
Critical Analysis of the Islamic Criminal Law and International Humanitarian Law on the notion of Jus ad Bellum and Jus in Bello

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ABSTRACT

War has to be on just grounds. The theory of Just war is the hallmark of the armed conflict which is technically called Jus ad Bellum. Islamic law combines the concepts of jus ad bellum, the right to go to war and jus in bello the conduct of war whereas International Humanitarian Law (IHL) separates these two concepts and only applicable to the Jus in Bello. Islamic law requires that both the decision to go to war and the conduct of war must be just and in accordance with Islamic principles but IHL has no jurisdiction over the jus ad bellum which results into the narrow applicability of IHL rules on the contemporary armed conflicts and poses a gap which has to be bridged. This research article endeavors to propose extension of the jurisdiction of the Islamic Criminal Law to IHL statutory rules for inculcating the just war theory into the framework of IHL by including the Jus ad Bellum into the structure of IHL in consonance with the Islamic Criminal Law.

Keywords: Siyar, Jihad, Non-international Armed conflicts (NIAC), Jus in Bello, Jus ad Bellum, International armed conflicts (IAC), Common Article 3(CA3), Additional Protocol II (APII), Geneva Conventions (GCs)

Introduction

Islamic law and IHL are distinctive from each other yet share conjoint objectives of shielding noncombatants (civilians) and preventing unnecessary suffering throughout armed conflict. Islamic law predominantly focus on the notion of "Just War," highlights the right to self-defense and forbids unwarranted power, while IHL attentions on the fortification of Horse De Combat/ non-combatants and the approaches of combat. An acute investigation exposes both resemblances and variances, prominence the prospective for collaboration and the need for sustained discourse on best practices.

The *jus In bello*, sometimes known as International Humanitarian Law (IHL), establishes the legal framework for regulating the behavior of parties to armed conflict. Its main goal is to protect those who are not actively involved in the conflict, such as civilians, and to guarantee that their rights are respected even in times of war. The primary goal is to limit the methods and means used in war and to reduce the human toll. IHL is known as the law of war because it helps to humanize conflict, as is often said that war is devoid of humanity. It covers not only combatants but also the protection of civilian targets, cultural sites, historical monuments, and other symbols that symbolize peace, heritage, and national identity during times of war. The destruction of civilian infrastructure and property is severely prohibited by IHL, as is the use of dangerous weapons, particularly those of mass destruction, and the targeting of civilians.

The existence of an armed conflict is a prerequisite for the application of international humanitarian law, as its regulations cannot take effect until this occurs. States have tasked the International Committee of the Red Cross (ICRC) with promoting knowledge and comprehension of IHL and how it is applied in times of war. Although its main use is in inter-state armed conflicts, IHL also covers non-international (NIACs) and international (IACs) armed conflicts. There are specific legal guidelines that apply when governments are directly engaged in conflict. However, the legal ramifications vary when states support rebel organizations or wage asymmetric warfare—using proxies or protecting combatants among civilians which raises distinct difficulties due to the asymmetry. As a result, the way that IHL applies and the effects it has in NIACs and IACs are affected by the nature of government participation, whether it be direct or indirect.

Islamic law of war, also known as "Siyaar" or "Jihad", is a set of guidelines and principles that govern the conduct of warfare in Islam. These principles are derived from the Quran, Hadith (Prophetic traditions), and the consensus of Islamic scholars. *Jus ad Bellum* and *Jus in Bello*: Islamic law combines the concepts of *jus ad bellum* the right to go to war) and *jus in bello* the

conduct of war. Whereas IHL separates these two concepts. Islamic law requires that both the decision to go to war and the conduct of war must be just and in accordance with Islamic principles. The intention behind going to war must be pure and just, such as defending Muslims, protecting Islamic lands, or upholding justice. The features of Islamic Law of War are War must be fought for a just cause, such as self-defense, protecting innocent lives, or defending Islamic values. The use of force must be proportionate to the threat or aggression faced. A clear distinction must be made between combatants and non-combatants, with non-combatants being protected from harm. Avoid causing unnecessary harm to people, animals, and the environment.

