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**Indexing**



## Perspective of the Islamic Law of War on the Armed Non-state Actors' Militancy

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### Abstract

Both the Islamic Law of War and the International Humanitarian Law (IHL) aim at preserving the human dignity of the combatants as well as non-combatants by defining the parameters for the belligerent parties in the conduct of war. The armed non-state actors involved in conflicts in recent years, however, negate this very principle of avoiding unnecessary suffering of the civilians and the most vulnerable segments of the society and they target these defenceless segments of the society. The armed groups with Islamic inclination, at the same time attempt at gaining legitimacy using distorted religious interpretations. Yet practically their modus operandi is violating Islamic law of armed conflict creating a paradoxical situation. In order to examine the status of the armed non-state actors engaged in armed conflict and their conflicting attributes in the light of Islamic Law, Al-Shaybani's *Al-Siyar Al-Kabir* is discussed in detail. It provides guidance and rules addressing both internal and international matters on a similar pattern as in international law. Furthermore, the challenges arisen from the activities of the armed groups having Islamic affiliation and their possible solutions are also discussed. One plausible remedy for the puzzling standing of armed groups in non-international conflicts is to include them in interpretation and operationalization of laws governing their conduct in war. Further, the Islamic law of armed conflict can play a crucial role in bridging the gap between non-state actors claiming Islamic affiliation and international community.

**Keywords:** humanitarian rights, armed Non-state actors, armed conflict, International Humanitarian Law, Islamic Law of Armed Conflict

### Introduction

The term armed non-state actor,<sup>1</sup> is not present in the historic Islamic literature, however, the presence of these elements cannot be denied from the very beginning of the religion. Time and again a dissenting group arises from within the community to challenge the writ of the state and the authority of the caliph or the ruler of the time. It started even

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<sup>1</sup>Although there is no internationally recognized definition of armed non-state actors yet in international and non-international violent conflicts they are known to cause regime instability, political disorder and violent conflict. See D. E. Davis, "Non-state Armed Actors, New Imagined Communities, and Shifting Patterns of Sovereignty and Insecurity in the Modern World," *Contemporary Security Policy* 30 (2) (2009): 221.

during the time of the Prophet Muhammad (SAW) when he established the city state of Madina but the Jewish tribes residing in the area, that were also in contract with the Prophet (SAW), conspired against state as an accomplice to the foreign powers. Later, the challenge to the authority started coming from within the Muslim ranks. The rise of false prophets, *Kharijis*,<sup>2</sup> and *Hashashins*,<sup>3</sup> are just a few initial rebelling elements. Thus, Islamic scholars since the beginning have been discussing the rights of the authority and the use of force in the perspective of smooth functioning of the government.

The use of force has been considered the exclusive right of the state in the western conceptions. Islamic law also gives jurisdiction to the ruling government over the use of force.<sup>4</sup> It is interesting to examine the conditions under which injunctions of *Jihad* were first given to the Muslims. When the Muslims migrated to Madinah and established a city-state under the leadership of Prophet Muhammad (SAW), it was only then the permission for Jihad was given to the Muslims who suffered persecution and trial<sup>5</sup>. In Makkah when the Muslims were a persecuted minority, this permission to retaliate in kind was not given but injunctions of observing patience was given initially and commandments of migration were given later. The Muslim minority in Makkah before the migration was essentially non-state element in a city state dominated by *Quraish* tribe of polytheists. The armed struggle with the state was not allowed in these circumstance and permission of defense from aggression was only given after an independent city-state was established in Madinah under the Muslim authority and leadership. Henceforth, the Muslim army and weaponry was created to safeguard its territory and repel any form of aggression from others.

Later, the first Caliph Abu Bakar faced rebellion in the form of *Ridda* wars (Apostasy wars) by the rebels who followed *Tulayha*, *Musaylima* or *Sajjah* who all claimed

<sup>2</sup>*Kharijis* or Kharijites were one of the earliest dissenting sect, as they withdrew their support from fourth Caliph Ali. They are allegedly associated with several incidents of bloodshed. See Jeffrey Thomas Kenney, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (New York: Oxford University Press, 2006), 4.

<sup>3</sup>Hashashins or Assassins in late 11<sup>th</sup> century had selected warriors with specialization in carrying out espionage and assassinations of important rival leaders. Over the course of 300 years, their activities resulted in killing of two caliphs and a number of viziers, sultans and other leaders. See Farhad Daftary, ed., *Mediaeval Isma'ili History and Thought* (Cambridge: Cambridge University Press, 2001), 1; Andrea L. Stanton, Edward Ramsamy, Peter J. Seybolt, and Carolyn M. Elliott, eds., *Cultural sociology of the Middle East, Asia, and Africa: an Encyclopedia* (SAGE publications, 2012).

