

THE 'GOD GAP' IN INTERNATIONAL HUMANITARIAN LAW

LESSONS LEARNED FROM ISLAMIC JURISPRUDENCE

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**The ‘God Gap’ in International Humanitarian Law:
Lessons Learned from Islamic Jurisprudence**

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Abstract: This essay bridges security and legal studies to show how contemporary debate over humanitarian legal norms today in both Islamic and international law traditions is a response to tectonic shifts in global conflict patterns now occurring in the post 9/11 security environment. If these shifts have helped raise these legal norms and their gaps to new heights of global discussion, this reflexive moment is overwhelmingly positive—provided that such attention, particularly in the Islamic context, is framed in ways adequate to the complexity of our changing international security environment. While it may sound facile to point out the obvious, that we are no longer living in a post-World War II or even a post-Cold War world, the fact of the matter is that both legal regimes are playing a role, albeit for different audiences, in reframing international security questions today—with implications for national and international security policies. This transnational role, as legal historian Wael Hallaq notes, is and has always been a distinctive feature of law in the Islamic tradition. The result is not only a commonality, but a symmetry to the challenges these legal regimes embody today: heightened interest in humanitarian law is, at bottom, a means to bring into discussion new and changing ethical standards to bear on new species of armed conflict.

1.0 The ‘God Gap’ in International Affairs

One ironic point of agreement across multiple academic disciplines has been an aversion to religion.

Fields as diverse as political science, anthropology, cultural studies, critical theory, international law, and development studies, among others—despite assurances of innovation—have shown a longstanding reticence in tackling the subject of religion.² In public and international affairs, Daniel Philpott has best

¹ This essay reflects research findings from our *Islam and International Humanitarian Law* initiative at Syracuse University’s Institute for National Security & Counterterrorism (INSCT), an interdisciplinary project at Syracuse University’s College of Law and the Maxwell School, which explores Islamic contributions to changing global conflict patterns and international legal norms, *available at* <http://insct.syr.edu/events/postconflict-justice-and-islam/>.

² The contemporary social science literature addressing this gap is vast. For recent milestone essays in political science, see J. Fox, *Religion: An Oft Overlooked Element of International Studies*, 3 *INT’L STUDIES REV.* 53

described how political scientists were not only “behind” in religious inquiry in politics, but slow to catch up in identifying the emerging role of religion as a force in public and international life—even after 9/11 when religiously-motivated political actors made this link undeniable.³ This gap in analysis belongs, Philpott explains, to the well-documented secular bias in western framings of global politics from the Westphalia (1648) narrative forward. So “insistently secular” was scholarship on global politics, that “dominant theories in this field assume[d] that states, nations, international organizations, parties, classes, businesses, interest groups, NGOs, elites, and lobbies carry on politics”—but do not “pursue religious ends” and were “not influenced by religious actors.”⁴ Indeed, despite the spectacular way in which religion has entered contemporary American political consciousness in the last decade few established means exist—conceptual, methodological, theoretical—to shift inquiry from a default secularism, particularly in national and international security inquiry and policy.⁵

If this is true academically, it is especially true in statecraft and policymaking. A recent two-year study by the *Chicago Council on Global Affairs* concluded that U.S. foreign policy is “handicapped by a

(2001); Daniel Philpott, *Explaining the Political Ambivalence of Religion*, 101 *AM. POL. SCI. REV.* 505 (2007); Kenneth D. Wald & Clyde Wilcox, *Getting Religion: Has Political Science Rediscovered the Faith Factor?* 100 *AM. POL. SCI. REV.* 523 (2006); and for a rebuttal with respect to Islam, see Sultan Tepe & Betül Demirkaya’s, *(Not) Getting Religion: Has Political Science Lost Sight of Islam?* 4 *POL. AND RELIGION* 203 (2011). See Saba Mahmood *Religious Reason and Secular Affect: An Incommensurable Divide?* 35 *CRITICAL INQUIRY* 836, 861 (2009) (noting that “the tradition of critical theory is infused with a suspicion, if not dismissal, of religion’s metaphysical and epistemological commitments”). For a long-gaze assessment in development studies see Severine Deneulin and Carole Rakodi, *Revisiting Religion: Development Studies Thirty Years On*, 39 *WORLD DEV.* 45 (2011).