Research Methodology

The present study will benefit from the doctrinal study. This research will embrace black letter approach by focusing on the letter of law rather than law in action. The researcher will compose a descriptive and explanatory analysis which will be based on the Islamic Criminal law and its scope and how it will complement the IHL if *jus in Bello* and *jus ad Bellum* simultaneously invoked. Qualitative Research Design will be observed by using non-numerical data aiming at gaining a deep understanding of IAC, CA3 and NIAC, rather than surface description of a large sample of a population. Whereas the Research Philosophy will be the interpretative which focuses on researcher's subjective experiences, on how to "construct" the theory by sharing meanings, and how they interact with or relate to each other. The reason of using Doctrinal Research Methodology by the researcher is this that, the researcher is constructing a theory that due to the internal asymmetrical warfare, a wide scale human rights violations are being occurred. So, the scope of IHL and the Geneva Conventions, must be extended and enhanced in order to preserve the human right atrocities. This is a subjective and non-numerical notion, contrary to the quantitative and numerical data, which is based on the hypothesis of the researcher

Significance

The Geneva Conventions marked seventy-one years in 2022, yet the evolution of warfare has far outpaced the development of the laws governing it. While conflict has taken on new and complex forms, the law of war appears to be progressing slowly. This study aims to explore the threshold for the application of International Humanitarian Law (IHL) through the lenses of *jus in bello* and *jus ad bellum*, particularly in relation to Islamic Criminal Law. It will highlight the necessity of a robust supervisory mechanism to ensure the enforcement of IHL during armed conflicts, especially where unconventional warfare is practiced—such as when one party possesses significantly inferior military capabilities and resorts to

asymmetric strategies. Furthermore, this research challenges the stance of certain scholars who argue that Islamic “Just War” theory can justify uses of force that may contradict the fundamental principles of IHL, aiming instead to show the compatibility and shared values between IHL and the ethical foundations of Islamic Law.

Contribution to Knowledge

Islamic Criminal is the pioneer law on the regulation of combats and atrocities committed during the war. In fact if one look at the very nature of the IHL it borrows most of its principles and rules from the Islamic law of armed conflict. As far as the subject of this article is concerned Jus in bello and jus ad bellum there is a huge difference between the two. Actual war ought to be just or not is a question which has to be dealt with very carefully. It will determine the nature of the war. War must be just or not? This is to be determined before entering to the war. On this point Islamic criminal law departs from the IHL and here lies the gap. The researcher proes that this gap has to be filled by the IHL by inculcating the principles of just war in the shape og Jus in Bellum. This study can be used to as a tool to highlight the challenges occurring, due to the new Wars to the application of the IHL, and IHL and provide its solution by integrating the principles of Islamic Criminal law. Further the study conceptualizes the changes and modification that would empower the IHL framework in dealing with the contemporary NIAC. This research is a one place destination to understand the old laws and new wars and their interoperability.

Just War Theory and Principles of Islamic Law of War

It is openly argued by some researchers that the Islamic notion of "Just War" can be used to validate the practice of imposing force in ways that may be inconsistent with IHL whereas others accentuate the prospective for IHL to be functional in a way that weakens the doctrines of Islamic law of war.

However Islamic law of war provides a comprehensive framework for the conduct of just warfare, by emphasizing the importance of justice, proportionality, and distinction. These principles are still relevant today and provide a valuable contribution to modern international humanitarian law(IHL). But the contemporary rules of IHL have been deviated from the just warfare and Jus in Bellum is no longer taken into consideration. However Islamic law of war and International Humanitarian Law (IHL) share some similarities, but they also have distinct differences. Jus ad Bellum and Jus in Bello.