<sup>4</sup>Elaborately explained in Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955), 206; Jāvid Iqbāl, *Islam and Pakistan's Identity* (Lahore: Vanguard Books, 2003); Ibn Khaldun, *The Muqaddimah: an Introduction to History*, Translated by Franz Rosenthal (New York: Pantheon Books, 1958).

<sup>5</sup>Muhammad Hisham Kabbani, and Shaykh Seraj Hendrics, "Jihād: a Misunderstood Concept from Islam," *The Islamic Supreme Council of America*, accessed May 16, 2019, <http://islamicsupremecouncil.org/understanding-islam/legal-rulings/5-jihad-a-misunderstood-concept-from-islam.html?showall=1>

prophethood. Their followers were first invited back to Islam but when they denied they were severely punished and most of them were slain.<sup>6</sup> The second category of dissenter or *Baghi* group confronted the fourth Caliph *Ali* in the shape of *Kharijis*. Initially a few propositions were negotiated to keep them in *Dar-ul-Islam* but once they opposed the Caliph, they were dealt with according to the law. In the light of these instances, the opinion of classical Islamic scholars tend to support the authority of Imām/Caliph/Ruler opposing any individual or group revolting against them. This theory was upheld even if the imam committed an error as early Muslim jurists support that rebellion is even worse than tyranny.<sup>7</sup> There is, however, a clear shift in the ideology regarding Jihad in modern Islamic revival movements.

Since the 17<sup>th</sup> and 18<sup>th</sup> century the Muslim world has been witnessing puritanical and revivalist movements aimed at achieving the lost glory of Islam's golden era. The violent dissenting groups have always been present under the Caliphate and the have been condemned by scholars and neutralized by the authority. However, in the revivalist movements, the Islamic scholars themselves supported armed conflict aimed at regime change and hope of replacing it with government willing to enforce *Sharī'ah* or establish the rule of society according to Islamic principles.<sup>8</sup> Their intent may be noble but the consequence of this shift has been disastrous for the social wellbeing of general masses that Islam aims at protecting at all costs. First, the cause of concern is that the groups in individualistic capacity have started declaring state as morally corrupt and not fulfilling Islamic injunctions according to their narrow interpretations. Secondly, such non-state groups are injuring human sense of security by employing terrorism as their warfare tactic and using public as shield against the retribution of the state. These both elements qualify non-state armed actors in spreading mischief in the land, which is severely criticized under the Islamic law.

The concept of state in Islam is essentially modelled around the first city state of Medina, which did not separate religion from worldly matters rather it was completely guided by the Islamic law. Thus, the political Islam or Islamism is much used to refer to the movements that idealize and work towards revival of Islamic state to its initial glory. It is misleading to consider that political Islam or Islamism is a new phenomenon initiated in late 1970s and early 1980s with Islamic revolution in Iran and struggle of 'Mujahidin without borders'<sup>9</sup> against the Soviet Union in Afghanistan. On the contrary, it is a much older trend to engage in activities to promote Islam as a body of faith that has an ideology of how society should be organized. Linking these efforts to return to the Golden Age of

<sup>6</sup>Karen Armstrong, *A Short History of Islam* (Modern Library: New York, 2002).

<sup>7</sup>Khadduri, *War and Peace in the Law of Islam*, 78.

<sup>8</sup>Samira Haj, "Reordering Islamic Orthodoxy: Muhammad Ibn'Abdul Wahhab," *The Muslim World* 92, no. 3/4 (2002): 333; Saiyid Athar Abbas Rizvi, *Shāh Walī-Allāh and his Times: a Study of Eighteenth Century Islām, Politics, and Society in India* (Canberra: Ma'rifat Publishing, 1980); Syed Abul 'Ala Maududi, *Human Rights in Islam* (Pakistan: Islamic Publications Limited, 1982).

<sup>9</sup>Frédéric Volpi, ed. *Political Islam: A Critical Reader* (New York: Routledge, 2013).

Islam, however, has been the key element of modern evolution of Islamism which is simultaneously conservative and revolutionary. “It is conservative in the sense that it harks back to a very old social and political tradition and ethos. Yet it is also revolutionary in the sense that it requires a dramatic change of practices and institutions to be realized in the contemporary context.”<sup>10</sup>

According to the perception created by the western media and political powers, *Jihād* has been the central element to bring about this dramatic change giving rise to both national and trans-national armed struggles by armed non-state actors. The identity and socio-political agenda of those who employ this term, however, is crucial to understand its morphed meaning. Although *Jihād* is an Arabic noun for the word ‘struggle,’ which can be an individual or communal pursuit for self-betterment, but it’s now more commonly equated to “Holy war...prescribed by the *sharī‘ah* against the infidels.”<sup>11</sup> The promotion of the biased definition has defamed the concept as well as instigated rogue elements to manipulate religious texts to use it for their own vested interests.

