of the classical Islamic law of armed conflict and emphasizes the importance of incorporating the concept of treaty or convention (’ahd) and the multilateral nature of international relations’ standardization into contemporary Islamic studies on humanitarian law.*

**Keywords:** Islamic law of armed conflict, international humanitarian law, siyar.

## Introduction

In the classical works of Islamic jurisprudence (al-fiqh al-islami), the terms “Islamic law of armed conflict” or “Islamic law of war” (qanun al-harb fi al-Islam) were not used. However, the subject matter of this legal discipline was the focus of its study, especially in the context of discussions on Islamic international law (siyar). It is also synonymous with another term that is used equally in contemporary Islamic legal discourse, which is “Islamic international humanitarian law” (qanun al-dawli al-insani fi al-Islam). It is, in fact, a set of principles and practical sharia rules applied in international armed conflicts aimed at protecting a person, his or her dignity and fundamental rights for the duration of those conflicts.<sup>1</sup> In other words, it is a set of legal rules governing the protection of non-combatants and those who have ceased fighting and restricting the methods and means of warfare.

1 Muhammad Sulayman Nasrullah al-Farra, “Ahkam al-qanun al-dawli al-insani fi al-islam”, (MA thesis, Faculty of Sharia and Secular Law of the Islamic University of Gaza, 2007), p. 48.

This article aims to present the historical development of Islamic law of armed conflict, its sources as well as its main characteristics. The importance of dealing with this area of legal knowledge in Islam at the beginning of the 21st century is indicated by the fact that, unfortunately, in many parts of the world where Muslims make up the majority of the population, wars have an international or domestic character and that the Muslims appear to be the greatest victims of war and terror in modern times. It should be added that some parties to those wars invoke classical Islamic war law, often selectively, to justify their actions, questioning the validity of international humanitarian law to which Muslim countries have pledged support by adopting and ratifying the Geneva Conventions on conduct of war.<sup>2</sup>

It is therefore understandable why systematization and further elaboration of the Islamic law of armed conflict, especially in relation to new situations and problems posed by contemporary forms of warfare, comes as a kind of reaction to the development of secular international humanitarian law and the dilemma of its universal applicability. A similar situation exists when we talk about the contemporary Muslim human rights discourse (*huquq al-insan*), a response to the adoption of international human rights documents and the creation of international monitoring mechanisms for their application in Muslim countries. Studying the Islamic system of norms that regulate conduct of war and its comparison to international humanitarian law should not be seen as an “intellectual luxury”<sup>3</sup> or an academic exercise. Rather, it’s imperative and necessary to create the assumption that the principles of humane treatment shared by civilized nations and the major religions of the world will be applied to the victims of armed conflict as much as possible.

## Sources and development of Islamic law of armed conflict

The classical Islamic law of armed conflict (*jus in bello*) was developed during the second century AH / eighth century AD in the works of jurists Abu Hanifa (d. 150 AH/767 AD), al-Avza’i (d. 157 AH/774 AD), Malik (d. 179 AH/795 AD), al-Shafi (d. 204 AH/819 AD), and in particular Muhammad al-Shaybani (d. 189 AH/804

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2 These are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (all adopted on 12 August 1949).

3 Ahmed al-Dawoody, *IHL and Islam: An overview*, downloaded from: <https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>, accessed on 20.9.2018.

AD).<sup>4</sup> The famous al-Shaybani's work *Kitab al-syar al-kabir* (Grand proceedings of international law) was a subject of particular interest within the Hanafi Law School. Translated into Turkish, it served as a manual for laying down the foreign policy of the Ottoman State.<sup>5</sup>

Classical Islamic law of armed conflict forms an integral part of the *siyar*, Islamic international law or Islamic law of the people, which, in the broadest sense, deals with the regulation of relations between Muslim and non-Muslim States (*dar al-Islam* and *dar al-kufr*) in peace and war, and also the legal status of non-Muslims who permanently or temporarily reside in the territory of *dar al-Islam*. However, it should be noted that the classical Islamic doctrine on warfare, except in separate works on *siyar*, was elaborated within encyclopedic works of *fiqh*, in chapters devoted to jihad, military campaigns, etc.

Linguistically the Arabic word *siyar* is the plural of the word *sira*, which is again a derivative of the verb *sara* – *yasiru* meaning *to go, to move*.<sup>6</sup> In terminological terms, *sira* in Islamic studies denotes the biography of the Messenger of Allah, a.s., which includes, among other things, His missionary and military visits, while *siyar* indicates the branch of Islamic jurisprudence that deals with international relations of the Islamic State.

The sources of *siyar* are sources of Islamic law in general, ranging from the Quran and the Sunnah to secondary sources such as public interest (*maslaha*) or custom ('urf). The following are particularly important for the Islamic law of armed conflict, which is an integral part of the *siyar*:

1. Quranic texts addressing the treatment of Muslim soldiers in war and immediately after its end. An example is the verse that states:

*“Fight in God’s cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits.”*<sup>7</sup>

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4 Muhammad ibn al-Hasan al-Shaybani was born in Vasiṭ 132 AH/749 AD. He grew up in Kufa and spent part of his life in Baghdad. He studied *fiqh* before the Kufan Imams Abu Hanifa and Abu Yusuf, and before Imam Malik in Medina. For a time he served as a Qadi during the reign of Caliph Abbas Harun al-Rashid, but quickly left the civil service to preserve autonomy and impartiality. He is credited with the merit of recording the doctrine of the Hanefi madhhab. He has written a number of works, some of which are first-rate sources for finding out the views of Imams Abu Hanifa and Abu Yusuf. These works, whether written by al-Shaybani alone or supervised by Abu Yusuf, are collectively referred to as *zahir al-rivaya*, which means that they are authentic and transmitted by his students. These include the following works: *Al-Mabsut*, *Al-Jami 'al-Kabir*, *Al-Jami' al-sagir*, *Al-Siyar al-Kabir*, *Al-Siyar al-sagir* and *Al-Ziyadat*. see Fikret Karčić, *History of Sharia Law* (Sarajevo: Faculty of Islamic Studies, 2005), p. 91–92 and *The Islamic Law of Nations: Shaybani's Siyar*, trans. Majid Khadduri (Baltimore, 1966), p. 37.

5 Fikret Karčić, *Sharia Law Studies* (Zenica: Bemust, 1997), p. 82.

6 Teufik Muftić, *Arabic Bosnian Dictionary* (Sarajevo: El-Kalem, 1997), p. 698.

7 Quran 2: 190.

It is safe to say that as per this verse, it is necessary to distinguish between combatants and civilians, i.e. all categories of people who do not participate in hostilities.

2. Reports on the statements and actions of the Messenger of Allah, a.s., referring to the context of armed conflicts between Muslims and their enemies among the Meccan pagans and their allies in the Arabian Peninsula, which are recorded in works from the Sirah and Hadith collections. An example is the amnesty granted to the inhabitants of Mecca by the Messenger of God, a.s., after it was conquered.
3. The State practice of the first four Caliphs (*sunna khulafa' al-rashidun*), as well as the later Muslim rulers, if it was not rejected by Islamic scholars because of its opposition to sharia. For example, the directive sent by the first Caliph Abu Bakr, r.a., to the Usama-led Muslim army before embarking on the conquest of Syria in 12 AH / 634 AD. Most classical historical sources, such as the work *Tarihu al-rusul wa al-muluk* by Ibn-Jarir al-Tabari, record the directive. The text reads:

*“O men, I order ten things to you, so remember them well: Do not be treacherous or take the spoils of war, do not deceive or mutilate, do not kill children, the elderly and women, do not cut off the top of a palm tree or burn it, do not cut fruit and slaughter sheep, cows or camels, except for food. You will come across people who have dedicated themselves to the monasteries, so leave them alone, them and to what they have dedicated themselves. You will come across people who will offer you dishes with a variety of foods, so when you eat from them, mention Allah’s name.”*<sup>8</sup>

4. Treaties, covenants and conventions concluded on behalf of the Islamic State by the Prophet, a.s., the Caliphs, or other authorized representatives of the Muslim community.<sup>9</sup>
5. Instructions addressed to military commanders, diplomats or other servants of the Islamic State.

Based on these materials, classical Muslim jurists have developed a rich doctrine of Islamic law in armed conflict. It is increasingly attracting the attention of contemporary researchers as well as humanitarian workers in regions affected by armed conflict at a time when the universality of international humanitarian law is being questioned. The reasons include the blockade on application of its norms in some Muslim nations (such as the Palestinians) and the emergence of wars in which

8 According to: Fevzi Oussedik, *Introduction to International Humanitarian Law*, trans. Bego Hasanović (Sarajevo: Qatar Red Crescent and Faculty of Islamic Studies, 2011), p. 76.

9 See Muhammad Hamidullah, *Majmu'a al-vatha'iq al-siyasiyya li 'ahd al-nabawi wa al-khilafa al-rashida* (Beirut, 1985).

there is a marked asymmetry between dominant military forces and resistance movements that resort to certain methods of war that are contrary to international and Islamic norms, such as suicide bombings.<sup>10</sup>

An example of contemporary interpretation and attempt to apply classical Islamic law of war to the contemporary armed conflict is provided by the Taliban *Layha* or Mujahideen Code of Conduct, adopted in 2006 and last revised in 2010. It is characteristic of *Layha* to contain several provisions that are in line with sharia and international humanitarian law (e.g. prohibition of torture or prohibition of killing government soldiers who surrender, etc.), but also those which are contrary to both (e.g. execution of contractors who supply oil or other raw materials to foreign occupiers or the government, suicide actions, etc.).<sup>11</sup>

### Characteristics of the Islamic law of armed conflict

When talking about the characteristics of the Islamic law of armed conflict, we can first emphasize its religious character since it was developed on the basis of the authoritative religious texts of Islam, the Quran and the Sunnah. This distinguishes it from international humanitarian law, which is considered a secular order of norms.<sup>12</sup> Given the religious nature of Islamic law, some people mistakenly conclude that all its norms are unchangeable, which is not the case.<sup>13</sup> Thus, for example, numerous provisions of Islamic law of war are based on *ijtihad*, and not on binding provisions of the Quran or Sunnah, or, nevertheless, reflect the prevailing customs of war in one historical period.

Another characteristic of Islamic law of armed conflict is that its respect is a matter of Muslim belief. That is to say a Muslim soldier seeks to enjoy the pleasure and closeness of Allah Almighty, attain His reward and be safe from His wrath and punishment. Thus, respect for the Islamic law and norms of armed conflict for Muslims is not motivated solely, nor primarily, by fear of criminal prosecution or pressure from the international community of States. This is something that a Muslim soldier feels obliged to do, whether or not the enemy adheres to the norm of humane treatment in conflict. This is particularly relevant to those who emphasize the compatibility of international and Islamic humanitarian law with a view to internalizing international norms in wars waged in Muslim States.<sup>14</sup> It is also

10 See Fikret Karčić, *Sharia Law Studies*, p. 87; M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), p. 235.

11 V. M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (New York: 2014), p. 190–198, 234–236. For a detailed analysis of the *Layha* code see 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. 93, nb. 881 (2011): p. 81–102.

12 Ahmed al-Dawoody, “IHL and Islam: An overview”, downloaded from: <https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>, accessed on 20.9.2018.

13 Ahmed al-Dawoody, “Islamic law and international humanitarian law: An introduction to the main principles”, *International Review of the Red Cross*, vol. 99, nb. 3 (2017): p. 998.

14 Ahmed al-Dawoody, “IHL and Islam: An overview”, downloaded from: <https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>, accessed on 20.9.2018.

significant in pointing to the great influence of Islamic law of armed conflict on the treatment of Muslim parties in the current armed conflicts, especially with non-governmental armed formations claiming to follow the Islamic frame of reference. Classical Muslim jurists have made great efforts to distinguish between acts that are allowed to and prohibited for Muslim soldiers, all with a view to reconciling the two extremes. Namely, to reduce the suffering of the victims of war, especially women and children, and other segments of the non-hostile population, on the one hand, and to secure the preconditions for military victory, on the other. This commitment to the elaboration of Islamic *jus in bello*, which is visible with classical Muslim jurists in relation to the relative neglect of Islamic *jus ad bellum*, has been noticed by some Western commentators.<sup>15</sup>

Thirdly, the Islamic law of armed conflict is self-imposed in the sense that it contains restrictions on warfare illustrated by classical Muslim jurists in a historical period that did not have international treaties on conduct of war.<sup>16</sup> Thus, it is an Islamic version of international humanitarian law that imposes unilateral obligations and restrictions on the Muslim military when it comes to dealing with war, regardless of whether those or similar norms are adhered to by the other party to the conflict.

Furthermore, Islamic law of armed conflict as well as Islamic law as a whole is a “jurists’ law”. Thus, it is a system of norms developed by individual Muslim jurists (*fuqaha*) led by the guidance of the Quran and precedents from the life of the Messenger of God, a.s., and by the context and time in which they lived and operated. The State government has never codified these rules, unlike, for example, Islamic civil or family law that have been the subject to State codifications, though not until the late 19th and early 20th centuries. Thereby it is not unusual that we come across differing and conflicting opinions of jurists, which reflect the various interpretations of the Quranic texts and actions of the Prophet, a.s., as well as the appreciation of the public interests (*maslaha*) and the prevailing customs in international relations of that time.

We will take as an example the issue of treating prisoners of war. Muslim jurists agree that the fate of prisoners of war is decided by the imam, or the holder of political authority, and not by individual soldiers or military commanders, which is in line with the provisions of modern international humanitarian law. However, they have different views on the options available to the imam in deciding the fate of prisoners of war.<sup>17</sup>

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15 Ahmed al-Dawoody, “Islamic law and international humanitarian law: An introduction to the main principles”, *International Review of the Red Cross*, p. 1000.

16 Ahmed Al-Dawoody, “IHL and Islam: An overview”, downloaded from: <https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>, accessed on 20.9.2018.

17 See Muhammad Munir, “Debates on the Rights of Prisoners of War in Islamic Law”, *Islamic Studies*, Vol. 49, nb. 4 (2010): p. 463–492.

One group of Muslim jurists limits the imam – the head of the Islamic State – to two options for dealing with prisoners of war: liberation with no compensation (*mann*) and ransom (*fida'*), based on the Quranic verse 47: 4.<sup>18</sup>

Another group made up of Hanafi lawyers believes that keeping the best interest of the community in mind, the head of State decides whether the prisoners will be: a) executed; b) enslaved; or c) released, with the obligation to remain in the Islamic State and pay *jizyah* because their return to the hostile country could strengthen the enemy army.<sup>19</sup>

The third group, made up mostly of jurists – the Shafi'i, the Hanbali, the Jaffari and the Zahiri – advocates that the political authorities have four options at their disposal: a) execution; b) enslavement; c) unconditional release; or d) ransom, while Malikis add the imposition of a duty to pay *jizyah*.<sup>20</sup> The jurists who allow the execution of prisoners of war base their position on reports of the execution of three prisoners of war in the war between the Muslims and their enemies in the time of the Messenger of God, a.s.. However, research by some authors shows that these executions were an exception to the general practice and were committed because of crimes committed prior to the war.<sup>21</sup>

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18 These comprise 'Ali ibn Abi Talib, al-Hasan ibn al-Hasan al-Basri (d. 110 AH/728 AD), Hammad ibn Abi Sulayman (d. 120 AH/737 AD), Muhammad ibn Sirin (d. 110 AH/728 AD), Mujahid ibn Jabr (d. 103 AH/721 AD), 'Abd al-Malik ibn 'Abd al-'Aziz ibn Jurayj (d. 150 AH/767 AD), 'Ata' ibn Abi Rabbah (d. 114 AH/732 AD), Abu 'Ubayd ibn Sallam, according to: Muhammad Munir, "Debates on the Rights of Prisoners of War in Islamic Law", p. 469. The Quranic verse they are referring to is: "When you encounter the unbelievers in the fight, strike them until you weaken them, and then tie them up and afterwards, either generously liberate them or demand ransom until the struggle is over. So do it! If Allah wanted, He would have revenge on them, but He wants to tempt you with by one another. He will not undo the deeds of those who perish in the way of Allah." (Quran 47: 4).

19 Muhammad Munir, "Debates on the Rights of Prisoners of War in Islamic Law", p. 466.

20 Ibid.

21 It is the execution of 'Uqbah ibn Abi Mu'ayt, a prisoner in Battle of Badr, for crimes he committed against the Prophet, a.s., and the Muslim community during 13 years of persecution of Muslims in Mecca. 'Uqbah was the leading enemy of the Muslims who tortured the Prophet, a.s.: standing with his foot on the Prophet's neck while he was sitting and almost choking, spat the Prophet in the face. Thus, the execution of 'Uqbah is not a precedent for establishing the right of the Imam to execute prisoners, but rather an exception, motivated by the crimes he committed before he came to imprisonment. The second executed was Abu 'Izzah al-Jumahi, after the Battle of Uhud. He had previously been captured at the Battle of Badr and was released on the condition that he would not write blasphemous poetry against Islam in the future, would not incite non-Muslims against Muslims, and would not join the enemy army, but he broke his promise. After the conquest of Mecca, the Prophet declared a general amnesty for all who lay down their weapons, except for seven to eleven persons who had previously committed horrific crimes against the Muslim state and its citizens. However, only one person was executed, and it was 'Abdullah ibn Khatal who had converted to Islam and had been the Prophet's Companion in Medina, so the Prophet sent him to collect zakat from a tribe together with one servant. He killed that servant on the pretext that he had badly cooked his food, took his money and fled to Mecca, where he rejected Islam. He, too, could have avoided the execution by apologizing to the Prophet, a.s., for his actions, but he did not. Thus, the execution of prisoners of war was never an established rule during the life of the Prophet, a.s. The release of captives without compensation was the rule in the practice of the Prophet, a.s., and the righteous Caliphs. Ibid, p. 471– 473).

The fact that classical Islamic law of war developed through the interaction of text and historical context and that Islamic legal tradition is not homogeneous but composed of sub-traditions, makes it difficult to compare it to modern humanitarian law. According to some researchers, comparative studies of this kind reduce both legal traditions, Islamic and Western, to static and monolithic constructs though they are in fact complex legal traditions that are dynamic (in terms of changes driven by the passage of time) and plural (made up of a series of sub-traditions). Another possible disadvantage of such comparisons is the disguised Orientalism, which is manifested in the fact that the Western system is taken as a norm based on which the adequacy or compatibility of the Oriental “Islamic system” is measured.<sup>22</sup>

Another challenge faced by researchers and activists in the field of Islamic law of armed conflict concerns the contextualization of Islamic norms of war. Specifically, the sources of this legal discipline speak of a context of war in which weapons, techniques and tactics of warfare differ significantly from contemporary wars, i.e. whose destructive capacity, especially in relation to non-combatant populations whose protection is the focus of humanitarian norms, was far smaller. When some Muslim military formations in contemporary armed conflicts invoke the opinions of classical Muslim jurists who have legitimized certain war techniques and tactics prohibited by international humanitarian law today, they ignore the difference between primitive forms of warfare and modern wars that use far more lethal weapons and more perfidious war tactics.<sup>23</sup>

Despite the prominent shortcomings of the comparative approach, it cannot be ignored that it has numerous positive effects like revealing the fundamental compatibility of modern humanitarian law with the spirit and principles of Islamic law of war, but not necessarily with all the individual rules formulated by Islamic jurists throughout history.

