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## **Ius in Bello under Islamic International Law**

**Mohamed Elewa Badar\***

### **Abstract**

In 1966, Judge Jessup of the International Court of Justice pointed out that the appearance of an English translation of the teaching on the 'Islamic law of nations' of an eighth-century Islamic jurist (Shaybānī) is particularly timely and of so much interest because of the debate over the question whether the international law, of which Hugo Grotius is often called the father, is so completely Western-European in inspiration and outlook as to make it unsuitable for universal application in the context of a much wider and more varied international community of States. However, there has been little analysis of the role of Islam in shaping the modern European law of war and its progeny, international humanitarian law. This paper argues that there is a room for the contribution of the Islamic civilisation within international humanitarian law and a conversation between different civilisations is needed in developing and applying international humanitarian law norms.

**Keywords:** Islamic International Law; *Siyar*; Ius in Bello; International Criminal Court

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## 1. Introduction

In 1964, in an article entitled 'Diversity and Uniformity in the Law of Nations' Judge Philip Jessup of the International Court of Justice stressed that "the effectiveness of *public* international law [...] would be seriously impaired if there were no tolerance of certain differences stemming from various legal systems".<sup>1</sup> Judge Jessup's observation was inspired by Margaret Mead's work on 'The Underdeveloped and the Overdeveloped' where she emphasised: "Nations are, and should be, different from one another".<sup>2</sup> Two years later, Justice Jessup pointed out that the timely appearance of an English translation of the teaching on the 'Islamic law of nations' of an eighth-century Islamic jurist (Shaybani) is of much interest because of the debate over the question whether the international law is completely Western-European in inspiration and outlook as to make it unsuitable for universal application in the context of a much wider and more varied international community of States.<sup>3</sup> The same remark was made by Baron de Taube earlier in 1926, in his lecture at the Hague Academy of

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<sup>1</sup> Philip C. Jessup, 'Diversity and Uniformity in the Law of Nations', 58 *American Journal of International Law* (1964) 341, p. 343 (emphasis in original).

<sup>2</sup> Margaret Mead, 'The Underdeveloped and Overdeveloped', 41 *Foreign Affairs* (1962) 78, p. 89.

<sup>3</sup> Philip C. Jessup, 'Foreword', in *The Islamic Law of Nations: Shaybānī's Siyar* (John Hopkins, Baltimore, Maryland, 1966), Majid Khadduri trans., p. vii; Marcel A. Boisard, 'On the Probable Influence of Islam on Western Public and International Law', 11 *International Journal of Middle East Studies* (1980) 429-450, pp. 447-8: "It suffices to emphasize that Grotius, the founder of 'public international law,' lived in the seventeenth century, whereas Shaybani, who wrote a treatise at least as complete and systematic, taking into account the generally casuistical presentation of Muslim law, died at the beginning of the ninth!"; Christopher G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan, Houndmills, 1988) pp. 149-158 (emphasising the influence of Islamic doctrine on the writings of Hugo Grotius on the law of combat).

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International Law where he pointed out that “the modern public international law of declarations of war was a direct descendant of Islamic doctrine, having passed into chivalric codes during the Crusades, through the Christian church and into the modern law of war”.<sup>4</sup> Another judge of the International Court of Justice, Judge Bedjaoui, has argued that the full range of Islamic conception of international law

will be appreciated if at each stage of the analysis it be borne in mind that it arose at the beginning of the 7<sup>th</sup> century. In various astonishing ways it nevertheless resonates strongly to our own era. This reminder of the remote origin in time of a legal system enables one to measure the extent of what Islam introduced into a dimming mediaeval West. It will also enable us to realise the still vital relevance of this *corpus juris* laid down, if may be forgiven for saying so in present company, one thousand years before Grotius, Gentilis, Ayala or Pierre Bayle.<sup>5</sup>

However, there has been little analysis of the role of Islam in shaping the modern European law of war and its progeny, international humanitarian law.<sup>6</sup> Writers on the modern law of nations have used the comparative method, but have drawn almost exclusively on Western experience.<sup>7</sup> This bias is not justified in a time when the

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<sup>4</sup> Baron Michel de Taube, 'Études sur le développement historique du droit international dans l'Europe orientale', 1926 *Recueil des Cours* 341, pp. 393-394; James Cockayne, 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilisation', 84 *International Review of the Red Cross* (2002) 597-626, p. 599.

<sup>5</sup> Mohammed Bedjaoui, 'The Gulf War of 1980-1988 and the Islamic Conception of International Law', in Ige F. Dekker and Harry H.G. Post, (eds.), *The Gulf War of 1980-1988 The Iran-Iraq War in International Legal Perspective* (Martinus Nijhoff, The Hague, 1992) pp. 277-300, p. 283.

<sup>6</sup> James Cockayne, 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilisation', 84 *International Review of the Red Cross* (2002) pp. 597-626, p. 599.

<sup>7</sup> Khadduri, *Shaybānī's Siyar*, *supra* note 3, p. xii.

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family of nations is no longer made up principally of Western nations,<sup>8</sup> but of different nations with prevalent differences in ideological approaches.<sup>9</sup> Judges sitting at international courts and tribunals know little about the Islamic conception of international law.

With the International Criminal Court's recent adventures in the Middle East and North Africa, where *Shari'a* or Islamic law is integrated in or has a significant influence on the legal systems of these countries, knowledge of Islamic legal tradition becomes inevitable. The ICC's potential involvement in Nigeria, for example, underscores this reality as Islamic law on rebellion offers a comprehensive code for regulating the conduct of hostilities in non-international armed conflicts, and thus it can be used as a model for improving the contemporary international legal regime.<sup>10</sup>

This paper argues that there is room for the contribution of the Islamic civilisation within international humanitarian law and a conversation between different civilisations is needed in developing and applying international humanitarian law norms.

## **2. Islamic law – meaning and conception**

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<sup>8</sup> Ibid.

<sup>9</sup> Philip C. Jessup, *supra* note 1.

<sup>10</sup> See Mohamed E. Badar, 'The International Criminal Court and the Challenge of Legal Pluralism: The Islamic Law on Rebellion and the Armed Conflict in Nigeria' 2 *Cambridge Journal of International and Comparative Law* (forthcoming).

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Islamic law (*Shari'a*) has its roots deeply embedded in the political, legal and social aspects of all Islamic states and it is the governing factor of all Islamic nations.<sup>11</sup> It is often described by both Muslims and Orientalists as the most typical manifestation of the Islamic way of life – the core and kernel of Islam itself.<sup>12</sup> Other commentators deem this an exaggeration and do not believe Islam was meant to be as much of a law-based religion as it has often been made out to be.<sup>13</sup> In any case, Islamic law (*Shari'a*), one of the recognized legal systems of the world,<sup>14</sup> is a particularly instructive example of a 'sacred law' and differs from other systems so significantly that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena.<sup>15</sup>

The Hague International Conferences on Comparative Law of 1932 and 1937, for example, confirmed that Islamic law is independent of other patterns and established that the Islamic civilisation and jurisprudence are considered to be among the principal legal systems of the world in the sense of Article 9 of the Statute of the Permanent Court of International Justice.<sup>16</sup>

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<sup>11</sup> Hamid Enayat, *Modern Islamic Political Thought* (Austin, University of Texas, 1982); Albert Hourani, *Arabic Thought in the Liberal Age: 1798-1939*, (Cambridge, Cambridge University Press, 1983); Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul-al Fiqh*, (Cambridge, Cambridge University Press, 1997).

<sup>12</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford, Clarendon Press, 1964), p. 1.

<sup>13</sup> Mohammad H. Kamali, *Shari'ah Law: An Introduction* (Oxford, One World, 2008), p. 1.

<sup>14</sup> See René David and John E. C. Brierly, *Major Legal Systems in the World Today*, (New York, Macmillan, 1978), p. 421.

<sup>15</sup> Schacht, *supra* note 12, p. 2.

<sup>16</sup> Sobhi Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' 117 *Recueil des Cours* (1966) 205-328, p. 221.

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The evolution of Islamic law is best explained by Sobhi Mahmassani in his 1966 celebrated work on 'The Principles of Islamic Law in the Light of Islamic Doctrine':

Islamic law has a long history during which many juristic sciences and schools of varying shades and methods arose. This history passed through successive periods. The first was the era of the Prophet Muhammad, during which Islam was born and was based on the divine text of the Quran and the sacred Traditions of the Prophet. But after Muhammad's death, the jurists had to study the earlier sources of the Quran and the Traditions in the light of the progressive needs created by the new expansion of the changing Islamic society. When Holy texts were lacking, they resorted to reason, employing discussion and consensus in some cases, and analogy or equity in others. The study of legal sources [...], the interpretation of divine texts and the conclusions deduced created what is called *Ijtihad*. This word literally means effort, but legally it was used to designate the earnest effort in seeking the knowledge of legal rules from their original sources. The reasoning and deductions resulting from *Ijtihad* gave rise to controversies among jurists (called Mujtahids), and consequently to different schools of jurisprudence and to different sects, the chief of which are the four Sunni and the three Shi'a schools.<sup>17</sup>

Although original,<sup>18</sup> Islamic law, like any other, has its 'sources' (*al-masadir*); it also has its 'guiding principles' (*al-usul*) that dictate the nature of its 'evidence' (*al-adilla*); it equally employs the use of 'legal maxims' (*al-qawa'id*) and

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<sup>17</sup> *Ibid.*, p. 223.

<sup>18</sup> *Ibid.*, p. 221.

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utilises a number of underlying 'objectives' (*al-maqāsid*) to underpin the structure of its legal theory.<sup>19</sup>

Islamic law, like Roman law, used to be a 'jurist law', in the sense that it was neither a product of legislative authority nor case law, but a creation of the classical jurists, who elaborated on the sacred texts.<sup>20</sup> However, with the first codifications in the middle nineteenth century, Islamic law became 'statutory law', promulgated by a national territorial legislature.<sup>21</sup>

It is no secret that most Islamic nations are viewed as being non-progressive, especially with respect to their national legal systems and implementation of criminal laws.<sup>22</sup> On the other hand, the Islamic states view the West and East as being unethical, immoral and unduly biased towards the religious, cultural and political aspects of Islam itself.<sup>23</sup>

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<sup>19</sup> Gavin Picken, *Islamic Law* (Routledge, London, 2010).

<sup>20</sup> Aharon Layish, 'The Transformation of the *Shari'a* from Jurists Law to Statutory Law', 1 *Die Welt des Islams, New Series* (2004) 86. See also Farooq A. Hassan, 'The Sources of Islamic Law', 76 *American Society of International Law Proceedings* (1982) 65.

<sup>21</sup> *Ibid.*

<sup>22</sup> John L. Esposito, *The Islamic Threat: Myth or Reality?*, in J. Rehman *et al.*, (eds.) *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers, The Hague, 2007), p. 5. See also J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order*, (Hart Publishing, Oxford, 2005).

<sup>23</sup> James T. Gathii, 'The Contribution of Research and Scholarship on Developing Countries to International Legal Theory', 41 *Harvard International Law Journal* (2000) 263; S. S. Ali and J. Rehman, 'The Concept of Jihad in Islamic International Law', 10 *Journal of Conflict & Security Law* (2005) 321-343; M. A. Boisard, 'On the Probable Influence of Islam on Western Public and International Law', 11 *International Journal of Middle East Studies* (1980) 429.



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However, since the death of the Prophet Muhammad, Islamic law has evolved over time through the work of jurists as a response to the needs created by the progress of the changing Islamic society.<sup>24</sup>

### 3. Islamic Schools of Thought

Scholars tracing their doctrine to the same early authority regarded themselves as followers of the same school. Early interest in law evolved where men learned in the *Qur'ān* began discussions of legal issues and assumed the role of teachers.<sup>25</sup> At first students rarely restricted themselves to one teacher and it only became the normative practice in the second half of the ninth century for jurists to adopt a single doctrine.<sup>26</sup> When prominent jurists<sup>27</sup> began to have loyal followers, which would apply exclusively their doctrine in courts of law, the so-called 'personal schools' emerged and only a few of these leaders were raised to the level of founder of a 'doctrinal school', what is referred to in Islamic law as the *madhhāb*.<sup>28</sup> When they emerged, the doctrinal schools did not remain limited to the individual doctrine of a single jurist, but possessed a cumulative doctrine in which the legal opinions of the leading jurists were, at best, *primi inter pares*.<sup>29</sup>

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<sup>24</sup> Mahmassani, *supra* note 16, p. 223.

<sup>25</sup> Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, Cambridge, 2005), p. 153.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, Those jurists are Abu Hanifa, Ibn Abi Layla, Abu Yusuf, Shaybani, Malik, Awza'i, Thawri and Shafi'i.

<sup>28</sup> *Ibid.*, p. 157.

<sup>29</sup> *Ibid.*, p. 156.