## 2. Permissibility and Code of Conduct of Rebellion

Like all other aspects of life, Islam also address the conditions under which rebellion by an armed group against state becomes permissible and also the principles governing the conduct of this act. Rebellion is considered as ‘the act of resisting or defying the authority of those in power.’<sup>12</sup> This act may range from passive non-compliance to a more active armed insurrection. Muhammad Hamidullah’s work titled *The Muslim Conduct of State* further elaborates five different types of violent opposition to government.<sup>13</sup> Insurrection, mutiny, war of deliverance, rebellion and civil war have different level of hostility attached to it, requiring subjective assessment on deciding its befitting response by the opponent government. Insurrection may only require law of the land to decide on its retribution. Yet, if it grows more powerful it may become rebellion or even a civil war, demanding a more firm response from the ruling government.

As for the rulings of Islamic law in regard to the violent opposition to the government, the early Muslim jurists have used the terms of *hirabah*, *baghy* and *khurūj*, to categorize different types of the conflict.<sup>14</sup> *Hirabah* denotes a particular category of robbery on which *hadd* is imposed.<sup>15</sup> Whereas, *Baghy* is equated to creating mischief (*fasad*) in the land by disturbing peace and order. In legal terms, this can be associated with rebellion against a

<sup>10</sup>Volpi, *Political Islam*, 2.

<sup>11</sup>Gilles Kepel, *Jihād: The Trail of Political Islam* (London: IB Tauris, 2006).

<sup>12</sup>Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2006).

<sup>13</sup>Muhammad Hamidullah, *The Muslim Conduct of State* (Kuala Lumpur: The Other Press, 2011).

<sup>14</sup>Sadia Tabassum, *Rebellion: A Comparative Study of Islamic and Modern International Law* (Islamabad: Iqbal Institute for Research and Dialogue, 2020).

<sup>15</sup>Hadd is a fixed punishment, obligatory to be enforced as a right of God. Ibid.

just ruler. The third category of *khurūj*, literally refers to ‘going out’ and originally refers to the rebellion against the fourth Caliph Ali (God be pleased with him). Historically, however, this term is also used in positive connotation for the leaders of *Ahl al-bayt* against the unjust and tyrannical Umayyad and Abbasid rulers.<sup>16</sup> The code of conduct established for rebellion by the early Muslim jurists is irrespective to whether the war is just or not, as it is a subjective matter. For this reason, *khurūj* and *baghy* terms are interchangeably used and are dealt under the law of war. Whereas, *hirabah* is treated through criminal law of the land.<sup>17</sup>

On the contrary, the contemporary international law considers rebellion as an internal affair of the state. However, UN Security Council has the authority to take appropriate actions, whenever the internal affairs of the state pose threat to the international peace. Although, legality of such ‘Humanitarian Intervention’ remains debatable. In order to regulate the code of conduct for hostilities during rebellion, International Humanitarian Law (IHL) is primarily approached. However, due to its state centric nature, it has several loopholes for regulating a non-international conflict. One of the several challenges faced by IHL is that the state usually do not admit a secessionist conflict within their boundaries in order to avoid interference of international organizations in the guise of monitoring the conflict. Secondly, by avoiding existence of the conflict state evades the responsibility to give combatant status to the insurgents or belligerent fighters, as doing so may lend legitimacy to the secessionist movement or their cause. This is for the reason that states are apprehensive that even if they admit of the conflict, the law is not binding on the armed non-state actors, whereas, state would be held accountable of their actions in the conflict.

The Muslim jurists as early as the 8<sup>th</sup> century developed a comprehensive and detailed law on rebellion, as the Muslim community faced several revolutionary and rebellious movements in their early history. The Islamic law on armed conflict and especially rebellion is a comprehensive model code as it offers an objective approach for ascertaining the existence of internal conflict and also admits combatant status for the rebels. Consequently, the state also has to admit repercussions of accepting de facto authority of rebelling non-state actors in the territory under their control.<sup>18</sup> Yet at the same time the Islamic law also emphasizes that territory under the control of the rebels remains to be the de jure part of the parent state. This on one hand offers some sense of peace to civilians and non-combatants during the rebellions and civil war and on the other hand ease the apprehensions of the state that considers granting combatant status to the rebels would lend legitimacy to their movement.

Despite the clarity in the Islamic law of rebellion itself, there is a lot of difference of opinion surrounding whether the Islamic law recognizes the right of community to ouster

<sup>16</sup>*Ahl al-bayt* refers to the members of the household of the Prophet (Peace be upon Him).

<sup>17</sup>Tabassum, *Rebellion: A Comparative Study of Islamic and Modern International Law*.

