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STUDENT NOTES: AS-SALAMU ALAYKUM? ¹ HUMANITARIAN LAW IN ISLAMIC JURISPRUDENCE

NAME: Karima Bennoune *

BIO:

* Brown University, B.A. (1988); University of Michigan, M.A. (Middle Eastern and North African Studies) (1994); University of Michigan Law School, J.D. (1994). The author would like to thank Professor Raji Rammuny for his assistance with transliterations.

SUMMARY:

... I. Exploring Islamic Humanitarian Law: ... The following central questions are considered: What is the nature of the **Islamic law** of nations, of which humanitarian law is a component? Does **Islamic law** incline towards war in external relations? What protections does Islamic legal doctrine offer to civilians, prisoners of war, and others in time of war, and does it otherwise limit the conduct of hostilities in important ways? Does Islamic international law conflict with contemporary international law precepts on the use of force? ... **International humanitarian law** has a vital and interactive relationship with the law on the use of force, which may be considered the primary corpus of humanitarian law. ... Though this debate remains unresolved, it is important to be aware of the discussions surrounding the meaning of jih<mac a>d. Furthermore, in the context of a discussion of Islamic humanitarian law, it is instructive to note that many Muslim scholars have interpreted the legal conception of jih<mac a>d to be peaceful or defensive in nature and thus compatible with modern international law precepts on the use of force. ...

TEXT:

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I. Exploring Islamic Humanitarian Law:

the Nature of the Project

This Note examines Islamic legal doctrine in the field of humanitarian law and considers the historical contributions made by **Islamic law** to contemporary **international humanitarian law**. The goal of this Note is neither to unfairly attack nor to apologize for **Islamic law**, but rather to attempt an honest appraisal of Islamic humanitarian precepts, with an awareness of the way in which Islam has often been stereotyped as hostile and bloodthirsty in Western discourse. ² The intent is two-fold: First, to establish that scholars of modern **international humanitarian law** have often ignored its historical roots in **Islamic law** and second, to examine how contemporary States which call themselves "Islamic" may be impacted by the historical and contemporary debate about the nature of Islam and **Islamic law**.

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To explain the historical contributions of Islamic humanitarian law and to place the debates about the

nature of **Islamic law** within their contemporary context, Part II provides an outline of contemporary **international humanitarian law**. The parameters of both contemporary and Islamic humanitarian law are defined so that comparisons may be made between them. [***606**]

In Part III, the sources of Islamic international law are discussed. In Part IV, these sources are explored for the rules they expound concerning the conduct of warfare. In this section, interpretations of numerous scholars in the field are reviewed to provide an outline of the debate concerning the law on the use of force within Islamic legal theory. This is followed, in Part V, by an examination of the system of rules governing the manner in which hostilities must be conducted according to **Islamic law**.

In Part VI, some general comparisons will be made between Islamic humanitarian law and its contemporary international counterpart.³ Finally, Part VII investigates the historical impact of Islamic humanitarian law and argues that the history of contemporary **international humanitarian law** must be revised to include the contributions made by Islamic civilization.

As commonly written, the history of contemporary **international humanitarian law** is a relatively short one, drawing only on the last several centuries of European international legal theory, with the primary source considered to be the work of Grotius. This body of law is often viewed as a product only of the Christian tradition (sometimes expanded to the Judeo-Christian tradition) and of European experience.⁴

[***607**] Such an official history excludes the experiences and teachings of non-European peoples, whose traditions have also made great contributions to the development of modern humanitarian concepts.⁵

It is ironic to note, for example, that in a volume entitled *The International Dimensions of Humanitarian Law*, despite the presence of numerous chapters explaining various cultural interpretations and versions of humanitarian law, the chapter entitled "The Development of **International Humanitarian Law**" makes no references to non-European sources or experiences as relevant to the topic. Instead, this "history" is restricted to Rousseau, Grotius, and various European and American wars.⁶ It is a goal of this Note to demonstrate how such a concept of the history of contemporary **international humanitarian law** must be rethought and broadened to include the contributions of other legal and cultural traditions, the example here being the Islamic system.

II. The Fundamentals of Contemporary

International Humanitarian Law

Before examining Islamic **international humanitarian law**, it is important to be precise about what is meant by the term humanitarian law.⁷ Given the goals of this Note, discussed above, the study of Islamic precepts can be best examined using the basic tenets of contemporary **international humanitarian law** as a backdrop.

The International Committee of the Red Cross (ICRC) has defined **international humanitarian law** applicable in armed conflict as:

international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and [***608**] which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.⁸

The basic goals of humanitarian law are: First, to place some humane restrictions on the ways in which hostilities are conducted and, second, to create specific categories of protected persons (and more recently the environment) which are considered hors de combat⁹ and entitled to specific kinds of humane treatment. Thus, this body of law codifies "the rights of man in time of war"¹⁰ and constitutes "the human rights component of the law of war."¹¹ The basic philosophy of modern **international humanitarian law** has been summarized by the Swiss jurist Jean Pictet as "do to others what you would have done to yourself."¹²

Currently, the principal sources of humanitarian law at the international level are the four Geneva Conventions of 1949¹³ and the two 1977 Additional Protocols¹⁴ to those treaties which regulate the [*609] treatment of particular groups of war victims, including prisoners of war and civilians. There are several other sources which limit the means and methods of warfare including the earlier Hague Conventions,¹⁵ and international conventions on specific types of weaponry,¹⁶ as well as the rules of customary international law.¹⁷ However, the Geneva Conventions and their Additional Protocols remain the preeminent source materials and the most widely known codes in this area of law.¹⁸

The ICRC summarizes the Conventions in the Basic Rules of the Geneva Conventions and Their Additional Protocols, and distills them into seven basic principles applicable in armed conflicts.¹⁹ These fundamental concepts may be summarized as follows: 1) Those who do not take direct part in the hostilities should never be harmed, but rather must be actively protected; 2) An enemy who is either sick or injured, or surrenders, and becomes hors de combat, cannot be harmed or killed; 3) The wounded and sick are always the responsibility of the party in whose power they are located, and they must be collected and cared for. Medical personnel, transport, and equipment involved in the care of the sick and wounded are also protected from attack and are to be distinguished by the emblems of the red cross or crescent; 4) Captured combatants, or prisoners of war (P.O.W.s), have certain basic rights and they must be adequately provided for and allowed to correspond with their families. They cannot be attacked or be the objects of reprisal; 5) No one should be subjected to torture or other cruel and unusual treatment and no one shall be held responsible for an act which he or she has not committed. No one shall be denied basic judicial guarantees; 6) The choices of methods of warfare are limited and those means which cause "unnecessary losses or excessive suffering" are absolutely prohibited; and 7) Distinctions must always be made between civilian and military [*610] populations and property, and only military targets can be subjected to attack.²⁰

The Fourth Geneva Convention establishes a thorough set of rules for parties that occupy territory after the cessation of hostilities and sets standards for the treatment of civilians in that territory.²¹ A civilian is defined by Additional Protocol I as any person not a combatant.²² In case of confusion about an individual's status, she is to be presumed a civilian.²³ The protections offered to civilians in occupied territory are more comprehensive than those available in other areas of humanitarian law. All collective punishments, mass forcible transfers, and the movement of people into or out of the occupied territories are absolutely prohibited.²⁴

Considerably less protection is offered to those caught in internal armed conflict.²⁵ Such persons are shielded only by common article three of the four conventions and Protocol II.²⁶ Common article three states that those who have laid down their weapons or are otherwise hors de combat are entitled to humane treatment, without distinction, at all times. Violence against such persons, including torture,²⁷ is prohibited as is the taking of hostages,²⁸ humiliating and degrading [*611] treatment,²⁹ and extrajudicial sentencing or executions.³⁰ Finally, common article three and Additional Protocol II allow the ICRC to offer humanitarian help in cases of internal conflict.³¹

Recognizing the vast limitations of the protections offered by the conventions to those caught in internal armed conflict, Protocol II provides for further guarantees, including the application of common article three, regardless of whether a state of war has actually been declared.³² Most importantly, Protocol II extends the Protocol I protections for civilians to situations of internal conflict and states that starvation of civilians is a prohibited method of internal warfare.³³ It makes clear that "the civilian population as such, as well as individual civilians, shall not be the object of attack."³⁴ However, this Protocol has been deemed to be frugal at best in what it offers to the victims of internal conflict. Malcolm Shaw has concluded that it "is in reality a fairly modest instrument which emphasizes in practice the importance of the distinction between international and non-international armed conflicts."³⁵

International humanitarian law offers little or no protection in the event of internal disturbance.³⁶ To remedy this situation, the ICRC has [*612] debated the possible adoption of a humanitarian declaration on internal strife.³⁷

International humanitarian law has a vital and interactive relationship with the law on the use of force, which may be considered the primary corpus of humanitarian law.³⁸ In modern international law, as embodied in the United Nations Charter, force has been outlawed as a means of carrying out international relations or resolving disputes.³⁹ The only exceptions to this are the Charter's article 51⁴⁰ authorization of

individual and collective self-defense and chapter VII ⁴¹ authorization of U.N. actions.

III. Sources of Islamic International Law

Islamic public international law is known by the term *as-siyar*. ⁴² The entire conception of "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 law. ⁴³ In the [*613] words of Majid Khadduri: "The *siyar*, if taken to mean the **Islamic law** of nations, is but a chapter in the Islamic corpus juris, binding upon all who believed in Islam as well as upon those who sought to protect their interests in accordance with Islamic justice." ⁴⁴

The starting point for a discussion of Islamic humanitarian law is an enumeration of the sources of that law. **Islamic law**, generally, is derived from four main sources: the Holy Qur'^{<mac a>n}, the Sunna, Ijm^{<mac a>}", and Qiy^{<mac a>s}. ⁴⁵ Comprised of the interpretation of these principle sources via a process known as *fiqh*, the Shar^{<OVERSTRIKE>"a} is an all encompassing code of regulations for Muslims in all areas of their lives. ⁴⁶ Thus, in addition to the Qur'^{<mac a>n} and the Sunna, the particular sources of Islamic international law include treaties made between Muslims, publicly issued orders to commanders in the field by the early Caliphs, ⁴⁷ and the opinions and interpretations of great Muslim jurists. ⁴⁸ This list corresponds neatly to the categories of sources which form the basis of contemporary international law: international agreements, custom, general principles, and scholarly opinions. ⁴⁹ [*614]

Analyzed in terms of the modern law of nations, the sources of the Muslim law of nations conform to the same categories defined by modern jurists and the statute of the International Court of Justice, namely, agreement, custom, reason and authority. The Qu'ran and the true Muhammadan hadiths represent authority; the sunna, embodying the Arabian *jus gentium* is equivalent to custom; rules expressed in treaties with non-Muslims fall into the category of agreement; and the fatwas and juristic commentaries of text-writers as well as the utterances and opinions of the Caliphs in the interpretation and the application of the law, based on analogy and logical deductions from authoritative sources may be said to form reason. ⁵⁰

In order to establish the contours of Islamic humanitarian law, these sources must be examined for what they have to say about the conduct of warfare.

IV. War and Jih^{<mac a>d} in Islam

A. The Jih^{<mac a>d} Debate

There is great debate within Islamic legal scholarship over the meaning of the term "jih^{<mac a>d}," about what the duty of jih^{<mac a>d} entails for Muslims, and when the use of force is authorized by **Islamic law**. ⁵¹ This Note will not digress too far into the intricacies of the jih^{<mac a>d} debate. But clearly, the *jus ad bellum* (law of war) is connected to the *jus in bellum* (law in war) in the architecture of the religio-military structure of **Islamic law** itself, as well as in contemporary international law. Simply put, a basic understanding of the way a society conceives of justified warfare is fundamental to a thorough analysis of its rules for the conduct of war. Thus, a general overview of jih^{<mac a>d} is important to ground further discussion.

