

## The Law of War and Concept of Jihad in Islam

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### Abstract

[The primary aim of international law has been to prevent and minimize use of force in international conflicts. Before World War II, Western scholars were preoccupied with the idea of what constitutes a “just war”; since 1945, the international community has more pragmatically focused on achieving consensus on basic principles to govern use of force. Today, use of force is considered legitimate for the purposes of self-defense, ending civil war in a neighboring country, reprisal, protection of state nationals in another country, humanitarian interventions and, lately, “hot pursuit.” All of these reasons, except the last, are mentioned in the Qur’an as grounds for using force, i.e. jihad with the sword. The view that Islam assumes all non-Islamic territories as enemies by default is false: the Islamic ideal for international relations is peaceful and just co-existence, and Muslims were the first to incorporate principles of neutrality in their international dealings. The view that Muslims are allowed to use force to convert non-Muslims to Islam is also wrong; Muslims are expressly forbidden from using force for this purpose. Use of force is only one aspect of jihad, which means to struggle, and Muslims may resort to it only in clearly specified situations, and then, only in strict compliance with defined moral principles, for example, that no non-combatant may be hurt, no treachery may be committed, and action may only be taken under a legitimate political authority. The concept of jihad with the sword in Islam is organically related to other forms of jihad a Muslim is committed to, such as the struggle for spiritual purification, deeper knowledge, a better society and peaceful spread of Islam through jihad with the pen, money, and tongue. Some of the Islamic principles for jihad with the sword, e.g. that war is not aimed at destroying the enemy but at weakening his power, have only recently been incorporated in contemporary international law. – Editors]

International law, as developed by different civilizations at different times, has aimed at one basic objective, namely, to prevent war and, where war becomes inevitable, to control and minimize the use of force containing the war to a bare minimum. This being the objective, the only true criterion for measuring the success or failure of an international law and, particularly, a law of war, is whether or not it has prevented, contained or minimized the use of force. The extent of success of a law of war should be decided in the light of this basic criterion. Mere expressions of pious wishes and impressive ideals, and eloquent declarations and announcements should not be given much weight in considering whether a law has succeeded or failed.

In the light of the relevant documents of the United Nations (UN) and other international bodies, particularly those dealing with the foundations of international humanitarian law, the purpose of international law is:

- to prevent war;
- to ensure that international or inter-state disputes are resolved peacefully;
- if war becomes inevitable, to contain it to a bare minimum;
- to minimize the effects of war, particularly for those who are not belligerent and are not taking active part in any belligerent activity; and, finally,
- to provide protection to those accidentally affected by war.

Despite the great efforts made by lawyers and jurists in different traditions and in different eras of human history, international law has remained unsuccessful in controlling the powerful and protecting the weak. There are very few examples in human history when a powerful country, a powerful monarch or a powerful army bent upon waging war could be either prevented from war or cajoled into avoiding it merely with reference to legal principles and moral considerations. So far, this remains an ideal yet to be realized by human beings. However, despite the general consensus in human societies that war should be avoided as far as possible, there has always been a consensus that war is inevitable in certain conditions where the use of force should be allowed. But the most difficult question remains: who decides that a particular war or use of force at a certain moment is permissible and justified?

In the past, almost up to the beginning of the 20th century, many Western writers relied on the concept of what they called a “just war.” International legal discourses concentrated on developing a viable and precise concept of a just war. A number of principles were advanced to identify a just war and to distinguish it from an unjust war; however, in practical terms, it was always the powerful who decided that their war was a just war. The wars fought by the weak or by the defeated were always considered by the victorious and the powerful to be unjust wars. While victory has always had many claimants and inheritors, defeat has had none. Defeat was always left without anybody to claim it. This was because a ‘just’ war was always fought by the powerful.

Who, then, can prevent the actual use of force by the powerful? Can a moral motivation or a religious orientation prevent war? Or could a determination on the part of those on the sidelines, outside the arena of war, effectively reduce the use of force? These questions are relevant to discussions on the Islamic law of war and the Islamic concept of jihad.

Before the Second World War, the law of war was extremely ineffective and weak for the purposes of controlling the powerful and minimizing or containing war. It consisted of certain treaties and agreements that had been entered into by different countries. In addition to these, there were customary laws based on customary principles and conventions that were adhered to, at least theoretically, by scholars and jurists.