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Different schools of thought are divided into Sunni schools and *Shi'a* schools. Sunni schools or orthodox schools recognize the authority of the Traditions of the Prophet (*Sunnah*), as well as the authority of the four Orthodox Caliphs followed by the majority of the Muslims after the Prophet's death.<sup>30</sup> They comprise the Hanafi, named after Imam Abu Hanifa, the Maliki, named after Imam Malik, the Shafe'i, named after Imam Al Shafe'i and the Hanbali named after Imam Ibn Hanbal. Out of these schools the Hanafi school, the oldest and most progressive, was geographically the most wide-spread, and for much of Islamic history, the most politically puissant, whereas the Hanbali school, mainly based on the strict literal interpretation of the *Qur'an* and *Sunnah*, is regarded as the most conservative of the orthodox schools. Other *Sunni* schools, such as the Awza'i school, disappeared.<sup>31</sup> *Shi'a* schools recognize Ali (Shi'a of Ali) as the rightful Caliph or successor to the Prophet, as he was the cousin and son-in-law of the Prophet. They comprise of the Twelvers (Imami school), who acknowledge the existence of twelve Imams in the line of the descendants of Lady Fatima, the Prophet's daughter and Ali's wife; the Isma'ili, followers of Ismail, whom they consider the legitimate seventh Imam; and the Zaydi, whose adherents followed the leadership of Zaid, the fifth Imam.<sup>32</sup> Out of these the Twelvers are the best known and have the largest percentage of followers in Iran and Iraq.<sup>33</sup>

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<sup>30</sup> Mahmassani, *supra* note 16, pp. 223-224.

<sup>31</sup> *Ibid.*, p. 226.

<sup>32</sup> Hallaq, *supra* note 25, p. 156.

<sup>33</sup> M. Cherif Bassiouni, *The Shari'a and Post-Conflict Justice* (2010) at 15 (on file with the author).

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It is hard to find consensus among the various schools and sub-schools; however, some consensus can be found among the four *Sunni* schools and some consensus among the three *Shi'a* schools. The difference in the rules for interpreting the *Qur'an* is the fundamental element that separates the *madhāhib* from one another.<sup>34</sup> While there is no question that the *Qur'an* is the first source of the *Shari'a*, followed by the *Sunnah*, there are differences among the schools as to the ranking of the other sources of law.

In order to create greater legal certainty, rulers could direct the judge (*qadi*) they appointed to follow one school.<sup>35</sup> This was the practice of Ottoman Sultans, while Saudi Kings left their *qadi* totally free in choosing the *madhhāb* and opinions for deciding cases, as there is a strong sense of independence among the religious scholars staffing the courts, based on their view that the realm of the *fiqh* is their prerogative and the state should not interfere.<sup>36</sup>

While today there is a general understanding among the Islamic republics that the law has to comply with the *Shari'a*, the concurrence of legislation with the whole body of Islamic law, including Islamic jurisprudence (*fiqh*) and the doctrine of a particular school of Islamic law is not always included.<sup>37</sup> An example can be derived from the Constitution of the Islamic Republic of Pakistan, which states that “[a]ll

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<sup>34</sup> Abdur Rahim, *The Principles of Islamic Jurisprudence* (1994), pp. 73-110; Mahmassani, *supra* note 16, p. 227.

<sup>35</sup> Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century. Themes in Islamic Law* (Cambridge University Press, Cambridge, 2005), p. 6.

<sup>36</sup> *Ibid.* Nevertheless, Saudi *qadis* as a rule follow the Hanbali school.

<sup>37</sup> Ramin Moschtaghi, *Max Planck Manual on Afghan Constitutional Law, Vol. I, Structure and Principles of the State*, Amended 3<sup>rd</sup> Edition (2009), p. 31, <[www.mpil.de/shared/data/pdf/mpil\\_constlaw\\_manual\\_3rd\\_ed.\\_2009\\_engl.pdf](http://www.mpil.de/shared/data/pdf/mpil_constlaw_manual_3rd_ed._2009_engl.pdf)>, 11 March 2013.

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existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and *Sunnah*". Similarly the Afghanistan Constitution declares that "no law can be contrary to the sacred religion of Islam", but restricts the application of the Hanafi jurisprudence in Article 130 only to cases "when there is no provision in the Constitution or other laws regarding the ruling on an issue". In Saudi Arabia, on the other hand, Hanbali legal rules constitute the laws of the kingdom.<sup>38</sup> In Iran the constitution states that laws and regulations must be based on Islamic criteria, which in practice covered the *Shari'a* the *fiqh*, *fatwa* and doctrine of the Ja'fari fraction of Islam.<sup>39</sup>

#### 4. *Shari'a* and Muslim Societies

The modern Islamic society is divided into sovereign nation-states. Today there are 57 member States of the Organization of the Islamic Cooperation (OIC) which is considered the second largest inter-governmental organization after the United Nations.<sup>40</sup> The Organization claims to be the collective voice of the Muslim world and aims to safeguard and protect its interests.<sup>41</sup> Most States who joined the OIC are

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<sup>38</sup> Said Mahmoudi, *The Sharia in the New Afghan Constitution: Contradiction or Compliment?* (2004), p. 868, <[www.mpil.de/shared/data/pdf/mahmoudi,\\_the\\_shari%27a\\_in\\_the\\_new\\_afghan\\_constitution\\_contradiction\\_or\\_compliment.pdf](http://www.mpil.de/shared/data/pdf/mahmoudi,_the_shari%27a_in_the_new_afghan_constitution_contradiction_or_compliment.pdf)>, 11 March 2013.

<sup>39</sup> *Ibid.*, p. 871.

<sup>40</sup> This number includes Palestine which is not yet considered a state under international law. For more information on the OIC, see <[www.oic-oci.org/page\\_detail.asp?p\\_id=52](http://www.oic-oci.org/page_detail.asp?p_id=52)>, 11 March 2013.

<sup>41</sup> In 2004 the OIC has made submissions on behalf of Muslim states regarding proposed reforms of the UN Security Council to the effect that "any reform proposal, which neglects the adequate representation of the Islamic Ummah in any category of members in an expanded Security Council will not be acceptable to the Islamic countries". See (A/59/425/S/2004/808), para. 56, quoted in Mashood A. Baderin (ed.), *International Law and Islamic Law* (Ashgate, Aldershot, 2008), p. xv.

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predominantly *Sunni*, with only Iran, Iraq, Azerbaijan, Bahrain and Lebanon having a predominantly *Shi'a* population. Apart from Lebanon and Syria, all Arab states consider Islam as the State religion and source of law.<sup>42</sup>

Ten countries have declared themselves Islamic states, including the Islamic Republic of Afghanistan, the Islamic Republic of Iran, the Kingdom of Saudi Arabia and the Islamic Republic of Pakistan. Twelve other countries have declared Islam as the state religion and also recognize a constitutional role for Islamic principles or jurisprudence. Bassiouni divides predominant Muslim societies into three categories. The first category comprises secular states, like Turkey, who despite its moral or cultural connection with Islam does not subject its laws to the *Shari'a*. Countries from the second category such as Iraq and Egypt, expressly state in their constitutions that their laws are to be subject to the *Shari'a*, therefore their constitutional courts decide on whether a given law is in conformity with the *Shari'a* and can also review the manner in which other national courts interpret and apply the laws to ensure conformity.<sup>43</sup> The third category of states proclaims the direct applicability of the *Shari'a*. According to one commentator, the majority of Muslim States fall between the two poles of 'purist' Saudi Arabia and 'secular' Turkey.<sup>44</sup> Most states have been selective in determining which *Shari'a* rules apply to their

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<sup>42</sup> Clark B. Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State', 37 *Columbia Journal of Transnational Law* (1998) 81.

<sup>43</sup> Bassiouni, *supra* note 33.

<sup>44</sup> J. Esposito, 'Contemporary Islam: Reformation or Revolution?', in John L. Esposito, (ed.), *The Oxford History of Islam* (Oxford University Press, New York, 1999), p. 643.

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national legislations.<sup>45</sup> As a consequence of colonialism and the adoption of Western codes, *Shari'a* was abolished in the criminal law of some Muslim countries in the nineteenth and twentieth centuries, but has made a comeback in recent years with countries like Iran, Libya, Pakistan, Sudan and Muslim-dominated northern states of Nigeria reintroducing it in place of Western criminal codes.<sup>46</sup>

## 5. *Siyar* - Islamic International Law/Islamic Law of Nations

Linguistically, *siyar* is the plural form of the Arabic word *Sirah*, which is in turn derived from the verb *sara – yasiru* (to move). *Sirah* is a technical term in the Islamic sciences meaning the bibliography of the Prophet while its plural form, *siyar*, refers to legal matters. As the term *siyar* is not used in the Qur'ān, there has been much speculation on its use.<sup>47</sup> The most important contribution in *Siyar* related matters came from the Hanafi School.<sup>48</sup> The first classical commentator on Muslim international law was Abu Hanifa, while one of his followers, Al-Shaybānī, became known as 'the father of Muslim international law' due to his remarkable treatise, *al-Siyar al-Kabir* (the Major *Siyar*), which serves as a standard work of reference to-date.<sup>49</sup>

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<sup>45</sup> Haider A. Hamoudi, 'The Death of Islamic Law', 38 *Georgia Journal of International and Comparative Law* (2009) 316, p. 325.

<sup>46</sup> Peters, *supra* note 35, p. 124.

<sup>47</sup> Conversely, *sirah* is found 27 times in the *Qur'ān*. Anke I. Bouzenita, 'The *Siyar* – An Islamic Law of Nations?' 35 *Asian Journal of Social Science* (2007) 19, p. 20.

<sup>48</sup> *Ibid.*, p. 25.

<sup>49</sup> Mohammad T. Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague, 1968), pp. 34-35.

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The sources of Islamic law are also the sources of Islamic international law. They are grouped into two categories. Primary sources are based on text and are regarded as the only authoritative Holy enactments of Islamic jurisprudence. They comprise the *Qur'ān* and the *Sunnah*. Secondary sources are based on opinion. They comprise consensus of opinion (*ijma*) and analogy (*Qiyas*). Other sources, such as equity and reason or customs, are accepted by some Muslim schools.<sup>50</sup> In addition to these sources, *Siyar* is built on the orthodox practice of the early Caliphs and other Muslim rulers, arbitral awards, treaties, pacts and other conventions, official instructions to commanders, admirals, ambassadors and other State officials, the internal legislation for conduct regarding foreigners and foreign relations, the custom and usage.<sup>51</sup>

While the Western notion of international law rests on a post-Westphalian premise of territorially based nation-states who enjoy full sovereign rights and equality of status, the 'Islamic Law of Nations' or *Siyar* is a legal system based on the *Shari'a* intended to apply universally to all people in every time and place.<sup>52</sup> However, both propose to regulate beyond national boundaries, religious denominations and alliances.<sup>53</sup> For Hamidullah, the 'Muslim Law of Nations' is "that part of the law and custom of the land and treaty obligations which a Muslim de

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<sup>50</sup> Mahmassani, *supra* note 16, pp. 228-231.

<sup>51</sup> Muhammad Hamidullah, *Muslim Conduct of State*, 4th edn., (Lahore: Ashraf Press, 1961), p. 18.

<sup>52</sup> Shaheen S. Ali, 'Resurrecting *Siyar* through Fatwas?', in M. Cherif Bassiouni and Amna Guellali. (eds.), *Jihad and its Challenges to International and Domestic Law*, (The Hague Academic Press, The Hague, 2010), p. 116.

<sup>53</sup> For an analysis of the problems of compatibility of the two systems, see Bouzenita, *supra* note 47, pp. 19-46.

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facto or de jure State observes in its dealings with other de facto or de jure States”,<sup>54</sup> while Khadduri describes it as “the sum total of the rules and practices of Islam’s intercourse with other peoples”.<sup>55</sup> Al Ghunaimi points out, that in the modern world *Siyar* covers all international relations, not only those with non-Muslims.<sup>56</sup> However, Badr argues that whatever the definition of *Siyar* is, it should not lose sight of the historical framework of Islam.<sup>57</sup>

As noted by Al Ghunaimi, “[t]he Islamic theory by all means subscribes to the monistic theory in so far as the normative relation between national and international law is concerned”.<sup>58</sup> The classical doctrine of *Siyar* makes a division of the world into Muslims and non-Muslims comparable to that of the classical Roman division between Romans and barbarians, without recognizing equal status for the other party.<sup>59</sup> In this sense the Islamic classical doctrine played an equivalent role to that of the Greco-Roman Laws as a remote shape of modern international law.<sup>60</sup> Their rules for foreign relations were accordingly the rules of an imperial state.<sup>61</sup> This doctrine, however, is outdated and the practice of Muslim governments, communities and the Muslim diaspora indicate new norms of *Siyar*. As an example of contemporary *Siyar*, we must consider the membership of Muslim states in the United Nations, active participation in the formulation of various human rights and other treaties, accession

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<sup>54</sup> Hamidullah, *supra* note 51, p. 3.

<sup>55</sup> Majid Khadduri, *War and Peace in the Law of Islam*, (The Johns Hopkins Press, Baltimore, 1955), p. 47.

