

War and Islamic Humanitarian Law: Appraising Warfare and Distinction as a Principle in Hostilities

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Abstract

War is a complex phenomenon which was used as a tool for carrying out international relations before the advent of Islam in Arabia. The misconception that Islam promotes war and sets no limit in means and methods of warfare is illusive. Islam met warfare and has made it legitimate (though to be prosecuted within its legal principles). The only legitimate war Islam permits is the war that is solely waged for the sake of Allah. During conduct of hostilities, Islam has put in place certain norms to guide the warfare and has made principle of distinction as one of the fundamental rules. The principle requires belligerents to always distinguish between combatants and civilians and between civilian objects and military objectives, and shall accordingly direct their military operations only against military objectives. Further, Islam insists that civilians must enjoy immunity against direct attack as long as they do not participate in the hostilities. This fact depicts that thousand years back, Islam regulates conduct of its military in warfare. Thus the paper examines legitimacy of war in Islam and the conduct of warfare within the context of the principle of distinction.

Key words: Civilian, Combatant, Jihad, Legitimate Target, Protection

1. Introduction

Islam as a religion of peace discourages aggression and made war a legitimate phenomenon only when it becomes necessary. Even in cases where Islam approves war as a legitimate option and allows Muslims to participate in the hostilities, it has at the same time provided for rules to regulate the prosecution of the war. One among the rules and principles set out by Islam for the purpose of regulating conduct of hostilities hundreds of years back is the basic need to distinguish between combatant and civilian and between civilian objects and military objectives, and accordingly, military operations shall only be directed against military objectives.

It is against this background that the paper intends to discuss Islamic Humanitarian law, which forms integral part of Islamic International law (*Siyar*). The paper will consider concept of jihad and when war becomes a legitimate option in Islam. The various classifications of conflicts in Islam will also be considered. The last segment of the paper will discuss principle of distinction under Islamic law. In doing so, all the necessary elements of the principle such as combatant, civilian, civilian objects, military objectives and the position of civilian who have taken a direct part in the hostilities will be discussed.

2. Meaning of Islamic Humanitarian Law

Islamic law is defined as a regulator of one's life as a Muslim or the commandments or law regulating the conduct of Muslim in the whole of his life not only as individuals but also as community¹. Islamic law is also conceived as a path which embodies the totality of Islamic guidance, which seeks to govern every aspect of a believer's life². However, the topic of this paper is not centered on Islamic law in general but certain aspect of Islamic law. Thus, the relevant segment of Islamic law which covers substantially the subject of the paper is the general rules of international law (*Al-Siyar*), which applies to the relations of states during war and peace. Under Islamic international law, Islamic Humanitarian law is an essential element and fundamental principles of the Islamic legal system.³ It is based not only on the notion of armed conflict but also on the Muslim faith and on the nature of the Islamic legal system, and its conception of relations between the Islamic world and the world outside it⁴. Islamic Humanitarian law is an integral part of Islamic international law (*Siyar*), which simply referred to as those rules and practices that *sharia* allows in international relations⁵. Thus, International law in the Islamic system differs from contemporary notions, as the Islamic law of nations was an integral part of Islamic law rather than a separate body of law⁶.

Al-Siyar is the relevant branch of *sharia* known to early Muslim jurists and was consistent with concept of international law of the time⁷. It relates to the relationship between Muslims and non-Muslims, which is traceable to the activities of the first Muslim community of Medina in 630 AH. Although it originally pertained to the Prophet Muhammad's conduct in war and it was subsequently formalized to encompass laws on the conditions for peace and neutrality⁸. Imam Abu Hanifa was the first scholar to institutionalize and formalize the concept of *al-siyar* in series of lectures he gave titled "the Muslims laws of war and peace". Thereafter, his lectures were compiled by his student, Muhammad Ibn Hassan Shaybani for the text "Introduction to the Laws of Nations". The text was later translated to English by Majid Khadduri entitled "The Islamic Law of Nations" and it is the basis for the contemporary Islamic International law (*Siyar*)⁹.

3. The Concept of Jihad

The significant aspect of *Siyar* which guides the Islamic Humanitarian law is the concept of Jihad. Jihad has been a subject of great debate among Islamic legal scholars, particularly with respect to its meaning, the duty it entails for Muslims and when the use of force is authorized by Islamic law¹⁰.

¹ Kyari, M., 'Application of Sharia in Borno Under the Colonial Rule (1902-1960)' in Mua'zu, M.A. and Olayowola A., (eds), *Perspective in Sharia*, (Sakirabe Publishers, Maiduguri, 2002)P188. Islamic law since the beginning of its inception has been a universal message, and call to all mankind, a mercy to all worshipers of Allah, Arab or non Arab, to all of Allah's countries East and West, to all colours white or black. Therefore, it is of universal application and has all the elements and forces that make it comprehensive, practicable and moderate. Its divine origin reveals only the fundamental and inviolable principles, leaving a due scope for the human intelligence to workout details and makes the necessary adaptation. See Abdal-Ati, H., *Islam in Focus*, (Dar Al-Manarah, Egypt, 2009) P174

² Yadudu, A.H., 'Benefit of Shariah and Challenges of Reclaiming Heritage' in Mu'azu, M.A. and Olayiwola, A., (eds), *Perspective in Sharia*, (Sakirabe Publishers, Maiduguri, 2002) P11. Islamic law covers both spiritual and mundane aspect of human life. The spiritual aspect deals with religious observances and it encompasses the rules which regulate the relation of man with Allah. It also makes clear what is obligatory on man towards his creator with regard to showing obedience to Him and omitting the acts forbidden by Him. See Hassan, H.H., *An Introduction to the Study of Islamic Law*, (Adam Publishers and Distributor, New Delhi 2009) P9