It was mostly after 1945 that greater details for the law of war were advanced that were more precise and relevant to world realities. The Charter of the United Nations has given new dimensions to the law of war. For the first time in human history, in the late 1940s, a consensus was achieved, at least theoretically, on a set of basic concepts and principles on the basis of which the law of war was to be evolved and the mechanism to prevent the use of force was to be developed. As submitted, the earlier jurists had mainly concentrated on the concept of just war. They had engaged themselves for the most part in developing principles and criteria for categorizing wars as just or unjust wars. St. Augustine — a great name in Christian history and theology, Hugo Grotius, who is considered to be the father of international law, at least in the West, and many other scholars and writers were busy, up to the beginning of the 20th century, in unending discussions on just and unjust war. The general tendency of these writers was to develop a legal mechanism whereby all wars, excepting the just war, could be prohibited and considered illegal. But, in practice, it was the logic of force that prevailed rather than the logic of argument and wisdom. Contemporary international law, the core of which is embodied in the Charter of the United Nations and other international instruments and conventions, provides comparatively more precise, accurate and down-to-earth concepts to justify the use of

force. Contemporary writings have dispensed with the discussion on just or unjust wars; such justifications are no longer referred to. However, in the last 50 years or so, following the establishment of the United Nations, scholars have written about the grounds and the situations that justify the use of force by a state, and where such use of force may be justified in international law.

The first ground is self-defense, which has been a subject of long discussions both in academic circles and in debates and deliberations in the UN General Assembly and Security Council. The concept of self-defense, its meaning, and the extent of its application have also been discussed extensively and elaborated in several important judgments of the International Court of Justice. The idea of self-defense has been extended to include areas where an immediate and imminent threat calling for self-defense is not involved. This extended meaning has given rise to the idea of preemptive action. Subsequently, the idea of action taken by a possible target against a possible aggressor has also been included in the larger definition of self-defense. The second case where use of force is regarded as justified is where, in case of a civil war or a civil commotion or strife, a country invites a neighboring country to intervene and put the situation right by using force against those perpetrating civil war without any justification. Such an intervention has also been considered in many writings on international law to be a just cause for the use of force.

The third ground for use of force is reprisal, or the primitive principle of 'tit for tat', meaning a punitive action in response to a similar action.

The fourth ground is protection of nationals and the property of a country abroad. If the nationals or properties of a country have been attacked in another country, it would be considered justified for a country to use force in order to save and defend its nationals and property.

Apart from these 'valid' and recognized grounds, there is a ground, misused in the estimation of the defeated and used for positive purposes in the opinion of the powerful, known as "humanitarian intervention." A humanitarian intervention may be used to extend genuine support and help to a persecuted minority or a persecuted people. However, this type of intervention can also easily be exploited and misused to create a basis for intervening in the internal affairs of other countries and people with ulterior and unorthodox motives. The question of national liberation movements is closely related to the question of humanitarian intervention, and such movements have recently found mention in many books on international law. National liberation movements emerged in the middle of the 20th century and quickly became popular in many African and Asian countries. The colonizers, in almost all these cases, were Western and European powers, and those running and leading the national liberation movements mostly belonged to African and Asian countries. The rapid and successive emergence of liberation movements in these countries gave rise to the question whether the use of force against or by these movements is justified in international law, and, if so, to what extent. What should be the grounds for justification on both sides? If the use of force against the liberation movement is justified, then the activities of the liberation movement would have to be acknowledged to be unjustified. On the other hand, if the national liberation movements are justified in using force against the colonizers, then the use of force by the colonizer would not, under any pretext, be justified. This question is thus a two-edged sword that has to be tackled carefully.

During the last four decades, the idea of hot pursuit has also found its way into textbooks on international law as a valid or possible ground for the use of force

against a foreign country. Hot pursuits are, in many cases, offshoots of action against national liberation movements.

These grounds have been elaborately discussed by the International Court of Justice in its landmark judgment, given in 1986, in *Nicaragua vs. United States*. Some of the basic concepts have been dilated upon in this judgment. Apart from basic discussions, the obiter dicta in the judgment are very significant for understanding the related legal issues.

## II

Before discussing the Islamic concept of war with reference to jihad, it is important to ask one basic question: What is the original and natural relationship between two countries, particularly between one Muslim country and the adjoining or neighboring non-Muslim country?

This question is important for two reasons. Firstly, some prominent thinkers of human history have ruled that it is not peace but war that is the original nature of the relationship between two countries. Those who propound this theory include men like Plato. Some Western scholars of Islam, including Majid Khadduri, have attributed this view to some Muslim jurists as well, including Imam Abu Hanifah. According to Khadduri's statement in his book "War and Peace in the Law of Islam," Imam Abu Hanifah, the founder of the Hanafi school of Islamic jurisprudence (followed by around 60 percent of Muslims around the globe), believed that the nature of the relationship between the Muslims and non-Muslims is war. The argument advanced by Majid Khadduri is interesting. He says, since Imam Abu Hanifah divided the world at large into two major territories — the territory of Islam, *Dar al-Islam*, and the territory of war, or *Dar al-Harb*, he must have considered that the natural relationship with the non-Muslim world is nothing but *harb* or war. But in reaching this conclusion, Khadduri has had to ignore the exact significance of this division, and to conveniently brush aside the elaborations offered by other Hanafi jurists on the position of Hanafi jurists in particular and other Muslim jurists in general.

