

# CASE NOTES AND COMMENT

## ‘ISLAM, LAW AND WAR’

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### ABSTRACT

This paper will examine how Islam has conceived war. The methodology will be based upon examining the works of both historical and modern authors to outline not only the concept of war in Islam, but also rules of warfare. This paper will also enumerate how prisoners of war have traditionally been treated in Islam.

### I. INTRODUCTION

Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor aged man. Bring no harm to trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy’s flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.<sup>1</sup>

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<sup>1</sup> Caliph Abu Bakr – the first Caliph after Prophet Muhammad’s death as cited in Youssef H Aboul-Enein and Sherifa Zuhur, *Islamic Rulings on Warfare* (2004) 22.

but also the rules of warfare. This paper will also enumerate how prisoners of war have traditionally been treated in Islam.

It is arguable that war is a social necessity which nations practice in order to solve their social problems, which defy a peaceful solution. Human communities have plunged into conflicts not only for the mere attainment of material goals but for the achievement of moral needs as well. Ibn Khaldun was of the view that war had existed in society since 'Creation'. Man, by his very nature, was warlike, motivated to fight for selfish interests or emotion.<sup>2</sup>

Some historians explain that in the absence of war, progress and civilization would have been hindered in some nations. For example, Hegel argued that change can only take place when there are opposing forces which struggle against one another so that a new product, stronger than the rest, rises from the conflict.<sup>3</sup> The favour of the Quran in this regard springs from the fact that it offered this view fourteen hundred years prior: "... If it were not for God's support of some people against others, there would be chaos on earth. But God showers His grace upon the people." [2:251] Islam, since the days of Prophet Muhammad, has had to deal with war and armed conflict. This has ranged from enmity from the powerful Byzantine and Persian empires early in the Islamic development, to the Crusaders, the Mughals, the European Colonists over the last three hundred years to the modern day Arab-Israeli, Iraqi-Iranian and recent Gulf conflicts. Thus, it is not surprising that given this history, that Islam has developed a legal theory to explain how the Islamic community can wage war to defend itself. This paper will explain this Islamic legal device.

One important point that needs to be raised at the outset is that the work of the recognized Muslim jurists on warfare needs to be approached with the existing socio-political requirements and conditions of the seventh to ninth century in mind.<sup>4</sup> Therefore,

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<sup>2</sup> As cited in Majid Khadduri, *War and Peace in the Law of Islam* (1955) 70.

<sup>3</sup> As cited 'The War System in Islam' at <<http://www.submission.org.au/war.html>> accessed 27 July 2005.

<sup>4</sup> Mohammad Tallat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (1968) 133.

their rulings should not be considered unconditionally applicable to Muslims in the twenty first century.

## II. DISCUSSION OF KEY ISLAMIC TERMS

There are a number of key terms and concepts that need to be defined and explained prior to discussing the main tenet of this paper. One of these terms is that of '*jihad*', an Arabic word, which of itself has been the subject of scores of books and chapters.<sup>5</sup> Jihad has a great significance in the lives of *Muslims* (the adherents of Islam, and literally meaning 'one of submits'). Like any language, Arabic has unique words which have a particular meaning, and which cannot be translated precisely. A fair translation for jihad is a sincere and noticeable effort (for good); an all true and unselfish striving for spiritual good.

In the West, jihad is one of the few Arabic words which most people believe they understand. Jihad is often equated with the use of force and is often inaccurately defined as 'holy war'.<sup>6</sup> In reality, the term jihad comes from the Arabic verb '*jihada*', meaning to struggle or exert. *Harb* is the general term used for war. The Prophet Muhammad is recorded in the *sunna*<sup>7</sup> as stating that the exertion of force in battle is a minor jihad, while self-exertion in peaceful and personal compliance with the dictates of Islam [constitutes] the major or superior jihad – the greater jihad of non-military struggle.<sup>8</sup> The Prophet continued to say that 'the best form of jihad is to speak the truth in the face of an oppressive rule'. Jihad has also been defined as 'exertion of one's power to the utmost of one's capacity'.<sup>9</sup>

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<sup>5</sup> Wael Hallaq (forthcoming), *Jihad and International Law*, p.1.

<sup>6</sup> Hilmi M. Zawati, 'Is Jihad a Just War? War, Peace and Human Rights under Islamic and Public International Law' (2001) 53 *Studies in Religion and Society* 13.

<sup>7</sup> Short anecdotal accounts of Prophet Muhammad's actions or opinions preceded by a list of transmitters, termed the hadith.

<sup>8</sup> Jacob Neusner and Tamara Sonn, *Comparing Religion through Law: Judaism and Islam* (1999) 203.

<sup>9</sup> As cited in Karima Bennoune, 'As-salamu alaykum? Humanitarian Law in Islamic Jurisprudence' (1994) 15 *Michigan Journal of International Law* 615.