³ Islamic Humanitarian law shares the same sources with Islamic law. Its sources include Qur'an, Sunnah (tradition of the Prophet (PBUH)), Ijma (consensus opinion of Muslim jurists), Qiyas (analogical deduction), treaties and peace agreements made by the Muslim leaders with non-Muslims, orders that are issued to commanders in the field by the early companions of the Prophet and the opinions and interpretations of great Muslim jurists. Bennoune, K., "As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence", (1994) Vol.15, No 2, MICH. J. INT'L L. P613. See also Mohammed, U.S., Islamic Concept of the International Law (The Siyar), Ahmadu Bello University Law Journal (A.B.U.L.J.) Vol.27-28, 2008, P50

⁴ Sultan, H., The 'Islamic Concept' in UNESCO, *International Dimensions of Humanitarian Law*, (UNESCO, Paris, 1988) P29

⁵ Aboul-Enein Y.H., 'Islamic Rulings on Warfare' available at http://www.au.af.mil/au/awc/awcgate/ssi/islam_warfare.pdf (Visited 11th October 2010)

⁶ Bonnoune, K., Op.Cit, P612

⁷ An-Na'ima, A.A., *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, (Syracuse University Press, Syracuse, 1996) P143

⁸ Mohammed, U.S., Op cit, P48

⁹ Aboul-Enein, Y.H., Op cit.

¹⁰ Bennoune, K., Op cit, P614

The term Jihad comes from the Arabic verb “*jahada*” meaning to struggle or exert¹¹. According to An-Na’im¹², the commonly used Islamic term for the use of force in international relations is Jihad. It literally means effort and exertion, which includes but is not necessarily restricted to effort and exertion in war¹³. In the words of Abdalati¹⁴, Jihad means to struggle to the utmost of one’s capacity, a war that is waged solely in the name of Allah against those who practice oppression as enemies of Islam,¹⁵ a war that is waged to spread Islam without compelling others to convert to Islam¹⁶. Thus, Jihad can be regarded as violent conflict¹⁷ but it is wrong to constantly allude to the fact that Jihad is always a violent conflict because Jihad can be one’s struggle against his evil desires, against Satan and against one’s human enemies. It also implies one’s striving and undergoing hardship and forbearing in great difficulties in obtaining his livelihood¹⁸. Jihad also entails that each Muslim must strive to live up to the tenets and requirements of his religion by constant manifestations of charitable deeds¹⁹. It is merely a duty to be fulfilled by each individual, a religious duty as well as it was above political obligation imposed collectively upon the subjects of the state so as to achieve Islam’s ultimate purpose²⁰. Thus, Jihad as such was not a casual phenomenon of violence; it was rather a product of complex factors that Islam worked out its jural-doctrinal character²¹.

The Prophet was reported to have said that the exertion of force in battle is a minor Jihad, while self exertion in peaceful and personal compliance with the dictates of Islam constitutes the major or superior Jihad, and the best form of Jihad is to speak the truth in the face of an oppressive ruler²². Therefore, reference to Jihad generally as holy war is inaccurate since superior or best Jihad refers to self-exertion against evil rather than violent conflict²³.

Another significant aspect of *Siyar* which took a center stage in Islamic Humanitarian law is the dichotomization of the world into two abodes i.e. the abode of Islam (*dar al-Islam*) and the abode of war (*dar al-harb*). The abode of Islam consists of countries where Muslims exercise power, rules of Islamic law are implemented and Islamic rituals are performed²⁴. The abode is made up of Muslims and people of the covenant (*Dhimmi*)²⁵. On the other hand, the abode of war consists of countries outside Islamic sovereignty and the religious and political rules of Islam are not implemented in such countries. The people of the abode are considered belligerents²⁶. The communities of the *dar al harb* are regarded as being in a state of nature for they are incompetent to enter into international relations with Islamic state on the basis of equality and reciprocity because they failed to conform to Islam’s ethical and legal standards and they carry with them no implied recognition of status under Islamic law²⁷.

¹¹ Khadduri, M., *War and Peace in the Law of Islam*, (The Lawbook Exchange Ltd, New Jersey, 2006) P55

¹² An-Na’im, A.A., Op cit, P144

¹³ Ibid Pp144-5

¹⁴ Abdal-Ati, H., Op cit, P177

¹⁵ According to Ruxton, war is a conjoint duty incumbent on all Muhammadans, even though it may be waged against one of their own chief guilty of treason or against a chief who withholds the legal faith or against an unjust or tyrannical government. See Ruxton, F.H, *Maliki Law, Being a Summary from French Translations of the Mukhtasar of Sidi Khalid*, (El-Nahar Press, Cairo, 2004) P73

¹⁶ Abdal-Ati, H., Op cit, P177.

¹⁷ In violent Jihad the struggle was not proclaimed for enmity against an innocent peace-maker who has not harmed the Muslims and has not fought them, nor show symptoms of enmity against them. See Qaradawy, Y., *Introduction to Know Islam*, (Al-Waseelat Publishers, Lagos, 1995) P281

¹⁸ Al- Marzouqi, I.A., *Human Rights in Islam*, ((NP), 2005) P92

¹⁹ Farah, C.E., *Islam Beliefs and Observances*, (Barron’s Educational Series, New York, 1970) P158

²⁰ Mohammed, U.S., Op cit, P55

²¹ Khadduri, M., Op cit, note 11, P69

²² Cited in An-Na’im, A.A., Op cit, P145. See also Bennoune, K., Op cit, P615

²³ Bennoune, K., Op cit, P615

²⁴ Al-Marzouqi, I.A., Opcit, Pp 107-9

²⁵ Dhimmi are non Muslims who live in the territory of Islam in peace. It is the duty of Muslims to protect them and their property. Dhimmi do not have to render military service, even if their lands or districts which constitute a part of the Islamic state are attacked by a foreign power. See Al-Marzouqi, I. A. Op cit, P108