<sup>18</sup>Sadia Tabassum, “Combatants, not Bandits: the Status of Rebels in Islamic Law,” *Int'l Rev. Red Cross* 93 (2011): 121.

an unjust ruler from his position or challenge the system of government. The Hanafi jurists support the removal of unjust ruler as it is stated to come under the doctrine of enjoining right and forbidding wrong.<sup>19</sup> Yet modern scholars generally conclude that there is no provision to rebel against the unjust ruler in the Islamic legal discourse, as removal of ruler is declared a *fitnah* (mischief) itself that needs to be avoided. Abou El Fadl, however, points out that declaring rebellion a crime would imply that some of the most esteemed companions of the Prophet (SAW) have committed this crime.<sup>20</sup> Qaradawi, on the other hand, explicitly regards the use of force by individuals in their private capacity as unacceptable in Islamic Law.<sup>21</sup>

Dr Muhammad Munir mentions that contemporary non state Islamic actors claim that the presence of imam or some central authority of the Muslim state is not necessary for the declaration of *jihād*.<sup>22</sup> The *jihādīs* argue that they have a legitimate right to declare and conduct jihad. In conclusion to the question on whether armed groups have a right to wage jihad, Dr Munir states that if such a group is small and is not operating with the consent of the state then they may be treated as criminals.<sup>23</sup> As for the law dictating conduct during the conflict by the state and the armed group, Majid Khadduri believes that the Islamic law offers the most humane approach to provide immunity to non-combatants as they are regarded as the 'protected persons.'<sup>24</sup> Dr Sadia Tabassum further elaborates that fighters of armed groups are also given the status of combatants under the Islamic law, rather than treating them as bandits, preventing mass injustices in a non-international armed conflict.<sup>25</sup> Thus, Islamic law of armed conflict offers a more comprehensive and encompassing approach towards dealing with armed groups rebelling against the state. This approach may offer valuable contributions towards IHL in dealing with the armed groups having Islamic affiliation in the contemporary non-international armed conflicts.

### 3. Islamic Law of Armed Conflict

Historically the writers of international law began in the period of Greek City-States, followed by Roman period and then jump right to the modern times, ignoring the gap of nearly a thousand years when Islamic civilization was flourishing.<sup>26</sup> Despite the fact that Islamic civilization like others used laws to establish order in the society and govern its

<sup>19</sup>Hanafi school of thought is one of the four schools of thought regarding religious jurisprudence within Sunni Islam.

<sup>20</sup>Khaled Abou El Fadl, *Rebellion and violence in Islamic Law* (Cambridge University Press, 2006).

<sup>21</sup>Yusuf Al-Qaradawi, *Fiqh al-Jihād: Dirasah Muqaranah li Ahkāmihī wa falsafatihī fi daw al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009).

<sup>22</sup>Muhammad Munir, *The Law of War and Peace in Islam: Causes and Conduct of Jihad and Non-state Islamic Actors Under Islamic Law* (Edwin Mellen Press, 2018), 133.

<sup>23</sup>Ibid., 159.

<sup>24</sup>Majid Khadduri, *War and Peace in the Law of Islam*.

<sup>25</sup>Sadia Tabassum, *Combatants, not Bandits: the Status of Rebels in Islamic Law*.

<sup>26</sup>Hamidullah, *The Muslim Conduct of State*.

inter-civilizational relations. The Islamic legal system relies on divine sources, however, with the expansion of Islamic territory with the spread of Islam, need for establishing new legal occurrences were realized by Muslim jurists.<sup>27</sup> The Muslim powers developed relations with its neighbours in a manner that served their interests, as peace was not the norm of international community and the world was ruled by war. With the increase of the non-Muslims becoming subjects of Islamic territories, the Muslim scholars felt the need of establishing and compiling rules that governed both internal and international affairs. These rules later came to be known as Islamic Law of Nations or '*Siyar*'.<sup>28</sup> One of the most important works covering topics of international law was done by an Islamic Scholar Al-Shaybani, who wrote a book called *Al-Siyar Al-Kabir* in the 8<sup>th</sup> century. This book 'serves as a standard work of reference to-date.'<sup>29</sup> *Siyar* is the term used for rules and regulation concerning the topics of international law, or the relations of the Muslim state with other states, domestically and internationally, both in the times of peace and war.

The sources of Islamic International Law or *Siyar* is the same as *Sharī'ah* (Islamic Law or literal translation 'the way'). *Sharī'ah* is derived from the primary sources of the Holy Qur'ān and *Sunnah* (Prophetic tradition). Additionally, it has secondary sources including *Ijma'a* (consensus of scholars) and *Ijtihād* (reasoning).<sup>30</sup> Some important sourcing principles of *Siyar* includes, flexibility to cater for the needs of all times and places, without violating the core principle of law. It also has structural hierarchy to prioritize divine revelation (Qur'ān) over human reasoning (*Ijtihād*). Moreover, *Siyar* has jurisdiction over both state as well as individuals.<sup>31</sup> Al-Shaybani's understanding of the world is based on classical division of international community into *Dar-ul-Islam* (Islam's state) and *Dar-ul-Harb* (Foreign land, instead of common translation of abode of war).<sup>32</sup> This dichotomy is usually the legal term used to differentiate the Muslim state from the rest of the world. Al-Shaybani also covers several other topics like the declaration of war, the use of force, POWs and laws during war etc. Most importantly he addressed civil or internal wars, participation of foreign fighters in civil war and principle of non-intervention.