In the West, where the term is one of the few Arabic words which most people believe they understand, "jih^{<mac a>d}" is often equated with the [*615] use of force and is often inaccurately defined as "holy war." ⁵² In reality, the term jih^{<mac a>d} comes from the Arabic verb "j^{<mac a>hada,"} meaning to struggle or exert. ⁵³ The Prophet Muhammad is recorded in the sunna as stating that the exertion of force in battle is a minor jih^{<mac a>d}, while "self-exertion in peaceful and personal compliance with the dictates of Islam [constitutes] the major or superior jih^{<mac a>d}." ⁵⁴ He went on to state that "the best form of jih^{<mac a>d} is to speak the truth in the face of an oppressive rule." ⁵⁵ Jih^{<mac a>d} has also been defined as "exertion of one's power to the utmost of one's capacity." ⁵⁶

Classical ⁵⁷ scholarship described **Islamic law** as dividing the world into two groups of territories, d^{<mac a>r} al-harb ⁵⁸ (the abode of war) and dar al-Isl^{<mac a>m} (the abode of Islam), between which the only

possible relation was one of violent conflict. A permanent state of warfare existed **[*616]** between Islam and the outside world, the world of war.⁵⁹ These views were reemphasized in nuanced form by contemporary scholars whom Mustantir Mir classifies as the neoclassicists.⁶⁰

For example, Majid Khadduri, one of the preeminent scholars of **Islamic law** in the English-speaking world, states categorically that "no compromise is permitted with those who fail to believe in God [polytheists], they have either to accept Islam or fight."⁶¹ In addition to the polytheists, apostates, dissenters, deserters, and highway robbers are also to be subjected to a forceful jihād.⁶² Khadduri sees the relationship with the "scripturaries"⁶³ as essentially similar to that with all other non-Muslims, except that they are offered three choices: accepting Islam, a violent jihād, or paying the poll tax called jizya.⁶⁴

While some prominent Islamic scholars also favor this interpretation, in the West this description has often gone hand in hand with the construction of Islam as a religion spread by the sword entirely. As Agha Shahi states, this constitutes an "indict[ment of] the historical role **[*617]** of Islam as one of permanent belligerency towards the non-Muslim world."⁶⁵

Other Islamic scholars, classified as the modernists, have maintained that the jihād does not include offensive warfare but only permits self-defense, and that the faith is not intended to be spread by force.⁶⁶ Mir has concluded that the modernist position is the one most firmly established today and that it has the most supporters.⁶⁷ For modernist scholars, the basis of international relations in **Islamic law** is peace, and force is only permissible in a "just war."⁶⁸ As they see it:

The state is obliged to refrain from engaging in wars prompted by differences in religious belief or for exploitation of other people's resources... War is ... permitted to defend the faith, the territorial integrity of the state; to defend the oppressed and persecuted of the world, to protect the honour, dignity and freedom of man, and to preserve peace in the world.⁶⁹

Modernist scholars point to Qur'anic verses which emphasize the importance of peace, such as 59:23 which states: "Allah is the source of peace and the bestower of security"⁷⁰ and 7:56 which warns "do not promote disorder in the earth after peace has been established."⁷¹ They refer also to verses such as 109:6, which states, "unto you your religion and unto me my religion,"⁷² arguing that force against non-Muslims is justified only when non-Muslims threaten Muslims or interfere with their religious practice.⁷³

In attempting to resolve the conflicting representations of jihād, scholars have also pointed out that the orientation toward peace and the limits on the resort to war shifted after the death of the Prophet **[*618]** Muhammad in response to the pressures of empire building and the dynamics of power.⁷⁴ As Shahi analyzes this change, "later Muslim jurists found it expedient to legitimize the wars of expansion of the Muslim rulers."⁷⁵ Where scholars such as Khadduri⁷⁶ and Abdullahi Ahmed An-Na'im⁷⁷ interpret the aggression of the later Caliphs as meaning that Islamic legal doctrine was inherently war-like, Shahi and other modernists place this phenomenon in what they see as its historical context and question the assumptions made about **Islamic law** on this basis:

Their theories [those of eighth and ninth century Muslim jurists] were the product of a historical epoch when the power of the Abbasid caliphate or the universal Islamic state, was at its zenith. But it is surprising that contemporary scholars should prefer to base their judgments on the rules of Islamic conduct of state not on those to be found in the Quran and the Sunnah, but on interpretations by jurists which reflected the ethos of a particular age of Islamic history.⁷⁸

Along the same lines, the famous scholar Muhammad Abduh (1842-1905) insisted on the defensive character of the jihād. He argued that the Islamic conquests which occurred later were based on power rather than law, and not all of them were valid in Islam.⁷⁹ Similarly, Hans Kruse explains this tension between the doctrinal Islamic jihād and political realities as "attempts to maintain the appearance of political facts conforming with religio-legal demands"⁸⁰ His explanation of this phenomenon is that the concept of jihād was frequently used as an **[*619]** excuse or disguise

for "imperialistic enterprises," a practice which caused a great deal of discomfort among clerics and religious scholars. ⁸¹

In stressing the originally pacifistic character of Islamic legal doctrine, modernist scholars look to the actions of the Prophet and early Muslim conduct of State. ⁸² Shahi gives numerous examples of the Prophet acting as a peacemaker and concluding treaties. ⁸³ He also points to the fact that Islam and Eastern Christianity coexisted more or less peacefully for long periods of time. ⁸⁴ Waheed-uz-Zaman paints a picture of the Prophet as a diplomat committed to peace and offers as an example the Treaty of Hudaibiya, which the Prophet concluded with the Quraish tribe of Mecca in A.D. 628. ⁸⁵

Along similar lines, scholars such as Kruse and Saed Banajah stress the various peaceful options available in Islam, outlining a third category beyond *al-sulh* and *al-Islam* called *al-sulh* (the house of peace). ⁸⁶ *al-harb* included three key Islamic institutions which offered security for "unbelievers." They were the promise of security or *aman*, ⁸⁷ which must be met unconditionally; *dhimmi* ⁸⁸ status which made Christians and Jews (and occasionally others who could be deemed "scripturaries") protected semicitizens with certain rights and subject to taxation; and the *muwada'ah*, ⁸⁹ an international treaty which could only **[*620]** be revoked with notice. ⁹⁰ These options provide the foundation for peaceful international relations and contradict the notion of a mandatory, constant, and violent *jihad* with the non-Muslim world. ⁹¹

Though this debate remains unresolved, it is important to be aware of the discussions surrounding the meaning of *jihad*. Furthermore, in the context of a discussion of Islamic humanitarian law, it is instructive to note that many Muslim scholars have interpreted the legal conception of *jihad* to be peaceful or defensive in nature and thus compatible with modern international law precepts on the use of force. ⁹²

B. The Islamic Legal Philosophy of Warfare

Through the concept of *jihad*, warfare was brought under control and subjected to law as it had not been in pre-Islamic Arabia. "The jurist-theologians consciously formulated law subordinating all personal considerations to *raison d'etat*, based on religious sanction." ⁹³ Islam thereby outlawed all war except the *jihad*. This philosophy may be compared to the framework of the modern law of force, under which the permissible use of force is limited to certain specific authorized categories. This development had a significant impact on the application of humanitarian principles to warfare.

By using this word [*jihad*] to denote war, by further limiting it by means of *fi sab' al-'illah* [in the way of God] and by laying down an elaborate set of rules for the conduct of war in all its stages, Islam presents a new understanding of war... All this gives to *jihad* an ideological-cum-ethical dimension that is obviously missing from the pre-Islamic practice of war. ⁹⁴

The Qur'an's statements on fighting have been read to mean that "while according sanction to fighting in self-defence ... [it] enjoins concurrently, humanitarian rules of warfare to mitigate the human **[*621]** suffering it inflicts." ⁹⁵ Ahmed Yamani goes so far as to state that respecting Islamic humanitarian precepts is a basic pillar of Islam after the five original pillars. ⁹⁶ The centrality of humanitarian concerns within the Islamic legal conception of warfare is thus established.

This early Islamic concern with humanitarian principles stands in sharp contrast to the Western conception of "Holy War," which associates the concept with backwardness and barbarity. In Islamic history, the spiritualization of conflict, in fact, constituted a move toward a more enlightened and less brutal model of warfare. ⁹⁷ Even An-Na'im, who concludes that *jihad* is inherently aggressive, recognizes the original development of the concept as a positive phenomenon:

Historically, *jihad* was a positive phenomenon because it humanized the practice of warfare in the Middle Ages. First, *Shari'ah* prohibited the prevalent practice of using war for material gain or revenge. Second, the Prophet and his companions, acting in accordance with the Qur'an and Sunna, laid

down very specific and strict rules for honorable combat. ⁹⁸

As Islamic legal doctrine subsumed warfare into religion, humanitarian considerations were built into the concept of permissible war itself. Thus, the construction of the Islamic rules of war is permeated by the basic Islamic conception that the religion's teachings are as much **[*622]** about the relations between human beings as between the individual person and Allah. ⁹⁹ Since warfare was theoretically restricted to those types of conflicts and settings permitted by Islam, it should always be ruled by these Islamic precepts about human interrelationships. If a particular conflict failed to meet these standards, i.e., if humanitarian precepts were violated during the alleged jihād, the conflict no longer qualified as permissible warfare because it was no longer Islamic. ¹⁰⁰ This conception also had consequences for individual participants in the jihād, since for Muslims, the war component of jihād was

conceived as an act of worship [and had] also to follow certain hard and fast rules which may be called the war-ritual. Transgressing these ritual rules of war would deprive this act of its character as an act of worship and would decrease the transcendental value and merits of the participants. ¹⁰¹

Furthermore, there is an absolute quality to these humanitarian provisions in the **Islamic law** of war. These provisions are "based on divine commands and the precepts of the Prophet and constitute inviolable norms. They are not based on reciprocity or expedience. The Islamic injunctions prescribe ehsan [benevolence and excellence] in human relations." ¹⁰² This conception applies also to the human interaction with property and the environment. Since, in the Islamic system, all wealth is supposed to be a trust from God, it is considered a serious trespass to destroy it without cause. ¹⁰³ Muhammad Chapra cites a Qur'anic verse to the effect that "destroying both life and property has been declared ... to be equivalent to spreading mischief and corruption in the world." ¹⁰⁴ According to Chapra, this is the spirit which imbued **[*623]** the Caliphs' orders to their commanders regarding their conduct in battle. ¹⁰⁵

V. Islamic Humanitarian Principles: Methods and

Targets of Warfare

Fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah does not love those who exceed the limits. ¹⁰⁶

As we examine Islamic humanitarian rules, it is important to keep in mind the outline of contemporary humanitarian law provided above, in Part II. It is crucial to note that more than a millennium before the codification of the Geneva Conventions, most of the fundamental categories of protection which the Conventions offer could be found, in a basic form, in Islamic teachings. ¹⁰⁷

In Islamic jurisprudence, as we have seen, the only type of permissible force was the jihād. The jihād functioned as a primary limitation on violence. In addition to the jihād, the use of force was subjected to a second set of limitations - humanitarian considerations.

The specific prohibitions on the methods of warfare were first elaborated in detailed instructions given by the Prophet, and later by the first Caliphs, to Muslim warriors as they were being sent into battle. Though methods of warfare employed in the seventh and eighth centuries differ greatly from contemporary methods, the principles established in earlier times are equally relevant today. Women, children, and other noncombatants were recognized as a separate category of persons entitled to various degrees of immunity from attack, a development which may be seen as the birth of the "civilian." ¹⁰⁸ Prisoners of war were not to be executed and elaborate instructions for their care were developed. Fighters who committed "war crimes" were subject to punishment. Even the environment ¹⁰⁹ was not to be subjected to unlimited onslaught. **[*624]**

The Islamic view seems to differ from the Christian-inspired "do to others what you would have done to yourself" view of humanitarian law, cited above. In Islam, these rules are supposed to apply not merely because of reciprocity concerns, but also because they are just and because acting in conformity with

them is required by Allah. This principle is reflected in the orders of the Prophet Muhammad and the Caliphs. In the words of Khadduri:

The binding force of the siyar was not based essentially on reciprocity or mutual consent, unless non-Muslims desired to avail themselves of Islamic justice, but was a self-imposed system of law, the sanctions of which were moral or religious and binding on its adherents, even though the rules might run counter to their interests. ¹¹⁰

A. Humanitarian Principles Found in Military Orders

The Prophet instructed "Abdur-Rahman ibn-'Awf (d. A.H. 31/A.D. 652), ¹¹¹ an early Quraishite convert to Islam and military commander, to "never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His messenger for your guidance." ¹¹² Furthermore, the Prophet instructed the Muslim troops dispatched against the advancing Byzantine army in language that foreshadows modern humanitarian rules and concerns:

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 infants at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; 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. ¹¹³

Other restrictions the Prophet imposed include the prohibition of burning or drowning to kill the enemy, as these methods inflicted unnecessary suffering. ¹¹⁴ However, some scholars have claimed that such **[*625]** methods were permissible if the Muslims could not otherwise obtain victory. ¹¹⁵ Khadduri also states that the Prophet opposed "treacherous killing and mutilation" but that he allowed Muslims to retaliate in kind against such practices. ¹¹⁶ On the other hand, there is a theoretical current which suggests that the Prophet disavowed cruel and unusual treatment as a fairly general rule. Hisham ibn al-Hakim (d. A.H. 179/A.D. 795), a Shi'ite jurist, testified that he had "heard God's messenger say that God will torture those who torture people on earth." ¹¹⁷

Muhammad is reported to have permitted some devious tactics in battle, having described war as a ruse, and to have stated that "ruse is invaluable in war." ¹¹⁸ The types of tricks permitted involve various deceptive practices such as lying and spreading false rumors to demoralize the enemy camp. ¹¹⁹

However, in Islamic doctrine, breaking one's promise or reneging on an oath were absolutely forbidden. ¹²⁰ According to the renowned Shafi'i jurist, an-Nawawi (d. A.H. 676/A.D. 127), there is a consensus among Islamic scholars that allows for tricks in war against unbelievers, unless they have been given a promise or guarantee. The Qur'an clearly states that one should "not break the oaths after making them fast." ¹²¹

