
Islamic Laws of War and Contemporary International Humanitarian Law: Discrimination and Proportionality

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Since the beginning of the seventh century, Islamic law has played an essential role in protecting the personal, economic, judicial, and political rights of civilians during armed conflict. Fourteen centuries before the Universal Declaration of Human Rights was drafted in 1948, it had already initiated a human revolution consisting of a set of human principles. In addition, Islamic law has made a significant contribution to international humanitarian law (IHL). This paper focuses on two specific legal constructs in warfare: the definition of the combatant and the principle of distinction. This article comparatively examines how these two laws deal with different aspects of war that fall under jus ad bellum, jus in bello, and jus post bellum. A comparative analysis of the various elements and aspects of just war theory in Islamic and contemporary international law provides a much deeper understanding of its limitations. We can safely conclude that there is a unique relationship between the Islamic law of war and IHL.

Keywords

Islamic Law of War, International Humanitarian Law, Jus ad Bellum, Jus in Bello, Human Rights

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I. Introduction

The rules of war were first codified by the Muslim jurist Mohammad Ibn al-Hassan al-Shaybani in the 8th century CE.¹ More than a millennium before the codification of the Geneva Conventions, most of the basic categories for protection offered by the Conventions were found in a fundamental form in Islamic teachings. Islamic norms emphasise restraint and the importance of doing no more harm than is necessary to accomplish the goal. One of such examples may be found at the following verses of the Quran:

And fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah (God) does not love those who exceed the limits.² But if they (the enemy) incline towards peace, do thou (also) incline towards peace, and trust in God: for He is the One that heareth and knoweth (all things).³ If they withdraw from you but fight you not, and (instead) send you (guarantees of) peace, then God hath opened no way for you (to war against them).⁴

Similarly, the United Nations Charter prohibits using force against other states, believing that war is not a solution to a problem. Thus, the following question arises: what rules apply to war if it is prohibited? The simple answer is that the comity of nations cannot renounce the possibility of conflict,⁵ as nations would repeatedly demonstrate their strength under different pretexts and with different justifications. The UN Charter prohibits war but does not exclude it. States maintain the right to defend themselves individually or collectively against any aggression. If a victim is not allowed to defend itself, this will destroy the dream of maintaining international peace. General prudence necessarily requires some rules to apply on the battlefield to avoid or minimise the suffering of those who are not combatants.⁶

For many countries, war was not the best option, as warring states inevitably lose many lives and suffer injuries, as well as losses of physical capital and damage to

¹ KHALED BASHIR, *ISLAMIC INTERNATIONAL LAW: HISTORICAL FOUNDATION AND AL-SHAYBANI'S SIYAR* 25 (2018).

² Al-Quran 2:190.

³ *Id.* 8:61.

⁴ *Id.* 4:90.

⁵ *Comity of Nations*, BLACK'S LAW DICTIONARY 324 (10th ed. 2014). The "comity of nations" permits recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair, and not detrimental to another nation's interests.

⁶ Article 3 of the 1949 Geneva Conventions protects persons taking no active part (not combatants) in the hostilities. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 113-8 (2004).

infrastructure. Moreover, economic organisations and institutions are significantly affected in the event of war.⁷ As a result, the state of war will be unstable, and eventually will take much more time to rebuild and recover. Therefore, just war theory comes into play to prevent wars and minimise the impact of wars and armed conflicts, especially on the lives of innocent people, the economy and infrastructure.⁸

Islam is often wrongly characterised mainly by Western/Christian media as a religion that promotes terrorism rather than peace.⁹ In fact, however, there were wars before the advent of Islam. The question of how Islam relates to the morality of war is one of the most compelling topics of discussion and debate in the world today.¹⁰ In particular, the concept of jihad has come up repeatedly in the mass media. It is a multi-layered concept that encompasses more than just war.¹¹ For international law, the “theory of just war” is an overarching principle consisting of *jus ad bellum*,¹² enshrined in the UN Charter, *jus in bello* and *jus post bellum*.¹³

The rules of just war fall under the two broad principles of discrimination and proportionality. The principle of discrimination concerns who are legitimate targets in war, while the principle of proportionality addresses how much force is morally appropriate. A third principle can be added to the two traditional principles, namely the principle of responsibility, which requires an examination of where responsibility lies in war.

Just war theory is rooted in the concept of humanity and should guide people’s conduct in the event of war.¹⁴ The doctrine of *jus bellum justum* is referred to as a tradition of military ethics studied by military leaders, theologians and policymakers.¹⁵ This doctrine aims to ensure that a war is fought in a morally

⁷ Phil de Imus, Gaëlle Pierre & Björn Rother, *The Cost of Conflict*, 54(4) FIN. & DEV. 20-1 (2017).

⁸ International Committee of the Red Cross, International Humanitarian Law is the Key to Upholding Multilateralism and Addressing Global Challenges (Nov. 9, 2018), <https://www.icrc.org/en/document/title-international-humanitarian-law-key-upholding-multilateralism-and-addressing-global>.

⁹ Asia Society, Islam, Terrorism and Malaysia’s Response (Feb. 4, 2002), <https://asiasociety.org/islam-terrorism-and-malaysias-response>.

¹⁰ Lena Krikorian, *Just War Theory and Islamic Ethics of War – A Growing Divergence?*, POLEMICS (July 1, 2017), <https://www.polemics-magazine.com/opinion/just-war-theory-and-islamic-ethics-of-war-a-growing-divergence>.