²⁶ Zuhili, W., ‘Islam and International Law’ (2005) Vol. 87, No. 858, *International Review of the Red Cross*, P278. An-Na’im pointed out that the theoretical permanent state of war between Muslims and non Muslims did not necessarily mean violence or fighting. An-Na’im, A.A., Op cit, P150

²⁷ Khadduri, M., *The Islamic Law of Nations: Shaybani’s Siyar*, (The John Hopkins Press, United States of America, 1966) P12

Thus, the relationship that exists between the two abodes is war²⁸. This is a confirmation or rather a description of the bad relations that prevails in the past because of continues attacks on Muslims and the recurrent war between Muslims and others. In addition to the two abodes, Shafi'i jurists added a third abode known as the abode of peaceful arrangement (*dar al suhl*) or adobe of covenant (*dar al-ahad*). It consists of countries which the Islamic nation has a formal treaty or at least non belligerent relations²⁹. However, some jurists particularly the Hanafi jurist, did not recognized the third abode. They argued that if the inhabitants of a territory concluded a peace treaty and paid tribute to the Islamic state, they automatically become part of the *dar al Islam* and its people are entitle to the protection of the Islamic state³⁰.

4. Legitimacy of War in Islam

Prior to the advent of Islam, the use or threat of force was the norm among the various entities or polities of Arabia. When the first Muslim state was established in seventh century, force was the basic method of conducting what is known today as international relations³¹. Thus it has become inevitable that Islam should endorse the use of force in Muslims relations with non Muslims but it has introduced new norms to control reaction for going to war as well as its actual practice. Therefore, Islam brought warfare under control and subjected to law as it had not been in pre Islamic Arabia³².

However, among the objects of Islam is peace among mankind, instead of war and struggles³³. It is provided in the Qur'an that Allah is the source of peace and the bestower of security³⁴. In yet another verse, Allah forbids promoting disorder in the earth after peace has been established³⁵. Allah prohibits causing mischief on the earth, especially after it has been set in order. When the affairs are in order and then mischief occurs, it will cause maximum harm to the people. Thus, Allah forbids causing mischief and ordained worshipping Him, supplicating to Him, begging Him and being humble to Him³⁶. The Prophet (PBUH) was reported to have said the worse of names is war and it is bitter³⁷. Therefore, Islam preaches no coercion or compulsion in religion³⁸ but principle of peace and security is a firmly established rule that should not be violated in any way, except in the case of aggression by others and when the enemy resorts to arms³⁹. In line with this principle, should anyone violate the rights of the Islamic state, disturb its peace, or endanger its security or exploit its peaceful policies, the state must hasten to defend itself and suppress all attempts of such a nature. It is only under this circumstances, Islam justifies war and prescribed moral principles to be followed to confine its scope to a minimum and carry its course only as far as it is necessary⁴⁰.

²⁸ Though it should be noted that in the contemporary world it is wrong to assume that the division of the world into two abodes implies continual battle between Muslims and non Muslim states because this is not the case as this division has no textual support, for no provision is made for it either in the Qur'an or in the Hadith. See Zuhili, W., Op cit, P279. In addition, the existence of permanent state of war between the two abodes within the context of contemporary international relations could simply mean non recognition of *dar al harb* by the *dar al Islam*. Khadduri, M., Op cit, note 33, P13

²⁹ The Prophet (PBUH) was reported to have said that anyone who kills a person from among the people with whom there is treaty, will not smell the fragrance of paradise, although its fragrance reaches to a walking distance of forty years. Cited in Qurdawi, Y., *Halal Wal haram Fil Islam*, (Al-Tauheed Publishers Company, Lagos, 1989) P325

³⁰ Khadduri, M., Op cit, note 27, P13. See also Bennoune, K., Op cit, P619

³¹ An-Na'im, A.A., Op cit, P142

³² Bennoune, K., Op cit, P620

³³ Al- Qaradawy, Y., Op cit, P280

³⁴ Qur'an 59 Verse 23. The verse provide thus 'He is Allah, beside whom La ilaha illa Huwa (none has the right to be worshipped but He), the king, the Holy, the One Free from all defects, the Giver of security, the Watcher over Hiss creatures, the All-Mighty, the Compeller, the Supreme....'

³⁵ Qur'an 7 Verse 56. The verse provides thus 'And do not do mischief on the earth after it has been set in order, and invoke Him with fear and hope. Surely, Allah's mercy is (ever) near unto the good doers.'

³⁶ Ibn Kathir, Abridged by a Group of Scholars Under the Supervision of Al-Mubarakpuri, S.S., 1st Edition, (Darussalam Publishers and Distributors, Riyadh 2000), P82

³⁷ Cited in Al- Qaradawy, Y., Op cit, P284

³⁸ Qur'an 2 Verse 256 reads "there is no compulsion in religion, verily the right path has become distinct from the wrong path. Whoever disbelieves in Taghut and believes in Allah, then he has grasped the most trustworthy hand hold that will never break: And Allah is All-Hearer, All-Knower". See also Qur'an 109 Verse 1-6

³⁹ Zuhili, W., Op.Cit,P270

⁴⁰ Abdal-Ati, H., Op.Cit, P174

Moreover, Islam abolished all kinds of warfare except Jihad, as such, only a war which has an ultimate religious purpose, i.e. to enforce Allah's law or to check transgression against it, is a just war. All other forms of fighting are prohibited within or outside the Muslim brotherhood⁴¹. In other words, Islam restricted the use of force in international relations to self defense and the propagation of Islam⁴². These were the only legitimate reasons for war in Islam. With respect to war for self defense, Muslims are not enjoined to proclaim for enmity or war against an innocent peace-maker who has not harmed the Muslims and has not fought them, nor shows symptoms of enmity against them. In other words, those who do not start an aggression, it is not permissible to start fighting them, because Allah had forbidden aggression and does not like aggressors⁴³. The Qur'an provides thus