The researcher enumerates the principles of Islamic Criminal Law which are annexed with the Jus ad Bellum such as the intention behind going to war must be pure and just, defending Muslims protecting Islamic lands, or upholding justice, War must be fought for a just cause such as self-defense,

protecting innocent lives, or defending Islamic values. The modern principle of proportionality by IHL was originated from Islamic Law in the form of the use of force must be proportionate to the threat or aggression faced. A clear distinction must be made between combatants and non-combatants, with non-combatants being protected from harm. Avoidance of Excessive Harm, avoid causing unnecessary harm to people, animals, and the environment. Declaration of War: A formal declaration of war must be made before engaging in combat. Avoiding Treachery, combatants must avoid using treachery, deception, or surprise attacks. Respect for Prisoners: Prisoners of war must be treated with respect and dignity, and not subjected to torture or mistreatment. Protection of Civilians, including women, children, and the elderly, must be protected from harm and not targeted intentionally. There are certain prohibited acts as well which are proscribed by the Islamic Law such as Killing Non-Combatants: Intentionally killing non-combatants, including women, children, and the elderly, Torture and Mistreatment: Subjecting prisoners of war or civilians to torture, mistreatment, or humiliation, Destruction of, Infrastructure, Destroying infrastructure, such as hospitals, schools, and mosques, unless they are being used for military purposes and Use of Prohibited Weapons: Using prohibited weapons, such as poison or chemical weapons.

Applicability of Islamic Criminal Law

IHL applies to international and non-international armed conflicts, whereas Islamic law classifies conflicts based on religious criteria, with different rules applying to conflicts between Muslims and non-Muslims. Jus ad Bellum and Jus in Bello: Islamic law combines the concepts of jus ad bellum (the right to go to war) and jus in bello (the conduct of war), whereas IHL separates these two concepts. Islamic law requires that both the decision to go to war and the conduct of war must be just and in accordance with Islamic principles.

Treatment of Prisoners of War: While both Islamic law and IHL require humane treatment of prisoners of war, Islamic law allows for the execution of prisoners in certain circumstances, such as if they pose a threat to the security of the state .

Islamic law has specific rules governing the conduct of hostilities, such as the prohibition on killing women, children, and the elderly, unless they are directly participating in hostilities. IHL also has rules governing the conduct of hostilities, but they are more general and do not specifically address the protection of certain categories of civilians. Despite these differences, there are also areas of convergence between Islamic law and IHL, such as the principles of distinction and proportionality, which require that parties to a conflict distinguish between military targets and civilians, and that they

avoid causing unnecessary harm to civilians and civilian objects. Human Shields: Islamic law prohibits the use of human shields, but it also allows for the targeting of combatants who use human shields, whereas IHL requires that parties to a conflict take all feasible precautions to avoid or minimize harm to civilians and civilian objects.

Applicability of International Humanitarian Law

The framework of International Humanitarian Law (IHL) will be examined in detail; however, it is essential first to explore its historical background and evolution to develop a comprehensive understanding of its foundations. Discussing the origin and gradual development of IHL provides necessary context for appreciating its current structure and applicability. The purpose of this chapter is to offer a thorough insight into IHL from its inception to its modern interpretation, setting the stage for a deeper analysis. Subsequently, the chapter will assess the application and effectiveness of IHL in the context of asymmetric warfare, where traditional legal frameworks face unique challenges.

Geneva Law

International Humanitarian Law (IHL) is broadly categorized into two main branches: the Geneva Law and the Hague Law. The Geneva Law focuses on the regulation of armed conflict and the protection of individuals who are affected by it, particularly those who are not actively involved in hostilities. On the other hand, the Hague Law governs the means and methods of warfare, including the regulation of weapons and tactics used during combat. It addresses what weapons can be used and prohibits those deemed unacceptable under international norms. While both branches serve distinct purposes and follow different operational paths, they share a common objective—“to humanize the war” and mitigate the suffering caused by armed conflict. Each branch contributes uniquely to the legal landscape of warfare, offering frameworks to reduce the brutality of war through lawful conduct and humanitarian protections.

Following the adoption of the First Geneva Convention (GC), several treaties were developed that further refined and expanded the scope of IHL. These developments led to the revision of earlier GCs in 1906, 1929, and ultimately 1949, creating a more comprehensive system. Today, the four Geneva Conventions are collectively referred to as “the Geneva Convention,” and they enjoy near-universal ratification. Their provisions are now largely considered part of customary international law, meaning they apply even to states that have not formally ratified them. To supplement the GCs, two Additional Protocols (APs I and II) were introduced in 1977 to broaden their reach, especially in international and non-international armed conflicts. However, these Protocols have not achieved the same level of

acceptance as the original Conventions. AP II, in particular, addresses non-international armed conflicts (NIACs), a topic on which many states remain hesitant to cede authority, fearing constraints on their internal sovereignty. As a result, AP II contains fewer and less comprehensive provisions compared to AP I.