¹¹ Magnus Nilsson, *Just War and Jihad: A Cross-cultural Study of Modern Western and Islamic Just War Traditions 1* (Lunds University Statsvetenskapliga Institution, 2006), <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1324088&fileId=1324089>.

¹² Amaya Amell, *The Theory of Just War and International Law: From Saint Augustine, through Francisco de Vitoria, to Present*, 38(1) HISP. J. 63-76 (2017).

¹³ U.N. Charter art. 2, ¶ 4.

¹⁴ Erich Freiberger, Just War Theory and the Ethics of Drone Warfare, E-International Relations (July 18, 2013), <https://www.e-ir.info/2013/07/18/just-war-theory-and-the-ethics-of-drone-warfare>.

¹⁵ JONATHAN RAMACHANDRAN, SAVIOUR OF THE WORLD 183 (2014).

justifiable manner, with all elements having to be met for a war to be considered just. The elements can be divided into two types: the right to go to war (*jus ad bellum*) and the right to wage war (*jus in bello*). Unfortunately, much less has been said about what happens after a war, although it is crucial to the justice of the war itself. Faced with this shortcoming, contemporary scholars have introduced the third element, known as *jus post bellum*, which deals with the morality of post-war settlement and reconstruction. This concept is a humanitarian approach that can be traced from the earliest Islamic and Christian times to the more secular present.¹⁶ The elements of just war theory are discussed below by comparing the perspectives of Islamic and international law.

This article argues that Islamic law is not only consistent with international law, but has also paved the way for the improvement of modern international law within its present framework. Therefore, it can be concluded that just war theory provides a similar framework for deciding why, when and how legitimate war should be waged. This paper is divided into four parts including Introduction and Conclusion. Part two will shortly discuss traditions of Islamic Law and contemporary international law with reference to discrimination and proportionality. Part three will deal with the Islamic approach to the law of war comparing it to modern international humanitarian law.

II. Islamic Law and Contemporary International Law: A Short Comparison

Islamic preaching, including Islamic values and ethics, law and doctrine, is universal in character. Islam provides guidance for all aspects of a Muslim's life,¹⁷ including social, cultural, religious, political, military and martial affairs. Islam does not maintain preaching for economic, material, racial, imperialist or nationalistic interests, but for the salvation, happiness, welfare, justice and prosperity of all humanity. People are equal in terms of humanity, respect for human rights and human dignity, and no category of people or individual is superior to others except in terms of piety and good deeds. God says:

¹⁶ MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 132 (1977).

¹⁷ Shabir Ahmed Sayeed & Anand Prakash, *The Islamic Prayer (Salah/Namaaz) and Yoga Togetherness in Mental Health*, 55(2) INDIAN J. PSYCHIATRY 2 (2013).

Mankind! We created you from a single (pair) of a male and a female and made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of God is (he who is) the most righteous of you. And God has full knowledge and is well acquainted (with all things). (Quran, Surah al-Hujraat 49:13)

The rule governing the relationship between Muslims and the “People of the Book,” namely the Jews, Christians and Sabians, is the ideal, most rational and only procedure, as expressed in the following verse of the Quran:

God forbids you not, with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them: for God loveth those who are just! God only forbids you, with regard to those who fight you for (your) faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances) that do wrong. (Quran, Surah al-Mumtahanah 60:8-9)

Religions provide commandments on principles and rules of war through the conduct exhibited by the prophets under divine guidance. In a strict sense, Islamic law provides laws of war in the Quran and the Sunnah of the Holy Prophet as the primary sources.¹⁸ The most significant part of Islamic law that governs the general rules of international law is called *al-Siyar*,¹⁹ which emphasises the fundamental principle of all international relations or relationships between Muslims and non-Muslims.²⁰

Developments in contemporary international law as a legal system are based, on the one hand, on responses to the inherent need in international society for the balance of power and, on the other hand, on agreements between states. Grotius treated international law as a universal and secular natural law applicable to all states.²¹

Under contemporary international law, the just war doctrine holds the pragmatic view that war does not occur without cause and context. Therefore, incidental factors that might trigger a war should also be considered. However, the rules of

¹⁸ ‘Sunnah’ includes the traditions of the Holy Prophet consisting of his sayings, actions, practice, prohibitions, and silence etc. See SYED AMEER ALI, *MOHAMMEDAN LAW* 9 (5th ed. 1976).

¹⁹ Labeeb Ahmed Bsoul, *Historical Revolution on the Islamic Law of Nations/ Siyar: Between Memory and Desire*, 17(1) *DIG. MID. EAST STUD.* 48 (2008).

²⁰ *Id.*

²¹ Steven Forde, *Hugo Grotius on Ethics and War*, 92(3) *AM. POL. SCI. REV.* 639-48 (1998).

engagement should restrict actions that affect civilians, non-combatants, prisoners of war, the wounded and the helpless. The just war doctrine is a theory that determines when it is appropriate to use force and the proper conduct in the use of force. These two aspects have developed into separate branches of international law: *jus ad bellum* and *jus in bello*. Today's international law is the result of continuous development over the past centuries, especially through the contributions of the Greeks, Romans, Jews, European Christians and Arab Muslims.²²

III. Islamic International Law regarding the Law of War

The rules of just conduct in war fall under two broad principles: discrimination and proportionality. The principle of discrimination concerns legitimate targets in war, while the principle of proportionality refers to how much force is morally appropriate. A third principle can be added to the two traditional principles, namely the principle of responsibility, which requires an examination of where responsibility lies in war.

