

THE CONDUCT OF WARFARE IN ISLAMIC LAW AND INTERNATIONAL LAW: A COMPARATIVE STUDY

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ABSTRACT

Warfare is just as bad as could be considered, but despite this fact, wars have been fought and shall continue in the future as well. War is an intense armed conflict between states and paramilitary groups characterized by the presence of violence, aggression, and destruction of life and property using military tactics. Even in such circumstances, the Islamic law as well as international law has described some fundamental rules, which shall be followed by the warring parties. This portion of law is known as the jus in bello, while the portion of the legal rules talking about the legitimacy of warfare is known as the jus ad bellum. The conduct of war is differently explained by Islamic law and the International Humanitarian Law. International Humanitarian Law can be defined as the body of laws governing the conduct of states during an armed conflict. The guiding principles of IHL arise from the need of placing limits on the conduct of warfare to diminish its damages. Whereas the Islamic law of war has been derived by the Muslim Jurists through the primary sources, the Holy Qur'an and Prophet Muhammad saw Sunnah. Secondary sources include early Islamic precedents, consensus between the jurists (Ijma), jurists' rulings through analogy, and public interest (Al-Dawoodi, 2017).

Keywords: Conduct of Warfare, Jus in Bello, Jus ad Bellum, Islamic Law, International Law.

INTRODUCTION: CONCEPT OF WAR IN ISLAM

The concept of war in Islam is explained under the topic of Jihad. The word jihad is derived from the word *juhd* meaning to exert, strive or struggle. Jihad refers to a holy war or constant struggle. It refers to a kind of war waged for the protection of Islam (*Deen*) as a religious duty. There are two major types of Jihad. The first is the Jihad of self, which refers to controlling oneself from the evil temptations as prohibited by Allah Almighty. This type of jihad is the greater jihad, leading to the process of self-purification. The second type of Jihad refers to an armed struggle. This is the minor jihad, which refers to the state of external self-defense which may be carried out with one's own tongue, pen or sword. This has further two types; defensive Jihad and aggressive Jihad. Defensive Jihad is the Jihad against outside invasion. It is imperative for Muslims to protect themselves and their lineage from the invasion of non-Muslims. Aggressive Jihad is the Jihad that includes an offensive attack on the enemy to spread the deen of Allah and for removing the darkness and cruelty that is accompanied by religions other than Islam. Islam has laid down clear rules for an ethical war. Under no circumstances does Islam fosters violence and oppression. In the Holy Qur'an, there are two Arabic roots used to explain violence. The first root justifies "to wage war" and the second root justifies "oppression". The jurists conclude that the use of force is allowed in Islamic war if deemed necessary by the situation (the necessity of war). The necessity of the situation also depends on the nature of the enemy or the kind of threat it poses to Islam. The necessity here refers to all the reasons for fighting the non-believers for the preservation of the Muslim community from destruction. In Islam, violence is only glorified if it is for the religious pursuits. Otherwise, it is condemned (Pettygrove, 2007). However, the use of force has been regarded as the last resort along with ethical rules for conducting the war which are:

- In self-defense
- When other nations have attacked an Islamic state
- When a state is oppressing the Muslims in their country

In crux, Islam fosters war to defend Islam rather than to promote it.

Concept of war as explained by International Humanitarian Law

In warfare, it is considered praiseworthy if people set out to kill and injure other people deliberately. Whereas in the normal code of conduct, it would be considered the worst thing one can do. This radical expression of warfare goes entirely against the normal ethical code of normal human conduct. The notion of absolute warfare translates to the idea that everything is fair in war. This exempts all codes of conduct during the war. This idea says that the absolute aim of war is to defeat your opponent anyhow which means that any and all means are justified. This idea focuses on the attainment of victory until the other side is destroyed. This implies that any means that can help to attain such ends are deemed permissible, no matter the cost. The absolute conclusion of warfare is the attainment of peace, by ending the conflict. War may end the conflict but it is not the best way to attain a peaceful conclusion. War has many negative impacts. It may completely destroy one of the two parties. So, we need an alternative to absolute warfare. We can develop a set of guidelines that do not completely end warfare but allows armed conflict to take place in a controlled manner, so as to limit the costs. This concept is called humanitarianism, which limits the cost of warfare in all domains. It moderates the impacts of war. It implies that there are limits to war. There are certain things in war, which bind people together. It is normal human nature to avoid suffering. International humanitarian law binds people through the values of freedom from suffering and liberty, as no one can live eternally in suffering (Crowe, 2013).