*"Permission to fight back is given to those who have been oppressed, and surely Allah is Most-Powerful to bring their victory. Those who were repelled from their homes unjustly only that they said: Our Lord is Allah."*⁴⁴

Ibn Abbas was reported to have said that they were driven out of Makkah to Madinah unjustly, i.e. Muhammad (PBUH) and his companions only because they said our lord is Allah. In other words, they had not done anything to their people or committed any wrongs against them, apart from the fact that they believe in the Oneness of Allah and they worshipped Him Alone, with no partner or associate⁴⁵. Therefore, whosoever interferes to stop the word of Allah then should be fought, but whosoever does not intervene he is not to be fought⁴⁶. Muslims can only resort to combat in defense of their existence and to repel aggression without any influence from an oppressive Sultan, an unjust ruler or a despotic leader.⁴⁷

Furthermore, in the contemporary period, this widely accepted notion of the defensive jihad was first put to test in Afghanistan in the 1980s. After the Soviets invaded Afghanistan in 1979 to prop up a failing communist government, Islamic scholars throughout the Muslim world called for jihad. Thousands of Muslim fighters flocked to Afghanistan to fulfill their religious duty, supported by Islamic charities, wealthy individuals and governments in Muslim countries such as Saudi Arabia, Kuwait and Pakistan⁴⁸. Islamic scholars and leaders of Islamic states alike concurred that the jihad was an Islamic duty that could include fighting, financial support, humanitarian work or verbal assistance, depending on an individual's capacities and resources⁴⁹.

Nevertheless, there is progression from the use of force for self defense to use of force for propagating Islam. This is in view of the fact that upholding Islam is considered by *sharia* to be a legitimate reason for the use of force and such force can be used even against Muslims whose conduct is deemed to be subversive of the Muslim community or detrimental to the interest of Islam⁵⁰. It is legitimate to wage war for the purpose of propagating Islam without necessarily compelling others to convert to Islam⁵¹. Thus, Islam permits war for the propagation of Islam, sanctioned and regulated the use of force by Muslims against non Muslims not only in self defense but also as a means of propagating Islam⁵².

⁴¹ Khadduri, M., Op cit, note 17, P69

⁴² Though some modern Muslim scholars proclaim that sharia permitted the use of force only in self defense. However, the assertion is unfounded because both the Qur'an and Hadith did in fact, towards the end of the Prophet's life, sanction the use of force in propagating Islam as well as in self defense. See An-Na'im, A.A., Op cit, P148

⁴³ In Qur'an 2 Verse 190 Almighty Allah says "fight those who fight you but transgress not the limits. Truly Allah likes not transgressors". See also Sabiq, S., *Fiqh Us-Sunnah by the Doctrinal Writings of the Holy Prophet*, Translated by Matraji, F.A.Z., Vol. IV, (Dar El Fikr, Beirut, 1996) P69

⁴⁴ Qur'an 22 Verse 39

⁴⁵ Ibn Kathir, Op cit, Pp584-5

⁴⁶ Al-Marzouqi, I.A., Op cit, P95

⁴⁷ Qur'an 4 Verse 75 reads "And how can you not fight in the cause of Allah and to save those women and children who have been oppressed and who pray, Our Lord deliver us from this land whose people are oppressors and make for us from you a protector, and make for us from you a helper". See also Zuhili, W., Op cit, P271

⁴⁸ Wiktorowicz, Q. and Kaltner, J., 'Killing in the Name of Islam: Al-Qaeda's Justification for September 11' (Summer 2003) Vol. X, No. 2, Middle East Policy Council Journal, also available at

<http://ics.leeds.ac.uk/papers/vp01.cfm?outfit=pmt&folder=10&paper=540>

⁴⁹ Ibid

⁵⁰ An-Na'im, A.A., Op cit, P150

⁵¹ Abdal-Ati, H., Op cit, P177

⁵² An-Na'im, A.A., Op cit, P148

In addition, offensive jihad functions to promote the spread of Islam, enlightenment and civility to the *dar al-harb* (domain of war). In most contemporary interpretations, the offensive jihad can only be waged under the leadership of the caliph (successor to the Prophet). It is tempered by truces and various reciprocal agreements between the Islamic state and non-Muslim governments, such as guaranteed freedom of worship for Muslim minorities. Today, very few focus on this form of jihad⁵³.

However, some Islamic scholars (the modernist) maintained that the use of force does not include offensive warfare but only permits self defense and that faith is not intended to be spread by force. They uphold that the basis of international relations in Islamic law is peace and force is only permissible in a just war⁵⁴. The modernist further opine that state is obliged to refrain from engaging in wars prompted by differences in religious belief or for exploitation of other people's resources and state is allowed to defend the faith, the territorial integrity of the state and to preserve peace in the world⁵⁵. Therefore, legitimate war in Islam is fair war, meaning that those who wage war against Muslims are to be fought⁵⁶.

5. Typology of Conflicts in Islam

Concept of Islamic Humanitarian law did not draw distinction between the various types of war or armed conflict but it has classified conflicts into various classes with the same rule governing the classification because the rules were laid down by the same divine authority to be observed by all and applied without distinction or discrimination⁵⁷. Islamic scholars considered different types of conflict, which might be waged against Muslims as well as non Muslims.