The *jus bellum justum*, or just war theory, is rooted in the concept of humanity and intended to guide the conduct of people under conditions of war.²³ The theory is referred to as a tradition of military ethics followed by military leaders, theologians and policymakers.²⁴ This theory aims to ensure that a war is fought in a morally justified manner, with all elements having to be met for a war to be considered just. These elements can be divided into two types: the right to go to war, or *jus ad bellum*, and the right to wage war, or *jus in bello*. Although it is crucial to the justice of the war itself, little has been said about what happens after a war. Faced with this shortcoming, contemporary scholars introduced the third element, known as *jus post bellum*, which deals with the morality of post-war settlement and reconstruction. The concept of *jus post bellum* is a humanitarian approach that can be traced from the earliest Islamic and Christian times to the more secular present.²⁵ These three elements of just war theory are discussed below, with a detailed comparison between the perspectives of Islamic and contemporary international law.

²² NEHALUDDIN AHMAD, BASIC PRINCIPLE OF INTERNATIONAL LAW 87 (2020).

²³ Freiburger, *supra* note 14.

²⁴ RAMACHANDRAN, *supra* note 15.

²⁵ WALZER, *supra* note 16.

A. Three Elements of Just War Theory: Development of Islamic Perspectives

1. Jus ad Bellum

The *jus ad bellum* is a set of criteria that must be consulted before engaging in war to determine whether entry into the war is permissible, that is, whether it is a just war or not. According to Islam, war should only be considered the last resort.²⁶ Therefore, every effort should be made to avoid fighting before making the decision to go to war. As mentioned earlier, the Islamic State must offer the enemy three options.²⁷ The primary one is to make peace by signing a treaty with which all Muslims must comply. According to Islamic law, an agreement between two people is considered an agreement with God; if someone breaches the agreement, they are said to be breaching their agreement with God.²⁸

In Islamic world, war must be waged for a just and reasonable cause. This is in accordance with the Quran: “Do not take the life God has made sacred, except by right. This is what He commands you to do: perhaps you will use your reason.”²⁹ This dictum means that war is not permissible without a justified cause. This is also in line with the contemporary theory of war, *jus ad bellum*. Furthermore, it is important to note that war is forbidden except in certain circumstances.³⁰ Such circumstances are discussed below.

²⁶ Makram Abbès, *Can We Speak of Just War in Islam?*, 35(2) HIST. POL. THOUGHT 234-61 (2014).

²⁷ AL-BUKHĀRĪ, ṢAḤĪḤ AL-BUKHĀRĪ 4:63, no. 3026. See also TAQĪ AL-DĪN IBN TAYMĪYAH, MINHĀJ AL-SUNNAH AL-NABAWĪYAH [Book reference, Vol 1, Book 3 Hadith 5, Sahih al-Bukhari 63]. Narrated Anas bin Malik:

While we were sitting with the Prophet (ﷺ) in the mosque, a man came riding on a camel. He made his camel kneel down in the mosque, tied its foreleg and then said: “Who amongst you is Muhammad?” At that time the Prophet (ﷺ) was sitting amongst us (his companions) leaning on his arm. We replied, “This white man reclining on his arm.” The man then addressed him, “O Son of `Abdul Muttalib.” The Prophet (ﷺ) said, “I am here to answer your questions.” The man said to the Prophet, “I want to ask you something and will be hard in questioning. So do not get angry.” The Prophet (ﷺ) said, “Ask whatever you want.” The man said, “I ask you by your Lord, and the Lord of those who were before you, has Allah sent you as an Apostle to all the mankind?” The Prophet (ﷺ) replied, “By Allah, yes.” The man further said, “I ask you by Allah. Has Allah ordered you to offer five prayers in a day and night (24 hours)?” He replied, “By Allah, Yes.” The man further said, “I ask you by Allah! Has Allah ordered you to observe fasts during this month of the year (i.e. Ramadan)?” He replied, “By Allah, Yes.” The man further said, “I ask you by Allah. Has Allah ordered you to take Zakat (obligatory charity) from our rich people and distribute it amongst our poor people?” The Prophet (ﷺ) replied, “By Allah, yes.” Thereupon that man said, “I have believed in all that with which you have been sent, and I have been sent by my people as a messenger, and I am Dimam bin Tha`laba from the brothers of Bani Sa`d bin Bakr.”

²⁸ Nabil Saleh, *Origins of the Sanctity of Contracts in Islamic Law*, 13(3) ARAB L. Q. 252-64 (1998).

²⁹ Al-Quran 6:151.

³⁰ AL-BAYHAQĪ, AL-SUNAN AL-KUBRĀ 8:49, no. 15896. All of the narrators are reliable and have not been accused of weakness according to al-Haythamī, see NŪR AL-DĪN AL-HAYTHAMĪ, MAJMA`AL-ZAWĀ`ID WA MANBA`AL-FAWĀ`ID 3:156, no. 3004 (1980).

