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ISLAMIC LAW AND INTERNATIONAL HUMANITARIAN LAW

Islamic law is the bedrock of Islam and one of the three major legal systems in the world today.

Owing to its unique characteristics, some parties to armed conflict continue to refer to Islamic law as a primary source of rules governing their conduct during armed conflict. The similarities in the principles underpinning international humanitarian law (IHL) and Islamic laws of war suggest that these two legal traditions have the same objectives. Promoting the universality of these principles, which transcend legal traditions, cultures and civilizations, is essential for ensuring compliance with IHL.

WHAT IS ISLAMIC LAW?

Due to its unique sources, nature and methods, "Islamic law" is not easily defined. Much of the confusion surrounding Islamic law derives from the complex and highly technical nature of this legal system, coupled with the fact that, historically, Muslims did not use the exact equivalent of the word "law" in their languages.

Islamic law is comprised of two legal genres:

- *Sharī'ah* (literally, "path" or "way") is the set of divine rules given by God in the Qur'ān or ascribed to the Prophet Muhammad.
- *Fiqh* (literally, "understanding") is defined as the practical rules derived or developed by the jurists from specific sources or proofs.

The set of sources and methods used by the jurists to derive these rules of law is the subject of the academic discipline of *Uṣūl al-Fiqh* (legal theory/methodology).

What does it govern?

Islamic law therefore includes both secular and religious dimensions. In general, the areas regulated by Islamic law include acts of worship, family law, commercial law, international law, constitutional law and criminal law.

Based on, and in addition to, the legal injunctions included in the Qur'ān and the tradition of the Prophet Muhammad, Islamic law largely consists of:

- legal rulings
- legal maxims
- *fatwas* (non-binding legal opinions) developed by jurists
- court judgments.

In most areas, Islamic law was never codified. Therefore, the main issues concern distinguishing between: divine rules (*Sharī'ah*) and human interpretation of rules; rules that are changeable and those that are unchangeable; and rules that apply in all circumstances and those that are contextual.

Even the divine component *Sharī'ah* – which makes up a very small portion of Islamic law – is sometimes interpreted differently and its objectives and application understood differently. Consequently, different and sometimes conflicting rules are developed by the jurists of different schools of Islamic law.

The schools of Islamic law

Within the three sects of Islam – the Sunnīs, Shi'īs and Ibāḍīs – different extant schools of law (*madhhab*) are predominant in different countries.[1]

- For Sunnīs: (1) the Ḥanafī school in Syria, Egypt, parts of Iraq, Turkey, the Balkans, Pakistan, Afghanistan, Bangladesh and India; (2) the Mālikī school in Mauritania, Morocco, Tunisia, Algeria, Libya, Sudan, the United Arab Emirates and West Africa; (3) the Shāfi'ī school in Yemen, Jordan, Palestine, Lebanon, Somalia, Djibouti, the Maldives, Indonesia, Malaysia, Brunei, Singapore, the Philippines and Thailand; and (4) the Ḥanbalī school in Saudi Arabia and Qatar and to a lesser extent in the rest of the Gulf countries.
- For Shi'īs: (1) the Ja'farī (Twelver) school in Iran, Azerbaijan, Iraq, Lebanon, Bahrain and Afghanistan; (2) the Zaydi school in Yemen; and (3) the Ismā'ilī school in India, Pakistan and Afghanistan.
- For Ibāḍīs: the Ibāḍī school of law in Oman.

1 The following is a non-exhaustive list. More than one school of law could be applied in the same country on an individual or communal level, though a state usually applies a single school of law in its court system. In some cases, courts may include rulings from other schools of law, mainly from the same sect, because they are viewed as equally authoritative.

Apart from Afghanistan, the Maldives and Saudi Arabia – which only apply Islamic law – most Muslim countries apply an amalgamation of Islamic law and civil law or common law and, in some cases, customary law. Turkey applies civil law only.[2]

The term "jurist" (*faqīh*, plural *fuqahā'*) refers to those qualified to apply general legal principles to specific situations. Only a subset of jurists, *mujtahids*, are qualified to exercise independent reasoning to derive rules of Islamic law. Jurists are usually associated with a specific school of law whose methodology and principles they apply.