History of Islamic law of war

The West has always felt susceptible to the advent of Islam and its fast spread throughout the world. The emergence of Islam in 610 AD, posed many social, economic, and political threats to already present systems of leadership in Arabia. The followers of the new religion (Islam) had to face a lot of hostility and were forced out of the birthplace of Islam (Mecca) twice; first, they traveled to Abyssinia and then to Yathrib. During this, there were many battles between the Muslims and the non-believers. The Sirah and hadith literature provides all the information regarding the deaths and prisoners during the Islamic wars. The texts of Tafseer also include in-depth knowledge on such matters. The Fuqaha or the jurists used these texts as sources to derive the Islamic law of war. The Islamic laws of war have been derived by the jurists and legal scholars belonging to Sunni or Shi'ite sects, coming from one of the many schools of thought prominent amongst Sunni and Shi'ite sects both.

History of International Humanitarian Law

International Humanitarian Law's codification began in the nineteenth century. International Humanitarian Law is based on various international conventions such as the Hague Regulations of 1899, the Geneva Conventions 1949, and two additional protocols of 1977. Article 38(1) of ICJ has listed the following primary sources of international humanitarian law:

- International conventions
- International customs
- General principles of law recognized by civilized nations
- As a supplementary source, judicial decisions, and the teachings of the most highly qualified publicists (Crowe, 2013).

Almost all the states have agreed to abide by these laws thus IHL has now become customary law. It only covers international and national armed conflicts. It does not cover internal acts of violence. It covers two areas: the protection of people who are no longer part of the conflict and the limits to the means of conduct in warfare.

Islam and the West in a state of conflict

The west has associated Islam with the concept of holy war (Jihad) and Muslims with the propagation of violence in need to spread the name of Allah. Muslims throughout the world find it disturbing. The west has always been unsure of the Muslim community residing there. In the post 9/11 era, London suicide bombings, terrorist attacks, hostage taking and beheading in certain Muslim states led to much speculation that it was a sign of increasing religious extremism and violence associated with Islam. Post 9/11 jihad was directly associated with terrorism in the western literature. Islam being the religion of

the one fifth population in the world, urges to clear such misconceptions about Islam engrained in the western literature (Dawoody, 2011).

Use of Force in Islam

The context of Islamic laws of war has been derived from the seven centuries of war. Islamic law has been uncoded for the greater part since its birth. It was only in the twentieth century that jurists started codifying it and due to the tools used in the law-making process, the laws about use of force in Islamic law contradict each other (Dawoody, 2017). In Qur'an the word *harb* is used for war. Quran does not allow violence unless it is necessitated by a situation. In the instances where believers are prevented from worshipping and where there is a threat to Islam, violence is permissible. Islam allows the use of force in self-defense in the verse (22:39) and for the defense of those who are oppressed and are unable to defend themselves in the verse (4:75). As it is stated in the Qur'an (5:32) that whosoever saves the life of one person is as if he has saved all humanity. Muslim states follow the defensive theory of jihad in contrast to the offensive theory.

Quran also allows the use of force against Muslims under some circumstances. If two groups of believers fight amongst each other, seek reconciliation between them and if one believer commits aggression against the other then fight the aggressor. Here permission is given to fight the aggressors. Verse 49:9 does not indicate if this is applicable either for an armed conflict or just for a rebellion within a state or both. But many scholars have implied that this theory of defensive jihad only applies for believers, it is not applicable on all humanitarian grounds. The offensive or aggressive theory of jihad states that Islam did not promote the use of force during the early days of Islam. During the Meccan period force was permissible during self-defense. Verse (42:42) states that the blame is upon those wrong people and make mischief on earth unjustly. After's prophet, Muhammad's migration to Medina, where he formed a Muslim community jihad was made obligatory for all Muslims. Verse 22:23 allows the use of force. It was relegated to the prophet Muhammad after the migration. It states that permission to fight is given to those against whom fighting is launched because they have been wronged. In 9 AH, a command was relegated which stated to fight the polytheists and the people of the book unless they embraced Islam.