Jihad and its derivations appear some thirty-six times in the *Quran* (the Muslim holy book of divine revelation)<sup>10</sup>. Jihad implies the striving of spiritual good. This jihad involves particular change in one's self and mentality. It may concern the sacrifice of material property, social class and even emotional comfort solely for worship of Allah (God). The *raison d'état* is that one who practises jihad will gain tremendously in the afterlife,<sup>11</sup> more so for one who dies on a military jihad.<sup>12</sup>

Jihad is primarily an emphasis on the individual. Jihad also includes the striving and establishing of justice. Before one can strive for justice in his/her community, justice must be one of his/her main religious and moral principles. Jihad may also reflect the war aspects in Islam (Submission). The fighting of a war in the name of justice or Islam, to deter an aggressor, for self-defence, and/or to establish justice and freedom to practice religion, would also be considered a jihad.<sup>13</sup>

Aboul-Enein and Zuhur state that according to the classical jurists there are a number of jihads:

1. Jihad against polytheists – those who fail to believe in God;
2. Jihad against Apostasy – those believers who have renounced Islam;
3. Jihad against Baghi – those dissenters who have renounced the Imam's authority;
4. Jihad against Deserters and Highway robbery; and
5. Jihad against the Scripturaries – that is peoples of the Book, ie Jews, Sabians and Christians.<sup>14</sup>

Unless the Muslim community is subject to a sudden attack where the whole population is required to defend the community – an individual duty known as 'fard 'ayn', jihad is a collective obligations of the whole populace.<sup>15</sup> It is regarded as a 'fard

<sup>10</sup> James Turner Johnson, *The Holy War in Western and Islamic Tradition* (1997) 61.

<sup>11</sup> "The Hereafter is far better for you than this first (life)." (93:4)

<sup>12</sup> Neusner and Sonn, above n 8, 206.

<sup>13</sup> Khadduri, above n 2, 56.

<sup>14</sup> Aboul-Enein and Zuhur, above n 1, 5–6.

<sup>15</sup> Ghunaimi, above n 4, 141.

al-kifayah', that is binding on Muslims as a collective group, not individually. If the duty is undertaken by a section of the populace it ceases to be obligatory on others. However, the whole community would fall into error if the duty was neglected, and not performed at all.<sup>16</sup> It is this collective obligation of jihad that excludes it from being on the five pillars of Islam, namely fasting, regular prayers, pilgrimage to Mecca, Zakaat and the profession of the faith, which are individual duties.<sup>17</sup>

Classical scholarship described Islamic law (shari'ah) as dividing the world into two distinct spheres of territories, *dar al-Harb* (the abode of war) and *dar al-Islam* (the abode of peace). Dar al-Harb was the name for the regions where Islam did not dominate, where divine will was not observed, and therefore where continuing strife was the norm. By contrast, dar al-Islam was the name for those dominions where Islam ruled, where submission to God was observed, and where peace and tranquillity reigned.

Akyol observed that the distinction is not quite as simple as it may at first appear. For one thing, the division was regarded as legal rather than theological.<sup>18</sup> Dar al-Harb is not separated from dar al-Islam by things like the popularity of Islam or divine grace; rather, it is separated by the nature of the governments which have control over a territory. A Muslim-majority nation not ruled by Islamic law is still dar al-Harb, while a Muslim-minority nation ruled by Islamic law could qualify as being part of dar al-Islam. Ghunaimi argues that dividing the world into the respective spheres introduces terms which never occurred in the Quran and the hadith. These terms are 'an innovation of the Abbasid legists', and 'unfounded' and not a principle of Muslim legal theory.<sup>19</sup>

This distinction between the two spheres has parallel in Christian Medieval thought according to Johnson. Augustinian theology stated that the earth was divided into two cities, namely civitas

<sup>16</sup> Khadduri, above n 2, 60.

<sup>17</sup> However, Ghunaimi notes that Kharijites conceived jihad as a sixth pillar of Islam, a notion discounted by other Muslims – Khadduri, above n 2, 141.

<sup>18</sup> Mustafa Akyol 2004, 'Muslim Jurists on POWs and Non-Combatants', in *FrontPageMagazine.com* dated October 8, 2004 at <<http://www.FrontPage.com>> accessed on 25 July 2005.

<sup>19</sup> Khadduri, above n 2, 184.

terrenae (ordered to things of the earth) and civitas dei (ordered to God). This Augustine distinction is directly comparable to the Islamic distinction of dar al-Harb and dar al-Islam respectively.<sup>20</sup>

The classical Islamic juristic view has been that conflict was descriptive of the relationship between dar al-Harb and dar al-Islam. Muslims were expected to bring God's word and God's will to all of humanity, arguably by force if absolutely necessary, and attempts by the regions in dar al-Harb to resist or fight back must be met with a similar amount of force. While the general condition of conflict between the two may stem from the Islamic mission to spread God's word, specific instances of warfare are believed to be always due to the immoral and disordered nature of dar al-Harb regions. However, the *imam* (religious leader) was deferred a degree of latitude in choosing 'when, where, and against what enemy to wage jihad', which according to Johnson led to formal treaties suspending hostilities for up to ten years, and informal peace that lasted much longer.<sup>21</sup>

Khadduri states that the as Muslim power began to wane, the principle of jihad as a permanent war had become obsolete.<sup>22</sup> Hallaq supports this contention by stating that 'the number of independent treaties on jihad declined after the third/ninth century [Islamic/Western calendar]'.<sup>23</sup> Zawati notes that that not a single piece of evidence in Islamic legal discourse instructs Muslims to wage perpetual war against those nations which fall outside of the sovereignty of the Islamic State or to kill non-Muslims.<sup>24</sup>

With respect to Khadduri, Zawati's arguments are the more sound, and resonating with the evidence from the sources of Islamic law. According to Zawati, the chief aim of jihad is not to force non-believers to embrace Islam, nor to expand the Islamic State. Killing non-believers who refuse to accept Islam is worse than disbelief and inconsistent with the message of the Quran.<sup>25</sup>

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<sup>20</sup> Johnson, above n 10, 49.