Furthermore, there is evidence that Muslim leaders actually enforced this teaching. The second Caliph, Umar ibn al-Khattab (d. A.H. 35/A.D. 656) ¹²² was informed of the conduct of a Muslim fighter who told a Persian soldier not to fear him and then proceeded to kill the Persian. Umar warned the commander, saying "as God is my witness, if I hear anyone has done this I shall cut his neck." ¹²³ Again, this philosophy is a precursor of contemporary principles codified in the Geneva Conventions which prohibit the killing, injuring, or capture of an adversary by **[*626]** resort to perfidy, and mandate punishment for the commitment of such war crimes. ¹²⁴

Further detailed criteria for the conduct of war were offered by the early Caliphs in a number of celebrated addresses to Muslim soldiers being sent into battle. In a famous speech to warriors departing on the first Syrian expedition, the first Caliph, Abu Bakr as-Siddiq (d. A.H. 13/A.D. 634), ¹²⁵ enumerated a list of principles which also created protected categories of noncombatants and prohibited unnecessary attacks on the environment. He instructed the warriors:

Stop O people, that I may give you ten rules to keep by heart! Do not commit treachery, nor depart from the right path. You must not mutilate, neither a child or aged man or woman. Do not destroy a palm-tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. ¹²⁶

An alternative rendition of this passage has Abu Bakr ordering the Muslims in more detail as follows:

When you meet your enemies in the fight, behave yourself as befits good Muslims, and remember to prove yourselves the true descendants of Ismail ... If Allah gives you victory, do not abuse your advantages and beware not to stain your swords with the blood of one who yields, neither you touch the children, the women, nor the infirm also men whom you may find among your enemies. In your march through the enemy territory, do not cut down the palm, or other fruit-trees, destroy not the products of the earth, ravage no fields, burn no houses... Let no destruction be made without necessity ... Do not disturb the quiet of the monks and the hermits, and destroy not their abodes ... ¹²⁷

Caliph Umar is reported to have had standard instructions that he issued to his departing armies, which temporally extended the protections given to noncombatants and warned about abuses of military power as follows:

Do not mutilate when you have power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a **[*627]** minor, but try to avoid them at the time of the encounter of the two armies, and at the time of the heat of victory, and at the time of expected attacks. ¹²⁸

Umar is reported to have actually enforced these orders and went so far as to remove Khalid Ibn al-Walid (d. A.H. 21/A.D. 641-2), his military commander, because Khalid was overzealous in slaughtering the enemy. Omar is reported to have said, "Khalid's sword is indeed violent." ¹²⁹ The Caliph, in fact, replaced Khalid with Amr-ibn-al-As (d. A.H. 42/A.D. 636) specifically because the latter man was less bloody and fought what the Caliph called, "a lenient war." ¹³⁰

Regulations on fighting were also applied to the early Islamic equivalent of noninternational military engagements, conflicts among Muslims. The fourth Caliph "Ali ibn Abu-Talib (d. A.H. 41/A.D. 661) ordered his soldiers during the internal Muslim conflict with Mu'awiyah ¹³¹ as follows:

If you defeat them, do not kill a man in flight, do not finish off a wounded man, do not uncover a pudendum, or mutilate the dead, do not rip open a curtain or enter a house without permission, do not take any of their property, and do not torture or harm their women even though they may insult your leaders, and remember God, mayhap you will have knowledge. ¹³²

Caliph "Ali is also reported to have forcefully forbidden Muslim fighters from killing those who had fled from the battlefield. He is believed to have ordered soldiers neither to pursue fugitives from the fighting for a distance of more than a mile, nor to continue sieges for overly long periods of time. ¹³³

The Qur'an may further be read to support the cessation of hostilities against a retreating or surrendering combatant in the following **[*628]** verse: "If they incline to peace, incline thou to it, and set thy trust upon Allah. If then they withdraw from you and do not fight against you, but offer you peace, Allah has not opened for you a way against them." ¹³⁴ Allowing the possibility of surrender is an important aspect of humanitarian law, which prohibits total war to the death. ¹³⁵ Herein, **Islamic law** again seems to augur this development.

In a further foreshadowing of modern law, some early Muslim jurists ¹³⁶ made specific prohibitions of types

of weaponry and strategies considered particularly cruel. For example, the Maliki jurist, Khalil ibn Ish^{mac a>q} (b. A.D. 1365) believed that poisoned arrows should not be used, in part because the suffering they inflicted far exceeded the potential gain.¹³⁷ However, Hilli (A.D. 1250-1325), a Shi'ite jurist, went as far as completely prohibiting the use of poisoned arrows in any form against any enemy.¹³⁸ Some modern Muslim legal scholars have interpreted this collection of principles in the contemporary world absolutely to forbid the use of nuclear weapons.¹³⁹

B. Noncombatants

There is some controversy in Islamic scholarship over the proper definition of combatants. Some, like Yamani, argue that any able-bodied man is a combatant, whether or not he is actually a participant in the hostilities.¹⁴⁰ Others argue that both the elderly and monks, who were normally protected, could be killed if they were even indirectly involved **[*629]** in supporting the enemy cause. For example, in the battle of Hunayn,¹⁴¹ Muslim fighters are reported to have killed a man who was over one hundred years old, in the presence of the Prophet Muhammad. The Muslim fighters killed the aged man allegedly because he provided helpful advice during battle.¹⁴² However, as a counterpoint to this, one may cite, as representative of the concept of forgiveness in the Islamic conduct of warfare, the general amnesty granted by the Prophet to the inhabitants of Mecca after the city's fall.¹⁴³

Some early Islamic legal scholars, in elaborating their interpretations of proper procedures for Islamic warfare, seem to have overlooked the prior instructions by the Prophet and the Caliphs. The dichotomy between their views and the earlier idealistic articulations echoes the theory that the conception of jih^{mac a>d} shifted for reasons of political expediency.¹⁴⁴

For example, Abu H^{mac a>nifa} concluded that everything which the jih^{mac a>dists} could not conquer should be destroyed, including homes, churches, trees, and livestock.¹⁴⁵ Shafi' held that all lifeless things, such as trees, could be destroyed but that living creatures, such as animals, could be killed only if the Muslim fighters believed that the creatures' continued existence would strengthen their enemies.¹⁴⁶ Furthermore, the followers of N^{mac a>fi} ibn al Azraq, a Kh^{mac a>riji} jurist, argued that, among polytheists, women and children were as guilty as adult men of polytheism and should also be killed.¹⁴⁷

Still, as a precedent to today's international consensus, most Muslim "jurists agreed that noncombatants who do not take part in the fighting [such as women, children, monks and hermits, the aged, the blind, and the insane] were excluded from molestation."¹⁴⁸ Shafi' strongly maintained that catapults could not be directed against inhabited houses, but only against fortresses, unless the homes were located very close to **[*630]** fortresses.¹⁴⁹ Some Hanafi and Shafi'i jurists did not even rule out attacks on peasants and merchants who were not active in the hostilities.¹⁵⁰ In this view, combatants and noncombatants were to be carefully distinguished and treated according to their particular legal status.¹⁵¹ However, Khadduri also states that "once the unbelievers in the dar al-harb had been invited to adopt Islam and refused to accept one of the alternatives ... the jih^{mac a>dists} were allowed, in principle, to kill any one of them, combatants or non-combatants, provided they were not killed treacherously and with mutilation."¹⁵² These interpretations clearly conflict with those cited above, and demonstrate the tension in Islamic legal scholarship regarding the categorization of noncombatants. However, the bulk of the evidence, particularly if one pays careful attention to the military orders of the early Caliphs and commanders, seems to support an interpretation of the law that requires noncombatants to be shielded from harm.

This tradition of protecting civilians goes back to the Prophet.¹⁵³ His active concern with protecting civilians is also shown by the following examples. When a man told the Prophet that a woman had been killed, the Prophet replied "she certainly could not have been fighting." Later when a number of children were killed, the Prophet grew angry and cried, "why is it that some people are so aggressive today as to kill progeny?"¹⁵⁴ These quotes clearly indicate that, as early as the time of the Prophet, **Islamic law** distinguished between combatants and noncombatants, and censured the random use of weapons against combatants and noncombatants alike.¹⁵⁵

Many Muslim scholars' statements and views concur with such an assessment. M^{mac a>lik} is said to have gone so far as to warn against killing women and children who take active part in the hostilities.¹⁵⁶ Al-Awza'i believed that women and children could be killed for taking part in the fighting or supporting the war effort against Muslims, but only if it was proven that they had actually done so. This sentence could not be **[*631]** carried out based simply on suspicion or likelihood, but rather the women and children

must have actually served as combatants or guides. ¹⁵⁷

Furthermore, the Prophet Muhammad is reported to have opposed the use of starvation as a weapon. In the war with the Meccans, a blockade of cereal exports to Mecca was ordered by a Bani Hanifa noble. When the Prophet was informed of this blockade by the Meccans themselves, he immediately ordered that it be lifted. ¹⁵⁸

In modern humanitarian law, a key development is the wearing of special uniforms and badges to denote combatants and noncombatants, so that they may be distinguished during hostilities. ¹⁵⁹ Yamani suggests that the Prophet may have engaged in a rough form of this practice by wearing a special robe during military marches. In the Battle of Badr (A.D. 624), ¹⁶⁰ it is recorded that the Muslim fighters wore for the first time, a special sign made out of wool. However, there is no further proof that during the time of the Prophet any attempt was made to officially provide Muslim fighters with uniforms. ¹⁶¹

As shown above, Islamic legal rules which first developed in the seventh and eighth centuries foreshadow contemporary humanitarian tenets in many ways. However, Islamic legal protections offered to those under Muslim occupation seem to differ the most from contemporary provisions. ¹⁶² Conquered enemy persons under Muslim military occupation were given one year to become dhimmis (protected semicizens subjected to taxation) or leave the territory. ¹⁶³ The owners of land in occupied enemy territory could maintain their ownership but **[*632]** had to submit to taxation. ¹⁶⁴ However, Muhammad Qutb points to what he considers the generous tradition of Islamic treatment of conquered peoples. To this effect, he cites the decision of Caliph Umar to whip the son of Amr ibn al-As, the victorious general and renowned governor of Egypt, because the son had beaten an Egyptian Coptic subject with no legal justification. ¹⁶⁵ According to Qutb, the general himself was almost the target of the Caliph's whip. ¹⁶⁶ This presages the modern practice of holding violators of humanitarian law responsible for their actions.

Furthermore, in accordance with modern international law, Islam has been held to completely forbid the levying of any collective punishments, with reference to the Qur'anic injunction that "no burden bearer bears the burden of another." ¹⁶⁷ Yamani relates a story of Abu Hurayrah, in which Hurayrah reported that the Prophet told some Muslim soldiers the following parable: "An ant bit a Prophet whereupon he ordered the ant hill to be burnt. Then God said to him, "If an ant bites you, would you burn a whole community of ants who sing the praises of God?" " ¹⁶⁸

C. Prisoners of War

Although captured women and children (sabi) were generally distinguished from combatants and not killed, they were considered part of the spoils of war (ghanima), and they could be divided and enslaved. ¹⁶⁹ While a better alternative than execution, enslavement was still discouraged by the Prophet and was subjected by him to the absolute edict that captive mothers and children were not to be separated. ¹⁷⁰

Prisoners of war ("asr") were also considered part of the spoils of war. ¹⁷¹ There are wide-ranging opinions on the rules governing their treatment. However, there is a general scholarly consensus that Islamic teachings resolved the problem of how prisoners of war were to be **[*633]** treated in a most enlightened fashion in an era when prisoners could be executed at will. ¹⁷² On the subject of prisoners of war, the Prophet is reported to have stated:

They are your brothers. Allah has put them in your hands; so whosoever has his brother in his hands, let him give food to eat out of what he himself eats and let him give him clothes to wear out of what he himself wears, and do not impose on them a work they are not able to do themselves. If at all you give them such work, help them to carry it out. ¹⁷³

Caliph Abu Bakr said of prisoners of war: "Treat the prisoners and he who renders himself to your mercy with pity, as Allah shall do to you in your need; but trample down the proud and those who rebel." ¹⁷⁴ In fact, Muslim tradition sometimes went as far as feeding prisoners before feeding soldiers and releasing prisoners when food was not available for them. ¹⁷⁵

It has also been reported that early Islamic practice permitted representatives of the enemy to visit

prisoners of war for the purpose of counting them. ¹⁷⁶ This nascent practice foreshadows the contemporary custom of allowing representatives of the International Committee of the Red Cross (ICRC) to visit prisoners of war. ¹⁷⁷

A Qur'anic verse on the subject of prisoners of war orders as follows:

So when you meet in battle those who disbelieve, then smite the necks until when you have overcome them, then make [them] prisoners, and afterwards either set them free as a favor or let them ransom [themselves] until the war terminates. That [shall be so]; and if Allah had pleased He would certainly have exacted what is **[*634]** due from them, but that He may try some of you by means of others ... ¹⁷⁸

