

FIQH AL-JIHĀD IN THE CONTEMPORARY WORLD:
ADDRESSING THE GAPS IN THE REGULATIONS
ON THE MEANS AND METHODS OF WARFARE

BY

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ABSTRACT

Since the perfection of Islam through the revelations to Prophet Muḥammad ﷺ, Muslims have always been engaged in wars until this day, and the *aḥadīth* indicate that war will continue until near the end of times. Throughout the ages, the trends of warfare have always developed in scale, means, and methods. Mostly through customary laws, rules regulating warfare have always been set and developed. While modern international humanitarian law (IHL) seems to have developed very rapidly within the past century to meet the new challenges of war, *fiqh al-jihād* seems to instead experience lethargy. It seems to be very difficult to find comprehensive and accurate rulings of *fiqh* regarding various aspects of modern warfare, especially in the means and methods. This research employs a doctrinal legal research to fill in the gap of scholarship specifically in the rulings related to the means and methods of warfare. It first explores the extent to which *fiqh* can develop, and whether it could be affected by the development of science and technology and international law. Second, this research examines three areas of the recent developments on the means and methods of warfare: (i) proportionality and precaution in attacks, (ii) means and methods which may cause unnecessary suffering and superfluous injuries, and (iii) treachery and perfidy; and explores the options to develop *fiqh al-jihād* rulings to cover what has yet to be covered or covered inaccurately. This research finds that certain areas of *fiqh*, especially rules related to *maṣlaḥat* such as which include much of *fiqh al-jihād*, can, to some extent, change depending on the circumstances which include developments of science, technology, and international law. However, these developments are only considered to the extent that it fulfils, and does not contradict, the principles and purposes of the *Sharī'ah*. It is also found that the development of international law regarding means and methods of warfare in the aforementioned three areas can, to a large extent (but not all), be adopted into *fiqh al-jihād*.

خلاصة البحث

منذ أن اكتمل الإسلام بنزول الوحي على النبي محمد صلى الله عليه وسلم، ظلّ المسلمون منخرطين في الحروب إلى وقتنا الحاضر، وقد جاء في أحاديث نبوية عديدة أن ذلك سيستمر حتى قيام الساعة. وعلى مر العصور، تطورت فنون الحرب من حيث الحجم والوسائل والأساليب، حتى تم وضع قواعد لتنظيم الحرب وتطويرها على شكل قوانين عرفية. في حين نجد أن القانون الدولي الإنساني الحديث *International Humanitarian Law (IHL)* قد تطور أيضاً بشكل سريع خلال القرن الماضي لمواجهة التحديات الجديدة للحروب. وعلى نقيض ذلك، يُرى أنّ "فقه الجهاد" يعاني من الركود، حيث يصعب العثور على أحكام فقهية شاملة ودقيقة في مختلف جوانب الحرب الحديثة، خاصة في جانب الوسائل والأساليب. يستخدم هذا البحث طريقة البحوث القانونية الفقهية أو التقليدية لسد نقص البحوث المتعلقة بقواعد ووسائل الحرب وأساليبها على وجه التحديد. ويقوم كذلك باستكشاف عدة محاور، منها: أولاً: مدى إمكانية تطوّر الفقه الإسلامي وتأثره بتطور العلوم والتكنولوجيا والقانون الدولي. ثانياً، يتناول البحث ثلاث مجالات للتطورات الأخيرة التي شهدتها وسائل وأساليب الحرب وهي (1): التناسب والحذر في الهجمات، (2) الوسائل والأساليب التي قد تُسبّب معاناة غير ضرورية وإصابات زائدة، (3) الخيانة والغدر. إضافة إلى ذلك، يقوم هذا البحث بالكشف عن خيارات أفضل لتطوير أحكام "فقه الجهاد" ولتغطية ما لم يتم تناوله بشكل دقيق ومفصّل. وخلص البحث إلى أنّ بعض مجالات الفقه الإسلامي خاصة القواعد المتعلقة بـ "المصالح المرسلّة" -والتي يشتمل "فقه الجهاد" على شيء كبير منها- يمكن أن تتغير إلى حد ما تبعاً للظروف المحيطة من تطورات في العلوم والتكنولوجيا وكذلك القانون الدولي؛ غير أن هذه التطورات لا يمكن أن يُعتدّ بها إلا إذا وافقت مبادئ ومقاصد الشريعة الإسلامية ولم تتعارض معها. كما خلّصت الدراسة كذلك إلى أنه من الممكن الاستفادة إلى حد كبير جزئياً من تطور القانون الدولي فيما يتعلق بوسائل الحرب وأساليبها في المجالات الثلاثة المذكورة أعلاه في "فقه الجهاد".