<sup>21</sup> Ibid 63.

<sup>22</sup> Ghunaimi, above n 4, 65.

<sup>23</sup> Hallaq, above n 5, 1.

<sup>24</sup> Zawati, above n 6, 11.

<sup>25</sup> Ibid 12.

Killing a non-believer unless he became a Muslim would constitute the greatest compulsion in religion, and contrary to the Quranic verse: “Let there be no compulsion in religion”. [2:257]

Khadduri also states that jihad was not the only legal means of dealing with non-Muslims since peaceful methods such as negotiation, arbitration and treaty making, were applied in regulating the relations of the faithful with non-Muslims when the fighting ceased.<sup>26</sup>

As a matter of completeness, the Shi’a law of jihad was similar to that exposed by the Sunni jurists. The only subtlety was that not only the failure of a non-Muslim to believe in Allah would justify the triggering of a jihad, but also the failure of a Muslim to obey an imam would make that person liable for punishment by a jihad.<sup>27</sup>

An analysis of the Quranic verses on war needs to account for the following issues. The Quran, divided into 114 suras (chapters) with 6,219 ayat (verses), may be distinguished into two periods of revelation. These are the Meccan and Medinan, signifying the time when Prophet Muhammad left Mecca for Medina to escape persecution.<sup>28</sup> The verses from the Meccan period taught patience, forgiveness and restraint, whereas the concept of military jihad as warfare developed throughout the Medinan period. An historical analysis will show Meccan hostility necessitated the Muslims in Medina to take up arms in their self-defence.

A number of modern scholars of Islam attempt to deal with this apparent tension in the Quran between the tolerance in the Meccan verses and the Medinan verses that are a call to arms by suggesting that the later verses (such as the Sword verse<sup>29</sup>) ‘abrogate or render void the earlier verses where Prophet Muhammad was ordered to preach, but avoid conflict with

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<sup>26</sup> Khadduri, above n 2, 54.

<sup>27</sup> Ibid 66.

<sup>28</sup> Aboul-Enein and Zuhur, above n 1, 7.

<sup>29</sup> “Fight against those who believe not in God and the Last Day, nor forbid that which has been forbidden by God and his Messenger, and those who acknowledge not the religion of truth among the people of the scripture until they pay the jizyah, and feel themselves subdued” [Surah al-Tawba:29].

non-believers'.<sup>30</sup> However, this analysis misses the point that God's word cannot be abrogated, and instead there is a purpose for each verse which not only has to be studied holistically and in context, but is also contingent on the circumstances, similar to the historical environment in which the verses were sent down during.<sup>31</sup> In any case, there were three distinct triggers for fighting: to stop fighting, to protect the Mission of Islam, and to defend religious freedom.<sup>32</sup>

Another important concept was the *Jizya* or poll tax is a personal tax levied on non-Muslims in a Muslim State, which resembles the *zakaat* (Alms Tax) which is levied on Muslim citizens by the Muslim State. These non-Muslims are called *Dhimmi*s (which from the Arabic origin, 'Dhimma,' meaning security, protection and custody) because the said rights are guaranteed by God and His Apostle, and such was the custom the Muslim leaders followed in dealing with the *Dhimmi*s.<sup>33</sup>

The poll tax is levied so that all the capable non-Muslim citizens of the State can contribute to the general welfare of the State, and that in return for this, they can enjoy their rights as nationals of this State, including welfare.<sup>34</sup> The poll tax is not collected from the weak and poor. In his message to the people of Hira, Khaled Ibn Al-Walid said:

When a person is too old to work or suffers a handicap, or when he falls into poverty, he is free from the dues of the poll tax; his sustenance is provided by the Moslem Exchequer.<sup>35</sup>

When the dues of the poll tax are paid by these people, they have to be supported, protected, granted a freedom of faith, and treated on a footing of justice and equality with Muslims. The poll tax is

<sup>30</sup> Aboul-Enein and Zuhur, above n 1, 11.

<sup>31</sup> Ghunaimi states that there is another methodology for dealing with apparently contradictory commandments bearing on the same subject, one being in general terms and the other being conditional, 'the contention is that general commandment is to be limited by the conditions of the conditional commandment': Ghunaimi, above n 4, 165.

<sup>32</sup> Khadduri, above n 2, 11.

<sup>33</sup> Akyol, above n 18.

<sup>34</sup> Ghunaimi, above n 4, 154.