The people of the book could be spared if they agreed to pay *jizya*; a protection tax (Shah, 2013). As spreading Islam through jihad is considered an obligation, many scholars believe that it can be done through peaceful means such as *da'wa* or missionary work. Many scholars believe that offensive jihad must be the last resort for fighting the non-believers. As the Quran says that there is no compulsion in religion. The dis-believers must be fought only when they pose a threat to Islam or the Muslim communities. The Quran itself states that if the enemy inclines towards peace so shall you incline towards peace with trust in God. Qaradawih's book of *Fiqh-al-Jihad* posits that jihad cannot be used to eliminate disbelievers from the earth. He says that Islam has only allowed fight against those who cause hinderance in their worship. As prophet Muhammad SAW also said that we have returned from lesser jihad to greater jihad; controlling oneself from the acts of evil (TNH, 2014).

Contemporary Principles of War

The principles of war have been followed for many years by many commanders and military officials. These laws do not ensure success, but they do act as a guide towards successful military operations. These techniques, when applied skillfully can yield potential results. We cannot say that these principles are rigid rather they are quite flexible, but the crux is the same, as it has been for many years. These principles are devised by an in-depth study of various war operations and personal experiences of the military officials. With the increase in technology, the laws need not be changed only new techniques are needed to maximize the use of modern technology. Social, economic and political factors also change war's practices. (Lonnie R Harrelson, 25th May 2005). There are nine contemporary principles of war. These principles are not the only preconditions for going on a war but they act as a guide to bring out artifice in the leaders.

1. The purpose of war, the aim, which gives men motivation to fight. It gives them a sense of direction.
2. Offensive action is necessary to attain the desired objective.
3. It is the use of overwhelming combat power at the right place and time.
4. It is the realization to use all the combat power in the most efficient way, to gain maximum output.

5. It is the movement of forces in relation to the enemy to secure an advantage. Effective maneuver exploits success and continuously poses new problems for the enemy, rendering his actions ineffective, eventually leading to his defeat.
6. It says that all the assets must be employed under one commander. Only one person must have the authority to give orders, as he sees fit.
7. It means that we should never give our enemy any advantage. It reduces vulnerability to hostile actions or surprises.
8. We should attack the enemy when they are least expecting an attack.
9. Simple, concise, and clear planning can avoid any unforeseen complications or confusion.
(Lt General Frank and Major General Spider Marks, January 1st, 2017)

Islamic Laws of War

The laws for war in Islam are:

1. The civilians and non-combatants should be protected from the devastation of war, especially women, children, and elder people. Hazrat Abu Bakr (R.A) bade the Muslims before the conquest of the Levant that if they win the battle, they shall not abuse their power and authority and that they shall not touch anyone who yields. The disbelievers had to pay a tax for not converting to Islam.
2. Indiscriminate attacks are prohibited in Islam, so no civilians are harmed voluntarily. Civilians include women, peasants, children, religious scholars, and medical staff. But once civilians engage in any combatant activity they no longer stay civilian.
3. Indiscriminate weapons are also prohibited for Muslims.
4. Muslims cannot fight Muslims unless they oppose Muslim leaders. If Muslims engage in a fight with other Muslims, then after fighting, Muslim prisoners shall be neither enslaved nor imprisoned.
5. After the victory, no civilian property shall be harmed. Hazrat Abu Bakr (R.A) said to his army that they are not allowed to cut down any palm trees, or other fruits and burn down any fields. They shall not cause any damage to the Earth. And if they need food, they shall ask for it from the civilians, just enough for one meal.
6. The prisoners of war shall be treated well. Muslim men are prohibited from mutilating the prisoners of war.
7. If the soldiers disobey their leaders, they shall be held accountable for doing so. The only orders they are allowed to forsake are the ones involving disobedience of God. For example, one time Abdullah bin Umar refused an order from his leader to kill all the prisoners as it was against the orders of Allah. Prophet Muhammad (PBUH) later absolved him from this blame.
(TNH 24th April 2014)

Compatibility of Islamic laws with contemporary principles of warfare

Muslims believe that Islamic laws of war are just as applicable today as they were 1400 years ago. Contemporary principles are also the same just a few additions have been made over time with the increase in technology and other political and economic factors. Contemporary principles and Islamic laws of war do not entirely go hand in hand. Some principles can be synced but not all. There are a few differences that are reconcilable. The authors that write that both are similar have only considered the factors that are in conformity with one another and the authors that write that both are antagonistic have only considered the factors which are opposite. We can study the compatibility by comparing treaty laws and international laws, and for Islamic laws, we need to look at the sharia laws decided for the Islamic war.