<sup>56</sup> Al Ghunaimi, *supra* note 49, p. 96.

<sup>57</sup> Gamal M. Badr, ‘A Survey of Islamic International Law’, 76 *Proceedings of the American Society of International Law* (1982) 56.

<sup>58</sup> Al Ghunaimi, *supra* note 49, p. 91.

<sup>59</sup> *Ibid.* See also Khadduri, *supra* note 7.

<sup>60</sup> Al Ghunaimi, *supra* note 49, p. 192.

<sup>61</sup> Khadduri, *supra* note 55, p. 45.



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to these treaties, as well as the formation of the Organization of Islamic Conference and its Charter, which implies agreement to conduct relations with other states on the basis of equality and reciprocity.<sup>62</sup>

The Muslim law of nations can be seen as a consequence of a (temporary) failure of Islam to win the whole world, which leaves non-Muslim communities outside the frontiers of Islam and the need to establish with them rules necessary for cohabitation, thus the making of treaties is not only permitted, but encouraged in order to prevent conflicts.<sup>63</sup> The Prophet of Islam was the first treaty maker, a diplomat seeking to gain recognition for his *Ummah* (nation), and the Treaty of *Hudaibiyah*, which he contracted with the non-Muslims of Mecca, is one of the most important precedents for *Siyar*.<sup>64</sup>

A contract in Islamic law is not merely a matter of secular law between the contracting parties, but a covenant with God.<sup>65</sup> The purposes and terms of treaties should be in compliance with the *Shari'a*, however, even in cases when they were apparently contrary to some principles of Islam, historically this was resolved in favour of the treaty's binding nature, because of the principle *pacta sunt servanda*,

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<sup>62</sup> See Ali, 'Resurrecting Siyar through Fatwas?', p. 117. See the preamble of the OIC Charter: "We the Member States of the Organization of the Islamic Conference, determined to... uphold the objectives and principles of the present Charter, the Charter of the United Nations and international law as well as international humanitarian law"; available at <[www.oic-oci.org/is11/english/Charter-en.pdf](http://www.oic-oci.org/is11/english/Charter-en.pdf)>, 11 March 2013.

<sup>63</sup> Khadduri, *supra* note 55, pp. 43-44.

<sup>64</sup> Imran Hosein, 'Diplomacy in Islam, Treaties and Agreements. An analysis of the treaty of Hudaibiyah' 3 *Muslim Educational Quarterly* (1986) 67-85; M. Khadduri, 'The Islamic Theory of International Relations and its Contemporary Relevance', in J. Harris Proctor, (ed.), *Islam and International Relations* (Paul Mall Press, London, 1965), pp. 24-40; Khadduri, *supra* note 3.

<sup>65</sup> UNODC, 'Combating trafficking in persons in accordance with the principles of Islamic law' (2010) at 23, <[www.unodc.org/documents/human-trafficking/Islamic\\_Law\\_TIP\\_E\\_ebook\\_18\\_March\\_2010\\_V0985841.pdf](http://www.unodc.org/documents/human-trafficking/Islamic_Law_TIP_E_ebook_18_March_2010_V0985841.pdf)>, 11 March 2011.

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which the *Shari'a* fully recognizes.<sup>66</sup> In this aspect the *Qur'ān* demands: "O ye who believe! fulfil (all) obligations" *Qur'ān* (5:1). In another context, the *Qur'ān* stipulates: "Fulfil the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them" *Qur'ān* (16:91).

## 6. Ius in Bello under Islamic International Law

War crimes encompass both grave breaches of the Geneva Conventions and violations of the laws and customs of war.<sup>67</sup> While acknowledging that not every violation of the rules of international humanitarian law is a war crime, it is generally accepted that serious violations of both Geneva and Hague law entail individual criminal responsibility. Common article 3, and Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II, which concern unlawful attacks on civilians or civilian objects, to the extent that they echo the Hague Regulations, entail individual criminal responsibility.<sup>68</sup> According to the Rome Statute, the International Criminal Court has jurisdiction over war crimes. Article 8 defines the jurisdiction of the Court with that respect and the first paragraph indicates that the Court shall have jurisdiction over offences "committed as part of a plan or policy or as part of a large-scale commission". Article 8(2) of the ICC Statute maintains the distinction between international and internal armed conflicts. Furthermore, the Statute specifies four types of categories of war crimes:

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<sup>66</sup> Bassiouni, *supra* note 33, 58-59.

<sup>67</sup> Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 (*Prosecutor v. Kordić and Cerkez*), 2 March 1999, International Criminal Tribunal for the Former Yugoslavia (ICTY), Case No. IT-95-14/2-PT, T. Ch. III, paras. 21-22

<sup>68</sup> *Ibid.*, paras. 30-34.

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1. The Rome Statute reiterates the wording of the four Geneva Conventions of 1949 (GCs), (articles: 50 GC I, 51 GC II, 130 GC III and 147 GC IV).<sup>69</sup> The breaches of the GCs under the statute specify that prohibited acts, including wilful killing, torture, inhuman treatment, hostage taking or extensive destruction and appropriation of property must be in the lights of international armed conflict and against individuals protected under the Geneva Convention.
2. Violations of laws and customs applicable in international armed conflict; The crimes stemmed from a variety of sources but mainly from the following enumerated instruments:
  - a. 1899 Hague Declaration (IV, 3) relating to Expanding Bullets,<sup>70</sup>
  - b. 1907 Hague Convention respecting the Laws and Customs of War and Land,
  - c. 1925 Geneva Protocol, and
  - d. 1977 Additional Protocol I to the GCs.
3. Violations specified under the common Article 3 to the GCs which is related to non-international armed conflict. Thus, prohibiting any acts related to violence against individuals, murder, mutilation and cruel treatment and torture.

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<sup>69</sup> Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

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4. Violations of the laws and customs applicable in armed conflicts but not of an international character.<sup>71</sup>

The advent of Islam set peace as the perfect social ideal which applies both to believers and to all peoples and nations. However, since war is recognized as an inherent condition of humankind, peace is regarded as the normal state and war as an exceptional, although unavoidable, state.<sup>72</sup> Thus the *Qur'ān* does not order war,<sup>73</sup> as seen by many western scholars,<sup>74</sup> but it does allow it when certain conditions are met. Several limitations are placed on the code of conduct before, during and after the conflict. Surat Al-Nisa (4:74) provides a general guideline "Let those (Believers) who sell the life of this world for the Hereafter fight in the cause of Allah, and whoso fights in the cause of Allah, and is killed or gains victory, we shall bestow on him a great reward".<sup>75</sup> This means that the believers must have mercy and not fight when it is not necessary for self-defence and they must keep to the principle of proportionality.<sup>76</sup> Roger Algase outlines that the Islamic law of war strikes a balance

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<sup>71</sup> Per Saland, 'International Criminal Law Principles', in Roy Lee, (ed.), *The ICC: The Making of the Rome Statute* (Kluwer Law International, The Hague, 1999), pp. 214-215; Theodor Meron 'Reflections on the Prosecution of War Crimes by International Tribunals' 100 *The American Journal of International Law* (2006) 551.

<sup>72</sup> Mahmassani, *supra* note 16, pp. 277-279 (describing war as "the natural primitive manifestation of the passion for revenge and collective retaliation").

<sup>73</sup> For more details on how Islam forbids the starting of wars or acts of aggression, see Ahmed Abou-El-Wafa, *Islam and The West: Coexistence or Clash?* (Dar Al-Nahda, Cairo, 2006), pp. 249-262. See generally Al Ghunaimi, *supra* note 49.

<sup>74</sup> See generally, Juan Cole, *Sacred Space and Holy War* (I.B. Tauris, London, 2002). See also, Peter Bergens, *Holy War, Inc.: Inside the Secret World of Osama Bin Laden* (Free Press, New York, 2002).

<sup>75</sup> Translated by Al-Hilali-Khan Al-Madinah King Fahd *Qur'ān* verse 4:74 cited in Gene W. Heck, Ph.D, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy*, (Riyadh: King Faisal Centre for Research and Islamic Studies, 2006), p. 33.

<sup>76</sup> See *Qur'ān* verse 2:190. See also Mohammad H. Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, (Islamic Texts Society, Cambridge, London, 2008), pp. 54-55; Matthias

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between military necessity and respect for human life in a manner which gives higher priority to saving lives of non-combatants than do modern international laws.<sup>77</sup> On this ground, the Cairo Declaration on Human Rights in Islam (1990) provides that “[i]t is the duty of individuals, societies and states to protect [the right to life] from any violation, and it is prohibited to take away life except for a Shari’ah prescribed reason”.<sup>78</sup>

The rules of conduct of Muslims during war time are strictly regulated by the Holy *Qur’ān*, the words of the Prophet (*pbuh*) and the commands of Abu Bakr As-Siddiq (632-634), the first Caliph of Islam, and some rulings from other Muslim commanders.<sup>79</sup> Rules of warfare, including those addressing the treatment of enemy persons and property, are governed by the fundamental principles of necessity, humanity and chivalry. Specific rules derived from these principles are mainly as follows:

Principles of humanity and virtue should be respected during and after war.<sup>80</sup>

A non-combatant, who is not taking part in warfare, whether by action, opinion, planning or supplies, must not be attacked.<sup>81</sup>

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Vanhullebusch, ‘General Principles of Islamic Law of War: A Reassessment’ 13 *Y. B. Islamic & Middle E. L.* (2006-2007) 37.

<sup>77</sup> Roger Algase, ‘Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of Hostilities’ 16 *Revue De Droit Penal Militaire et De Droit de la Guerre* (1997) 245-261.

<sup>78</sup> Cairo Declaration on Human Rights in Islam, adopted at the 19th Session of the Islamic Conference of Foreign Ministers, Res. 49/19-P, Cairo, 5 August 1990, annexed to letter dated 19 September 1990 from the Permanent Representative of Egypt to the UN addressed to the UN Secretary-General, UN Doc. A/45/421-S/21797, 20 September 1990, Article 2(a).

<sup>79</sup> Algase, *supra* note 77.

<sup>80</sup> Mahmassani, *supra* note 16, p. 303.

<sup>81</sup> *Ibid.*

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The destruction of property or animals is prohibited, except when it is a military necessity to do so, for example for the army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses.<sup>82</sup>

It is prohibited to kill for no reason, to continue killing when the enemy is defeated, to break peace treaties, or to force prisoners to fight against their own forces.

It is prohibited to kill women, children, those incapable of fighting or neutrals, including peasants, physicians and journalists.

It is prohibited to use poisonous weapons, to burn prisoners or property, to amputate body parts or to sexually abuse in any way, including rape.<sup>83</sup>

It is prohibited to mistreat prisoners of war, the sick or the wounded.<sup>84</sup>

Torture, excess and wickedness, humiliation of men, treachery and perfidy are prohibited.<sup>85</sup>

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<sup>82</sup> See for different rulings under these headings Hamidullah, *supra* note 51, pp. 204-207 and 223-228. See also, Sheikh W. Al-Zuhili, 'Islam and International Law' 87 *International Review of the Red Cross* (2005) 269-283.

<sup>83</sup> Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study*, (Graham & Trotman/Martinus Nijhof, London, 1994), pp. 63-160.

<sup>84</sup> Starvation, for example, is proscribed as a method of warfare. Report on the practice of Jordan (1997), as cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005), Vol. II, p. 1132. This is also confirmed by action taken by the Hezb-i-Islami faction during the 1994 conflict in Afghanistan. Although the Hezb-i-Islami faction blocked all humanitarian convoys heading for enemy controlled territory, such actions were justified on allegations that it had opened three markets in areas under its control to ensure the sustenance of the civilian population. AFP, Press information, Islamabad, 15 February 1994. However, in a report addressed to the UN Secretary-General, Kuwait denounced Iraqi "practices [violating] all the values of Islam and of civilization... [including] [c]learing of warehouses, and co-operative societies of foodstuffs with a view to causing starvation among citizens". Kuwait, letter dated 5 August 1990 to the UN Secretary-General, UN Doc. S/21439, 5 August 1990.

<sup>85</sup> Mahmassani, *supra* note 16, 303. See also Bosnia and Herzegovina, *Instructions to the Muslim Fighter*, 1993, para. c (stating that "Islam... forbids the torture and brutalization of prisoners of war"), as cited in Jean-Marie Henckaerts and Louise Doswald-Beck, *supra* note 84, p. 2113.

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A breach of any of the above rules would be regarded as a war crime.<sup>86</sup>

### 6.1. Non-Combatants

A non-combatant, who is not taking part in warfare, whether by action, opinion, planning or supplies, must not be attacked.<sup>87</sup> Fighting can only be committed against enemy combatants as provided by the *Qur'ān*: “And fight in the way of God those who fight against you”.<sup>88</sup> The *Qur'ān* and *Hadiths* prohibit the attack of specific categories of enemy non-combatants who do not share in hostilities and who are unable to do so, including women and children, the aged, the blind, the sick, the incapacitated, the insane, the clergy and **al-asif** (farmers, craftsmen and traders).<sup>89</sup> Thus, within this context jurist developed a distinction of two categories of enemy: *Al-muqatilah*, *ahl Al-qitall*, *al-muharibah* (combatants, fighters, warriors) and *Ghayr*

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<sup>86</sup> Malekian, *supra* note 83, pp. 63-160

<sup>87</sup> For the different rulings in this regard see Hamidullah, *supra* note 51, pp. 204-207 and 223-228; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, Basingstoke and New York, 2011), pp. 107-197; Abou-El-Wafa, *supra* note 73, pp. 249-279. Malekian, *supra* note 83.