<sup>35</sup> Akyol, above n 18.



a small contribution when compared to the services the Muslim State offered to protect the Dhimmis and support the army in charge to keep the city safe, and significantly less than the zakaat. Ghunaimi notes that one of the essential causes of the amazing military successes of the early Muslims was the discontent of the local population in the surrounding areas with the Byzantine Government.<sup>36</sup>

### III. ISLAMIC LAW – A BRIEF OVERVIEW

According to faithful, Islam is the ultimate and perfect religion in the line of Abrahamic religions is derived from the Tradition (the Sunna). For the Quran saw itself as confirming rather than altering the central message of the Abrahamic religions that preceded it chronologically, namely Judaism and Christianity. Consequently, the Quran does not take up the issue of abrogation or supersession of the previous Abrahamic religions and prescribe the forced conversion of the followers of those religions. In the contrary, Islam recognizes the central belief in one God of the Abrahamic faiths, whose main tenets are shared by Islam.<sup>37</sup>

According to Dr Sachedina, a student of Islamic law must avoid a highly essentialist interpretation of the classical Muslim juristic formulations, common in modern scholarly analysis on Islamic law.<sup>38</sup> Rather, Islamic law needs to be studied holistically, that within its historical and cultural context. For example, Taheri states that a number of articles recently published on the subject of war in Islam in the modern media draw upon Abul Ala Maudoodi, and Sayyed Qutb – who are supposed to have redefined the concept of '*jihad*' as the Islamic version of 'holy war'.<sup>39</sup>

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<sup>36</sup> Ghunaimi, above n 4, 23.

<sup>37</sup> Abdulaziz Sachedina, 'From Defensive to Offensive Warfare: The Use and Abuse of Jihad in the Muslim World', from the University of Virginia portal at <<http://www.people.virginia.edu/~aas/article/article8.htm>> at 13 December 2006.

<sup>38</sup> Ibid.

<sup>39</sup> Amir Taheri, 'Islam and War', *New York Post* (New York) February 16, 2003.

Taheri argues that these authors had a strictly 'Western' reading of Islam. What this means is that arguably both Maudoodi and Qutb tried to understand Islam through the prism of Western terminology. Maudoodi was deeply influenced by Locke and Hume. Qutb was overwhelmed by his reading of Rebatet and Bernanos. Islam was primarily viewed as a political ideology rather than a belief system. Taheri argues that these authors would not hesitate to refashion that ideology to suit their political agenda, which led a self-serving formulation.<sup>40</sup>

The starting point for a discussion of Islamic law is discussion of the sources of that law. Islamic law, generally, is derived from four main sources: the Holy Quran, the Sunna, Ijma, and Qiyas. Comprised of the interpretation of these principle sources via a process known as fiqh, the Sharia is a complete code of regulations for Muslims in all aspects of their lives. Thus, in addition to the Quran and the Sunna, the particular sources of Islamic international law include treaties made between Muslims, publicly issued orders to commanders in the field by the early Caliphs, and the opinions and interpretations of great Muslim jurists.<sup>41</sup>

It is because of this relationship between the law and the religion that Islamic law is able to be supported by some force that ensures its performance. For example, modern International Humanitarian law determines that civilians who are not regular members of a military are not considered as combatants, and hence should not be directly targeted; only regular armed men engaged in a war are considered as combatants, and accordingly open to be subjected to lethal force. Islamic law not only agrees on this point, but provides a religious sanction. The Quran states: "You may fight in the cause of God against those who attack you, but do not aggress. God does not love the aggressors." [2:190] It is clearly an act of transgression when Muslims fight those who do not fight them, people like their enemy's children and wives, as well as their sick, old and clergy. Unlike man-made law, Islamic law is supported by God's sanction, and the belief that on the day of judgement, all must account for their actions. It is this ultimate over-sight that not only offers the ultimate

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<sup>40</sup> Ibid

<sup>41</sup> Bennoune, above n 9, 614.

compliance, but also ensures that by following religious tenet on warfare, a Muslim can at the same time be worshiping in the path of God.

#### IV. CONCEPT OF WAR IN ISLAM

While the Quran introduced the injunction for the legitimization for the use of force through the concept of jihad, this was in response to the pre-Islamic Arab tribal culture, where the security of a tribe and even its existence depended upon institutionalized military power. The main element among the tribes was being able to protect all their members and to avenge all insults, injuries, and deaths through their military strength. According to Sachedina, the Semitic system of retaliatory justice based on ‘a life for a life’ in the “circumstances of desert life could not always ensure that crime would not be committed lightly and irresponsibly”.<sup>42</sup> Accordingly, the legitimate use of force prescribed by the Quran provided an appropriate moral restriction on the use of military power to resolve conflicts. Legitimization of jihad in the meaning of ‘fighting’ appears in the context of defending the community and bringing the breakdown of the public order to a halt.

According to Bennoune<sup>43</sup> Islamic law prohibited the prevalent practice of using war for material gain or revenge. In addition, the Prophet and his companions, acting in accordance with the Quran and Sunna, laid down very specific and strict rules for honourable combat. Thus, Islamic legal doctrine subsumed warfare into religion, considerations of appropriate rules of warfare were built into the concept of permissible war itself.

Since use of force was theoretically restricted to those types of conflicts and settings permitted by Islam, it should always be ruled by these Islamic precepts about human interrelationships. For example, if a particular conflict failed to meet these standards, the conflict was no longer qualified as permissible warfare because it was no longer Islamic. This conception also had consequences for individual participants in the jihad, since

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<sup>42</sup> Sachedina, above n 37.