In contrast to St Augustine's permission to participate in war only when it is just, *Siyar* holds the key to wage war only if it's in accordance with the religious principles; i.e.,

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<sup>27</sup>Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and al-Shaybani's Siyar* (United Kingdom: Edward Elgar Publishing, 2018).

<sup>28</sup>Labeeb Ahmed Bsoul, "Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire," *Digest of Middle East Studies* 17, no. 1 (2008): 48-68.

<sup>29</sup>Anke Iman Bouzenita, "The Siyar-An Islamic Law of Nations?", *Asian Journal of Social Science* 35, no. 1 (2007): 19-46.

<sup>30</sup>Christopher Gregory Weeramantry, *Islamic Jurisprudence: an International Perspective* (Springer, 1988).

<sup>31</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, 21.

<sup>32</sup>*Ibid.*, 48.



bellum pium (literally translated as pious war or war according to God's will).<sup>33</sup> *Siyar* aims at limiting the right to wage war to three cases only or else it would be illegal. First, it is permissible only in self-defence, secondly defence of the oppressed and thirdly in defence of the religion. Jus ad bellum permitted in *Siyar*, firstly include war in self-defence for which it becomes compulsory on everyone to fight the attacker in case the regular army is not sufficient to defend the state. Second cause is '*istinqād*' which is very similar to the idea of humanitarian intervention. Such intervention is encouraged in for rescuing the Muslims (as it is duty of every Muslim) and even non-Muslims living in a Muslim state. Thirdly, the permission to go to war is in defence of freedom of religion. Al-Shaybani states that the third condition of permission was for the sake of spreading the message of Islam to all human beings and giving them free choice to convert to Islam if they freely choose to do so without coercion.<sup>34</sup>

Similarly, it is generally believed by scholars that war is compulsory only when it is imposed on the Muslims.<sup>35</sup> Any other case of use of force is prohibited. There is also consensus of the scholars that no one should be forced into or out of religion. Another criteria on which just war has to be based on in Islam is '*Niyah*' or intent.<sup>36</sup> For a war to be both legal and acceptable to God, it not only has to fulfil either one of above mentioned three cases, it also has to be based on the intention for sake of serving God. Only those who follow this criteria are recognized to be doing Jihad and if they die in such a war they are considered martyrs.<sup>37</sup>

In regard to jus in Bello, *Siyar* includes many humanitarian rules that were only recently added into other systems. Indiscriminate killing, for example is absolutely prohibited in Islam as it is mentioned in the holy Qur'ān that killing an individual unjustly is like killing the whole humanity.<sup>38</sup> Moreover, the messenger explicitly disapproved of killing of women and children.<sup>39</sup> Also POWs are ordered to be treated humanely. Such examples depict that violence and punishment of the enemy was never the aim of wars fought on Islamic agenda, rather it is completely the opposite. *Siyar* rejects many cruel practices of pre-Islamic Arabia beheading enemy soldiers and displaying them as war trophies.<sup>40</sup> Furthermore, *Siyar*, both identified and protected the non-combatants like women, children, elderly, frail and worshippers in places of worship, prohibiting their killing during and after the war.<sup>41</sup>

<sup>33</sup>Sherifa Zuhur, and Aboul-Enein Youssef H, *Islamic Rulings on Warfare* (USA: Strategic Studies Institute, US Army War College, 2004).

<sup>34</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, 97.

<sup>35</sup>*Ibid.*, 97.

<sup>36</sup>Zuhur, and Aboul-Enein, *Islamic Rulings on Warfare*.

<sup>37</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, 114.

<sup>38</sup>Al-Qur'ān: al-Ma'ida, 05:32.

<sup>39</sup>Zuhur, Aboul-Enein, *Islamic Rulings on Warfare*.

<sup>40</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*.

<sup>41</sup>Zuhur, and Aboul-Enein, *Islamic Rulings on Warfare*.

Exploring war laws offered by Islam require the concept of *jihad* may be expounded in detail. Contrary to the western influence that translate *jihad* as holy war, its more appropriate translation is ‘struggle,’ ‘effort’ or ‘strife.’<sup>42</sup> Although Al Shaybani did not offer any formal definition of *jihād* in his *Siyar*, yet he used the term in equivalence to the term ‘use of force.’<sup>43</sup> He, however, explained that *jihād* is a war that has to be carried out according to the laws given by God, for His sake and by people that accept authority of God and are followers of his last prophet. Some scholars mention *jihād* as public duty i.e., if it is carried out by some it is not required to be performed by the rest. Al-Shaybani never denies support of fighting non-believers if they decline Islam or peace deal to come under rule of the Muslim state. In contrast, however, he also claims that being strong and showing readiness for war, has a deterrent impact on the enemy, hence making world a safer place. According to *Hanafi* school of thought, war is obligatory on the Muslims only if necessary. Whereas, Al-Shaybani considers jihad an obligation that cannot be discontinued until non-believers accept Islam or sign a peace treaty. It is pertinent to mention that the context in which such thought arose was a constant environment of war and threats of annihilation of the Muslim community in early days of Islam. Furthermore, from the wars fought by the Prophet Muhammad (SAW) it can be concluded that he never practiced aggressive *jihād* or offensive war rather he fought only in the defense of his nation.<sup>44</sup>

