

Exploring foundational convergence between the Islamic law of armed conflict and modern international humanitarian law: Evidence from al-Shaybani's *Siyar al-Kabir*

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Abstract

This paper compares and contrasts the Islamic law of armed conflict with the modern international humanitarian law, with the view of identifying foundational similarities between these two separate canons, drawing extensively from al-Siyar

al-Kabir. To this end, it raises the question as to whether the Islamic law of armed conflict is compatible with its modern counterpart, and, if it is, to what extent. To address these interlinked questions, the study departs from the premise that in order to identify resemblance, it is necessary to enquire into the foundations (both legal and philosophical) of the Islamic and contemporary approaches vis-à-vis armed conflicts.

Keywords: Islamic law of armed conflict, *al-Siyar al-Kabir*, international humanitarian law.

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Introduction

This paper seeks to compare and contrast the Islamic law of armed conflict with the modern international humanitarian law (IHL), with the view of identifying foundational similarities between these two (historically and culturally) separate canons, drawing extensively from *al-Siyar al-Kabir*, a major work on the Islamic law of nations by Muhammad al-Shaybani, an influential Hanafi jurist known as one of the *Imamayn* (two imams), a term referring to two most important disciples of Imam Hanafi, the founder of the Hanafi school of jurisprudence. To this end, it raises the question as to whether the Islamic law of armed conflict is compatible with its modern counterpart, and, if it is, to what extent. To address these interlinked questions, the study departs from the premise that in order to identify resemblance, it is necessary to enquire into the foundations (both legal and philosophical) of the Islamic and contemporary approaches *vis-à-vis* armed conflicts.

Hypothesizing that the two approaches enjoy ontological resemblance,¹ suggesting that they depart from similar foundational principles, and that they do not have to necessarily share the same material and linguistic content and scope

1 Without referring to ontological resemblance, attempts to explore similarities between the Islamic law of war and modern IHL will probably fail in their quest for objectivity. In our view, the foremost reason underlying the identifiable points of convergence between the two legal bodies lies in the fact that decision-makers and commanders have to decide upon similar cases with similar priorities and worries. Every commander, barring only a few, strives to secure the safety and survival of his soldiers and subjects with a fairly realistic view to keeping their loyalties that will in turn enable the continuation of their power struggle. This in turn would normally cause the ruler to respect the enemy personnel in his own power, so that any retaliatory measures would not be meted to his own under enemy yoke. This decision-making *modus operandi* based on social fact offers a strictly secular yet practicable key to understanding the ontological resemblances without any overly idealistic or quasi-religious allusions, observance of which is just too tiresome to prove under the light of the historic experience. Herein lies the source of any resemblances between these legal bodies. Needless to say, any value attached to human dignity by Islam and/or the modern legal conception of IHL may have played a role in the formation of that praxis. Yet, these teachings also form at least partially the social fact of a given era. For a critical account of those attempts that claim that modern international law and the Islamic conception of law of nations are entirely separate fields of study that are blatantly foreign to each other, see David A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order", *Virginia Journal of International Law*, Vol. 33, No. 2, 1993.

due to what the circumstances of the time when they originated dictated,² the paper elaborates on the very foundations of modern IHL through an analysis of the primary legal texts and of the views proposed by leading thinkers and scholars of modern times, and further identifies the principles enshrined in al-Shaybani's work upon which the Islamic law of armed conflict has been built. Thus, rather than retelling what is covered in *al-Siyar*, its philosophical and legal reasoning as reflected in the content is identified in order to establish an association between the Islamic law of armed conflict and contemporary understanding in terms of what they seek to achieve and to regulate in a specific case of armed conflict.

The section that follows briefly recalls the historical encounter between the Islamic conception of law of nations and modern international law. To explore the areas of convergence, the paper then reviews the major legal texts constituting modern IHL, including The Hague and The Geneva Conventions (along with the relevant protocols), and refers to major principles of customary IHL and then analyses the primary contributions by leading scholars to the current understanding of humanitarian principles. The purpose of this review is to devise a compilation of major principles that serve as the basis of contemporary rules of armed conflict. The next section presents main features of the *siyar* as a scholarly field of inquiry and its place within Islamic studies. The study then presents an in-depth analysis of al-Shaybani's work (only parts relevant to the rules on regulating an armed conflict)³ with specific reference to conformity with the humanitarian principles of modern times applicable to cases of conflict.

The study concludes that the Islamic law of armed conflict as depicted in *al-Siyar* and modern IHL are converged in many respects; the convergence is particularly identifiable in the principles upon which they have been built and developed. In doing so, this study makes a novel contribution to the existing literature which features extensive coverage of al-Shaybani's work through a literal and textual analysis rather than framing its contribution within a historical context. Hence, this article distinguishes itself from scholarly accounts focused on the review of the Islamic law of armed conflict⁴ by offering a foundational analysis revolving around an examination of major principles that reflect the ontological stance and teleological assumptions of Islamic scholarship on the ethics and law of armed confrontations.

- 2 What we mean is that rather than looking at the detailed content of both legal traditions (i.e. specific rules and injunctions which might be misleading), we believe that it is necessary to focus on the principles upon which these traditions are built (in other words, we argue it is safer to depart from what their ontologies tell us about what they try to achieve).
- 3 This study limits itself to the review of the foundational principles of the Islamic law of armed conflict. The early *siyar* studies did not make any distinction or classification within the subject matters that they covered; however, the main subjects covered include law of armed conflict, diplomatic immunities and treaty law. The authors deliberately study the law of armed conflict for better clarity. The same approach may also be employed to identify similarities between the Islamic understanding of law of diplomacy and the modern approach to diplomatic affairs by focusing on the foundational principles.
- 4 There is a vast literature focused exclusively on the Islamic law of war or armed conflict. Al-Dawoody's seminal contribution to the literature provides a comprehensive coverage of the subject, along with a detailed bibliography of previous scholarly works in the field: Ahmed al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave, New York, 2011.

Historical encounters

Scholarly accounts focusing on the emergence and development of IHL fail to acknowledge the contribution of Islamic thinking in this particular field. Even views by renowned legal scholars who are considered as founders of modern international law on war and peace greatly resemble the major Islamic precepts.⁵ Particularly, the contact and interaction between the West and Islam in Andalusia have arguably narrowed the gap between the two civilizations. Though not an essential requisite for the argumentation of this paper, it may be fair to argue that, as a result of this interaction, some of the Islamic principles on the conduct of war have been at least partially borrowed by Western thinkers and scholars.⁶

Before the codification of the law of armed conflict in the West, Islam had prescribed some basic principles and tenets on the conduct of hostilities and warfare.⁷ An independent area of scholarly study, *Siyar*, for instance, refers to examination of the life of the Prophet Muhammad, as well as the battles he took part in; however, in a technical sense, it incorporates the rules and standards that must be observed in these battles. Most chapters of *Siyar* studies focus on how Muslim combatants are required to act during war and by which obligations and rules they are bound.

It is possible to identify striking and substantial similarities between the rules and standards spelled out in these studies and those codified within the modern law of armed conflict.⁸ Some of the forerunners of international law had at least partial interaction with the Islamic legacy of law and history in Italy and Spain where Islam has historically been influential. To name some, Francisco Victoria, Baltazar de Ayala, Alberico Gentili and Hugo Grotius had some contact with this legacy of Islam.⁹ It will be an overgeneralization to argue that their ideas and theories of international law were shaped and determined by Islam, but there

5 For a comparative account on the Islamic and Western view of war and peace, see John Kelsay and James Turner Johnson (eds), *Just War and Jihād Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, Greenwood Press, New York, 1991. Also see Harfiya Abdel Haleem, Oliver Ramsbotham, Saba Risaluddin and Brian Wicker (eds), *The Crescent and the Cross: Muslim and Christian Approaches to War and Peace*, St. Martin's Press, New York, 1998.

6 See Louis M. Holscher and Mahmood Rizwana, "Borrowing from the Shariah: The Potential Uses of Procedural Islamic Law in the West", in Delbert Rounds (ed.), *International Criminal Justice: Issues in a Global Perspective*, Allyn and Bacon, Boston, MA, 2000.

7 Marcel A. Boisard, "The Conduct of Hostilities and the Protection of the Victims of Armed Conflict in Islam", *Hamdard Islamicus*, Vol. 1, No. 2, 1978.

8 See Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law", *International Journal of Middle East Studies*, Vol. 11, No. 4, 1980.