### **Importance of international treaties and multilateralism of international relations for contemporary Islamic law of armed conflict**

The classical *siyar* doctrine divides the world into two zones: the “space of Islam” (*dar al-Islam*) and the “space of disbelief” (*dar al-kufr*), the latter being qualified as the “space of war” (*dar al-harb*) or “space of peace” (*dar al-sulh*), depending on whether a particular country is at war or at peace with a Muslim State. This division, which is comparable to the classical division of Roman status right into Roman citizens (*cives Romanus*) and foreigners (*gentium*), corresponded to the

22 James Cockayne, “Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations”, *International Review of the Red Cross*, vol. 84, nb. 847 (2002): p. 597.

23 Ahmed al-Dawoody, “Islamic law and international humanitarian law: An introduction to the main principles”, p. 1001.



nature of the imperial States, but it has been overcome historically. The practices of contemporary Muslim governments, communities and the Muslim diaspora point to new *siyar* norms. Examples of contemporary *siyar* at a practical level include the membership of Muslim States in the United Nations and their active participation in the formulation of various international human rights conventions. The other instances include their accession to international humanitarian law conventions and the formation of an Islamic Cooperation Organization whose charter indicates the agreement by Muslim countries that their relations with other countries will be governed and guided by equality and reciprocity and respect for the norms of international law.<sup>24</sup>

Hence, for the modern *siyar*, as well as the elaboration of the contemporary Islamic law of armed conflict, it is of utmost importance to understand the legal nature of treaties (conventions, pacts) in Islamic law, as well as the fact that all Muslim countries are signatories to the Geneva Conventions. A treaty (*'aqd* or *'ahd*) in Islamic law is not only subject to the dispositive law of the contracting parties, but it is also a treaty with God. Islamic law fully recognizes the principle of *pacta sunt servanda* under which contractual obligations must be fulfilled, of which we have clear indications in the Quran:

*“You who believe, fulfil your obligations”*<sup>25</sup>

*“Fulfil any pledge you make in God’s name and do not break oaths after you have sworn them.”*<sup>26</sup>

Support for the obligation to fulfil contractual obligations is also found in the Hadith of the Messenger of Allah, a.s.: “Muslims are obliged to fulfil the conditions they have assumed, except for the condition that forbids what is allowed or allows what is forbidden.”<sup>27</sup>

The early history of Islam shows that agreements were probably the most important aspect of Ummah’s international relations. As with all other emerging States, these agreements were important because they provided international legitimacy to the Muslim State through formal recognition by other States.<sup>28</sup>

In principle, the terms of the treaty must be in accordance with Islamic law. However, even when international treaties in the early history of Islam contained provisions that were contrary to some provisions of Islamic law for political

24 Mohamed Elewa Badar, “Jus in Bello under Islamic International Law”, *International Criminal Law Review*, Vol. 13 (2013): p. 607–608.

25 Quran, 5: 1.

26 Quran, 16: 91.

27 al-Tirmidhi, Sunan, p. 1352.

28 M. Cherif Bassiouni, *The Shari’a and Islamic Criminal Justice in Time of War and Peace*, p. 151.

reasons and a balance of military power, the Muslim community did not question an obligation to honour those contracts. An example of this is the agreement in Hudaybiyyah, whereby the Prophet, a.s., accepted the condition of returning to the Quraysh tribe those who converted to Islam and fled to Medina, as well as the requirement that Muslims abstain from performing Hajj without the permission of Quraysh even though the Hajj represents one of the five pillars of Islam.<sup>29</sup>

As mentioned earlier, Muslim countries have accepted to be members of the United Nations and a party to several international conventions that contain the essence of international humanitarian law. Therefore, based on the Islamic legal principle of fulfilling contractual obligations (*pacta sunt servanda*), they are obliged to ensure the protection of civilians, medical personnel operating under the Red Cross and Red Crescent emblems and other categories of persons who do not participate in or cease to participate in the war. They are also obliged to prosecute and penalize anyone who violates the above principle of distinguishing between combatants and non-combatants, as well as other humanitarian law restrictions regarding the use of weapons and war techniques. Finally, Muslim governments can fulfil the commitments they have made by signing international treaties either by the direct application of international law or, in parallel, the application of parallel provisions contained in the sharia.<sup>30</sup>

## Conclusion

Islamic law of armed conflict has developed from the 2nd century AH / 8th century AD in the works of prominent representatives of the classical schools of Islamic law, especially in discussions on international relations of the Muslim State (*siyar*). Among these works, the *Grand Proceedings of Islamic International Law (Kitab al-siyar al-kabir)* by Hanafi jurist Muhammad al-Shaybani, which also served as a guide for the foreign policy of the Ottoman State, is particularly noteworthy.

Classical Muslim authors have developed the doctrine of Islamic law of war based on a whole range of sources of Islamic law, both textual and rational. Most Islamic regulations on the use of force were derived from the Quran and the Sunnah, as well as the State practices of the first rulers of the seventh-century Muslim State, i.e. the Prophet, a.s., and the first four Caliphs.

Islamic law of armed conflict is characterized by the religious nature of its sources, principles and rules, as well as the motivation to comply with its norms, rather than the unilateral character of a given system of norms, the plurality of legal opinions and conclusions, as well as its attachment to pre-modern methods and techniques of warfare, which necessitates its contextualized interpretation and application in modern armed conflicts.

<sup>29</sup> Ibid, p. 150–151.

<sup>30</sup> Ibid, p. 152–153.

Unlike classical Islamic *jus in bello*, which developed as a unilateral system of norms that binds Muslim participants in international and non-international armed conflicts regardless of whether the other party to those conflicts adheres to the given norms, modern Islamic law of armed conflict must respect the principle of multilateralism of international relations and their standardization. The fact that contemporary Muslim Nation States have accepted membership to the United Nations and assumed certain international treaty obligations regarding the use of force and the conduct of hostilities in armed conflict requires that contemporary researchers in Islamic international humanitarian law pay particular attention to the concept of an agreement or convention (*'ahd*) and its incorporation into the modern doctrine of *siyar*.

## Bibliography

1. Al-Dawoody, Ahmed. "IHL and Islam: An overview", <https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>, (downloaded on 20.9.2018).
2. Al-Dawoody, Ahmed. "Islamic law and international humanitarian law: An introduction to the main principles". *International Review of the Red Cross*, Vol. 99, nb. 4 (2017).
3. Al-Farra', Muhammad Sulayman Nasrullah. "Ahkam al-qanun al-dawli al-insani fi al-islam". MA Thesis, Faculty of Sharia and Secular Law of the Islamic University of Gaza, 2007.
4. Al-Tirmidhi. *Sunan*. 1352.
5. Badar, Mohamed Elewa. "Jus in Bello under Islamic International Law". *International Criminal Law Review*, Vol. 13 (2013).
6. Cockayne, James. "Islam and International Humanitarian Law: From a Clash to a Conversation between civilizations". *International Review of the Red Cross*, Vol. 84, nb. 847 (2002).
7. Hamidullah, Muhammad. *Majmu'a al-vatha'iq al-siyasiyya li 'ahd al-nabawi wa al-khilafa al-rashida*. Beirut: 1985.
8. Karčić, Fikret. *History of Sharia Law*. Sarajevo: Faculty of Islamic Studies, 2005.
9. Karčić, Fikret. *Sharia Law Studies*. Zenica: Bemust, 1997.
10. Korkut, Besim, trans. Quran with translation. Medina: Complex Khadim al-haramayn al-sharifayn al-malik Fahd for print Mushafi Sherif, no publication year.
11. Majid Khadduri, prev. *The Islamic Law of Nations: Shaybani's Siyar*. Baltimore: Johns Hopkins University Press, 1966.
12. M. Cherif Bassiouni. *The Shari'a and Islamic Criminal Justice in Time of War and Peace*. New York: Cambridge University Press, 2014.
13. Muftić, Teufik. *Arabic Bosnian Dictionary*. Sarajevo: El-Kalem, 1997.
14. Munir, Muhammad. "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. 93, nb. 881 (2011): 81-102.
15. Munir, Muhammad. "Debates on the Rights of Prisoners of War in Islamic Law". *Islamic Studies*, Vol. 49, nb. 4 (2010): 463-492.
16. Oussedik, Fevzi. *Introduction to International Humanitarian Law*. Translated by Bego Hasanović. Sarajevo: Qatar Red Crescent and Faculty of Islamic Studies, 2011.

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## RIGHT TO PEACE AND TO INITIATE A WAR IN ISLAMIC LAW

**Abstract:** *Islamic teaching invokes peace, seeks it and establishes various means for its expansion and strengthening. Despite these efforts that are based on the fundamental Quranic principles, the Prophet's tradition and the rich heritage of Islam, wars have coloured the history of man's existence on earth since its creation to the present day. There is hardly a period in history without war. In itself, war is not desirable in Islamic teaching and is waged only when it becomes a strict obligation and when all available options for a peaceful solution are exhausted. Accordingly, the Almighty says in the Quranic verse 216 of sura al-Baqara: "Fighting is ordained for you, though you dislike it..." A legitimate war in Islam is not of an offensive nature, but fought out of necessity and self-defence. Through the examples of different battles we can conclude that it has always been a war in response to aggression, attack, siege or other forms of violence. These battles were neither the trigger for a war nor the imposition of faith by use of force nor the desire to grab prey. The position of Islamic teachings towards war and the circumstances of warfare is best framed through Abu Bakr Abdullah ibn Uthman's instructions to Usama ibn Zayd ibn Harithah's army before they set out to war. He laid out clear views on the dignified treatment of the other party, non-Muslims, protection of their dignity and protection of universal human values. The far-reaching influence of these rules is best illustrated by the fact that they have become the framework for international humanitarian law (IHL) and numerous international conventions and laws.*

**Keywords:** peace, war, conflict, battle, Islam, human rights, coexistence, international conventions.

### Introduction

The time we witness, the events that fill its pages, the tragic numbers of those killed, oppressed, raped, expelled or missing and the large number of people who have been displaced from their hearths and homelands bring us back to Islam and its fundamental intentions based on peace and security, prohibiting violence and injustice of every kind. Peace is neither a casual idea in Islam that appears

to solve the problem of wars and save lives nor is it an ideal theory that cannot be translated into reality. Rather, it is a fundamental and deeply-rooted idea that is both theoretical and practical, idealistic and realistic at the same time. The followers of Islam should reflect godliness, which is the basis of their belief and behaviour, enabling them to build a global society of mutual cooperation, fraternity, justice and charity, where rights and holiness are held in high regard and evil is minimized.<sup>1</sup>

Holy Islam is the last creed and mission of God. From its very appearance in the time of the Prophet (peace and blessings of Allah be upon him), He emphasized upon the qualities of the middle way. This is marked by moderation, tolerance, relief and elimination of anxiety and difficulty in all regulations, provisions and rules that are permanent and applicable in all times and places until the end of the world. As the faith of the right path, it permeates all areas of belief, worship, ethics, mutual actions and social relations.

There is no doubt that the middle path (*vesatijja*) is one of the topics most closely connected with the reality of Muslims whose religious, ideological, rational, cognitive and practical framework are extremely important to emphasize, because this path is, in fact, an Islamic programme: the realization of happiness and construction of civilizational values depend upon it. However, as ideologies wander between exaggeration and fierceness on the one hand, and negligence and carelessness on the other, we are obliged to pause and think so as to correct misconceptions and distorted attitudes.

In today's globalized world, any inter-religious or inter-ethnic incident, conflict, violence, provocation or xenophobic outburst can threaten relations between people and groups across the world. Thus principles of dialogue and coexistence among people of different beliefs and worldviews are essential.

Research indicates that there has been virtually no long-term respite from armed conflict in human history. Ever since man has lived on earth there has been some form of war and conflict. Statistics show that only 26 days of human history have been spared wars, conflicts and violence. Considering that the history of warfare is also a kind of chronology of violence, many sociologists and psychologists claim that war is, in fact, an expression of man's natural aggression. Otherwise, they believe, it would have disappeared with the progress of civilization.

The first recorded war was fought around 2700 BC in Mesopotamia between Sumer and Elam. Interestingly, the former lived in present-day Iraq and the latter

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1 According to: Mutlaq Rashid Alkarawi, Role of Islam in Strengthening World Peace, trans. A. Adilović (Sarajevo: Centar za dijalog – Vesatijja and El-Kalem, 2012), p. 11.

in present-day Iran. The English and French had been at war for more than 100 years, from 1337 to 1453, and the Arauco War in South America lasted for 290 years from 1536 to 1825 between the native population and the Spanish invaders. While the First World War was the bloodiest war, World War II was a total and mass-mobilizing war. Some wars have resulted in the loss of millions of human lives, such as the Mongol conquests, whereas the shortest war lasted only 40 minutes.

Today, most wars are being fought in areas where Muslims constitute the majority population. Muslims today make up the largest percentage of displaced people and refugees. Some statistics also indicate that nine out of 10 orphans in the world are Muslim. And as painful as these numbers and facts may be, the truth is we cannot avoid facing them as these portray our reality.

Islamic teaching clearly promotes and encourages peace and that is the original purpose of its mission. Its doctrines, regulations and moral principles confirm that war is hateful and believers are to refrain from starting or participating in armed conflicts. If a war does break out they are to minimize damage and ease consequences.

### **Etymological constants of peace**

It is important to look into the etymology of some of the keywords that define Islam. The words Islam and *silm* (or *salam*) are derived from one root word: *slm*.<sup>2</sup> Islam is the *peace* in whose shade Allah has commanded the believers to enter and take refuge. The Supreme Lord says: “You who believe, live in peace and do not follow in the footsteps of the Shaitan; he really is an open enemy to you”<sup>3</sup>. The word *silm* in this Quranic verse has been interpreted as the word *salam* (peace) that stands in contrast to the word “war” or *harb* in Arabic.<sup>4</sup> It becomes clear that God’s call to believers is to enter into peace and not turn their heads. The word *silm* also bears the meaning of the word “Islam”.<sup>5</sup> The verse can consequently be understood as an invitation for all to enter into the sphere of obedience to God or *Islam*, its doctrine, servitude, mutual conduct and business, moral and legislative realm. By this, one enters into true peace with oneself, one’s family, one’s community and with all people.<sup>6</sup>

The fundamental meaning of the word *silm* is complete surrender and submission (*istislām*)<sup>7</sup>, obedience and abandonment of friction. In addition, immersing

2 Teufik Muftić, *Arabic Bosnian Dictionary* (Sarajevo: El-Kalem, 2004), p. 670.

3 Q, Al-Baqara, 208.

4 Teufik Muftić, *Arabic Bosnian Dictionary* (Sarajevo: El-Kalem, 2004), p. 278.

5 Ibid, p. 670.

6 Jusuf al-Karadavi, *Jihad. Types and Implications*, trans. F. Pašanović, M. Hadžić, M. Mehabović, Z. Mujkanović and M. Mrahoročić (Sarajevo: Centar za dijalog – Vesatijja and El-Kalem, 2013), p. 257.

7 Ibid, p. 670.

completely in God's provision and sincerity toward Him brings peace and harmony among men, rejecting warfare and killing among those who firmly hold onto Him. Explanations of the word of God state that living in peace strengthens the feeling that it is an invincible fortress. Believers who enjoy completeness in peace understand that they should remain steadfast and persevere in promoting it to gain its fullness.<sup>8</sup>

Principles of the Holy Quran direct us to the paths of peace and say: "People of the Book, Our Messenger has come to make clear to you much of what you have kept hidden of the Scripture, and to overlook much [you have done]. A light has now come to you from God, and a Scripture making things clear, with which God guides to the ways of peace those who follow what pleases Him, bringing them from darkness out into light, by His will, and guiding them to a straight path."<sup>9</sup>

Peace is one of the most beautiful names of the Creator by which devotees invoke their Lord and seek to approach Him more and more by remembering Him. The Muslim reading the Quran encounters this: "They shall have the Home of Peace with their Lord, and He will take care of them as a reward for their deeds."<sup>10</sup>

In the Muslim community, there is the name *Abduselam*, which means slave of the Peaceful, that is God. *Jannah* (heaven), which a believer longs for and strives to be among its inhabitants, is called the house of peace, and the most common word in it is peace. It will be a greeting among believers in the other world: "when they meet Him they will be greeted with 'Peace'— and He has prepared a generous reward for them."<sup>11</sup> Peace or Salam is the obligatory greeting of the adherents of Islam both in the transient (this world) and in the eternal world: "Peace to you, mercy and blessing of God! *Esselamu alejkum ve rahmetullahi ve berekatuhu.*" In the Prophetic tradition, the Hadith often reminds to spread peace.

When a Muslim, a believer in prayer, performs the act of sitting, which is an integral part of the prayer ritual, he sends a salute of peace to Prophet Muhammad, himself and his congregation, saying: "Peace be to you, Prophet, and the grace and blessing of God; peace to us and to the good slaves of God." In completing his prayer he again sends a greeting of peace, turning first to his right and then to his left, declaring that he was in a state of peace during his complete devotion to God. When he has finished praying, he turns to face the people and life around them, accepting them in peace. Thus, a Muslim believer is at peace in his servitude and also in relation to other people.<sup>12</sup>

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8 Tafsir Ibn Jarir (1/247–248) and Tafsir al-Manar (2/256–258).

9 Q, al-Ma'ida, 15–16.

10 Q, al-An'am, 127.

11 Q, al-Ahzab 44.

12 According to: J. al-Karadavi, *Jihad. Types and Implications...*, p. 260.

## What if a war breaks out after all?

It is in the nature of believers of Islam to invoke and spread peace. However, if war breaks out and becomes their obligation in the name of the Supreme Creator and His path, then the believer enters the war decisively, fearlessly and patiently, convinced that one of two good things await him: victory or death in the name of God and His path. The Almighty says: “Fighting is ordained for you, though you dislike it. You may dislike something although it is good for you, or like something although it is bad for you: God knows and you do not.”<sup>13</sup>

When Muslims are forced to fight a battle that has become their strict *farz* (duty), they are obliged to do everything they can to minimize its human and material damage and are ordered not to kill anyone but the one who is fighting them. They must not kill women, children, the elderly or the needy, monks and religious persons, farmers and traders. They are also forbidden to cut down trees, tear down buildings, disturb peace and order on earth. They will only do what the necessary needs of war require. But necessity has its own rules and they are required to adhere to them. The Quran has also limited what is necessary by not crossing a certain border and non-violence.<sup>14</sup>

Most historical sources record Abu Bakr’s, Allah was pleased with him, will to Usama’s army that reads: “Men, I order 10 things to you and remember them well: Do not be treacherous or take the spoils of war to hide; do not deceive or mutilate, do not kill children, old men and women; do not cut off the top of a palm tree or burn it; do not cut fruit and slaughter sheep, cows or camels except for food. You will come across people who have dedicated themselves to the monasteries, so leave them alone, them and what they have dedicated themselves to. You will come across people who will offer you dishes with a variety of foods, so when you eat from them, mention Allah’s name.”<sup>15</sup> Abu Bakr’s will, pronounced more than 14 centuries ago, preceded and became the backbone of numerous international conventions, with many provisions, lessons and principles being derived from it. Humanitarian law experts consider it a summary of the Geneva Conventions and the principles of IHL. A number of international treaties have been made based on this will, including the First International Convention on the Protection of the Wounded and Sick in 1864 (ten articles and subsequent revisions), the Convention on the Protection of the Wounded and Shipwrecked (63 articles), the Convention on the Protection of Prisoners (143 articles), the Convention on the Protection of Civilians (169 articles), the Protocol I (two articles) and the Protocol II (28 articles).<sup>16</sup>

13 Q, al-Baqara 216.

14 According to: J. al-Karadavi, *Jihad. Types and Implications...*, p. 262.

15 Ibn Ğarīr al-Tabarī, *Tārīḥ al-rusul wa al-mulūk*, 3rd part, p. 227.

16 From the presentation of Dr Mohammad Mujahid at the Second Arabic Symposium in International Humanitarian Law held in Amman from 15 to 24 November 1986 and 1988.