APPROVAL PAGE

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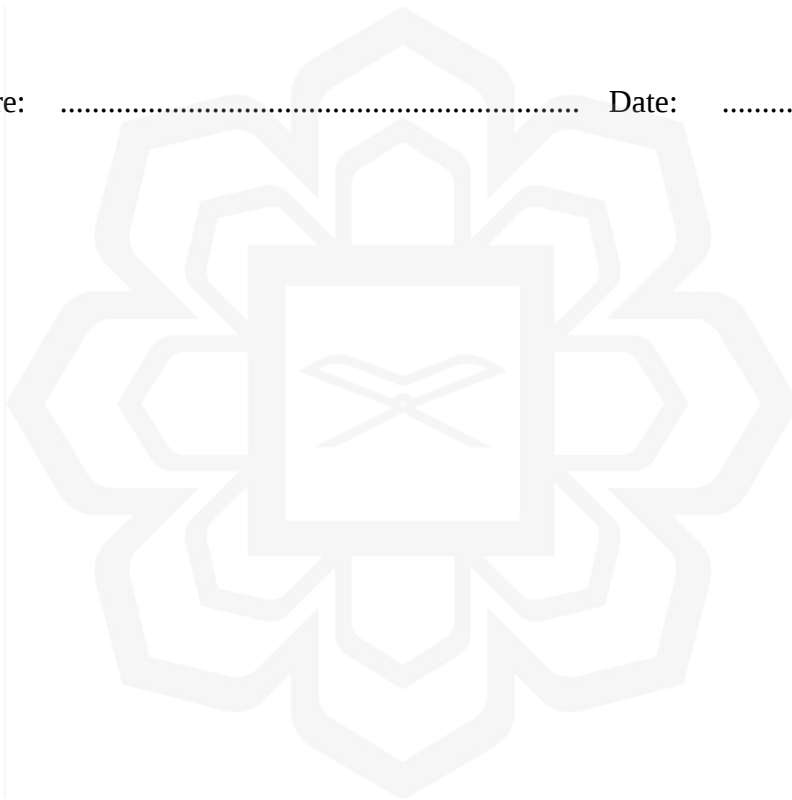
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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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*DEDICATED TO ALL THE MUTTAQĪN AROUND THE WORLD,
FROM THE BEGINNING UNTIL NEAR THE END OF TIME*

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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Pulp Mills Case (Argentina v. Uruguay) (Oral Proceedings CRT 2009/14) [2009] ICJ
Rep 113



LIST OF INTERNATIONAL INSTRUMENTS

Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864), or Geneva Convention 1864.

Geneva Convention Relative to the Treatment of Prisoners of War (1949), or Geneva Convention III.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977), or AP I.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977), or AP II.

Protocol III of the Convention on Certain Conventional Weapons of 1980.

Hague Convention (IV) on War on Land and its Annexed Regulations, (1907), or the Hague Regulations.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980), or Convention on Certain Conventional Weapons.

Universal Declaration of Human Rights (1948), or UDHR.

Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons), (1995), or Protocol on Blinding Laser Weapons.

Convention on Cluster Munitions (2008)

International Covenant on Civil and Political Rights (ICCPR)

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989), or Second Optional Protocol to the ICCPR.

Rome Statute of the International Criminal Court (1998), or Rome Statute.

Declaration of the United Nations Conference on the Human Environment (1972), or Stockholm Declaration.

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977), or ENMOD.

The Cairo Declaration on Human Rights in Islam (1990).

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), or the Ottawa Treaty.

Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body (1899), or the Expanding Bullet Declaration.

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (1868), or the Declaration of St. Petersburg.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1992).

Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

LIST OF NATIONAL INSTRUMENTS

Lieber Code of April 24, 1863 (1863), or the Lieber Code.

The Republic of Indonesia Presidential Decree No. 087/TK/1973.