Types of Armed Conflicts

Dieter Fleck categorizes armed conflict into two main types: international armed conflict (IAC) and non-international armed conflict (NIAC). This bifurcation is also endorsed by the International Committee of the Red Cross (ICRC). However, with the evolving dynamics of international humanitarian and battlefield law (IHBL), it is now recognized that armed conflicts may also take the form of transnational armed conflicts or internationalized NIACs.

In such evolving scenarios, especially where asymmetrical elements are involved—such as conflicts between states and non-state armed groups—the situation becomes more complex. These asymmetrical wars raise critical questions regarding the threshold for the applicability of International Humanitarian Law (IHL). This issue is particularly pressing in cases involving non-state actors operating across borders, a subject that will be examined in subsequent chapters.

It is essential to understand that the existence of an armed conflict is a prerequisite for the application of IHL; without it, the provisions of IHL cannot be invoked. Nonetheless, not every act of violence or hostility qualifies as an armed conflict, whether international or non-international. This ambiguity stems from the absence of a clear definition of “armed conflict” in treaty law.

The International Criminal Tribunal for the former Yugoslavia (ICTY), in its landmark *Tadić* decision, provided a widely accepted definition, stating: “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

International Armed Conflicts

Whenever armed conflicts arise between two or more states, the matter falls within the ambit of international law. Consequently, International Humanitarian Law (IHL), as a subset of international law, becomes applicable. In such scenarios involving inter-state hostilities, the four Geneva Conventions of 1949 and Additional Protocol I (AP I) are triggered. Specifically, Common Article 2 of the Geneva Conventions outlines the definition of an international armed conflict, extending its application to all cases of declared war or any other armed conflict between two or more High Contracting Parties, even if one of the parties does not recognize the state of war.

An international armed conflict is fundamentally characterized by disputes and hostilities between states. Irrespective of the scale or intensity of these confrontations, the relevant statutes and legal frameworks under IHL and customary international law regulate such conflicts. However, it is not uncommon for states to manipulate the context of warfare by blending elements of internal armed conflict with tactics of unconventional warfare. This gives rise to hybrid and asymmetric warfare, which introduces unique dimensions and complex consequences.

Traditionally, in the context of international armed conflicts, states have resorted to conventional means and methods of warfare, adhering to both statutory and customary rules of international law. To mitigate unnecessary destruction and disproportionate suffering, states endeavor to apply the existing norms of IHL in both letter and spirit, upholding the humanitarian principles that underpin the law of armed conflict.

Non-International Armed Conflict

Common Article 3 (CA3) is the only provision in the entire Geneva Conventions that deals specifically with non-international armed conflicts (NIACs), which are carried out within the frontiers of a state. Although Additional Protocol II (APII) is an ancillary instrument that also regulates NIACs, it provides a more detailed framework for the conduct of non-state actors, including their command structure, organizational setup, and the essential rudiments that must be followed in all circumstances.

However, the absence of a universally accepted definition of “armed conflict” makes the notion of NIAC vague and subtle in terms of interpretation and applicability. This creates a significant stumbling block in the implementation of CA3, largely because states are often reluctant to declare a situation as a NIAC. Such declarations could open the door for international intervention and scrutiny of what are considered internal affairs. It is perhaps for this reason that Pictet observed that CA3 of the Geneva Conventions does not clarify the notion of “an armed conflict not of an international character.” Some scholars contend that any attempt at definition would fail to capture the range of complex, factual realities and might, in turn, risk narrowing the protective scope of humanitarian law.

Upon deeper examination of the International Humanitarian Law (IHL) framework, it becomes clear that NIACs are subdivided into two categories. The first category falls directly under CA3 and includes armed conflicts occurring within a state’s territory, regardless of whether the state itself is a party to the conflict. The evaluation of such conflicts hinges on whether hostilities have reached a threshold of armed conflict within the territory.