Abu Bakr's first will refers to the prohibition of treachery, which essentially prohibits violations of Islamic principles and commandments. If a fighter says the words "fear not" to a non-Muslim, he should not afterwards be killed, nor his dignity harmed through an act such as rape. In today's context, Article 27 of the Geneva Convention on the Protection of Civilians mandates that "women must be protected, especially against the violation of their personal dignity, especially rape. Attacks on the elderly are forbidden, no matter who it is."

The second will refers to a ban on the appropriation of war booty, warning fighters to free themselves from any craving for someone else's right and the malice that could lead them to kill innocent people and civilians. The third will forbids deceit, saying that Muslims are forbidden to initiate fighting even when one of them has been killed first.

Article 27 of the Geneva Convention on the Protection of Civilians in wartime states: "Protected persons shall have the right, at all times, to respect for their personality, their honour, their family rights, their religious beliefs and rituals, their habits and customs. They will be treated humanely at all times. No force should be used on them."

The fourth will forbids mutilation and emphasizes how much Islam respects human beings even after their death so they must be hastily buried with respect. It is echoed in Article 17 of the First Geneva Convention which stipulates that "corpses must be collected and protected against looting". The fifth will prohibits the killing of vulnerable and weak categories of people including children, the elderly and women, as confirmed by Article 27 of the Geneva Convention.

Even during difficult conditions of war and great danger, Abu Bakr pays attention to the protection of the environment, flora and fauna, based on the Supreme Creator's love for nature.

The protection of religious persons and priests is especially emphasized in Abu Bakr's wills to ensure that they live in peace. These are paralleled in the provisions on religious persons accompanying the armed forces set out in Articles 24 and 27 of the First Geneva Convention and Articles 36 and 37 of the Second Geneva Convention.<sup>17</sup>

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17 V. F. Oussedik, *Introduction to International Humanitarian Law...*, p. 76–79.

## Terminology specific to war and conflict in Islamic law

Here are some of the most common terms used in the context of war and conflict in Islamic law:

*Jihad* is derived from the Arabic root *ǧāhada*, *yuǧāhidu*, *ǧihād*, which literally means investing effort and potential and enduring hardship.<sup>18</sup> The Quran mentions it 34 times in various derivatives. It is widely used in the sense of the struggle to promote religion and defend the inviolable values of the *Ummah*, the Muslim community. *Jihad*, as it is treated in the Quran and Sunnah, has a wider and more far-reaching implication than fighting. As many as 13 types of *jihad* are mentioned including *jihad* against one's ego, corruption, injustice and negativity in society. But, there is also a *jihad* waged with weapons against the enemy and others. In common understanding, the different types of *jihad* boil down to just one of its forms, which is armed combat.

*Kital* is an armed combat. It is one of the branches of *jihad*, the armed battle in opposing the enemy, which is understood by many to be an understanding of total *jihad*, although it is etymologically and semantically distinct from *jihad*. Etymologically it comes from the roots *qātala*, *yuqātlu*, *qitāl*, *muqātela*<sup>19</sup> and has a different meaning from *jihad* because it basically has the meaning of "killing" and *jihad* has the meaning of "toil". The word *kital* with derivatives in the Quran is mentioned 67 times. According to Islamic religion, *kital* is led only in the way of Allah and is led by the believers.

*Jihad* is a broader and more comprehensive word than *kital*, although sharia law practitioners have often defined *jihad* as *kital* in the path of Allah. *Jihad* is the obligation of every Muslim man and woman, physically and financially, in thought and word. *Jihad* complements an individual's belief. We read this in many Quranic verses: "Believers, bow down, prostrate yourselves, worship your Lord, and do good so that you may succeed. Strive hard for God as is His due: He has chosen you and placed no hardship in your religion, the faith of your forefather Abraham..."<sup>20</sup>

From this it can be concluded that every Muslim should be a *mujahid* but it is not necessary for every Muslim to be a *muqatil*, an armed fighter. To be a *muqatil* is an obligation only in certain conditions.

*Harb* is the use of weapons and material force by one group against another; tribe against tribe, State against State, or a group of States against another. War is a secular term that existed before *jihad*. Its aim is to dominate and subjugate others

<sup>18</sup> T. Muftić, *Arabic Bosnian Dictionary*, p. 245.

<sup>19</sup> *Ibid*, p. 1166.

<sup>20</sup> Q, al-Hajj 77–78.

and to control their wealth. The term *jihad* is different because it is a religious term that is characterized by its goals and motives, ethics and criteria. However, *jihad* is acceptable in sharia only if it is intended to uplift the word of God, which is truth and justice, dignity, security and freedom for all people.

'*Unf* is violence and signifies fierceness and rudeness. It is mentioned in Hadiths but not mentioned in the Quran.

'*Irhāb* comes from the verbs *rahība*, *yarhabu*, *rahb* and *ruhban* which mean *to be afraid* or *to fear*.<sup>21</sup> The extended verb form *'arhaba*, *yurhibu* and *'irhāb* mean to intimidate or frighten. The opposite of it is *'amina* (to be safe) or *'amn* (safety).<sup>22</sup>

A legitimate war in Islam is not of an offensive nature, but a war fought out of necessity and in self-defence. Through the examples of different battles, we can conclude that it has always been a war in response to aggression, attack, siege or other forms of violence. These battles were not the beginning of a war or the imposition of faith by means of weapons, nor the desire to grab prey.

In the case of a permissible struggle, Islam has laid down special rules through numerous verses. Thus, the Quran says in the verse we quoted previously: "Fighting is ordained for you, though you dislike it..."<sup>23</sup> Also in another verse it says, "Fight in God's cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits."<sup>24</sup> It indicates that according to the teachings of Islam, war must not depart from its main and well-defined goal. War and combat are forbidden according to the teachings of Islam, except to repel attacks and free people so that they can live with freedom of choice.<sup>25</sup>

## How did the first generations of Muslims wage war?

At the time of the Prophet and the first Caliphs, war was defensive in nature, fought in self-defence and to defend others. In today's terminology, this is called lawful or legal defence.<sup>26</sup> In this regard numerous international treaties and in particular the Geneva Conventions that recognized the right to armed resistance and self-determination by people also find resonance in the holy words of God.

"Those who have been attacked are permitted to take up arms because they have been wronged— God has the power to help them— those who have been driven unjustly from their homes only for saying, 'Our Lord is God.' If God did not repel

21 T. Muftić, *Arabic Bosnian Dictionary*, p. 564.

22 Ibid, p. 48.

23 Q, al-Baqara 216.

24 Q, al-Baqara 190.

25 According to: M. R. el-Karavi, *The Role of Islam in...*, p. 12.

26 F. Oussedik, *Introduction to International Humanitarian Law...*, p. 61–62.

some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause – God is strong and mighty...".<sup>27</sup>

In a situation of war and conflict, under Islamic law, it is fair to help oppressed women and men. This is confirmed in the Quran:

*"Why should you not fight in God's cause and for those oppressed men, women, and children who cry out, 'Lord, rescue us from this town whose people are oppressors! By Your grace, give us a protector and give us a helper!'"*<sup>28</sup>

Islam encourages peace, tolerance and brotherhood with certain provisions for fighting wars as an exception. It is not a devastating war fought over dominance but one that seeks to restore alienated rights, help the oppressed, restore justice and charity among people.<sup>29</sup>

In his Muqaddima, Ibn Khaldun recalls that war has existed since Allah began creation and human beings have been inclined to it across nations and generations through the course of history. He observes that there have been various reasons for this such as jealousy, prestige, rivalry, aggression, commitment to Islam, protection, expansion of power and self-defense, among others.

## **Life / coexistence / dialogue in Islamic perspective**

Because Islam calls for peace, it proclaims that the human personality is the most sacred of them all. It equates the unlawful killing of one person with the murder of all people and the salvation of one person equals the salvation of all people. That is why one of the basic tenets of Islam tells us: "On account of [his deed], We decreed to the Children of Israel that if anyone kills a person – unless in retribution for murder or spreading corruption in the land – it is as if he kills all mankind, while if any saves a life it is as if he saves the lives of all mankind. Our messengers came to them with clear signs, but many of them continued to commit excesses in the land."<sup>30</sup> Islamic fiqh (legal) rule in international and general social relations requires that believers act upon the principle that war should be waged against every conqueror and peace should be built with all who are ready for it. The Almighty says: "But if they incline towards peace, you [Prophet] must also incline towards it, and put your trust in God: He is the All Hearing, the All Knowing."<sup>31</sup> Pluralism of thought and differing points of view do not represent weakness. It's the very idea that one's opinion is the "only way to be" that often causes conflict

27 Q, al-Hajj 39–40.

28 Q, al-Nisa' 75.

29 F. Oussedik, *Introduction to International Humanitarian Law...*, p. 64.

30 Q, al-Mā'ida 32.

31 Q, al-'Anfal 61.

and discord. Someone said long ago that where everyone thinks, no one thinks.<sup>32</sup> Today, more than in any other time, people need to find a way to manage their differences and dialogue is one of the important aids to this effect. Differences have been the grace of God given and recommended to humans since. Learning to look for similarities, while being aware of the many differences that surround us is the pledge to build a happy and peaceful society. The old saying that things are perceived through their opposites suggests that understanding the other helps us to correct ideas about ourselves, as well as to the basis of mutual human knowledge.<sup>33</sup>

The fundamental purpose that Allah Almighty made men for, is to help one another, agree with one another and sit with one another: "People, We created you all from a single man and a single woman, and made you into races and tribes so that you should recognize one another. In God's eyes, the most honoured of you are the ones most mindful of Him: God is all knowing, all aware."<sup>34</sup>

In the context of speaking about the direction to be followed in dealing with problems that occur within different social communities and among different people, Islam takes the following view: "Good and evil cannot be equal. [Prophet], repel evil with what is better, and your enemy will become as close as an old and valued friend."<sup>35</sup> It is a direction of gentleness and indulgence, a direction that suggests peace: "Repel evil with good..."<sup>36</sup>

It is necessary to understand the surroundings in which we live, the people we share space with, those we have or had a problem with, to think objectively about the circumstances that surround us, about the most beautiful speech and the best strategy. It is necessary to change our own habits, which are very often the result of an imposed view of the world. It is imperative to think of a solution that will turn your enemy into a friend, who will embrace you with all your personalities and problems: "...but only those who are steadfast in patience, only those who are blessed with great righteousness, will attain to such goodness."<sup>37</sup>

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32 Muhamed Jusić, "Dialogue has no alternative", *Vesatijja forum*, 2014, no. 5/1015 (2014): p. 23.

33 Ahmed al-Rawi, *We and others. Toward the best relationship between the components of human society, Muslims and others*, trans. Mehmed Kico and Amrudin Hajrić (Sarajevo: Centar za dijalog – Vesatijja, El-Kalem, Izdavački centar Rijasetu islamske zajednice u BiH, 2013), p. 354–355.

34 Q, al-Ĥujurat 13.

35 Q, Fuṣṣilat 34.

36 Q, al-Mu'minūn 96.

37 Q, Fuṣṣilat 35.

## Conclusion

Islam implies peace as a basis and norm in relationships with other people. The root of the *slm* underlying the word Islam is the concept of peace and obedience. From a spiritual perspective this should mean achieving peace through obedience to God. There are numerous places in the Quran and the Prophet's tradition which indicate that this concept refers to peace with God, inner peace as a result of relationship with God, peace with human beings and peace with nature. Peace is the salutation of Muslims, one of God's beautiful names, a description for *jannah* (paradise) and a greeting of its inhabitants.

There are no Quranic teachings that approve or encourage the fight against any peaceful individual. The only two justifications for combat activities are to stop aggression and cruel oppression. The condition for ending hostility is not to embrace Islam, but to stop aggression and oppression. There is no Quranic verse which, when placed in a particular historical context, allows fights on the basis of religious, ethnic or national origin. The Prophet of Islam and the Rightly Guided Caliphs were the best examples of how one should behave on the battlefield. Wars and battles were resorted to only when all other peaceful avenues to stop aggression had been exhausted. Historically, it cannot be said that Muslims have always fully understood and interpreted the concept of peace and armed struggle as required by the Law of God and numerous rules and recommendations have been violated to their detriment.

## Bibliography

1. Al-Rawi, Ahmed. *We and others. Toward the best relationship between the components of human society, Muslims and others*. Translated by Mehmed Kico and Amrudin Hajrić. Sarajevo: Centar za dijalog – Vesatijja, El-Kalem, Izdavački centar Rijasete islamske zajednice u BiH.
2. Al-Manār, Tafsīr (2/256–258).
3. Ibn Ġarīr al-Tabarī, *Tārīḥ al-rusul wa al-mulūk*.
4. Ibn Ġarīr, Tafsīr (1/247–248).
5. Jusuf al-Karadavi. *Jihad. Types and Implications*. Sarajevo: Centar za dijalog – Vesatijja and El-Kalem, 2013.
6. Jusić, Muhamed. "Dialogue has no alternative". *Vesatijja forum*, Sarajevo: Preporod, (2014): 23.
7. Korkut, Besim, trans., *Quran with translation*. Medina: Complex Khadim al-haramayn al-sharifayn al-malik Fahd for print Mushafi Sherifa, no year of publication.
8. Mutlak Rašid el-Karavi. *Role of Islam in Strengthening World Peace*. Translated by A. Adilović. Sarajevo: Centar za dijalog – Vesatijja and El-Kalem, 2012.
9. Muftić, Teufik. *Arabic Bosnian Dictionary*. Sarajevo: Rijaset Islamske zajednice u Bosni i Hercegovini and El-Kalem, 2004.
10. Oussedik, Fevzi. *Introduction to International Humanitarian Law*. Sarajevo: Faculty of Islamic Studies and Qatar Red Crescent, 2011.

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## HUMAN DIGNITY IN THE LIGHT OF ISLAMIC LAW<sup>1</sup>

**Abstract:** *In this paper, we examine Islamic teachings and how they describe the special place and role of man on earth and the basic principle of human dignity. Islamic jurists have derived these teachings from Islamic sources, quoting the Quranic verses and the Hadith (traditional sayings of Muhammad, peace and blessings of Allah be upon him), as well as using examples from history. The topic of human dignity has become increasingly relevant in the light of ongoing conflicts, constant tensions and differing interests. As a result, it's easy to reduce a person to merely a number or a statistic, completely overlooking the human dignity and universal honour. Islam teaches that human dignity is a gift from God that must be respected, protected and valued.*

**Keywords:** al-karāma, human dignity, inviolability, honour, equality, justice, freedom of religion and protection of property, charity.

### Introduction

The Quran uses the expression *al-karāma* to describe the dignity of man. *Karāma* also means tribute, honour, reputation, prestige, respect, esteem, nobility and generosity.<sup>2</sup> Allah's beautiful name *al-Karīm* is derived from the root of this term and is most commonly translated as noble. *Karīm* is defined in the *Lisān al-arab* dictionary as something that encompasses all that is good, honourable and virtuous. The Quran is also said to be *al-Qur'anal-karim*, which means that the Quran, the Word of God, is full of goodness, benefit and value.

According to the Quran, man is created in "the most beautiful form". He is given special abilities such as intellectual capabilities to learn, develop and acquire new knowledge. On earth, Allah Almighty has made many benefits available to him;

1 The paper was presented at the Seminar on International Humanitarian Law in the light of Islamic Law, held on 20.12.2017, organized by the Faculty of Islamic Studies of the University of Sarajevo and the International Committee of the Red Cross. The seminar was held at the Faculty of Islamic Studies in Sarajevo. The paper has been modified for publication.

2 Teufik Muftić, *Arabic Bosnian Dictionary* (Sarajevo: El-Kalem, 1997), p. 1284.

benefits that are not only material and intellectual, but also spiritual. According to Islam, the special grace given to man is the grace of faith. Allah, J.S., has from time to time sent messengers and revelation to man to point out the “right path”, to teach him his mission, role and opportunity given in his worldly life to shape himself into “the most beautiful form”. In light of the Hadith of Muhammad (peace and blessings of Allah be upon him) “I am sent to perfect morality in men,”<sup>3</sup> the special task of man is to develop into a person governed by the highest moral principles. A human being has the freedom to make choices and to decide which life path to take. At the same time, man is asked to treat his attributes equally and with dignity.

The history of mankind and the reality of modern man depict that it is not only a sublime but a difficult task, in fact a great challenge for man. The constant hostilities, wars, attacks on human dignity and rights and the destruction of goods and resources all lead to the conclusion that one irresponsibly refers to, or even contrarily to, the position which Allah, J.S., has entrusted to him. This behaviour of man favours the political and philosophical theories according to which the “natural state” (*statum naturae*) of man is war (Thomas Hobbes) and that in this struggle for survival, “a man is a wolf to another man” (*homo homini lupus*) and “the war of all against all” rules (*bellum omnium in omnes*).

It is therefore important to constantly return to the fundamental values of civilized society and point out the values of man while helping the modern civilization overcome human weaknesses. Though it’s crucial to preserve human dignity as a universal value, it is both a constant transgenerational struggle and a goal.

In this light, the Quran strongly reiterates to the believer and the reader that the struggle for preservation and affirmation of human dignity has no alternative and that the principles of Islam in the believer’s life should be respected regardless of the low human interests, current situation and circumstances.

In this paper, we will quote the Quranic verses and the Hadiths of Muhammad, a.s., as two basic sources of Islamic teachings and thus Islamic law. We will also use examples from history and how they describe the special place and role of man on earth and the basic principle of human dignity that Islamic jurists have derived from Islamic sources.

## **The problem of understanding the concept of human dignity**

Article 1 of the Universal Declaration of Human Rights states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.<sup>4</sup> This is an

3 Al-Bukhari, *Adab al-mufrad*.

4 [http://www.ombudsman.co.me/docs/deklaracija\\_o\\_ljudskim\\_pravima.pdf](http://www.ombudsman.co.me/docs/deklaracija_o_ljudskim_pravima.pdf), accessed on 21.11.2017.



important international document that establishes the concept of human dignity in a legal act, which intends to point out not only its moral meaning, but also the legal, i.e. international, civilizational and human obligation arising from this document.