³ Daniel Philpott, *The Challenge of September 11 to Secularism in International Relations*, 55 *WORLD POL.* 66 (2002); see also Daniel Philpott, *Has the Study of Global Politics Found Religion*, 12 *ANN. REV. OF POL. SCI.* 183, 184 (2009) (noting that while there was “genuine neglect, religion’s absence was never complete”). For some of those exceptions, see DOUGLAS JOHNSTON & CYNTHIA SAMPSON, *RELIGION, THE MISSING DIMENSION OF STATECRAFT* (1994); M. JUERGENSMEYER, *THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* (1993); Scott M. Thomas, *Taking Religious and Cultural Pluralism Seriously: The Global Resurgence of Religion and the Transformation of International Society*, 29 *Millennium* 818 (2000); see also R. Inglehart, *Is There a Global Resurgence of Religion?* *Pew Forum on Religion & Public Life* (Council on Foreign Relations, Washington, DC, 2006), available at <http://pewforum.org/events/?EventID=116>. Two foundations, the Henry R. Luce Initiative on Religion and International Affairs and the Social Science Research Council’s Religion in the Public Sphere, are supporting emergent research—though, contemplating the role of religion in national security policy is still often left to policymakers without academic input. For a promising exception, see the Religion, Conflict, and Peace initiative at Georgetown University’s Berkley Center for Religion, Peace, & World Affairs.

⁴ Philpott (2009) *supra* note 3, at 186-7 argues such theories “reason as if religion has disappeared from politics.”

⁵ Tepe & Demirkaya *supra* note 2.

narrow, ill-informed and uncompromising Western secularism” that “feeds religious extremism, threatens traditional cultures, and fails to encourage religious groups that promote peace and human rights.”⁶ If attributing extremisms to gaps in U.S. academic discourse is a causal stretch, Chris Seiple, President of the Institute for Global Engagement, is on firmer ground in declaring religion in U.S. foreign policy the “elephant in the room.”⁷ “You’re taught,” he elaborates, “not to talk about religion and politics” even while “it’s at the nexus of national security” because “[t]he truth is the academy has been run by secular fundamentalists for a long time, people who believe religion is not a legitimate component of realpolitik.”⁸ Though one wonders if a moderate secularist is tenable,⁹ Seiple is right again that new ideas on this subject in academia are not easily forthcoming and, furthermore, that this dearth of innovation still often defines U.S.-Muslim relationship-building and outreach efforts at U.S. federal agencies, notably the U.S. Department of State and in the Office of the President.¹⁰

Yet, if this so-called ‘god gap’ in U.S. foreign policy remains an important shortcoming, a more serious paradox exists with respect to Islam.¹¹ As discussions of religion in public life increase, including now emergent interest in religious activity in international affairs, there has been an equivalent pressure

⁶ R. Scott Appleby, et al. *Engaging Religious Communities Abroad: A New Imperative for U.S. Foreign Policy: Report of the Task Force on Religion and the Making of U.S. Foreign Policy* (Chicago Council on Global Affairs 2010); David Waters, ‘God Gap’ Impedes U.S. Foreign Policy, *Task Force Says*, THE WASHINGTON POST, 24 Feb 2010.

⁷ Waters *supra* note 6.

⁸ *Id.*

⁹ Seiple’s analysis reduces secularism to a competing ideology in a religious horizon of terms. For the secular in social science, see CRAIG CALHOUN ET. AL., *RETHINKING SECULARISM*, (2011).