*Jihād* as a public duty and tool for peace, imposes several duties and requirements on the individuals participating in it. Under Islam the most important duty of the combatant is having right intention.<sup>45</sup> Having intention of worldly gains is clearly prohibited. This discourages people from starting war based on unjust causes or for egoistic aims. Since the war is being fought for a noble cause, the combatant also has the responsibility that the means and methods used in the warfare are also within recognized permissibility.

#### 4. Jus in Bello in *Siyar*

Whenever Prophet Muhammad (SAW) sent an army or some troops, he would advise its leader to fear Allah in his personal conduct and ensure immunities to the non-combatants like women, children, elderly, frail and worshippers.<sup>46</sup> Later, first Caliph Abu Bakar also forbade destroying of fruit bearing trees and killing of animals except for food during the conduct of war.<sup>47</sup> Furthermore, Al-Shaybani explained that fighters should

<sup>42</sup>John Kelsay, “Al-Shaybani and the Islamic law of War,” *Journal of Military Ethics* 2, no. 1 (2003): 63-75.

<sup>43</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani’s Siyar*.

<sup>44</sup>Cherágh Ali, *A Critical Exposition of the Popular ‘Jihād’: Showing that All the Wars of Mohammad Were Defensive, and that Aggressive War, Or Compulsory Conversion, is Not Allowed in the Koran: with Appendices Providing that the Word ‘jihād’ Does Not Exegetically Mean ‘warfare’, and that Slavery is Not Sanctioned by the Prophet of Islam*, Vol. 1. (Library of Alexandria, 1885).

<sup>45</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani’s Siyar*, 114.

<sup>46</sup>Khadduri, *War and Peace in the Law of Islam*, 206.

<sup>47</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani’s Siyar*, 163.

abstain from unnecessary killing or injuries as aim of war is not to persecute the enemy rather use of force has to follow the rule of proportionality. Act of targeting a non-combatant is permissible only when they are captured for killing a human being or targeting the soldiers and even then they are to be tried under criminal law.<sup>48</sup>

*Siyar* also addresses the topic of military tactics and limitations on the conduct of war by recognizing that practical needs of fighting may compromise immunities of the combatants. For example, in order to break in the enemy fortification, some non-combatants may be killed in the process resulting in unavoidable collateral damage.<sup>49</sup> Additionally lying and breaking promises or mutual agreements is prohibited while fighting with the enemy. Treatment of enemy personnel is also explicitly addressed in *Siyar*, prohibiting unnecessary brutality and mutilation of corpses.<sup>50</sup> Another change that Islam brought in the warfare is the treatment of the prisoners of war (POW). Before all the captured men, properties or land during war was considered right of the possessor and were treated at most as war booty.<sup>51</sup> The prisoners of war were enslaved and it was considered legal to subject them to humiliating treatment and torture.<sup>52</sup> For the regulation of post-war affairs, Islamic international law offers very humane treatment of POWs. For the Muslims captured by enemy it is ordered that he should faithfully follow his parole and liberty. However, if parole is not available then he is allowed to escape or wait for his state to pay ransom to free him from captivity.

On the other hand the enemy prisoners captured by the Muslims enjoy the protection of not being killed merely because they are POW. This, however, does not impede the trial and punishment of prisoners for committing crimes beyond the primitive actions of belligerency.<sup>53</sup> POWs are also ensured the right to the practice of exchanging prisoners along with the compulsion to feed, clothe and treat them well under all circumstance until final decision regarding them is made. Furthermore, women, children, elderly, visually impaired or crippled, and according to some jurist even the peasants and serfs are exempted from execution unless they were actively involved in fighting.<sup>54</sup> POWs were treated humanely even if they were enslaved. *Siyar* also introduced the system of ransom and also freeing prisoners just for the sake of God.<sup>55</sup> By doing so Islam tried to limit the practice of slavery and attempted to eventually eliminate it.

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<sup>48</sup>Ibid., 184.

<sup>49</sup>Ibid.

<sup>50</sup>Hilmī Zawāṭī, *Is Jihād a Just War?: War, Peace, and Human Rights under Islamic and Public International Law*, Vol. 53 (New York: Edwin Mellen Press, 2001).