- According to the modern laws of war combatants are allowed to get involved in hostilities without any punishment as long as no rules are defied. Under the third Geneva convention, the prosecution of prisoners is allowed in Article 85. Whereas the Qur'an forbids the killing of prisoners after their capture. In Islam, it is emphasized that the prisoners should be freed by grace, or by paying any ransom, or in the exchange for Muslim slaves or by enslaving them.
- Modern laws of war also state that prisoners should be given medical treatment after being captured. (Third Geneva Convention, 1977, Art 30). Islamic laws also emphasize that prisoners should be provided with medical assistance.

- Both the modern laws of war and the Islamic laws of war share the point of view on the escapement of prisoners of war. Both emphasize that if the prisoner is captured while escaping the field, he is applicable to disciplinary laws but if he successfully escapes, reaches safety, and is then recaptured, then no punishment laws apply to him.
- Perfidy is considered of the most hideous acts to be done during the war according to modern laws. Similarly, Islamic laws also prohibit all sorts of treachery and duplicity during the war. The Holy Qur'an advises Muslims to fulfill all the contracts made during the course of the war. One example is that Caliph Umar (RA) harshly punished one of his soldiers when he assured a Persian soldier, hiding in the mountain that he would not be killed if he came out. But later killed him when he showed himself.
- Ruses of war are defined as the use of many tactics to misguide the opponent to gain an advantage. It is different from perfidy because in perfidy contracts are made confidently with a clear objective of betrayal whereas, in ruses of war, we try to use different techniques to mislead the enemy. Ruses of war have become a major norm of modern laws of war. Islam has also asserted the use of tactics to mislead the enemy. Muslims are allowed to act friendly or to pretend in front of the enemy to gain an advantage. During the battle of Trench, Muslim soldiers are sort of sent some misguiding messages to detract the enemy.
- Siege is the tactic in which the attacking forces subject the under-attack city to confinement. The enemy may cut off the city's water supply and other resources like food so that the city dies of starvation. The modern laws of war prohibit this tactic because the civilians depend on such resources for their survival. Islamic laws also denounced this tactic because it completely defies the Islamic law of distinction during the war. As the main victims of this are the civilians and the army altogether.
- There are certain types of weapons that are prohibited by the modern laws of war. Weapons that cannot distinguish between military objectives and the civilian population are banned. The weapons which might cause excessive destruction and unnecessary catastrophe are prohibited. According to Islamic laws, the use of poisoned weapons is not allowed because it may cause unnecessary suffering to the victim.
- Use of weapons of mass destruction has been strictly prohibited by the modern laws of war. The use of biological, chemical, and nuclear weapons is strongly condemned due to the mass destruction they cause. Islamic laws have no proper set of rules for use of WMD, maybe because no Muslim countries have experienced destruction from those weapons. But the Islamic scholars say that they do condemn using such weapons but if someone uses it on them, they surely are allowed to reciprocate. They advocate use of WMD from the verses of the Holy Qur'an where The Almighty has permitted to take revenge in the same way as they were harmed. But there is no proper consensus.

CONCLUSION

The Islamic laws have been devised from the basic principles laid down in the Holy Qur'an and Sunnah. Muslims are practicing these rules for almost 14 centuries by now. The so-called popularity of Hugo Grotious is just unmatched with the history, as he seems in his works, that he has been influenced by the tremendous works of Imam Shaybani (the pupil of Imam Abu Hanifah). All the laws have been devised by scholars from their experience study of contextual wars and the social environment around them. As time changes the social factors also change which leads to new minds devising new laws, in conformity with the basic Islamic principles (Tahsin Khan, July-September 2019). As the Muslim countries have signed various treaties like The Geneva Conventions, and one of the basic tenets of Islam is following the treatise being signed by the Muslims. Many scholars would say that the contemporary principles of war are compatible with those of Islamic laws (TNH, 2014).

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