The terms *Dar al-Islam* and *Dar al-Harb* are neither mentioned in the Qur'an nor in the ahadith or traditions of the Prophet (peace be upon him [pbuh]). Thus, this terminology and the resultant classifications do not have any normative or permanent value. These are terms that have been used by different jurists to discuss the situation obtaining in their respective times and climes. During the days of Imam Abu Hanifah, the two contemporary Muslim states — the Abbassids in the East and the Umayyads in the West — were either practically at war with their neighboring powers or there was a kind of armistice between them. Therefore, the Muslims of the second century of the hijrah must have found that their relations with non-Muslim powers were characterized either by actual war or latent hostility during the intervening periods of armistice. This is why Imam Abu Hanifah refers only to these two categories of relations.

The second reason why it is important to ask about the natural relationship between a Muslim country and its non-Muslim neighbor as envisaged in Islamic law and jurisprudence is that it also escaped the attention of Western writers that the majority of Muslim jurists, including the Hanafis, say that if a Muslim country enters into a relationship of peace with another country, through an agreement of friendship or cooperation or any kind of mutual understanding that results in permanent or temporary removal of hostilities, it becomes a *Dar al-Ahad* — Territory of Pledge. The Territory of Pledge or Territory of Treaty has the same legal status as the Territory of Islam, wherein people are guaranteed peace and security on permanent terms. This point will be elaborated later.

According to the Qur'an, the original relations between a Muslim country and its neighbors are characterized not only by peaceful co-existence but also by justice and fair play. The call the Qur'an makes is: "تعالوا إلى كلمة سواء" meaning "Let us come to agree to a common ground." The achievement and maintenance of this common ground is the permanent and original nature of the relationship between Muslims and non-Muslims. The Qur'an says, "Allah invites you to an abode of peace." The establishment of the abode of peace is the primary and the ultimate goal of the Islamic Shari'ah.

Unless this permanent relationship is established, jihad cannot be realized. Jihad is basically a struggle and endeavor to achieve an objective. Literally, jihad means an ongoing struggle and a continuing endeavor. Those who are familiar with Arabic would be aware that words in the language have different scales: words in the same scale have a continuity in their meaning but each has a different nuance.

Etymologically, the scale of the term jihad includes terms like qital (fighting), nizal (duel), nisab (fixed standard), etc. There are two similar terms that are relevant to the concept of jihad and have the same root: one is mujahadah, which means a mutual struggle, and the other is the derivative, ijihad, which means concentrated struggle. If a struggle is academic, it is ijihad; if it is spiritual, it is mujahidah; and if it is physical, it is jihad.

Jihad cannot be understood without reference to mujahidah and ijihad. At the same time, the basic philosophy of jihad has an integral and inseparable relationship with the universality of Islam. This relationship has been acknowledged by the authors of the Encyclopedia of Islam as well, who say that the "Universality of Islam is an integral feature of its teachings and that is fundamental and central to the philosophy of jihad. The centrality of the universality of Islam to the idea of jihad in particular and to the teachings of Islam in general is very significant." The essential relationship between jihad and the universality of Islamic teachings is highlighted in the Qur'an in the chapter Al-Hajj. This chapter, which was revealed in Madinah, included for the first time a verse mentioning defensive war and the use of force. It reads: "Permission is given to those who have been wronged. Allah is certainly capable of helping them. They are the people who have been driven out of their homes without any rightful cause." Through this verse, the Muslims of Madinah were allowed to defend themselves and to fight those who had driven them out and wronged them. This verse is known in Islamic terminology as the "Verse of Permission" — Ayatul Idhn.

Some commentators of the Qur'an have pondered the significance of the placement of this verse in a chapter dealing extensively with the Hajj, the Islamic pilgrimage that is performed annually by Muslims from different parts of the world. During the Hajj, the Hujjaj, or pilgrims, assemble in Makkah and in other places in the city's vicinity. This huge multiracial and international assembly is a demonstration of the universality of Islam and the solidarity of the Muslims. The chapter Al-Hajj opens with the Qur'anic portrayal of the Day of Judgment when all human beings will be presented before the Creator. This is followed by a discussion about the Hajj with intermittent mention of permission for jihad. The chapter ends with a brief reference to jihad, to the Prophet Ibrahim and to the universal role of Muslims. There is a subtle relationship between all these themes; each is related to the universality of Islam and humankind. Thus, the assemblage of humanity on the Day of Judgment symbolizes the ultimate universality of the Muslim Ummah as well as the ultimate unity of human beings. The Hajj symbolizes and demonstrates, on a lesser scale, the universality and pan-humanism of Islam. Likewise, jihad represents the unity of the Muslim Ummah and universality of its message.