The first permissible form of war is the Jihad against unbelievers or polytheists⁵⁸. The Prophet (PBUH) is reported to have said confront the polytheist with your hand, your tongue and your property⁵⁹. In another tradition, the Prophet (PBUH) laid down condition precedent to waging war against the unbelievers. The Prophet (PBUH) said: if you encounter an enemy from among the non Muslims, then offer them three alternatives, whichever of these they may accept, agree to it and withhold yourself from them; so call them to embrace Islam, if they accept, then agree to it and withhold yourself from them. If however, they refuse, then call them to pay the *Jizya*⁶⁰. If they accept, then agree to it and withhold yourself from them. If they refuse, then seek help from Allah and fight them⁶¹. Therefore, no compromise is permitted with those who fail to believe in Allah or pay the Poll tax, they are either to accept Islam, pay *Jizya* or fight⁶².

There is Jihad against apostasy. Apostasy is the renunciation or abandonment of the Islamic faith for any other religion by one who professed it⁶³. It is considered a capital crime in Islam for one to change his Muslim identity⁶⁴. Jihad against apostasy is targeted at people who have been adjudged Muslims irrespective of whether they were born into it, or had embraced it later, if they convert to any other religion⁶⁵.

⁵³ Wiktorowicz, Q., and Kaltner, J., Op cit.

⁵⁴ The modernist based their opinion on these Qur'anic verses: Qur'an 7 verse 56 which reads "And do not do mischief on the earth, after it has been set in order...."; Qur'an 109 verse 6 also states "to you be your religion and to me my religion"; and Qur'an 59 verse 23 which states that "Allah is the source of peace and the bestower of security".

⁵⁵ Bennoune, K., Op cit, P617

⁵⁶ Zuhili, W., Op cit, P282

⁵⁷ Sultan, H., Op cit, P32

⁵⁸ Aboul-Enein, Y.H. and Zuhur, S., Op cit, P5

⁵⁹ Sunna Abu Dawud and Al-Nasa'i. In Sahih Jami'I Al-Saghir, P3090

⁶⁰ Jizya is a tax impose upon non Muslims leaving in an Islamic state as consideration for the security of their life and property enjoyed from an Islamic state.

⁶¹ Cited in An-Na'im, A.A., Op cit, P148

⁶² Khadduri, M., Op cit, note 17, P75. See also Bennoune, K., Op cit, P116

⁶³ Bambale, Y.Y., *Crimes and Punishments Under Islamic Law*, (Malthouse Press Limited, Lagos, 2003) P74

⁶⁴ Badawi, N., 'Islamic Jurisprudence and the Regulation of Armed Conflict,' (2009) available at http://ihl.ihlresearch.org/data/global/images/Islamic_Jurisprudence_Regulation_AC.pdf (Visited 10th November 2010)

⁶⁵ Abubakar, M.S., 'The Role of the Sharia in Solving Armed Conflicts Between Muslims or Between Muslims and Non Muslims' in Aliyu, I.A., (ed), *Alternative Dispute Resolution and Some Contemporary Issues*, (M.O. Press & Publishers Ltd., Kaduna, 2010) P174

Apostasy may take place in two forms i.e. either the believer converted from Islam without intention to join the *dar al harb* or a group of believers having renounced Islam joined the *dar al harb* or separated themselves in a territory constituting their own abode⁶⁶. Thus, where the apostates remain within the domain of Muslim community without escaping to places that will keep them distinct from the Muslim community and remain within the reach and power of the Muslim leadership they will not be fought⁶⁷. Where they have fled from the fold of Muslim community and taken shelter within the domain of non believers, so that they can resist, it is compulsory to wage war against this group after a respite and excuses have expired. They are to be fought whether they are advancing or retreating⁶⁸. The crime of apostasy is made punishable so as to close all doors that will debase the sacred notion of the religion of Islam⁶⁹.

Jihad may also be waged against rebels. In Islam, rebellion is considered as a cause of instability and destruction to the socio-political system of the Islamic state. The perpetrators are sanctioned by death penalty and it is used as political weapon of Islam for suppression of rebellion and disorder⁷⁰. In cases where the rebels are warned and they persist, then they should be fought but not in the same way infidels will be fought. The fight should be intended to serve as a deterrent but not to exterminate⁷¹. In conducting the war, the leader is permitted to fight only those who come out to combat the forces of the state⁷². However, where the rebels did not disobey the leader of the *Ummah* and have not moved to seclusion but remain within the authority of the ruler they should not be fought⁷³.

Jihad against brigands and deserters is permitted in Islam. It is a war that is targeted at a group of mischief makers who take up arms against members of the society by blocking the highway, robbing and/or killing people. The group is deemed to be waging war against Allah and His messenger and the state must stand to curb their excesses. Thus, Almighty Allah said:

“Indeed the penalty for those who wage war against Allah and His messenger and strive on earth (to cause) corruption is none but they be killed or crucified or that their hands and feet be cut off from the opposite sides or that they be exiled from the earth, that is for them a disgrace in this world and for them in the hereafter is a great punishment”⁷⁴

The phrase “wage war” mentioned in this verse means oppose and contradict, and it includes disbelief, blocking roads and spreading fear in the fairway. This verse does not spare a person (Muslim or Idolater) from punishment if he kills, causes mischief in the land or wages war against Allah and His Messenger and then joins rank with the disbelievers, before the Muslims are able to catch him. He will still be liable for punishment for the crimes he committed⁷⁵.

Lastly, we have Jihad against sedition or dissension. It is one of the teachings of Islam that Muslims are expected to give allegiance to their leader and none should revolt against the leader⁷⁶. Where the dissenters did not renounce the authority of the leader, they are not to be fought and they would be allowed to reside peacefully in the *dar al Islam*. However, the leader should persuade them to abandon their dissenting ideas and conform to the law. If they refused and failed to conform to the law, then war is to be waged against them⁷⁷. Jihad against sedition or dissension is equally fought against a contemnor who abuses or insults the religion or the Prophet. (PBUH).