SOURCES OF ISLAMIC LAW

Sunnī schools

In the Islamic law-making process, Sunnī jurists use two categories of sources.

The main sources (also known as "agreed-upon" sources) are, in order of authority:

1. the Qur'ān
2. the Sunnah (tradition) of the Prophet, comprised of his sayings, deeds and tacit approvals
3. *ijmā'* (consensus of legal opinions)
4. *qiyās* (legal analogical or deductive reasoning).

If no rulings can be found in these primary sources, then the *mujtahids* exercise legal reasoning (*ijtihād*) through a number of supplementary sources or jurisprudential methods to develop Islamic laws. These supplementary sources (also known as "disputed" sources) are:

5. *istiḥsān* (juristic or public preference)
6. *maṣāliḥ* (public interest)
7. *sadd al-dharā'i'* ("blocking the means", i.e. prohibiting an otherwise lawful act that would lead to unlawful results, or permitting an act that will lead to a result consistent with Islamic principles)
8. *shar' man qablanā* (divine laws preceding Islam)
9. *qawl al-ṣaḥābi* (legal opinions of the Companions of the Prophet)
10. *'urf* (custom)
11. *istiṣḥāb* (the presumption of continuity of an existing rule).

The various Sunnī schools of law differ in their interpretation and application of these supplementary sources. Whereas jurists are bound by the Qur'ān, the Sunnah and *ijmā'*, their legal opinions derived from supplementary sources may diverge from those of other jurists.

Shi'ī schools

Shi'ī jurists only accept the following as binding sources of law:

1. the Qur'ān
2. the Sunnah (understood by some schools to include the tradition of certain *imams* from the household of the Prophet)
3. *ijmā'*
4. *'aql* (reason).

The remaining jurisprudential methods used by Sunnī jurists are not recognized as sources in the Islamic law-making process by Shi'ī jurists.

2 See http://www.juriglobe.ca/eng/index.php, all web addresses accessed May 2018.

ISLAMIC LAWS OF WAR

Origins

At the time of its emergence in 610 CE, followers of Islam encountered hostility that resulted in two mass movements and a number of violent encounters, including battles, between Muslims and other communities. This aspect of Islamic history is dealt with in religious, historical and juridical texts that provide a basis for Islamic laws of war.

Islamic laws of war are derived predominantly from the Qur'ān, *hadith* literature, *sīrah* literature (early Islamic history, including the biography of the Prophet) and *tafsīr* (exegeses of the Qur'ān). These rules are compiled in *fiqh* literature under headings such as: *al-jihād* (here, "law of war"); *al-siyar* (international law); *al-maghāzī* (campaigns);[3] *akhlāq al-ḥarb* (the ethics of war); and *al-qanūn al-dawlī al-insānī fī al-Islām* (Islamic international humanitarian law).

Characteristics

Islamic laws of war have a number of unique characteristics, which is why they continue to be the frame of reference for some parties to armed conflict. These characteristics should thus be taken into consideration when Islamic law is applied to armed conflict.

As Islamic regulations on the conduct of hostilities are derived from the Islamic scriptures, Muslims are motivated to comply with them by the prospect of divine reward (or punishment), in addition to a state's enforcement measures.

It follows that compliance is not subject to reciprocity; Muslims are expected to comply regardless of the conduct of their adversaries. However, jurists sometimes use the notion of reciprocity as a basis for loosening restrictions on certain weapons or tactics.

Over time, contradictory regulations have developed from the diverging interpretations of jurists. This is a result of both the contextual and textual foundations of Islamic law and the need for jurists to balance Islamic principles with the military necessity of winning a war.

Conflicting rulings create major difficulties when Islamic law is applied in contemporary armed conflicts, because they can be used selectively to justify attacks against protected civilians and objects. They are especially problematic when employed by those lacking the necessary expertise in Islamic law. This explains the gap sometimes observed between the theory and practice of Islamic laws of war.