The purpose of jihad is not to convert people to Islam, as is more than evident from the Qur'anic verse: "There is no compulsion in religion." (2:256) Jihad is, rather, meant to bring about a holistic, harmonious and integrated transformation of human individuals and society. This total and all-round transformation of individuals and society is the ultimate objective, which cannot be achieved within a short period of time. It cannot be achieved in a day or two, or even in a decade or two. It is an ongoing and life-long mission of each and every Muslim. This is why whenever the Qur'an refers to jihad, it does not refer to armies, rulers or governments. It refers to individuals.

There are several verses in the Qur'an that begin with the words "Those who believe in the Almighty and undertake the jihad." This diction indicates that, as soon as they enter into the fold of Islam and accept the universality of the message contained in its Divine Book, Muslims are under an obligation to become participants in the ongoing collective and all-round struggle for the betterment of human society. The struggle for betterment of human society is not confined to physical improvement, material well-being or to outer beautification of human life; although Islam does not teach asceticism, and recognizes the role of material well-being in a balanced life, such well-being is, at best, considered a means to an end and not the purpose of human life. The jihad, or struggle for reform and improvement, therefore starts within the human soul and body. This is because Islam does not subscribe to the idea of dividing the human being into contending or mutually exclusive tendencies. The human being is a very complex creation of the Almighty, as complex as the entire universe. The Qur'an likens the creation of one human individual to that of the entire universe and the cosmos. A human being is as unlimited in his potential and capabilities as the entire universe. An ongoing struggle is required to unfold this capability, translate it into action, and ensure that this potential is translated into action at every stage. This ongoing struggle is known as jihad. It starts from within. If the heart is purified, then the entire life is purified. The Prophet of Islam (pbuh) has said, "Verily there is a morsel (of flesh) in everybody's trunk; as long as it is purified, the entire body is purified. As soon as it is polluted, the entire body is polluted: this morsel is the heart." As such, the purification of the soul and heart becomes the first step in this struggle. If a person is not motivated from within, he cannot be motivated without. Therefore, this comes as the first stage of jihad, which is known as jihad bin nafs or struggle with the self.

In some Islamic, particularly Sufi, literature, jihad bin nafs is sometimes called al-jihad al-akbar — the major jihad. The reason is not that this type of jihad is of higher value, or bigger in significance or resources than other types of jihad, but because it is a continual struggle that spans the entire life of an individual. It is expected with this type of jihad that there should not be a single moment when an individual is not engaged in some inner exercise to prepare himself for the ultimate success on the Day of Judgment when he will be accountable only to the Creator. In this regard, the Prophet of Islam (pbuh) has prescribed the ideal attitude in the following terms: "You should worship Allah the Almighty and abide by His Commands with such a dedication as if you are seeing Him, because if you are not seeing Him, He is seeing you." This hadith simply means that a Muslim must have a living consciousness and a constant awareness of always being in the Divine presence. Everybody must, therefore, remember that he is answerable for his actions and roles on the Day of Judgment.

If this level of awareness is achieved, the first stage of jihad stands realized. This is necessary because there are verses in the Qur'an, as well as ahadith of the Prophet

(pbuh), in which it has repeatedly been stressed that jihad will continue until the Day of Judgment. It will continue only in this sense; that each and every Muslim is under an obligation to constantly purify himself and to continuously fight against the forces of evil. This struggle is necessary for ultimate success in this world and in the Hereafter.

Shah Wali Allah of Delhi, who lived in 18th century India and is considered one of the greatest exponents of Muslim philosophy and theology, explains jihad in terms of the universal Divine Message and in the context of the eternality of that Divine Message. In his view, the perfection and the completion of the Divine Message requires that it should be a lasting, viable and practical message. A continued endeavor is needed to make this message viable, practical and lasting, and to support and sustain its permanence and perfection. This need is fulfilled by jihad.

Jihad requires for its success not only a long struggle, but also a relentless spirit of perseverance or sabr — which not only means perseverance but also dedicated commitment to the cause. Unless there is perseverance and constant endeavor, without fear and without interruption, this exercise cannot continue. This is why, in several verses of the Qur'an, jihad and sabr have been bracketed together. Likewise, most of the ahadith on sabr have been included by the hadith compilers in the chapter on jihad in their compilations. This juxtaposition of verses and ahadith on sabr and jihad indicates that sabr, which is primarily a spiritual and moral quality, has a relevance with the outer struggle as well. Without the inner qualities, the outer struggle is futile and useless.