¹⁰ For US-Muslim relationship-building and outreach initiatives in the Office of the U.S. President, see Office of Faith-based and Neighborhood Partnerships, *available at* <http://www.whitehouse.gov/blog/2010/02/23/navigating-religious-issues-abroad>; and the newly-formed interfaith advisory board to improve relations with Muslims domestically and internationally, EXEC. ORDER NO. 13,498 (Feb. 6, 2009), *Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships*, Section 1. Amendment to EXEC. ORDER NO. 13,199 66 C.F.R. 8499 (Jan 29, 2001) *Establishment of White House Office of Faith-Based and Community Initiatives*.

¹¹ Philpott (2009) *supra* note 3, at 186-7, (defining the ‘God gap’ as “scholarship on global politics [which] is insistently secular” and “assume[s] that states, nations, international organizations, parties, classes, businesses, interest groups, NGOs, elites, and lobbies carry on politics through power, conquest, freedom, wealth, welfare provision, human rights, justice, and other goals, but they do not pursue religious ends and are not influenced by religious actors”).

not to study Islam, particularly comparatively and especially among academics.¹² This pressure does not belong to the familiar narrative of willful historical ignorance and bias toward Islam in the West—however tempting it may be for some to make that case.¹³ It arises, instead, from core mental and methodological barriers that aid and abet the ‘god gap’ in U.S. foreign policy with respect to Islam and which, thus, undermine our ability to forge a rapport between legal norms that have much to say to one another and that may advance shared international security challenges in the contemporary security environment. The main purpose of this article is to set out a preliminary case for how Islamic and international humanitarian law, taken together, offer such a rapport and potential fruitful conceptual tools in this endeavor.¹⁴

¹² Tepe & Demirkaya *supra* note 2, at 223, makes this case empirically by reviewing how political scientists have studied Islam since 2002 at the discipline’s flagship annual conference of the American Political Science Association (APSA): “the state of research on Islam in the APSA. . . suggest[s] . . . a crippling knowledge gap among political scientists.” A notable exception before 9/11 is Samuel Huntington, *The Clash of Civilizations*, 72 *FOREIGN AFF.* 22 (1993); *CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996), which defined global conflict in civilizational-religious terms and included Islam. For the use of the ‘clash of civilizations’ term, see Bernard Lewis *The Roots of Muslim Rage*, *THE ATLANTIC MONTHLY* 48, Sept. 1990; Ervand Abrahamian, *The US Media, Huntington, and September 11*, 24 *THIRD WORLD Q.* 529 (2003), (arguing that after 9/11 the Huntington ‘culture’ paradigm marginalized the study of actual politics, particularly Palestine or Arab nationalism, in international relations).

¹³ The standard for this argument is EDWARD SAID, *ORIENTALISM* (1978), but it is worth mentioning Said’s precursors: THIERRY HENTSCH, *IMAGINING THE MIDDLE EAST* (1992); MEYDA YEOENOLU, *COLONIALIST FANTASIES: TOWARDS A FEMINIST READING OF ORIENTALISM* (1998); RICHARD WILLIAM SOUTHERN, *WESTERN VIEWS OF ISLAM IN THE MIDDLE AGES* (1962); and A.L. Tibawi, *English-Speaking Orientalists: A Critique of their Approach to Islam and Arab Nationalism*, 8 *ISLAMIC Q.* 25 (1964); *Second Critique of English-Speaking Orientalists: Their Approach to Islam and the Arabs*, 23 *ISLAMIC Q.* 3 (1979).

¹⁴ I use international humanitarian law (IHL), the laws of war, and the laws of armed conflict (LOAC) interchangeably, though authors have argued for preferences for good reasons, i.e., see the “law of international armed conflict,” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT*, 13-14 (2004); see also *WAR, AGGRESSION AND SELF-DEFENCE* (4 ed. 2005). IHL relies upon customs, treaties, and general humanitarian principles (of distinction, proportionality, unnecessary suffering, and military necessity). The bulk of the *jus in bello* or conduct of hostilities rules are found in the four revised Geneva Conventions of 1949 and their Additional Protocols of 1977 protecting victims of armed conflict: the sick and wounded (the First Convention); the shipwrecked (the Second Convention); prisoners of war (the Third Convention); and civilians in the hands of an adverse party and in general (the Fourth Convention). As part of public international law, the *jus in bello* is *lex specialis*—it traditionally applies only during armed conflict—and its force depends not on the formal declaration of war but on the *de facto* existence of armed conflict. A separate body of law, known as the *jus ad bellum*, or the law governing the resort to force, governs the right of states to use force in their foreign policy, enshrined in Article 2(4) of the UN Charter. *Jus in bello* rules apply to all state parties in a conflict regardless of whether the conflict is lawful by *ad bellum* standards in a traditional “bright line” distinction between these branches of the law—a recognition that compliance would suffer if parties to a conflict comported with the law only when they deemed another party’s resort to war lawful.