⁶⁶ Khadduri, M., Op cit, note 17, P76

⁶⁷ Abubakar, M.S., Op cit, P175

⁶⁸ Ibid P176. However, jurists suggest negotiation before fighting begins because negotiation may persuade them to return to Islam. Apostates do not have options, they either return to Islam or fight. Khadduri, M., Op cit, note 17, P76

⁶⁹ Bambale, Y.Y., Op cit, P74

⁷⁰ Ibid P83

⁷¹ Abubakar, M.S., Op cit, P177

⁷² Bambale, Y.Y., Op cit, P85

⁷³ Abubakar, M.S., Op cit, P176

⁷⁴ Qur’an 5 Verse 33. The Prophet (PBUH) was also reported to have said that he who levels weapon against my community is not of us. In another tradition, the Prophet said that who disobeys the community and goes out against them dies as a non Muslim. Cited in Bambale, Y.Y., Op cit, P70

⁷⁵ Ibn Kathir, Op cit, Pp 161-2

⁷⁶ Aboul-Enein, Y.H., Op cit, P5

⁷⁷ Khadduri, M., Op cit, note 17, P77

The Prophet (PBUH) was reported to have said- kill the person who abuses the Prophet and whip the one who abuses my companion⁷⁸.

6. Principle of Distinction under Islamic Humanitarian Law

With the advent of Islam through the doctrine of Jihad, warfare was brought under control and subjected to law as it had not been in pre Islamic Arabia. Islamic legal doctrine has subsumed warfare into religion; humanitarian considerations were built into concept of legitimate war⁷⁹. Thereby, it introduces new norms to control the reasons for going to war as well as the actual conduct of hostilities⁸⁰. Consequently, in the architecture of the religio-military structure of Islamic law, law of war (*jus ad bellum*) is connected to the law in war (*jus in bello*). It is in line with this that Islamic doctrine of *bellum justum* has become necessary because a justifiable reason as well as the formalities for the conduct of hostilities is necessary. Therefore, not only was war to be *justum*, but also to be *pium*, that is in accordance with the sanction of religion and the implied commands of Allah⁸¹. So the Prophet (PBUH) and his companions acting in accordance with the Qur'an and *Sunnah* laid down very specific and strict rules for honorable combat⁸². Hence, Islam had permitted war as a necessity and also makes it regulated with its values⁸³. Therefore, Islamic Humanitarian law regulates in detailed the Muslim armies conduct during hostilities⁸⁴.

Among the humanitarian considerations that were subsumed into Islamic Humanitarian law is the principle of distinction. Under the concept of Islamic warfare, responsible leadership, strict discipline and absolute respect for Islamic law together constitute the criterion for drawing the essential distinction between combatants and civilians and between civilian objects and military objectives. Principle of distinction is a basic rule of warfare in Islam⁸⁵. It is a duty in Islamic humanitarian law to distinguish between two categories of persons in case of armed conflicts of whatever nature. Combatants must be distinguished from non-combatants and accordingly, hostilities are to be directed only against combatants⁸⁶. Hence, the obligation to distinguish between civilian objects and military objectives is clearly imperative and significant in conduct of hostilities⁸⁷.

Almighty Allah has made it a duty upon a Muslim army to fight only the combatants. The Qur'an provides- "fight those who fight you but transgress not the limits. Truly Allah likes not transgressors."⁸⁸ This was the first verse about fighting that was revealed in Madinah. Ever since it was revealed, Prophet used to fight only those who fought him and avoided non-combatants. The phrase "those who fight you" implies fighting the enemies who are engaged in fighting Islam and its people and not otherwise. The verse also enjoins Muslims to fight for the sake of Allah and should not be transgressors. According to Al-Basri, the term "transgression" includes mutilating the dead, theft (from the captured goods), killing women, children and old people who do not participate in warfare, killing priests and residents of houses of worship, burning down trees and killing animals without real benefit⁸⁹. In other words, acts of war can be committed only by combatants. In line with this, Muslim scholars unanimously recognize the obligation to distinguish between combatants and civilians⁹⁰. It was reported that during a war, the Prophet (PBUH) saw the corpse of a woman lying on the ground and he said: she was not fighting. How then was she killed? From this statement of the Prophet, jurists have drawn the principle that those who are non-combatants should not be killed during or after the war⁹¹.

⁷⁸ Qazi Ayaz, Al-Shifa, Volume II, P199

⁷⁹ Bennoune, K., Op cit, Pp620-1

⁸⁰ An-Na'im, A.A., Op cit, P142

⁸¹ Khadduri, M., Op cit, note 17, P57

⁸² Bennoune, K., Op cit, P614

⁸³ Sabiq, S., Op cit, P68

⁸⁴ An-Na'im, A.A., Op cit, P149

⁸⁵ Sultan, H., Opcit, P36

⁸⁶ Ibid P37

⁸⁷ Ibid P38

⁸⁸ Qur'an 2 Verse 190

⁸⁹ Ibn Kathir, Op cit, Vol.1, Pp 527-8

⁹⁰ Sultan, H., Op cit, P37

⁹¹ Aduly, M., (ed) *Bulug Al-Maram Min Adillat Al-Ahkam, Attainment of the Objective in Conformity With Evidence of the Legal Judgment*, (Translated by Hibah, G.A., Dar Al-Kotob Al-Ilmiyah, Lebanon, 2008) Hadith No 1313.

In another narration the Prophet (PBUH) stated that fight in the name of Allah and by Allah, and as to the creed of the messenger of Allah. Do not kill an old man, nor a young child, or a woman⁹². Do not grudge, and gather your spoils and do good deeds and be benevolent⁹³.