The second category is governed by APII and refers to conflicts between state armed forces and organized armed groups within the same state. In

these cases, APII becomes applicable in accordance with Article 1, which sets the criteria for internal armed conflicts that meet a higher threshold than that required under CA3. APII provides a more structured legal regime for such conflicts, emphasizing the protection of victims and regulation of hostilities. IHL acknowledges this dichotomy of armed conflicts in its statutory framework. However, with evolving global dynamics, a third, exceptional type of armed conflict has emerged—the internationalized NIAC. These conflicts, though rare, occur under unique and exceptional circumstances, such as when external forces intervene in a conflict that began as a purely internal matter. While internationalized NIACs are academically recognized, their practical occurrence is infrequent and limited to specific geopolitical conditions.

Convergence of Islamic Criminal Law and IHL

Islamic law and IHL are distinctive from each other yet share conjoint objectives of shielding noncombatants (civilians) and preventing unnecessary suffering throughout armed conflict. Islamic law predominantly focus on the notion of "Just War," highlights the right to self-defense and forbids unwarranted power, while IHL attentions on the fortification of Horse De Combat/ non-combatants and the approaches of combat. An acute investigation exposes both resemblances and variances, prominence the prospective for collaboration and the need for sustained discourse on best practices.

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Islamic law of war and IHL are one the same page in many ways such as both are compatible on the issue of the protection of civilians and the prevention of unnecessary harm. In addition to it on the notion of protection of human dignity and modesty of the human. On the issue of the torture and exploitation of the civilians and other vulnerable groups who have nothing to do with the war. Islamic Law in the form of the use of force must be proportionate to the threat or aggression faced. A clear distinction must be

made between combatants and non-combatants, with non-combatants being protected from harm. Avoidance of Excessive Harm: Avoid causing unnecessary harm to people, animals, and the environment. Declaration of War: A formal declaration of war must be made before engaging in combat. Avoiding Treachery: Combatants must avoid using treachery, deception, or surprise attacks. Respect for Prisoners: Prisoners of war must be treated with respect and dignity, and not subjected to torture or mistreatment. Protection of Civilians: Civilians, including women, children, and the elderly, must be protected from harm and not targeted intentionally. There are certain prohibited acts as well which are proscribed by the Islamic Law such as Killing Non-Combatants: Intentionally killing non-combatants, including women, children, and the elderly, Torture and Mistreatment: Subjecting prisoners of war or civilians to torture, mistreatment, or humiliation, Destruction of Infrastructure: Destroying infrastructure, such as hospitals, schools, and mosques, unless they are being used for military purposes and Use of Prohibited Weapons: Using prohibited weapons, such as poison or chemical weapons.

Conclusion

It may be gathered that both Islamic law and IHL suggest harmonizing structural framework for catering the issues of armed conflict. Academics and legislators may work together to advance a more complete and operative method to shielding noncombatants and safeguarding the legal demeanor of armed conflict By identifying both the resemblances and modifications between the two systems. In this article the researcher has discussed the IHL and its framework in the context of Islamic Criminal Law which carry out the just means and methods of warfare. Islamic law combines the concepts of jus ad bellum, the right to go to war and jus in bello the conduct of war whereas International Humanitarian Law (IHL) separates these two concepts. Islamic law requires that both the decision to go to war and the conduct of war must be just and in accordance with Islamic principles but IHL has no jurisdiction over the jus ad bellum which results into the narrow applicability of IHL rules on the contemporary armed conflicts and poses a gap which has to be bridged. This research article endeavors to propose extension of the jurisdiction of the Islamic Criminal Law to IHL for inculcating the just war theory into the framework of IHL by including the Jus ad Bellum into the structure of IHL. In consonance with the Islamic Criminal Law. Islamic law of war provides a comprehensive framework for the conduct of warfare, emphasizing the importance of justice, proportionality, and distinction. These principles are still relevant today and provide a valuable contribution to modern international humanitarian law.

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