<sup>43</sup> Bennoune, above n 9, 616.

for Muslims, the war component of jihad was conceived as an act of worship and had also to follow certain rules which may be called the war-ritual. Transgressing these ritual rules of war would deprive this act of its character as an act of worship and would decrease the transcendental value and merits of the participants.<sup>44</sup>

Sachedina categorizes the Quranic jihad as strictly a defensive jihad based upon an absolute absence of any reference to an offensive jihad in the Quran, that is, jihad, undertaken to convert all humanity to Islam.<sup>45</sup> However, as the historical development of the relationship between Islam and power progressed, Muslim jurists regarded this explicitly Quranic principle of defensive warfare as abrogated by the verse, which has been dubbed as ‘the sword verse’ that declares war on the unbelievers: “...slay them wherever you find them, and take them, and confine them, and lie in wait for them at every place of ambush.” [9:5] The jurists maintained that fighting was obligatory for Muslims, even when the unbelievers had not begun hostilities. This is most likely premised on the historical fact that early Islamic State was caught between the Persian and Byzantium empires, each of which were claiming universal domination and proclaiming war as an effective means of achieving their goal.<sup>46</sup> In the wake of the phenomenal conquests achieved by Muslim armies during the early history of Islam, the jurists began to apply the term jihad to military action and to efforts to expand the Muslim empire through the extension of the boundaries of the Islamic empire. Thus, it is arguable that the theories of those eighth and ninth century Muslim jurists were the product of a historical epoch when the power of the universal Islamic state, was at its zenith.

Bennoune states that it is surprising that contemporary Islamic scholars should prefer to base their judgments on the rules of Islamic conduct of state not on those to be found in the Quran and the Sunna, but rather upon interpretations by jurists which reflected the ethos of a particular age of Islamic history. Bennoune cites Hans Kruse who explains this tension between the doctrinal Islamic jihad and political realities as ‘attempts to

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<sup>44</sup> Ibid 622.

<sup>45</sup> Sachedina, above n 37.

<sup>46</sup> Ghunaimi, above n 4, 70.

maintain the appearance of political facts conforming with religio-legal demands ...'.<sup>47</sup> Kruse explains that the concept of jihad was frequently used as an excuse or disguise for 'imperialistic enterprises', a practice which caused a great deal of discomfort among clerics and religious scholars.<sup>48</sup>

In stressing the originally pacifistic character of Islamic legal doctrine, Bennoune looks to the actions of the Prophet and early Muslim conduct of State. Bennoune posits numerous examples of the Prophet acting as a peacemaker and concluding treaties, citing the example the *Treaty of Hudaibiya*, which the Prophet concluded with the Quraish tribe of Mecca in A.D. 628.<sup>49</sup>

Similarly, the various peaceful options available in Islam, outlining a third category beyond dar al-Harb and dar al-Islam called dar al-sulh (the house of peace). Dar al-Harb included three key Islamic institutions which offered security for 'unbelievers'. This was the promise of security or *aman*, which must be met unconditionally; dhimmi status which made Christians and Jews (and others who could be deemed 'scripturaries') protected these citizens with certain rights and subject to taxation; and the *muwada'ah*, an international treaty which could only be revoked with notice. These options provide the foundation for peaceful international relations and contradict the notion of a constant and violent jihad with the non-Muslim world.<sup>50</sup>

Since that time, jihad has been used as an instrument by both religious as well as secular Muslim leaders, fighting sometimes external aggression or domination, and at other times internal enemies of the Muslim state. While outside the scope of this paper, today jihad is conceived as a divinely sanctioned means to combat the enemy, which provides justifications for going to war without concern for limitations upon the means. This means that overemphasis on the *jus ad bellum* criteria at the expense of undermining the *jus in bello*, which formed the major focus of

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<sup>47</sup> Bennoune, above n 9, 619.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 619–20

<sup>50</sup> Ibid

the classic discussions of jihad and served to justify wars fought for advancing Muslim hegemony.<sup>51</sup>

Thus, it can be seen that military victory should not lead to expansion or dominance as the case is with colonial regimes, nor should it lead to control over sources of wealth, or to arrogance in the land to raise one race above another. Victorious believers had to establish regular prayers to attain spiritual exaltation by worshipping God, and to purify their spirits. They had to establish the obligatory charity and thus establish social justice by supporting the right of the needy to live a decent life. They had to advocate righteousness by spreading benevolence and justice among people, and forbid evil by fighting against evil and corruption and uprooting them from society. Fighting had to be in the cause of God: “You shall fight in the cause of God, and know that God is Hearer, Knower.” [2:244]

The Quran demanded believers to fight in the cause of God, without any worldly intentions. The following verses, sent down to the Prophet in Medina, clarify the aims of war:

Those who readily fight in the cause of God are those who forsake this world in favour of the Hereafter. Whoever fights in the cause of God, then gets killed, or attains victory, we will surely grant him a great recompense. Why should you not fight in the cause of God when weak men, women, and children are imploring: “Our Lord, deliver us from this community whose people are oppressive, and be You our Lord and Master.” [4:74–75]

The jihadists must possess certain requirements in order to spiritually benefit for striving in God’s path. These requirements are that the jihadist must be a believer. The next requirement is that the jihadist must be able-bodied, mature and sound-minded person. Thus, excluded were minors, the insane, the sick, weak and crippled. In principle, a jihadist must be a male; however in cases of sudden attack on Islam, women could participate in the fighting. Other requirements included being free of debt and economically independent, unless excused by his creditor. Obtaining of his parent’s permission was another precursor for the jihadist. Two important elements that followed from being a jihadist was proceeding with the right intention (niyyah), that is

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<sup>51</sup> Sachedina, above n 37.