To understand this statement, we will briefly refer to the book *Dignity* by Michael Rosen, who analysed this term from the perspective of numerous debates conducted between authors in Western literature. He begins his analysis with the statement of Schopenhauer and others who believe that the notion of human dignity has no meaning, or even that it is a useless term, which at the same time raises the question of what dignity really means. How can it be evaluated and what are the mechanisms or criteria for recording it? Is the use of this syntagm just moral and / or does it have, or should it have, some other implications? These philosophical as well as legal dilemmas arise from the different contexts of using the term dignity. Further complicating matters, the notion of dignity is used by “advocates of quite different moral points of view”<sup>5</sup> While some consider it a trait that belongs to all human beings, others use it, for example, in a speech about the right to a “dignified death” when referring to the right to euthanasia. There are many similar examples that show how it’s used differently, with varied worldviews and moral standpoints.

If we return to the quoted article from the Universal Declaration of Human Rights, it is clear that the Declaration, illustrated in its first article, conceived dignity as a universal value shared by all people. Dignity is the inner core, “something intangible that all human beings inalienably carry”,<sup>6</sup> that is, “dignity is something we all possess through “humanity in our personality”, and this establishes a duty of mutual respect and self-respect”<sup>7</sup>

Another way to interpret dignity is to point to the social status that it provides. Man is the bearer and enjoyer of social dignity. From the point of view of Islam, the status of man is indeed positioned high and he is not closely tied to the primary meaning of “social”, but rather his status is expressed in the context of all created beings. This status is described in the Quran, in the verses 30–34 of the surah al-Baqara, where Allah, J.S., asks the angels, the beings who do not sin, to bow to a man.<sup>8</sup> The scene being drawn while these verses are read clearly shows the status of man that Allah, J.S., has honoured him with.

5 Michael Rosen, *Dignity*, trans. Jelena Kosovac (Belgrade: Clio, 2015), p. 7.

6 *Ibid.*, p. 27.

7 *Ibid.*, p. 40.

8 “And when thy Lord said to the angels: ‘I will appoint a regent on Earth!’ – they said: ‘Will your regent be the one who will make a mess on it and shed blood? And we celebrate and praise You and worship You, as it suits You.’ He said, ‘I know what you don’t know.’ And He taught Adam the names of all things, and then presented them to the angels, and said, ‘Tell Me their names, if ye speak the truth.’ ‘Blessed be You,’ they said, ‘we only know what you have taught us; You are the Omniscient and the Wise. ‘Oh Adam,’ He said, ‘tell them their names!’ And when he told them their names, Allah said: ‘Did I not tell you that only I know the secrets of heaven and earth, and that only I know what you do publicly and what you hide!’ And when We said to the angels, ‘Bow to Adam!’ – they bowed, but Iblis did not want to, he became elated and became an unbeliever”.

For this topic, it is important to emphasize upon another meaning of the notion of dignity, namely dignity as a lifestyle that deserves respect. Historically, there are examples of how people have earned respect and lasting glory due to their dignified lives. For instance, historians of the East and West have praised Salahuddin Al-Ayyubi (1137–1193) for his moralistic and honourable conduct after the occupation of Jerusalem by the Crusaders, by showing respect for the enemy, the weak, the families of the dead and others and treating them as human beings. Although this has been forgotten today, “Muslims have lifted the Christian prohibition and allowed Jews to settle in Jerusalem.”<sup>9</sup> Unfortunately, world history and therefore Muslim history also records many opposite, or negative, examples.

### The sublimity of man's creation

“It is God who created the heavens and earth, who has sent down water from the sky and with it brought forth produce to nourish you; He has made ships useful to you, sailing the sea by His command, and the rivers too; He has made the sun and the moon useful to you, steady on their paths;” (Ibrahim 32–33). “Have you not considered how God has made everything on the earth of service to you? That ships sail the sea at His command?” (Al-Hajj 65). “[People], do you not see how God has made what is in the heavens and on the earth useful to you, and has lavished His blessings on you both outwardly and inwardly?” (Luqman 20). “He has subjected all that is in the heavens and the earth for your benefit, as a gift from Him. There truly are signs in this for those who reflect.” (al-Ghashiyah 13). From the verses we have quoted, as well as other similar content, it is clearly observed that Allah, J.S., has subordinated everything that He created to man to be at His service. This indicates that man is truly elevated to a high, honourable position among creatures.

The honour and reputation are illustrated by the Hadith of the Messenger of God, a.s. – “Abdullah bin ‘Amr, r.a., narrates that he saw the Messenger of God circumambulating the Kaaba and saying: ‘How good you are and how good your fragrance; how great you are and how great your sanctity. By the One in Whose Hand is the soul of Muhammad, the sanctity of the believer is greater before Allah than your sanctity, his blood and his wealth, and to think anything but good of him.’”<sup>10</sup> As per Islamic sources, the Kaaba is called the House of Allah (*Bayt Allah*). It is a symbol of Islam and Muslims from all over the world turn towards it in their prayers. Every Muslim desires and prays to visit the Kaaba and make the pilgrimage one day. Yet, according to the Hadith of honour, the dignity of a believer, his possessions and life, even a good opinion of him, are more valuable and honourable than his holiness and inviolability. This comparison shows the

9 Ahmed S. Akbar, *Living Islam: From Samarkand to Stornoway*, trans. Zulejha Ridanović (Sarajevo: Preporod, 1993), p. 66.

10 Ibn Majah, Sunan. ما أطيبك وأطيب ریحك! ما أعظمك وأعظم. «رأيت رسول الله صلى الله عليه وسلم يطوف بالكعبة ويقول: ما أطيبك وأطيب ریحك! ما أعظمك وأعظم. ما له ودمه وإن نظن به إلا خيرا» [رواه ابن ماجة. أحرمته! والذي نفس محمد بيده لحرمة المؤمن أعظم عند الله حرمة منك، ماله ودمه وإن نظن به إلا خيرا].

extent to which a person is considered as a valued being and the amount of honour given to him.

From this follows the rule of respect or protection of human dignity which Allah, J.S., commanded him in the Quran:

ولقد كرمنا بني آدم وحملناهم في البر والبحر ورزقناهم من الطيبات وفضلناهم على كثير ممن خلقنا تفضيلاً

“We have honoured the children of Adam;<sup>11</sup> and carried them by land and sea; We have provided good sustenance for them and favoured them specifically above many of those We have created.” (Al-Isra 70).<sup>12</sup>

### a. Bearer of dignity by the act of creation

The concept of human dignity is more encompassing than the term “rights” because dignity includes, in the first place, the enjoyment of rights and the fulfilment of obligations.<sup>13</sup> What man is created with is part of human nature and it is permanent and constant, regardless of the fact that a particular legal system in a country does not advocate or protect it, precisely because of the universal nature of human dignity. That is why it is emphasized that man is an exalted creature by his form of creation (al-khalq), and also by the potential given to him in his creation, i.e. temper, nature, mentality and character (al-khuluq). On the exaltation of his creation, Allah, J.S., says: “We create man in the finest state then reduce him to the lowest of the low” (Al-Tin 5, Al-Tin 4).

Man is an elaborate and complex being and because of the uniqueness and singularity of his nature, it is very difficult to define his essence. The human variables range between physical attributes and man’s impulses, passions and intellectual ability to deep levels of understanding and emotions. In Tafsir, we come across various interpretations of the aforementioned verse that bring out the peculiarities of His creature. From among these, an interpretation that must find mention is that man is the most beautiful form, in that his mind and heart are two vessels that offer separate benefits – while the upper part of the body has been created to facilitate understanding and receiving revelations given only to him, the lower part of the body carries all that is terrestrial or animal in man, such as instincts, etc.

11 “Indeed, We have honored the children of Adam, We carry them by land and sea and supply them with comforts, and give them precedence far above most of Our creatures”. V. Muhammed Asad, trans. and commentary, trans. Hilmo Ćerimović, *Message of the Qur’an* (Sarajevo: El-Kalem, 2004), p. 421. The English translations of this verse, which we have reviewed for this occasion, have used the translation: “We have honored the children of Adam”, which is, in fact, the same meaning of expressing the honor, tribute and dignity of man.

12 Translation of the Qur’an by Besim Korkut.

13 Enes Karić, *Human Rights in the Context of Islamic-Western Debate* (Sarajevo: Pravni centar Fond otvoreno društvo BiH, 1996), p. 217.

It is also interesting to read the following Quranic verse: “And God created each animal out of [its own] fluid: some of them crawl on their bellies, some walk on two legs, and some on four. God creates whatever He will; God has power over everything” (Al-Nur 45). From this verse, one can also understand the additional peculiarity of man in relation to other moving beings. While some are necessarily bound to earth because they move only if they crawl with their whole bodies, man has been created to move in such a way that he is upright and raised, thus closest to the sky.

### **b. Man is a being of reason and the recipient of revelation**

“He created the heavens and earth for a true purpose; He formed you and made your forms good: you will all return to Him” (Al-Taghabun 3). Taberi says the most chosen being is shaped in the most beautiful form, that is, the most appropriate form and is also endowed with the best nature or temper.

By his exterior, man is primarily a bodily being. He is also a rational being, a being of the spirit, that is, of reason and emotion. About this other dimension of human beings, Allah, J.S., says, among other things: “We have created many jinn and people who are destined for Hell, with hearts they do not use for comprehension, eyes they do not use for sight, ears they do not use for hearing. They are like cattle, no, even further astray: these are the ones who are entirely heedless” (Al-A'raf 179). Therefore, man is a being of choice, i.e. he is free to make choices in his life and to responsibly relate to the honour bestowed upon him, to the body he is given, to the reason with which he is endowed, to the time at his disposal, against the role and legacy entrusted upon him. In other words, he has been given the capacity to properly relate to the freedom he enjoys and, of course, he is free to believe in God, who is also offered all the benefits associated with it, such as sending revelation and messengers.

“We have sent among you a Messenger of your own to recite Our revelations to you, purify you and teach you the Scripture, wisdom, and [other] things you did not know ” (Al-Baqara 151). The honour given to man is also an opportunity for Allah to speak directly to him, to send him His Word and open the way to faith for every man. “[Prophet], if My servants ask you about Me, I am near. I respond to those who call Me, so let them respond to Me, and believe in Me, so that they may be guided” (Al-Baqara 186). Therefore, Taberi concludes that Allah, J.S., has subordinated everything to man and that, despite his weaknesses, he is the supreme being of Allah.

### c. Man is the bearer of responsibility

The Quran states that man is distinguished, but at the same time obliged, by the position of Allah's regent on earth. In the Quran, it is said, "[Prophet], when your Lord told the angels, 'I am putting a successor on earth,' they said, 'How can You put someone there who will cause damage and bloodshed, when we celebrate Your praise and proclaim Your holiness?'" but He said, 'I know things you do not.'" (A-Baqara 30). Here, the term "regent" refers to Adam, a.s., as it stands in Tafsir, as also to man in general since Adam is a companion of men. The Quran also says directly for David, a.s., that he is a Caliph, therefore this appointment is not the exclusivity of Adam, a.s., but the ideal that every man should realize. "David, We have given you mastery over the land. Judge fairly between people. Do not follow your desires, lest they divert you from God's path: those who wander from His path will have a painful torment because they ignore the Day of Reckoning." (Sad 26).

The term regent (*al-khalif*) is used to mean the one who is the regent of Allah, i.e. the man who obeys the commands of Allah and does not follow others, following His instruction and not someone else's. The verse also states that the one who is given this majestic role must himself be worthy of such a task so that the trust shown to man is also shown to him to whom it belongs, who is worthy and willing to do such a task.

The regent of Allah is the one who does the will of Allah on earth and treats all people with respect for their rights: "God commands justice, doing good, and generosity towards relatives and He forbids what is shameful, blameworthy, and oppressive. He teaches you, so that you may take heed" (Al-Nahl 90).

### Principles derived from the term human dignity

When it comes to human dignity, the classical sharia jurists elaborated on the rules of warfare under the chapters called *al-siyar* in the Hanafi school of law or *al-ghihād* in Maliki and Shafi schools of law and, in this sense, protection of civilians in conflict situations by incorporating specific verses and Hadiths. Since it is impossible to impose all these rules and human rights protecting dignity, for the purposes of this paper it is better to emphasize upon the basic principles derived from the verses and Hadiths, i.e. from the whole of Islamic teachings, on which these rights should be built and developed.<sup>14</sup> It should be added that there is no single list of these rules.

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14. V. Sheikh Wahbeh al-Zuhaili, "Islam and international law", *International Review of the Red Cross*, ICRC, (2005): p. 272–275. Muhammad Arksusi, "Al-karama al-insaniyya fi daw'i al-Qur'ani wa ittifaqiyati Geneva", in *Maqalat fi al-Qanun al-duwali al-Insani wa al-Islam*, ed. Amir Al-Zamali, *International Review of the Red Cross*, (2008): p. 2–6.

### **a. Equality**

Human race not only has the same origin, but also the same task. “People, be mindful of your Lord, who created you from a single soul, and from it created its mate, and from the pair of them spread countless men and women far and wide; be mindful of God, in whose name you make requests of one another. Beware of severing the ties of kinship: God is always watching over you”(Al-Nisa’ 1).

The unique origin of humanity means that every person is the bearer of honour and dignity regardless of skin colour, origin, social status, ethnicity, nationality or any other affiliation. Individual identities are recognized and mutually appreciated. The world is not divided into north and south, east and west. On the contrary, from the Quranic perspective, these divisions are erased: “The East and the West belong to God: wherever you turn, there is His Face. God is all pervading and all knowing” (Al-Baqara 115).

At the last Hajj, which was three months before the Messenger of God, a.s., departed this world, He gave a speech which is understood as His will to all Muslims. Delivering the universal message of Islam regarding human dignity, He said in front of 10,000 pilgrims who were present: “O people, your Lord is One, and your father is one: all of you are the descendants of Adam, and Adam was from the earth. The noblest of you in Allah’s sight is the most Godfearing: Arab has no merit over non-Arab other than the degree of awareness of Allah.”<sup>15</sup>

This universal teaching of Islam that was proclaimed 14 centuries ago, found its reflection in the social reality in which Bilal, a black man and an Ethiopian, became the first muezzin to the Muslims in Medina, and Abdullah b. Mesud, a shepherd of Meccan dignitaries, became a Muslim governor in Kufi and the chosen teacher of Companions of the Prophet and Tabi’un (successors). There are many examples of human success and greatness among the Companions. The powerful teachings of Islam encouraged many to fight for their own dignity and the dignity of others and motivated the Companions to resist pagan customs that made the blood of a tribal aristocrat more expensive or more valuable than that of a slave. The teachings also reinforced that women, elderly and children have the same rights as men.

For this reason, in the “blessed periods” of Muslim history, we note that non-Muslims were able to hold high-level positions in the Ottoman Empire. Children from Bosnia and Herzegovina and the Balkans rose to prominent posts in the courts at Istanbul or became governors and other similar high-ranking officials in many regional centres such as Cairo, Damascus or Hijaz. That is why the concept of separate mosques for whites or only for black Muslims or some exclusive nations

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<sup>15</sup> Ibid, p. 3.

could never be developed among the Muslims. Or, to put it differently, the concept of commemorating or celebrating the day of victory over non-Muslims has never historically developed among Muslims, except for marking the arrival of Islam in that area. This is unlike many celebratory practices, say in Spain, in which glory, architecture and art emphasize victories over the Moors, i.e. Muslims. Muslim calendars mark “religious festivals, the end of fasting, or the remembrance of Ibrahim’s sacrifice to Allah, or the birth of the Prophet.”<sup>16</sup>

The Quran draws attention to the prohibition on acts of violence of any kind. Violence, or *zulm*, has more than one meaning. *Zulm* is darkness, a blindness from which one cannot find the right path, i.e. when one does not act in accordance with the instructions of Allah. *Zulm* is an injustice to others and also to oneself. Allah calls upon men: “Believers, no one group of men should jeer at another, who may after all be better than them; no one group of women should jeer at another, who may after all be better than them; do not speak ill of one another; do not use offensive nicknames for one another. How bad it is to be called a mischief-maker after accepting faith! Those who do not repent of this behaviour are evildoers. Believers, avoid making too many assumptions – some assumptions are sinful – and do not spy on one another or speak ill of people behind their backs: would any of you like to eat the flesh of your dead brother? No, you would hate it. So be mindful of God: God is ever relenting, most merciful” (Al-Hujurat 11-12).

The principle of equality proclaims the protection of all rights that arise from it, such as the right to equal treatment, the right to medication, the right to education and many others. Islam’s only legitimate value criterion for distinguishing between people is the degree of awareness / worship of Allah. Allah says: “People, We created you all from a single man and a single woman, and made you into races and tribes so that you should recognize one another. In God’s eyes, the most honoured of you are the ones most mindful of Him: God is all knowing, all aware” (Al-Hujurat 13). According to the verse, Allah made people different in order to transcend these differences and understand values that are more than purely biological realities. In the multitude of differences is Allah’s grace and the wisdom of creation: “Had your Lord willed, all the people on earth would have believed. So can you [Prophet] compel people to believe?” (Yunus 99). The level of awareness of Allah is the basic criterion for evaluation. In this sense, Allah’s justice is that this opportunity is available to all and that no one is denied. However, further clarification is needed here. Namely, belonging to Islam or declaring oneself to be Muslim does not mean that the ideal of sincere faith and obedience to Allah has been realized. Becoming a Muslim means moving towards building yourself as a believer, and this is a daily ongoing process.

16 Ahmed S. Akbar, *Living Islam: From Samarkand to Stornoway*, trans. Zulejha Ridanović (Sarajevo: Preporod, 1993), p.76.

## b. Justice

In many verses, Allah, J.S., instructs Muslims to establish the principle of justice as one of the fundamental principles of a healthy individual and society. “You who believe, uphold justice and bear witness to God, even if it is against yourselves, your parents, or your close relatives. Whether the person is rich or poor, God can best take care of both. Refrain from following your own desire, so that you can act justly – if you distort or neglect justice, God is fully aware of what you do” (Al-Nisa’ 135).