In the following subsections, I first examine A.E Mayer's comparative work on Islam and human rights law which, though it involves a different corpus of law than the traditional laws of war, has implications for international humanitarian law and frames my own thesis that Islam sets the limits of scholarly inquiry on religion in today's law and security policy arena.¹⁵ I then outline five barriers in the academic study of Islamic law on its own terms and their ramifications for security issues. After that, I turn to the second prong in the argument, the symmetry between the challenges that both international and Islamic legal regimes face in the post-9/11 security climate and the insights possible when these regimes are brought together to critically reflect upon such challenges.

1.1 Censuring Comparative Legal Inquiry on Islam

Ann Mayer's longstanding interest in the "nexus between Islam and human rights" not only anticipated the increasingly significant role that Islam would come to play in modern discussions of international human rights discourse today but, more important, identified the limits that still constrain comparativist inquiry on Islam in the context of international law—with implications for the laws of war. Central to *Islam and Human Rights*, one of the first major statements in the field in 1991, was Mayer's critique of the unwitting role that scholars played in inhibiting such comparative legal inquiry. Mayer

¹⁵ See A.E. MAYER, *ISLAM AND HUMAN RIGHTS* (4 ed. 2007); for her reflection on this nexus, see *The Islam and Human Rights Nexus: Shifting Dimensions*, 4 *MUSLIM WORLD JOURNAL OF HUMAN RIGHTS* 1 (2007). See also ABDULLAHI AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* (2008); MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2003); *ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM* (2010); SACHEDINA ABDULAZIZ, *ISLAM AND THE CHALLENGE OF HUMAN RIGHTS* (2009); JAVAID REHMAN & SUSAN C. BREAU, *RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES* (2007). Since it is not practicable to survey the evolving relationship between Islamic law, international law, and human rights, I distill several key distinctions from this emergent debate which are helpful for a prospective rapport between Islamic and international humanitarian law: (1.) a shift in emphasis on classical, often conservative Islamic doctrine and singular, authoritative interpretation to the polyvocal, indeterminate, and varied nature of Islamic law and implicit modern norms embedded in it; (2.) a critical shift from the exclusionist or incompatibility thesis to commonalities, harmonies, compatibilities, and commensurabilities; (3.) efforts to promote a cross-culturally sensitive universalism as a standard for human rights norms; (4.) a genuinely dialogic approach to achieving universalism, both integrating Islamic contributions to human rights discourse and holding to a minimum standard of universal protections; and (5.) the recognition that discontinuities and differences between international human rights law and Islamic values result as much from problems of interpretation than as strictly matters of the letter of the law. For a fuller and somewhat different elaboration, see MASHOOD A. BADERIN, *INT'L HUM. RTS. AND ISLAMIC L.* 27, 27 (2003).

memorably argued that scholars engage in a kind of intellectual “precensureship,” creating informal but effective pressures and ‘barriers to entry’ by declaring comparative work on Islamic-based legal norms “off-limits”—before it even begins.¹⁶ She traced this scholarly precensureship to two familiar sources, the distortions of culture-based objections associated with cultural relativism and the Saidian Orientalist critique.¹⁷ Ironically, Mayer observed, the “uncritical assimilation” of some of the most restrictive forms of cultural relativism—the view that human rights norms are essentially western and “do not apply outside Western countries”—migrated from academia to become the favored position of governmental powerbrokers in many Muslim-majority states, especially as these officials engaged the international community.¹⁸ This restrictive view of the western nature of human rights law succeeded in turning the

¹⁶ A.E. MAYER, *supra* note 15.