2. Self-defence

To be attacked by another is an abrogation of one's rights; therefore, self-defence is well within the bounds of justice.³¹ Islam permits war in self-defence, as stated in the Quran:

To those against whom war is made, permission is given to fight because they are wronged, and verily, Allah is most powerful for their aid. They are those who have been expelled from their homes in defiance of right – (for no cause) except that they did say, “Our Lord is Allah.” Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid His (cause), for verily Allah is full of strength, exalted in might.³²

In this context, Islam allows war, in self-defence, to defend Islam.³³

3. To Help the Victims of Aggression

Muslims have a duty to assist those Muslims who are oppressed and weak.³⁴ This is in line with the text in the Quran, which states:

And what is the matter with you that you do not fight in the cause of Allah and for those weak, ill-treated and oppressed among men, women and children whose only cry is: “Our Lord, rescue us from this town whose people are oppressors, and raise for us, from you, one who will protect, and raise for us, from you one who will help.”³⁵

The Quran clearly shows the use of force to defend other Muslims who cannot protect themselves. However, the permission to use force is neither limited nor specific to Muslims but applies to all humanity.³⁶ The Quran says: “Whoever saves the life of a person is as if he has saved the life of the whole of humankind.”³⁷ In this context, the Quran allows war to help the victims of aggression, regardless of their religion - whether they are Muslims or not.

³¹ Abū Dāwūd, *id.*

³² Al-Quran 22:39-40.

³³ Khaled Fadl, *Islamic Law, Jihad and Violence*, 16(1) J. ISLAMIC & NEAR E. L. 1 (2017).

³⁴ Niaz Shah, *The Use of Force under Islamic Law*, 24 (1) EUR. J. INT'L L. 345 (2013).

³⁵ Al-Quran 4:75.

³⁶ Shah, *supra* note 34.

³⁷ Al-Quran 5:32.

4. To Fight against the Aggressors

The Quran also allows the use of force against other Muslims in certain circumstances, as mentioned in the Quran:

(If) two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah's command. So if it comes back, seek reconciliation between them with fairness, and maintain justice.³⁸

In this context, permission is given to fight aggressors. However, there are different views on the meaning of this verse. The popular interpretation of this meaning is that a ruler can use force against a rebellion.³⁹ This view cites the example of the Fourth Caliph Ali and his fight against the rebels to justify its interpretation. Thus, this verse became the basis for the use of force against rebellion.⁴⁰

Another view is the fight against apostasy,⁴¹ considered a rebellion against Islam. For example, a battle was waged between the Caliph Abu Bakr and the apostates because they refused to pay tithes⁴² and challenged the decision of the caliphate. The wisdom behind this rule is to preserve the purity of the religion; the apostates must be forced to repent and return to Islam. This rule was established to defend Islam against all attempts to denigrate or undermine its role as the institution that gave rise to Islamic states and the rule of Islamic law.⁴³ In modern international law, *jus ad bellum* is the law for preventing war.⁴⁴ It refers to the conditions under which states may resort to war or use armed force in a legitimate manner.⁴⁵ It presupposes a "just" cause to protect innocent life and human rights; prevent a corrupt government from harming and invading its own people and other peoples; or prohibit a politician from

³⁸ *Id.* 49:9.

³⁹ *Id.*

⁴⁰ NIAZ SHAH, ISLAMIC LAW AND THE LAW OF ARMED CONFLICT: THE ARMED CONFLICT IN PAKISTAN 66-7 (2011).

⁴¹ Sheikh Wahbeh al-Zuhili, *Islam and International Law*, 87(858) INT'L REV. RED CROSS 281 (2005).

⁴² (Tithe) is a one-tenth part of something, paid as a contribution to a religious organization or compulsory tax to the government. See Collins Cobuild Advanced Learner's Dictionary, <https://www.collinsdictionary.com/dictionary/english/zakat>. In Islam, it is called (Zakah /Zakat) a form of almsgiving, often collected by the Muslim Ummah. See Mahdi Salehi & Arash Poour, *A Study on the Influences of Islamic Values on Iranian Accounting Practice and Development*, 10(2) J. ISLAMIC ECON. BANKING & FIN. 154-82 (2014).

⁴³ Santhira Morgan & Jasni bin Sulong, *Punishment for Apostasy: A Review and Choosing the Right Perspective*, 10(6) INT'L J. ACADEMIC RES. BUS & SOC. SCI. 739 (2020).

⁴⁴ Casrten Stahn, '*Jus ad bellum*, '*jus in bello*' ... '*jus post bellum*'? –Rethinking the Conception of the Law of Armed Force, 17(5) EUR. J. INT'L L. 921-43 (2006).

⁴⁵ *Id.*

going to war for his personal ambitions.⁴⁶

From the perspective of international law, Article 2(4) of the UN Charter obliges all Members not to threaten or use force in their international relations against the territorial integrity or political independence of another state or in any other manner inconsistent with the stated purposes of the UN.⁴⁷ The UN has also established two exceptions to the prohibition of war.⁴⁸ First, the UN recognises self-defence against armed attack as set out in Article 51 of the said Charter, which states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”⁴⁹ Second, the Security Council can authorize armed measures to restore or maintain peace and security as laid down at Article 39 which states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”⁵⁰

There are two conditions under which force can be used in self-defence. First, military action should only be used as a last resort.⁵¹ It requires nations to assess all available means to meet a particular threat and, among those means deemed sufficient, to give preference to means other than war. In other words, war must be the last option to be preferred.⁵² Second, the use of force must be equal and proportionate to the threat encountered and limited to what is necessary to meet such a threat.⁵³ In practice, this means that a state that has acted in self-defence must immediately report to the Security Council the measures it has taken. The right to use force in self-defence continues until the Security Council has taken the steps necessary to maintain international peace and security,⁵⁴ as stated in Article 39 of the UN Charter.⁵⁵

⁴⁶ See generally JENS OHLIN & LARRY MAY, *NECESSITY IN INTERNATIONAL LAW* (2016), <https://doi.org/10.1093/acprof:oso/9780190622930.001.0001>.