LIST OF ABBREVIATIONS

ﷺ	Sal Allāhu ‘Alayhi wa Sallam
AD	Anno Domini
AILA	Asosiasi Cinta Keluarga Indonesia
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977)
BBC	The British Broadcasting Corporation
BC	Before Christ
CHR	Commission on Human Rights
CT Scan	Computed Tomography Scan
Da‘esh	Al-Dawlah al-Islāmiyyah fī al-‘Irāqi wa al-Shām
e.g.	exempli gratia
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977
et al	et alia
etc	et cetera
HRC	Human Rights Council
HRW	Human Rights Watch
i.e.	id est
IBFIM	Islamic Banking & Finance Institute Malaysia
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTY	The International Criminal Tribunal for the Former Yugoslavia

IED	Improvised Explosive Devices
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIUM	The International Islamic University of Malaysia
ISIS	The Islamic State of Iraq and Syria
ISS	International Space Station
JIAT	Joint Incidents Assessment Team
JIL	Jaringan Islam Liberal
LESFI	Lembaga Studi Filsafat Islam
MSA	Muslim Student Association
n.d.	No date
NATO	North Atlantic Treaty Organisation
No	Number
Para	Paragraph
PBUH	Peace Be Upon Him
PT	Perseroan Terbatas
RSIS	S. Rajaratnam School of International Studies
SAS	Special Air Service
SC	Security Council
Sdn Bhd	Sendiri Berhad
UDHR	Universal Declaration of Human Rights (1948)
UK	United Kingdom
UN	United Nations
UNICEF	The United Nations Children's Fund
USA/US	United States of America
v.	Versus
Vol	Volume

WMD	Weapons of Mass Destruction
WWII	World War II



CHAPTER ONE

GENERAL INTRODUCTION

1.1 RESEARCH BACKGROUND

In its historical origins, the international laws regulating the conduct of armed conflict have been coloured by very rich contributions from various civilisations, and *fiqh al-jihād* (the Islamic law of war) was indeed a part of it since the time of Prophet Muḥammad ﷺ. As Jean Pictet notes, the Muslims did contribute very positive practices in the ethical conduct of war unlike their Christian opponents, among them are giving humane treatment towards war captives and having high standards of chivalry in honouring agreements.¹ But, as International Humanitarian Law (IHL) develops, one should question whether *fiqh al-jihād* keeps up.

As time goes by, IHL is crystalised from all these customary practices from various civilisations into international treaties and the Geneva Convention 1864 is seen as the birth of modern IHL. As a branch of international law, IHL aims to mitigate or limit the effects of armed conflicts, by covering two areas:²

- i. The protection of those not or no longer taking part in hostilities, and
- ii. Restrictions on the means and methods of warfare.

The early sources of modern IHL are streamered into two branches to deal with each of those areas. For the protection of those not or no longer taking part in hostilities, IHL has what is known as the ‘Geneva Laws’. These are made by the Geneva Conventions and typically specialise in providing rights and protections

¹ Jean Pictet, *Development and Principles of International Humanitarian Law*, (Geneva: Henry Dunant Institute, 1985), 16–17.

² Advisory Services on International Humanitarian Law, "What is International Humanitarian Law?", ICRC, <https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> (accessed 4 May, 2017). See pages: 1-2.

towards certain persons during war, such as: the wounded and sick in war (land or in shipwrecks), prisoners of war, and civilians. For the second area, i.e. the limitation of the means and methods of warfare, IHL has what is known as the 'Hague Laws'. Consisting mostly of the Hague Regulations, they focus on the regulation of weaponry and tactics of warfare; limiting their harmful effects. The Geneva Laws and Hague Laws then merged when the Additional Protocols to the Geneva Conventions 1949 were made in 1977 (hereinafter, AP).³

This research focuses on the second area, i.e. the limitation on the means and methods of warfare. The goal of IHL is to limit the harmful effects of war which do not go well with the reality of human creativity for destruction. While war has been going on since the beginning of human history, it has evolved from being destructive to becoming worse: from bare hands to swords and then to guns, from crossbows to mangonels then to cannons, from horses to tanks then to bomber jets. When one weapon is used to be a danger within a radius of a few meters, now they can be a danger within a radius of hundreds of miles.

Sassoli and Bouvier noted that IHL treaties always try to catch up with the developments in warfare, but usually lag one step behind.⁴ This is true for all laws, as per the Dutch saying *het recht hink achter de feiten aan*.⁵ However, the Hague Regulations were made in the best way possible to meet the challenges of its time. In addition, numerous other conventions such as the Convention of Certain Conventional Weapons, the Convention on Cluster Munitions, and so many others, were also made for this very purpose. A simple assessment is that although there may be areas where IHL lags behind, it is catching up pretty good.

³ See generally: Richard John Erickson, "Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict", *Virginia Journal of International Law*, vol. 19, no. 3 (1979): 557–592.