¹⁷ For culture-based objections to human rights in Islamic traditions, it is worth recalling the early contribution by ABDUL A’LA MAUDUDI, *HUMAN RIGHTS IN ISLAM* 13 (1976) (noting “the people of the West have the habit of attributing every good thing to themselves and trying to prove that it is because of them that the world got this blessing”). *But see* Heiner Bielefeldt, ‘Western’ versus ‘Islamic’ Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights, 28 POL. THEORY 90, 90 (2000), (Maududi’s view is an uncritical “Islamization of human rights” which fails to acknowledge “tensions between human rights and shariah law” by advocating a definition of equality that papers over “the two main issues over which traditional shariah and modern human rights collide,” i.e., gender and religion); Robert Carle, *Revealing and Concealing: Islamist Discourse on Human Rights*, 6 *Human Rts R.* 122, 124 (2005), (both Tabandeh and Maududi “develop a synthesis between human rights and traditional Shari’a that conceals the conflicts and tensions between the two”). Advancing the discussion, see Abdullahi An-Na’im, *Islam and Human Rights: Beyond the Universality Debate*, *AMERICAN SOC. OF INT’L L. PROCEEDINGS* 94 (2000) and *What Do We Mean by Universal? 4 INDEX OF CENSORSHIP* 120, 120-121 (1994), (arguing for meaningful universalism in which human rights “ought, by definition, to be universal in concept, scope and content as well as in application,” in short, a “globally accepted set of rights or claims to which all human beings are entitled by virtue of their humanity and without distinction on grounds such as race, gender or religion”; and yet, “there can be no prospect of the universal application of such rights unless there is, at least, substantial agreement on their concept, scope and content”). MASHOOD BADERIN, *Introduction: Abdullahi An-Na’im’s Philosophy on Islam and Human Rights*, *ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA’IM* 128 (Baderin ed. 2010), (integrating this view into his “philosophy of cross-cultural universality” so as to incorporate “vigorous constituencies for universal human rights worldwide, including the Islamic world,” which can “never be mobilised in a global project on purely Western liberal notions of individual civil and political rights,” and thus will “only command genuine universal respect and validity through discourse and dialogue”). For one of the earliest statements of this concern in western academia, see the Executive Board, American Anthropological Association, *Statement on Human Rights*, 49 *AM. ANTHROPOLOGIST* 539 (Oct.-Dec. 1947); more recently, American Anthropological Association, Committee for Human Rights, *Declaration on Anthropology and Human Rights*, adopted by the AAA membership Jun. 1999, available at <http://www.aaanet.org/stmts/humanrts.htm>; and K. Engle’s analysis, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999*, 23 *HUM. RTS. Q.* 536 (2001).

¹⁸ Mayer, *supra* note 4, at 4. *See also* MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001); Bryan S. Turner, *Cosmopolitan Virtue, Globalization, and Patriotism*, 19 *THEORY, CUL. & SOC.* 1, 46 (2002). As human rights regimes from dissident perspective comprise too many sources to describe here, I mention five common points of criticism, as noted in Bryan S. Turner (2002); NIRA YUVAL-DAVIS, *Human/Women’s Rights and Feminist Transversal*

tables so as to make even neutral scholarly inquiry and local Muslim human rights activist critiques of violations of international human rights by their own governments impermissible insofar as these critiques were said to rest upon western values—a perspective that grew to assert the purported western pedigree of international law more generally.¹⁹

Such cultural objections were also bolstered by linking such human rights critiques with the exertion of western hegemony—claiming solidarity with Said’s Orientalist critique.²⁰ The West’s selective admonition of abuses by Muslim states based on whether U.S. officials sought to reward allies, for instance, lent support to this suspicion. Seeing “yet another chapter in the history of the imperialist West cynically invoking human rights deficiencies in Middle Eastern countries to justify self-interested