Principles

The vast and detailed Islamic legal literature concerned with regulating armed conflict shows that many of the issues covered by IHL were addressed by Muslim jurists 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.

As with IHL, classical Islamic legal literature distinguished between international and non-international armed conflicts. The Islamic rules on the use of force in non-international armed conflicts are much stricter and more humane than those for international armed conflicts. Arising from early Islamic history, Islamic law identifies four different categories of non-international armed conflicts, each of which has different regulations on the use of force.

3 Although often taken to mean offensive military engagements, the term *maghāzī* was used in early Islamic literature to describe a range of foreign expeditions, whether for diplomatic, military or proselytization purposes.

Islamic laws of war sought to humanize armed conflict by protecting the lives of non-combatants, respecting the dignity of enemy combatants, and forbidding deliberate damage to an adversary's property except when absolutely required by military necessity. The following are the core principles of Islamic laws of war.

Islamic law makes it abundantly clear that all fighting on the battlefield must be directed solely against enemy combatants. Civilians and other non-combatants must not be deliberately harmed during the course of hostilities.

Protection of civilians and non-combatants

Islamic law makes it abundantly clear that all fighting on the battlefield must be directed solely against enemy combatants. Civilians and other non-combatants must not be deliberately harmed during the course of hostilities. This broad principle is aligned with IHL, which requires belligerents to distinguish between combatants and civilians and prohibits attacks against civilians or civilian objects (Additional Protocol I of 1977 (AP I), Arts 48 and 51(2); Customary IHL Study (CIHL), Rule 1).

Five categories of people are specifically protected from attack under Islamic law: women; children, the elderly; the clergy; and, significantly, the '*usafā*' (slaves or people hired to perform certain services for the enemy on the battlefield, but who take no part in actual hostilities). The duties of the '*usafā*' on the battlefield at the time included such things as taking care of the animals and of combatants' personal belongings. Their equivalent in the context of modern warfare would be civilians accompanying the armed forces who do not take part in actual hostilities and, accordingly, cannot be targeted (Third Geneva Convention of 1949 (GC III), Art. 4(A)(4)).

Based on the logic guiding these categories, the Companions of the Prophet and succeeding generations of jurists have extended protection from attack to additional categories of people, such as the sick, the blind, the incapacitated, the mentally ill, farmers, traders and craftspeople.

As is the case for civilians under IHL, members of these categories will lose their protection from attack if they take part in hostilities (Article 3 common to the four Geneva Conventions of 1949 (GC I–IV); AP I, Art. 51(3); Additional Protocol II of 1977 (AP II), Art. 13(3); CIHL, Rule 6).[4] The mere fact that jurists investigated cases of individual participation shows that the principle of distinction and the prohibition of attacks against those not participating in hostilities were major concerns for many classical Muslim jurists.

Prohibition against indiscriminate weapons

From the Qur'ānic prohibition against killing another human being come rulings prohibiting means or methods of warfare that may cause incidental harm to protected people and objects which would be excessive in relation to the anticipated military advantage.

In order to preserve the lives and dignity of protected civilians and non-combatants, classical Muslim jurists discussed the permissibility of using indiscriminate weapons of various kinds, such as catapults and poison- or fire-tipped arrows.

In the interpretation of this prohibition, jurists arrived at varying conclusions depending on the circumstances. Military necessity is one of the circumstances in which the use of indiscriminate weapons may be permitted.

The notion that belligerents must minimize incidental harm to civilians and civilian objects, and that this limits the means and methods that they can use, is common to both Islamic law and IHL (AP I, Art. 51(4); CIHL, Rule 17). However, the two legal traditions may differ as to whether or in what circumstances specific means or methods are lawful.

4 See also Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2010: https://shop.icrc.org/guide-interpretatif-sur-la-notion-de-participation-directe-aux-hostilites-en-droit-international-humanitaire-2597.html

Prohibition against indiscriminate methods of warfare

Motivated by the same concerns that led them to investigate the lawfulness of using certain means of warfare, classical Muslim jurists discussed the permissibility of two potentially indiscriminate methods of warfare that could result in the killing of protected persons and damage to protected objects:

- *al-bayāt* (attacks at night): increased the risk of protected persons and objects being harmed
- *al-tatarrus* (human shields): jurists deliberated the permissibility of shooting at human shields because of the risk of inflicting incidental harm on protected persons.