⁴⁷ U.N. Charter art. 2, ¶ 4.

⁴⁸ Michael Wood, *International Law and the Use of Force: What Happens in Practice?*, 53 INDIAN J. INT'L L. 345 (2013).

⁴⁹ U.N. Charter art. 51.

⁵⁰ *Id.* art. 39.

⁵¹ Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors*, 106(4) AM. J. INT'L L. 1-8 (2012).

⁵² John Coverdale, *An introduction to the Just War Tradition*, 16(2) PACE INT'L L. REV. 221 (2004).

⁵³ Bethlehem, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ U.N. Charter, <https://www.un.org/en/about-us/un-charter/full-text>.

As mentioned above, Islamic law of war arguably lays down stricter and clearer grounds than modern international law. The reasons laid down in modern international law are still vague and subject to the discretion of the Security Council.

B. Jus in Bello

The concept of *jus in bello* is similar to the ethics of war from the time of the Prophet Muhammad. He gave the first guidelines thousands of years before adopting modern international humanitarian law (IHL). As presented in Islam, the ethics of war was not only focused on victory, but also emphasised humanity, the environment, property and infrastructure.⁵⁶ At the time of the Prophet, he banned the killing of non-combatants, such as innocent women and children, and prioritised the environment, infrastructure and the preservation of property. Indeed, modern laws of war have many similarities with Islam's ethics of war.⁵⁷ In the context of international law, *jus in bello*, also commonly known as IHL, governs how war should be conducted. The main purpose of IHL is to limit the suffering caused by war by protecting and assisting victims as much as possible.⁵⁸

Jus in bello regulates warfare between the states and internal conflicts. As stated in the *Tadic* judgement of 15 July 1999,⁵⁹ the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia explicitly recognised that *jus in bello* applies not only to international conflicts but also to internal conflicts. This is also underpinned by the Statute of the International Criminal Court, adopted on July 17, 1998, which allows the court to impose penalties for war crimes committed in non-international armed conflicts and those committed in international armed conflicts.⁶⁰ Hence, *jus in bello* applies not only to international conflicts, but also to all internal armed conflicts. Some points that can be compared in the regulation of *jus in bello* between Islamic law and international law are discussed below.

1. The Non-combatants and Principle of Distinction

The principle of distinction means that combatants must always be distinguished from civilians, who are protected because they do not directly participate in

⁵⁶ Nurfaizatul Aishah Ab Aziz, *War and Conflict: A Comparison of War Theory and Modern Law and the Ethics of War in the West and Islam* [Peperangan dan Konflik: Perbandingan Teori Peperangan dan Undang-Undang Moden serta Etika Peperangan dalam Barat dan Islam], 13(1) CIVILIZATION J. UNIVERSITI SAINS MALAY, 46 (2020).

⁵⁷ *Id.*

⁵⁸ Francois Bugnion, *Jus ad Bellum, Jus in Bello and Non-international Armed Conflicts*, 6 Y.B. INT'L HUMANITARIAN L. 167 (2003).

⁵⁹ Prosecutor v. Tadić, Case No. IT-94-1-1, Judgment, ¶ 296 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

⁶⁰ *Id.*

hostilities. Article 51 of Additional Protocol 1 provides, *inter alia*, that the civilian population and individual civilians may not be the target of an attack. According to Islamic law, a non-combatant who does not participate in warfare through action, opinion, planning or supply may not be attacked. Islam teaches its believers to respect and uphold humanity during and after a war. Therefore, public and private security must be guaranteed on the battlefield to prevent the continuation of warfare.⁶¹ The Quran text supports this as follows: “Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.”⁶² This can be further supported by a *hadith* of al-Baihaqi, in which, according to Malik ibn Anas, the Prophet says: “Move forward in the Name of God, by God, and on the religion of God’s Prophet. Do not kill an elderly, or a child, or a woman do not misappropriate booty, gather your spoils, do good for God loves good doers.”⁶³

Inspired by the Prophet, Abu Bakr, the first caliph, commanded Yazid ibn Abi Sufyan to wage war in this manner. In a famous decree, he declared,

I prescribe ten commandments to you: do not kill a woman, a child, or an old man, do not down trees bearing fruit, do not destroy inhabited areas, do not slaughter sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle (commit *ghulul*),⁶⁴ nor be guilty of cowardliness.⁶⁵

Modern international law has numerous international legal instruments that protect non-combatants in warfare. For example, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, promulgated by the UN General Assembly Resolution 3318 (XXIX) on December 14, 1974,⁶⁶ stipulates in its Article 1 that: “... inflicting incalculable suffering, especially on women and children, who are the most vulnerable members of the population.”⁶⁷ Also, Article 2 condemns the use of chemical and biological weapons against civilians “including defenceless women and children.”⁶⁸ In addition, the Geneva Conventions of 1949 and their Additional Protocols of 1977 provide that all women are entitled to the same general protection

⁶¹ Wahbeh al-Zuhili, *supra* note 41, at 87.

⁶² Al-Quran 2:190.

⁶³ ABŪ JA’FAR AL-ṬABARĪ, JĀMI’ AL-BAYĀN ‘AN TA’WĪL AL-QUR’ĀN 3:563 & 2:190 (2000).

⁶⁴ *Ghulul* means misappropriation of booty or spoils of war.

⁶⁵ Ridwan Solahudeen, *The Concept of War and Peace under the Islamic International Law*, 15, ACADEMIA (2016), https://www.academia.edu/22847417/THE_CONCEPT_OF_WAR_AND_PEACE_UNDER_THE_ISLAMIC_INTERNATIONAL_LAW.

