

Islamic Laws of War and International Humanitarian Law: Big Homework for Islamic Jurists

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Introduction

War has always been an essential part of Islamic law and history. *Jihad*, the meaning of which is not limited to but includes physical armed warfare, is among the highly valued acts of worship in Islamic teachings. Since classical times, Islamic scholarship has included the laws of war, whether in a chapter in large *fiqh* (Islamic law) compendiums such as in Imam Al-Shafi'i's *Al-Umm* or specific books dedicated to the laws of war such as Imam Ibn Nuhaas's *Mashari Al-Ashwaq*. Classical literature on *fiqh al-siyar* (Islamic international law), such as Imam Shaybani's *Siyar Al-Kabir* (which is now only available as within Imam Al-Sarakhsi's commentary) and Imam Al-Fazari's *Siyar*, usually has warfare as the first and central part. As suggested by Khaled Ramadan Bashir, these laws predate and likely

influenced European international law generally and laws of war specifically. According to Jean Pictet, Muslims were an essential part of the historical development of international humanitarian law (IHL).

In a more contemporary context where both Islamic law and IHL have been developed in their respective ways, there has been much engagement between IHL and Islamic scholars. The ICRC, most noticeably, has been conducting dialogues with Islamic scholars worldwide, such as in Cairo, Aceh, and Geneva. I have had the honor to participate in the Aceh (2017) and Geneva (2018) events. All these events, particularly those that I have participated in, always end generally with a happy tone: to some extent, Islamic law and IHL seem to have similar principles to protect certain types of persons during warfare. In such a case, it is hoped that armed conflicts involving Muslims should have a more faithful application of the laws of war, considering how obeying Islamic law is an extension of worshiping Allah.

However, in wars involving Muslims today, many IHL violations have been attributed to groups claiming to follow Islamic law, such as ISIS and the Taliban, causing many victims among those who are supposed to be protected in war. Is this because Islamic law and IHL do not really share similar principles? Or, Islamic law and IHL do share similar principles, but the said Islamic groups are violating their own laws?

Despite the joy of having some principles shared between Islamic law and IHL, there are incompatibilities in various other detailed aspects that may create more victims. In some cases of incompatibility between Islam and international law, it can be a case of 'conflict of worldviews', such as much of the 'Islam and human rights' debate. However, in the case of Islam and modern IHL, many incompatibilities are due to Islamic law scholarship lagging in assessing and formulating new rulings to anticipate new problems in contemporary warfare that did not exist in classical works.

This results, in most cases, to a problem dreaded by both Islamic law and IHL: less protection afforded to those who deserve it. In my view, there are two main problems: lack of comprehensive works on the relationship between *fiqh al-siyar* and international law, and lack of comprehensive details in rulings for various aspects of modern warfare not found in classical scholarship.

First Issue: The Relationship between Fiqh al-Siyar and International Law

The laws regulating the conduct of armed conflict is a branch of international law, just like how the Islamic laws of war (*fiqh al-jihad*) is a branch of *fiqh al-siyar*. However, there is a lethargy in *fiqh al-siyar* scholarship explaining how it should relate to International law.

We have several problematic approaches, such as how some Islamic jurists seem too apologetic. Nesrine Badawi suggests that even renowned Islamic jurists like Shaykh Wahbah Al-Zuhayli and Shaykh Muhammad Abu Zahrah are too hastily compromising Islamic legal

standards to prove that Islam conforms with international standards. Other scholars like Ebrahim Afsah even suggest forgetting Islamic law and surrendering to international law standards, an approach heavily criticized by other Muslim scholars such as Khaled Bashir.

Other problematic approaches are attributable to those labeled 'extremists' who detest international law altogether. For example, the prominent Al-Qaeda scholar Abu Muhammad Al-Maqdisi declared that Saudi Arabia is a *Kafir* (disbelieving) State because it subjects itself to non-Islamic international law and the United Nations. While many will gasp at this, Al-Maqdisi has a point. Believing other laws as superior to the laws of Allah is, according to scholarly consensus, a nullifier of faith. A Muslim believing so could be declared as an apostate, although such a process of *takfir* (i.e., declaring a Muslim as an apostate) must not be taken lightly and would require some procedure. After all, the real source of law in Islam is only Allah. As Imran Ahsan Nyazee Khan (2003) explains, every other source of law is derived from what He reveals.

However, the Islamic sciences of *fiqh al-siyar* undoubtedly intersect with international law. Muhammad Hamidullah (2011) explains that *fiqh al-siyar* has recognized treaties and customary international law (core sources of international law) since the classical Islamic period. Abiding by agreements (which do not contradict the Sharia) is a religious obligation and betraying them is a sign of hypocrisy. Meanwhile, following customs (which do not contradict the Sharia) is also among the secondary sources of law in Islam. In this vein, it may be essential to critically examine Al-Maqdisi's critic rather than dismiss him altogether simply because he is an 'extremist.' A careful examination of each international treaty and customary international law must be made to consider which can be accepted Islamically and which cannot, rather than a blanket acceptance or rejection.