<sup>88</sup> *Qur'ān* Verse 2:190.

<sup>89</sup> *Hadith* 17932, 17933, 17934, 17935, 17936, 17937, 2613 and 2614 in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. *Hadith* 2608 and 2663 in Sulayman Ibn Al-Ash'ath Abu Dawud, *Sunan Abi Dawud*. A translated version of these *hadiths* can be found on the Islamic Nature website, <[iknowledge.islamicnature.com/hadith/scholar/abudawud/book/008/](http://iknowledge.islamicnature.com/hadith/scholar/abudawud/book/008/)>, 11 March 2013. See also Mohammad Abu Nimer, 'A Framework for Nonviolence and Peace-building in Islam', 15 *The Journal of Law and Religion* (2000-2001) 217-265; Ali Ahmad, 'The Role of Islamic Law in the Contemporary World Order', 6 *The Journal of Islamic Law and Culture* (2001) 157-172. A similar provision is found in Article 3(a) of the Cairo Declaration on Human Rights in Islam, which provides that “in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children”. Cairo Declaration (1990), *supra* note 78.

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*al-muqatilah*, *ghayr al-muharibah* (non-combatants, non-fighters and non-warriors).<sup>90</sup>

Jurists outlined that those under the age of fifteen and those who have not reached puberty yet (a child) are protected and immune,<sup>91</sup> from being attacked and from taking part in war.<sup>92</sup> This is also the age limit provided for the protection of children under the Geneva Conventions Additional Protocol I, 8 June 1997.<sup>93</sup> Al-Ghazali justifies this with the fact that they 'are not fit for fighting'.<sup>94</sup> Similarly, regarding women, Ibn Qudamah provides that the reason for their immunity is that they do not fight,<sup>95</sup> while Al-Shawkani (d.1250-1834) ascribes it to their physical weakness.<sup>96</sup> However, jurists provide that if women and children are involved in fighting during the war, either by taking part in it or by way of giving advice or opinion,<sup>97</sup> they will forfeit their right to immunity. Even so, Maliki jurists are of the opinion that if a woman is standing guard over the enemy's army or strongholds, or if she warns the enemy or throws stones at the Muslim army, she still cannot be

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<sup>90</sup> Hamidullah defines combatants according to Islamic law as "those who are physically capable of fighting". See Hamidullah, *supra* note 51, p. 59. See also Ahmad, *supra* note 89, pp. 157-172.

<sup>91</sup> Hamidullah, *supra* note 51, pp. 204-207 and 223-228.

<sup>92</sup> See Maryam Elahi, 'The Rights of the Child under Islamic Law: Prohibition of the Child Soldier', 19 *Columbian Human Rights Law Review* (1988) 265, pp. 274, 279.

<sup>93</sup> Additional Protocol to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 77. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.

<sup>94</sup> Muhammad Al-Ghazali, *Al-Wasit Fi Al-Madhhab*, ed. Ahmad Mahmud Ibrahim and Muhammad Tamir, 7 Vols. (Dar Al-Salam, Cairo 1997/1417) Vol.7, p. 19, cited in Al-Dawoody, *supra* note 87, p. 112

<sup>95</sup> Ibn Qudamah, *Al-Mughni*, Vol. 9, p. 250, in Sayed S. Haneef, *Homicide in Islam: Legal Structure and the Evidence Requirements* (A.S. Nordeen, Kuala Lumpur, 2000). See also, Hamidullah, *supra* note 51, pp. 204-207 and 223-228.

<sup>96</sup> Muhammad Ibn 'Ali Ibn Muhammad Al-Shawkani, *Nayl Al-Awtar: Min Ahadith Sayyid Al-Khyar Sharh Muntaqa' Al-Akhbar*, 9 Vols. (Dar Al-Jil, Beirut 1973) Vol. 8, p. 73, cited in Al-Dawoody, *supra* note 87, p. 112. See also Ahmad Z. Yamani, 'Humanitarian International Law: A General Outlook' 7 *Michigan Yearbook of International Legal Studies* (1985) 189-215.

<sup>97</sup> Mahmassani, *supra* note 16, pp. 302-303.



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targeted.<sup>98</sup> However, if a woman kills a member of the Muslim army with the stones that she throws, then she must be killed.<sup>99</sup> Al-Shaybānī provides that it is permissible to kill a woman in self-defence, but if she is captured alive, killing her would be forbidden.<sup>100</sup> Regarding children, Sufyan Al-Thawri (d. 161/778) adds that it is undesirable to attack them, even if they fight during the war.<sup>101</sup> However, others believe that if a woman is a Queen and a child is a King of the enemy and they fight in battle they can also be killed.<sup>102</sup> Furthermore, according to a *fatwa* (Al-Fatawa Al-Hindiyyah) if a wealthy woman spends her money on inciting the enemy to fight then she 'can also be killed'.<sup>103</sup>

According to the Prophet's rulings, the aged also cannot be targeted. However, some jurists believe that an aged person that is involved in planning a war can be killed.<sup>104</sup> This follows from a report about a killing of a 100 years old man who was planning the operations of the battle of Hunayn. At that time the Prophet did not

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<sup>98</sup> Ahmad Al-Dardir, *Al-Sharh Al-Kabir*, ed. Muhammad 'Alīsh, 4 Vols. (Dar Al-Fikr, Beirut n.d.) Vol. 2, p. 176, cited in Karima Bennoune, 'As-Salāmū 'Alaykum?' Humanitarian Law in Islamic Jurisprudence' 15 *Michigan Journal of International Law* (1994) 605-644.

<sup>99</sup> Al-Qarafi, *Al-Dhakhirah*, Vol. 3, p. 399, cited in Al-Dawoody, *supra* note 87, p. 113. *See also* Saqr, *Al-'Alaqat Al-Dawliyyah*, p. 48, cited in Hamidullah, *supra* note 51, pp. 253-256 and 204-233; Mohamed A. Dayem and Fatima Ayub, 'In The Path of Allah: Evolving Interpretations of Jihad and Its Challenges', 7 *UCLA Journal of Islamic & Near Eastern Law* (2008) 67-120.

<sup>100</sup> Khadduri, *supra* note 3. *See also* Yamani, *supra* note 96, pp. 189-215.

<sup>101</sup> Muhammad Ibn Jarir Al-Tabari, *Kitab Al-Jihad Wa Kitab Al-Jizyah Wa Ahkam Al-Muharibin Min Kitab Ikhtilaf Al-Fuqaha Li-Abi Ja'far Muhammad Ibn Jarir Al-Tabari*, Joseph Schact (ed.), (Brill, Leiden, 1933), p. 9.

<sup>102</sup> Hamidullah, *supra* note 51, pp. 253-256 and 204-233.

<sup>103</sup> Al-Shaykh Nizam and others Indian Scholars, *Al-Fatawa Al-Hindiyyah: Fi Madhhab Al-Imam Al-A'zam Abi Hanifah Al-Nu'man*, 6 Vols. N.p. (Dar Al-Fikr 1991/1411) Vol. 2, p. 194 cited in Al-Dawoody, *supra* note 87, p. 113.

<sup>104</sup> Abou-El-Wafa, *supra* note 73, pp. 263-278. *See also* Hamidullah, *supra* note 51, pp. 253-256 and 204-233.

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condemn the killing.<sup>105</sup> However, other jurists believe there is nothing that exists in Islamic texts that allow the killing of an aged man even if he is planning a war.<sup>106</sup>

The blind, sick, insane and incapacitated are also immune during wartime; however, there are some exceptions.<sup>107</sup> For instance, Al-Thawri has allowed the targeting of those incapacitated if they are still fit and able to fight or if they support the enemy in any way during the war.<sup>108</sup> Furthermore, if the insane gains or regains his sanity he can also be targeted according to Abu Hanifah.<sup>109</sup>

Another protected group are religious persons (the clergy) who live in hermitages or convents. This is based on the Prophet's commands and Abu Bakr's Ten Commandments to his army leader. He reiterated the Prophet's prohibition against targeting hermits, but allowed *al-shammāsah* (the tonsured) to be killed.<sup>110</sup>

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<sup>105</sup> Khadduri, *supra* note 55, p. 104. See also Abdulrahman M. Alsumaih, 'The Sunni Concept of Jihad', in *Classical Fiqh and Modern Islamic Thought*, Ph.D Thesis, University of Newcastle upon Tyne, 1998, p. 118.

<sup>106</sup> Mohammad Ibn Ali Ibn Mohammad Al-Shawkani, *Al-Sayl Al-Jarrar Al-Mutadaffiq 'Ala Huda'iq Al-Azhar*, ed. Mahmud Ibrahim Zayid, 4 Vols. (Dar Al-Kutub Al-Ilmiyyah, 1984-5/1405), Vol. 4, p. 533, in Anke I. Bouzanita, 'The Siyar: An Islamic Law of Nations', 35 *Asian Journal of Social Sciences* (2007) 17-46.

<sup>107</sup> *Hadith* 17931 which details when Caliph Abu Bakr prohibited harming the sick, in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 13 March 2013. Other *Hadiths* can be found on the Islamic Nature website available at <[iknowledge.islamicnature.com/hadith/](http://iknowledge.islamicnature.com/hadith/)>, 13 March 2013.

<sup>108</sup> Saqr, *Al-Alaqaq Al-Dawliyyah*, p. 48, cited in Hamidullah, *supra* note 51, pp. 253-256 and 204-233. See also Dayem and Ayub, *supra* note 99, 67-120

<sup>109</sup> Saqr, *Al-Alaqaq Al-Dawliyyah*, p. 48, cited in Hamidullah, *supra* note 51, pp. 253-256 and 204-233.

<sup>110</sup> Anas Ibn Mālik, *Hadith* number 965 in Anas Ibn Malik, *Mutwatta' Al-Imam Malik*, (ed.), Muhammad Fu'ad Abd Al-Baqi, 2 Vols. (Dar Ihya' Al-Turath Al-Arabi n.d.), vol. 2, p. 447 available from the Islamic Nature website translated in English; <[iknowledge.islamicnature.com/hadith/](http://iknowledge.islamicnature.com/hadith/)>, 11 March 2013. *Hadith* 17904, 17927, and 17929, in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*, vol. 9, pp. 85 and 89. This can be downloaded from The Shafi'i Fiqh website in word format [www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. *Hadith* 9375 and 9377 in Al-Sana'ani, *Al-Musannaf*, vol. 5, pp. 199 *et seq.* These citations can all be found in Khadduri, *supra* note 55, pp. 51-109 and 118-141. All *Hadiths* translated to English can be found on the Islamic Nature website available from <[iknowledge.islamicnature.com/hadith/](http://iknowledge.islamicnature.com/hadith/)>, 11 March 2013.

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According to some, he permitted this because “whenever a war starts, the tonsured do fight, unlike the hermits”.<sup>111</sup>

Furthermore, Al-Asif (a hired man) being a non-combatant is also protected.<sup>112</sup> This refers to someone who is paid by the enemy to do work for them during a war as Al-Shawkani provides “to mind the belongings and the animals but not engage in fighting”.<sup>113</sup> Thus, all non-combatants are immune, even if they affect the war in a fairly insignificant way.<sup>114</sup> Farmers, craftsmen and traders are also protected. Umar Ibn Al-Khattab gave the following instruction: “Do not steal from the booty; do not betray; do not kill a child; and fear God in the way of the enemy farmers and do not kill them unless they wage war against you”.<sup>115</sup>

In addition, Hamidullah states that “[i]t appears that in classical times of Islam, it was prevalent practice among non-Muslims to take shelter behind enemy prisoners.

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<sup>111</sup> *Hadith* 17930 In Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. Vol. 9, pp. 85 and 89. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013.

<sup>112</sup> *Hadith* 2841 and 2842 in Mohammad Ibn Yazid Ibn Majah, *Sunan Ibn Majah*, available from the Kalamullah website <[www.kalamullah.com/ibn-majah.html](http://www.kalamullah.com/ibn-majah.html)>, 11 March 2013. *Hadith* 17936 and 17937 in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013.

<sup>113</sup> Al-Shawkani, *Al-Sayl Al-Jarrar*, Vol. 4, p. 532, cited in Al-Dawoody, *supra* note 87, p. 115.

<sup>114</sup> *Hadith* 17939 in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. See Khadduri, *supra* note 55, p. 104. See Hamidullah, *supra* note 51, p. 204. See also Hilmi M. Zawati, *Is Jihad a Just War? War, Peace and Human Rights under Islamic and Public International Law*, (Lewiston, New York, Edwin Mellen, 2001), p. 44; Weeramantry, *supra* note 3, p. 136.