⁴ Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect In War?*, vol. 1 (The International Committee of the Red Cross, 2006), 131.

⁵ Loosely translated as 'law always limps behind the development of things', see: Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, (Yogyakarta: Liberty, 3rd edn., 1991), 93.

Fiqh al-jihād, on the other hand, does not seem to be doing too well on this field. This is despite the fact that *jihād* is supposed to be an important part of Islamic teachings. It is so important to note that Prophet Muḥammad ﷺ said that a Muslim never participating in or desiring *jihād* is a hypocrite:⁶

This is why since the time of the early scholars, complete *fiqh* books will always have a chapter on *jihād*, such as *Al-Umm* of Al-Shāfi‘ī, and treatises of international law will always have a *jihād* part in it too such as *Al-Siyār* of Imam Al-Shaybānī. There were even special books on *jihād* such as *Mashari al-Ashwaq* by Imam Ibn Nuhās. Works on comparative *fiqh* of different schools of jurisprudence (*madhhab*) also have a chapter on *jihād*, such as *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* by Imam ibn Rushd.

It is then a wonder why the current scholarship of *fiqh* barely discusses the topic of *jihād* sufficiently incorporating the very rapid development of means and methods of warfare – even in the recent decades. Some works seem to be oblivious of this problem, such as the work of Zayd bin ‘Abd al-Karīm al-Zayd.⁷ Al-Zayd discusses IHL in Islam, but in doing so only speaks of the protection of persons not or no longer involved in armed conflicts. This is of course a very important topic, however by not mentioning the limitation of the means and methods of warfare at all, Al-Zayd is missing out on a very important topic. Other works may seem to incorrectly and inaccurately identify the issue, such as the works of Yūsuf al-Qaradāwī.⁸ There are a lot to be discussed on his approach, which is no doubt a scholarly masterpiece. However, there are some issues that may need further revisiting. For example, putting any explosive devices (from hand grenades to nuclear

⁶ The Prophet ﷺ said:

مَنْ مَاتَ وَلَمْ يَغْزُ وَلَمْ يُحَدِّثْ بِهِ نَفْسَهُ مَاتَ عَلَى شُعْبَةٍ مِنْ نِفَاقٍ

“One who died but did not fight in the way of Allah nor did he express any desire (or determination) for Jihād died the death of a hypocrite.” See: Muslim ibn al-Ḥajjāj al-Naysābūrī, *Sahih Muslim*, Vol. 5, (Riyadh: Darussalam, 2007), ḥadīth no.4931.

⁷ Zayd bin ‘Abd al-Karīm Al-Zayd, *Muqaddimah fī al-Qānūn al-Duwalī al-Insānī fī al-Islām*, (Kuwait: The International Committee of the Red Cross, Kuwait Delegation, 2004).

⁸ Yusuf Al-Qardhawy, *Fiqh Jihād* (Bandung: Mizan, 2010).

weapons) under the same category and therefore applying the same ruling would be unreasonable.

Therefore, there is a great need to fill the gap in *fiqh al-jihād*. It is hoped that these gaps can be filled to adapt to the new developments in warfare. Doing so is the objective of this research. To start with, there are a number of questions which would need to be asked in order to address this problem properly.

The first question is on the relationship between the rules set in IHL and *fiqh al-jihād* in limiting the means and methods of warfare to achieve the similar goal of mitigating the harmful effects of war. The reality is that most, if not all, Islamic or Muslim-Majority Nations (hereinafter referred to as Muslim Nations) are parties to the major IHL conventions, or at least are considered to have acquiesced to them as customary international law. Did the Muslim nations concede to modern IHL because of *fiqh al-jihād*? Or is it despite of *fiqh al-jihād*? Therefore, a comprehensive comparative analysis has to be made between the two bodies of law (IHL and *fiqh al-jihād*).

One must map the issues out, and see whether there are problems and if yes, where they are. Once the problems have been identified, a solution must be devised.

When the premise of Islam is to have a solution towards all problems and that all problems must be solved with Islamic sources, the current works of *fiqh* does not seem to cover certain areas or they do so improperly, and there may be a need for a new *ijtihad* (i.e. juristic reasoning)⁹ on the matter. This becomes the next question to be answered.

The extent of which re-*ijtihad* is possible is also a question in itself, and how to implement this re-*ijtihad* is another question. The sources and justification from which changes of rules can be made can be subjected to tough debates. This has not considered the extent of which it is possible to adopt rules which are not taken from

⁹ This term is elaborated more in Chapter Two.