While some jurists made some contradictory rulings, there was consensus on the fundamental point that protected persons and objects were not to be deliberately harmed.

In IHL, the prohibition of indiscriminate attacks includes attacks employing a method of combat which cannot be directed at a specific military objective (AP I, Art. 51(4); CIHL, Rule 11). The use of human shields is specifically prohibited (GC I, Art. 23; GC IV, Art. 28; AP I, Art. 51(7); CIHL, Rule 97). Whether an attack at night is permissible under IHL depends on the circumstances, taking into account the attacker's obligation to comply with the principles of distinction, proportionality and precaution in particular.

IHL rules already reflect the balance between considerations of humanity and military necessity. Therefore, military necessity cannot justify a departure from belligerents' obligations under IHL.

Protection of property

> *"In Islam, everything in this world belongs to God, and human beings are entrusted with the responsibility of protecting His property and contributing to human civilization. Hence, even during the course of hostilities, wanton destruction of enemy property is strictly prohibited."*

Such destruction constitutes the criminal act described metaphorically in the Qur'ān as *fasād fī al-arḍ* (literally, "destruction in the land").

As a rule, except when required by military necessity, attacks against enemy property may only be carried out with one of two aims in mind: to force the enemy to surrender or to put an end to the fighting. Belligerents must not deliberately cause the destruction of property for the sake of it. This rule generally applies to animate and inanimate property alike.

Classical Islamic legal literature reflects the sanctity of an adversary's private and public property. For example, consuming an enemy's food supplies or using their fodder to feed one's own animals was regarded as permissible only in the quantities absolutely necessary for military purposes. Targeting horses and similar animals during the course of hostilities was permitted only if enemy soldiers were mounted on them while fighting. Such targeting also formed part of the prohibitions against indiscriminate means or methods of warfare (see above).

IHL rules on the protection of property in the conduct of hostilities are complex and wide-ranging. The general rule is that attacks must not be directed against civilian objects (AP I, Art. 52; CIHL, Rule 7). Additionally, certain objects benefit from specific protections, e.g. medical facilities, the natural environment, objects indispensable to the survival of the civilian population and cultural property.

Prohibition against mutilation and management of the dead

> *Islamic law strictly prohibits mutilation.*

Islamic law strictly prohibits mutilation, and instructs Muslims to avoid deliberately attacking an enemy's face.

Regard for human dignity requires that dead enemy soldiers be buried or their bodies handed over to the adversary after the cessation of hostilities. Failure to discharge this obligation is, according to the jurist Ibn Ḥazm (d. 1064 ce), tantamount to mutilation.

Similar rules apply under IHL. Parties to armed conflict must take all possible measures to search for, collect and evacuate the dead without adverse distinction (GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP II, Art. 8; CIHL, Rule 112). They must take all possible measures to prevent the dead from being despoiled; the mutilation of dead bodies is prohibited (GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP I, Art. 34(1); AP II, Art. 8; CIHL, Rule 113). They must endeavour to either facilitate the return of the remains of the deceased or dispose of them in a respectful manner (GC I, Art. 17; AP I, Art. 34; CIHL, Rules 114–115).

Treatment of prisoners of war

Some of the above-mentioned characteristics of Islamic law also come to the fore in the matter of prisoners of war. There are two main issues here: how prisoners of war should be treated; and what to do with them.

As to the treatment of prisoners of war, Islamic law requires that they be treated humanely and with respect. They must be fed and given water to drink, clothed if necessary, and protected from the heat and the cold and from cruel treatment. Their families would remain with them, so as to protect family unity. Torturing prisoners of war to obtain military information is prohibited. These rules broadly reflect the principles articulated in IHL.