An example in the context of justice is related to Caliph Umer b. Abdul Aziz (682–720). The inhabitants of Samarkand once complained to him that the Muslim army had occupied their town under the command of Qutaibah, in breach of an existing treaty. The caliph wrote a letter to Suleiman b. Abi Es-Sirri, saying: “The inhabitants of Samarkand have complained about the injustice inflicted on them by Qutaibah, who expelled them from their property. Therefore, when this book reaches you, name a *qadi* who will examine their case and make the right decision! If the ruling is in their favour, then station the Muslim army to a camp outside the walls of the city they were in before Qutaibah came to them.” Following an investigation, the nominated *qadi*, Jami’b, Hadir, ordered in his ruling that the Arabs leave Samarkand and move outside the walls. This decision was put into action and had far-reaching consequences as the locals were surprised by the just decision and decided to “keep the Arabs in their city and continue their fraternal life, appreciating peace above all else.”<sup>17</sup>

It has been previously said that Islam establishes only the legitimate principle of grading people according to the level of consciousness of Allah, J.S. This is, of course, a moral criterion, for Allah alone knows what is in the souls of men. However, this consciousness is reflected in the reality of human life and its actions so that such a man, a believer, guided by the awareness of and encounter with Allah, will not allow himself to be carried away by other interests but by the sole interest of satisfying and fulfilling Allah’s requirements. It is also interesting that Allah, J.S., defines the concept and act of justice as a deed closest to the consciousness of Allah, i.e. full consciousness of Allah is impossible without acting just. Allah says: “You who believe, be steadfast in your devotion to God and bear witness impartially: do not let hatred of others lead you away from justice, but adhere to justice, for that is closer to awareness of God. Be mindful of God: God is well aware of all that you do” (Al-Ma’ida 8). Unlike the notion of consciousness of Allah, which is said to be an internal, personal and immeasurable criterion, justice and just actions are for the most part conspicuous

<sup>17</sup> Halil Imaduddin, *Reflections of Islamic transformation under the rule of Omer ibn Abdulaziz*, trans. Mehmedalija Hadžić (Sarajevo: Nova knjiga, 2008), p. 654–655. Fethi Osmani, *Jihad: Legitimate struggle for human rights*, in: Enes Karić, *Human rights...*, p. 228.



and measurable. In this context, this Hadith can be cited: “Allah will not look at your appearance or your property but will look at your hearts and your actions.”<sup>18</sup>

### **c. Freedom of faith and protection of property**

“There is no compulsion in religion: true guidance has become distinct from error” (Al-Baqara 256), is one of the verses that proclaims freedom of belief and freedom to practice your religion. We can list here some important documents and historical facts that show that Muslims have built a multi-religious, multinational and multicultural society on the basis of this principle. Upon his arrival in Medina, Muhammad, a.s., drafted the Medina Constitution that regulated the rights and obligations not only among Muslims but also among Medina Jews and Muslims in which they pledged to respect, protect and assist each other in war and peace.<sup>19</sup>

Two documents of Muhammad, a.s., who in this way introduced into normative practice (Sunnah) for Muslims to build a society of diversity, are certainly important for this topic.

The first document is the Charter with the Najran Christians, which, in the second part, states:

*“The protection of Allah and the guarantee of Muhammad, the Messenger of God, is given to Najran and its surroundings, whether for their goods, their people, their practice and faith, their absent and present, their families and their shrines, and whatever large or small is in their possession.*

*No bishop will be removed from his bishopric, no monk from his monastery, no priest from his parish. No load will burden them, nor will the blood of revenge from the time before submission. They will not be called up to the army, nor will they be tithed. No armies will overwhelm their territory. And when one of them asks for a debt, justice will be done. They will be neither oppressors nor oppressed. And whoever does usury to them in the future will be denied my protection. No man will be charged with a mistake committed by someone else.*

*Therefore, the guarantee of Allah and the assurances of Muhammad, the Messenger of God, confirm the content of this Charter until the day when Allah shows His authority, if they, the Najranis, remain of goodwill and act in accordance with their tasks without suffering any wrongdoing.”<sup>20</sup>*

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18 Ahmed b. Hanbel, Musned.

19 V. Muhamed Hamidullah, *Muhammed, a.s., life*, trans. Nerkez Smajlagic (Ognjen Prica: Zagreb, 1977), p. 174–186.

20 *Ibid.*, p. 469.

The second document is the Charter with the Monastery of St Catherine in Sinai in which the Messenger of God, a.s., says:

*“This is the message of Muhammad, son of Abdullah, as a vow to those who preach Christianity, near and far: We are with them! Surely, I, the helpers and my followers, will defend them because Christians are our subjects, and so by Allah I am against everything that seems to hurt them. There is no compulsion towards them. Neither their judges will be replaced from courtrooms, nor monks from monasteries. No one will tear down their temple or damage it or take anything from it to Muslim homes. If anyone does any of these things, they will break the covenant of God and disobey the Messenger of God. Truly, they are my allies and they have my guarantee against everything they hate. No one will force them to travel or fight. Muslims will fight for them...”*<sup>21</sup>

When Caliph Umer entered Jerusalem in the 15th year of Hijri, he gave a very similar guarantee of protection of religion, property, religious communities and individuals via a charter he gave the citizens of Jerusalem<sup>22</sup>:

*“In the name of Allah, the Merciful, the Compassionate,*

*This is the guarantee of peace and protection given by Allah’s slave Umer, r.a., the leader of the righteous, to the people of Jerusalem. It guarantees the protection of their lives, property, churches and crosses, whether in good or bad condition, and everything within their religious community. Their churches will not be occupied, demolished or taken away in whole or in part. None of their crosses or property will be confiscated. They shall not be coerced into religion, nor may any of them be harmed (in any way).”*<sup>23</sup>

For us, in Bosnia and Herzegovina, the Ahdname of Sultan Mehmed Fatih given to the Franciscans of Fojnica in 1463, which we present as translated by Hazim Šabanović, is historically also important: “He (i.e. God) is the only helper. (Tughra) Mehmed, son of Murad-han, always victorious! The command of the honourable,

21 Fikret Karčić, “Muhammad, a.s. – protector of human rights”, in *Muhammad, a.s., in contemporary thinking of our ulema* (Sarajevo: Medžlis Islamske zajednice Sarajevo, 2014), p. 90.

22 V. <http://hrlibrary.umn.edu/arab/IS-8.html>, accessed on 16.11.2017. and [mhttps://albushra.org/holyland/chapeter2c.htm](https://albushra.org/holyland/chapeter2c.htm), accessed on 30.11.2017.

23 Muslim historians have never questioned the authenticity of this charter, while their Western counterparts have written very generously about it. However, it is an indisputable fact that there are charters of practice or oral guarantees already in place during the early period of expansion of the Muslim state. In his *History of the Arabs*, Philip Hitti cites the text of a Charter issued by the commander of the Muslim army, Khalid b. Velid, to the people of Damascus, from which a comparison can be seen with Omer, which leads to the conclusion that the pattern of giving security to the inhabitants of the cities in their occupation was followed, and that security encompassed the protection of life, property and religion, that is, churches. “In the name of Allah, the Merciful, the Compassionate. This is what Halid b. Velid will do to the people of Damascus if they enter it: he promises them the security of life, property and churches. The city walls will not be demolished, nor will any Muslim dwell in their homes. In addition, we give them the covenant of Allah and the protection of His Messenger, caliph and believers. As long as they pay their taxes, they can only expect good”. V. Philip Hitti, *History of the Arabs* (Sarajevo: Veselin Masleša, 1983), p. 149. See also, Thomas W. Arnold, *History of Islam. Historical flows of the mission* (Sarajevo: Starješinstvo Islamske zajednice Bosne i Hercegovine, Hrvatske i Slovenije, 1989), p. 82–85.

exalted Sultan's sign and the bright imperial tughra, the conqueror of the world, is as follows:

*“I, Sultan Mehmed-han, make known to the whole world (to my people and to my eminent men) that to my proprietors of this imperial fehran the Bosnian monks my great grace appeared, so I command the following: Let no one make nuisance to the mentioned (monks) and their churches and let no one disturb them. May they dwell carelessly in my kingdom. And let those who have fled (fled and left) be free and safe. Let them come and dwell without fear in the lands of my empire. Let them dwell in their monasteries, and let no one, not my high majesty nor any of my viziers nor of my servants nor of my subjects nor any of the inhabitants of my empire, offend or disturb these. Let them not intrude or threaten or offend them, nor their souls (lives), nor their possessions nor their churches. Also, let them be allowed to bring a man from outside (from a foreign land) to the lands of my empire. For this reason, I generously give the imperial command and swear by the following difficult oaths: I swear by the Creator of earth and the heavens, who feeds all creatures, and by seven mus'hafs and by our great herald (Muhammad), and by the sabre that I graze – no one will oppose what is written as long as they serve me, obey me and obey my command. Written on May 28 at Milodraž dwelling”<sup>24</sup>*

Finally, there is another example worth mentioning, i.e. of the Yazidi people, a Kurdish ethno-confessional community that was in the spotlight of global community during the recent Iraq war. They were, as a non-Muslim community, part of many Muslim States that once occupied Iraq, so, until recently.

#### **d. Benevolence**

One of the most common syntagms referred to in the Quran is “those who believe and do good”, which is an invitation to believers to constantly reinforce their beliefs by doing good and not doing bad. Islam, at the same time, urges believers to devote themselves to the utmost in the performance of a good deed, to do a degree more, i.e. to bring that deed to perfection (al-Ihsan). This commitment to “doing good” even in situations where, for example, the other party has not “deserved” such a relationship is important especially today when human life is often reduced to a mere figure or a statistic. War or suffering dehumanizes man and often erases all human qualities, values and goodness. It seems that never has there been a greater need to highlight the dignity of every human being and the affirmation of good deeds and benevolence.

Allah explicitly calls for charity and good deeds: “God commands justice, doing good, and generosity towards relatives and He forbids what is shameful, blameworthy, and oppressive. He teaches you, so that you may take heed” (Al-Nahl

<sup>24</sup> <https://www.nkp.ba/horion-bosna-ahdnama-mehmeda-el-fatiha-franjevcima-najstariji-dokument-o-ljudskim-pravima-u-historiji/>, accessed on 2.12.2017.

90). One must show one's greatness and responsibility and be just in a situation where one can take revenge, i.e. when one has the power to not only reciprocate in the same measure, but to completely destroy. During Badr (the first battle led by Muslims), Muhammad, a.s., allowed the prisoners of war to buy ransom if they taught ten Muslims to write, which remains a complete novelty in the doctrine of war and treatment of prisoners of war to date. The consequences of this act were far-reaching for the Muslims as well as for the prisoners of war themselves.

“Let harm be requited by an equal harm, though anyone who forgives and puts things right will have his reward from God Himself – He does not like those who do wrong” (Al-Shura 40). It is not only fair to act just or to punish the perpetrator of the wrongdoing or to return in same measure, but more than that, to find the strength to do better and more than that, i.e. to find the strength to return better than done. Good and evil are not the same! “Good and evil cannot be equal. [Prophet], repel evil with what is better and your enemy will become as close as an old and valued friend” (Fussilat 34).

### **Inviolability of the human body after death or dignity of the dead**

According to Islamic teachings, the dignity of man does not cease with his death. There are numerous instances in literature where the ulema have presented detailed discussions concerning the treatment of the deceased and the place of their burial. From the dignity of a living man also arises his right to a dignified funeral / last rite and burial. For us in Bosnia and Herzegovina who survived the genocide and witnessed the deprivation of the right of killed civilians and soldiers to a decent funeral and burial, this is an important point. It is also a painful experience as many families have endlessly waited for closure due to lack of information about the whereabouts of their loved ones. To make matters worse, the dead were moved from one grave to another, from the primary to the secondary, and then to the tertiary, and so on, in order to hide the crimes.

Therefore, we will list several Hadiths of the Messenger of God Muhammad, a.s., on the basis of which the jurists have made numerous precepts in order to preserve the dignity of man even after his death.

In many Hadiths, Muhammad, a.s., has taught Muslims to give “salaam” on their entry and visit to the burial ground in order to greet the dead and pray for them. One of the Hadiths narrated by Abu Hurairah states: “When a man walks past his brother’s grave whom he knew and called him a salaam, this salaam returned to him and recognized him. If, on the other hand, he passes by the grave of someone he did not know and calls salaam to him, then he returns the salaam”.<sup>25</sup>

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<sup>25</sup> Ibn al-Qayyim, *Kitab al-Ruh*.

Also, the Messenger of God, a.s., narrated that He forbade sitting and building on a cemetery. He also forbade the following: "To break a bone to a dead man is to break a bone to a living one."<sup>26</sup> From these and many other traditions, the ulema took the position that it was forbidden for a Muslim to perform cremation. And lastly, the Messenger of God, a.s., strictly forbade the desecration of slain enemy soldiers after the battle.

## Conclusion

Man is the most chosen creature of Allah and has been given high status among creatures and bestowed with special honours.

The sources of Islamic teachings, the Quran and the Sunnah of the Messenger of God Muhammad, a.s., strongly emphasize upon the universal and unique origin of man that all people share. Therefore, the concept of division into whites and blacks, Arabs and non-Arabs has never developed in Islamic practice.

Equality of men, justice, freedom of religion and benevolence are just some of the universal principles derived from the verses and Hadiths that affirm and protect the dignity of man.

The dignity of man, in the origin and status he enjoys among created beings, should, in Islamic perception, be realized and affirmed in a dignified life. These verses and Hadiths were an inspiration to some Muslim rulers to exercise their rule in justice, safeguarding the dignity of their subjects and protégés, and thereby securing themselves a dignified memorial.

History records these significant examples, some of which have earned them respect both in the East and the West. However, the opposite of them were also recorded. These negative examples from Muslim history are by no means attributable to Islam but are the result of deviations from Islamic teachings.

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<sup>26</sup> Ibn Maga, *Sunan, Kitabu-l-Džena'iz*, Ahmad, *Musnad*.

## Bibliography

1. Ahmed, Akbar S. *Living Islam*. Translated by Zulejha Ridanović. Sarajevo: Preporod, 1993.
2. Al-Bukhari. *Adab al-mufrad*.
3. Al-Zuhaili, Sheikh Wahbeh. "Islam and International Law." *International Review of the Red Cross*, vol. 87, No. 858, 2005.
4. Arksusi, Muhammad. "Al-karama al-insaniyya fi daw'i al-Qur'ani wa ittifaqiyati Geneva". In *Maqlat fi al-Qanun al-duwali al-Insani wa al-Islam*. Editor of the edition Dr. Amir Al-Zamali. ICRC, 2008.
5. Halil, Imaduddin. *Reflections of Islamic Transformation under the rule of Omer Ibn Abdulaziz*. Translated by Mehmedalija Hadžić. Sarajevo: Prevodilac, 2008.
6. Hamidullah, Muhamed. *Muhammed a.s., Life*. Vol. I. Translated by Nerkez Smajlagić. Zagreb: Ognjen Prica, 1977.
7. Hanbel, Ahmed b. *Musned*.
8. Ibn al-Qayyim. *Kitab al-Ruh*.
9. Ibn Mağa. *Sunan*.
10. Karčić, Fikret. "Muhammed, a s. – protector of human rights". In *Muhammed, a.s., in contemporary thinking of our ulema*. Sarajevo: Medžlis Islamske zajednice BiH, 2014.
11. Karić, Enes. *Human rights in the context of Islamic-Western debate*. Sarajevo: Pravni centar – Fond otvoreno društvo BiH, Sarajevo, 1996.
12. *Quran with translation*. Translated by Besim Korkut. Medina: Kompleks Khadim al-haramayn al-sharifayn al-malik Fahd for print Mushafi Sherif, no year of publication.
13. Mehmedović, Adem, Karić, Nezir. "Horion Bosna: Ahdname of Mehmeda El-Fatiha to Bosnian Franciscans, the oldest document on human rights in history". Nezavisni Kalesijski Portal, 2013. Available on: <https://www.nkp.ba/horion-bosna-ahdname-mehmeda-el-fatiha-franjevcima-najstariji-dokument-o-ljudskim-pravima-u-historiji/> (accessed on 2.12.2017).
14. Muftić, Teufik. *Arabic Bosnian Dictionary*. Sarajevo: El-Kalem, 1997.
15. Rosen, Michael. *Dignity*. Translated by Jelena Kosovac. Beograd: Clio, 2015.

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## PRINCIPLES OF ISLAMIC LAW OF ARMED CONFLICTS: PROTECTION OF PROPERTY, TREATMENT OF PRISONERS OF WAR, PROVIDING REFUGE AND TREATMENT OF BODIES OF THE DECEASED DURING HOSTILITIES

**Abstract:** *Armed conflicts have existed since the beginning of human civilization. They are not only deadly, but also cause destruction of property and lead to chaos and insecurity. With the emergence of Islam on the world stage, a different concept of understanding armed conflict emerges, which over time will offer a recognizable moral code of war in Islam. As per Islamic teachings, wars have a moral character and the morality of the goals and means are equally important. Muslims believe that the most honourable, and not the strongest, have the right to survive. Destruction of infrastructure, crops, flora and fauna and religious sites is strictly forbidden to Muslims during armed conflict. Islam explicitly calls for humane treatment of prisoners and the bodies of fallen combatants and terms the use of a human shield “shameful”. Moreover, it is preferred that armed conflict ends peacefully so that lives and property can be saved. There is a noticeable similarity in the legal solutions offered by Islamic law of armed conflict and the international humanitarian law (IHL).*

**Keywords:** Islam, armed conflict, property, captives, body of the killed, enemy, burial, mutilation, security, freedom, moral code, convention, human rights.

## Armed conflict: The beginning, motives and results

Armed conflicts are not a recent occurrence – they are as old as mankind. The first murder was committed by Kābil, the son of the Father of Humanity Adam, a.s.. Though Kābil was convinced that murder was the only solution when he committed it, he bitterly repented it till the end of his life.<sup>1</sup> Since then, armed conflicts have become a constant practice of humanity on the path to gaining authority, power and wealth – both individual and national. The motive for armed conflict has varied according to different interests, times and circumstances. The result of armed conflict is the suppression of one interest by another and the constant disturbance or disorder (*fasād*) that becomes the official order of society, of which the Quran expresses itself in its own way.<sup>2</sup>

## Legal nature of armed conflict in Islamic law

With the appearance of Islam at the beginning of the seventh century AD, the original concept of the understanding of armed conflict emerges on the world stage. This takes on a different legal form over time. In the two primary sources of Islamic law – the Quran (the Word of God) and the Sunnah (practice of Muhammad, a.s.) – three different terms are used to denote war operations: endeavour (*yihād*), armed conflict (*qitāl*) and war (*ḥarb*).<sup>3</sup>

The legal nature of armed conflict under Islamic law can be seen through the constant endeavour to counter aggression, protect the Muslim community,<sup>4</sup> freely express religious beliefs, eliminate centres of crisis<sup>5</sup> and help the disenfranchised.

- 1 “And tell them, exactly, according to the Truth, What happened to the two sons of Adam when they offered the sacrifice, so that one was received, and the other was not: ‘I will kill you, let you know,’ said the other, to which the first replied: ‘God only receives from those who are kept!’ If you would extend your hand to me to kill me, I would not extend a hand to you to kill you, because I am truly afraid of God, the Lord of the worlds. In fact, I want you to bear mine and your sin and to be among those who will be in the Fire, because it is a punishment for those who commit violence. And so his nefis (soul, ego) encourage him to kill his brother and he killed him, thus becoming one of the losers. Thereafter, God sent a raven to wander the earth, showing him how to bury his brother’s dead body, and he, repenting, exclaimed, ‘Woe to me! Am I not even able to be like this raven so I can bury my brother’s dead body!’. That is why we have prescribed to the Israelites that whoever kills a man, not for settlement or because he makes a mess on Earth, as if he killed all people, while he who saved someone’s life, as if he saved all people’s life. However, even though Our messengers came with clear evidence, many of them continued to make transgressions in the world afterwards” (Quran 5:27–32). (The translation of the meaning of all the verses in this work is by Nurko Karaman.)
- 2 “For if God did not allow people to suppress one another, the monasteries and churches and synagogues and mosques would be demolished, in which the name of God is much mentioned. God will certainly help those who help Him – because God is truly strong and powerful!” (Quran 22:40).
- 3 More on individual meanings can be read in the work of Almir Fatić, “Jihad, harb and kital in Quran”, in *Islamic concept of peace, freedom and security – Proceedings*. eds. Muhamed Okić and Muhamed Jusić (Sarajevo: El-Kalem i Vojno muftijstvo, 2017), p. 71–86.
- 4 “And what is it for you so that you do not fight for the sake of God, as well as those of men, women, and children who are oppressed, who pray: ‘Our Lord, lead us out of this city inhabited by abusers and give us a protector, grant us a helper from You!’” (Quran 4:75).
- 5 “But fight against them so that confusion may prevail, and that the law of God may be established, but if they cease, then it remains only against those who commit violence” (Quran 2:193).