⁶⁶ G.A. Res. 3318 (XXIX) (Dec. 14, 1974).

⁶⁷ *Id.* art. 1.

⁶⁸ *Id.* art. 2.

without discrimination as men during conflict, whether as combatants, as civilians⁶⁹ or as persons *hors de combat*.⁷⁰

2. Property, Infrastructure and the Principle of Proportionality

The principle of proportionality aims to limit the damage caused by military operations by requiring that the effects of the means and methods of warfare should not be disproportionate to the military advantage sought. Islam shows concern not only for human life, but also for trees, infrastructure and property in every way.⁷¹ Islam prohibits the Muslim army from destroying the enemy's property. The Quran mentioned: "Whatever you (believers) may have done to (their) palm trees – cutting them down or leaving them standing on their roots was done by God's will, so that He might disgrace those who defied Him."⁷²

This principle is also supported by Abu Bakr's orders to Yazid ibn Abi Sufyan, as mentioned above.⁷³ Thus, destroying property is prohibited unless there is a military necessity to do so, for instance, if the army has to break through a barricade or if a property contributes directly to the war, such as castles or fortresses.⁷⁴ One of the objectives of IHL (the law of war) is to ensure that protected persons, property and places are properly identified, marked and defended.⁷⁵ Similar to non-combatants, many international legal instruments are designed to protect property in armed conflict. For example, The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (hereinafter 1954 Convention) seeks to protect cultural property, including objects of architectural, artistic or historical significance and applies to non-international conflicts. The First Protocol, which aims to prevent the export of cultural property from occupied territories and ensure that such property is safeguarded and returned, was adopted at the same time with the

⁶⁹ ICRC, Protection of Women in Situation of Armed Conflict (May 6, 2013), <https://www.icrc.org/en/doc/resources/documents/field-newsletter/2013/india-e-newsletter/legal-opinion-05-2013.htm>.

⁷⁰ It is anyone who is in the power of an adverse party or anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness, or anyone who clearly expresses an intention to surrender provided he or she abstains from any hostile act and does not attempt to escape. See ICRC, Practice relating to Rule 47: Attacks against Persons Hors de Combat (IHL Databases), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule47>.

⁷¹ Matthias Vanhullebusch, *General Principles of Islamic Law of War: A Reassessment*, 13 Y.B. ISLAMIC & MIDDLE E. L. 37-56 (2007).

⁷² Al-Quran 59:5.

⁷³ SHAH, *supra* note 40.

⁷⁴ Wahbeh al-Zuhili, *supra* note 41, at 282.

⁷⁵ IPU & ICRC, INTERNATIONAL HUMANITARIAN LAW - HANDBOOK FOR PARLIAMENTARIANS 58 (2020), <https://shop.icrc.org/international-humanitarian-law-handbook-for-parliamentarians-pdf-en.html>.

1954 Convention.⁷⁶

The Second Protocol to the 1954 Convention (1999) expands the rules for the protection of cultural property and strengthens the enforcement mechanisms that apply to non-international conflicts.⁷⁷ The principle of proportionality requires combatants to ensure that the harm caused to civilians or civilian property is not excessive compared to the concrete and direct military advantage expected from attacking a legitimate military target. The principle of proportionality (Article 51(5) (b) API) states that even if there is a clear military target, it is not possible to attack it if the expected harm to civilians or civilian property is excessive in relation to the expected military advantage. In other words, the principle of proportionality aims to limit the damage, so that the mode of warfare must not be disproportionate to the military advantage.⁷⁸

C. Diplomatic Immunities during the War

Many Muslim scholars believe the Treaty of Hudaibiyyah laid the foundation for discussing Islamic diplomatic law. Although Islam recognised and acknowledged that diplomatic envoys should be protected even before the Treaty of Hudaibiyyah, it is the first treaty to affirm the principles of diplomatic immunity and to establish the legal validity of the international agreement. Therefore, Muslim scholars always refer to the Treaty of Hudaibiyyah as the classic model for Islamic diplomatic law.⁷⁹

After a series of emissaries were exchanged between the people of Mecca and the Prophet, the Prophet finally sent Suhayl ibn 'Amr to arrange and execute the Treaty of Hudaibiyyah. Suhayl was treated with the utmost respect and was not imprisoned throughout the treaty process.⁸⁰ In international Islamic law, diplomatic immunities and privileges are now codified in Articles 10, 11, 12 and 13 of the 1976 Convention on the Immunities and Privileges of the Organisation of the Islamic Conference.⁸¹

The most remarkable international legal instrument protecting diplomats by granting diplomatic immunity is the 1961 Vienna Convention on Diplomatic Relations. Article 44 states that the diplomat, their family and their property must be afforded facilities in the receiving state to enjoy privileges and immunities, even

⁷⁶ Vanhullebusch, *supra* note 71.

⁷⁷ *Id.* at 15-6.

⁷⁸ MATTHIAS VANHULLEBUSCH, *WAR AND LAW IN THE ISLAMIC WORLD* 281 (2015).

⁷⁹ Muhammad Ismail, *Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility* 211 (2012) (unpublished Ph.D. dissertation, University of Hull).

⁸⁰ *Id.* at 217.