9 "Francisco de Victoria (1480–1546) and Suarez (16–17th centuries) were both Spanish nationals and were educated in the same country where Islamic theories had a potential influence on culture, jurisdiction and politics. Their work on the law of nations therefore benefited from the principles of Islamic international law, especially on the law of war. Similarly, the classical writer of international law Hugo Grotius (1563–1645) who is recognised by some European writers as the father of the law of nations in Europe, was a theologian and also studied Islamic law thereby benefited from the principles of Islam, especially concerning the law of war." Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search*, Brill, Leiden, The Netherlands, 2011, p. 3.

should be at least some minor inspirations. Some scholars, for instance, argue that Grotius's competence in international law could be attributed to his study of Islamic sources during his stay in exile in Istanbul.¹⁰ Others confirm that Islam has remained focused on law of armed conflict and the humane dimension of this law, adding that "a number of concerns identified with just war thinking are reflected in Islamic circles, as are certain features of moral reasoning".¹¹ It is often acknowledged that the Islamic approach to international law has certainly made an impact on the development of European understanding of law of armed conflict, and international law in general.¹²

However, while this review would point out to convergences between the Islamic law of armed conflict and modern rules of warfare, areas of convergences have not been adequately addressed in the existing Islamic scholarship for two reasons: one is the way that Islamic law has been interpreted, and the other is the overall conviction among Muslim scholars and communities that nothing good may come out of Western thinking and reasoning. To identify the similarities, it is not necessary to go into the details of the rules of the Islamic law of armed conflict. One may find these so-called rules rather outdated and even brutal since, for instance, under these rules, even enslavement of prisoners may be allowed. However, reference to rules in isolated time frameworks would be just misleading given that Islamic laws, just like any other bodies of law, are progressive in nature, suggesting that they are inevitably affected by current circumstances and requirements. For this reason, attention should be paid to how Islam treats the notion of war, and how it approaches its justifications and consequences, rather than specific rules made or formulated in a certain period of history.

This indicates that Islamic law should be interpreted in a way to adopt progressive regulations and incorporate them into the practices. However, as it stands now, Islamic law is a corpus of "Islamic" scholars whose competence stems from their own justification and assertions. In other words, in its current form, Islamic law, and, of course, the Islamic law of armed conflict, is not suitable for codification and practicable in real-life incidents and events. For this reason, rather than the specific rules, the main determinants and dynamics of Islamic law should be taken into consideration to offer insights and comments on how a modern version of the Islamic law of armed conflict may respond to modern-time atrocities and wartime violations.¹³

10 Ernest Nys, *Les Origines du Droit International*, Thorin & Fils, Paris, 1894, p. 201; M. Rahmi Telkenaroğlu, "Muhammed b. Hasen Eş-Şeybânî (189/804) ve Hugo Grotius'un (1583–1645) Devletler Hukukuna Etkileri, Mukayeseli Bir Çalışma", *İslâm Hukuku Araştırmaları Dergisi*, Vol. 5, 2005.

11 John Kelsay, "Religion, Morality, and the Governance of War: The Case of Classical Islam", *Journal of Religious Ethics*, Vol. 18, No. 2, 1990, p. 123.

12 See, for instance, Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations*, Brill, Leiden, The Netherlands, 2019.

13 For a similar approach, referring to the concern that both contemporary militant Islamist groups and the modern Muslim scholars who denounce their militancy claim to have based their arguments on original sources of Islam, and thus encouraging for a critical examination of the foundational literature, see Nesrine Badawi, *Islamic Jurisprudence on the Regulation of Armed Conflict: Text and Context*, Brill, Leiden, The Netherlands, 2019.

Once such an approach is adopted in law-making and legal reasoning, it would become clear that the Islamic law of armed conflict in fact considers two main principles in a battle: that the use of force must be proportionate and justifiable for the attainment of the military goals and that some places and groups of people must be protected. When these ground rules are established, it is easy to identify the details, as done in the modern-time international conventions and other legal mechanisms. Such an approach would also bridge the gap between the Islamic law of armed conflict as formulated centuries ago and current IHL.

Principles of international humanitarian law

Today, it is safe to claim that IHL is a fully established branch of law, principles of which have stood the test of time and been solidified in binding legal texts.¹⁴ The IHL of today is the embodiment of efforts to strike a balance between two countervailing considerations: namely the observation of military necessity and the protection of humanitarian values.¹⁵ At the heart of this amalgamation lies a realistic understanding of IHL and its duties, where the countervailing arguments are taken cognizance of, with a view to improving the implementation chances of IHL.

The principle of distinction

The International Court of Justice in its Advisory Opinion on the threat or use of nuclear weapons describes the principle of distinction between combatants and non-combatants as one of the “cardinal principles” of IHL that cumulatively constitute the very fabric of this branch of law.¹⁶ The Court reminds that this principle plays a crucial role by establishing the obligation to never make civilians and civilian objects the target of attacks.¹⁷ As the 1987 Commentary informs, this principle was included in the 1899 and 1907 Hague Conventions. However, the principle finds its nucleus in the St. Petersburg Declaration of 1868, which unmistakably delineates the legitimate objectives of attacks and the legal rationale

14 Caitlin Mitchell, “When Laws Govern LAWS: A Review of the 2018 Discussions of the Group of Governmental Experts on the Implementation and Regulation of Lethal Autonomous Weapons Systems”, *Santa Clara High Technology Law Journal*, Vol. 36, No. 4, 2020, p. 413.

15 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 16.

16 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, International Court of Justice Reports, 1996, p. 257, para. 78; Vincent Chetail, “The Fundamental Principles of Humanitarian Law through the Case Law of the International Court of Justice”, *Refugees Survey Quarterly*, Vol. 21, No. 3, 2002, p. 200; Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, School of Human Rights Research Series, Vol. 26, Intersentia, Antwerp, Oxford and Portland, OR, 2008, p. 295.

17 International Court of Justice, *ibid.*, p. 257, para. 78.

that should exist under any future military operations, namely, the weakening of the military forces of the enemy.¹⁸

The principle of distinction concretized in Article 48 of Additional Protocol I offers a general protective cover for non-combatants and civilian objects.¹⁹ The principle of distinction has the status of customary law perfectly applicable for international as well as non-international armed conflicts.²⁰

The principle of proportionality

Following the designation of a person, a group of persons or a building as a military objective, a test of proportionality is, first of all, a requisite in every attempt to establish the legality of a soon-to-be executed military plan on the targeted objectives. It is an *ex ante* test, since the law refers to expected or anticipated values to be compared with each other with a view to avoiding an excess between their conflicting values, which are expected loss of “civilian life, injury to civilians, damage to civilian objects, or a combination thereof” on the one hand, and “the concrete and direct military advantage anticipated” on the other. As the U.S. Department of Defense stresses: “The principle of proportionality acknowledges the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects ... even with reasonable efforts by the parties to a conflict to minimize collateral injury and damage.”²¹

Any comparison between values has to be quantified in the abstract and every process of signifying concrete beings in the abstract runs the risk of a brutal or reckless reification. That said, proportionality, with all its strings attached, is a vital test. Only after solidly establishing the military status of an objective should a planner run with this test, with a view to avoiding, or in any event, minimizing the collateral damage by taking all feasible precautions. Article 57 of Additional Protocol I creates a legal obligation for military commanders to take all feasible precautions to verify the military nature of the object of the planned attack as well as to avoid, or, in any event, minimize collateral damage on civilians and civilian objects.²²

Principle of military necessity

Another critically important IHL principle is military necessity.²³ In today’s legal understanding, the principle of military necessity is expected to have a restraining

18 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 2nd ed., Cambridge University Press, Cambridge, 2010, p. 251; Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law*, Edward Elgar Publishing, Northampton, MA, 2013, p. 71.

19 Andreas R. Ziegler and Jorun Baumgartner, “StGB 264”, in Hans Vest, Andreas R. Ziegler, Jürg Lindenmann and Stefan Wehrenberg (eds), *Die Völkerstrafrechtlichen Bestimmungen des StGB: Kommentar*, Dike Verlag AG, Zurich, 2014, p. 597.

20 J. Crowe and K. Weston-Scheuber, above note 18, p. 71.

21 U.S. Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, p. 3, available at: https://www.tjls.edu/slomansonb/9.7_Conduct_PGWI.pdf (accessed in September 2021).

22 Petra Ochmannova, “Unmanned Aerial Vehicles and Law of Armed Conflict Implication”, *Czech Yearbook of Public and Private International Law*, Vol. 2, No. 1, 2011, p. 154.

23 Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, p. 796.

effect on battling parties, which are now solely allowed to weaken their opponents' armed forces and their fighting capacity.²⁴ IHL in its totality is the living negation of Cicero's famous motto: "*Inter arma leges silent.*" ("The laws of war are silent.") On the contrary, it is the *lex specialis* deliberately made for the necessities of war. As early as 1868 by the St. Petersburg Declaration and in 1907 by the Hague Regulation, it was a proclaimed objective of IHL to alleviate the calamities of war and evils of war, at least as much as it was allowed in the wake of military necessities.²⁵ One would be utterly right to claim that IHL is free of any blanket claims of military necessity as an excuse for potential violations of and derivations from the *lex scripta*. IHL of today is a *notstandsfest* body, in which military necessity can only kick in if and only if explicitly referred to in the applicable rules.²⁶ The principle of military necessity as we understand it today is of customary nature, applicable to international and non-international armed conflicts alike.²⁷

Principle of humanity

Causing unnecessary suffering and inflicting superfluous injury is prohibited in IHL. The International Court of Justice reminds us vividly in its Advisory Opinion on the Threat or Use of Nuclear Weapons²⁸ that "it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."