God's service, and not material gain. The other element was obedience and loyalty to the military commander.<sup>52</sup>

According to Peters, in peacetime Muslims must fulfil their collective jihad-duty by military training and material preparations for warfare.<sup>53</sup> With respect this does not differ from the Latin maxim 'si vis pacem, para bellum' – in times of peace, prepare for war'.

## V. RULES OF WARFARE

Fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah does not love those who exceed the limits. [2:190]

As noted previously, for the jihad to have any validity, it must be waged 'in the path of God' and not for the sake of material gain. Accordingly, the rules of warfare are also constructed with the intent of serving God. The specific prohibitions on the means and methods of warfare were first elaborated in detailed instructions given by the Prophet, and later by the first Caliphs, to Muslim warriors as they were being sent into battle. Though methods of warfare employed in the seventh and eighth centuries differ greatly from modern methods, the principles established in earlier times are equally applicable today. Women, children, and other non-combatants were recognized as a separate category of persons entitled to various degrees of immunity from attack<sup>54</sup>

The initiation of war must be preceded by an invitation to Islam. Only upon failure to accept the faith or pay the poll tax in the case of Scripturaries, could fighting be precipitated.<sup>55</sup> In Islam, the rules of warfare are supposed to apply not merely because of reciprocity concerns, but also because they are just and because acting in conformity with them is required by God. This principle is reflected in the orders of the Prophet Muhammad and the Caliphs. Khadduri states, when discussing the law of nations:

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<sup>52</sup> Khadduri, above n 2, 84–86.

<sup>53</sup> Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Wiener Publishers (1996) 119.

<sup>54</sup> Bennoune, above n 9, 623.

<sup>55</sup> Khadduri, above n 2, 96.

(It) was not based essentially on reciprocity or mutual consent, unless non-Muslims desired to avail themselves of Islamic justice, but was a self-imposed system of law, the sanctions of which were moral or religious and binding on its adherents, even though the rules might run counter to their interests.<sup>56</sup>

The Prophet instructed his followers to ‘never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His messenger for your guidance.’<sup>57</sup> Further, the Prophet instructed the Muslim troops dispatched against the advancing Byzantine army in language that foreshadows modern humanitarian rules:

In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit-trees and touch not the palm ... and do not mutilate bodies and do not kill children.<sup>58</sup>

Other restrictions the Prophet imposed include the prohibition of burning or drowning to kill the enemy, as these methods inflicted unnecessary suffering.<sup>59</sup> However, Bennoune cites scholar who have claimed that such methods were permissible if the Muslims could not otherwise obtain victory.<sup>60</sup> Khadduri also states that the Prophet opposed ‘treacherous killing and mutilation’ Hisham ibn al-Hakim testified that he had ‘heard God’s messenger say that God will torture those who torture people on earth.’<sup>61</sup>

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<sup>56</sup> Ibid 6.

<sup>57</sup> Muhammad Hamidulah, *The Muslim Conduct of States* (1953) as cited in Neusner and Sonn, above n 8, 624.

<sup>58</sup> Sahih Muslim (Ch: 2:32) as cited in A. Rahman I Doi, *Non Muslims under Shari’ah* (1983) 94–95.

<sup>59</sup> Hassan, *The Concept of State and Law in Islam* (1981) as cited in Bennoune, above n 9, 624.

<sup>60</sup> Bennoune, above n 9, 625.

<sup>61</sup> Ahmed Z. Yamani, ‘Humanitarian International Law in Islam: A General Outlook’ (1985) 7 *Michigan Year Book of International Legal Studies* 189, 201.



The Prophet is reported to have permitted certain tactics in battle, having described war as a ruse, and to have stated that ‘ruse is invaluable in war.’<sup>62</sup> The types of tactical deceptions permitted involved various practices such as obscuring the truth and spreading false rumours to demoralize the enemy camp. This is clearly contrasted to Islamic doctrine, where it was forbidden to break one’s promise or renege on an oath.<sup>63</sup> According to the renowned Shafi’i jurist, an-Nawawi, there is a consensus among Islamic scholars that allows for tricks in war against unbelievers, unless they have been given a promise or guarantee. The Quran clearly states that one should: “... not break the oaths after making them fast.” [16:91] According to Bennoune, particular early Islamic legal scholars, in elaborating their interpretations for proper procedures for Islamic warfare, may have overlooked the prior instructions by the Prophet and the Caliphs. The difference between their views and the earlier idealistic articulations may be attributable to the theory that the conception of jihad shifted for reasons of political expediency.<sup>64</sup>

Extant as an existing precedent, most Muslim ‘jurists agreed that non-combatants who do not take part in the fighting [such as women, children, monks and hermits, the aged, the blind, and the insane] were excluded from molestation.’<sup>65</sup> Shafi strongly maintained that catapults could not be directed against inhabited houses, but only against fortresses, unless the homes were located very close to fortresses.<sup>66</sup> Khadduri states that ‘once the unbelievers in the dar al-Harb had been invited to adopt Islam and refused to accept one of the alternatives ... the jihadists were allowed, in principle, to kill any one of them, combatants or non-combatants, provided they were not killed treacherously and with mutilation.’<sup>67</sup> These interpretations clearly conflict with that cited above, and demonstrate the tension in Islamic legal scholarship regarding the categorization of non-combatants. However, the bulk of the evidence, particularly if one pays careful attention to

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<sup>62</sup> Ibid.