Politics, GLOBAL FEMINISM: TRANSNATIONAL WOMEN’S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS 275 (MYRA MARX FERREE & AILI MARI TRIPP, eds., 2006); David Kennedy, *The International Human Rights Movement: Part of the Problem*, 15 HARV. HUM. RTS. J. 102, 114, 123 (2002). These include: (1.) “tainted origins” (Kennedy at 114) or the implicit liberal, western, individualistic, post-enlightenment, secular, modern, and/or capitalist ideologies embedded in human rights that carry with them purportedly irredeemable limits or biases; (2.) a fixation on rules and bureaucracies in ways that often cloak power dynamics or structural hierarchies; (3.) the fact that human rights rules are not ‘justiciable’ or enforceable as states enforce rights and no global government exists with authority to do so (Turner at 46); (4.) the abstract entitlements of rights regimes and their reliance on “the least effective institutional forms available” in contrast to more successful international governance models i.e. standards-based regimes, economic law regime in private law (Kennedy at 123); and (5.) the tendency of human rights norms to accommodate current political systems instead of pushing for systemic change (Yuval-Davis at 275). In addition to An Naim and Baderin, *supra* note 17, some interdisciplinary legal treatments of these respective arguments include: Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211 (1999); Kate Schick, *Beyond Rules: A Critique of the Liberal Human Rights Regime*, 20 INT’L REL. 321 (2006); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOCIOLOGY 1373 (2005); Makau W. Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, *Buffalo Legal Studies Research Paper No. 2007-013*: 547 (2007); SIOBHAN MULLALLY, GENDER, CULTURE AND HUMAN RIGHTS: RECLAIMING UNIVERSALISM (2006); and AMOS GUIORA, FREEDOM FROM RELIGION (2009).

¹⁹ For this issue as it impacts the nongovernmental human rights community, see Naz Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, (addressing the tension for human rights practitioners of the apparent contradiction between human rights norms and Islamic law). Compare with Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. AND DEV. L. J. 67, 67 (2005) (conceptualizing “individual duties to the community”).

²⁰ Mayer, *supra* note 4, at 5, 6, (noting that many critics of US foreign policy have drawn links between scholarship that highlights human rights deficiencies in the Middle East and U.S. uses of human rights rhetoric to justify invasions: Afghanistan and Iraq interventions, for instance, were preceded by “statements professing outrage over such violations perpetrated by the Taliban and Saddam Hussein” and the virtues of “spreading the blessings of democracy and humans rights in the region”). Yet, while such human rights concerns ring “hollow” when U.S. foreign policy accommodates gross human rights abuses by governments in the region, still, conflating critiques of human rights in Muslim milieus with U.S. hypocritical government policy is an “especially weak” argument in cases where Islam is used to *deny* universally-accepted human right norms by U.S. allies.

intervention,” many observers, “automatically associate[d] all academic writing dealing with such deficiencies with White House strategies,” Mayer explained.²¹

If scholars’ study of foreign culture were disqualified on the basis of the hypocrisy of their home country’s foreign policy, Mayer argued, few scholars would qualify and most cross-cultural inquiry would be banned.²² Indeed, given “the propensity of governments to rank political advantage (domestically, globally) over ethical concerns,” few governments are “fit arbiters of human rights norms or ethics—a pathology not limited to the United States or the West.”²³ Conceding the West’s spotty history of human right violations, then, does not license one to “reflexively classify criticisms of Islamic human rights schemes” as “products of Western prejudice” or as campaigns “to tarnish the image of Islam” to thereby legitimate “Western domination of Muslim countries.”²⁴ It simply means that the United States faces its own compliance problems with international law—no surprise to international lawyers, legal scholars, or even the news-reading public witnessing recent U.S. reversals on long-held bans on torture, among other cases.²⁵ Likewise, concluding that the U.S. government resorts to cynical deployments of human rights rhetoric cannot stand in the way of independent scholars assessing human rights anywhere in the world, so long as they apply consistent standards.