Thus, prisoners of war held by Muslims were either to be released without conditions, ransomed, or exchanged for Muslim prisoners held by the enemy, or under some circumstances, enslaved. ¹⁷⁹ However, Mir has emphasized the extraordinary nature of permissible enslavement. ¹⁸⁰

According to Khadduri, a decision as to the treatment of prisoners of war was left to the imam who could order their execution in special circumstances, or order them released, ransomed, exchanged, or enslaved. ¹⁸¹ Although, prisoners of war were sometimes enslaved, the Qur'an did not comment on the permissibility of this practice. ¹⁸² Khadduri claims that the Prophet himself enslaved captives, as did the first Caliph Abu Bakr, but that Caliph Umar was against the practice. ¹⁸³

The most noble course of action was considered to be the unconditional release of prisoners. The Prophet is reported to have often engaged in this course of conduct. Following the Battle of Badr, the Prophet reportedly released seventy prisoners with the only condition being that they must teach some illiterate Muslims to read and write. ¹⁸⁴ Bukhari also records that after the Battle of Hunayn (A.D. 631), 6000 prisoners taken from the Hawazin tribe were simply set free by the Prophet with neither conditions nor ransom. ¹⁸⁵ The historian Al-Tabari also reports that over one hundred families of the Bani Mustaliq tribe were taken prisoner, but were set free without ransom by the Prophet. ¹⁸⁶

The execution of prisoners was forbidden except in exceptional circumstances. When Khalid ibn al Walid killed captives from the Jadhimah tribe, the Prophet is reported to have said, "O Lord I register **[*635]** to you my displeasure at what Khalid has done." ¹⁸⁷ However, it has been said that the Prophet himself killed prisoners. It has also been argued that the Prophet only did so if the specific prisoner was considered to have committed a crime before the hostilities, rather than merely having participated in the fighting. Yamani points to the execution of "Uqbah ibn Abu Mu'ayt, a prisoner of war, who had sometime earlier attacked Muhammad while he was praying. He argues that it would be possible to construe this as analogous to executions permitted by modern law based on crimes committed outside of the scope of hostilities or as a result of grave violations of humanitarian law, above and beyond mere participation in the hostilities as an enemy combatant. ¹⁸⁸

VI. Islamic Humanitarian Law and **International**

Humanitarian Law: Some Comparisons

Given popular wisdom about the origins of humanitarian law and the supposed brutal nature of Islamic doctrine, it is instructive to view **Islamic law** in light of the current state of the law of war. ¹⁸⁹ Thus, one discovers a legal system neither inherently warlike nor bloodthirsty, but rather one which constitutes one of the earliest attempts to institutionalize humanitarian limitations on the conduct of military conflict. The Islamic system, though developed some thirteen centuries before the codification of modern **international humanitarian law**, foreshadows its development, and contains the kernel of its most important protections. Clearly, any comparisons between **Islamic law** and contemporary international law are closely related to the jihad debate, discussed above. ¹⁹⁰ Scholars who hold to a more neoclassical view of the **Islamic law** of war are most likely to find unresolvable differences with contemporary international law. As Mohammed Draz argues, if such an interpretation is correct, then international law has no sense in Islam because, as a result, non-Muslims would be deprived of rights to life and liberty. ¹⁹¹ For example, An-Na'im has written that Islamic Sharia and contemporary international law are inherently irreconcilable. **[*636]**

Shari'a is in direct conflict with the Charter of the United Nations because, whereas that charter prohibits the use of force in international relations except in self-defense, Shari'a sanctions the use of force to propagate Islam or to uphold its integrity in another Muslim country. Moreover, Shari'a's underlying theme of a permanent state of war with, and nonrecognition of, non-Muslim states repudiates the entire basis of modern international law. ¹⁹²

He concludes that this very nature of jihād makes the Sharī'a system incompatible with contemporary international law and that this impacts the foreign policy of Islamic countries today.

First, the Islamic nations must reassess the validity of jihād and whether the aggressive propagation of Islam by violence is viable in the modern world. Second, Muslims must question whether non-recognition of sovereign non-Muslim states and classification of them as dar al-harb, territories of war, can continue when peaceful coexistence is imperative. Given these aspects of public Shari'a, it is arguable that this system is both morally indefensible and practically untenable today. ¹⁹³

One could question whether or not this is an accurate portrayal of the international relations of modern Muslim states. As An-Na'im himself notes, all modern Muslim countries are members of the United Nations and are bound by the U.N. Charter. ¹⁹⁴

Conversely, a modernist interpretation, which as noted above is the most prevalent view today, leads to a determination of potential harmony with international law, since force is permitted only in self-defense and, in some cases, for the protection of human rights. ¹⁹⁵ For example, Agha Shahi absolutely disagrees with An-Na'im's assessment, **[*637]** holding that there is a basic compatibility between international law, including the U.N. Charter, and **Islamic law**. Similarly, Louis Gardet has concluded, regarding the **Islamic laws** of war, that "nothing would seem to indicate that they [the **Islamic laws** of war] are not in conformity with modern international law." ¹⁹⁶ Even Khadduri who viewed the relations between the Islamic and non-Islamic world as necessarily hostile, articulates that "in Islamic legal theory, the ultimate objective ... was not war per se but the ultimate establishment of peace." ¹⁹⁷

International cooperation is entirely possible within the modernist framework. For example, Mir writes that whether Islamic international law is compatible with participation in international organizations, such as the United Nations, depends upon which theoretical framework one adopts. He argues that the modernist view (which he claims is the most popular today) would not raise obstacles to such participation. ¹⁹⁸

As for **international humanitarian law**, **Islamic law** contains many of the requisite protections in the basic categories. Distinction is made between combatants and noncombatants. Prisoners of war are to be well-treated, and only in exceptional cases are they to be subjected to execution. Property is protected, as is the environment, which is only now emerging as an important protected category in contemporary international law. ¹⁹⁹ There are also clear standards of responsibility and punishment for those who commit war crimes, and the principle of not following illegal orders is established. ²⁰⁰ Yamani takes the position that in matters of humanitarian law, the guarantees provided by **Islamic law** are not only compatible with contemporary international law, but actually surpass it, particularly in the field of internal armed conflict. ²⁰¹

Certain negative aspects of **Islamic law**, as discussed above, must also be recognized. Prisoners could be enslaved under certain limited circumstances, a practice which in the contemporary world is recognized as abhorrent. Not all jurists believed that noncombatants were to be **[*638]** spared, and the definition of combatants was less generous than the modern definition. However, the above examination of Islamic humanitarian precepts does show that the major categories of protected persons and restricted acts were present in **Islamic law**, at least in a nascent form. Furthermore, compared to policies exemplified by later Christian practice, such as the Reconquista and the Crusades, the unfolding of Islamic humanitarian concepts is clearly recognizable as a progressive and historically significant phenomenon. ²⁰²

Finally, if one looks at the praxis of warfare by governments claiming to be "Islamic" or claiming to abide

by **Islamic law** in modern times, the reality is quite grim and falls far short of the legal ideals. In the past decade alone, over 1,000,000 people - men, women, children, combatants, and noncombatants - were killed in the Iran-Iraq war alone. ²⁰³ This does not invalidate the law itself. In fact, one could point to the similar failure of the Geneva Conventions in the last forty-five years. The huge and terrible gaps between both Islamic and **international humanitarian law**, and the reality of warfare as actually practiced, cry out for active enforcement of both bodies of existing law. ²⁰⁴ **[*639]**

Furthermore, it is important to study the law, regardless of its application, to understand the historical contributions of Islamic jurisprudence to the development of **international humanitarian law** as it exists today.

VII. Conclusion: The Historical Impact of

Islamic Humanitarian Law

The Islamic rules of war far predate a similar codification in Europe. ²⁰⁵ As Kruse concludes, "the positive international law of Europe had more than eight centuries later not yet reached the high degree of humanitarianization with which the **Islamic law** of war was imbued." ²⁰⁶ Shahi agrees that Islamic theory in this area was far ahead of its time in an era when the Mongols swept across Asia putting whole villages to death. Furthermore, when one considers another historical counterpart, the Christian Crusades, during which Muslims and Jews were routinely massacred, and conquered towns plundered with the apparent blessings of both church and national rulers, the Islamic humanitarian system truly emerges as a positive development. ²⁰⁷

Grotius, whom the Europeans consider to be the "father of international law" ²⁰⁸ did not attempt to codify the law of war until the early **[*640]** seventeenth century. He did so in mortification over the conduct of European armies, conduct which he, with no sense of irony, admitted that "even the Barbarians would be ashamed of." ²⁰⁹ In fact, the "Barbarians" as shown above, already had a highly developed system of rules in this area.

"Siyar' was far in advance of contemporary customs and practices of warfare and infinitely more so than those of antiquity which even sanctioned genocide... The treatment of the vanquished in the holy city of Jerusalem by the Caliph Umar, a few years after the death of the Prophet and again by Saladin in the time of the Crusades, stands out in sharp contrast with the behavior of the other conquerors as one between the most civilized and the most cruel treatment of enemy populations. ²¹⁰

Following this logic, it has been posited that the Islamic framework greatly impressed European scholars and fighters alike. There is evidence that they may have actually carried its concepts back from Arab Spain and from the Crusades to Europe, sparking the much later European development of similar concepts. ²¹¹ In the words of one European scholar:

The general importance of Islam for the development of civilization in the Mediterranean basin forces us to admit, that in this domain also, the Muslim world has contributed to the formation of certain institutions and customs of the law of war of the peoples of Europe. The latter found in their chivalrous adversaries from the time of the Crusades, pre-set rules concerning the declaration of war, combatants and non-combatants, the sick and wounded, prisoners of war, distribution of booty, prohibition of certain methods of injuring the enemy, etc... It is natural that these principles were amalgamated with the more or less analogous seeds of law to **[*641]** form, by the end of the Middle Ages this unwritten code of the law of war which formed the basis of the international legal concepts in this field until the contemporary period. ²¹²

Yamani is unequivocal in his view that "Islam was largely responsible for moving humanity from the darkness of Greco-Roman ideas about war to the light in which the enemy was guaranteed certain rights

and the fighting man was assured of certain protections." ²¹³ As Hassan points out, "a great deal of what is observed today had already been outlined as rules binding on states in their international relations." ²¹⁴

One of the greatest problems facing both international human rights law and **international humanitarian law** is that they are considered to be Western concepts, descended from Western values, and inspired by the Judeo-Christian tradition alone. ²¹⁵ Hassan argues that it is "mostly on account of a lack of such knowledge [that the work of Shaybani preceded Grotius] that the origins of the modern law of nations are only, generally, traced back a few hundred years to a few European writers." ²¹⁶ Yet, as shown in this Note, the heritage of Islam in the field of humanitarian law is tremendous.

Ultimately, claiming sole authorship of contemporary **international humanitarian law** is irrelevant and absurd for any legal and cultural tradition. What is crucial is the recognition of the multicultural roots ²¹⁷ **[*642]** of this body of law and, when judging Islam in the area of humanitarian principles, an appreciation and understanding of its historical contributions. As Hassan eloquently phrases this sentiment:

In terms of contemporary learning it is not of much consequence who is the father of international law; it is important to be aware of the comparative sources from which rules of our modern law may have come. This realization is, to say nothing else, helpful in making the norms of this law more acceptable to numerous nations as truly a law of nations and not merely a contemporary evolution of the last 200 years of the norms of European public law. ²¹⁸

If the vitally important body of contemporary **international humanitarian law** is to find further acceptance and compliance, the contributions to its development made by multiple cultural traditions and the great debt which it owes to the Islamic legal tradition, among others, must be recognized. ²¹⁹ Furthermore, the perceived legitimacy of the law is hurt among peoples whose traditions and historical contributions are excluded from official genealogies of contemporary humanitarian law. As Khadduri noted in 1966, "to draw on the experiences ... of other nations is as logical as it is pragmatic, for diversity of experience serves the common interests of an expanding community of nations." ²²⁰ Only **[*643]** with such an approach can these fundamental humanitarian principles assume their necessary role as global ideals which truly belong to and protect all of humanity. ²²¹

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FOOTNOTES:

ⁿ¹ As-Salamu Alaykum means "peace be upon you" and is a greeting frequently used in the Arab World.

ⁿ² For analysis of such caricatures of Islam, see, e.g., Asaf Hussain, *Western Conflict with Islam: Survey of the Anti-Islamic Tradition* (1990); Edward Said, *Covering Islam* (1981); Edward Said, *Orientalism* (1978).

ⁿ³ Such comparisons between contemporary law and **Islamic law** are by their very nature somewhat

ahistorical. Gamal Badr provides an eloquent warning of the methodological dangers in this area:

Differences between mature legal systems become more apparent when they are compared out of temporal context. This is what happens when, as some are wont to do, the doctrine of *jihad* as it was conceived during Islam's age of expansion is compared, not to the corresponding Christian doctrine of crusade, but to the present day principle of nonuse of force and the outlawing of war in the U.N. Charter, still more of an ideal than a reality.