In addition to the 1868 Declaration, this principle has been reaffirmed in a number of other IHL documents. Additional Protocol I offers a more actual restatement of the rule in its Article 35(2), which reiterates among basic rules that "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." An identical customary rule is applicable in international and non-international armed conflicts alike.

Siyar as a field of study and al-Shaybani's siyar

Islamic scholars and jurists have devised a separate and semi-autonomous field of study, *siyar*, that exclusively focuses on the legal aspects of the interactions between Islamic political authority and other political entities; more specifically,

24 Gabriella Venturini, "Necessity in the Law of Armed Conflict and in International Criminal Law", in I. F. Dekker and E. Hey (eds), *Netherlands Yearbook of International Law*, Vol. 41, No. 1, 2010, p. 48.

25 A. R. Ziegler and J. Baumgartner, above note 19, p. 588.

26 Bernhard Kempen and Christian Hillgruber, *Völkerrecht*, Verlag C.H. Beck, Munich, 2007, p. 264.

27 Gökhan Güneysu, "Askeri Gereklilik İlkesi ve İnsancıl Hukuk", *Ankara Barosu Dergisi*, Vol. 4, No. 1, 2012, p. 99.

28 International Court of Justice, above note 16, p. 257.

however, *siyar* also refers to the legal study of armed conflicts from an Islamic perspective. More precisely, this particular field of study lays the legal ground for political and diplomatic engagements, as well as for the conduct of warfare by defining obligations for the followers of the Islamic faith. A scholarly endeavour, *siyar* has been devised by non-practitioners (such as lead scholars of hadith and influential jurists) but also been implemented (although not all the time in its entirety) unilaterally by the political authorities of Islamic suzerainty.

Imam A'zam Abu Hanifa (after whom the Hanafi School of jurisprudence is named) is cited as the first jurist to systematize the study of armed conflict in the history of Islamic scholarship.²⁹ Abu Hanifa also solicited a work on the same subject, asking his disciple, al-Shaybani, to produce *Siyar al-Saghir*. Subsequently, Muhammad b. Hassan al-Shaybani also wrote one of the most influential works in this field, *Siyar al-Kabir*. This article, however, draws on Muhammad b. Ahmad al-Sarakhsi's³⁰ commentary to *Siyar al-Kabir* (*Serh al-Siyar al-Kabir*, hereinafter referred to as *al-siyar*) because the original text has not survived to the present time.³¹ Although Shaybani's original text is not existent, the commentary's authenticity and its attribution to Shaybani is not disputed. Sarakhsi's commentary has been reproduced, expanded and translated into different languages. Because it is recognized as an authoritative text in the study of war and peace, the Ottoman State used the commentary as a textbook in the training of military officers; the commentary also served as a guideline to the conduct of war that the Ottoman army's combatants should rely on during battle.³² Recent scholarly studies on Shaybani's views on the Islamic law of nations, particularly law of armed conflict, also relied on Sarakhsi's commentary.³³

This article utilizes a Turkish translation of the commentary by a committee of Islamic scholars³⁴ who, in addition to the original text, considered previous translations in different languages and original copies reserved in library holdings.³⁵ The work arguably covers a wide range of issues mostly relevant to the law of nations. The subjects covered include the virtues of serving in the military along the borders, the rules that the military commanders are required to observe, the principles of deploying troops, use of flags and banners, a framework of calling opponents to either convert to Islam or to accept terms for peace, diplomatic interactions, rules on the spoils of war and prisoners of war (POWs)

29 Ahmet Yaman, Introduction to Turkish Translation of *Siyar al-Kabir*, Sarakhsi's Commentary, Vol. 1, p. 9. See note 35.

30 For Sarakhsi's contribution to the Islamic law of armed conflict, see Ahmed al-Dawoody, "Al-Sarakhsi's Contribution to the Islamic Law of War", *UCLA Journal of Islamic and Near Eastern Law*, Vol. 14, No. 1, 2015.

31 Ahmet Yaman, "es-Siyeru'l Kebir", *İslam Ansiklopedisi*, Vol. 37, pp. 327–9.

32 Aydın Taş, *İmam Muhammed'in Usul Anlayışı*, Nizamiye Akademi, Istanbul, 2019, p. 55.

33 See Osman Taştan, *The Jurisprudence of Sarakhsi with Particular Reference to War and Peace: A Comparative Study in Islamic Law*, Unpublished PhD Thesis, University of Exeter, 1993.

34 To check authenticity, Arabic and English versions were also consulted; the annotated Turkish translation contains extensive details.

35 Muhammad b. Ahmad al-Sarakhsi, *İslam Devletler Hukuku: Şerh'üs Siyeri'l Kebir*, Vols I–V, edited by Ahmet Yaman, translated by İbrahim Sarımsı and Sait Şimşek, Eğitaş, Konya, 2001 (referred to as *al-siyar* in the text).

and agreements with other nations.³⁶ *Jihad* as a form of warfare and as a religious duty for Muslims is extensively covered in *al-siyar* which seems to be endorsing a view of Islamic supremacy in both ethical and military terms.

Rich in terms of references to verses and hadiths of the *Qur'an* to substantiate the legal arguments, *al-siyar* offers a reliable sketch of the Islamic approach to the pursuit of peace with non-Islamic communities and, when necessary, to the conduct of warfare. Because it was produced in times of Islamic military and political supremacy, *al-siyar* does not pay much attention to prescribing rules that the opponents also have to follow, and, instead, adopts a unilateral approach by which only Muslim combatants are held responsible. However, *siyar* as an autonomous field of study does not confine itself to prescription of rules that are applicable to the interactions between Muslims, but also their acts in relation to non-Muslims, thus generating the norms that also “regulate external aspects of Muslims”.³⁷ This is a direct outcome of viewing Islam as a dominant and superior (and universal) religion, seeking “to overcome ethnocentrism”.³⁸

Not only rulers, but also scholars and jurists in the Muslim world have been motivated since the Islamic rule started to expand to convey what they considered a universal message of ultimate salvation even if it means domination by the sword. This motivation manifests itself in the unilateral constraints in terms of how to deal with non-Muslims as the goal is to appeal to non-Muslims, rather than ensuring that they would submit to the Islamic rule. For this reason, recent scholarship tends to regard *siyar* as the Islamic law of nations, Shaybani’s *al-siyar* being at the epicentre of the scholarly inquiry.³⁹ In reference to the premises of *siyar*, a conception of an Islamic international order is also proposed.⁴⁰ Some accounts, on the other hand, rely on a more specific focus involving the Islamic perspective on war and peace.⁴¹

36 A. Yaman, above note 31, p. 328.

37 Yasuaki Onuma, “When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective”, *Journal of the History of International Law*, Vol. 2, No. 1, 2000, p. 19.

38 *Ibid.*

39 See, for instance, Majid Khadduri, *The Islamic Law of Nations: Shaybani’s Siyar*, Johns Hopkins Press, Baltimore, 1966; Majid Khadduri, “Islam and the Modern Law of Nations”, *American Journal of International Law*, Vol. 50, No. 2, 1956; Jean Allain, “Acculturation through the Middle Ages: the Islamic Law of Nations and its Place in the History of International Law”, in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Northampton, MA, 2011; Shameem Akhtar, “An Inquiry into the Nature, Origins and Source of Islamic Law of Nations”, *Islamic Studies*, Vol. 10, No. 1, 1971; Haniff Ahamat and Mohd Hisham Mohd Kamal, “Modern Application of *Siyar* (Islamic Law of Nations): Some Preliminary Observations”, *Arab Law Quarterly*, Vol. 25, No. 3, 2011; and Mohammad Talaat al-Ghunaimi, *The Muslim Conception of International Law and The Western Approach*, Martinus Nijhoff, The Hague, 1968.

40 See Bassam Tibi, “Islamic Law/*Shari’*a, Human Rights, Universal Morality and International Relations”, *Human Rights Quarterly*, Vol. 16, No. 2, 1994; Shahrbanou Tadjbakhsh, “International Relations Theory and the Islamic Worldview”, in Amitav Acharya and Barry Buzan (eds), *Non-Western International Relations Theory: Perspectives on and Beyond Asia*, Routledge, London, 2010; Muhammad Hamidullah, *The Muslim Conduct of State*, Islamic Book Trust, Kuala Lumpur, 2011.