<sup>63</sup> Bennoune, above n 9, 625.

<sup>64</sup> Ibid 629.

<sup>65</sup> Khadduri, above n 2, 103.

<sup>66</sup> Yamani, above n 61, 199–200.

<sup>67</sup> Ghunaimi, above n 4, 105–6.

the military orders of the early Caliphs and commanders, seems to support an interpretation of the law that requires non-combatants to be shielded from harm.

This tradition of protecting civilians goes back to the Prophet.<sup>68</sup> His active concern with protecting civilians is also shown by the following examples. When a man told the Prophet that a woman had been killed, the Prophet replied ‘she certainly could not have been fighting. Later when a number of children were killed, the Prophet grew angry and cried, “why is it that some people are so aggressive today as to kill progeny?”<sup>69</sup> These quotes indicate that, as early as the time of the Prophet, Islamic law distinguished between combatants and non-combatants, and censured the random use of weapons against combatants and non-combatants alike.<sup>70</sup>

Al-Awza’i believed that women and children could be targeted for taking part in the fighting or supporting the war effort against Muslims, but only if it was proven that they had actually done so. Irrefutable proof would be required that women and children must have actually served as combatants or guides, rather than on the basis of suspicion or likelihood.<sup>71</sup>

Among the principles of Islam which reveal tolerance toward the enemy in the time of war, is that it allows individuals and groups of the enemy who actively fight against Islam, to get in touch with Muslims and to reside in Muslim lands under the protection of the Islamic law which is known as the ‘Law of Protection’.<sup>72</sup> Islam ensures the protection of such people and requires Muslims to protect them with all they can afford as long as they are in Muslim territories. It even offers them certain privileges and releases them from certain obligations which Muslims have to observe.

Peters states that the following possibilities are envisaged to bring wars to an end in classical jihad doctrine. These are:

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<sup>68</sup> Bennoune, above n 9, 630.

<sup>69</sup> Yamani, above n 61, 199.

<sup>70</sup> Ibid 199.

<sup>71</sup> Ibid 207.

<sup>72</sup> Akyol, above n 18.

1. Cessation of hostilities;
2. Victory of the Muslim army;
3. Surrender of the enemy; and
4. Treaty of peace or armistice (aman).<sup>73</sup>

Wallaq states that classical jihad theory makes no mention of Muslim military defeat, and the possibility of ‘reducing Muslim sovereignty to a subjugated status.’<sup>74</sup> The assumption inherent in all the writings is winning.

## VI. PRISONERS OF WAR IN ISLAM

In regards to international humanitarian law (or the law of armed conflict), Islamic law has a number of the requisite protections in the basic categories. Distinction is made between combatants and non-combatants. Prisoners of war are considered prisoners of the State, and not as prisoners of the individuals or military units that have captured them.<sup>75</sup> Prisoners of war are to be well-treated, and only in exceptional cases are they to be subjected to capital punishment. Property is protected, as is the environment, which is only recently has emerged as a protected category in contemporary international law.<sup>76</sup> There are also clear standards of responsibility and punishment for those who commit war crimes, and the principle of not following illegal orders is established.<sup>77</sup>

Prior to discussing the treatment of prisoners of war under Islamic law, it is worthwhile to note that the international humanitarian law, as disseminated by its custodian the International Committee of the Red Cross (ICRC) aims to place some humane restrictions on the ways in which hostilities are conducted and, second, to create specific categories of protected persons (and more recently the environment) which are

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<sup>73</sup> Peters, above n 53,147.

<sup>74</sup> Hallaq, above n 5, 10.

<sup>75</sup> Peters, above n 53, 147.

<sup>76</sup> Bernard Oxman, ‘Environmental Warfare’(1991) 22 *Ocean Development and International Law* 433.

<sup>77</sup> Bennoune, above n 9, 637.

considered out of combat and entitled to specific kinds of humane treatment.<sup>78</sup> Despite this, there are still lacunas in the manner that certain modern states have treated those captured on the battlefield, to the point of denying those persons who have taken part in hostilities prisoner of war status.<sup>79</sup>

Due to the divine nature of Islamic law there is an absolute quality to these provisions in Islam. They protections are not based on reciprocity or expedience; rather the Islamic injunctions prescribe benevolence and excellence in human relations.<sup>80</sup>

Prisoners of war were considered part of the spoils of war, (*ghanima*). There are wide-ranging opinions on the rules governing their treatment. Bennoune argues that there is a general scholarly consensus that Islamic teachings resolved the problem of how prisoners of war were to be treated in a most enlightened fashion in an era when prisoners could be executed at will.<sup>81</sup> On the subject of prisoners of war, the Prophet is reported to have stated:

They are your brothers. Allah has put them in your hands; so whosoever has his brother in his hands, let him give food to eat out of what he himself eats and let him give him clothes to wear out of what he himself wears, and do not impose on them a work they are not able to do themselves. If at all you give them such work, help them to carry it out.<sup>82</sup>

Caliph Abu Bakr said of prisoners of war: “Treat the prisoners and he who renders himself to your mercy with pity, as Allah shall do to you in your need; but trample down the proud and those who rebel.”<sup>83</sup>

In fact, Muslim tradition sometimes went as far as feeding prisoners before feeding soldiers and releasing prisoners when food was not available for them.<sup>84</sup> Bennoune states that early

<sup>78</sup> Ibid 607–8

<sup>79</sup> George H. Aldrich, ‘The Taliban, al Qaeda, and the Determination of Illegal Combatants’ (2002) 4 *Humanitares Volkerrecht* 202.