Gamal M. Badr, *A Survey of Islamic International Law*, 76 *Am. Soc'y Int'l L. Proc.* 56, 61 (1982). See also Hamed Sultan, *The Islamic Concept*, in *International Dimensions of Humanitarian Law* 29, 30 (United Nations Educational, Scientific and Cultural Organization (UNESCO) ed., 1988). Because these are the standards against which the Islamic legal system is measured today, such comparisons between **Islamic law** and contemporary international law can be instructive if made with an awareness of such methodological difficulties. These issues are part of contemporary debates, such as that about the nature of *jihad*, ongoing both in and about the Muslim world. Such a comparative approach has been used by modernist Islamic scholars (whose views will be discussed in greater detail below): "When a [modernist scholar] talks about the **Islamic law** of war and peace, he has in mind one or more independent Islamic States that might well exist today." Mustansir Mir, *Jihad in Islam*, in *The Jihad and Its Times* 113, 121 (Hadia Dajani-Shakeel & Ronald Messier eds., 1991).

¶4. For example, Thomas Buergenthal states that "[humanitarian law's] modern development is usually traced to a series of initiatives undertaken by the Swiss in the 19th century." Thomas Buergenthal, *International Human Rights in a Nutshell* 14 (1988). Sometimes the omission of non-European contributions has been even more blatant. Consider the following: "Public International Law in general, and the Law of War in particular, emerged as an integral part of the Christian civilization of Western Europe. The subsequent movement whereby International Law reached out from Europe to become more truly universal is still in progress today." G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 46 *Int'l Rev. Red Cross* 3, 3 (1965) (emphasis added).

¶5. This is part of a widespread problem in the teaching of contemporary international law in Europe and the United States. Professor Khadduri noted this in the preface to his translation of Shaybani's *Siyar*: "Text writers on the modern law of nations, although appreciating the value of comparative method, have drawn almost exclusively on Western experience." Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* xii (1966).

¶6. G.I.A.D. Draper, *The Development of International Humanitarian Law*, in *International Dimensions of Humanitarian Law*, supra note 3, at 67-90. When speaking of Grotius' scholarship on the subject of humanitarian rules of warfare, Draper stresses that "inherent in it are the Christian ideals of justice, love and mercy, and their nexus and harmony with the natural law." *Id.* at 68 (emphasis added).

¶7. For a general introduction to **international humanitarian law**, see Frits Kalshoven, *Constraints on the Waging of War* (1987); Jean Pictet, *Humanitarian Law and the Protection of War Victims* (1975); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in *International Law of Human Rights* 345 (Theodor Meron ed., 1984).

¶8. Louise Doswald-Beck, **International Humanitarian Law: Outline of the Course**, in **International Humanitarian Law** 1 (International Institute of Human Rights ed., 1989).

¶9. *Hors de combat* means literally, outside or beyond the scope of combat. Attacks on persons or aspects of the environment which are *hors de combat* are considered violations of humanitarian law. According to the ICRC Basic Rules, "persons *hors de combat* ... are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction." International Committee of the Red Cross, *Basic Rules of the Geneva Conventions and Their Additional Protocols* 7 (1983) [hereinafter *Basic Rules*]. While useful for an academic understanding of the conventions, the ICRC stresses that the summary is not, itself, legally binding.

¶n10. Ahmed Z. Yamani, Humanitarian International Law in Islam: A General Outlook, 7 Mich. Y.B. Int'l Legal Stud. 189, 189 (1985).

¶n11. Buergenthal, *supra* note 4, at 190.

¶n12. Jean Pictet, The Principles of **International Humanitarian Law**, 66 Int'l Rev. Red Cross 455, 462 (1966). It must be noted that this view does not mean that international humanitarian obligations are based on reciprocity. One nation's violations do not justify those of its adversary. Rather, Pictet's statement is a plea for compliance based on the hope of reciprocity.

¶n13. Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [6 U.S.T. 3114](#), 75 U.N.T.S. 31 [hereinafter Geneva I]; Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [6 U.S.T. 3217](#), 75 U.N.T.S. 85 [hereinafter Geneva II]; Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, [6 U.S.T. 3316](#), 75 U.N.T.S. 135 [hereinafter Geneva III]; Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, [6 U.S.T. 3516](#), 75 U.N.T.S. 287 [hereinafter Geneva IV].

¶n14. Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144 Annex I (1977), reprinted in 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex II (1977), reprinted in 16 I.L.M. 1442 (1977) [hereinafter Additional Protocol II]. For commentary on the protocols, see Michael Bothe, et al., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982); Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA Pac. Basin L.J. 55 (1984).

¶n15. See, e.g., Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Convention of 1907].

¶n16. See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, [26 U.S.T. 571](#), 94 L.N.T.S. 65; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or Have Indiscriminate Effects, U.N. Doc. A/CONF. 95/15, Appendix A (1980), reprinted in 19 I.L.M. 1524 (1980).

¶n17. See Buergenthal, *supra* note 4, at 190; Doswald-Beck, *supra* note 8, at 2.

¶n18. Buergenthal, *supra* note 4, at 15, 191-97.

¶n19. See Basic Rules, *supra* note 9, at 7.

¶n20. *Id.*

¶n21. Geneva IV, *supra* note 13, [6 U.S.T. at 3516](#), 75 U.N.T.S. at 287.

¶n22. Additional Protocol I, *supra* note 14, art. 50, 16 I.L.M. at 1413.

¶n23. *Id.*

¶n24. Deportation and mass forcible transfers are prohibited by article 49 of the Fourth Geneva Convention. Geneva IV, *supra* note 13, art. 49, [6 U.S.T. at 3548](#), 75 U.N.T.S. at 318. Collective punishments are outlawed by: Geneva III, *supra* note 13, art. 87, [6 U.S.T. at 3384](#), 75 U.N.T.S. at 202; Additional Protocol I, *supra* note 14, art. 75(2)(d), 16 I.L.M. at 1423; Additional Protocol II, *supra* note 14, art. 4(2)(b), 16 I.L.M. at 1444. See also Buergenthal, *supra* note 4, at 194.

¶n25. Theodor Meron, *Human Rights in Internal Strife: Their International Protection* 69 (1987). See The American Red Cross - Washington College of Law Conference: *International Humanitarian and Human*

Rights Law in Non-International Armed Conflicts, [33 Am. U. L. Rev. 9 \(1983\)](#).

¶n26. Geneva I, supra note 13, art. 3(I), [6 U.S.T. at 3116-18](#), 75 U.N.T.S. at 32-34; Geneva II, supra note 13, art. 3(I), [6 U.S.T. at 3220-22](#), 75 U.N.T.S. at 86-88; Geneva III, supra note 13, art. 3(I), [6 U.S.T. at 3318-20](#), 75 U.N.T.S. at 136-38; Geneva IV, supra note 13, art. 3(I), [6 U.S.T. at 3518-20](#), 75 U.N.T.S. at 288-90; Additional Protocol I, supra note 14, part IV, 16 I.L.M. at 1412-26; Additional Protocol II, supra note 14, art. 4, 16 I.L.M. at 1444. On this topic, see Buergenthal, supra note 4, at 196-98.

¶n27. Geneva I, supra note 13, art. 3(I)(a), [6 U.S.T. at 3116](#), 75 U.N.T.S. at 32; Geneva II, supra note 13, art. 3(I)(a), [6 U.S.T. at 3222](#), 75 U.N.T.S. at 88; Geneva III, supra note 13, art. 3(I)(a), [6 U.S.T. at 3320](#), 75 U.N.T.S. at 138; Geneva IV, supra note 13, art. 3(I)(a), [6 U.S.T. at 3520](#), 75 U.N.T.S. at 290; Additional Protocol II, supra note 14, art. 4(2), 16 I.L.M. at 1444.

¶n28. Geneva I, supra note 13, art. 3(I)(b), [6 U.S.T. at 3118](#), 75 U.N.T.S. at 34; Geneva II, supra note 13, art. 3(I)(b), [6 U.S.T. at 3222](#), 75 U.N.T.S. at 88; Geneva III, supra note 13, art. 3(I)(b), [6 U.S.T. at 3320](#), 75 U.N.T.S. at 138; Geneva IV, supra note 13, art. 3(I)(b), [6 U.S.T. at 3520](#), 75 U.N.T.S. at 290; Additional Protocol II, supra note 14, art. 4(2), 16 I.L.M. at 1444.

¶n29. Geneva I, supra note 13, art. 3(I)(c), [6 U.S.T. at 3118](#), 75 U.N.T.S. at 34; Geneva II, supra note 13, art. 3(I)(c), [6 U.S.T. at 3222](#), 75 U.N.T.S. at 88; Geneva III, supra note 13, art. 3(I)(c), [6 U.S.T. at 3320](#), 75 U.N.T.S. at 138; Geneva IV, supra note 13, art. 3(I)(c), [6 U.S.T. at 3520](#), 75 U.N.T.S. at 290; Additional Protocol II, supra note 14, art. 4(2)(e), 16 I.L.M. at 1444.

¶n30. Geneva I, supra note 13, art. 3(I)(d), [6 U.S.T. at 3118](#), 75 U.N.T.S. at 34; Geneva II, supra note 13, art. 3(I)(d), [6 U.S.T. at 3222](#), 75 U.N.T.S. at 88; Geneva III, supra note 13, art. 3(I)(d), [6 U.S.T. at 3320](#), 75 U.N.T.S. at 138; Geneva IV, supra note 13, art. 3(I)(d), [6 U.S.T. at 3520](#), 75 U.N.T.S. at 290; Additional Protocol II, supra note 14, art. 6, 16 I.L.M. at 1445.

¶n31. Geneva I, supra note 13, art. 3(2), [6 U.S.T. at 3118](#), 75 U.N.T.S. at 34; Geneva II, supra note 13, art. 3(2), [6 U.S.T. at 3222](#), 75 U.N.T.S. at 88; Geneva III, supra note 13, art. 3(2), 6 U.N.T.S. at 3320, 75 U.N.T.S. at 138; Geneva IV, supra note 13, art. 18, [6 U.S.T. at 3520](#), 75 U.N.T.S. at 290; see also Basic Rules, supra note 9, at 52-53.

¶n32. See Basic Rules, supra note 9, at 53. It is important to note, however, that Additional Protocol II only applies, according to article 1(1), if dissident forces are under "responsible command" and "exercise such control over a part of [the High Contracting Party's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Additional Protocol II, supra note 14, art. 1(1), 16 I.L.M. at 1443.

¶n33. Starvation is prohibited as a method of internal warfare by article 14. Additional Protocol II, supra note 14, art. 14, 16 I.L.M. at 1447.

¶n34. Id. art. 13(2), 16 I.L.M. at 1447.

¶n35. Malcolm N. Shaw, *International Law* 583 (1986).

¶n36. An example of such a situation would be recurring riots. This may involve a great deal of force but still fail to trigger the protections of common article three or Protocol II. In fact, article 1(2) of Additional Protocol II specifically states that "this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Additional Protocol II, supra note 14, art. 1(2), 16 I.L.M. at 1443. International human rights law is supposed to cover this realm but the specific dangers of an internal crisis are often beyond its scope. See, e.g., Asbjørn Eide, *Internal Disturbances and Tension, in The International Dimensions of Humanitarian Law*, supra note 3, at 241. Furthermore, in time of crisis, derogations are permitted from certain human rights responsibilities, weakening existing protections. Id. at 244.

¶n37. Shaw, supra note 35, at 583.

¶n38. For a discussion of contemporary international law precepts on the use of force, see Shaw, supra

note 35, at 539-76.

¶n39. Article 2(4) of the United Nations Charter states that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, P4.

¶n40. Id. art. 51.

¶n41. Id. ch. VII.

¶n42. Hans Kruse, *The Foundation of Islamic International Law* 4 (1956). Sarakhsi (d. 483/1101) defined *siyar* as follows:

It describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (*musta'mins*) or permanently (*Dhimmis*) in Islamic lands; with apostates, who were the worst of the unbelievers, since they abjured after they accepted [Islam]; and with rebels (*baghis*), who were not counted as unbelievers, though they were ignorant and their understanding [of Islam] was false.

Khadduri, *supra* note 5, at 40 (citing Sarakhsi, *Mabsut* vol. X, at 2).

¶n43. "Essentially, the *siyar* formed an **Islamic law** of nations, not a law binding on all nations in the modern sense of the term." Khadduri, *supra* note 5, at 41. See also Sultan, *supra* note 3, at 29.

¶n44. Khadduri, *supra* note 5, at 6.

¶n45. Some elaboration of these sources may be helpful. The Qur'[<mac a>n](#) is the word of Allah as revealed to his Prophet Muhammad (circa A.D. 570-A.D. 632); the Sunna are compilations of the sayings, deeds, and customs of the Prophet Muhammad as laid down by scholars, the most important of whom are al-Bukh[<mac a>ri](#) and Muslim; *Ijm*[<mac a>](#)" represents consensus among Muslim legal scholars on specific legal issues; and *Qyas* is reasoning by analogy. The third source, *Ijm*[<mac a>](#)", is no longer technically available since under the Abbasid dynasty a "closing of the door" was declared. Many scholars view this as a cause of stagnation in Muslim legal thinking.