The first caliph of Islam, Abubakar reaffirmed the position the Qur'an and the tradition of the Prophet (PBUH) in his order to his commander. In his famous decree, Abubakar states- 'I prescribe ten commandments to you; do not kill a woman, a child or an old man, do not cut down trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palm, nor inundate them, do not embezzle, nor be guilty of cowardness.'⁹⁴ These set of instructions and similar codes of conduct deduced from the Qur'an, the tradition of the Prophet (PBUH) and orders of the companions constitute both mandatory injunctions and prohibitions for Muslim army. No Muslim army is allowed to overstep or breach them unless absolute military necessity requires incidental violation that cannot be averted⁹⁵.

Under the Islamic legal precepts, a clear distinction between combatants and non-combatants is drawn in an enemy country. As far as non combatant population is concerned, the instruction of the Prophet (PBUH) is do not kill them⁹⁶. In other words, under Islamic concept, civilians and the civilian population enjoy general protection from the dangers of hostilities and military operations provided they do not directly participate in the hostilities. Meaning, when civilians take part in hostilities they will automatically lose immunity and they will become legitimate target⁹⁷. Non-combatants according to Islamic law include persons such as women, children, the old, the infirm and the monks who are recognized as a separate category of persons entitle to various degrees of immunity from attack based on the instructions of the Prophet and the caliphs. Therefore, right from the time of the Prophet, Islamic Humanitarian law distinguished between combatants and civilians and strongly condemned the indiscriminate use of weapons against combatants and civilians alike⁹⁸.

Today, there is consensus of most Muslim jurists in international relations that non combatants who do not take part in fighting are excluded from molestation⁹⁹. The general protection accorded to civilians naturally implies that they are not subject to attack or to threat of violence¹⁰⁰. Within the context of Islamic Humanitarian law, children, idiots, imbeciles, old men, sick people, the blind, monks and women are recognized as civilians because these categories of people live a secluded life similar to that of women and women are not considered to be a threat to an Islamic state¹⁰¹.

Furthermore, when Malik was asked whether or not Muslims could kill enemy women and children who stand on the ramparts and throw stones at the Muslims and cause confusion in their ranks, he answered: the Prophet has forbidden the slaying of women and children. Malik went ahead to warned against killing women and children who even take active part in the hostilities¹⁰².

⁹² According to Ruxton, children, imbeciles, idiots, old men, impotent and sick people, the blind and monks living in cloisters are to be spared not because of their calling, for they are plunged even deeper than the others in infidelity but because they live a secluded life similar to that led by women. Ruxton, F.H., Op cit, P74

⁹³ Sabiq, S., Op cit, P53. There are some orientalist that use to cite the tradition of the prophet (PBUH) where the messenger of Allah was asked about the household of the polytheists, whose land may be assaulted during the night and that some of their women and offspring may be killed or wounded. Then the Prophet replied 'they are from among them'. Relying on this tradition, the orientalist alleged that Islam does not distinguish between combatants and civilians. However, the commentary of the Prophetic tradition shows that the reply of the Prophet was with respect to unintentional homicide of women and children, not the premeditated one. See also Aduly, M., Op cit, P418

⁹⁴ Imam Malik, A., *Al-Muwatta Malik*, Book 21, Hadith 21: 3: 10. See also Zuhili, W., Op cit, P282

⁹⁵ Zuhili, W., Op cit, P283

⁹⁶ Maududi, A., *Human Rights in Islam*, (Islamic Foundation, United Kingdom, 1980) P36

⁹⁷ Sultan, H., Op cit, P38

⁹⁸ Bennoune, P630

⁹⁹ Ibid P629

¹⁰⁰ Sultan, H., Op cit, P38

¹⁰¹ This position stands in case of apostasy, whoever commits apostasy constitute a threat not only against religion but also against the security of the Islamic state and the apostate should be put to death. In line with this, Hanafi jurists held that a woman apostate is not to be put to death. Bambale, Y.Y., Op cit, Pp79-80

¹⁰² The Prophet (PBUH) was reported to have prohibited those who killed the son of Abu Al-Haqaiq from killing women and children. One off the people said, when the woman of the son of Abu Al-Haqaiq harmed us with screaming I raised sword at

However, the position of majority of Islamic scholars is that the elderly and monks, who were normally protected, could be attacked if they are involved in supporting the enemy's war. This stand is buttressed by the incident that happened in 630 AD after the conquest of Makka, during the battle of *Hunayn*, Muslim fighters killed a man who was over one hundred years old, in the presence of the Prophet. The old man was killed because he was alleged to have provided helpful intelligent advice during the battle to the enemy¹⁰³. It is believed that women and children could be attacked for taking part in the fighting or supporting the war effort of the enemy but only if it was proven that they had actually participated in the hostilities. Thus the conviction on direct participation of women and children could not be based simply on suspicion or likelihood but rather they must have actually served as combatants or guides¹⁰⁴.

Moreover, under Islamic Humanitarian law, not only the civilian population that enjoy immunity from direct attack but also civilian objects. It is presumed that all objects are civilian unless proved otherwise. The nature, use and intended purpose of the objects are the criterion for distinguishing between civilian objects and military objectives¹⁰⁵. It is prohibited to direct attack against civilian objects because they enjoy equal immunity with civilian population against direct attack. The Prophet (PBUH) gave instructions to the Muslim troops deployed against the advancing Byzantine army and he said: "in avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infant at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitant; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children"¹⁰⁶. Similarly, Shafi'i strongly stressed that attack could not be directed against inhabited houses but only against fortresses, unless the homes were located very close to fortresses¹⁰⁷. He further asserts that all lifeless things could be killed but living creatures such as animals could be killed only if the Muslim army believed that the creatures continued existence could strengthen their enemies¹⁰⁸. The actual position is that during conduct of warfare destruction of property is prohibited, except when it is a military necessity¹⁰⁹.