41 See Majid Khadduri, *War and Peace in the Law of Islam*, Johns Hopkins Press, Baltimore, MD, 1979; John Kelsay and James Johnson (eds), *Just War and Jihad*, Greenwood Press, New York, 1991; Hilmi M. Zawati, *Is Jihād a Just War? War, Peace, and Human Rights under Islamic and Public International Law*, Edwin

Foundational principles of Islamic *jus in bello* in *al-Siyar al-Kabir*

A number of academic works have been produced to enquire into the Islamic view of warfare and the limitations and justifications it proposes; but only a small proportion of these studies try to identify the main principles that constitute the basis of the Islamic rules and standards applicable to the cases of armed conflicts.⁴² This paper further narrows down the scope, and places exclusive emphasis upon the Islamic principles applicable to ongoing armed conflicts with reference to al-Shaybani's *siyar*. To this end, the authors comparatively analyse the Islamic principles as spelled out in *al-siyar* prescribing individual religious (and legal) responsibility.⁴³

A textual analysis reveals that *al-siyar* underlines the significance of *jihad* which serves as the epicentre of an Islamic identity. There are plenty of references in *al-siyar* to the virtue and salience of *jihad*, both as an institution of reaffirming Islamic domination (upheld by the central authority) and as an individual obligation. A religious/divine value is often attached to everything that is *jihad*-related,⁴⁴ and *jihad*⁴⁵ in the form of armed confrontation with the infidels or the enemies of Islam is praised as a sublime human behaviour.⁴⁶ Just as *jihad* is prescribed as a religious/legal duty that particularly combatants are required to uphold (once armed struggle has been agreed upon and initiated by a legitimate political authority), individual responsibilities of the Muslim combatants during the armed conflict are similarly identified in reference to a broader conception of *jihad* which could only be performed in the name of Allah.⁴⁷

This means that Muslims, including the rulers and the subjects, are responsible to Allah who asks them to carry out *jihad* in conformity with certain rules. But it appears that at least in some instances, compliance with these rules is contingent upon how the enemy responds. Reciprocity is strongly advised in the case of bilateral agreements.⁴⁸ Rules pertinent to individual responsibility, on the other hand, appear to be unilaterally binding; thus, they have to be honoured regardless of whether

Mellen Press, Lewiston, NY, 2001; and S. M. Farid Mirbagheri, *War and Peace in Islam: A Critique of Islamic/ist Political Discourses*, Palgrave, New York, 2012.

42 See Matthias Vanhullebusch, "General Principles of Islamic Law of War: A Reassessment", *Yearbook of Islamic and Middle Eastern Law*, Vol. 13, No. 1, 2006–2007; and Ahmed al-Dawoody, "Islamic Law and International Humanitarian Law: An Introduction to the Main Principles", *International Review of the Red Cross*, Vol. 99, No. 3, 2017.

43 For a comparative study of how POWs are treated in the Islamic law of war and IHL, see Mohamed el-Zeidy and Ray Murphy, "Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War", *International Criminal Law Review*, Vol. 9, No. 4, 2009.

44 For instance, *al-siyar* has a separate section on *ribat* (serving alongside the frontier to protect *dar al-Islam* — the abode of Islam): see *al-siyar*, Vol. 1, pp. 33–60.

45 Classical Islamic scholarship tends to offer a distinction between "greater" and "lesser" *jihad*, arguing that Islam is not offensive in nature because emphasis is placed on greater *jihad* which involves efforts to contain sinful impulses. For further details, see David Cook, *Understanding Jihad*, University of California Press, Los Angeles, CA, 2005, pp. 5–32. However, this distinction makes more sense in relation to a discussion on *jus ad bello* (the law governing the conditions to wage a war).

46 See *al-siyar*, Vol. 1, pp. 41 and 48.

47 *Al-siyar*, Vol. 1, p. 60.

48 *Al-siyar*, Vol. 1, p. 61.

enemy combatants observe the same limitations. Whether or not these rules on individual religious responsibility applicable to the combatants are properly enforced and whether or not breach of these rules is adequately sanctioned remains unaddressed in Islamic legal and philosophical scholarship, including *al-siyar*.⁴⁹

It should be recalled that *al-siyar* contains rules that only Muslims are required to uphold; thus, it prescribes unilateral responsibilities for the individuals without referring to the responsibilities of the adversaries. Thus, it is only natural that large segments of the book are reserved for the legal and religious obligations of Muslim individuals *vis-à-vis* the ruler, the Muslim community and their belief system,⁵⁰ as well as for their rights as Muslims and benefits as fighters.⁵¹ Because it is not meant to prescribe responsibilities of non-Muslims, *al-siyar* does not have a separate section or discussion on what could be regarded as *jus in bello* that defines the obligations of the parties involved.

Although a number of scholarly accounts list numerous Islamic references to the humanitarian rules applicable to an armed conflict, the following commandments communicated by Caliph Abu Bakr to his commander summarize the overall gist of the Islamic approach on this matter:

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 an aged man. Bring no harm to the 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 had devoted their lives to monastic services, leave them alone.⁵²

It is possible, based on this summary and the content of *al-siyar*, to identify general principles that may be associated with the main objectives and teleological roots of the Islamic law of armed conflict. It should be noted that we deduce these general principles from specific injunctions and discussions spelled out in Sarakhsi's work, which does not move from these principles to the judgements it presents.

Principle of distinction

Al-siyar provides extensive coverage of the individuals and groups that are granted protection in conjunction with the principle of distinction. As a general rule, based on the verse in the *Qur'an* underlining that Muslims should fight only those who wage a war against them,⁵³ those who clearly stay out of the war are immune to

49 In rare instances, *al-siyar* provides some coverage of individual punishments to those who violate the rules of law of armed conflict. For instance, if a *dhimmi* unlawfully kills an enemy combatant who was granted safe conduct and confiscates his assets, he not only repairs the damages but is also condemned to whipping as well as jail, the amount of time which is to be determined by the ruler. See *al-siyar*, Vol. 1, p. 298.

50 See, for instance, *al-siyar*, Vol. 1, pp. 171–6.

51 See, for instance, *al-siyar*, Vol. 1, pp. 177–80 and 181–97.

52 Sahih Muslim, Vol. 19, Hadith No. 4292.

53 *Qur'an*, Chapter 2, Verse 190.

any offensive or aggression by Muslim combatants. *Al-siyar* makes numerous explicit references to such persons simply because they are non-combatants. Monks may not be killed, for instance, as long as they remain in their monasteries for religious purposes.⁵⁴ The same principle also applies to women who are not involved in the armed conflict by any means. However, exceptions to the immunity are also underlined: even slight or indirect involvement in the form of, for instance, encouraging the enemy combatants or raising their morale, renders the protection inapplicable.⁵⁵ Broader leniency is recommended against the underaged (perhaps toddlers and adolescents); combatants are urged to take every precaution possible to avoid killing them even if they are somehow part of the conflict.⁵⁶ The elderly, however, apparently are not covered in the same scheme of leniency since the Prophet Muhammad authorized his fighters to kill an old man who gave useful advice to the enemy combatants.⁵⁷ Muslim military units are further required to distinguish themselves from *hors de combat* by carrying banners or flags whose colours are specifically indicated in the hadiths that *al-siyar* reports.⁵⁸

Non-Muslims who make a pact with Muslims are automatically considered non-combatants and treated by the rules applicable to non-combatants. *Al-siyar* specifically states that assets of non-Muslims who conclude a peace agreement with Muslims may not be forcefully confiscated, referring to the established rule that assets and properties of a Muslim may not be unlawfully seized.⁵⁹ Similarly, even non-Muslims, particularly Christians and Jews, who live in the *dar al-harb* (abode of war)⁶⁰ are respected and treated as equals to Muslims unless they are designated combatants.⁶¹ If, for instance, an enemy combatant declares that he was a Christian who was serving in the army but now is just a priest, he is then considered a non-combatant and granted immunity.⁶²

Prisoners of war (POWs) are also regarded as *hors de combat* and, thus, may not be killed. Even though compliance with the orders of the commander is strictly stipulated, the fighters will not be rendered responsible if they deny killing a POW upon such an order.⁶³ Even though command responsibility in the modern sense cannot be identified, *al-siyar* narrates a report that the Prophet Muhammad required a commander who ordered killing of POWs pay reparations.⁶⁴ While there seems to be an agreement on the prohibition of killing POWs, additional privileges attached to the status have changed depending on

54 *Al-siyar*, Vol. 1, p. 62.

55 *Al-siyar*, Vol. 1, p. 63.

56 *Al-siyar*, Vol. 1, p. 63.

57 *Al-siyar*, Vol. 1, p. 64.

58 *Al-siyar*, Vol. 1, p. 89.

59 *Al-siyar*, Vol. 1, p. 149.

60 For the concepts of *dar al-harb* and *dar al-Islam*, see Giovanna Calasso and Giuliano Lancioni (eds), *Dār al-Islām / Dār al-Harb: Territories, People, Identities*, Brill, Leiden, The Netherlands, 2017.

61 See *al-siyar*, Vol. 1, pp. 161–4.

62 *Al-siyar*, Vol. 4, p. 27.

63 *Al-siyar*, Vol. 1, p. 183.