On sources of **Islamic Law**, see Sayed H. Amin, **Islamic Law** in the Contemporary World 8-14 (1985); John L. Esposito, *Islam: The Straight Path* 79-86 (1988); M. Cherif Bassiouni, *Islam: Concept, Law and World Habeas Corpus*, 1 Rut.-Cam. L.J. 163 (1969) [hereinafter Bassiouni, *Islam*]; M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, [74 Am. J. Int'l L. 609, 609 n.3 \(1980\)](#) [hereinafter Bassiouni, *Protection of Diplomats*]; Farooq A. Hassan, *The Sources of Islamic Law*, 76 Am. Soc'y Int'l L. Proc. 65, 71 (1982). These sources are given varying weights by different schools of thought within the Islamic tradition. See *infra* note 136. For general introductions to **Islamic law**, see Herbert Liebesny, *The Law of the Near & Middle East* (1975); Joseph Schacht, *An Introduction to Islamic Law* (1964).

¶n46. See Albert Hourani, *A History of the Arab Peoples* 65-69 (1991). Nayer Hornarvar describes the *Shar*'a as follows: "The Canon law of Islam is known as the *Shari'at*; it embraces all human activities. The *Shari'at* is more than just "law" in its modern sense; it is a code of ethics and duties. Its tendency is toward a religious evaluation of all human conduct." Nayer Hornarvar, *Beyond the Veil: Women's Rights in Islamic Societies*, 6 J.L. & Rel. 355, 362 (1988).

¶n47. The Caliphs were the Prophet's successors to the religious and political leadership of the Islamic community.

¶n48. Majid Khadduri, *War and Peace in the Law of Islam* 47 (1955).

¶n49. For the definitive list of such sources, see Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060:

The Court ... shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¶n50. Khadduri, *supra* note 48, at 47-48.

¶n51. See generally Mir, *supra* note 3. Mir gives a thorough examination of the varying trends within modern Islamic legal scholarship on the subject of jihad. He characterizes these as neoclassical, modernist, and apologist. *Id.* at 117. See also Mahmud Maqbal al-Bukra, *Mashruyat al-Harb Fi al-Shariat al-Islamiyat*, 45 *Egyptian Rev. Int'l L.* 71, 87-89 (1979).

¶n52. Clearly, such an interpretation is not always accidental, nor is it without serious consequences. This connection is made clear in the following passage:

The association of Islam with holy war, and of Muslims with the propagation of violence, seems to be endemic to Western awareness of Muslim faith ... When a member of the American military was interviewed on television [during the Gulf War of 1991] and said that if they want to get to their Allah he didn't mind speeding up the process, he was ... expressing an overt lack of reverence for Muslim life and Islamic faith.

Yvonne Haddad, *Operation Desert Shield/Desert Storm: The Islamist Perspective*, in *Beyond the Storm: A Gulf Crisis Reader* 248, 256 (Phyllis Bennis & Michel Moushabeck eds., 1991).

¶n53. See *The Hans Wehr Dictionary of Modern Written Arabic* 142 (J. Milton Cowan ed., 3d ed. 1976).

¶n54. Abdullah An-Na'im, *Toward an Islamic Reformation* 145 (1990) (citing Al-Kaya Al-Harasiy, *Akhan Al-Qur'* 1:89 (1983)).

¶n55. *Id.* See also A. Shahi, *The Role of Islam in Contemporary International Relations*, in *L'Islam Dans Les Relations Internationales* 18 (1986).

¶N56. Shahi, *supra* note 55, at 19.

¶n57. This term is used here as used by Mir to denote the earliest school of Islamic legal interpretation on this point. The classical doctrine makes use of the abrogation principle, under which scholars resolve the inconsistencies in pronouncements on jihad by holding that later precepts, which are more permissive in permitting hostilities, abrogate the earlier rules. See Mir, *supra* note 3, at 114-16.

¶n58. Three criteria were to be applied in deciding if a territory was to be considered part of *dhar al-harb*: 1) the law applied there was apparently non-Muslim; 2) the territory in question bordered Muslim-controlled lands, creating a likelihood of aggression; and 3) no Muslim or dhimmi (protected person under Muslim law) would be safe in such a country, except through a special agreement. Abdullahi Ahmed An-Na'im, **Islamic Law**, *International Relations, and Human Rights: Challenge and Response*, 20 *Cornell Int'l L.J.* 317, 324 n.37, 325 (1987) (citing Abu Zahrah, *Nazaria't Al-Harb Fi Al-Islam*, 14 *Revue Egyptienne Du Droit Int'l* 1, 17 (1958)). According to An-Na'im, recognizing the negative consequences of the categorization of *dhar al-harb*, Muslim jurists set these stringent guidelines and applied them vigorously in making such a determination. *Id.* at 324-25. See also Ibrahim Shihata, **Islamic Law** and the World Community, 4 *Harv. Int'l L.J.* 101, 107 (1962).

¶n59. An-Na'im, *supra* note 58, at 323-24. See also Khadduri, *supra* note 5, at 14-17.

¶n60. Mir cites the basic formulation of this position from Mawdudi:

So, just as it is incorrect to say that Islam uses the sword to convert people, it is equally wrong to say that the sword has played no part in propagating Islam. The truth lies in between the two, namely, that the call to Islam ... and the sword have both contributed to the propagation of Islam, just as is the case with any other civilization.

Mir, *supra* note 3, at 118.

¶n61. Khadduri, *supra* note 48, at 75. Using the nuances characteristic of a neoclassical argument, Khadduri concedes that a literal interpretation of the jihad as a constant violent conflict was not correct.

The jihad did not always mean war, since Islam's objective might be achieved by peaceful as well as violent means. Thus the jihad may be regarded as an intensive religious propaganda which took the form of a continuous process of warfare, psychological and political, no less than strictly military. From a legal viewpoint it meant a permanent state of war between Islam and enemy territory. But this state of war should not be construed as actual hostilities; it was rather equivalent, in Western legal terminology, to non-recognition.

Majid Khadduri, *Islam and the Modern Law of Nations*, 50 *Am. J. Int'l L.* 358, 359 (1956) (emphasis added).

¶n62. Khadduri, *supra* note 48, at 76-79.

¶n63. The term scripturaries or *ahl al-kitāb* (people of the book) refers primarily to the adherents of the other major monotheistic faiths based on scripture, i.e., Christians and Jews, but also includes peoples of other faiths which possess some type of scripture, such as Zoroastrians and Sabians. Polytheists could not usually obtain *dhimmi* status, although as a rare exception they might. See *id.* at 175-77. See also Edmond Rabbath, *Pour Une Theorie du Droit International Musulman*, 6 *Revue Egyptienne de Droit International* 1, 20 (1950).

¶n64. Khadduri, *supra* note 48, at 80.

¶n65. Shahi, *supra* note 55, at 23.

¶n66. For an overview of the modernists, see Mir, *supra* note 3, at 119-22.

¶n67. *Id.* at 123.

¶n68. See *id.* at 119; T. Rahman, *Doctrinal Position of Islam Concerning Inter-State and International Relations*, in *L'Islam Dans Les Relations Internationales*, *supra* note 55, at 118. See also Saed Muhammad Ahmad Banajah, *Al-Mabadi' Al-Siyasiyah* 13-16 (1985).

¶n69. K. Ahmad, *Islam's Contributions to International Political Thought*, in *L'Islam Dans Les Relations Internationales*, *supra* note 55, at 64.

¶n70. The Holy Qur'ⁿ, 59:23.

¶n71. The Holy Qur'ⁿ 7:56. For comment on this verse, see Shahi, *supra* note 55, at 17.

¶n72. The Holy Qur'ⁿ 109:6.

¶n73. See, e.g., Hassan, *The Concept of State and Law in Islam* 204 (1981). See also Mohammed Draz, *Le Droit International Public et L'Islam*, 1 *Revue Internationale de la Croix Rouge* 194, 199 (1952).

¶n74. See, e.g., An-Na'im, *supra* note 58, at 322-24. Mir describes this methodology as follows: "No less than the classical jurists, the modernists are concerned with establishing that the Qur'ⁿ is free

from inconsistency. But, unlike the classical writers, who use the principle of abrogation to that end, the modernists invoke the principle of contextualized interpretation of the Qur'ⁿ." Mir, supra note 3, at 120 (citations omitted).

ⁿ75. See Shahi, supra note 55, at 19 (citing Mahdudi and Hamidullah).

ⁿ76. Khadduri does recognize the exigencies of State building as a factor in shaping Islamic international law. However, his reading is that the doctrine created thereby represents the law itself. "The classical theory of the **Islamic law** of nations is found neither in the Qur'ⁿ nor in the Prophet's utterances, although its basic assumptions were derived from these authoritative sources; it was rather the product of Islamic juridical speculation at the height of Islamic power." Khadduri, supra note 5, at 19. For further discussion by Khadduri of the historical development of the **Islamic law** of nations, see Majid Khadduri, *The Evolution of Modern Sovereignty and Collective Security in the Middle East*, in *Major Middle Eastern Problems in International Law 1-3* (Majid Khadduri ed., 1972).

ⁿ77. See An-Na'im, supra note 58, at 325.

ⁿ78. Shahi, supra note 55, at 23.

ⁿ79. Hassan, supra note 73, at 207.

ⁿ80. Kruse, supra note 42, at 6.

ⁿ81. Id. at 15.

ⁿ82. See, e.g., Badr, supra note 3, at 57.

ⁿ83. Shahi, supra note 55, at 20-21. See also Draz, supra note 73, at 200-01.

ⁿ84. Shahi, supra note 55, at 20-22, 24.

ⁿ85. Waheed-uz-Zaman, *Doctrinal Position of Islam Concerning Inter-State and International Relations*, in *L'Islam Dans Les Relations Internationales*, supra note 55, at 133. On the historical background to the Treaty, see Hourani, supra note 46, at 17-19.

ⁿ86. See Kruse, supra note 42, at 17-23; Banajah, supra note 68, at 17-18. Khadduri notes that the third division, d^r al-sulh (territory of peaceful arrangement) also known as the d^r al-ahad (territory of covenants) was created by Shafi'i jurists and not recognized by all schools of Islamic legal thought. See Khadduri, supra note 5, at 12.

ⁿ87. The concept of aman forms the basis of diplomatic immunity in **Islamic law**. See Bassiouni, *Protection of Diplomats*, supra note 45, at 609-10.

ⁿ88. This status was legally to be maintained even during time of war when such persons became "enemy aliens." See Louis Massignon, *Le Respect de la Personne Humaine en Islam, et la Priorite du Droit d'Asile sur le Devoir de Juste Guerre* [The Respect for the Person in Islam and the Priority of Asylum Law in Regards to Just Warfare], 2 *Revue Internationale de la Croix Rouge* 467 (1952).

ⁿ89. Pacta sunt servanda, the recognition of the binding nature of treaties, was clearly recognized in **Islamic law** as it is in contemporary international law. It was first established through the treaty concluded by the Prophet Muhammad with the Jewish tribes of Yathrib-Medina in A.D. 625 and by the subsequent Treaty of Hudaibiya. On this point see Bassiouni, *Protection of Diplomats*, supra note 45, at 611, 614-15 n.18. See generally Mohammad Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (1968); Ibn Khaldun, *Muqaddimat* 126 (1858). Bassiouni cites a hadth of the Prophet Muhammad where he is reported to have said that "the Muslims are bound by their obligations, except an obligation that renders lawful the unlawful, and the unlawful lawful." Bassiouni, *Protection of Diplomats*, supra note 45, at 165.

ⁿ90. See Kruse, supra note 42, at 19-23. See also Draz, supra note 73, at 204-09.

¶91. The arguments of the modernist scholars have failed to convince proponents of other interpretations. See, e.g., An-Na'im's conclusion that "these [modernist] scholars fail, however, to take account of verses of the Qur'an that suggest aggressive jihad. Sunna and the actual practice of the early Muslims also support the idea of jihad as aggressive war." An-Na'im, supra note 58, at 325.

¶92. For further discussion of the compatibility of Islamic international law and contemporary international law based on the meaning of jihad, see infra notes 189-204 and accompanying text.

¶93. Khadduri, supra note 48, at 54.

¶94. Mir, supra note 3, at 114.

¶95. Shahi, supra note 55, at 119. Such a concept is clearly different from the early Christian idea of "just war" in which most practices were legal, with restraints placed only on those parties deemed to be fighting an unjust war. See Draper, supra note 4, at 4.

¶96. Yamani, supra note 10, at 191.

¶97. This is certainly not to argue that fighting "in the name of God" is today an inherently progressive concept, as this justification has been used in recent years by parties ranging from Islamic fundamentalists who murdered Algerian and Egyptian intellectuals, to both sides in the Iran-Iraq war. Thus, Islamic legal constructs have been abused by both Western observers, as well as some leaders and rebels who call themselves "Muslims." See, e.g., Maryam Elahi, *The Rights of the Child Under Islamic Law: The Prohibition of the Child Soldier*, 19 Colum. Hum. Rts. L. Rev. 259, 277-79 (1988) (outlining violations of children's rights on the Iranian side during the Iran-Iraq war, including using children as cannon fodder and mine sweepers); Flora Lewis, *The War on Arab Intellectuals* N.Y. Times, Sept. 7, 1993, at A15 (lists Algerian and Egyptian intellectuals assassinated in the last several years by Muslim fundamentalists). This reality further demonstrates the importance of promoting awareness of Islamic humanitarian precepts.