After the stage of spiritual jihad, there is another stage, namely, jihad bil Qur'an — struggle with the Qur'an. This form or phase of jihad has been mentioned in the Qur'an itself, significantly in a chapter revealed in Makkah: "وجاهدوهم به جهادا كبيرا" "[O Prophet] Undertake against them [the Unbelievers] an ongoing and major struggle with it (i.e. Qur'an)." In other words, the propagation of the message of the Qur'an also requires that struggle continue until each and every corner of the globe is reached and everybody becomes aware of the Qur'anic message. This effort has never been geared to forcing people to accept Islam. Jihad bil Qur'an has the simple purpose of conveying the divine message to the people, in the words of the Qur'an, "So that those who want to live, they should live on the basis of an argument and those who want to perish, they should perish with an argument." It is always for individuals to decide for themselves whether to accept this message or not; they themselves shall have the last word. Whether they decide to live by the Divine Wisdom contained in the Qur'an or not, is their decision.

Jihad bil Qur'an is closely related to jihad bil lisan, literally, jihad with the tongue, which means to use speech, communication power or any skill enabling a person to communicate with others to convey to them the message of the Qur'an. This is a form of continued dialogue that should be fully used in order to share Divine Wisdom with others. Jihad bil qalam, or jihad with the pen, is another form of jihad bil lisan.

Jihad bil maal, or endeavor with wealth, has been mentioned repeatedly in the Qur'an, for example: "The (good or ideal) believers are those, who...conduct jihad with their wealth and with their persons..."

The above mentioned verses indicate the general or comprehensive nature of jihad. Finally, the Qur'an refers to the last phase of jihad — jihad bi' l saif (jihad with the sword), also called qital or open or external jihad. This final stage of jihad is permitted as a last resort. Again, this type of jihad has different levels. A commentator of the Qur'an has classified the external jihad in terms of the following three types of problems:

Jihad against an open enemy;

Jihad against the devil, i.e. against the negative forces; and

Jihad against evil forces working among the Muslims themselves.

An enemy becomes an open enemy when:

He attacks the Muslims, commits naked aggression and violates the accepted canons of laws and morality;

He persecutes a Muslim minority in a country that is within reach of the Muslim government and violates the international standards or the prevalent norms for the protection of such minorities, and such minorities ask for help and support of the Muslims against him; and

He creates chaos and disorder in the neighborhood.

Notably, the Islamic rules governing the use of force are part of the Islamic law of war, which is an important and significant section of the broader international law of Islam. It should be mentioned here that Islamic international law has not had to face questions about its legal status or sanction: There is no separation or division in Islamic law between municipal and international laws because both types are derived from the Qur'an and the authority of the Prophet (pbuh) and, therefore, both constitute an integral part of the same legal system. Thus, the Islamic law of war and international relations have had the same sanction, power and support as other religious beliefs and rules of the Islamic legal system. It may be recalled here that Western international law has been based mostly on custom and usage, which is also acknowledged by the Shari'ah as a valid source of the rules of international law. We can safely say that the principles of Shari'ah constitute the jus cogens of the international law of Islam which control and regulate the custom.

We may recall that the grounds accepted by contemporary international law for use of force include self-defense, civil war in a neighboring country, reprisal, protection of the nationals of the state, humanitarian intervention, national liberation movements, and hot pursuits. All of these, except hot pursuit, have been mentioned in the Qur'an directly and expressly.

With regard to fighting in self-defense, the Ayatul Idhn is clear: "Permission is given to those who have been wronged...who have been driven out of their homes to fight against those who have wronged them."

According to many Muslim jurists, the purpose of jihad is simple: to provide security and safety to the Muslim government and the Muslim state to enable them to realize their objectives for this world and for the Hereafter. In other words, the only objectives of jihad are welfare and well-being in this world in the material sense and welfare and well-being in the spiritual sense. These very grounds, which are accepted and acknowledged by modern international law, have been mentioned in the Qur'an. With regard to jihad bil qital or use of force, the Prophet (pbuh) has said that the purpose of war is not to physically eliminate the enemy. Modern international humanitarian law has reached the same conclusion, saying that the purpose of war should only be to weaken the military power or military potential of the enemy. As soon as the military potential of the enemy is weakened, hostilities should be stopped. The same concern for minimizing use of force underlies the Islamic treatment of postliminium. The basic principle given by the Qur'an for postliminium is: "As soon as the war is over, then either leave the prisoners by way of favor or exchange them



for ransom.” Thus, the Muslim army can either exchange the prisoners of war (POWs) for its own POWs or accept ransom for them, and that is all.

In this context, a statement by a Shafi‘i jurist also deserves to be mentioned: “وجوب الجهاد وجوب الوسائل لا وجوب المقاصد” meaning “The obligation of Jihad is like the obligation of means and vehicles and not that of objectives.” Thus, in the opinion of the great jurists, jihad or war is not an objective in itself. It is just a means for realizing a greater and higher objective. If the objective can be achieved through other means, then those other means should be employed. The goal should be provision of peace and security to everybody, particularly the Islamic state.