64 *Al-siyar*, Vol. 1, p. 184.

the nature of the circumstances, thus affecting the juristic views and approaches on the matter.⁶⁵ In the early years of Islam when the Prophet Muhammad needed to prove his lenience and mercy, POWs were recognized broad and extensive rights. In compliance with the verse, “set them free, either by grace or ransom”,⁶⁶ revealed at the end of the Battle of Badr, Muslims had to free the enemy POWs either in exchange for Muslim POWs or for ransom. In response to complaints by enemy POWs at the end of the fight, the Prophet Muhammad instructed Muslims to offer good treatment to them; in a praise of how Muslims complied with this instruction, the *Qur’an* states, “they give food, for the love of Him, to the needy, the orphan, the captive”.⁶⁷

Those who are granted *aman* (which may be literally translated as “safe conduct”),⁶⁸ a novel practice in the theory and practice of Islamic law that has its roots in pre-Islamic customs, the Prophet Muhammad’s hadiths and the *Qur’an*, are also entitled to the same treatment. Distinguished from POWs in the sense that those who are granted *aman* (*musta’min*) decide to stay out of armed confrontation while they are still able to carry out their functions as combatants. Closely relevant to the principle of military necessity, granting safe conduct to the enemy combatants is a preferable action to ensure attainment of the military objective by guaranteeing at least temporal removal of the military threat from adversaries. *Al-siyar* dedicates a relatively lengthy section on the details of who is entitled to granting and receiving *aman*, as well as rules governing this institution.⁶⁹ As a general rule, a Muslim man, regardless of whether he is observant of all Islamic rules, is entitled to grant safe conduct to non-Muslims which then becomes binding upon all Muslims, thus effectively providing temporal assurance for the recipient.⁷⁰ Referring to practices by the Prophet Muhammad and Caliph Omar, *al-siyar* further recalls that Muslim women may as well grant *aman* for non-Muslims,⁷¹ but adds that safe-conduct terms proclaimed by *dhimmis*⁷² are legally void even if they fight alongside the Muslims against enemy aliens,⁷³ unless the commander of the military unit, or one of the Muslim combatants, grants authorization for them to do so.⁷⁴

65 See Lena Salaymeh, “Early Islamic Legal–Historical Precedents: Prisoners of War”, *Law and History Review*, Vol. 26, No. 3, 2008.

66 *Qur’an*, Chapter 47, Verse 4.

67 *Qur’an*, Chapter 76, Verse 8.

68 For further details on *aman*, see, among others, John Wansbrough, “The Safe-Conduct in Muslim Chancery Practice”, *Bulletin of the School of Oriental and African Studies*, Vol. 34, No. 1, 1971; and Mostafa Mohaghegh Damad, “The Institution of Aman in the Islamic Law of War”, *International Journal of Humanities*, Vol. 3, No. 1, 1991.

69 *Al-siyar*, Vol. 1, pp. 255–385.

70 *Al-siyar*, Vol. 1, p. 255.

71 *Al-siyar*, Vol. 1, pp. 256–7. Muslim slaves and children may grant safe conduct only if they are combatants.

72 For the legal status of *dhimmis* under Islamic law, see Nasim Hasan Shah, “The Concept of Al-Dhimma and the Rights and Duties of Dhimmi in an Islamic State”, *Journal of the Institute of Muslim Minority Affairs*, Vol. 9, No. 2, 1988.

73 *Al-siyar*, Vol. 1, p. 259.

74 *Al-siyar*, Vol. 1, p. 281.

Because *aman* is a legally binding contract between all Muslim individuals (and the Islamic political and legal entity) and the non-Muslim granted privileges associated with it, any breach of the terms of the contract entails reparations. *Al-siyar*, for instance, notes that if a group of Muslim combatants attacks a group of unbelievers protected under such a contract, kill the men and spare the women and their assets, then they have to pay reparations for the unlawfully murdered.⁷⁵ The safe-conduct terms, even in a broader context, apply to those who decide to convert into Islam even if the decision is taken under the pressing circumstances of the battle, i.e. during a siege that will probably result in a Muslim victory.⁷⁶ The institution of *aman*, in both cases, serves the goal of avoiding unnecessary use of force and military resources to achieve the military objective. In the case it is employed, the enemy combatants are transformed into *hors de combat* who become entitled to protections specified under the Islamic law of armed conflict. The coverage of safe conduct is often considered extensive in such a way to include instances, for instance, where it may be granted to a POW who openly defies Caliph Omar, noting that they would not submit to Muslims just because a prophet has been chosen from among them.⁷⁷ Envoys, on the other hand, are, according to *al-siyar*, entitled to exercising broad immunities without requiring provision of a safe-conduct agreement. In cases where full powers are provided, the envoys are regarded inviolable, even when they provide a sealed letter that was arguably produced by the enemy political ruler; Muslim combatants are strongly recommended to assume the authenticity of such a claim for the sake of caution.⁷⁸

Principle of military necessity

The principle of military necessity, in some instances, serves as a supplement to the principle of distinction whereas in some others, they seem to be upheld as if they are of equal significance. *Al-siyar* presents a number of rules and recommendations to ensure that the combatants are clearly distinguishable from the non-combatants. To this end, the ruler is strongly recommended to appoint a commander from among persons of high character and virtue to a military unit of any size.⁷⁹ It is incumbent upon the ruler to choose a person who is an expert on war-related matters so that the war would be properly fought, that unnecessary casualties are avoided and that military objectives are fulfilled in the most optimal way possible.⁸⁰ Subordinates in a military unit are, for the same purpose, required to follow and fully honour the orders by their commanders,⁸¹ with the exception that in the case it becomes

75 *Al-siyar*, Vol. 1, p. 261.

76 *Al-siyar*, Vol. 1, p. 263.

77 *Al-siyar*, Vol. 1, p. 265.

78 *Al-siyar*, Vol. 1, p. 290.

79 *Al-siyar*, Vol. 1, p. 79.

80 *Al-siyar*, Vol. 1, p. 80.

81 *Al-siyar*, Vol. 1, p. 82.

evident that the orders will lead to irreparable damage and complete destruction of the army, the Muslim combatants are not obliged to comply with them.⁸²

The focus and emphasis in these restrictions are not upon the sanctity of human life, but rather on the fact that killing the non-combatants is unnecessary and might be counterproductive. The same logic also applies to the restrictions on the protection of the environment and livestock. Trees, for instance, should not be unnecessarily cut down particularly if it is almost evident that the battleground will fall under Muslim control.⁸³ Likewise, cattle may not be destroyed unless it is necessary to slaughter them for feeding the fighters.⁸⁴ A review of the sections on the protection of the environment reveals that Muslim fighters are strongly recommended to avoid widespread destruction, particularly in the case that they will be near-future beneficiaries.⁸⁵ However, these restrictions do not apply to the incidents where it is essential for military purposes to cut down trees or contaminate the water supplies.⁸⁶

If deemed necessary in military terms, i.e., apt to accomplish the military objective, a ruse, particularly in the form of vague statements, is allowed whereas lying towards deception, or perfidy, broadly speaking, is not.⁸⁷ To further elaborate on the blurred boundary between a ruse and deception, *al-siyar* provides examples in detailed narration. For instance, a Muslim fighter may give the impression (without telling an explicit lie) that they have already won the battle so that the enemy would surrender.⁸⁸ In an account, *al-siyar* reports that when the Prophet Muhammad was told during the Battle of the Confederates (also known as the Battle of the Trench) about the decision of one of the communities in Medina to terminate agreement and join the aggressors, he implied that they did so in compliance with his request, ensuring that Abu Sufyan, commander of the Meccan polytheists, would doubt the shift in the alliance.⁸⁹ Plain lies are, however, prohibited for Muslims during war. *Al-siyar* notes that if a Muslim combatant tells people under siege that they have been granted safe conduct by the Islamic ruler (while it is a lie), the *aman* (safe conduct) will become binding upon all Muslims, including the ruler.⁹⁰ Similarly, if a group of Muslims lie to a group of enemy combatants that they are envoys authorized by their ruler to grant safe conduct or to negotiate terms of peace and they are permitted to the enemy lands, they may not kill anybody or seize any property during their stay.⁹¹

A critical review of *al-siyar* further reveals that those enemy combatants who ask for safe conduct from Muslims are granted broad entitlements, suggesting that the primary goal is to ensure that combatants will no longer pose

82 *Al-siyar*, Vol. 1, pp. 181–4.

83 *Al-siyar*, Vol. 1, p. 65.

84 *Al-siyar*, Vol. 1, p. 65.

85 *Al-siyar*, Vol. 1, pp. 71 and 73–4.

86 *Al-siyar*, Vol. 4, p. 58.

87 *Al-siyar*, Vol. 1, p. 135.

88 *Al-siyar*, Vol. 1, pp. 135–6.

89 *Al-siyar*, Vol. 1, pp. 136–8.

90 *Al-siyar*, Vol. 1, p. 344.