The point here is to underline this process as a historically positive development, one which involved making combat subject to the precepts of religion and thus to the rule of law. On the historical and progressive role of the codification of **Islamic law** in the context of the seventh century, see Sultan, supra note 3, at 30.

¶98. An-Na'im, supra note 58, at 326. Furthermore, the protections found in the rules extended to non-Muslims as well as Muslims. Such a view is preferable to that found in the later Christian Code of Chivalry, under which opponents had to meet "standards" of class, race, and religion to merit protection. Draper has argued, for example, that in the views of the Crusaders, chivalry did not apply during the Crusades because they were fought "against people who were neither noble nor Christian." Draper, supra note 4, at 18.

¶99. Uz-Zaman, supra note 85, at 131.

¶100. In light of this element of Islamic humanitarian precepts, it is interesting to note that Draper cites as "the seminal contribution of Grotius to the law of war ... [the] enunciat[ion of] the doctrine that the 'justness' or otherwise of the cause for which one or other belligerent had resorted to war was irrelevant to the duty of observing the rules of warfare by those belligerents." Draper, supra note 6, at 67. As outlined by Islamic legal scholars, the Islamic humanitarian precepts were supposed to be applied "whenever fighting was in progress." See Khadduri, supra note 5, at 13. Thus, Grotius' concept is at least foreshadowed by Islamic teaching, if not predated by it. This observation supports a theory forwarded by Farooq Hassan that the principles of State conduct which Grotius believed should be followed in warfare were inspired by the teachings of Islamic civilization. See Hassan, supra note 45, at 74; infra notes 187-94 and accompanying text.

¶101. Kruse, supra note 42, at 17.

¶n102. Ahmad, *supra* note 69, at 64.

¶n103. Muhammad Umar Chapra, Objectives of the Islamic Economic Order, in *Islam: Its Meaning and Message* 173, 194 (Kurshid Ahmad ed., 1976).

¶n104. *Id.* (citing The Holy Qur'[n](#) 2:205).

¶n105. *Id.* See *infra* notes 126, 127, 132 and accompanying text.

¶n106. The Holy Qur'[n](#) 2:190.

¶n107. See Sultan, *supra* note 3, at 33.

¶n108. Draz, *supra* note 73, at 201-02.

¶n109. In contemporary **international humanitarian law**, the environment is only now beginning to receive serious consideration as a special category in need of protection in the wake of the Gulf War of 1991. See, e.g., Bernard H. Oxman, Environmental Warfare, 22 *Ocean Dev. & Int'l L.* 433 (1991) (reviewing international protection of the environment in light of the Gulf War); Rex J. Zedalis, Burning of the Kuwaiti Oilfields and the Laws of War, 24 *Vand. J. Transnat'l L.* 711 (1991) (discussing the legality of Iraq's burning of Kuwaiti oil fields). On earlier international provisions protecting the environment in time of war, see Kalshoven, *supra* note 7, at 96.

¶n110. Khadduri, *supra* note 5, at 6.

¶n111. For information on names and dates in Islamic history, see Leyden, *The Encyclopedia of Islam* (1934).

¶n112. Muhammad Hamidullah, *The Muslim Conduct of State* 313 (1953).

¶n113. A. Rahman I Doi, Non-Muslims Under Shari'ah 94-95 (1983) (citing *Sahih Muslim* 2:32).

¶n114. Hassan, *supra* note 73, at 203.

¶n115. Rudolf Peters, *Islam and Colonialism* 20 (1979).

¶n116. Khadduri, *supra* note 48, at 106.

¶n117. Yamani, *supra* note 10, at 201. On the origin of Shi'ism, see *infra* note 131. For an overview of the major schools of Islamic legal thought, see *infra* note 136.

¶n118. *Id.*

¶n119. Ruses of war are specifically not prohibited by contemporary international law. Permissible acts are defined in article 37 as those "which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict" Additional Protocol I, *supra* note 14, art. 37, 16 I.L.M. at 1409. Such tactics are distinguished from those tactics which are considered perfidious and are prohibited. *Id.*

¶n120. As noted above, *Pacta sunt servanda* was a clearly established and respected principle of the **Islamic law** of nations. See *supra* note 89.

¶n121. The Holy Qur'[n](#) 16:91.

¶n122. Umar ibn al-Khattab was nominated Caliph in A.D. 634.

¶n123. Yamani, *supra* note 10, at 202.

¶n124. See Additional Protocol 1, *supra* note 14, art. 37, 16 I.L.M. at 1409.

¶n125. Abu Bakr was elected Caliph in A.D. 632 after the death of the Prophet Muhammad. He was very close to the Prophet, who had been married to his daughter Aisha.

¶n126. See Khadduri, *supra* note 48, at 102.

¶n127. Doi, *supra* note 113, at 95.

¶n128. Hamidullah, *supra* note 112, at 316.

¶n129. Yamani, *supra* note 10, at 198.

¶n130. Id. Khalid ibn al-Wald and "Amr ibn al-"As lived at the same time as the Prophet and converted to Islam while the Prophet was in Medina. They were among the most successful military commanders in early Islamic history.

¶n131. "Ali ibn Abu Talib, cousin of the Prophet Muhammad, was the last orthodox Caliph picked in A.D. 656. He was challenged and his reign led to internal troubles, including a civil war and a bizarre arbitration which brought an end to his Caliphate in A.D. 658. The Muslim world was thereafter divided into Sunnis (those who accepted the results of the arbitrations and nomination of Mu'awiyah as Caliph) and Shi'ites (those who were unconditional supporters of "Ali). The civil war brought the Banu Hashim clan of the Quraish tribe into a military conflict with the rival clan of Bani Umayya. See Hourani, *supra* note 46, at 25-26.

¶n132. Yamani, *supra* note 10, at 195.

¶n133. Doi, *supra* note 113, at 95.

¶n134. The Holy Qur'[4:90](#).

¶n135. For example, article 40 of Additional Protocol I states that "it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis." Additional Protocol I, *supra* note 14, art. 40, 16 I.L.M. at 1409. Furthermore, in **international humanitarian law**, surrender places a person hors de combat. Id. art. 41(2)(b), 16 I.L.M. at 1410.

¶n136. There are four primary legal schools which dominate Islamic jurisprudence. They are named after Imam Shafi (d. A.H. 204/A.D. 820), Malik ibn Anas (d. A.H. 179/A.D. 795), Abu Hanifa (d. A.H. 150/A.D. 767), and Ahmad ibn Hanbal (d. A.D. 855). The Hanifi school is the oldest, the most liberal, and that with the most followers in the contemporary Muslim world. This school stresses the making of law via qiyas or analogies to resolve issues not specifically addressed by a norm in the other three major sources of fiqh. The Maliki school relies most heavily on sources other than qiyas, though it does not reject this method outright. In this school, the importance of *ijma'* (lawmaking via consensus among legal scholars) is stressed. The Shafi'i school is exemplified by the great work of its namesake, *Risala*, whose methodology involves the use of science or *usul* to lay down the methods of juristic reasoning, while keeping an eclectic approach to traditional doctrines. The fourth or Hanbali school was strictly guided by *hadith* and thus stands as the most traditional view of **Islamic law**. See Hassan, *supra* note 45, at 69-70.

¶n137. Yamani, *supra* note 10, at 198.

¶n138. Khadduri, *supra* note 48, at 104.

¶n139. Shahi, *supra* note 55, at 27.

¶n140. Yamani, *supra* note 10, at 199.

¶n141. The Battle of Hunayn was fought in A.H. 8/A.D. 630 after the conquest of Mecca.

¶n142. Khadduri, *supra* note 48, at 104.

¶n143. Mecca was occupied by the forces of the Prophet Muhammad in A.D. 630. Shahi, *supra* note 55, at 21. The concept of forgiveness here is meant to be an extension of the ideal of peacetime human relations in Islam. The Muslim legal scholar Faruki writes of the Islamic ideal that "the commands of God are all-embracing and take into account the need for active sympathy with the problems of other human beings and indeed of all living things, in due proportions." Kemal A. Faruki, *Islamic Jurisprudence* 17 (1962).

¶n144. See *supra* notes 74-81 and accompanying text.

¶n145. Khadduri, *supra* note 48, at 103.

¶n146. *Id.*

¶n147. The Kharijites were one of the earliest sects of Islam. They undertook a number of military conquests. See Khadduri, *supra* note 48, at 104, n.5.

¶n148. Khadduri, *supra* note 48, at 103-04. See also Draz, *supra* note 73, at 201.

¶n149. Yamani, *supra* note 10, at 199-200.

¶n150. Khadduri, *supra* note 48, at 104.

¶n151. See, e.g., Rabbath, *supra* note 63, at 17.

¶n152. Khadduri, *supra* note 48, at 105-06.

¶n153. See *supra* notes 111-17 and accompanying text.

¶n154. Yamani, *supra* note 10, at 199.

¶n155. *Id.*

¶n156. Yamani notes that "when Malik was asked whether or not Muslims should 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.'" *Id.* at 207.

¶n157. *Id.* at 207.

¶n158. Draz, *supra* note 73, at 202.

¶n159. See, e.g., Geneva I, *supra* note 13, art. 13(2)(b), [6 U.S.T. at 3124](#), 75 U.N.T.S. at 40, which mandates that the convention's protections apply only to those "having a fixed distinctive sign recognizable at a distance" See also Geneva III, *supra* note 13, art. 4(2)(b), [6 U.S.T. at 3320](#), 75 U.N.T.S. at 138, which grants P.O.W. status based, in part, on the prisoner having a fixed distinctive sign recognizable at a distance. In an attempt to afford more protection in situations of guerrilla warfare, this concept has been somewhat altered. See Additional Protocol I, *supra* note 14, art. 44(3), 16 I.L.M. at 1410. However, this protocol stresses that combatants should always attempt to distinguish themselves from the civilian population, reiterating that it is not intended to change the "generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict." *Id.* art. 44(7), 16 I.L.M. at 1411.

¶n160. This battle has a special significance in Muslim history. Attacked by the Meccans and their allies, the Muslims succeeded in routing the enemy, despite the latter's numerical superiority.

¶n161. Yamani, *supra* note 10, at 199.

¶n162. See *supra* text accompanying notes 21-24.

¶n163. Rahman, *supra* note 68, at 128. Deportation from occupied territory is absolutely forbidden under

contemporary law. See supra text accompanying note 24.

¶n164. Rahman, supra note 68, at 128.

¶n165. Such corporal punishment of a civilian in occupied territory is analogous to behavior prohibited today under the Fourth Geneva Convention. See supra text accompanying notes 21-24.

¶n166. Muhammad Qutb, Islam and the Crisis of the Modern World, in Islam: Its Meaning and Message, supra note 103, at 258.

¶n167. Yamani, supra note 10, at 205 (citing The Holy Qur'[n](#) 53:38).

¶n168. Id. at 203.

¶n169. Khadduri, supra note 48, at 119.

¶n170. See Rahman, supra note 68, at 128. One must remember, as Massignon notes, that Islam preceded Christianity in legal attempts to restore the human rights of slaves. Massignon, supra note 88, at 453.

¶n171. Khadduri, supra note 48, at 119.

¶n172. See Rabbath, supra note 63, at 17. On this point, it is instructive to remember the poor treatment of Muslim captives by Christian crusaders discussed infra at note 207.

¶n173. Doi, supra note 113, at 96. See Anwar A. Qadri, Islamic Jurisprudence in the Modern World 278-79 (2d ed. 1973).

¶n174. Doi, supra note 113, at 95.

¶n175. Yamani, supra note 10, at 213-14. The Prophet is reported to have said to fighters: "Recommend to one another that prisoners be well treated." Yamani cites examples of Muslims feeding their captives with the best food available after the Battle of Badr. Salah al-Din al-Ayyubi, commander of the Muslim forces which repelled the crusaders, also reportedly freed large numbers of Christian crusaders because he did not have enough provisions to feed them. Id. at 214.

¶n176. Yamani, supra note 10, at 210.

¶n177. On P.O.W. visitation by the ICRC, see David P. Forsythe, Humanitarian Politics: The International Committee of the Red Cross 132-67 (1977).

¶n178. The Holy Qur'[n](#) 47:4.

¶n179. The Holy Qur'[n](#) 47:4; Mir, supra note 3, at 121.

¶n180. "Although, on the whole, the Qur'[n](#) seems to be disinclined to allow enslavement, the very fact that it did not categorically prohibit it left the matter to be decided situationally: if the enemy enslaves Muslim prisoners, Muslims might enslave enemy prisoners; otherwise not." Mir, supra note 3, at 121. While this evidence that Muslims practiced slavery under such circumstances may seem to contradict the nonreciprocal philosophy of Islamic humanitarian law discussed above, the practice may be distinguished from the other examples discussed on the basis that it is not clearly prohibited by the Qur'[n](#).