⁸¹ *Id.* at 212.

in the event of armed conflict.⁸² Article 45 further states that the receiving state must respect and protect the diplomat's premises, property and archives in the event of armed conflict, even if diplomatic relations between the two states are permanently or temporarily severed.⁸³ Thus, although Islamic law and modern international law come from different sources, they share the same core values, particularly with regard to the protection of individuals, property, infrastructure, prisoners of war and diplomats in war. As have been seen, there is ample evidence in the Quran for the theory of *jus in bello*, the ethics governing war.⁸⁴

D. Jus Post Bellum

After a war, there are three possibilities: either the army is defeated, it is victorious, or it agrees to a ceasefire. The principles of justice may then be applied to each situation. The principle of discrimination should be used to avoid punishing innocents or non-combatants; the rights or traditions of the defeated deserve respect; claims of victory should be proportionate to the character of the war; the principles of discrimination and proportionality should temper compensatory claims; and, controversially, the need to rehabilitate or re-educate an aggressor should also be considered.

Islam is a comprehensive religion. Regarding war, it demonstrably provides not only the just reasons to go to war and the ethics of war, but also guides the codes of conduct for Muslims after war. This post-war theory in Islam existed long before the adoption of modern international law in the seventeenth century in Europe and the introduction of the *jus post bellum* concept in contemporary international law. Although modern international law does not clearly define *jus post bellum*, it is typically associated with the idea of justice and the vindication of rights and obligations after war or conflict.⁸⁵ In today's context, *jus post bellum* remains the least developed part of just war theory.⁸⁶ The following section discusses some aspects that can be compared.

1. Prisoners of War

Islam greatly emphasises treating prisoners of war or captives with kindness,

⁸² Vienna Convention on Diplomatic Relation 1961, art. 44.

⁸³ *Id.* art. 45.

⁸⁴ Joel Hayward, *Qur'anic Concepts of the Ethics of Warfare: Challenging the Claims of Islamic Aggressiveness* 24-5 (Cordoba Foundation Occasional Papers No. 2, Apr. 2011).

⁸⁵ Robert Williams Jr. & Dan Caldwell, *Jus Post Bellum: Just War Theory and the Principles of Just Peace*, 7(4) INT'L STUD. PERSP. 309-20 (2006).

⁸⁶ MICHAEL WALZER, ARGUING ABOUT WAR 161 (2004).

compassion and respect. Islam forbids massacres, torture and other ill-treatment, as these acts contradict the principle of human dignity.⁸⁷ As Allah says in the Quran: “And they feed, for the love of God, the indigent, the orphan and the captive.”⁸⁸ Furthermore, according to the Prophet, “Prisoners are your brothers and companions. It is because of God’s compassion that they are in your hands. They are at your mercy, so treat them well as if you were treating yourself with food, clothes and housing.”⁸⁹ During his reign, Caliph Abu Bakr ordered his officers: “No prisoners should be tied in chains, handcuffed and they shall be provided with food, clothes and adequate housing.”⁹⁰

Under the Islamic law of war, prisoners of war can be treated in various ways. They can be freed, exchanged, ransomed or held in bondage after the war. The Prophet released some out of mercy and others for ransom, as mentioned in the Quran: “Thereafter (free them) either a favour (an act of grace) or (for) ransom until the war lays down (terminate) its burden.”⁹¹

Rich prisoners were required to pay a ransom based on their financial means. The poor, literate prisoners had to teach 10 Muslim children to read and write, while the Prophet unconditionally released any prisoner who was neither rich nor literate.⁹² The Prophet also practised prisoner exchange for his captive companions.⁹³ However, Islam allows Muslims to keep an eye on the prisoners in case they try to betray Muslims, as stated in the Quran: “If they try to deceive you, remember they have deceived God before. So, He gave you mastery over them, for God is all-knowing and all-wise.”⁹⁴

In cases where the prisoners are still in the captivity of the Muslims, either during or after the war, Islam obliges its believers to treat them well and forbids any revenge, as mentioned in the Quran: “And they feed, for the love of God, the indigent, the orphan and the captive.”⁹⁵ IHL also provides similar rules with the Islamic law of war. For example, the right to protecting prisoners of war is specified and elaborated first in the Geneva Convention of 1929 and then refined in the Geneva Convention III of

⁸⁷ Henry Iwansyah, *Islam and the Provision of War*, 15(2) AL-'ADALAH 338 (2018).

⁸⁸ Al-Quran 76:8.

⁸⁹ *Id.*

⁹⁰ Iwansyah, *supra* note 87, 338.

⁹¹ Al-Quran 47:4.

⁹² Rebaz Khdir, *The Fate of Prisoners of War between The Quran, The Traditions of the Prophet and The Practice of Islamic State in Iraq and Syria*, 13(34) EUR. SCI. J. 30 (2017).

⁹³ *Id.*

⁹⁴ Al-Quran 8:71.

⁹⁵ *Id.* 76:8.