Not only does Islamic international law limit the use of force by limiting the purpose and objectives for which it may be carried out, it also subjects the actual use of force to a rigorous set of rules. It goes without saying that this set of rules is to be, quite literally, implemented religiously because it is part of a religious law and draws its legitimacy from religious teachings like other religious principles.

With regard to the law or rules of war, the basic reform made by Islam is that the use of force is confined to the belligerent. This is the most fundamental principle laid down in the Qur’an and the ahadith. The use of force has to be limited to those who participate in hostilities in the battlefield. In the past, the battlefield was defined and confined. Today, it is difficult to confine or define a battlefield. Nevertheless, Muslims are required to ensure that only those who participate in the actual war are targeted and those who are not participating are protected and saved. Women and children cannot be killed. Religious people cannot be targeted. Hermits and the ascetics cannot be touched. All of these and other non-combatants should not be subjected to attack or targeted as long as they remain outside the orbit of actual war. The civil population has to be provided safety. The civil population and civil installations cannot be destroyed. These are some of the instructions the Prophet of Islam (pbuh) used to give to his warriors. Whenever he sent an army, he issued a charter along with the army, and ordered that the charter be read out to the soldiers. This practice was followed by the early caliphs and by many other successive Muslim rulers. A number of such charters have been included by Dr. Muhammad Hamidullah in his book “Al-Wathaiq al-Siyasiyyah,” which presents the political documents of the days of the Prophet of Islam (pbuh) and his immediate successors. In these documents, the Prophet (pbuh) gave his soldiers and commanders instructions, for example, that they should not cheat, commit treachery or mutilate the corpse of an enemy, and that they should never kill a child or a woman. On the basis of these instructions and a host of similar other instructions issued by the companions and successors of the Prophet (pbuh), an elaborate law of war has been developed. This law acknowledges the basic principle that the use of force should be confined to combatants and the belligerent.

The second basic principle of the Islamic law of war is that no use of force is allowed without the permission of a legitimate political authority. Without the permission of a legitimate Muslim government — if a legitimate Muslim government exists — no hostility or warlike operation can be initiated against any adjoining or neighboring enemy. Imam Abu Yousuf, a well-known Hanafi jurist and one of the founders of the Hanafi school, laid down this principle expressing it in the dictum: “لا تسرى سرية بغير إذن الإمام” meaning “No expedition can be dispatched without the permission of the government.” Other jurists also consider jihad as the function of the state: whenever it finds it expedient, the state will decide to undertake jihad. In a nutshell, the question of jihad cannot be decided by individuals. According to the Shi’ah jurist Imam Kulaini, who is considered to be the one of the four major authorities of Shi’ah fiqh,

jihad can be conducted only in the presence of the Imam or in the presence of a deputy of the Imam.

The third principal of the Islamic law of war is related to non-combatants. Paramedics and similar other persons are not considered a part of the combatants, even if they are supporting combatants and providing support to the belligerent. This privilege is extended not only to the medical corps but also to other supporting staff, including nurses, servants, cooks, suppliers of civil provisions, very old soldiers, and old persons who do not participate in the war. All these are exempted from execution and use of force. A question arose before the jurists: if a very old person who is a veteran of war is providing advice and guidance to the enemy combatants without physically participating would he also be exempted or not? Some jurists say he is exempted, while others say he is not. However, the nature of this discussion demonstrates the extent to which the wording of the Prophet (pbuh) was interpreted and how far its meaning and purport was stretched.

The fourth principle is that no act involving any kind of treachery may be committed. This has the authority of the Qur'an. There are several verses in the Qur'an that prohibit all kinds of treachery and mis-representation, even to the enemy. Two examples may be mentioned. During the days of the Second Caliph, there was a battle between the Muslims and Iranians. An Iranian soldier climbed a tree and took shelter at the top of the tree. A Muslim soldier located him and told him, in Persian, "Ma tars," i.e. "Do not fear." The Persian soldier thought that he was being given shelter and protection and came down. However, as soon as he came down, he was killed by the Muslim soldier. The matter was reported to the Second Caliph. He issued a policy statement in which he used the same Persian term declaring that any body saying "Ma tars" to an enemy soldier and then killing him will be prosecuted for murder and will be liable to a death penalty. Such an act was considered to be a murder by the Second Caliph, simply because of misrepresentation of intention. Here, the prohibition of treachery was extended far beyond its literal scope.