91 *Al-siyar*, Vol. 2, p. 47.

a military threat. By granting contractual immunities to the combatants, *al-siyar* seeks to minimize the potential damage to be caused by the military offensive and to expedite the achievement of military objective through a quicker surrender of the enemy. Safe-conduct immunities are granted even in cases where enemy combatants suffer from a relatively disadvantaged military position. An enemy combatant who is not protected in a fortress, for instance, is entitled to calling for a contractual safe conduct; according to *al-siyar*, the contract may even cover protection of his properties and family members that he will take from his hometown as well,⁹² except those in the battleground or areas that are under siege which will be considered spoils of war.⁹³

The institution of *aman* as reconceptualized in the Islamic law of armed conflict appears to be built upon two major premises: that as noted above, it seeks to expedite the accomplishment of the military objective; and its terms and conditions as spelled out in the contract are to be respected and honoured. In other words, the goal is not to show mercy for the enemy, but to give the message that once a contract has been made, Muslims will fulfil the legal obligations they undertook in association with that contract. *Al-siyar* narrates that if, in a military confrontation, the enemy combatants behind protective walls tell Muslim combatants that they will send a delegation for safe-conduct negotiation and that they will accept the terms the delegation will communicate with them, the terms negotiated with the delegation will be deemed binding. Therefore, if, for instance, the delegation secures a safe conduct for only themselves in return for a military surrender, Muslims do not have to grant safe conduct for those who remain in the fortress once they seize control, regardless of whether or not the delegation lied to their own military servicemen about the terms of the agreement they made with Muslims.⁹⁴

The same also applies to a hypothetical case involving a Muslim envoy authorized to negotiate with enemy combatants about the terms of a safe-conduct agreement. *Al-siyar* notes that if the envoy, despite that he has authorization to do so, tells the enemy commander that safe conduct will be granted to him, his relatives and his countrymen if he opens the gate, his words will be considered binding upon Muslims. Therefore, once the gate is opened, Muslim combatants may not take the people in the fortress prisoners or seize their properties.⁹⁵ In this case, too, emphasis is placed upon the assurance that an agreement delivers to the contracting parties. Therefore, the strong conviction that the words of an envoy create for the enemies is further backed by subsequent conduct of the Muslims. Whether or not the envoy is a Muslim, a *dhimmi* or an enemy combatant who has been previously granted safe conduct does not affect the binding effect of his words.⁹⁶ Granting safe conduct to a prisoner is also applicable, and legally binding upon all Muslims. However, in that case, the scope

92 *Al-siyar*, Vol. 2, p. 1.

93 *Al-siyar*, Vol. 2, p. 3.

94 *Al-siyar*, Vol. 2, p. 9.

95 *Al-siyar*, Vol. 2, p. 17.

96 *Al-siyar*, Vol. 2, p. 18.

of the *aman* institution is fairly limited. Because the safe conduct has been granted at a time when the grantee was no longer a combatant, he is still considered a spoil of war; the only immunity he will secure is against possible execution.⁹⁷

The contractual coverage of *aman* may, in certain cases, involve protection of the grantees. If, for instance, a group of people from the abode of war who have been granted safe conduct are attacked while in the abode of Islam by enemy combatants, and taken out of the Islamic land, Muslims are legally obliged to extend assistance to those covered by the *aman* agreement. This particular rule applies to the grantees of *aman* who are in the abode of Islam by virtue of which they become entitled to Muslim protection like the *dhimmis*.⁹⁸ Thus, the enemy combatants already know that once they cease to fight against Muslims and seek a safe-conduct protection, their lives will not be compromised and Muslims will have to honour the safe-conduct agreement by taking any measures possible to ensure their protection. The goal in such extensive coverage is to offer a broad incentive for the enemy combatants to stop fighting against Muslims, thereby enabling the Muslims to attain the military objectives without causing unnecessary damage.

Principle of humanity

Islam (and naturally *al-siyar*) proceeds from the premise that the Islamic faith offers the path for eternal salvation and, thus, Muslims should strive to deliver its message to non-Muslims; this premise has broad manifestations in the behaviours of Muslims, even in times of armed conflicts, that as long as there is hope for possible conversion of the adversaries to Islam, caution and resort to peaceful means are recommended. Apart from this general code of conduct, Muslims are tacitly encouraged to maintain good relations with unbelievers, particularly if they are relatives.⁹⁹ Similarly, in the battleground, a Muslim fighter is discouraged to kill his father who fights on the side of the enemy.¹⁰⁰ In other words, *jihad* in the form of violent confrontation is not considered a free pass to kill the enemy, but rather refers to a political framework and set of rules constrained by legal and ethical priorities.

This approach manifests itself in the battleground as a moral requirement of showing respect to the enemy by virtue of them being created as human beings. Muslim combatants are encouraged by the *Qur'an* and the hadiths to take part in armed aggression, but only to fulfil what has been prescribed as a military objective; as such, they are discouraged from relying on revengeful acts including torture, summary execution and humiliation of bodies. Even POWs, according to the primary sources of Islam, have to be given a decent treatment:

97 *Al-siyar*, Vol. 2, p. 43.

98 *Al-siyar*, Vol. 5, p. 11.

99 *Al-siyar*, Vol. 1, pp. 113–16.

100 *Al-siyar*, Vol. 1, p. 124.

Do not handcuff or tie up the prisoners. Do not mutilate. Do not kill the wounded. Do not pursue one retreating or one who throws down his weapon. Do not kill the old, the young or their women. Do not cut down trees, unless you are forced to do so. Do not deploy poison in lands. Do not cut off the water supply.¹⁰¹

Despite diverse (and in some instances, conflicting) views on how POWs should be treated and what rules are applicable to them, Muslim scholars and jurists overwhelmingly suggest that they may not be subjected to scourging heat, excessive cold, thirst, hunger and any other forms of torture.¹⁰² Similarly, Muslim individuals and authorities, according to Muslim jurists, have to avoid inflicting degrading or inhumane treatment on the enemy POWs.¹⁰³ Humane treatment that Muslims are recommended to grant to enemy POWs is compared to an act of charity.¹⁰⁴

Mutilation, dismemberment of the body organs, torture of any kind and other inhumane treatment of the body or persons alive is strictly forbidden and condemned in the Islamic tradition. *Al-siyar* narrates a report from Caliph Abu Bakr who expressed strong disapproval when the decapitated head of a lead enemy figure was brought to him. When told that this is exactly how the enemy treated the Muslim bodies, the Caliph underlines that it is still impermissible,¹⁰⁵ thus suggesting that the prohibition of inhumane treatment remains regardless of whether or not the adversaries honour the same rules. A particular case that confirms Abu Bakr's approach is the Battle of Uhud where, even though a number of Muslim bodies, including the Prophet Muhammad's uncle's, were severely mutilated, he did not authorize infliction of a similar harm to the bodies of the enemies.¹⁰⁶ It should also be noted that mutilation of body organs and excessive torture that leaves permanent marks on the body were regular practices of warfare even in the times of the Prophet Muhammad who, however, strictly forbade them for the Muslims, resulting in the adoption of a strong rule within the Muslim community that remains unchanged in the subsequent centuries.¹⁰⁷

However, the Islamic conception of humanity that might be identified through a review of laws governing armed conflict does not place much emphasis upon the sanctity and protection of life; instead, Muslims are strongly recommended to refrain from what appears to be inhumane and excessively violent conduct. This is why providing the essential needs of POWs does not contradict, in the Islamic law of war, with the possibility of killing them. The

101 Hadith cited in M. Khadduri, above note 41, p. 106.

102 M. Hamidullah, *The Muslim Conduct of State*, above note 40, p. 214.

103 Abdelrahman Afifi, "Jus in Bello and General Principles Related to Warfare According to Islamic Law", in Tallyn Gray (ed.), *Islam and International Criminal Law and Justice*, Torkel Opsahl Academic Epublisher, Brussels, 2018, p. 116.

104 Said El-Dakkak, "International Humanitarian Law Between the Islamic Concept and Positive Interactional Law", *International Review of the Red Cross*, Vol. 30, No. 275, 1990.

105 *Al-siyar*, Vol. 1, p. 127.