1949 and Additional Protocol I of 1977. For example, they must be treated humanely and protected from all violence, insult and public curiosity.⁹⁶ The Geneva Convention III also states that prisoners of war are entitled to accommodation,⁹⁷ food, clothing,⁹⁸ hygiene and medical care.⁹⁹ Their detention should thus not serve as punishment, but rather prevent further participation in the conflict.¹⁰⁰ The Geneva Convention IV also provided for even more comprehensive protection of prisoners of war.¹⁰¹

2. The Spoils of War

The *ghanimah* is the booty obtained from the enemy through an actual war against them. *Ghanimah* includes movable and immovable property such as cattle, gold and silver, and immovable property such as buildings, land and houses. The *Ghanimah* is the share of one-fifth, and the remaining four-fifths will be distributed among the militants who participated in the war.¹⁰² This is based on Allah's saying in the Quran: "And know that whenever you have taken as booty, a fifth thereof is for God and for the Messenger, and for the kinsmen and orphans and the needy and the wayfarer."¹⁰³

In general, the Geneva Convention III of 1949 provides for the protection of the spoils of war that remain in the possession of prisoners of war, such as their metal helmets, gas masks and articles of personal use, with the exception of weapons, horses, military equipment and military documents.¹⁰⁴ However, this rule varies from country to country. Guinea, for example, adheres to the guidelines set out in Article 18 of the Geneva Convention III without exception. As stipulated in Guinea's Disciplinary Regulations (2012), effects and articles of personal use, military equipment and documents must remain in their possession.¹⁰⁵ In contrast, Argentina's Law of War Manual of 1969 states that all movable public property captured or found during war becomes the property of the capturing state.¹⁰⁶ However, when soldiers

⁹⁶ Geneva Convention Relative to the Treatment of Prisoners of War 1949, art. 2.

⁹⁷ *Id.* art. 10.

⁹⁸ *Id.* art. 11.

⁹⁹ *Id.* art. 13.

¹⁰⁰ Alex Bellamy, *The Responsibilities of Victory: "Jus Post Bellum" and the Just War*, 34(4) REV. INT'L STUD. 601-25 (2008). See also ICRC, Prisoners of war and detainees protected under international humanitarian law (Oct. 10, 2010), <https://www.icrc.org/en/doc/war-and-law/protected-persons/prisoners-war/overview-detainees-protected-persons.htm>.

¹⁰¹ Bellamy, *id.*

¹⁰² Shaheen Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10(3) J. CONFLICT & SEC. L. 341 (2005).

¹⁰³ *Al-Quran* 8:41.

¹⁰⁴ Geneva Convention Relative to the Treatment of Prisoners of War 1949, art. 18.

¹⁰⁵ Guinea Disciplinary Regulations 2012, art. 12(b).

¹⁰⁶ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 14-9 (4th ed. 2009).

receive pay and the state has assumed the obligation to provide for them and their families, all war booty must be given to the state.¹⁰⁷ Herewith, Islamic law can be seemingly described as the forerunner of modern international law, including the concept of *jus post bellum*, which is considered a new element of just war theory.

IV. Conclusion

In summary, the underlying Islamic customary rules governing the methods of warfare are more accessible and well-defined than the provisions of positive law of law, at least in their current form. When war no longer seems to be a valid or appropriate means of settling international conflicts and when international relations are in a period of détente conducive to peace, more explicit and definitive IHL would be beneficial on this issue.¹⁰⁸ In this paper, the authors have compared Islamic law of war to IHL in terms of their definitions, i.e., whether both rules contain the same definitions or have different interpretations of how to wage war.¹⁰⁹

Just war has been theoretically systemised in Islamic and modern international law over the centuries. Islamic international law, or *al-Siyar*, divides countries into three categories: *Dar al-Islam*, *Dar al-Harb* and *Dar al-Sulh*. Such division serves to differentiate between belligerent and non-belligerent non-Muslim states.¹¹⁰ *Al-Siyar* has further explained that war can only take place with a just cause, for example, in self-defence to help the victim of a transgression and to wage war against the aggressors. Like modern international law, war can occur only with a just cause under Islam. This concept is also known as *jus ad bellum*. According to Articles 39 and 51 of the UN Charter, armed measures can be only invoked for self-defence or in the event of a breach of the peace as determined by the Security Council. In other words, if war is inevitable, there must be a just cause for it. Moreover, war must also be waged with minimal impact to reduce the number of casualties on both sides as much as possible.

This comparative study of *jus in bello*, the ethics of war, discussed how Islam

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 32 (2011).

¹¹⁰ Classical Islamic law may be divided into: *dar al-Islam* (territory of Islam/voluntary submission to God), denoting regions where Islamic law prevails; *dar al-sulh* (territory of treaty) denoting non-Islamic lands which have concluded a truce with a Muslim government (Nonbelligerent, Non-Muslim); and *dar al-harb* (territory of war), denoting non-Islamic lands whose rulers are called upon to accept Islam. See Hayward, *supra* note 84, at 4-5.

and modern international law governed certain issues of the armed conflict and developed a contemporary understanding in terms of what both seek to achieve and regulate in case of armed conflict. The issues explored are non-combatants, property and infrastructure, prisoners of war and diplomats. The finding of this research is that, in some ways, both Islamic and modern international law share the same principal values and main purpose, which is to avoid war in the first place. And if war does occur, both Islamic and modern international law regulate their ethics in such a way as to minimise the disruptive effects of war as much as possible.¹¹¹

The comparison of Islamic and modern international law regarding the theory of *jus post bellum* shows that Islamic law paved the way for modern international law, including the concept of *jus post bellum*, which is considered a new element of just war theory. As inferred from this survey, Islam had already developed similar just war principles before modern international law adopted them. However, there are still significant differences between Islamic and modern international law, as both have different sources, doctrine and philosophy of law. This comparative research demonstrates that Islamic law of war has set a pathway for IHL and will make a great contribution to the peace and harmony under contemporary international law.

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¹¹¹ SADAKAT KADRI, HEAVEN ON EARTH: A JOURNEY THROUGH SHARI'A LAW FROM THE DESERTS OF ANCIENT ARABIA TO THE STREETS OF THE MODERN MUSLIM WORLD 150-1 & 157 (2012).