## Purpose of armed conflict in Islamic law

The purpose of armed conflict in Islamic law is to establish peace through complete understanding of the realities and resistance to all forms of aggression against Islam and Muslims. Under Islamic law, armed conflict can only be an option if there is no alternative to doing so and in order to fight justly.<sup>6</sup>

## Rules of armed conflict in Islamic law

The rules of Islamic law governing armed conflict were written during early Islamic period in separate acts known as *siyar*<sup>7</sup>, which over time received a plethora of legal commentary (*sharh*) and have been the source of legal opinion (*fatwa*) in this area. Contemporary Islamic jurists write about the principles of Islamic law in armed conflict when treating issues in the field of international relations in Islam.<sup>8</sup>

## The moral code for Muslims in armed conflict

Thus, over time, a distinctive Muslim moral code of armed conflict has emerged. According to Islamic teachings, wars – just like economics, science and business – have a moral character because none of the above can be separated from morality. In addition, Islamic law equally insists on the morality of the means, and the concept “goal justifies the means” is irreconcilable with the general principles of Islamic law of armed conflict. Muslims believe in the power of truth, not the truth of power,<sup>9</sup> and believe that the most honourable, and not the strongest, have the right to survive. That is why in the event of a war, the comprehensive moral code for Muslims is their biggest reckoner.

Following this code is not optional, but a religious obligation that Muslims consider to be *ibadah* (rite and act dear to God). The moral code of armed conflict, according to the teachings of Islam, delves into pre-war, war and post-war situations. Islam teaches real-world view of life in which people’s relationships are usually not ideal and in which every action has a fitting reaction.

6 “Given that they are being wronged, it is permissible for those who are attacked to fight – although God is certainly able to help them – those who are driven from their homes for no other reason than because they say: ‘Our Lord is God!’” (Quran 22:39–40).

7 The most famous work in this area is *al-Siyaral-kabir and al-Siyaral-ṣaḡir*, by the Hanafi jurist Muḥammad ibn Ḥasan al-Shaybānī (d. 189 AH). The most famous commentary on this work was offered by the famous Hanafi jurist Muḥammad ibn Aḥmad al-Sarahsī (d. 490 AH). These works elaborate on the basic principles of Islamic law in armed conflict.

8 Valuable work on this topic was written by Egyptian Islamic jurist Muḥammad Abū Zahra (d. 1974) and Syrian Islamic scholar Wahba al-Zuhayli (d. 2015). V.: Muḥammad Abū Zahra, *al-‘Alāqaal-dawliyyafīal-islām* (Cairo: Dār al-Fikral-Arabī 1995); Wahba al-Zuhayli, *al-‘Alāqaal-dawliyyafīal-islām* (Damascus: Dār al-maktab, 2000).

9 “Indeed, the most obedient among you to God is he who is most guarded!” (Quran 49:13). And the Messenger of God Muhammad, a.s., said: “Whosoever his works degenerate, he shall not be lifted up by his origin.” The Hadith is recorded by a Muslim. V. Muslim ibn al-Ḥaḡḡāḡal-Quṣayri al-Naysābūrī (d. 261 AH), *Ṣaḥīḥ Muslim* (Riyadh: Dār al-Muḡnī 2000).

Thus, we find that classical collections of Islamic law regularly contain a chapter on the rules of armed conflict. Contemporary jurists, through international academies of Islamic law, national fatwa councils and individual legal opinions based on the earlier legal opinions of Islamic scholars, clearly indicate the obligation of individuals and governments to respect and apply all conventions and judgments in the field of international humanitarian law.

## **Correctness of principles in relation to the perniciousness of the practice of armed conflict**

A violation of the principles of Islamic law of armed conflict by a part of Muslim population does not necessarily indicate the correctness of the said principle or the obligation to comply with IHL. This is similar to stating that the violation of IHL principles by certain groups or individuals does not necessarily indicate the meaninglessness of such principles.

It is necessary to separate legal provisions from the practice of armed conflict, to insist on doing the right thing and to bring the practice into the given legal framework through consistent implementation of legal responsibility and the rule of law. We believe that the practice of addressing the violation of the Islamic law of armed conflict by Muslims in the media at the expense of Islam, while at the same time not addressing the violation of IHL by non-Muslims in the media at the expense of the religion to which they belong, cannot contribute to reducing the intensity of tensions and conflict between people.

This paper deals with defining the principles of Islamic law of armed conflict in the following four areas:

### **1. Protection of property during armed conflict**

One of the five fundamental protected human values of Islamic law (i.e. basic human rights in positive law) is the protection of private and public property.<sup>10</sup> According to Islamic law, the rules for the protection of material valuables treat the issue of the inviolability of property in a state of war and peacetime equally. Islamic law fundamentally distinguishes military from civilian property, in that it defines property to be used for military purposes as legal military objectives during the course of armed conflict.<sup>11</sup>

10 A special area in Islamic law theory (*uṣūl-fiqh*) is defined as “five protected values” (*al-ḍarūriyyāt-al-ḥams*) in terms of preserving the inviolability of the right to life, thought, property, dignity and origin. For every violation of these values, Islamic law provides for a specific worldly legal sanction (*ḥudūd*), and otherworldly responsibility and punishment.

11 You did not think that they would come out, and they also thought that their strongholds would protect them from God, but God, by instilling fear into their hearts, came from where they had never hoped, so that they destroyed their homes with own hands and hands of believers. Therefore, take instruction, oh you who have eyes!<sup>13</sup> (Quran 59:2).

### ***Destruction of infrastructure facilities***

Destruction of infrastructure such as hospitals, schools, roads, bridges, water supply, etc. is strictly forbidden and punishable under the Islamic law of armed conflict<sup>12</sup> and can only be considered in the case of reciprocal measures (*mu'amalaal-miṭl*).<sup>13</sup> Destruction of such infrastructure can make life difficult or impossible, and is not considered necessary to achieve the ultimate goals of war.

### ***Destruction of environment and religious sites***

Muslims are strictly forbidden from harming the environment, felling trees, burning crops, demolishing houses and settlements, polluting drinking water and the like – things that are often done by armed forces even when they are not legitimate military objectives.<sup>14</sup>

Destruction of the animal and phyto-worlds, such as burning or drowning bees,<sup>15</sup> as well as the use of weapons of mass destruction, are prohibited as per Islamic teachings as these could harm private or public good without which human life is unsustainable. It is not recorded by the Prophet, a.s., that he ever killed an animal,<sup>16</sup> except for feeding.<sup>17</sup>

The destruction of religious sites during armed conflict is forbidden, according to Islamic teachings. First Caliph Abu Bakr, r.a., was aware of this when he recommended to Yazīd ibn Abū Sufyān, one of the commanders he sent to Shām, that: “You will come across people who claim to have dedicated their lives to God (monks), so leave them and what they think they have dedicated themselves to. I advise you ten: Do not kill women, children, old men...!”<sup>18</sup>

12 Muḥammad ibn Aḥmad ibn Abī Sahlal-Saraḥsi (d. 490 AH), *al-Mabsūṭ* (Beirut: Dāral-Ma'rifa 1398), p. 10–31; Abūal-Walīd Muḥammad ibn Aḥmad ibn Muḥammadal-Qurṭubī Ibn Rusd (d. 595 AH), *Bidāyatal-muḡtahid wa nihāyatal-muqtaṣid* (Egypt: Matba' Muṣṭafāal-bābīal-ḥalabī, 1960), p. 1–309.

13 Abū 'AbdAllāh Muḥammad ibn Aḥmadal-Qurṭubī (d. 671 AH), *Al-Ġāmi'u li aḥkāmāl-Qurān wa al-mubayyinlimāṭaḍammanahū min al-sunnati wa āyaal-Qurān (Tafsīral-Qurṭubī)* (Cairo: Dāral-Ḥadīṭ, 1996), p. 16/236.

14 Yūsufal-Qaraḍāwī, *Jihad: Types and implications* (Sarajevo: Centar za dijalog – Vesatijja and El-Kalem, 2013), p. 486–489. Translation: Fikret Pašanović et al. Editor: Mustafa Prlijača.

15 Muwaffaqal-dīn ibn Qudāma (d. 620 AH), *Al-Muḡnī*, (Cairo: Dār Haḡr, 1990), p. 13, 143–144.

16 Mālik ibn Anas, *al-Mudawwanaal-kubrā* (Beirut: Dāral-kutub al-'ilmiyya, 1994), p. 1–499.

17 Muḥammad ibn Idrīsal-Šāfi'i (d. 204 AH), *Al-Umm* (Beirut: Dāral-Kutub al-'ilmiyya, 1993), p. 7–375.

18 Hadith recorded by Malik.

In all the above and similar cases, there is a noticeable similarity in the legal solutions between Islamic and international humanitarian law, that is, the provisions of Additional Protocols I<sup>19</sup> and II<sup>20</sup> of the Geneva Conventions of 12 August 1949. There is also a significant time difference between the adoption of the provisions of armed conflicts – the seventh century for Islamic law and the nineteenth century for positive law, as well as the difference in the sources of Islamic and positive law – the divine origin of Islamic regulations and the human origin of the legal norms of armed conflict.

## 2. Prisoners of war during armed conflicts

Islam explicitly requires the humane treatment of prisoners and the protection of their dignity, considering the care of the poor and captive persons one of the greatest acts dear to God (*tawāb*) and a desirable character trait of a religious personality. It is safe to say that until the appearance of Islam, there were no warriors with such a subtle sense of compassion for the captives: And feed them – with the food they themselves are willing eat – orphans, prisoners and the poor. “We feed you only for the love of God, and we need neither rewards nor thanks from you!”<sup>21</sup>; “Treat the prisoners nicely and politely.”<sup>22</sup>

### *Granting freedom or accepting ransom*

By normalizing the treatment of prisoners of war, the Quran gives Muslims a choice between either offering them freedom (*al-mann*) or buying their freedom (*fidā*). There is no mention of the third possibility. There was a consensus from Companions of Muhammad, a.s., that it was forbidden to kill prisoners of war.<sup>23</sup> Muslims have been commanded to treat prisoners nicely and silence the spirit of vengeance, as it is the same spirit that has led to mass war crimes in the past and thus it must be defeated.

19 In Part Two of Protocol I on Civilians and Civilian Population, Article 51. states: “The civilian population and individual civilians enjoy general protection against the dangers arising from military operations...”; Article 52. provides: “Civilian objects must not be subject to attack or repression...”; and Article 53. expressly requires: “It is forbidden: to perform any hostile act directed against historical monuments, works of art or temples that constitute the cultural or spiritual heritage of the people...”. V. Vesna Knežević-Predić et al., Ed., *Sources of Humanitarian Law* (Belgrade: International Committee of the Red Cross, 2007), p. 209–210.

20 In Part Four of Protocol II on the Protection of Civilians, Article 14. provides for the protection of facilities necessary for the civilian population to survive: “It is forbidden to expel the starving population as a method of warfare. In this regard, it is prohibited to attack, destroy, remove or render useless facilities necessary for the civilian population to survive such as food, agricultural areas for food production, harvesting, livestock, drinking water installations and reserves and irrigation facilities.” see *Sources of Humanitarian Law*, p. 250.

21 Quran 76: p. 8–9.

22 Ġalāluddīnal-Suyūṭī (d. 911 AH), *Al-Ġami’u al-ṣāġir min ḥadīṭal-bašīral-naḍīr* (Egypt: Matba’ Muṣṭafāal-bābīal-ḥalabī, 1954), p. 4/307–308.

23 Muwaffaqal-dīn Ibn Qudāma (d. 620 AH), *Al-Kāfīfīfiqhal-imām Aḥmad ibn Ḥanbal* (Beirut: Dāral-kutub al-‘ilmiyya, 1994), p. 4–122.

Contemporary Islamic jurists view the issue of prisoners of war within the real-world circumstances and consider that international conventions on prisoners of war<sup>24</sup> are in full accord with the teachings of Islam on the topic. It is forbidden to use prisoners of war as human shields, whether the captives be Muslims or non-Muslims. In fact, it is a fundamental principle of Islamic law of armed conflict.<sup>25</sup> It is also forbidden to kill civilians used as human shield by the hostile side. The Quran calls this practice of war shameful.<sup>26</sup>

Furthermore, the capture of ambassadors and other diplomatic and consular staff is forbidden, and this is another important principle of the Islamic law of armed conflict.<sup>27</sup> Diplomatic immunity is unrestricted under the provisions of IHL, while it is restricted in Islamic law in the event of a breach or threat to the national security of the host country.

Islamic law distinguishes prisoners of war from war criminals and seeks a good relationship with the former. With the latter, the Islamic law requires justice to be served against those responsible for war crimes committed and proven and crimes against peace and humanity.

### 3. Providing refuge (*amān*) during armed conflicts

As much as people fight wars with each other, they will always need each other, given their human weakness and the necessity. Hence, Islam never locked the door in front of those who waged war, but established rules governing relations between the warring parties. According to Islamic law, there is a practice of seeking safe haven and protection (*al-amān wa al-isti'mān*) for one who wants to reside in the territory under the jurisdiction of Muslims (*dār al-islām*) for

24 Third Geneva Convention on the Treatment of Prisoners of War, of 12 August 1949, Article 13, on the treatment of human beings and the prohibition of repression against prisoners of war, states: "Prisoners of war must be treated humanely at all times. Any act or unlawful omission on the part of the Detaining Power that causes them to die, or seriously endanger the health of a prisoner of war in their jurisdiction, shall be prohibited and shall be considered a grave violation of this Convention. In particular, no prisoner of war may be subjected to physical mutilation or medical or scientific experiment of whatever nature, unless justified by the treatment of the prisoner of war and carried out in his interest. Prisoners of war must also be protected at all times, in particular against any act of violence or intimidation, against insults and public curiosity. Repression measures against prisoners of war are prohibited." see *Sources of Humanitarian Law*, p. 51–52.

25 Classical Islamic jurists, such as Malik and Evzai, said: "It is not allowed to kill women and children in any case, even if those fighting (soldiers) would take women and children as a shield or establish themselves in a barrack or a boat, so they took their wives and children with them. They are not allowed to fire their weapons or burn them with fire." see Aḥmad ibn 'Alī ibn Ḥaḡar al-'Asqalānī (d. 852 AH), *Fatḥal-bārī* (Cairo: Dāral-Rayyān li al-turāt, 1989), p. 7/579–580.

26 "And if there was no fear that you would kill believers, men and women, whom you do not know, and therefore not knowing, because of them it is a shame to experience them – We would leave them to you" (Quran 4:25).

27 Muhammad, a.s., provided protection for the ambassadors of those with whom he was at war. When the two ambassadors of Musaylim came to him, he said: 'If the envoys were killed by accident, I would kill you both!' Hadith recorded by Ahmed in *Musned*, Hadith no. 15989.

tourism, commerce, a particular religious or civilian mission, studies or some other legitimate need to visit their country.<sup>28</sup>

According to provisions of Islamic law, a conflict can never be fought against an entire nation, but only against the system and military forces that help carry out violations of law, tyranny and aggression.

Islamic law provides for safe passage and guarantee of life (*amān*), as well as the possibility that any adult citizen can give refuge to a citizen of a foreign country who is at war with them. Such a possibility exists even on the battlefield for the duration of the fighting, in accordance with the general interest of the community. This right is given to him by the Quran<sup>29</sup> and commits the Muslim to providing some form of protection to the person seeking refuge.

According to the provisions of Islamic law, refuge can be provided to an individual as well as a group. If hostile combatants who established themselves in their cities sought and obtained refuge from Muslims, they would be granted the status of citizens and not prisoners of war of that community. It was a kind of “Islamic-law answer” to the issue of migrants and refugees of the time. The moral code for Muslims meant that a humane attitude had to be maintained for those fleeing the troubles of war and seeking the peaceful environment necessary to preserve one’s life, family, property, conviction and freedom in the broadest sense. By providing refuge to an enemy army soldier, Muslims undertake to extradite such a person to a third country without his or her consent. Such a form of protection is an early form of practice that we today recognize as international visa regime for borders and is a manifestation of the sovereignty of the community and the competencies of the individual within it.

#### **4. Treatment of bodies of those killed in armed conflict**

Islamic teachings, by their worldview, encompass every physical or spiritual segment of human life. Therefore, any life circumstance in which a Muslim can be found requires him to position himself and act in accordance with the teachings of his religion. One of the realities of life where people can unfortunately find themselves in is when they have to deal with the bodies of fallen enemy combatants during armed conflict. Islamic jurists, on the basis of basic and ancillary sources of sharia, have offered a number of recommendations and solutions for such occasions, of which we will briefly mention only the most important.

Dealing with the bodies of fallen combatants is an extremely sensitive issue in

<sup>28</sup> *Jihad: Types and implications*, p. 503.

<sup>29</sup> And if any of the polytheists ask you for protection, give him protection so that he may hear the Word of God, and then send him to the place where he will be safe. This is because they are people who do not know” Quran 9: 6).

the domain of extraordinary social circumstances that exist during wartime. Human emotions are very difficult to control, especially those resulting from war killings. Therefore, the mix of circumstances in which a soldier can find himself can be very complex and requires his or her self-preservation and willingness to preserve his or her own human dignity. The attitude towards the enemy during war is normatively defined in the basic sharia sources, that is, the Word of God – the Quran and the practice of Prophet Muhammad – the Sunnah.

When it comes to the Quran, as the primary source of precepts on the said issue, it was preceded by an event from the life of Muhammad, a.s. During the battle of Uhud, 70 Muslim fighters were killed in the third year AH, or in the year 625 AD, of which 64 were from the population of Medina (Ansar) and six from among the settlers from Mecca (Muhajir). Of this number, only the body of Ḥanzal ibn Abū ‘Āmir was not mutilated after the battle, by cutting off noses, ears and genitals. The cruelty that manifested on the bodies of the fallen Muslim fighters was an unprecedented brutality even for the customs of war at the time, which would have led Ebū Sufjān, the then commander of the victorious army, to tell the surviving Muslim fighters:

*“You will see a massacre like no other committed before! You know, I did not command it, but I’m not sorry about it!”*

The extent of the brutality and inhumane behaviour while handling the body of the Prophet’s uncle Hamza was incomprehensible, which, upon the withdrawal of the victorious enemy troops of the Meccan army, would cause shock and disbelief to the Prophet Muhammad, a.s., himself, who would swear revenge in such a psychological state, in the words: “If Allah gives me victory over these, I will avenge you so that I will mutilate 70 of them because of you”.

Caused by this vow of Prophet, a.s., and a similar one sworn by his Companions after the massacre of the bodies of Muslim soldiers killed, the Quranic verse was announced:

*“If you want to punish, then punish the same as you were punished, but if you endure it, it is certainly better for those who are patient.”<sup>30</sup>*

With this Quranic verse, the Almighty Allah forbids His Prophet Muhammad, a.s., but also other Muslims from doing what they have vowed, and invites them to reciprocate only the same measure of injustice, never more than that.