The other example is even more significant. The Muslim government had entered an agreement with a non-Muslim people living somewhere near the frontiers of modern Turkey and Syria. These people used to create difficulties for the Muslims, particularly by looting Muslim trade caravans traveling between Arabia and Europe. Caliph Mu'awiyah, the founder of the Umayyad caliphate, decided to take action against them. However, the agreement the Muslims had entered with these people was time-bound; it was extended every year. In order to take action against them, the Caliph waited until the agreement came close to its end. A month before the agreement was to expire, he prepared and ordered a Muslim army under his own command to march to the frontier where the troublemaking people resided. His idea was to wait until the last date of the agreement and then, instead of extending it, to attack and punish the people the very next morning. Technically, it would appear that he was totally justified, legally, constitutionally and in terms of today's international law. He was moving in his own area, and he was not taking any action during the period of the agreement. But this was the personal opinion of the Caliph, and it was not shared by some others. There was a Companion of the Prophet (pbuh), Amr ibn Anbasah, who considered this conduct a 'violation' of the treaty.

The story and its dramatic denouement are reported in Sahih Muslim—one of the most authentic collections of the sayings of the Prophet (pbuh). Amr ibn Anbasah mounted a horse and rushed in the direction in which the Muslim army was marching. The Caliph was informed that somebody was approaching and, subsequently, that it

was the Companion Amr ibn Anbasah. As Amr caught up with the Muslim army, he was shouting “وفاء لا غدر,” “Fulfill (the obligation)! No (commission of) treachery!” After reaching the Caliph, he explained his interpretation and understanding of the treaty, and how the initiative of the Caliph amounted to treachery. Amr pointed out that once a Muslim State enters into an agreement of peace with any people, it is required to remain peaceful even in its intentions towards the enemy. The two sides should be emotionally at peace. The fact that the Muslim ruler had contemplated a military action against the other side and had moved his army with this intent meant he had gone against the spirit of the commitment to have peace during the agreement period.

In this context, Amr ibn Anbasah referred to the Qur’anic verse that says: “And if you fear treachery from any people (with whom you have a covenant) then publicly throw their covenant to them. Allah does not love the treacherous.” Muslims are thus ordered to be open about their intentions to terminate agreements so that the enemy becomes aware of the current status of the agreement, realizes that any action may thenceforth be taken against him by Muslims, and is equally ready. Only then can Muslims take action against those with whom they have had peace agreements. The Muslim army, including the Caliph Mua’wiyah accepted this interpretation and, aborting the action immediately, returned to Damascus.

Finally, there is another area of Islamic international law that is closely linked to the law of war, and this comprises of principles of neutrality, which are contained in the Qur’an and which were formally laid down for the first time in legal history by Muslims. Ironically, many people believe that the nature of relationship between the Muslims and non-Muslims is, at least theoretically, a permanent state of war, and that Islamic law does not even contemplate a situation of neutrality between Muslim and non-Muslims. Sadly, this view has been expressed even by some of the leading Western scholars, due to inadequate understanding or, in some cases, irresponsible misrepresentation of the law of Islam. Those, who have propounded this idea and given it wide currency in the West include, for example, Majeed Khadduri, a Christian scholar from Iraq, and Bernard Lewis, a Jewish scholar from the United States.

The truth is that Muslims have entered into relationships of neutrality with different countries and different forces. There are at least a dozen important examples of neutrality in early Muslim history. The agreements of neutrality with Armenia, Cyprus and Ethiopia are well-known, and there were similar agreements with some other countries in these regions as well. Some of these agreements were maintained by Muslims for six hundred years; some for seven hundred years, and at least one, the agreement of neutrality with Ethiopia, has withstood the passage of 1424 years and stands to this day.

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The most pertinent UN document is the Charter of the United Nations Organizations, 1945, Article 2, Paragraph 4 of which lays down the limits for the use of force by members states and, thus, defines the scope of aggression. However, a serious academic debate has been under way regarding whether Article 2(4) is still effective in realizing its objectives. In the late 1960s and early 1970s, several scholars discussed what they termed as the “death” or the murder of this article. For a valuable study and analysis of relevant documents of other international bodies, see Sassoli and Bouvier, 1999.

Dixon, 2001, pp. 293 ff.

The question of what constitutes a just war and the distinction between a just and unjust war have been debated in legal circles for centuries. Discussions on jus and bellum and jus in bello have engaged the attention of writers in the East as well as the West since time immemorial. St. Augustine, St. Thomas Aquinas and Hugo Grotius tried to justify the use of force under Christian theology as well as under natural law theory. See Elshtain, Ed., 1992.

For details, see Wilson, 1988.

Humanitarian intervention is a comparatively recent term, coined to differentiate this type of action from other forms of intervention, such as internal or external interventions and punitive interventions prohibited or discouraged by international law. The only permissible form of intervention was contemplated in Article 2(4) of the UN Charter. See, for a good discussion of humanitarian intervention, Brownlie, 1974.

See, for a brief treatment, Levi, 1991, pp. 69-70; also see p. 77 for some more references.

See American Society of International Law, 1986, pp. 1023-1091.  
Khadduri, 1960.