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In the matter of what should be done with prisoners of war, classical Muslim jurists fell into three groups. The first found that prisoners of war must be released unilaterally or in exchange for captured Muslim soldiers. The second group, made up of some Ḥanafī jurists, argued that the state should decide, based on its best interests, whether to execute or enslave prisoners of war.[5] Others from the Ḥanafī school said that the prisoners of war may be freed, but must remain in the Muslim state because permitting them to return to their country would strengthen the enemy's forces. The third group, representing the majority of jurists, found that the state should decide, based on its best interests, between all of the above options (execution, enslavement, unilateral release, exchange for captured Muslim soldiers, or release within the Muslim state).

IHL provides detailed rules for the treatment of prisoners of war. They must be released and repatriated without delay after the cessation of active hostilities (GC III, Art. 118; CIHL, Rule 128), although some categories of prisoners of war may be repatriated or interned in a neutral country sooner, or otherwise released on parole or promise (GC III, Arts 21, 109 and 111).

5 Relevantly, those jurists who argued that it was permitted to execute prisoners of war based their conclusion on reports that three prisoners of war had been executed in the wars between the Muslims and their enemies during the Prophet's lifetime. Examination of the historical record, however, shows that if all or some of these reports were true, these three prisoners of war were singled out for crimes they had committed before joining the war.

Islamic regulations have the same underlying principles as IHL as concerns prisoners of war: they are interned not to punish them but to prevent them from further participating in hostilities; and they are to be treated humanely at all times. However, IHL specifically prohibits enslavement or execution of prisoners of war (GC I–IV, Common Art. 3; GC III, Art. 130; AP II, Art. 4(2)(f); CIHL, Rules 89 and 94).

Note that "prisoner of war" has a specific meaning in IHL (GC III, Art. 4 and AP I, Art. 44); separate rules govern the treatment of others deprived of their liberty in relation to armed conflict (GC IV, Arts 79–135; AP I, Arts 72–79; AP II, Arts 4–5; CIHL, Rules 118–128).

Safe conduct and quarter

The term *amān* encompasses both safe conduct and quarter.

Amān, in the sense of safe conduct, refers to the protection and specific rights granted to non-Muslim nationals of an enemy state who are temporarily living in or making a brief visit to the Muslim state in question for peaceful purposes. Because of the nature of their profession, diplomats have enjoyed the privileges of *amān* since the pre-Islamic era.

Amān, in the sense of quarter, is "a contract of protection, granted during the actual acts of war, to cover the person and property of an enemy belligerent, all of a regiment, everyone inside a fortification, the entire enemy army or city".[6]

Similar to IHL, the underlying principle of *amān* is *ḥaqn al-dam* (prevention of the shedding of blood, protection of life). Therefore, if enemy combatants request *amān* on the battlefield during the course of hostilities – whether verbally or in writing, or through a gesture or by some other indication that they are laying down their arms – they must be granted it. The duty to grant quarter is also a rule of IHL (CIHL, Rule 46).

Those granted *amān* must be protected and granted the same rights as civilian temporary residents of the Muslim state in question. They must not be treated as prisoners of war, nor must their lives be restricted in any other way during their stay in the Muslim state. This protection remains in effect until their safe return to their home country.

In brief, the *amān* system makes it unambiguously clear that enemy combatants must not be targeted if they are no longer fighting.

It goes without saying that perfidy is strictly prohibited under the Islamic law of war, as it is in IHL (AP I, Art. 37; CIHL, Rule 65).

> *Perfidy is strictly prohibited under the Islamic law of war.*

The similarities between IHL and Islamic laws of war suggest that these two legal traditions have the same objectives.

CONCLUSION

The uniqueness of Islamic law – its origins and sources, and its methods of creating and applying laws – is clear. Nevertheless, the similarities between IHL and Islamic laws of war suggest that these two legal traditions have the same objectives. The above-mentioned principles of Islamic law regulating the use of force in armed conflict demonstrate that the legal literature produced by classical Muslim jurists was intended to humanize armed conflicts.

6 Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, p. 130.

MISSION

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International Committee of the Red Cross
19, avenue de la Paix
1202 Geneva, Switzerland
T +41 22 734 60 01
shop.icrc.org
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