However, Allah Almighty teaches them something more generous than the above, which will be a sign of their uniqueness and their faith for all generations to come. Specifically, he teaches them and urges them to fully forgive their murderers and

<sup>30</sup> Quran, (16:126).

slaughterers. Following this call from Allah, it was not to be expected that the one who was sent to be “mercy to all the worlds” would do less than that. That is why His tongue spoke the words that will be obeyed by all who vowed like Him at the time, but also by all those who followed His example in their lives over future generations, regardless of how often not only centuries but millennia have shared them. His generous words are: “We will not reciprocate, but we will tolerate”. It is these words that will continue to be the roadmap and guide for all generations of Muslims and a source of inspiration on how to deal with the bodies of those killed in war.

In the Sunnah of Muhammad, a.s., we find other examples that further frame the subject of the treatment of those killed and thus clarify the fundamental attitude of Islam towards the desecration of bodies of those killed. Namely, in his later life circumstances in which he was forced to send an army to battle, Muhammad, a.s., would tell them: “...go to battle, but do not take the spoils of war for yourself, do not be treacherous, do not massacre...” Or on another occasion: “Do not take the spoils of war for yourself, or massacre the bodies!” Further confirmation of this attitude of Muhammad, a.s., towards the bodies of the killed is also found in the words of ‘AbdAllāhibn Zayd, which reflect a clear understanding of this topic by the first generation of Muslims: “The Messenger of Allah, a.s., forbade polluting the rivers and mutilation the dead”.

It is important to emphasize here another fundamental determinant of the Prophet’s, a.s., relation to the bodies of those killed. Namely, when an enemy soldier named Nawfal ibn ‘AbdAllāh was killed in the Battle of the Trench, Muhammad, a.s, gave his body to his family, refusing to receive any compensation for the act, thus establishing another humane principle of Islam.

Based on these very clear guidelines, an Islamic view was established on the issue of mutilation the bodies of the dead. Thus, after the Prophet’s death, his successors, first of all Abu Bakr and ‘Umar, r.a., forbade mutilation the deceased when giving instructions to their generals. In a letter, Abu Bakr would forbid the governor of Hadramawt from mutilation, describing it as a “heinous act”. But because of the new circumstances that they, as Muslims, had never encountered before, he would further protect the dignity of the dead human being. Specifically, the Bayhaki noted the following: “When the Persians and Byzantines defeated the enemy, their kings and commanders allowed them all. People’s heads would be brought to their kings or commanders as a sign of victory and excellence before others. So, the Muslim commanders in the war against the Byzantines decided to do the same as they did, so ‘Amr ibn ‘Āṣ and Shuraḥbil ibn Ḥasanpo ‘Uqbībn ‘Āmiru sent the Caliph Abu Bakr the head of Banān, one of the Byzantine greats. When the appointee came to Abu Bakr, the latter rebuked him vehemently, to which ‘Uqba



said: ‘Heir of the Messenger of Allah, they do the same to us’. To this, Abu Bakr answered: ‘Shall we look upon the Persians and the Byzantines and follow them in their actions and customs?! Don’t bring me heads; letter and news will suffice’.

From the sources outlined above, two basic principles of Islamic law were established regarding the bodies of those killed during armed conflict, namely:

### **a. It is forbidden to massacre the bodies of the dead.**

According to the practice of Prophet Muhammad, a.s., and his clear instructions to ban such an act, most Islamic jurists find it forbidden to massacre the bodies of the dead. So Ibn ‘Ābidīn says: “If a Muslim fighter had acquired a non-Muslim fighter during the war, he would not have the right to massacre him.”<sup>31</sup>

When it comes to legally elaborating on this, Islamic scholars imply that any form of mutilation of the body by massacre, i.e. cutting off limbs, causing injuries, removing internal organs, burning or destroying corpses, carrying body parts to the ruler and the like are all included.

In the contemporary circumstances of today, the removal of any organ of a dead person for the purpose of its transplantation will be considered mutilation and massacre, given the principle of inviolability of the body of the killed person.

### **b. The bodies of the dead are surrendered to the enemy or buried.**

On the basis of the case already mentioned in the time of Prophet, a.s., in the event of victory, Muslims are obliged to transfer the bodies of fallen enemy combatants to their representatives without claiming or taking any compensation thereon. In addition, if the hostile side does not take over the bodies for some reason, Muslims are under an obligation to bury them in accordance with current capabilities. The above obliges the Muslim side to take care of the bodies of the killed enemies in all situations.

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<sup>31</sup> Ibn ‘Ābidīn, Muḥammad Amīn (d. 1252 AH), *Raddal-muḥtārālāl-Durrāl-muḥtār. Ḥāšiyya Ibn ‘Ābidīn* (Beirut: Dāral-Fikr, 1998).

## Conclusion

Islamic law favours the peaceful end of armed conflict to save as many human lives and material possessions as possible. The basic sources of Islamic law, the Quran and the Sunnah, have established a humane and decent attitude towards the bodies of those killed during war, regardless of which party to the conflict they belong to. This is derived from the fact that according to Islamic teachings, all forms of massacre of the body of the killed person are strictly forbidden. In addition, the return of the bodies of those killed to their families or their burial in the country is prescribed. The first generations of Muslims condemned and found it unacceptable to cut off the heads of the killed and bring them to the ruler. This attitude of Islamic teaching towards the bodies of the killed is tantamount to the most up-to-date norms of international humanitarian law.

The fundamental principles of Islamic law of armed conflict are the protection of property and prisoners of war, the provision of refuge and the humane treatment of the bodies of fallen persons in armed conflict.

## Bibliography

1. 'Asqalānī al-Aḥmad ibn 'Alī ibn Ḥaḡar (d. 852 AH). *Fatḥal-bārīSharḥṢaḥīḥal-Buḥārī II*. Cairo: Dāral-Rayyān li al-turāt, 1989.
2. Abū Zahra, Muḥammad (d. 1974). *al-'Alāqaal-dawliyyafīal-islām*. Cairo: Dāral-Fikral-arabī, 1995.
3. Badawi, Nesrine. "Islamic Jurisprudence and the Regulation of Armed Conflict". Cambridge MA, Harvard University (2009). Available at: <https://hhi.harvard.edu/publications/islamic-jurisprudence-and-regulation-armed-conflict> (downloaded on 23.11.2019).
4. Buḥārī al-Muḥammad ibn Ismā'il, *Ṣaḥīḥal-Buḥārī – Buhari's collection of hadiths*, translation from Arabic by Hasan Škapur, [...]. Sarajevo: Visoki saudijski komitet za pomoć BiH, 2008.
5. Būṭī al-Muḥammad Sa'īdRamaḡān (d. 2013). *Al-Jihādfīal-islām*. Damascus: Dāral-Fikr, 2005.
6. Dawoody, al, Ahmed. *The Islamic Law of War: Justifications and Regulations*. New York: Palgrave Macmillan, 2011.
7. Fatić, Almir. "Jihad, harb and kital in Quran", in *Islamic concept of peace and security – Proceedings*, editors of the edition Muhamed Okić and Muhamed Jusić. Sarajevo: El-Kalem and Vojno muftijstvo, 2017.
8. Group of authors. *Jihad and the Islamic Law of War*. Amman: The Royal Aal Al-Bayt Institute for Islamic thought, 2009.
9. Haruna, Abdulrashid L. "War and Islamic Humanitarian Law: Appraising War fare and Distinction as a Principle in Hostilities". *International Journal of Humanities and Social Science*, 4/5, 2014.
10. Hayat, A. "Islamic Concept of Just War and Laws of Armed Conflict". Unpublished graduate paper, Quantico, 2013.
11. Ibn 'Ābidīn, MuḥammadAmīn (d. 1252 AH). *Raddal-muḥtāralāal-Durr-al-muḥtār* (Ḥāšiyya Ibn 'Ābidīn). Beirut: Dāral-Fikr, 1998.

12. Ibn Qudāma, Muwaffaqal-dīn (d. 620 AH). *Al-Kāfīfīqhal-imām Aḥmad ibn Ḥanbal*. Beirut: Dāral-kutub al-‘ilmiyya, 1994.
13. Ibn Qudāma, Muwaffaqal-dīn (d. 620 AH). *Al-Muḡnī*. Cairo: Dār Haḡr, 1990.
14. Ibn Rushd, Abūal-Walīd Muḡammad ibn Aḡmad ibn Muḡammadal-Qurṭubī (d. 595 AH). *Bidāyatal-muḡtahid wa nihāyatal-muqtaṣid*. Egypt: Matba‘ Muṣṭafāal-bābīal-ḡalabī, 1960.
15. Iqbāl, Mohammad. *Akhlaqyat Al Harb Fi El Islam*. ISESCO, 2014.
16. Karić, Enes, trans. *Quran with translation into Bosnian*. Bihać: FF, 2006.
17. *Quran with translation by Nurko Karaman*. Editor of the edition Nedžad Grabus. Sarajevo: Kupola d.o.o., 2018.
18. *Sources of humanitarian law*. Prepared by Vesna Knežević-Predić et al. Belgrade: International Committee of the Red Cross, 2007.
19. Mālik ibn Anas. *Al-Mudawwanaal-kubrā*. Beirut: Dāral-kutub al-‘ilmiyya, 1994.
20. Muslim, ibn al-Ḥaḡḡāḡal-Quṣayrīal-Naysābūrī (d. 261 AH), *Ṣaḡīḡ Muslim*. Riyadh: Dāral-Muḡnī, 2000.
21. Qaraḡāwī (al-), Yūsuf. *Jihad: types and implications*. Translated by Fikret Pašanović et al. Editor of the edition Mustafa Prljača. Sarajevo: Centar za dijalog – Vesatijja and El-Kalem, 2013.
22. Qurṭubī al-, Abū ‘AbdAllāḡ Muḡammad ibn Aḡmad (d. 671 AH). *Al-ḡāmi‘u li aḡkāmāl-Qurān wa al-mubayyinlimātaḡammanahū min al-sunnati wa āyaal-Qurān (Tafsīral-Qurṭubī)*. Cairo: Dāral-Ḥadīṭ, 1996.
23. Šāfi‘ī al-Muḡammad ibn Idrīs (d. 204 AH). *Al-Umm*. Beirut: Dāral-Kutub al-‘ilmiyya, 1993.
24. Saraḡsī al-Muḡammad ibn Aḡmad ibn AbīSahl (d. 490 AH). *Sharḡal-siyaral-kabīr*. Beirut: Dāral-Kutub al-‘ilmiyya, 1997.
25. Saraḡsī al-Muḡammad ibn Aḡmad ibn AbīSahl (d. 490 AH). *Al-Mabsūṭ*. Beirut: Dāral-Ma‘rifa, 1398.
26. Suyūṭī (al-), Ḓalāluddīn (d. 911 AH). *Al-Ḓāmi‘u al-ṣaḡīr min ḡadīṭal-bašīral-naḡīr*. Egypt: Matba‘ Muṣṭafāal-bābīal-ḡalabī, 1954.
27. Tuhmaz, Abdulhamid Mahmud. *Hanefi fikh*. Translated by Ahmed Purdić, Zuhdija Hasanović et al. Sarajevo: Grabus H., 2003.
28. Zuḡaylī (al-), Wahba (d. 2015). *Al-‘Alāqaal-dawliyyafīal-islām*. Damascus: Dāral-maktab, 2000. Senad Ćeman, dr. sc.

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## RELIGION AND MISSING PEOPLE – RIGHTS OF FAMILIES CONCERNING CIVIL STATUS, INHERITANCE AND BURIAL

Workshop on “Social functions of religions and religious practices in response to needs of families of missing people”

**Abstract:** *This paper deals with the issue of the status of missing and absent people in Islamic personal law, that is, the issue of family rights concerning civil status, inheritance and burial. We will explore the conditions under which a person may be considered missing or absent, when and in what manner the status of the missing person ceases to apply and the legal consequences of the missing status in relation to marriage, property-legal relations and burial.*

**Keywords:** missing person, absent person, Islamic law, civil status and burial.

### **Religiousness, spirituality and family**

According to the teachings of Islam, every child is born in natural faith (*fitra*), so parents direct the child to a belief that is close to them. The degree of religiousness (*Islam*) is manifest and individual, while the degree of spirituality (*iman*) is hidden and individual. In responding to the needs of the family of a missing person, the social function of religion helps to establish interpersonal relationships based on common good and benevolence without sin or enmity. Though there are different religious practices in responding to the families of missing people, they have a common goal of helping to resolve the status of the missing so that life can continue as normally as possible.

While families strive to be happy together, it is not always within their control. When a person disappears, his / her family members go through a difficult period of uncertainty and suffering. It can seem impossible to cope with such a challenge and the family requires the help and support of their community. Faith can help people seek meaning, direction, hope and peace. It is the responsibility of religious communities to share the teachings on the status of missing people and give families the choice to accept and apply the teachings and regulations.

## A topic that is always relevant and the practice of helping

The rights of missing people and their families have been of concern across historical and social periods. Opinions and views on the marital and property status of a missing person have been recorded since the normative period of Islam. The trend continued through the formation of sharia law schools (*madhhab*) until our days. In classical proceedings of Islamic law, the status of the missing person has been theoretically considered regularly and over time a certain religious practice has been created on its basis in response to the needs of the families of missing people.<sup>1</sup>

The practice of Muslims in Bosnia and Herzegovina in securing the rights of missing people and their families has changed according to the times they live(d) in. The earlier practice was to secure rights through the then existing sharia courts and by applying sharia marital law.<sup>2</sup> In the period of socialism there were no written works on this subject and the rights of the families of missing people were exercised through witnesses and civil courts. After the last war in Bosnia-Herzegovina (1992-1995), justice was sought through domestic and international courts as well as veterans' organizations. It has been the practice of the Islamic community in Bosnia-Herzegovina to provide written<sup>3</sup> and oral guidance and to organize the collective and individual burial (*janazah*) of those who have been missing. Such practices have been acceptable to families and the society in addressing the status of missing people and for those families who, with the efforts of the wider social and international community, have been able to retrieve the mortal remains of the missing people and find peace, thereby getting closure by knowing where their loved ones are buried. All missing people are treated equally, regardless of the reason for their disappearance – be it in connection with war, migration for economic or personal security or due to natural or other disasters.<sup>4</sup>

Let us list some of the most common concerns regarding the status of missing people in relation to the needs of their families.

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1 Example of work of Hassan Shaybani.

2 Abdulah Škaljić, "Pronouncing dead persons missing after 6 April 1941", *Glasnik*, XI/4 (1943): p. 82–84.

3 In the post-war period, we note three papers on the status of missing persons: Halil Mehanović, "The Sharia Position on the Issue of Missing Persons", *Hikmet: Journal for Religious-Theological and Cultural-Historical Issues* (93), VIII/9 (1995): p. 395–397; Ibrahim Džananović, "The Absence and the Missing of a Husband as a Reason for Divorce", *Takvim* (1997): p. 31–43; Sulejman Topoljak, "Regulations on the Missing Person in Islamic Law", *Glasnik*, LXVI/1-2 (2004): p. 55–78

4 This view is in the spirit of the Hanafi Law School, which, like the Shafi and Zahiri Law School, does not recognize multiple types of missing people on the grounds that one is presumed to be alive, or is presumed not to be alive, or has disappeared in Muslim countries, or that he is deprived of his liberty in non-Muslim countries, or in inter-Muslim wars, or in wars of Muslims with non-Muslims, as considered by the lawyers of the Maliki and Hanbali Law Schools, and on this basis distinguish between the legal consequences of the matrimonial and property issues of such persons. See Jusuf Ata Muhammed Hulu, *Ahkamul mefkudi fish sheriatil islamijje* (Nablus: Džamiatun Nedžah el vataniija, 2004), p. 25–27.

## When can a person be considered missing (mefkud)?

When every trace of a person is lost and it cannot be known with certainty whether he is alive or deceased, or there is no clear reason to take a position on it, the person can be considered missing.<sup>5</sup> Such status is acquired on the basis of the suspicion or ignorance of the condition (*hal*) of a person, and not on the basis of not being informed or not knowing the place (*mekan*) of disappearance. Thus, a person who is known to have been captured by a hostile military force, but it is unknown if he / she remained alive afterwards, may be considered missing regardless of any knowledge of the location of the capture.<sup>6</sup>

Islamic jurists consider the following conditions to recognize the status of missing people:

1. Person is absent without a trace, regardless of whether he / she travelled to another country, or went to a war and did not return, or disappeared after a natural disaster such as an earthquake, fire etc.
2. Loss of all forms of communication with loved ones so that they do not know anything about the condition of the missing person.
3. Passage of a considerable period of time.

According to the sharia, if one or more of the above conditions are not met a person cannot be declared missing. Instead, he / she will be considered absent, which would have different legal consequences compared to a missing person.<sup>7</sup>

## When can a person be considered absent (gaib)?

A person may be considered absent when he voluntarily or involuntarily leaves his / her place of residence and it becomes impossible for him / her to manage his / her affairs, either directly or through a proxy, jeopardizing his / her or others' interests. This applies regardless of whether he / she is determined as certainly alive.<sup>8</sup> Therefore, a person is considered to be absent when it is not known with certainty if he or she is alive, but also when he / she is alive and it's known with certainty but such a person is still unable to run his / her own business due to

5 Ibn 'Abidin, Muḥammad Amin (d. 1252 AH), *Radd al-muḥtār alā al-Durr al-muḥtār. Ḥāshiyah Ibn 'Abidin* (Beirut: Dār al-Fikr, 1386 AH), p. 4/292.

6 Ibn Qudāma, Muwaffaq al-dīn (d. 620 AH), *Al-Muḡnī* (Cairo: Dār Haḡr, 1990), p. 7/212.

7 Muḥammad ibn Aḥmad ibn Abi Sahl al-Saraḡsī (d. 490 AH), *Al-Mabsūṭ* (Beirut: Dār al-Ma'rifa, 1398 AH), 11/34; Mālik, ibn Anas (d. 179 AH), *Al-Muwaṭṭa* (Abū Zabī: Muassasa Zāyid ibn Sulṭān Ālu Nahyān li al-a'māl al-ḥayriyya wa al-insāniyya, 2004), p. 5/451; Muḥammad ibn Idrīs al-Shāfi'i (d. 204 AH), *Al-Umm* (Beirut: Dār al-Kutub al-'ilmiyya, 1993), I, p. 6/168; Yahyā ibn Sharaf al-Nawawī (d. 676 AH), *Rawdat al-tālibin wa 'umdat al-muṭtin* (Beirut: Dār al-Kutub al-'ilmiyya, undated), p. 6/34; Maṅṣūr ibn Yūnus ibn Idrīs al-Bahūti (d. 1051 AH), *Kashshāf al-qinā'i 'an matn al-iqnā'i* (Beirut: Dār al-Fikr, 1982), p. 4/464.

8 Ali Sejjid Hasan, *El ahkamul hasse bil mefkud* (Cairo: Darun nehdati al-arabijja, 1984), p. 17.

distance and absence. The status of an absent person is more general than that of a missing person. Each missing person can be considered as an absent person, but not every absent person can be classified as a missing person.

## Cessation of missing person status

The missing status ends in two cases: when the missing person appears or when the court rules that a person is dead. The basic sources of Islamic morality and law do not explicitly indicate a period of disappearance. This results in divergent views among Islamic scholars as they draw their own inferences (*ijtihad*) on this issue.