<sup>115</sup> Ibn Rushd, *Bidayah Al-Mujtahid*, Vol. 1, p. 281, cited in Hamidullah, *supra* note 51, p. 204. See also *Hadith* 17938 In Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013.

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I have not found a single instance where Muslims were accused of this cowardly act when they forced their prisoners to fight against their own nation".<sup>116</sup>

Dawoody thus provides that "the literature on who may or may not be targeted in war indicates that non-combatant immunity was a full blown doctrine developed by the second/eighth and third/ninth century Muslim jurist".<sup>117</sup> Furthermore, Johnson observes that "the Islamic position is clear: there is no justification for warfare directed intentionally against non-combatants in jihad".<sup>118</sup>

State practice shows that the prohibition of killing non-combatants is generally followed. For example, the Report on the Practice of Jordan states that there are no reported incidents of Jordanian troops resorting to direct attacks on civilians.<sup>119</sup>

## 6.2. Prohibited Weapons

The prohibition of employing poisonous weapons, asphyxiating gases, or weapons which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict is provided for in Article 8(2)(b)(xvii), (xviii), (xix), (xx) of the ICC Statute. According to the ICC Statute, a poisonous weapon is one that releases a substance which causes death or serious damage to health in the ordinary course of events, through its toxic

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<sup>116</sup> Hamidullah, *supra* note 51, p. 419. *See also*, Yamani, *supra* note 96, pp. 189-215.

<sup>117</sup> Al-Dawoody, *supra* note 87, p. 116. *See also* Dayem and Ayub, *supra* note 99, pp. 67-120.

<sup>118</sup> James T. Johnson, *Morality and Contemporary Warfare* (Yale University Press, New Haven, 1999), p. 186. *See also* Alsumaih, *supra* note 105, p. 120.

<sup>119</sup> Report on the Practice of Jordan, 1997, cited in Jean-Marie Henckaerts and Louise Doswald-Beck, *supra* note 84, p. 39.

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properties.<sup>120</sup> The only treaty instruments concerning use of weapons which apply to internal, as well as international conflicts, are 1996 Amended Protocol II to the Certain Conventional Weapons Convention concerning use of mines, booby traps and other devices and, perhaps, 1995 Protocol IV on Blinding Laser Weapons.

At the time of the Prophet, there were not many weapons that could cause much damage<sup>121</sup> and the fighting was mainly conducted one on one, therefore, there was little discussion about weaponry. However, important prohibition regarding some types of weapons evolved. For example, poisonous weapons were considered

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<sup>120</sup> ICC elements of "employing poison or poisoned weapons," Article 8(2)(b)(xvii):

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment;
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties;
3. The conduct took place in the context of and was associated with an international armed conflict;
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

ICC elements of "employing prohibited gases, liquids, materials or devices," Article 8(2)(b)(xviii):

1. The perpetrator employed a gas or other analogous substance or device;
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties;
3. The conduct took place in the context of and was associated with an international armed conflict;
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

ICC elements of "employing prohibited bullets," Article 8(2)(b)(xix):

1. The perpetrator employed certain bullets;
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body;
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect;
4. The conduct took place in the context of and was associated with an international armed conflict;
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

ICC elements of "employing weapons, projectiles or materials or methods of warfare listed in the Annex of the Statute," Article 8(2)(b)(xx):

[Elements will have to be drafted once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute].

<sup>121</sup> Weapons and instruments included lances, arrows, swords, shields and mangonels. Sieges and trenches were also allowed and used during long hostilities. Mahmassani, *supra* note 16, p. 292.

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against the moral aspects of human dignity and consequently against divine law.<sup>122</sup>

John Kelsay noted that classical Islamic texts contain extensive evidence of concern of the likelihood of harming non-combatants by the use of mangonels or hurling machines in battles.<sup>123</sup> In this regard, Kelsay observed that “Muslim discussion of weaponry is analogous to the *jus in bello* criterion of proportionality”.<sup>124</sup>

Another prohibition is the burning of humans as reflected in the *Hadith* “do not punish the creatures of God with the punishment of God”.<sup>125</sup> Hashmi claims that “the deliberate burning of persons, either to overcome them in the midst of battle or to punish them after capture, is forbidden”.<sup>126</sup> However, some provided that if it was the only way to overcome the enemy the use of fire in such a way is permissible.<sup>127</sup> Furthermore, flooding as a weapon is also prohibited because those who are immune could be caught in it,<sup>128</sup> similarly to poisoning the enemy’s source of water in order

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<sup>122</sup> See also Khadduri, *supra* note 55, p. 104; Weeramantry, *supra* note 3, p. 138; Malekian, *supra* note 83, pp. 74-75.

<sup>123</sup> John Kelsay, ‘Arguments Concerning Resistance in Contemporary Islam’, in Richard Sorabji and David Rodin, (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Ashgate, Aldershot, 2007), p. 65.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Hadith* 2854 and 6524 in Al-Bukhari. *Hadith* 4351 in Abu Dawud, *Sunan Abi Dawud*. *Hadith* 1458 in Al-Tirmidhi, *Sunan Al-Tirmidhi*, available from the Islamic Nature website <iknowledge.islamicnature.com/hadith/>, 11 March 2013. *Hadith* 16597, 16635 and 17841 in Al-Bayhaqi, *Sunan Al-Bayhaqi*, available from The Shafi’i Fiqh website in word format <www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/>, 11 March 2013. See also Alsumaih, *supra* note 105, p. 112.

<sup>126</sup> Sohail H. Hashmi, ‘Islamic Ethics and Weapons of Mass Destruction: An Argument for Non-proliferation’, in Sohail H. Hashmi and Steven P. Lee, (eds.), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (Cambridge: Cambridge University Press, 2004), p. 328. See also Zawati, *supra* note 114, p. 41.

<sup>127</sup> Adil Salahi, *Mohammad Man and Prophet: A Complete Study of the Life of the Prophet of Islam*, Leicestershire, Islamic Foundation, 2002/1423, p. 659.

<sup>128</sup> Dayem and Ayub, *supra* note 99, pp. 67-120. See also Yamani, *supra* note 96, pp. 189-215.

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to kill them.<sup>129</sup> Therefore, we can deduce the idea that the use of Weapons of Mass Destruction (WMD) is not permitted because only those weapons that can differentiate between combatants and non-combatants are permissible.<sup>130</sup>

On the other hand, the *Qur'ān* states that “whoso commits aggression against you, then respond within the same degree of aggression waged against you”<sup>131</sup> and “if you punish, then punish with the same punishment which had been inflicted upon you”.<sup>132</sup> This is also confirmed by Abu Bakr who provides “If you encounter your enemy, then fight them with the same weapon they fight you with”.<sup>133</sup> This developed the opinion that if the enemy holds the weapons of mass destruction, or uses them within a war for killing the Muslims, which is prohibited in Islam for Muslims to do, than Muslims will be permitted to use them against the enemies as confirmed through the principle of reciprocity.<sup>134</sup>

### 6.3 Destruction of Property

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<sup>129</sup> See Mohammed Bedjaoui, ‘The Gulf War of 1980-1988 and The Islamic Conception of International Law’, in Ige. F. Dekker, Harry H. G. Post, (eds.), *The Gulf War of 1980-1988* (Martinus Nijhoff Publishers, Dordrecht, 1992), p. 291.

<sup>130</sup> Dayem and Ayub, *supra* note 99, pp. 67-120. See also Shmuel Bar, *Warrant for Terror: Fatwas of Radical Islam and the Duty of Jihad* (Rowman and Littlefield, Lanham, 2006), p. 72.

<sup>131</sup> *Qur'ān* 2:194.

<sup>132</sup> *Qur'ān* 16:126.

<sup>133</sup> *Qur'ān* 2:195. See also Mohamed M. M. Elbakry, ‘The Legality of War,’ in Al-Shari’a Al-Islamiya (The Islamic Law) and Contemporary International Law: A Comparative Study, Ph.D Thesis, University of Glasgow 1987, p. 320.

<sup>134</sup> Dayem and Ayub, *supra* note 99, pp. 67-120.

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Similarly to the Nuremberg Charter<sup>135</sup> and the Statutes of the Yugoslavia and Rwanda Tribunals,<sup>136</sup> the ICC Statute contains provisions which prohibit the destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>137</sup> Moreover, the extensive destruction and appropriation of property, not justified by military necessity are considered by Article 8(2)(a)(iv) of the ICC Statute as grave breaches of the 1949 Geneva Conventions.

The property to which 'attacking or bombarding' refers would cover not only cities, towns or villages, but also factories, ports, bridges, industrial complexes, power stations and other types of large and small real property which one might not call a city, town or village or which do not form part thereof. There is still no authoritative definition of military necessity; however, the relevant literature proposes numerous definitions which may be summarised as follows: military necessity is a measure which is (1) urgent, (2) required for the attainment of (3) a known military purpose, and (4) in conformity with international humanitarian law.<sup>138</sup> Failure to fulfil any one of these requirements, according to this view,

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<sup>135</sup> Article 6(b). It reads: "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: [...] War Crimes: [...] wanton destruction of cities, towns or villages, or devastation not justified by military necessity". See also Article 23(g), Hague Regulations; Article 53, Geneva Convention IV.

<sup>136</sup> For the ICTY see Article 3(b).

<sup>137</sup> Article 8(2)(b)(v)(ix)(xiii) of the ICC Statute.

<sup>138</sup> For example, see Christopher Greenwood, 'Historical Development and Legal Basis', in Dieter Fleck, (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, Oxford, 1995), pp. 131-132; William G. Downey, 'The Law of War and Military Necessity', 47 *American Journal of International Law* (1953) 254; Burleigh C. Rodick, *The Doctrine of Necessity in International Law* (Columbia University Press, New York, 1928), pp. 59-61; B.V.A. Röling, 'The Law of War and the National Jurisdiction Since 1945' 100 *Hague Recueil* (1960) 382-387; Bernhardt (ed.), *Encyclopedia of Public International Law* (1982), 'military necessity'. Military manuals typically treat military necessity as a principle of international law authorising only that kind and degree of force which is (1) not otherwise prohibited by the law, (2) necessary for securing the submission of the enemy and (3) applied with the minimum possible expenditure of human, material



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renders the course of action 'militarily unnecessary' and 'not justified by military necessity' under international humanitarian law.

Finally, other international instruments such as the Cairo Declaration on Human Rights in Islam (1990) acknowledge the principle that it is prohibited to attack enemy's civilian buildings and installations by shelling, blasting or any other means.<sup>139</sup>

Although Muslim jurists disagree on the details of application of some rules,<sup>140</sup> according to *Shari'a* the destruction of property is prohibited, except when it is a military necessity to do so; for example for the army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses, although this principle has been violated on several occasions.<sup>141</sup> Plundering is also

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and temporal resources. It is suggested here, however, that international law does not prohibit the belligerent from invoking military necessity while pursuing objects other than—or, in any event, not directly linked to—the submission of its enemy. Quite on the contrary, there is some case law to the effect that military necessity may be relied upon for purely defensive purposes (*see, e.g., High Command in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. XI), p. 541; *Hostages in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. XI), pp. 1295-1297). Nor is it likely that, under international law, military necessity creates an obligation to minimise resource expenditure. Maximising resource efficiency is properly a matter of prudent war-making, not a duty under international law. Finally, it should be noted that the decision as to the existence of military necessity in a given situation is for the belligerent to make, in good faith and on the basis of the information available to him or her at the time (*see, e.g., High Command in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. XI), p. 541; *Hostages in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. XI), pp. 1295-1297).

<sup>139</sup> Cairo Declaration (1990), *supra* note 78, Article 3(b).

<sup>140</sup> Mahmassani, *supra* note 16, pp. 309-310.

<sup>141</sup> *See, for example, the resolution of the Council of the League of Arab States calling Iraq to safeguard public installations and property in Kuwait in accordance with Islamic law and to regard any measures incompatible with such a commitment as null and void. League of Arab States, Council, Res. 5038, 31 August 1990, annexed to letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4 (Libya opposed the resolution and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session).*

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prohibited, despite recurring violations. For example, it is reported that the first Algerian combatants to fight against French occupation in the 19<sup>th</sup> century followed Islamic teachings on this point. Conversely, the 1990 invasion of Kuwait by Iraq was accompanied by pillage and theft.<sup>142</sup>

The Prophet is quoted to have said: “Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle”.<sup>143</sup> Abu Bakr also provided guidelines to this effect:

I prescribe Ten Commandments to you: Stop, O people, that I may give you ten rules for guidance on the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies, do not kill a woman, a child, or an aged man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any of the enemies' sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness.<sup>144</sup>

The *Hadith* also confirms that the Prophet strictly prohibited the destruction of fruit-trees and tilled lands in enemy territories. Also the *Qur'ān* reveals that: “... and what you cut of the date palms or what you leave standing on their trunks is by the

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<sup>142</sup> Report on Practice of Algeria (1997), as cited in Henkaerts and Doswald-Beck (eds.), *supra* note 84, p. 1101; Bahrain, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, pp. 21-23.