<sup>51</sup>Stephen C Neff, *War and the law of Nations: A General History* (United Kingdom: Cambridge University Press, 2005).

<sup>52</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, 184.

<sup>53</sup>Hamidullah, *The Muslim Conduct of State*, 161.

<sup>54</sup>Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources," *The Muslim World* 89, no. 2 (1999): 144.

<sup>55</sup>Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*.

## 5. Challenges to Islamic Law on Armed Conflict

It has been observed that Armed Non-State Actors (ANSAs) pose a number of challenges to International Humanitarian Law (IHL). Similarly, the Islamic law on armed conflict is also not immune from such problems. The biggest and the most common challenge faced by both bodies of law in regards to ANSAs is ensuring implementation of relevant principles.<sup>56</sup> Like IHL, the Islamic law of war has a number of protections for civilians as well as combatants, along with punishments for the violator of these protections. However, the Islamic law on armed conflict is unique in the perspective that armed groups having Islamic affiliations often attempt at twisting and moulding the Islamic law in order to legitimize and lend credibility to their worldview. Another issue with implementation of Islamic law of war is that it lacks international appeal as it is hardly ever implemented in states having majority Muslim population. Presently, international community views with scepticism anything that is associated with Islam, mostly due to the bad repute brought by self-proclaimed the Muslim Militant groups and their acts of terrorism.

The concept of *jihād* is the most misused and distorted notion of the Islamic law of armed conflict in the contemporary conflict especially involving an armed group proclaiming it to be their justification to fight. Jihad is not to be performed in individual capacity rather it is communal or general duty, which means that if it is performed by a sufficient number, others will not be condemned for the neglect of it, making administration of *jihād* a matter to be decided by the governments.<sup>57</sup> In the contemporary conflicts, however, the most common claim made by the young fighters coming to the conflict zones from all over the world is that their government is part of *Dar-ul-Harb*. Hence they migrate to *Dar-ul-Islam* to fight the opponents. The idea of perpetual fight between *Dar-ul-Harb* and *Dar-ul-Islam*, in order to eliminate the former is used to attract the vulnerable minds by depicting it as the ultimate goal of every Muslim. However, many instances of their peaceful co-existence, where jihad remained suspended, can be found even in the life of the Prophet Muhammad (SAW). Ten years of peace through the Treaty of *Hudaybia* signed by the Prophet (SAW) himself is just one of the examples.<sup>58</sup> Thus, people misinterpreting the Qur'ānic verse, 'to kill them till the religion only be for Allah,' very conveniently ignore the second part of the verse which limits this reaction by stating that 'there is no aggression except against the aggressors.'<sup>59</sup>

<sup>56</sup>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* 9, no. 4 (2009): 623-649.

<sup>57</sup>Shaheen Sardar Ali, and Javaid Rehman, "The Concept of Jihād in Islamic International Law," *Journal of Conflict and Security Law* 10, no. 3 (2005): 321-343.

<sup>58</sup>Ibid.

<sup>59</sup>Al-Qur'ān, al Baqarah, 02:193.

Another challenge faced by the Islamic law of war is implementation of *Takfīri* ideology by the armed groups. *Takfīr* in literal sense is to declare a Muslim an apostate or non-believer, in contemporary times. However, it is an excuse to sanction violence against any sect or individual that practices Islam in a different manner than those who pronounce *Takfīr*. Mainstream Sunni scholars consider it wrong to engage in the practice of *Takfīr* or excommunication as declaring a Muslim a non-believer or *Kafīr* is a right held solely by Allah.<sup>60</sup> Yet its practice has been observed in the historic precedence of *Khawarij* movement till present day by the insurgent group Islamic State in Iraq and Syria. The Muslims have been the main targets of Islamic State since 2014 based on the same ideology.<sup>61</sup> *Takfīr* has been used by the Islamic State as tool to discredit Shia sect as they consider only those following the version of *Sunni* Islam are the true the Muslims and consequently they feel responsible to purge the society from the misguided versions of Islam. Practice of *Takfīri* ideology appears to be the common feature of most contemporary Islamic militant groups as Al Qaeda. They also embrace it although in a much more selective manner than the Islamic State. Al Qaeda's Ayman Al Zawahiri considers the governments ruling the Muslims as illegitimate and apostate, including all the employees and security forces employed by such governments.<sup>62</sup> Moreover, the Muslims of *Shia* sect are also considered apostate by him as he believes it is a religion based on falsehood.<sup>63</sup>

The most complicated part of the proclaimed Muslim armed groups is that even if they out rightly reject IHL in their actions yet they prefer that they appear to be following the Islamic law despite the fact that they might be misinterpreting it for their own benefit. Suicide bombing is an apt example for this. Suicide by an individual is considered one of the most abhorrent acts that a Muslim may commit as it is seen as a direct violation of the will of Allah.<sup>64</sup> Whereas, suicide bombing is regarded as the biggest spiritual achievement for any Muslim by the Islamist militant organizations. It is portrayed as an act of chivalry and absolute devotion that one is willing to sacrifice his/her life for the cause of Islam and a great reward of martyrdom is promised in the hereafter. Contrary to this portrayal, a suicide bomber in reality is violating Islamic law by committing crimes of killing civilians, mutilating their bodies, destroying civilian objects or properties, violating the trust of enemy soldiers and committing suicide.<sup>65</sup> Such paradoxical practices tarnish the image of

<sup>60</sup>Mohamed Badar, Masaki Nagata, and Tiphonie Tuani, "The Radical Application of the Islamist Concept of Takfir," *Arab Law Quarterly* 31, no. 2 (2017): 134-162.