For a brief note on the concept of “Dār,” see Thanwi, 1996, pp. 778-779. For details, see the work cited below.

Zaidan, 1963, pp. 18 ff.

The Qur’an, Al Imran 3: 64.

The Qur’an, Yunus 10: 25.

A comprehensive discussion on *ijtihad* is found in *Mawsu’at al-Fiqh al-Islami*, Cairo, n.d. Vol. III, pp. 5-12

Raghib al-Isfahani has defined this term as “struggling against one’s self”; see *Al-Mufradat fi Gharib al-Qur’an*, Karachi, in loco.

*Encyclopedia of Islam*, Vol. II, p. 538.

The Qur’an, Al-Hajj 22: 39-40.

According to a number of commentators of the Qur’an, each surah or chapter of the Qur’an has a major theme that runs through its verses and integrates all its contents in a certain order. The placement of the verses related to the Day of Resurrection, the Hajj and jihad in one surah should, therefore, be based on a logical order.

For another interpretation of this placement, see Islahi, 1997, pp. 204-206.

See, for example, the Qur’an, Al-Anfal 8: 72, 74, 75; At-Tawbah 9: 20, 88; Al-Hujurat 49: 15.

For different aspects of this all-round struggle, see the chapters on jihad in the major hadith collections. For example, Bukhari, *Kitab al-Jihad wa’l-Siyar*, particularly, Chapters 1, 2, 3, 37, 38 and 62.

Bukhari, Chapters on Iman, No. 39.

This is based on a hadith, considered weak, cited by Barhaqi in *Kitab al-Zuhd*.

For an account of his life and work, see Ghazi, 2002.

Wali Allah, 2004, pp. 298 ff.

See, for example, the Qur’an, An-Nahl 16: 110; Al-Baqarah 2: 249; Al Imran 3: 120, 125, 142, 200; Al-Anfal 8:46; Muhammad 47: 31.

See chapters on jihad in Bukhari, Muslim, Abu Daud, etc., for example, Bukhari, *Kitab al-Jihad*, Chapter 32 and Abu Daud, *Kitab al-Jihad*, 49.

The Qur’an, Al-Furqan 25: 52.

The Qur’an, Al-Anfal 8: 42.

For example, the Qur’an, Al-Anfal 8: 72 and At-Tawbah 9: 20.

Raghib al-Isfahani, *al-Mufradat fi Gharib al-Qur’an*, Karachi, root J-H-D, in loco: JHD.

The Qur’an, Al-Hajj 22: 39-40.

The Qur’an, Al-Anfal 8: 72.

A notable example is the handing over by the Prophet (pbuh) of Abu Jandal and Abu Basir, two young Makkan Muslims, to the Makkan infidels to honor a commitment he had made with them in the Treaty of Hudaibiyyah.

Sarakhsi, *al-Mabsut*, Vol. X, p. 3.

The Qur'an, Muhammad 47: 4.  
 al-Khatib al-Sharbini, Mughni al-Muhtaj, Vol. IV, p. 210.  
 Sarakhsi, Op. cit.; see also Fath al-Qadir, Vol. IV, p. 277.  
 Sarakhsi, Op. cit., p. 3.  
 The Qur'an is clear on this issue: it allows the use of force only against those who initiate aggression (Al-Baqarah 2: 190, etc.)  
 See the instructions given to his commanders by Abu Bakr, quoted by, among others, Tabari in Tarikh al-Umam Wa'l-Muluk.  
 Al-Hamid, 2000, pp. 287-306.  
 Texts of such instructions have been presented, with English translation, in Hamidullah, 1973, pp. 310-323.  
 Some of these documents have also been translated into French by Dr. Hamidullah under the title "Les Documents Sur la Diplomatie de l'Islam, published in 1934 in Paris.  
 See, for example, Malik's Muwatta'.

For an elaborate modern exposition of the Islamic law of war, see Zubaili, 1981, pp. 788-798.  
 Yusuf, n.d., p. 215.  
 For example, Mawardi, 1999, citing jihad as one of the primary functions of the Imam (pp. 51-52).  
 Abu Ja'far Kulaini, al-Kafi, Vol. I, p. 213.  
 Sarakhsi, Sharh al-Siyar al-Kabir, Vol. IV, Hyderabad Edition, pp. 112-113.  
 Hamidullah, 1973, pp. 212-215.  
 See, for example, the Qur'an, Al-Afal 8: 56-58 and At-Tawbah 9: 4, 7.  
 Badr ad-Din al-Ayni, Umdah al-Qari, Vol. XV, p. 94.  
 Quoted by Muslim, as well as Abu Daud and Tirmidhi.  
 The Qur'an, Al-Anfal 8: 59.

Source: <http://www.ips.org.pk/international-relation/the-muslim-world/1201-mahmood-ahmad-ghazi.html>