<sup>143</sup> Khadduri, *supra* note 55, pp. 102-107. *See also*, Yamani, *supra* note 96, pp. 189-215.

<sup>144</sup> Related by al-Byhaqi (according to Malik ibn Anas), available from The Shafi'i Fiqh website in word format at <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. *See also* the *Mutwatta Hadiths*, available from the Islamic Nature website at <[iknowledge.islamicnature.com/hadith/](http://iknowledge.islamicnature.com/hadith/)>, 11 March 2013; Heck, *supra* note 75, p. 71 (here the author compares the commandments of Caliph Abu Bakr on War and King James Bible on War).

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leave of Allah and to punish the evildoers".<sup>145</sup> Some jurists however claim that it is permissible in some cases to destroy the enemy's property. This opinion comes from the fact that at one time the Prophet ordered Muslims to cut down the palm trees of the tribe of Banu Al-Nadir in 4/625 to make them surrender during a bloodless siege that lasted for six nights and ended without fighting. Other jurists<sup>146</sup> claim this practice was later abrogated by the Prophet as evidenced in Abu-Bakr's previously mentioned Ten Commandments.<sup>147</sup> Abu-Bakr was the most knowledgeable about the Prophet's practice and the *Qur'ān* and he would not have given a ruling that was contrary to these. It is also provided that Muslim authorities have followed Abu-Bakr's rulings and accepted them.<sup>148</sup> However, opponents of this view claim that Abu-Bakr only gave those commands during his wars because he knew that he would win the wars and thus, hoped that the property will be his spoils of war and thus, needed them intact.<sup>149</sup> Furthermore, they believe that destruction of property is allowed if it is a military necessity, if it is in the public interest or it is the only way to win the war.<sup>150</sup>

Some property enjoys special protection. It is forbidden to attack any religious sites, which was confirmed by Judge Mohammad Bedjaoui, former member of the

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<sup>145</sup> *Qur'ān* 59:5.

<sup>146</sup> These include; Al-Awza'i, Abu Thawr, Al-Layth Ibn Sa'd, and Al-Thawri. See Dayem and Ayub, *supra* note 99, pp. 67-120.

<sup>147</sup> *Hadith* 965 in Ibn Malik, *Mutwatta*, available from the Islamic Nature website <[iknowledge.islamicnature.com/hadith/](http://iknowledge.islamicnature.com/hadith/)>, 11 March 2013. *Hadith* 17904, 17927 and 17929 in Al-Bayhaqi, *Sunan Al-Bayhaqi*, available from The Shafi'i Fiqh website in word format <[www.shafiiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. See also Bennoune, *supra* note 98, p. 626. See also, M. Cherif Bassiouni, (ed.), *A Manual on International Humanitarian Law and Arms Control Agreements*, (Transnational Publishers, New York, 2000), p. 9.

<sup>148</sup> Khadduri, *supra* note 55, p. 103. State practice supports this view. See, for instance, the Report on the Practice of Jordan (1997), as cited in Henkaerts and Doswald-Beck (eds.), *supra* note 84, p. 166.

<sup>149</sup> Saqr, *Al-Alaqaq Al-Dawliyyah*, in Hamidullah, *supra* note 51, pp. 253-256 and 204-233.

<sup>150</sup> Dayem and Ayub, *supra* note 99, pp. 67-120. See also Yamani, *supra* note 96, pp. 189-215.

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International Court of Justice,<sup>151</sup> as well as by state practice.<sup>152</sup> However, it is found that wine should be poured away and that any materials denying God should be burnt.<sup>153</sup> Furthermore, it is prohibited to cause damage to horses, cows, bees or any living creature except if there is a military necessity to do so or if they are slaughtered for food. In addition, jurists found that if it is approved by the commander on military necessity, Muslims are allowed to eat and give fodder to their animals from the enemy's territories, but only a necessary amount.<sup>154</sup> Thus, the decision depends on the need and necessity of destruction and whether the destruction can be avoided in anyway.<sup>155</sup>

#### 6.4 *The Concept of Quarter and Aman*

Islamic law governs Muslims wherever they reside. With regard to non-Muslims, Islamic law regulates the status of foreigners (*Harbis*) – those who reside outside the territory of Islam and to whom Islamic law and protection do not apply; temporary residents (*Musta'mins*) – those who are granted a temporary safeguard (*aman*) entitling them to enter the territory of Islam and to enjoy the status of temporary residents; and permanent residents (*Dhimmis*) – those who, by virtue of a *Dhimmah* pact, acquire the right to permanent residence in Islamic territory and to the

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<sup>151</sup> Bedjaoui, *supra* note 129, p. 289.

<sup>152</sup> Report on the Practice of Jordan (1997), as cited in Henkaerts and Doswald-Beck (eds.), *supra* note 84, p. 763 (stating that Jordan has always respected and protected against any violations the principle of inviolability of places of worship); Saudi Arabia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123 (stating that in Islamic societies the sole purpose of war is to repel aggressors without exposing the environment to danger).

<sup>153</sup> Dayem and Ayub, *supra* note 99, pp. 67-120

<sup>154</sup> See Hamidullah, *supra* note 51, pp. 135-145.

<sup>155</sup> Malekian, *supra* note 83, pp. 126-132.

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protection of Islamic law under certain conditions such as payment of a tribute and performance of certain conventional or customary duties.<sup>156</sup>

Quarter is a contract of protection provided during wartime to protect the person and the property of an enemy belligerent, or a regiment, or everyone inside a fortification or the entire enemy army or city.<sup>157</sup> Among many sources, the Report of Practice of Algeria (1997) and the Report of Practice of Jordan (1997) show that the use of giving quarters has been a long-standing practice of Islamic societies.<sup>158</sup> Likewise, the Report of Practice of Iran (1997) states that, during the Iran-Iraq war, Iraqi combatants were well-treated on the basis of Islamic law.<sup>159</sup> This rule reflects the *hors de combat* status provided under Article 41 of the Additional Protocol I June 8 1977 of the Geneva Conventions, which provides that the person granted this protection is safe, and therefore no hostilities can be directed at that person. However, with the Islamic *aman* this is done voluntarily unlike the *hors de combat* within the Geneva Convention.

Another important rule of the Islamic law of war is that of *aman* or temporary safeguard. It can be granted as one of the provisions of a treaty of peace (conventional *aman*) or as the ordinary pledge of safeguard (customary *aman*). The latter can be general, when granted by the Chief of State (*Imam*) or his official delegate to a city, or special, when granted to an individual or small group of

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<sup>156</sup> Mahmassani, *supra* note 16, pp. 250-263.

<sup>157</sup> Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (Mouton, The Hague, 1979), p. 29; Yamani, *supra* note 96, pp. 189-215.

<sup>158</sup> As cited in Henkaerts and Doswald-Beck (eds.), *supra* note 84, pp. 937-938.

<sup>159</sup> Report of Practice of Iran, 1997, as cited in Henkaerts and Doswald-Beck (eds.), *supra* note 84, p. 1992.

<http://booksandjournals.brillonline.com/content/10.1163/15718123-01303002;jsessionid=30xw2vefikq4p.x-brill-live-01>

individuals.<sup>160</sup> Rudolph Peters explains *aman* to encompass both safe conduct and quarter. This rule entails that the Muslim army must grant protection to enemy belligerents or any person from the enemy state,<sup>161</sup> in order to prevent bloodshed and protect life (*haqn al-dam*).<sup>162</sup>

As Peters explains, the other form of *aman* is that of safe conduct, a contract of protection granted to any non-Muslim of a country that is in a state of war with the Islamic state even though a war is not actually taking place. John Wansbrough noted that the “development of the medieval European safe conduct must have owed a good deal to Islamic law”.<sup>163</sup> This form of *aman* is provided to those who want to gain entry to the Islamic state for education, business, tourism and for any other purpose other than to help the enemy, i.e. conduct military acts or spying. Thus, this is like a visa or temporary permit which can be renewed.<sup>164</sup> It is based on the *Qur’ān* verse “And if anyone of the polytheists seeks your protection, then protect him until he hears the word of God. Then, afterwards, escort him to his place of safety”.<sup>165</sup>

### 6.5 Prisoners of War

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<sup>160</sup> Mahmassani, *supra* note 16, p. 255.

<sup>161</sup> Malekian, *supra* note 83, pp. 109-113. *See also* Yamani, *supra* note 96, pp. 189-215.

<sup>162</sup> *See* Hamidullah, *supra* note 51, pp. 208-209; M. Cherif Bassiouni, ‘Protection of Diplomats Under Islamic Law’, 74 *American Journal of International Law* (1980) 609, 613-614. *See also* Malekian, *supra* note 83, pp. 109-112.

<sup>163</sup> John Wansbrough, ‘The Safe Conduct in Muslim Chancery Practice’ 34 *Bulletin of the School of Oriental and African Studies* (1977) 20, p. 34.

<sup>164</sup> Khadduri, *supra* note 55, pp. 169.

<sup>165</sup> *Qur’ān* 9:6.

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Prisoners of war consist of enemy combatants taken at the time of a legally authorised war. Historically, the concept of war crimes has always been closely related to that of punishment. It is broadly accepted that both concepts (of war crimes and prosecution) were closely linked to the 1863 Lieber Instructions. According to these Instructions, “a prisoner of war remains answerable for his crimes committed against the captor’s army or people, committed before he was captured, and for infliction of retaliatory measures”.<sup>166</sup> However, Mahmassani points out that if the enemy embraces Islam before or after the capture, he cannot be treated as a prisoner of war and, consequently, being killed, enslaved or ransomed. Conversely, he enjoys immunity for his life, property and young children.<sup>167</sup>

The majority of Islamic jurists claim that if women and children are captured they are to be enslaved or exchanged for Muslim prisoners.<sup>168</sup> Regarding male prisoners the rulings are taken from the *Qur’ān* and *Sunnah*. The *Qur’ān* starts with providing that Muslims should “set them free either graciously or by ransom”.<sup>169</sup> In all the wars of the Prophet only three to five prisoners of war were executed. In the battle of Badr one out of seventy captives was executed for his crimes against the

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<sup>166</sup> See Instructions for the Government of Armies of the United States in Field (“Lieber Code”) of 24 April 1863, in G. Kirk McDonald and O. Swaak-Goldman, (eds.), *Substantive and Procedural Aspects of International Criminal Law*, Vol. II, Part 1 (Documents and Cases) (Nijhoff, Dordrecht, 2000), p. 559.

<sup>167</sup> Mahmassani, *supra* note 16, p. 306.

<sup>168</sup> See Malekian, *supra* note 83, pp. 156-159. However, if a child is captured alone, he or she is considered Muslim and cannot be returned by ransom or otherwise. Mahmassani, *supra* note 16, p. 306. Furthermore, Article 3 of the Cairo Declaration on Human Rights in Islam establishes that it is not permissible to kill non-belligerents such as women, children and old men.

<sup>169</sup> *Qur’ān* 47:4.

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Prophet and Muslims in Mecca.<sup>170</sup> The second POW (Abu 'Izzah al-Jumahi) was set free after the battle of Badr on condition that he would stop his blasphemous poetry against Islam and not fight the Muslims again. He broke his promise and fought against Muslims in the battle of Uhūd and again asked for pardon, but this time he was executed.<sup>171</sup> The third captive was 'Abdullah B. Khatal, who was executed right after Mecca was conquered. During his stay in Medina, he killed an innocent Muslim, reverted to the pre-Islamic faith, joined the enemy, and therefore, committed high treason.<sup>172</sup> In other occasions the Prophet released prisoners freely or for money or in exchange for Muslim prisoners, while at the Battle of Badr he released prisoners because they taught some Muslim children to read and write.<sup>173</sup>

Due to the different practices of the Prophet and the two different texts on the issue found in the *Qur'ān* jurists did not come to one majority view. There are three different views on this issue. The first is that the Islamic ruling on prisoners of war is restricted to releasing them either freely or in exchange for ransom as provided by the *Qur'ān* (47:4) and by the consensus of the Prophet's companions.<sup>174</sup> They also believe that this verse of the *Qur'ān* abrogated the Prophet's practice of execution and enslavement as it was revealed after the Prophet executed and enslaved

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<sup>170</sup> This was 'Uqbah b. Abi Mu'it. Muhammad Munir, 'The *Layha* for the *Mujahideen*: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law' 93 *International Review of the Red Cross* (2011) 81-102, p. 90.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> See Bennoune, *supra* note 98, p. 634.

<sup>174</sup> See Hamidullah, *supra* note 51, pp. 214. See also Lena Salaymeh, 'Early Islamic Legal-Historical Precedents: Prisoners of War' 26 *Law and History Review* (2008) 521-544, p. 528; Ray Murphy and Mohamed M. El-Zeidy, 'Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War', 9 *International Criminal Law Review* (2009) 623-649.