106 A. Afifi, "Jus in Bello and General Principles Related to Warfare According to Islamic Law", above note 103, p. 114.

107 *Al-siyar*, Vol. 1, p. 276.

overall stance regarding POWs is that they might be killed, freed for ransom or spared as free men. The early scholars and jurists base this approach on the verse:

So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either [confer] favor afterwards or ransom [them] until the war lays down its burdens.¹⁰⁸

Although not legally binding, Muslims are encouraged not to kill POWs. Prisoner exchange is specifically encouraged, particularly in cases where it is requested by the enemy and endorsed by the majority of the combatants in the battleground, because saving Muslim POWs is deemed one of the military objectives.¹⁰⁹ In any case, however, the political or military authority holds the discretion on the fate of enemy POWs.¹¹⁰ Regardless of the decision (including a decision to kill), torturing POWs and depriving them of food and water are prohibited.¹¹¹ There are instances involving the exercise of the most extreme options, ruled by the political authority. In the case of the surrender of the Banu Qurayza tribe, for example, the male POWs were killed whereas the others were enslaved. Because the Banu Qurayza accepted the offer, during the siege, that their fate would be determined by one of the leading Muslim figures, no contractual term was deemed to be violated. One of the close companions, Sa'd b. Muaz, made the judgement above, based on the terms of the surrender.¹¹²

Once again, *al-siyar* makes a distinction between those who have been granted contractual *aman* and the POWs in terms of the scope and extent of the protection. *Al-siyar* recalls that only those who have *aman* or those who converted to Islam are protected against being killed. Additionally, the POWs remain enemy combatants even if they have been neutralized whereas those who are protected by *aman* may not be legally combatants.¹¹³ In other words, the principle of military necessity applies to those who are granted safe conduct, but not to the POWs. The enemy combatants granted *aman* contribute to the expedited achievement of the military goals which is not the case with the POWs. Islamic political authority is given broad discretion to determine how the POWs should be treated; Muslims are reluctantly discouraged not to kill POWs, but still this option remains; in the case the political authority decides that the POWs may be killed, however, they may not be burned in fire.¹¹⁴ Therefore, it is safe to argue that a partial (and restricted in practice) exercise of the principle of humanity is recommended in *al-siyar*. In short, the principle of humanity is not fully operational in this case since the POWs may be killed and those who kill them even in the absence of authorization by the political ruler (unless they have

108 *Qur'an*, Chapter 47, Verse 4.

109 *Al-siyar*, Vol. 4, p. 159.

110 *Al-siyar*, Vol. 3, p. 75.

111 *Al-siyar*, Vol. 3, p. 79.

112 *Al-siyar*, Vol. 2, pp. 107–11.

113 *Al-siyar*, Vol. 3, p. 76.

114 *Al-siyar*, Vol. 4, p. 50.

been appropriated to their new owners) do not face any punitive sanctions.¹¹⁵ That the same also applies to the cases involving unlawful killing of those who may not be killed including non-combatants (elderly, children, priests, etc.)¹¹⁶ suggests that the principle of distinction, rather than the principle of humanity, prevails during an armed conflict.

Principle of proportionality

It is, particularly when compared with items that may be associated with the other three principles, hard to identify a solid base in the Islamic law of armed conflict that places strong emphasis upon the principle of proportionality. Rather than making explicit references, however, both the Islamic law of war in general and *al-siyar* in particular give the impression that the conduct of warfare should be proportional in terms of seeking a balance between the military objective and the potential human or material losses. It seems that a proportional conduct is ensured through the versatility of the military deployment and stationing in Muslim armies and the usefulness and diversity of the tactics that they employed. The success of the Muslim armies, in terms of both securing a victory and observing proportionality, is also due to their ability to borrow a great deal from the pre-Islamic habits and customs in Arabia, and from Persia and the Byzantium.¹¹⁷

Al-siyar, in addition to a number of normative rules, also contains details on the distribution of spoils of war to Muslim combatants. Although *jihad* is fought in the name of God, the possibility of entitlement to spoils is also a remarkable incentive for fighters. In the case of distribution of spoils, the Islamic law of war, in general, prescribes rights for Muslims.¹¹⁸ As long as the normative rules applicable to the non-Muslims and their properties are fully observed, the Muslim fighters, as part of the military offensive, may acquire the possession of the properties of the enemy combatants. A cardinal principle in the Islamic law of war governs this particular subject matter on the spoils of war which identifies the types, quality and quantity of spoils the fighters are entitled to.¹¹⁹ Also, because they are already aware of what to expect in terms of spoils of war, Muslim fighters avoid any tactics or military styles that could lead to total annihilation of their enemies. In other words, the legal and juristic texts make no explicit mention of the principle of proportionality; and yet because the proportions applicable to the distribution of the spoils are determined before the initiation of the war, combatants tend to avoid disproportionate action in the battleground.

Apart from these circumstantial constraints that might be identified through a review of the historical context and the primary motivations, the

115 *Al-siyar*, Vol. 3, p. 77.

116 *Al-siyar*, Vol. 4, pp. 8 and 22.

117 Youssef H. Aboul-Enein and Sherifa Zuhur, *Islamic Rulings on Warfare*, Strategic Studies Institute, U.S. Army War College, Carlisle, PA, 2004, p. 26.

118 *Al-siyar*, Vol. 2, pp. 113–361.

119 *Al-siyar*, Vol. 2, pp. 113–45.

Islamic law of armed conflict, with specific reference to *al-siyar*, does not contain any references to prohibited weaponry or military tactics by virtue of being disproportional to the military objective. *Al-siyar* explicitly states that burning down the enemy fortresses, drowning the people (apparently without distinction), using catapults and contaminating their water are all permissible acts in the battle.¹²⁰ *Al-siyar* further cites poisoned arrows as permissible weapons in the battle, noting that this may increase the chance of killing the enemy combatant.¹²¹ These are cited as wartime measures to defeat the enemy or ensure their surrender. *Al-siyar* further notes that these tactics may still be utilized even if the Muslims are aware that elderly, underaged, POWs, people granted *aman* and even Muslim POWs will be affected by such aggressive measures simply because such casualties are unavoidable.¹²²

As long as the enemy combatants are able to carry out the fight under strong defence and protection, such measures are undisputedly employable by the Muslim fighters. Those Muslim fighters using these weapons or tactics will not be condemned whatsoever if, in such cases, Muslim merchants or POWs are killed due to the attack even if they stated beforehand that they might be a target as well.¹²³ Similarly, in cases where enemy combatants use Muslim children as human shields, Muslims fighters may still carry on the offensive and they will not be held responsible if any of the children die.¹²⁴ As noted, *al-siyar* does not list any prohibited weapon or military tactic that may cause mass casualties. However, it also states that such weapons or tactics should be identified as essential to accomplish the military objective.¹²⁵

Conclusion

There are strong reasons to assume that the Islamic law of armed conflict and modern IHL have a common basis in terms of their focus and of on what principles they have been constructed.¹²⁶ First, as a unique branch of international law, IHL places emphasis upon the individual in particular, and what bears close relevance to the individual. Similarly, Islamic law, even in its general outlook, is rather individual based, ascribing rights and obligations to their legal status as individuals. Whereas individual obligations may weigh

120 *Al-siyar*, Vol. 4, p. 49.

121 *Al-siyar*, Vol. 4, p. 55.

122 *Al-siyar*, Vol. 4, p. 49.

123 *Al-siyar*, Vol. 4, p. 53.

124 *Al-siyar*, Vol. 4, p. 54.

125 *Al-siyar*, Vol. 4, p. 53.

126 For a thorough investigation into the religious basis offered by Christianity, Islam and Judaism for limitations of war, see Sohail H. Hashmi, *Just Wars, Holy Wars, and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges*, Oxford University Press, Oxford and New York, 2012. Also see Reuven Firestone, "Conceptions of Holy War in Biblical and Qur'anic Tradition", *Journal of Religious Ethics*, Vol. 24, No. 1, 1996. For a work on the compatibility between the Islamic approach to warfare, thus an Islamic *jus ad bello*, with international law, see Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law*, Routledge, London, 2014.

favourably against individual rights in other areas, *siyar* may be considered an exception as the primary focus in this field is to protect the individual. Second, close interaction between the Muslim world and some of the founders of modern international law, who have mostly pondered over attainment of peace and containment of war and its effects, suggests that there might be certain similarities in the approaches employed by Muslim scholars and jurists, and those who laid the foundations of modern IHL.

An inquiry into the possible areas of convergence is particularly meaningful given the dominance of two rather extreme and irreconcilable approaches in the literature on the nature and utility of Islamic law.¹²⁷ At one end, Muslim scholars either praise the Islamic law of armed conflict, arguing that it covers many issues that are not adequately addressed even in modern times,¹²⁸ or adopt an apologetic stance, suggesting, in an implied response to criticisms, that uncontrolled violence may not be associated with the concept of *jihad*.¹²⁹ At the other end, the contribution by Islam to the development of the idea of a humane conduct of warfare is either ignored or underestimated.¹³⁰ A number of scholarly accounts that fall in between properly engage with the main sources of Islamic law on the conduct of warfare and on the privileges and protections attached to relevant parties, in acknowledgement of the extensive coverage by Islam of rules pertinent to armed conflicts.¹³¹ While these studies succeed in exploring the content of these rules and identify the circumstances under which they have been made, they do not attempt at searching for foundational similarities or differences by comparing and contrasting the contemporary legal mechanisms on the law of armed conflicts and the Islamic approach.