Basically, a missing person is considered to be alive until proven otherwise. This is in accordance with the sharia rule that “the thing remains as it was until proven otherwise”, as well as another rule under which “what is certain cannot be denied by doubt”.<sup>9</sup> According to a maxim of the Hanafi jurists, “a missing person lived for his own and died for someone else’s rights”.<sup>10</sup> This means that a missing person is governed by the regulations of a living person in matrimonial law and the regulations of a dead person in hereditary rights so he cannot inherit the same as the deceased person. This approach is argued in the words of the Prophet, A.S., “The wife of the missing person is his wife until she finds out about his death or until he gives her a divorce”<sup>11</sup> as well as an auxiliary sharia source *istishab* (principle of continuity), the duration of the condition established once in the past until proven contrary.

This is a position of the Hanafi *madhhab* that does not issue a *fatwa* in the practice of Muslims in Bosnia-Herzegovina so that the difficulties faced by the wife and heirs of a missing person can be eliminated, which is one of the intents of sharia law.

Maliki and Hanbali law school jurists believe that a missing person can be legally declared dead after four years, citing such a ruling by Caliph Omer (r.a.).<sup>12</sup> The jurists of the Shafi law school believe that it is the duty of the court to carry out the process of determining the approximate date of death and that the judge, at his own discretion, carries out the proceedings in his own conscience.<sup>13</sup>

The theoretical debates about the missing person’s waiting period, which could

9 Osman Kozlić, *Fiqh rules* (Sarajevo: El-Kalem, 2005), p. 159–160; 149–154.

10 “Hajjun fi hakki nefsihī mejjitun fi hakki gajrihi”. see Abū Bakr ibn Mas’ūd ‘Alā al-dīn al-Kāsānī (d. 587 AH), *Badā’i’u al-ṣanā’i’ fī tartīb al-ṣharā’i’* (Beirut: Dār al-Kitāb al-‘Arabī, Beirut, 1982), II, p. 6/196.

11 Ġamāl al-dīn ‘Abd Allah ibn Yūsuf al-Zayla’ī (d. 762 AH), *Naṣb al-rāya li aḥādīṭ al-Hidāya* (Cairo: Dār al-Ḥadīṭ, 1995), p. 3/471–472.

12 Aḥmad al-Dardīr Abū al-Barakāt (d. 1201 AH), *Ḥāshiya al-Dusūqī ‘alā sharḥ al-kabīr* (Beirut: Dār al-Fikr, nedatirano), p. 2/428; Ibn Qudāma, Muwaffaq al-dīn (d. 620 AH), *Al-Muḡnī* (Cairo: Dār Haḡr, 1990), p. 9/133.

13 Shams al-dīn Muḥammad ibn Aḥmad al-Ḥaṭb al-Sharbīnī (d. 977 AH), *Muḡnī al-muḥtāḡ ilā ma’rifat ma’ānī alfāz al-minḥāḡ* (Beirut: Dār al-Kutub al-‘ilmiyya, 1994), p. 3/27.

be in the range of one to 120 years, have helped Islamic jurists to come up with a positive solution, combining the views of all law schools, both with respect to the interests of the missing person and the interests of the wife and heirs.<sup>14</sup>

The issue of missing person status was also discussed in international Islamic law academies, which adopted a resolution stating that “competent state court bodies have the discretion to determine the waiting time for a missing person, which may not be less than one or more than four years, counting from the moment of disappearance, necessarily using the most contemporary missing person search systems, taking into account the specifics of each individual case and following the procedure in their own conscience.”<sup>15</sup>

When it comes to the practice observed by Muslims in Bosnia and Herzegovina, it is within the jurisdiction of the local court to officially declare a missing person dead. Each case is treated individually and separately because of the specific circumstances that have to be taken into consideration when determining the beginning and end of disappearance.

### **Legal consequences of missing status**

The missing status of a person is a state of uncertainty, of neither life nor death, during which his marriage and family as well as private property must be protected as they are two of the five most important interests of people (*ed darurijatul hamse*) according to the teachings of Islam.

Accordingly, Islamic jurists consider the missing person as alive in relation to rights that do not benefit the person and are acquired by death. Thus, the property of the missing person cannot be distributed to the heirs during the time of the disappearance, bond contracts cannot be terminated, and the marriage cannot be dissolved before a decision is made on the person’s death. On the other hand, the missing person is treated as deceased in relation to rights that favour him, and damages to other persons and is acquired by the fact that the person is dead. Thus, missing status is considered a temporary impediment to inheritance on the basis of blood or will. The relevant part is left undivided until the moment of the person’s appearance or a judgment on his death. In the event of his appearance, he will be introduced into the ownership of part of the inheritance or will, while in the case of death the missing person’s property will be inherited by his heirs. In the event of a declared death, the undivided portion shall be returned to the heirs who were alive at the time of the decedent’s death, while the portion given by the

14 Ibrahim Džananović, “The Absence and the Missing of a Husband as a Reason for Divorce”, *Takvim* (1997): p. 39.

15 Resolution no. 2. *About the period of waiting for a missing person. Muddetu intizaril mefkud*, Academy of Islamic Law at the League of Islamic World in Mecca, Twenty-first Session, Mecca, 2014. Available at: <http://www.themwl.org>.



will (testament) of the decedent will be returned to those who are in the will. This is based on the sharia rule “that the matter remains as it has been until proven otherwise”.

### **Marital status of a missing person**

A person’s missing status cannot be grounds for dissolution of marriage. Muhammad, A.S. said, “The wife of the missing person is at great temptation, so let her be patient: she cannot marry until there is sure evidence that the missing person has died.”<sup>16</sup> The marriage lasts during the husband’s disappearance and only after the court has declared the missing person dead can a court decision on the dissolution of marriage be made. After a waiting period (*iddet*) of four months and 10 days, if the woman wishes she can join a new marriage and the deceased’s inheritance can also be shared thereafter.

If at the time of the court decision about the death of a person who had been considered missing the reliable date of death is determined, and if that time period is longer than the waiting period, his wife is not obliged to wait any more. If she wants, she can start a new marriage from the date of issue of death certificate as the waiting period is counted from the time of her husband’s death and not from the time when the news of his death is known.

If a missing person’s wife were to marry another person before the court officially declared his death, such a marriage would be null and void (*baṭil*) according to the teachings of Islam. The couple must divorce and be permanently forbidden from each other under the sharia rule that says the one “who illegally tries to speed up the exercise of his right, he will be permanently denied that right”.

If a missing person is officially declared dead and his wife enters into a new marriage, but the missing person appears, he is given the right to choose between taking his wife back or taking the wedding gift (*mehra*) from the second husband.

### **Marital status of an absent person**

Absence may be the reason for seeking the termination (*fesh*) of the marriage contract. The degree of uncertainty in the case of an absent person is lower in comparison to a missing person. If the absence of the husband causes material or moral damage, the wife may petition the court for divorce. Whether the absence is intentional or unintentional and whether the absent person is serving a prison sentence, according to the sharia rule, “damage must be remedied”, and in such situations the only remedy can be the husband’s return or divorce. In practice,

16 Abū Bakr Aḥmad ibn al-Ḥusayn ibn ‘Alī al-Bayhaqī (d. 458 AH), *Al-Sunan al-kubrā* (Dār al-Ma’rifa, undated), p. 7/445.

based on one of the resolutions of international Islamic law academies, if a person has been absent for up to a year his wife can file for divorce.<sup>17</sup>

In practice, the theory of Hanafi lawyers – who do not make a distinction between missing and absent persons and practically do not allow divorce to happen – is rejected because it essentially entails a lifelong waiting period. Instead, the Hanbali *madhhab* theory has been adopted, which explicitly states that the marriage of an absent person who refuses to submit to the obligation of cohabitation at the invitation of the court can be divorced even under the assumption that the wife has material possibilities for a normal life. The recommendation of the Islamic community of Bosnia-Herzegovina of 1917 to the sharia courts was to apply the Hanbali law school rules, whereby a woman is entitled to a judicial dissolution of marriage if the husband is absent for 12 months and to pay maintenance from the husband's property becomes impossible.<sup>18</sup>

### **Legal status of the property of a missing person**

All property rights are considered valid at the time of disappearance or absence of a person until his return or declaration of death. The estate of the missing person shall be managed by the court through an authorized person during the absence and it cannot be the subject of inheritance. The regular expenses of the family are paid from the total estate, including for the wife, children and parents whose livelihood falls on him both in his presence and during his absence. None of the lease agreements are terminated during absence and the court appoints an agent to collect rents and take care of the missing person's material interests. In this way, the assets of the missing person are cumulatively preserved until the time of the final resolution of the missing person's status.

In case the missing person shows up, he takes over the property and continues to manage it. If, however, the missing person does not appear and death is proven by the sharia through valid evidence of witnesses or other facts, he will be considered as deceased from the moment of presenting the evidence and his inheritance will go to the heirs who are alive at that moment. In the event that such a person is declared dead by the State, he will be considered as deceased from the moment of the court judgment and his inheritance will pass down to the heirs who are alive at that time. The missing person is treated as alive based on the existence of some previous condition (*istishab*) before disappearance because the thing remains as it was until proven otherwise. And the missing

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17 Resolution no. 3, Academy of Islamic Law at the League of Islamic World in Mecca, Twenty-first Session, Mecca, 2014. Available at: <http://www.themwl.org>.

18 Circular of the Supreme Sharia Court in Sarajevo no. 234 of 27 January 1917. see Ibrahim Džananović, "Absence and missing of husband as a reason for divorce", *Takvim* (1997): p. 41.

person cannot be inherited due to the condition of death as a valid legal basis for inheritance, while death in a state of disappearance is an uncertain category.<sup>19</sup>

In the event that the heirs divide the property of the missing person before the court's declaration of death and the missing person appears in the meantime, the property shall be returned to the missing person with material compensation from the heirs for what was spent as illegal use of another's property, except for what was spent on mandatory alimony and maintenance. If the missing person appears after the court's declaration of death, only the property owned by the heir at that moment will be restored, while the spent property cannot be claimed since it was used following a court decision on the right disposition and it is not subject to subsequent material compensation.<sup>20</sup> If the missing person was pronounced dead on the basis of the testimony of witnesses and the appearance of the missing person proves that the witnesses were wrong, and the inheritance passed down to the heirs is partly spent based on the testimony, the witnesses are obliged to pay for the expenses from their own estate since they presented false testimony causing loss of property of a missing person.<sup>21</sup>

## Burial of missing persons

Missing people are officially declared dead by the State authorities if even after many years of organized and dedicated search they are not found. The search for a missing person sometimes ends with finding the remains and a forensic scientist confirming the identity through DNA analysis. The practice of the Islamic community in Bosnia-Herzegovina is to perform a joint burial rite in absentia (*janazah al-ghaib*) after the official proclamation of missing people in a particular locality. This is attended by close family members and believers who thus bid farewell to the missing people with a prayer for the dead to receive forgiveness and for the families to have patience and peace. If the remains of a missing person are found during the search for a deceased person or after he has been pronounced dead, the burial and religious rituals (*janazah*) are organized according to the circumstances and condition of the remains.

Believers asked questions about Islamic rules for the burial of such persons and the Islamic community, through an authorized person (*jetvai-emin*), expressed a view that was acceptable to them and has become a practice for burial of missing people.<sup>22</sup>

19 Wahba al-Zuhaylī (d. 2015), *El Fikhul islamiyy ve edilletuhu* (Damascus: Dār al-Fikr, II, 1985), p. 420–421.

20 'Alī ibn Sulaymān al-Mardāwī (d. 885 AH), *Al-Inṣāf fī ma'rifat al-rāḡiḥ min al-ḥilāf* (Dār Iḥyā al-turāt al-'arabī, II, undated), p. 7/340; Muḥammad ibn Idrīs al-Shāfi'ī (d. 204 AH), *Al-Umm* (Beirut: Dār al-Kutub al-'ilmiyya, I, 1993), p. 5/256

21 Maṣṣūr ibn Yūnus ibn Idrīs al-Bahūtī (d. 1051 AH), *Kashshāf al-qinā'i 'an matn al-iqnā'i* (Beirut: Dār al-Fikr, 1982), p. 5/423; Ibn Qudāma, Muwaffaq al-dīn (d. 620 AH), *Al-Muḡnī* (Cairo: Dār Haḡr, 1990), p. 8/212.

22 Asked by the Institute for Missing Persons: It has been known to the Bosnian public that the *janazah* and burial of victims of genocide have been done in the Memorial Complex "Srebrenica – Potočari Memorial and Cemetery for the Victims of the Genocide" for seven years in a row. ...->

## Conclusion

The issue of the status of a missing person according to Islamic rules is an expression of the degree of religiousness and spirituality of believers, since in Bosnia-Herzegovina we can talk about the moral application of sharia law. Theoretical considerations of this issue by Islamic jurists have helped to take a stand and define practice in responding to the needs of the families of missing people. There are limits to religious regulations and believers should be familiar with them. Every violation of these boundaries leads to sin which in turn leads to further sin and spiritual restlessness. The Islamic community in Bosnia-Herzegovina takes care of the religious needs of believers and actively participates in supporting families during the disappearance period of a family member. This kind of assistance is significant in every society.

## Bibliography

1. Al-Barakāt, Aḥmad al-Dardīr Abū. *Ḥāshiya al-Dusūqī ‘alā sharḥ al-kabīr*. Beirut: Dār al-Fikr, undated.
  2. Al-Bayhaqī, Abū Bakr Aḥmad ibn al-Ḥusayn ibn ‘Alī. *Al-Sunan al-kubrā*. Beirut: Dār al-Ma‘rifa, undated.
  3. Al-Kāsānī, Abū Bakr ibn Mas‘ūd ‘Alā al-dīn. *Badāi‘u al-ṣanāi‘i fī tartīb al-sharāi‘*. Beirut: Dār al-Kitāb al-‘arabī, 1982.
  4. Al-Mardāwī, Alī ibn Sulaymān. *Al-Inṣāf fī ma‘rifat al-rāḡiḥ min al-ḥilāf*. Beirut: Dār Iḥyā al-turāt al-‘arabī, undated.
  5. Al-Zayla‘ī, Ğamāl al-dīn ‘Abd Allah ibn Yūsuf. *Naṣb al-rāya li aḥādīṭ al-Hidāya*. Cairo: Dār al-Ḥadīṭ, 1995.
  6. Al-Bahūtī, Manṣūr ibn Yūnus ibn Idrīs. *Kashshāf al-qinā‘i ‘an matn al-iqnā‘i*. Beirut: Dār al-Fikr, 1982.
  7. Al-Saraḥsī, Muḥammad ibn Aḥmad ibn Abī Sahl. *Al-Mabsūt*. Beirut: Dār al-Ma‘rifa, 1398 AH.
  8. Al-Shāfi‘ī, Muḥammad ibn Idrīs. *Al-Umm*. Beirut: Dār al-Kutub al-‘ilmiyya, 1993.
  9. Al-Sharbinī, Shams al-dīn Muḥammad ibn Aḥmad al-Ḥaṭb. *Muḡnī al-muḥtāḡ ilā ma‘rifat ma‘ānī alfāz al-minḥāḡ*. Beirut: Dār al-Kutub al-‘ilmiyya, 1994.
- 22 <- Unfortunately, it is also widely known that the vast majority of victims could not have been buried in complete condition because, in an effort to cover up the traces of their crimes, the warlords dislocated the remains from primary to secondary and tertiary mass graves. Given the significant number of relatives of these victims (this refers to more than 500 victims at this time), assistance should be given in deciding on the burial, in terms of advice from the Islamic community, on how to deal with a situation where only scarce skeletal remains have been found (sometimes this is literally only one bone of the slain)? Fatwā-emīn Dr Enes Ljevaković replied, “It is a religious obligation of the living and the right (*hak*) of killed and dead Muslims to be buried in an appropriate burial ground in a dignified manner in accordance with sharia law. In doing so, regulations that can be applied in the circumstances apply. The Almighty says in the Quran: ‘...be mindful of God as much as you can...’ (al-Taḡhabun 16). Since many of the victims were found only in some parts of the skeleton, despite much effort and time and there are no indications or guarantees that the remaining parts of the skeleton will be found in due course, the individual skeletons of each victim that are found and identified, no matter how many of any kind, should be buried in a separate burial ground (*kabur*) so that each person’s grave is known because part of the skeleton found is the identity of the person to whom it belongs. Janazah, as is customary, is held collectively for all victims. If new parts of the victim are subsequently found and identified, they should be buried in a grave in which part or parts of the skeleton of the victim were previously buried.”

10. Al-Zuḥaylī, Wahba. *El Fikhul islamijj ve edilletuhu*. Damascus: Dār al-Fikr, 1985.
11. Al-Nawawī, Yaḥyā ibn Sharaf. *Rawdat al-ṭālibīn wa ‘umdat al-muftīn*. Beirut: Dār al-Kutub al-‘ilmiyya, undated.
12. Džananović, Ibrahim. “Absence and missing of husband as a reason for divorce”, *Takvim*, Sarajevo, 1997.
13. Hasan, Ali Sejjid. *El ahkamul hasse bil mefkud*. Cairo: Darun nehdati al arabijja, 1984.
14. Kozlić, Osman. *Fiqh rules*. Sarajevo: El-Kalem, 2005.
15. Mālik ibn Anas. *Al-Muwaṭṭa*. Abū Ḥabīb: Muassasa Zāyid ibn Sulṭān Ālu Nahyān li al-a‘māl al-ḥayriyya wa al-insāniyya, 2004.
16. Muḥammad, Amin, Ibn ‘Ābidin. *Radd al-muḥtār alā al-Durr al-muḥtār (Ḥāshiyya Ibn ‘Ābidin)*. Beirut: Dār al-Fikr, 1386 AH.
17. Muwaffaq al-dīn, Ibn Qudāma. *Al-Muḡnī*. Cairo: Dār Haḡr, 1990.
18. Škaljić, Abdulah. “Pronouncing dead persons missing after 6 April 1941”, *Glasnik*, XI/4, Sarajevo, 1943.

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Even wars have limits. They are defined by International Humanitarian Law which obliges protection of all people not taking part in the conflict, as well as limiting the means and methods of warfare. The rules and laws of war undoubtedly have deeper historical roots. They are derived from elementary human values that are an integral part of all the world's philosophies and religions.

Islamic law guarantees victims of armed conflict the right to protection, respect, and dignified humane treatment. It also calls for the protection of civilian facilities and property. Islamic law limits the methods and means of warfare to the limits of military necessity. All this is in full compliance with the provisions of International Humanitarian Law and the Geneva Conventions. Thus, the similarities between IHL and Islamic law are not coincidental, but evidence that there are values that are universal and an important part of most religious and other worldviews.

The book "Islamic Law and International Humanitarian Law" was created by the joint efforts of the International Committee of the Red Cross in Bosnia and Herzegovina and the Faculty of Islamic Studies at the University of Sarajevo. Academic papers in the book arose from jointly organized meetings, primarily from the scientific conference held in September 2018 in Sarajevo. Through articles in the book, the authors who spent much of their academic work dealing with International Humanitarian Law or Islamic Law, answer questions that have emerged as crucial in the discussions.



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