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prisoners.<sup>175</sup> The second opinion is that the head of state has the choice to execute or enslave prisoners according to what is in the best interest for the Muslims.<sup>176</sup> Abu Hanifah based this on the reasoning that if Muslims were to release prisoners freely or exchange them for Muslim prisoners this would make the enemy stronger.<sup>177</sup>

However, the majority of jurists believe that the head of state has wider powers and thus depending on what he feels is the best option for the interest of the Muslims he can either execute some or all of the prisoners, enslave them, set them free or exchange them for Muslim prisoners or for money.<sup>178</sup> Yet Article 3(a) of the Cairo Declaration on Human Rights in Islam (1990) provides that “in the event of the use of force and in case of armed conflict... it is a duty to exchange prisoners of war.”

In addition to the above, regardless of their destiny, prisoners must be treated in a humane manner while captive. The *Qur'ān* provides that: “And they feed the needy, the orphans and the captives out of their food, despite their love for it (or because of their love for God). Indeed we feed you for the sake of pleasing God: we do not wish reward or gratitude from you”.<sup>179</sup> In the practice of the Prophet the prisoners were either held in the mosque or He divided them amongst his Companions advising them to “observe good treatment towards the prisoners”.<sup>180</sup> As one prisoner described:

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<sup>175</sup> See Al-Dawoody, *supra* note 87, p. 137.

<sup>176</sup> Salaymeh, *supra* note 174, pp. 521-544, 530. See also Yamani, *supra* note 96, pp. 189-215.

<sup>177</sup> Murphy and El-Zeid, *supra* note 174, pp. 641-647.

<sup>178</sup> *Ibid.*, 641-647.

<sup>179</sup> *Qur'ān* 76:8. See also Bennoune, *supra* note 98, p. 633.

<sup>180</sup> Malik A. Al-Mubarak, *Warfare in Early Islam*, PhD Thesis, University of Glasgow, 1997, pp. 202-204. See also Hamidullah, *supra* note 51, p. 214; Alsumaih, *supra* note 105, p. 147; A. Guillaume,

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I was with a number of the Ansar when they (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 be untouched.”<sup>181</sup>

Other prisoners also claimed to have had the same treatment.<sup>182</sup>

Thus, the majority of jurists follow these rules found within the *Qur'ān* and *Sunnah* providing that prisoners should be clothed if needed as per the practice of the Prophet,<sup>183</sup> that they should be protected from heat, cold, hunger, thirst, and all forms of torture<sup>184</sup> regardless whether military information is needed from them or not.<sup>185</sup> Similarly, Article 3(a) of the Cairo Declaration on Human Rights in Islam (1990) provides that “in the event of the use of force and in case of armed conflict ... prisoners of war shall have the right to be fed, sheltered and clothed”. The jurists also unanimously believe that the Islamic state cannot execute enemy hostages under their

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*The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah* (Oxford University Press, Oxford, 1955), p. 309.

<sup>181</sup> Al-Mubarak, *supra* note 180, pp. 202-204.

<sup>182</sup> Sahih Muslim and Bukhari *Hadiths* on these issues are available from the Islamic Nature website <<http://iknowledge.islamicnature.com/hadith/>>, 11 March 2013. See also Murphy and El-Zeidy, *supra* note 174, pp. 641-647; Salaymeh, *supra* note 174, pp. 521-544.

<sup>183</sup> Hamidullah, *supra* note 51, p. 215. See Saleem Marsoof, 'Islam and International Humanitarian Law', 15 *Sri Lanka Journal of International Law* (2003) 23-28, p. 25; Weeramantry, *supra* note 3, p. 125; Al-Mubarak, *supra* note 180, pp. 205-207.

<sup>184</sup> Hamidullah, *supra* note 51, p. 215. See Marsoof, *supra* note 183, p. 25; Weeramantry, *supra* note 3, p. 125; Al-Mubarak, *supra* note 180, pp. 205-207.

<sup>185</sup> See Marsoof, *supra* note 183, p. 25; Weeramantry, *supra* note 3, p. 125; Al-Mubarak, *supra* note 180, pp. 205-207. Malik said he never heard that the torture of prisoners to obtain military information could be Islamically permissible. See also Malekian, *supra* note 83, pp.103-106 (on the prohibition of torture).

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control even if the enemy killed their Muslim brothers held as hostage. This rule was followed by Caliph Mu'awiyah Ibn Abi Sufyan (d. 60/680) when he refused to execute the Roman prisoners he held after the Roman emperor had broken the peace treaty with the Muslims by executing the Muslim hostages he held.<sup>186</sup>

In addition, the majority of jurists believe that the captives should not be separated from their families who are also captured, such as parents from their children.<sup>187</sup> This rule complies with Article 82 of the Geneva Convention (IV) for the Protection of Civilian Persons in Time of War.<sup>188</sup> Article 3(a) of the Cairo Declaration on Human Rights in Islam (1990) also provides that "in the event of the use of force and in case of armed conflict ... it is a duty to arrange visits or reunions of the families separated by the circumstances of war".

### 6.6 Night Attack

There is no provision in the Rome Statute of the International Criminal Court which prohibits night attacks. However, in Islamic law attacking at night may be seen as forbidden, because the enemy is taken by surprise and is not given the due warning.<sup>189</sup> A *Hadith* reported by Anas Ibn Malik claims that "whenever the Prophet

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<sup>186</sup> Khaled Abou El Fadl, 'Islam and the Theology of Power' 221 *Middle East Report* (2001) 28-33, p. 30 (prohibition of murder of hostages).

<sup>187</sup> Hamidullah, *supra* note 51, p. 215; Weeramantry, *supra* note 3, p. 135; Troy S. Thomas, 'Prisoners of War in Islam: A Legal Inquiry' 87 *The Muslim World* (1997) 44-53, p. 50.

<sup>188</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.

<sup>189</sup> Edward W. Lane, *An Arabic-English Lexicon* (Librairie Du Liban, Beirut, 1968), Vol. 1, p. 281.

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reached a people by night, he never started an attack until it was morning".<sup>190</sup> Thus, a night attack would be regarded as a war crime under Islamic law.<sup>191</sup> However, the majority of jurists believe it is permissible to attack at night<sup>192</sup> because of a later *Hadith* reported by Al-Sa'b Ibn Jaththamah about how "the Prophet was asked if it was permissible to attack the enemy by night which may result in casualties among women and children. Then, the Prophet replied that they (women and children), are from them (the enemy warriors)".<sup>193</sup> As evidence of modern state practice, the Report on the Practice of Algeria recalls the principle whereby war is a ruse. The report also notes that Algerian fighters during the war of independence predominantly used methods of war such as surprise attacks, ambushes, camouflage, misinformation and mock operations.<sup>194</sup>

### 6.7 Prohibition of Mutilation

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<sup>190</sup> *Hadith* 2785 in Mohammad Ibn Isma'il Al-Bukhari, *Al-Jami' Al-Sahih Al-Mukhtasar*, ed. Mustafa Dib Al-Bagha, 3<sup>rd</sup> ed., 6 vols. (Dar Ibn Kathir, Damascus Beirut 1987/1407), vol. 3, p. 1077 in Mohammad Ibn Isma'il Al-Bukhari, *Translation of the Meanings of Sahih Al-Bukhari: Arabic-English*, Trans. Muhammad Muhsin Khan, Vol. IV (Kitab Bhavan, New Delhi, 1987). This can also be found on the Islamic Nature website available from <iknowledge.islamicnature.com/hadith/>, 11 March 2013.

<sup>191</sup> See Khadduri, *supra* note 3, pp. 94-101. See also Elbakry, *supra* note 133, p. 312; Dayem and Ayub, *supra* note 99, pp. 67-120.

<sup>192</sup> Malekian, *supra* note 83, pp. 70-73, 135-147. See also Hamidullah, *supra* note 51, pp. 411-424.

<sup>193</sup> *Hadith* 2850 in Mohammad Ibn Isma'il Al-Bukhari, *Al-Jami' Al-Sahih Al-Mukhtasar*, ed. Mustafa Dib Al-Bagha, 3<sup>rd</sup> ed. 6 Vols. (Dar Ibn Kathir, Damascus Beirut 1987/1407). Vol. 3, p. 1077 in Mohammad Ibn Isma'il Al-Bukhari, *Translation of the Meanings of Sahih Al-Bukhari: Arabic-English*, Trans. Muhammad Muhsin Khan, Vol.IV (Kitab Bhavan, New Delhi 1987) Vol. 3, p.1097. See also *Hadith* 1745 *Sahih Muslim*. *Hadith* 2839, *Hadith* 9385 and 9386 all available from the Islamic Nature website. This can also be found on the Islamic Nature website available from <iknowledge.islamicnature.com/hadith/>, 11 March 2013.

<sup>194</sup> Report on the Practice of Algeria (1997), Chapter 2.4, as cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), p. 1256.

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Also stemming from the principle of humanity are the prohibition of mutilation and rules on how to deal with the dead bodies of the enemies. At the battle of Uhud bodies of Muslims including the Prophet's uncle were mutilated by the enemy and the Prophet and his followers vowed to do the same if they got the chance. However, following this, the *Qur'ānic* verse on mutilation (16:126-127) was revealed and the Prophet in return prohibited betrayal and mutilation.<sup>195</sup> This instruction was then followed by Abu Bakr instructing to "beware of mutilation, because it is a sin and a disgusting act".<sup>196</sup> Practice shows evidence that this principle is still followed. For example, the *Instructions to the Muslim Fighter* of 1993 provide that "Islam ... forbids the mutilation of enemy wounded".<sup>197</sup> Likewise, during the Iran–Iraq War, Iran evacuated wounded Iraqi combatants to safe places, in accordance with the principles of Islamic law.<sup>198</sup> Furthermore, Article 11(a) of the Cairo Declaration on Human Rights in Islam (1990) provides that "human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty".

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<sup>195</sup> *Hadith* 966 in Ibn Malik, *Mutwatta'*. *Hadith* 1408 and 1617 in Mohammad Ibn Isa Al-Tirmidhi, *Al Jami' Al-Sahih Sunan Al-Tirmidhi*. *Hadith* 2613 in Abu Dawud, *Sunan Abi Dawud*. *Hadith* 1731 in Al-Qushayri, *Sahih Muslim*. *Hadith* 2342 (prohibition of mutilation) and 5197 in Al-Bukhari, *Al-Jami' Al-Sahih AlMukhtasar*. All the *Hadiths* can be found on the Islamic Nature website available from <[iknowledge.islamicnature.com/hadith/](http://iknowledge.islamicnature.com/hadith/)>, 11 March 2013. See also Alsumaih, *supra* note 105, p. 124.

<sup>196</sup> Quoted in an Islamic Information website which is available from the following link: <[www.rasoulallah.net/v2/document.aspx?lang=en&doc=7473](http://www.rasoulallah.net/v2/document.aspx?lang=en&doc=7473)>, 11 March 2013.

<sup>197</sup> Bosnia and Herzegovina, *Instructions to the Muslim Fighter*, 1993, para. c, as cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *supra* note 84, p. 2172.

<sup>198</sup> Report on the Practice of Iran (1997), Chapter 5.1, as cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *supra* note 84, p. 2611.

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It is also regarded as mutilation if dead bodies are just left to rot without a burial.<sup>199</sup> Reports detail several occasions where the Prophet buried the dead after hostilities regardless of whether they were enemies or Muslims.<sup>200</sup> Burying the dead is also a rule provided by the first Geneva Convention Article 17 1949. Furthermore, when the bodies are handed back to the enemy nothing should be accepted in return. At *Ghazwah al- Khandaq* or the Battle of the Trench, Nawfal Ibn Abd Allah Ibn Al-Mughirah died when he attempted to jump the trench with his horse. When the Meccans offered payment for receiving the body of Nawfal, the Prophet gave them the body but refused the payment.<sup>201</sup> Likewise, Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict ... it is prohibited to mutilate dead bodies”.

### 6.8 Child Soldiers

Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the ICC Statute consider as a war crime any acts of conscripting and enlisting children under the age of fifteen years into an armed conflict or using them to participate actively in hostilities. Lubanga, the first

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<sup>199</sup> Abou-El-Wafa, *supra* note 73, pp. 269-270.

<sup>200</sup> *Hadith* 6409 in Al-Bayhaqi, *Sunan Al-Bayhaqi*. Available from The Shafi'i Fiqh website in word format <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. *See also* Alsumaih, *supra* note 105, p. 125.

<sup>201</sup> *Hadith* 18135 and 18136 in Al-Bayhaqi, *Sunan Al-Bayhaqi*. Available from The Shafi'i Fiqh website at <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. *Hadith* 1715 in Al-Tirmidhi, *Sunan Al-Tirmidhi*. Available from the Islamic Nature Website <<http://iknowledge.islamicnature.com/hadith/>>, 11 March 2013. *See also* Alsumaih, *supra* note 105, p. 125.