But this is a merely traditional way of seeing international law. A more contemporary and constructivist approach is to recognize the international law-making trend. As Catherine Brölmann describes, such a trend of international law has "rules with a statutory function, above and beyond rules governing voluntary legal relations between equal subjects." This is not yet considering *jus cogens* and *obligatio erga omnes*, considered as the highest norms of international law to which no derogations are permitted. Especially relating to the laws of armed conflict, much of IHL is considered *jus cogens* norms, and many of the conventions (the Geneva Conventions and others) are also law-making treaties.

There are scholars like Antony Anghie (2004) and many others who note how the developing world did and do not have fair chance to be involved in this process of law-making. The Muslim world is, sadly, included. However, Islamic scholars do not seem to be helping much in this regard either. It appears that all works of *fiqh al-siyar*, classic and contemporary, are written in a manner where the Islamic state is fully sovereign and only accepts what it consents to. Shaykh Wahbah Al-Zuhayli (2011) realizes how contemporary international law, to some extent, erodes sovereignty. However, like most (if not all) other works of *fiqh al-siyar*,

he does not explain how to position the international law-making trend in a *fiqh al-siyar* framework, especially regarding rules which are binding despite the absence of direct consent (such as *soft law*). Hence, more research is needed in this regard.

Second Issue: Lack of Comprehensive Detail in Rulings

There is a severe lack of detail in how contemporary Islamic jurists deal with questions arising from the developments in modern warfare. As reflected in most contemporary literature on IHL and Islam (such as those published by the ICRC, including Ammeur Zemmali's edited book), many scholars seem content that Islam teaches humaneness because "The Prophet (peace be upon him) prohibits killing women, children, and the decrepit in war." Such a notion is correct, but there are numerous details not addressed by the current Islamic legal scholarship.

For example, how similar is Islamic law to the IHL notion of "participation in hostilities"? It is hard to find any Islamic source discussing this. One specific question of medical personnel was discussed in the ICRC Islam and IHL expert workshop in Geneva 2018. However, more questions follow, such as the status of police officers in non-combat functions, reserve forces, and many others. As Al-Dawoody (2011) notes, there are categories of persons (such as those severely ill) which are not among the specifically protected persons mentioned in the *Qur'an* and *Sunnah*, but the classical jurists included them as protected persons anyways. Such an inclusion is due to a general prohibition to attack those who do not participate in the hostilities. This may indicate that a mere general principle is not enough, and a more detailed ruling is needed.

Further, contemporary Islamic scholars do not comprehensively respond to the question of modern weapons such as bombs and missiles. In his book *Fi al-Jihad: Adab wa Ahkam*, Shaykh Abdullah Azzam follows the Prophet Muhammad's lead (peace be upon him) using *qiyas* (analogy) to deduce that bombs and missiles are permitted but goes no further. There is no discussion on how to avoid collateral damage, a core concern when using such weapons. Muhammad Thala'at Al-Ghunaymi (2012) adds that the Muslim army should try not to aim at civilians, which is a needed additional detail not present in other works, but it cannot be that simple. Compare this to Articles 51, 57, and 58 of Additional Protocol I 1977 which provides a proportionality principle to minimize collateral damage.

On the other hand, there are other Islamic jurists like Shaykh Yusuf Al-Qaradhawy, who argue that such weapons may only be used in defensive warfare and not in offensive warfare. Indeed, advanced weaponry is not the sole determining factor in winning a war, but prohibiting such weapons is practically suicide when facing an enemy using them. This ruling is not realistic. Additionally, in defensive warfare, Al-Qaradhawy permits bombs and missiles without mentioning the need to avoid collateral damage.

Islamic law prohibits the deaths of non-combatants and tolerates it when it is inevitable, but this should not be taken lightly. An Islamic legal maxim states *al-darūratu tuqaddira bi qadarihā* (necessity exceptions apply proportionally), and the Qur'an prohibits transgressing limits during the war. However, with such a lack of detailed rulings, these general principles in Islamic law cannot be performed well.

The above are mere examples indicating the necessity for Islamic law scholars to formulate more detailed rulings for numerous new problems emerging in contemporary warfare. Here, I find that it may be possible from an Islamic law perspective to adopt some provisions from modern IHL to help elaborate general rules in Islamic law while rejecting any that contradict Islamic law. This act is possible not just for minimizing collateral damage but in many other issues also such as determining combatant status, so more protection can be afforded to those who deserve it.

Concluding Remarks

There are a few reasons why more detailed and comprehensive research into the Islamic laws of war is essential. From an international law perspective, a fair and comprehensive comparative analysis between legal traditions within international law is essential. It would improve the legitimacy of international law in its purported claim of universality, responding to critiques from TWAIL scholars. Additionally, when the relevant actors feel religiously bound by those laws, more legal protection could reduce the terrors brought by war. A religious bond towards laws similar to IHL is potentially more effective than relying on IHL. Note that IHL has a lack of compliance and even some debate as to whether and how it is even binding on non-state armed groups.

Most importantly, from an Islamic law perspective, the need is more acute. The lethargy of legal scholarship may cause problems because some persons may not be afforded the protection they deserve. If the lack of protection is due to the lack of legal rulings, it is incumbent upon the Islamic jurists to resolve this problem as a collective obligation of the Muslim *'ummah*.