<sup>80</sup> Bennoune, above n 9, 622.

<sup>81</sup> Ibid 633.

<sup>82</sup> As cited in Anwar A. Qadri, *Islamic Jurisprudence in the Modern World* (2<sup>nd</sup> ed, 1973) 278–279.

<sup>83</sup> Sahih Muslim (Ch: 2:32) as cited in Doi, above n 58, 95.

<sup>84</sup> Yamani, above n 61, 213–4.

Islamic practice permitted representatives of the enemy to visit prisoners of war for the purpose of counting them.<sup>85</sup> A Quranic verse on the subject of prisoners of war orders as follows:

So when you meet in battle those who disbelieve, then smite the necks until when you have overcome them, then make [them] prisoners, and afterwards either set them free as a favour or let them ransom [themselves] until the war terminates. That [shall be so]; and if Allah had pleased He would certainly have exacted what is due from them, but that He may try some of you by means of others ... [47:4]

Hence, prisoners of war captured by Muslims were either to be released without conditions, ransomed, or exchanged for Muslim prisoners held by the enemy, or under some circumstances, enslaved. According to Khadduri, a decision as to the treatment of prisoners of war was left to the imam who could order their execution in special circumstances, or order them released, ransomed, exchanged, or enslaved.<sup>86</sup> Although, prisoners of war were sometimes enslaved, the Quran is silent on the permissibility of this practice. Khadduri claims that the Caliph Umar was against the practice.<sup>87</sup>

The noblest course of action was considered to be the unconditional release of prisoners. The Prophet is reported to have often engaged in this course of conduct. After the Battle of Badr, the Prophet released seventy prisoners on the condition that they must teach some illiterate Muslims to read and write.<sup>88</sup> Bukhari also records that after the *Battle of Hunayn* (A.D. 631), 6000 prisoners taken from the Hawazin tribe were simply set free by the Prophet with neither conditions nor ransom.<sup>89</sup>

The execution of prisoners was forbidden except in exceptional circumstances. When Khalid ibn al Walid killed captives from the Jadhimah tribe, the Prophet is reported to have said, 'O Lord I register to you my displeasure at what Khalid has done'.<sup>90</sup> However, it has been said that the Prophet himself killed

<sup>85</sup> Ibid 210.

<sup>86</sup> Ghunaimi, above n 4, 127.

<sup>87</sup> Ibid 131.

<sup>88</sup> Doi, above n 58, 95.

<sup>89</sup> Sahih al-Bukhari (ch 40:7) as cited in Doi, above n 58, 96.

<sup>90</sup> Ibid 96.

prisoners. It has also been argued that the Prophet only did so if the specific prisoner was considered to have committed a crime before the hostilities, rather than merely having participated in the fighting. Yamani points to the execution of Uqbah ibn Abu Mu'ayt, a prisoner of war, who had earlier attacked Muhammad while he was praying.<sup>91</sup>

Qutb cites the decision of Caliph Umar to whip the son of Amr ibn al-'As, the victorious general and renowned governor of Egypt, because Amr's son had beaten a Coptic subject without any legal justification. According to Qutb, the general himself was almost the target of the Caliph's whip.<sup>92</sup>

To conclude this section, upon capture by the enemy, Muslim prisoners were under no obligation to submit or obey the orders of the enemy. If they were able to escape or destroy enemy property, they should attempt to do as much. However, if the Muslim prisoner gave a pledge not to escape, he must faithfully observe his parole.<sup>93</sup>

## VII. CONCLUSION

This paper has attempted to examine how Islam has conceived war. In addition, this paper has also attempted to enumerate how prisoners of war have traditionally been cared for in Islam. It should be noted that force was never a factor in the spread of Islam. If it happened that non-Muslim people embraced Islam, it was mainly due to the various kinds of justice on the part of the Muslim. It was also due to the tolerance and leniency of Islam, which was unknown to the other religions at that time.

For Muslims going to war must be for the right motive, in God's way. The intent of the jihadist was all important – to bring justice, or for self defence. Pure jihad was never for material gain, and there were also limits to the conflict. This no way better expressed that the following verse from the Holy Quran:

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<sup>91</sup> Yamani, above n 61, 213.

<sup>92</sup> Muhammed Qutb, 'Islam and the Crisis of the Modern World' in Kurshid Ahmad (ed), *Islam: Its Meaning and Message* (1976) 258.

<sup>93</sup> Khadduri, above n 2, 129.

And fight in the way of Allah those who fight you, and do not exceed limits surely Allah does not love those who exceed the limits. [2:190].