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accused to appear before the ICC, was the first to be charged under the above provisions of the ICC Statute.<sup>202</sup>

Children are protected in different ways in Islam and are free from fighting within an armed conflict according to Islamic rules of war.<sup>203</sup> Islamic laws protecting children are similar to those under the international legal system. In particular the Convention on the Rights of the Child and its Optional Protocols, more specifically, that preventing children from being involved in, or used for, armed conflicts. This is evidenced in the fact that it was widely accepted by the Islamic world.<sup>204</sup>

The paper prepared by UNICEF titled 'Investing in The Children of The Islamic World' confirms that Islam forbids child soldiers, labour, pornography, trafficking and much more leading to abuse towards children; however, unfortunately it is not fully practiced in the Islamic states of today's world.<sup>205</sup> The Organization of Islamic Conference supporting the objectives of the UNICEF paper has had

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<sup>202</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 29 January 2007, International Criminal Court, Case No. ICC-01/04-01/06, Situation in the Democratic Republic of the Congo – Decision on the Confirmation of Charges (*Lubanga Decision*).

<sup>203</sup> Hamidullah, *supra* note 51, p. 164. See generally Bennoune, 'As-Salāmū 'Alaykum?', *supra* note 98, pp. 605-643; Abu Nimer, *supra* note 89, pp. 217-265. See also Ahmad, *supra* note 89, pp. 157-172.

<sup>204</sup> Convention on the Rights of the Child (1990). See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, entered into force 12 February 2002; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, entered into force on 18 January 2002, available at <[www.unicef.org/crc/](http://www.unicef.org/crc/)>, 11 March 2013.

<sup>205</sup> See 'Investing in the Children of the Islamic World', UNICEF available from [www.unicef.org/publications/files/Investing\\_Children\\_Islamic\\_World\\_full\\_E.pdf](http://www.unicef.org/publications/files/Investing_Children_Islamic_World_full_E.pdf)>, 11 March 2013. See also recent reports on the use of child soldiers available from <[www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&query=Child+Soldiers+Global+Report&skip=0&querysi=Child+Soldiers&searchin=fulltext&display=10&sort=date&x=11&y=15](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&query=Child+Soldiers+Global+Report&skip=0&querysi=Child+Soldiers&searchin=fulltext&display=10&sort=date&x=11&y=15)>, 11 March 2013.

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difficulties implementing the rules preventing abuse of children. However, the progress of eliminating child abuse is outlined in the UN reports on child soldiers.<sup>206</sup>

Islamic laws governing war and the prohibition of using children for such cause is contrary to Iran's claim in 1983 to the UN that children are fighting during war time to fulfil their religious duties.<sup>207</sup> However, within Islam and according to the *Qur'ān* and *Sunnah* the protection of children extends to a child until he or she has reached the age of puberty and then maturity.<sup>208</sup> This protection prevents the attack of children and forcing them to fight within an armed conflict even if the child wishes to do so.<sup>209</sup>

Furthermore, *Hadiths* from the Prophet and *Qur'ān* texts prevent the attack of specific categories of enemy non-combatants which includes women and children amongst others.<sup>210</sup> This confirms that children are regarded as non-combatants and not able to fight. It is maintained that if children and woman stand guard over the enemy's army or strongholds, or if she warns the enemy or throws stones at the Muslim army, she still cannot be targeted.<sup>211</sup> A well-known *Hadith* provides: "move forward in the name of God, by God, and on the religion of God's Prophet. Do not

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<sup>206</sup> See recent reports from this website which can be obtained from <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&query=Child+Soldiers+Global+Report&skip=0&querysi=Child+Soldiers&searchin=fulltext&display=10&sort=date&x=11&y=15>>, 11 March 2013.

<sup>207</sup> See Elahi, *supra* note 92, pp. 259-280.

<sup>208</sup> *Ibid.*, pp. 259-280.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Hadith* 17932, 17933, 17934, 17935, 17936, 17937, 2613 and 2614 in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. *Hadith* 2608 and 2663 in Sulayman Ibn Al-Ash'ath Abu Dawud, *Sunan Abi Dawud*. A translated version of these *Hadiths* can be found on the Islamic Nature website <[iknowledge.islamicnature.com/hadith/scholar/abudawud/book/008/](http://iknowledge.islamicnature.com/hadith/scholar/abudawud/book/008/)>, 11 March 2013. See also Nimer, *supra* note 89, pp. 217-265; Ahmad, *supra* note 89, pp. 157-172.

<sup>211</sup> Bennoune, *supra* note 98, pp. 605-643.



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kill an elderly, or a child, or a woman, do not misappropriate booty, gather your spoils, do good for God loves good doers".<sup>212</sup> Thus, it is unanimously believed that women and children should be protected during wartime and should not be targeted.<sup>213</sup>

Jurists outlined that those under the age of fifteen and those who have not reached puberty yet are protected and immune,<sup>214</sup> from being attacked and from taking part in war.<sup>215</sup> This is also the age limit provided for the protection of children under the Geneva Conventions Additional Protocol I, 8 June 1997.<sup>216</sup> The main justifications for this are provided by different jurists for instance Al-Ghazali provides that they 'are not fit for fighting'.<sup>217</sup> Therefore, fighting can only be committed against enemy combatants as provided by the *Qur'ān* "And fight in the way of God those who fight against you".<sup>218</sup>

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<sup>212</sup> Related by Al-Bayhaqi (according to Malik Ibn Anas). In Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. This can be downloaded from The Shafi'i Fiqh website in word format <[www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/](http://www.shafiifiqh.com/maktabat-shafii-fiqh/books-of-hadith/)>, 11 March 2013. See also *Hadith* 2608 and 2663 in Sulayman Ibn Al-Ash'ath Abu Dawud, *Sunan Abi Dawud*. A translated version of these *Hadiths* can be found on the Islamic Nature website <[iknowledge.islamicnature.com/hadith/scholar/abudawud/book/008/](http://iknowledge.islamicnature.com/hadith/scholar/abudawud/book/008/)>, 11 March 2013.

<sup>213</sup> Mohammad Ibn Ahmad Ibn Mohammad Ibn Rushd, *The Distinguished Jurist's Primer: Bidayah Al-Mujtahid*, Vol.1 Translated by Imran Ahsan Khan Nyazee, reviewed by Mohammad Abdul Rauf. (Garnet, Reading, reprint 2002), p. 280; Alsumaih, *supra* note 105, p. 117; John Kelsay, 'Islamic Law of War', in Gabriel Palmer-Fernandez, (ed.), *Encyclopaedia of Religion and War* (Rutledge, New York, 2004), pp. 221-225.

<sup>214</sup> Hamidullah, *supra* note 51, pp. 204-207 and 223-228.

<sup>215</sup> See Elahi, *supra* note 2, pp. 265, 274, 279. See also Hamidullah, *supra* note 51, p. 164.

<sup>216</sup> Additional Protocol to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 77. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.

<sup>217</sup> Mohammad Al-Ghazali, *Al-Wasit Fi Al-Madhab*, ed. Ahmad Mahmud Ibrahim and Muhammad Tamir, 7 Vols. (Dar Al-Salam, Cairo 1997/1417) Vol. 7, p. 19, cited in Al-Dawoody, *supra* note 87, p. 112.

<sup>218</sup> *Qur'ān* Verse 2:190.

<http://booksandjournals.brillonline.com/content/10.1163/15718123-01303002;jsessionid=30xw2vefikq4p.x-brill-live-01>

Additionally, some jurists provide justifications of immunity, for women and children through the principle of *maslahah* (public interest), because they can be enslaved or exchanged for Muslim prisoners of war, or for ransom.<sup>219</sup> However, jurists provide that if women and children are involved in fighting during the war they will forfeit their right to immunity but their opinions differ on this.<sup>220</sup> For instance, Sufyan Al-Thawri (d. 161/778) provides that it is still undesirable to attack children even if they fight during the war.<sup>221</sup> However, others believe that if a woman is a Queen and a child is a King of the enemy and they fight in battle, they can be killed.<sup>222</sup>

Puberty on its own does not qualify a child to be an adult; he must also have gained maturity with his puberty. Thus, without maturity his spiritual guardian or parent must remain caring for him and he will still be regarded as a child and not fit for fighting during an armed conflict.<sup>223</sup> Generally, females are not fit for fighting in Islam and remain with their guardian until marriage.<sup>224</sup> The majority of jurists believe that a child must also be of age (have reached puberty and gained maturity) to grant *Aman* to anyone including non-Muslims.<sup>225</sup>

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<sup>219</sup> Hamidullah, *supra* note 51, pp. 204-207 and 223-228.

<sup>220</sup> Abou-El-Wafa, *supra* note 73, pp. 263-278.

<sup>221</sup> Muhammad Ibn Jarir Al-Tabari, *Kitab Al-Jihad Wa Kitab Al-Jizyah Wa Ahkam Al-Muharibin Min Kitab Ikhtilaf Al-Fuqaha Li-Abi Ja'far Muhammad Ibn Jarir Al-Tabari*, ed. Joseph Schacht (Brill, Leiden, 1933), p. 9.

<sup>222</sup> Hamidullah, *supra* note 51, pp. 253-256 and 204-233.

<sup>223</sup> Elahi, *supra* note 92, p. 271.

<sup>224</sup> *Ibid.*

<sup>225</sup> Khadduri, *supra* note 55, pp. 165; Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (Mouton, The Hague, 1979), p. 130.

<http://booksandjournals.brillonline.com/content/10.1163/15718123-01303002:jsessionid=30xw2vefikq4p.x-brill-live-01>

Furthermore, the Shafi'i school of law provide that even if a child has become of age they still cannot participate in an armed conflict unless they have their parent's permission. This is based on the *Hadith* where the Prophet sent a young soldier back from the battlefields to attain permission from his parents to fight in the war. He also prevented a young Muslim called Ibn Umar from fighting in the war (at the Battle of Uhud) because he was 14 years old, but after one year allowed him to fight in another war.<sup>226</sup>

In analysis, under the *Qur'ān* and *Sunnah* it is obvious that child soldiers are prohibited and the qualification of a soldier is that of one who is mature and has reached the age of puberty, is sane, strong enough to fight and not female. The general age for fighting is seen in the past as 15 years old, if he has gained maturity. However, in modern times this 'age' maybe different as it can be argued that those at the time of the Prophet had to mature quickly, but today children tend to mature a lot slower.

Unfortunately, the practice of Islamic States<sup>227</sup> using child soldiers in modern times is not a reflection of Islamic law as confirmed by Maryam Elahi in her piece on child soldiers<sup>228</sup> and by the UNICEF paper titled 'Investing in the Children of the Islamic World'.<sup>229</sup> Therefore, there is a great need to implement the rules of Islamic

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<sup>226</sup> Khadduri, *supra* note 55, p. 54.

<sup>227</sup> See recent reports on the use of child soldiers available at <[www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&query=Child+Soldiers+Global+Report&skip=0&querysi=Child+Soldiers&searchin=fulltext&display=10&sort=date&x=11&y=15](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&query=Child+Soldiers+Global+Report&skip=0&querysi=Child+Soldiers&searchin=fulltext&display=10&sort=date&x=11&y=15)>, 11 March 2013.

<sup>228</sup> Elahi, *supra* note 92, pp. 259-280.

<sup>229</sup> See 'Investing in the Children of the Islamic World', UNICEF available from <[www.unicef.org/publications/files/Investing\\_Children\\_Islamic\\_World\\_full\\_E.pdf](http://www.unicef.org/publications/files/Investing_Children_Islamic_World_full_E.pdf)>, 11 March 2013.

<http://booksandjournals.brillonline.com/content/10.1163/15718123-01303002;jsessionid=30xw2vefikq4p.x-brill-live-01>

law within Islamic States to achieve a more humane society, whilst also enjoying human rights similar to that of those enjoyed on an international level.

## 7. Conclusion

This study evidences that there is room for the contribution of the Islamic civilisation within international humanitarian law and a conversation between different civilisations is needed in developing and applying international humanitarian law norms. The present author endorses Judge Bedjaoui's contention that '[T]he West has either remained ignorant of the contribution of the Arabs and Islam to international law or has disregarded it. With the exception of a few highly specialised historians, Western scholars who have sought to trace back the history of international law have done so after their fashion without hardly ever thinking of the Islamic contribution. All over the world, even today, the great majority of treatises and manuals of international law short-circuit the history of international law by mentioning the contribution of Greco-Roman antiquity and then calmly passing over the contribution which Islam made from the seventh to the fifteenth century.'<sup>230</sup>

One cannot but speculate about the intentions behind such an omission. Is it due to a hidden rivalry between the main religion of the West, namely Christianity, and Islam; is it a fear of giving any legitimacy to a religious law by a world striving to be secular; or is it merely ignorance on the subject? The omission of a genuine

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<sup>230</sup> Bedjaoui, *supra* note 5, p. 294.

Mohamed Elewa Badar, 'Ius in Bello under Islamic International Law' (2013) 13  
*International Criminal Law Review* 593-625

<http://booksandjournals.brillonline.com/content/10.1163/15718123-01303002;jsessionid=30xw2vefikq4p.x-brill-live-01>

mention of the Arab or Islamic influence in the narratives of other parts of Western and international history suggests something other than a mere coincidence.