<sup>61</sup>Jamileh Kadivar, "Exploring Takfir, Its Origins and Contemporary Use: The Case of Takfīri Approach in Daesh's Media," *Contemporary Review of the Middle East*: 2347798920921706. (2020)

<sup>62</sup>Shane Drennan, "Constructing Takfīr: From Abdullah Azzam to Djamel Zitouni," *The CTC Sentinel* (2008).

<sup>63</sup>Ibid.

<sup>64</sup>Munawar A Anees, "Salvation and Suicide: What does Islamic Theology Say?" *Dialogue* 45, no. 3 (2006): 275-279.

<sup>65</sup>Muhammad Munir, "Suicide Attacks and Islamic Law," *International Review of the Red Cross* 90, no. 869 (2008): 71-89.

Islam in the international community at one hand and on the other hand it drives the vulnerable Muslims away from the true teachings of Islam.

As for the challenges posed to the Islamic law on armed conflict, the major concern is that Islamist militant groups do not outrightly reject its rules rather misinterpret them in order to create legitimacy for their existence in the society. Groups like Al Qaeda, Tehrik-e-Taliban Pakistan and Islamic State proclaim to be torch bearers of true Islam and attempt at validating their actions by citing religious excuses. However, the fact that these groups claim to be following Islamic laws on war, indicate they can be opened up to some sort of dialogue, if not with the international community than with Islamic law scholars about their interpretations.<sup>66</sup> Unanimous Fatwas of Islamic scholars against their so-called jihad, however, is also not generating desired results.<sup>67</sup> A more apt way of engaging these groups in order to ensure humanitarian principles are respected in the conflict is through engaging their constituency.<sup>68</sup> Despite giving religious dimension to their actions, the Islamist militant groups primarily have political aims of dominance that cannot be established without the support of the people or their members. Educating and disseminating information of humanitarian principles enshrined in Islam to the masses would not only expose the misinterpretations of Islamic teachings by the armed group about also curtail the number of people joining them with a false hope?

## 6. Conclusion

As the nature of warfare has been evolving over the years, the challenges posed to International Humanitarian Law have also increased in number and complexity. As the majority of armed conflicts presently around the world are non-international in nature, involving armed groups proclaiming Islamic affiliation, the Islamic Law on armed conflict add a new dimension to the challenges posed and potential solution to these problems. Historically, the contribution of the Muslims in international law and law of armed conflict are ignored. However, these bodies of law provide clear guidelines regarding permissible actions during warfare, ensuring the elimination of unnecessary suffering and the use of force in proportionality. The Rights of fighter (both during war and as prisoners of war) and non-fighters (women, children, elderly) are clearly stated. Yet vested interests of armed groups and states alike inspire disrespect of both international and Islamic laws. The political interests of the powerful states tend to undermine the rights of armed groups through the practice of labelling them as terrorists. Whereas, armed groups rationalize their brutal war tactics as a need of asymmetrical warfare.

<sup>66</sup>Annyssa Bellal, "Beyond the Pale? Engaging the Islamic State on International Humanitarian Law," In *Yearbook of International Humanitarian Law* Volume 18 (2015): 123-152, (The Hague: TMC Asser Press, 2016).

<sup>67</sup>Kamala K. Dash, "The Fatwa Against Terrorism: Indian Deobandis Renounce Violence but Policing Remains Unchanged," In *Radicalisation Crossing Borders International Conference, Melbourne, Australia*. 2008.

<sup>68</sup>Bellal, "Beyond the Pale? Engaging the Islamic State on International Humanitarian Law."

In order to generate mutual respect for law by the armed group and the state, the ideal solution is to engage them formally in its interpretation and operationalization. The Islamist armed groups are additionally inclined to have apparent religious and ethical outlook despite their violations of the same principles. This can be used to the benefit in order to generate compliance to the law by educating the community from which they attract their fighters about correct interpretation of Islamic laws. IHL and the Islamic law on armed conflict both complement each other and in order to enhance observance of both the bodies of law in the contemporary conflicts, benefits should be collected from each. An additional feature in the Islamic law of war providing combatant status to the fighters of armed group, may prove to be the key element needed to address some of the challenges by armed non-state actors posed to IHL.

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