This study sought to fill this gap by taking al-Shaybani's *Siyar al-Kabir* as reference for its argument. Shaybani's *al-siyar* has been extensively studied and examined in many respects, but not in terms of the principles it contains upon which further contributions by Islamic scholars have been based in later centuries. Compiling what is enshrined in the *Qur'an* and the hadiths, the primary sources of Islamic law, the *siyar* showcases the Islamic teleology as applied to the armed conflict, which apparently does not rule out its utility as an apparatus to disseminate the Islamic message but prescribes certain restrictions in

127 For a brief discussion, see Yadh Ben Achour, "Islam and International Humanitarian Law", *International Review of the Red Cross*, Vol. 20, No. 215, 1980.

128 See, for instance, Hilmi M. Zawati, "Theory of War in Islamic and Public International Law", in Niaz A. Shah (ed.), *Islam and the Law of Armed Conflict*, Edward Elgar, Cheltenham, 2015.

129 See, for instance, Rudolph Peters, *Jihād in Mediaeval and Modern Islam*, E.J. Brill, Leiden, The Netherlands, 1977.

130 There is also visible tendency in modern times, particularly geared by the 9/11 attacks and violent activism of Islamist groups, to associate Islam (and *jihad*) with an idea of permanent warfare. See, for instance, John Laffin, *Holy War: Islam Fights*, Grafton, London, 1988. See also Glenn E. Robinson, *Global Jihad: A Brief History*, Stanford University Press, Redwood City, CA, 2020.

131 There are in addition to accounts of general nature, scholarly works addressing specific issues of the Islamic law of armed conflict. See, for instance, Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *The Muslim World*, Vol. 87, No. 1, 1997; John Kelsay, *Islam and War*, Westminster/John Knox Press, Louisville, KY, 1993; and Maryam Elahi, "The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier", *Columbia Human Rights Law Review*, Vol. 19, No. 2, 1987–1988.

the case where controlled and justified violence is deemed necessary. While *al-siyar* does not make any discernible distinction between *jus ad bello* and *jus in bello*, the authors restrict the scope of the paper to the examination of the principles that gave birth to the rules to be observed in armed conflict, thus deliberately not raising a debate on the legal basis, under Islam, for the initiation of a war.¹³²

The authors, in an attempt to explore areas of convergence, first identified the principles that can be detected in the major texts of modern IHL. By examining recent literature, as well as the primary canon, we argued that the rules of contemporary IHL are based on the principle of distinction, the principle of proportionality, the principle of military necessity and the principle of humanity. Subsequently, they critically review al-Shaybani's *al-siyar* to explore the existence of the same principles through a textual analysis, with a primary focus on the rules elaborated in the text that are relevant to the conduct of war rather than what justifies it.

Findings based on the review suggest that there are convergences to varying degrees. In particular, *al-siyar* places emphasis upon the distinction as a cardinal principle to avoid unnecessary harm to Muslim combatants and their adversaries as well. This emphasis is two-dimensional, referring to a utilitarian tendency to prevent waste of resources and to a divine purpose of protecting human life, as well as of keeping the option of conversion for the non-Muslims. From an Islamic law standpoint, boundaries between combatants and non-combatants have to be clearly drawn so that unnecessary casualties are prevented in the battle where the primary goal for Muslims is to achieve military objectives, often towards proving the superiority of the Islamic faith and conveying its message to others for them to experience the same privileges. Thus, for non-combatant immunity to be respected, proper measures should be taken to ensure distinction.

References in *al-siyar* to the principle of humanity also bear relevance to the sanctity of life. While it does not propose a cosmopolitan conception of humanity,¹³³ *al-siyar* reminds of how the *Qur'an* and the hadiths depict life in its entirety and what obligations they prescribe for Muslims to protect and cherish it. Believers are considered superior, but only because of their belief which will entail a better treatment on a spiritual level; thus, they are equals to their opponents in the battleground because all lives matter. This, however, does not lead to a conception of a unified humanitarian identity that constructs the Islamic approach *vis-à-vis* the conduct of warfare. Additionally, because an armed conflict, by definition and by nature, involves increased likelihood of casualties, protection of life does not stand out as a primary objective. The focus on the upholding of the principle of humanity, thus, bears relevance to restrictions and obligations that require Muslim combatants to refrain from inhumane conduct such as torture, mutilation and dismemberment of body organs. As such, military

132 For an Islamic view of *jus ad bello*, see, amongst others, Niaz A. Shah, "The Use of Force under Islamic Law", *European Journal of International Law*, Vol. 24, No. 1, 2013.

133 For a study that argues otherwise, suggesting that the construction of Islamic belief presents a sense of humanism, see Marcel A. Boisard, *Humanism in Islam*, American Trust Publications, Oak Brook, IL, 2014.

necessity often prevails over recommendations towards observation of the humanitarian principles.

The principle of military necessity manifests itself in *al-siyar* in a technical and non-normative appearance. Rules pertinent to this principle serve a thorough observation and implementation of the rules constructed in reference to the principle of distinction. Sanctity of life is often (and heavily) underlined in the primary sources and the emphasis appears to have been conveyed to apply to the conduct of warfare as well. Restrictions to employment of acts, tactics and weaponry that would not seem to be necessary for the attainment of military objective, thus, serve this purpose. In the practical implementation of this principle, certain rules and recommendations are specified for Muslim combatants to observe during battle, including obligations to avoid total destruction of trees, fields and livestock; even though protection of the environment is not prescribed as an absolute requirement, whenever it is evident to stay out of the boundaries of military necessity, Muslims are recommended to take precautions towards its protection. The same also applies to weapons and tactics to be employed in the battle.

Based on the review above, it should be noted that the principle of proportionality is the least obvious and accentuated. As long as they are considered necessary, justifiable and essential to accomplish the military objective, any tactics or weapons are legally permitted for Muslims to utilize in battle. Priority is given to a military victory, or if possible, to surrender of the enemy; any tactic that secures such an outcome is listed as justifiable in *al-siyar*. Burning down a fortress, contaminating water supplies, using catapults and drowning people under siege are some of the extreme acts and tactics that *al-siyar* refers to as permissible. However, these acts are justified only when they are regarded inevitable towards attainment of the military objective. Thus, the principle of proportionality has partial enforcement, obviously in conjunction with the cases that display relevance to the principle of military necessity.

Findings in this study may make particular sense in the case of broader attempts to bridge the gap between Islam as a source of an international/global order and the modern understanding of international relations.¹³⁴ Change and evolution in theoretical thinking, particularly in terms of how to approach the concept of *jihad*,¹³⁵ and intensified interaction between Islam and contemporary IHL,¹³⁶ as well as efforts to identify foundational similarities between world civilizations particularly in terms of normative contributions to the humanization

134 For such attempts at presenting an Islamic political worldview, see, amongst others, J. Harris Proctor (ed.), *Islam and International Relations*, Frederick A. Praeger Publishers, New York, 1965.

135 Al-Dawoody notes, “modern Muslim scholars unlike their predecessors who were mainly concerned with the Islamic *jus in bello* (rules regulating the conduct during war), stress that peace is the Normal State of Relations with non-Muslims.” See Ahmed al-Dawoody, “Armed *Jihad* in the Islamic Legal Tradition”, *Religion Compass*, Vol. 7, No. 11, 2011, pp. 477–8.

136 James Cockayne, “Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations”, *International Review of the Red Cross*, Vol. 84, No. 847, 2002.

of war,¹³⁷ will add further momentum to such endeavours. Possible modes of theoretical thinking, on the other hand, include, among others, a relatively submissive approach that “the Muslims’ religious duty may be satisfied by applying a modern version of Islamic law that is consistent with peaceful international relations and respect for human rights...[that] will be derived from the fundamental sources of Islam, without being identical in every respect to historical *Shari’a*”,¹³⁸ and an ambitious challenge that will introduce an alternative methodology of Islamic global international relations that abolishes a classical classification of political jurisdictions between *dar al-Islam* (abode of Islam – peace), *dar al-harb* (abode of war) and *dar al-‘adl* (abode of justice) and introduces a universally inclusive paradigm.¹³⁹ Regardless of what option seems plausible and is chosen by Muslim thinkers, convergences between the Islamic law of armed conflict and contemporary IHL hold concrete prospects to rebuild a new world order that underlines commonalities rather than differences between world civilizations.¹⁴⁰

137 See Vesselin Popovski, Gregory M. Reichberg and Nicholas Turner (eds), *World Religions and Norms of War*, United Nations University Press, Tokyo and New York, 2009.

138 Abdullahi Ahmed An-Na’im, “Islamic Law, International Relations, and Human Rights: Challenge and Response”, *Cornell International Law Journal*, Vol. 20, No. 2, 1987, p. 320.

139 See, for instance, Ahmed al-Dawoody, “From Tripartite Division to Universal Humanism: Alternative Islamic Global International Relations”, in Deina Abdelkader, Nassef Manabilang Adiong and Raffaele Mauriello (eds), *Islam and International Relations: Contributions to Theory and Practice*, Palgrave Macmillan, Basingstoke, 2016.

140 For an example of search for a common ground by a renowned contemporary Muslim scholar, see Sheikh Wahbeh al-Zuhili, “Islam and International Law”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005.