¶n181. Khadduri, supra note 48, at 127. The term "im'[m](#)" is defined variously as the head of State, the leader in prayer, or the head of a school of **Islamic law**. Majid Khadduri, The Islamic Conception of Justice 241 (1984).

¶n182. Mir, supra note 3, at 121.

¹⁸³ Khadduri, *supra* note 48, at 131.

¹⁸⁴ Doi, *supra* note 113, at 95.

¹⁸⁵ *Id.* at 96 (citing Sahih al-Bukhari, ch. 40:7).

¹⁸⁶ *Id.* at 96.

¹⁸⁷ *Id.*

¹⁸⁸ Yamani, *supra* note 10, at 213. On modern prosecution of war criminals, see Igor Blishchenko, Responsibility in Breaches of **International Humanitarian Law**, in *The International Dimensions of Humanitarian Law*, *supra* note 3, at 283.

¹⁸⁹ See *supra* notes 7-41 and accompanying text. For an interpretation of the impact of Islamic doctrine in the contemporary world, see James Piscatori, *Islam in a World of Nation-States* (1986).

¹⁹⁰ See *supra* notes 51-92 and accompanying text.

¹⁹¹ Draz, *supra* note 73, at 197.

¹⁹² An-Na'm, *supra* note 54, at 151.

¹⁹³ An-Na'm, *supra* note 58, at 327.

¹⁹⁴ *Id.* at 327 n. 59. Furthermore, when Muslim countries have signed onto treaties which they believe to contradict the Shar'a, they have usually made reservations to that effect. See, for example, reservations made by Egypt and Iraq when ratifying the Convention on the Elimination of All Forms of Discrimination Against Women, which were made specifically with regard to possible conflict with the Shar'a. Convention on Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 34th sess., 107th plen. mtg., U.N. Doc. A/RES/34/180 (1980), reprinted in 19 I.L.M. 33 (1980). This issue is discussed in Theodor Meron, *Human Rights Law Making in the United Nations 77-79* (1986). Thus, if no reservations were made to the U.N. Charter, as is the case, it is possible to presume that Muslim nations believed the two sets of obligations, those under **Islamic law** and those under the U.N. Charter, did not contravene one another in significant ways.

¹⁹⁵ Mir's conclusion is that "on the modernist interpretation, the Islamic prescriptions concerning [sic] war and peace would seem to have not a few points of contact, or even agreement, with modern international law." Mir, *supra* note 3, at 121-22 (citations omitted).

¹⁹⁶ "Rien ne semble s'opposer a ce qu'elles se conforment aux lois internationales modernes." Mir, *supra* note 3, at 12 (translated by author).

¹⁹⁷ Khadduri, *supra* note 48, at 141.

¹⁹⁸ Mir, *supra* note 3, at 123.

¹⁹⁹ This is clearly superior to the track record of Western law which routinely allowed military despoliation until the early 1900s. On the emerging norm of the environment as a protected category in time of war, see *supra*, text accompanying note 109.

²⁰⁰ See Yamani, *supra* note 10, at 215.

²⁰¹ Hamed Sultan takes the same position arguing that in the Islamic conception there are no distinctions made between internal and external conflicts with regard to rules governing the conduct of hostilities. Sultan, *supra* note 3, at 32. This contrasts with the vast disparity present in modern law, as discussed above. See *supra* text accompanying notes 25-35.

²⁰² Note, for example, the mass expulsion and forced conversion of Muslims and Jews from Spain

after the Reconquista, despite a promise not to take punitive action against the conquered people. See Hourani, *supra* note 46, at 85. On the misery inflicted on civilians by the Crusaders, see *id.* at 85-86; Amin Maalouf, *The Crusades Through Arab Eyes* (1984). Draper describes the massacre in Jerusalem of both Jews and Muslims who had sought refuge, in their holy places, from the Crusaders. See Draper, *supra* note 4, at 11.

¶n203. See Elahi, *supra* note 97, at 278 (detailing grisly practices during the Iran-Iraq war by the Iranian regime which employed children as "soldiers," sometimes sending them unarmed to detect minefields at the frontlines. Though this is clearly prohibited by **Islamic law**, a fatwa, issued by the Ayatollah Khomeini was used to justify the practice). On the Iran-Iraq war, see Dilip Hiro, *The Longest War* (1991). Iraq is also reported to have used chemical weapons and committed numerous other violations of humanitarian law during the bloody conflict. See Flora Lewis, *Victory for the Weary*, *N.Y. Times*, July 31, 1988, at E25.

¶n204. When considering this issue, it is vital to stress that Islamic humanitarian law is not the only body of law which is sometimes manipulated to cover egregious violations. For example, while the United States claimed that the Gulf War was a vindication of international law, facts on the ground told a different story, showing what the U.N. Assistant-Secretary General himself found to be "near-apocalyptic" conditions. See, e.g., Report to the Secretary General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment by a Mission to the Area Led by Mr. Martti Ahtisaari, Under-Secretary General for Administration and Management, U.N. SCOR, U.N. Doc. S/22366 (1991) (reporting "near apocalyptic" conditions in post-war Iraq); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 *Harv. Int'l L.J.* (forthcoming Winter 1994) (outlines that, while widely touted as a triumph of international law, the war and sanctions against Iraq produced catastrophic results for civilians); Ramsey Clark, *The Fire This Time: U.S. War Crimes in the Gulf* (1992); Eric Hoskins, *Making the Desert Glow: U.S. Uranium Shells Used in the Gulf War May Be Killing Iraqi Children*, *N.Y. Times*, Jan. 21, 1993, at A25; Burns Weston, *Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy*, [85 Am. J. Int'l L. 516 \(1991\)](#) (questioning the minor U.N. oversight of U.N. sponsored military actions taken during the Gulf War); Louise Cainkar, *The Gulf War, Sanctions and the Lives of Iraqi Women*, *Arab Stud. Q.*, Spring 1993, at 15 (recounting the difficult health and sanitation conditions facing Iraqi women due to the Gulf War and U.N. Sanctions); Harvard Study Team, *Public Health in Iraq After the Gulf War* (May 1991).

¶n205. While Shaybani wrote in the 8th century A.D., Grotius' scholarship dates from the early 17th century. On Grotius, see Shaw, *supra* note 35, at 22-23. On Shaybani, see *infra* text accompanying note 208.

¶n206. Kruse, *supra* note 42, at 17.

¶n207. Consider, for example, the following account of the fall of Jerusalem to the Crusaders on July 15, A.D. 1099 (A.H. 492):

The exiles still trembled when they spoke of the fall of the city: they stared into space as though they could still see the fair-haired and heavily armoured warriors spilling through the streets, swords in hand, slaughtering men, women, and children, plundering houses, sacking mosques.

Two days later, when the killing stopped, not a single Muslim was left alive within the city walls. Some had taken advantage of the chaos to slip away, escaping through gates battered down by the attackers. Thousands of others lay in pools of blood on the door-steps of their homes or alongside the mosques. Among them were many imams, ulama, and Sufi ascetics who had forsaken their countries of origin for a life of pious retreat in these holy places. The last survivors were forced to perform the worst tasks: to heave the bodies of their own relatives, to dump them in vacant, unmarked lots, and then to set them alight, before being themselves massacred or sold into slavery.

Maalouf, *supra* note 202, at xiv. Such an account is corroborated by Draper, *supra* note 4, at 11.

¶n208. Hassan questions this distinction, citing the Muslim scholar al-Shaybani's (d. A.H. 189/A.D. 804) monumental work *al-Siyar al-Kabir*. This work, which codified the **Islamic law** of nations and was

"considered by some to be the first and foremost work of international law in human history since the beginning of the Christian calendar" preceded Grotius by nearly 800 years. See Hassan, *supra* note 45, at 71. *Al-Siyar Al-Kabir* appears in translation in Khadduri, *supra* note 5, at 75-292. For information on Shaybani's life and scholarship, see the Translator's Introduction in *id.* at 22-57.

¶n209. Shahi, *supra* note 55, at 20. See also Draper, *supra* note 6, at 68 (highlighting what Draper calls Grotius' "Christian shame"). Draper shares Grotius' unintentional irony when he relays the comment of the historian Niceta, that "even the Saracens would have been more merciful" than the Christian Crusaders were. Draper, *supra* note 4, at 13 (emphasis added).

¶n210. Shahi, *supra* note 55, at 19.

¶n211. On this point, see Kruse, *supra* note 42, at 32-35; Hassan, *supra* note 45, at 74. Draper may unintentionally confirm such a view when he remarks that in the Crusades "little was seen of the virtues of chivalry except, surprising to relate, on the part of Saladin and his Emirs." Draper, *supra* note 4, at 10. Had he been aware of **Islamic law**, Draper might have been somewhat less surprised.

¶n212. Rabbath, *supra* note 63, at 22 (citing Lecture by Baron M. de Taube at the Academy of International Law in the Hague given in 1926) (translated by author). See also *id.* at 22-23.

¶n213. Yamani, *supra* note 10, at 189-90.

¶n214. Hassan, *supra* note 45, at 71. See also Draz, *supra* note 73, at 196 (arguing that public international law generally has important roots in **Islamic law** and practice); Massignon, *supra* note 88, at 450; Rabbath, *supra* note 63, at 22-23.

¶n215. There is a certain growing awareness of this problem in some Western international legal circles. See, e.g., Philip C. Jessup, Foreword, in Khadduri, *supra* note 5, at vii.

The appearance of this text of Shaybani's teachings is particularly timely because there is now so much interest in the debate over the question whether the international law of which Hugo Grotius is often called the father is so completely Western-European in inspiration and outlook as to make it unsuitable for universal application in these days of a much wider and more varied international community of states.

Id. Draper puts this dilemma in more patronizing terms: "Some jurists have seen much of the stress and strain in contemporary international relations as the direct consequence of extending a regime of legal rules, born in the specifically Christian tradition of Western Europe, to other civilizations nurtured in a wholly different set of values and ideas." Draper, *supra* note 4, at 3-4 (emphasis added). It may be argued that the problem is not that humanitarian law is too European in orientation, but rather that its nonEuropean roots are not acknowledged and it is widely touted as being purely Western in origin.

¶n216. Hassan, *supra* note 45, at 71.

¶n217. Such recognition of the multicultural roots of legal principles is occurring elsewhere in historical and legal studies. One such debate is that over the Native American, and particularly Iroquois, roots of the U.S. Constitution. On this debate, see David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* 28, 291-92 nn. 31-32 (1992).

¶n218. Hassan, *supra* note 45, at 74.

¶n219. On diverse cultural approaches to humanitarian law, see generally Emmanuel G. Bello, *African Customary Humanitarian Law* (1980); Sumio Adachi, *The Asian Concept*, in *The International Dimensions of Humanitarian Law*, *supra* note 3, at 13; W.S. Armour, *Customs of Warfare in Ancient India*, 8 *Transactions of the Grotius Soc'y* 71 (1922); Emmanuel G. Bello, *Shared Legal Concepts Between African Customary Norms and International Conventions on Humanitarian Law*, 23 *Revue de Droit Penal Militaire et de Droit de la Guerre* 285 (1984); Yolande Diallo, *African Traditions and Humanitarian Law* (1976); A. Ibrahim, *Traditional Asian Approaches: A Malaysian View*, 9 *Austl. Y.B. Int'l Law* 217 (1985); Adamou

Ndam Njoya, *The African Concept*, in *International Dimensions of Humanitarian Law*, supra note 3, at 5; L.R. Penna, *Humanitarian Law in Ancient India*, 23 *Revue de Droit Penal Militaire et de Droit de la Guerre* 235 (1984); L. R. Penna, *Traditional Asian Approaches: An Indian View*, 9 *Austl. Y.B. Int'l L.* 168 (1985); Jean Pictet, *Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions*, in *International Dimensions of Humanitarian Law*, supra note 3, at 3; Jose Maria Ruda, *Concepcion Latinoamericana del Derecho Humanitario*, 51 *Revista Juridica de la Universidad de Puerto Rico* 199 (1982); Nagendra Singh, *Armed Conflicts and Humanitarian Laws of Ancient India*, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet* 531 (1984); M. Sornarajdh, *An Overview of the Asian Approaches to International Humanitarian Law*, 9 *Austl. Y.B. Int'l L.* 238 (1985); Zhu Li-Sun, *Traditional Asian Approaches: The Chinese View*, 9 *Austl. Y.B. Int'l L.* 143 (1985).

¶n220. Khadduri, supra note 5, at xii.

¶n221. See Rabbath, supra note 63, at 23. Rabbath echoes this view specifically with regard to increasing awareness of Islamic legal contributions. "L'etude de l'histoire vraie de l'Islam, de ses institutions politiques, de son droit international, apportera une contribution essentielle a la formation d'une communaute internationale reelle." (The study of the true history of Islam, its political institutions, and its international law, will bring an essential contribution to the formation of a real international community.) Id. (translated by author).