On the other hand, combatant is defined as the person who carries arms against Muslims and has the physical and mental ability to engage in war and actually waged war directly or indirectly against Muslims¹¹⁰. In other words, any person who directly participated in the conduct of hostilities against Muslims is subject to attack. Under the Islamic law of warfare, the legitimacy of a target in the context of a war is typically determined by the capacity of that target or individual to fight against the Muslims. This includes every soldier and leader as well as advisers to the military and the enemy leadership including civilian advisers. The vast majority of civilians however, are excluded from target list because they are not actively engaged in battle, particularly women, children and the elderly, whose capacity to fight is considered minimal in most cases¹¹¹.

her, but when I remembered the prohibition of Allah's messenger (PBUH), I gave up. But for this reason, we would have been relieved of her. Imam Malik, A., *Al-Muwatta' (the Approved)* (Translated by Hibah G.A., Vol.I, Dar Al-Kotob AL-Ilmiyah, Lebanon, 2007) P229

¹⁰³ Badawi, N., Op cit, P10

¹⁰⁴ Bennoune, K., Op cit, Pp630-1

¹⁰⁵ Sultan, H., Op cit, P38

¹⁰⁶ Bennoune, K., Op cit, P629

¹⁰⁷ Ibid

¹⁰⁸ However, Hanafi held the view that everything which the Jihadist could not conquer should be destroyed, including homes, churches, trees and livestock. See Bennoune, K., Op cit, P629. This opinion is weak as it contradicts the law of humanity that is embedded in Islamic Humanitarian law. It is also inconsistent with the traditions of the Prophet (PBUH) where he prohibits the destruction of fruit trees, civilian homes and livestock. At the same time Hanafi's view contradicts the teaching of the commands given to Muslim army by the companions of the Prophet. Moreover, Muhammad has shown that the source of authority upon which such information was taken was a weak one. According to him, Khadduri who was the major source got the information from people who cannot be trusted, and that Khadduri himself added some things to that of Hanafi without disclosing that it was his opinion. See Muhammad Munir, 'The Protection of Civilians in War: The Non-Combatant Immunity in Islamic Law' (September 2011), at 6 <http://works.bepress.com/muhammad_munir/13> viewed 12 April 2013

¹⁰⁹ For instance, destruction for army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses used by the enemy to prevent the Muslim army from advancing. See Zuhili, W., Op cit, P282

¹¹⁰ Mahboub, M.M., *War and the Protection of the Rights of Individuals: An Examination of Islamic and International Humanitarian Laws*, (Triumph Publishing Co. Ltd, Kano (ND)) P19

¹¹¹ Wiktorowicz, Q. and Kaltner, J., Op cit.

Sometimes a person can be considered a combatant even if he does not actually carry a weapon¹¹².

According to Yamani any able bodied man is to be treated as a combatant, whether or not he is actually participating in the hostilities. Obviously, this definition seems to be inconsistent with the Qur'anic provisions, the traditions of the Prophet (PBUH) and the orders given to Muslim army by the companions of the Prophet that hostilities are permitted only between combatants i.e. acts of war may be committed only by combatants¹¹³. Even the combatants have code of conduct during war such as: the prohibition of torture by fire to enemy combatant because the Prophet was reported to have said punishment by fire does not behove anyone except the Master of the fire; combatants should also accord protection to wounded soldiers who are not fit to fight because the Prophet said do not attack a wounded person and that no one should be tied to be killed as Prophet (PBUH) was reported to have prohibited the killing of anyone who is tied or is in captivity¹¹⁴.

Islamic Humanitarian law permitted hostilities between combatants and at the same time confines attack to military targets, which as well include military objectives. Military objectives are those objects that by their nature or use are intended for the pursuit of hostilities¹¹⁵. So hostilities had to be restricted to enemy combatant soldier and then only in the battle field¹¹⁶. Where an object is used to prevent Muslim army from advancing or used to attack them, it has automatically become military objective subject to direct attack¹¹⁷.

7. Conclusion

Jihad is an important aspect of *al-Siyar* which means effort and exertion that includes but is not necessarily restricted to effort and exertion in war. It can be regarded as violent conflict but it is wrong to constantly refer to Jihad as always a violent conflict. Islam Humanitarian law justifies war and has prescribed moral principles to be followed to confine its scope and restricts the use of force in international relations to self defense and the propagation of Islam. In conduct of hostilities, Islam recognizes principle of distinction as a basic rule of warfare. It is a duty in Islamic humanitarian law to distinguish between two categories of persons in cases of armed conflict regardless of whatever the nature of the conflict may be. Combatants must be distinguished from non combatants and accordingly, hostilities are directed only against combatants. There is unanimity of Muslim jurists that civilians are not subject of direct attack and the general protection accorded to civilians implies that they are not subject to threat of violence. So a clear cut distinction is always drawn between combatants and civilians in enemy country. Where a civilian engages in an act that amounts to direct participation in hostilities he loses immunity against direct attack and becomes a legitimate military target.

It is suggested that Muslim army should always take precautionary measures to ensure that they distinguish between combatants and civilians, and accord the civilian population the necessary protection they deserve during conduct of hostilities. It is further suggested that Muslim scholars and students should take the task to orient and educate fellow Muslims and non Muslims through television programs, internet, social networks, newspapers and other mediums of communication on the object of Islam (establishing peace among mankind) and the true meaning of Jihad so that the misconception about Islam being a religion that encourages war and Jihad as a violent war would be cleared.

¹¹² For instance, a person who came to wash and cook for American soldiers in order to feed them to fight such a person is considered a combatant. See Aaron, D., *In Their Own Words: Voices of Jihad*, (RAND Corporation, Santa Monica, 2008) P106

¹¹³ Zuhili, N., Op cit, P282. See also Sultan, H., Op cit, P37

¹¹⁴ Maududi, A., Op cit, P36

¹¹⁵ Sultan, H., Op cit, P38

¹¹⁶ An-Na'in, A.A., Op cit, P142

¹¹⁷ Zuhili, W., Op cit, P283