A more harmful unintended consequence of this “hands off” approach to Islam and to cultural arguments for constraining the application of international rights norms in Muslim contexts has been the resurgence of that quintessential Orientalist conceit, also identified by Said—that Islam is a static, uniform system which dominates its societies, not a consensual, living tradition, whose coherence and continuity have been imperiled most by western intrusion, not by local government hypocrisy, incompetence, corruption, or oppression.²⁶ Too often, that is, Muslim governments claim cultural

²¹ Mayer, *supra* note 4, at 5. See generally JULIE MERTUS, *BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY* (2004).

²² Mayer, *supra* note 4, at 6.

²³ *Id.* Hence, the need for human rights *nongovernmental* organizations.

²⁴ *Id.* at 5.

²⁵ See Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003).

²⁶ Mayer, *supra* note 4, at 8. For an emergent counter-argument in the crucible of the Egyptian Arab Spring, exiled Sunni cleric Sheik Yusuf al-Qaradawi, banned from the United States and Britain for advocating

objections when they wish to equate Islamic culture with government representations of culture to circumscribe freedoms and to monopolize the authority to define Islam in practice (as in the law).²⁷ Such twin conceits—human rights are religiously constrained and Islamic norms are static—are useful for official accounts of culture in which the manifest diversity of Islam is strictly reduced. In fact, ‘Arab Spring’ activists have, most recently, exposed such cynical uses of cultural arguments by defensive regimes in Libya, Egypt, Syria, Iran, and elsewhere, as ploys to dismiss recent uprisings as “Western plots” or to delegitimize as “Western” protestors’ claims for greater freedoms, government accountability, and socio-economic development—objectives that many protestors defend as God-given rights under Islam.²⁸ In fact, part of the cohesion of prodemocracy uprisings across the Middle East and North Africa is this deep skepticism toward such coopted and reified uses of Islam in favor of arguments for commensurable norms between Islam and universal human rights norms, enshrined both in international human rights law and humanitarian legal rules governing conflicts.²⁹ In this respect, Mayer defines a dynamic approach to Islamic law that not only identifies disabling uses of cultural arguments in

violence against Israeli civilians and U.S. forces, delivered his first public sermon in 50 years in Tahrir Square in which he said: “the Arab world had changed” and young revolutionaries should “[p]rotect” their revolution—“Don’t you dare let anyone steal it from you,” and, remember, he emphasized “that Islamic law supports the idea of a pluralistic, multiparty, civil democracy,” see David Kirkpatrick, *After Long Exile, Sunni Cleric Takes Role in Egypt*, THE NEW YORK TIMES, 18 Feb. 2011, available at <http://www.nytimes.com/2011/02/19/world/middleeast/19egypt.html?scp=1&sq=qaradawi&st=cse>.

²⁷ Mayer, *supra* note 4, at 9-10.

²⁸ See Hosni Mubarak’s speech to the Egyptian people: ‘I will not . . . accept to hear foreign dictations’, THE WASHINGTON POST, 10 Feb. 2011 (trans. transcript), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021005290.html>, (“I am telling you, as a president of the country, I do not find it a mistake to listen to you and to respond to your requests and demands. But it is shameful and I will not, nor will ever accept to hear foreign dictations, whatever the source might be or whatever the context it came in”).

²⁹ The recent Middle East and North African uprisings reveal how much Muslim and Arab traditions of human rights have been excised from public discourse and civil society in Egypt, Jordan, Tunisia, elsewhere in the Magreb, as well as in Yemen, other Persian Gulf States, and beyond. See Susan E. Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 HUM. RTS. Q. 799 (2004); KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST (1991). But see Abdullahi An-Na’im, *Human Rights in the Arab World: A Regional Perspective*, 23 HUM. RTS. Q. 701, 702-3 (2001), (cautioning against “human rights dependency” in, “the widely prevalent perception that the governments of developing countries are more responsive to international pressure for the protection of human rights in their countries, than to the activities of local NGOs and other actors within their own societies.” An-Na’im notes three concerns: (1.) this pattern in human rights activism creates the global “public perception” that “the protection of human rights is a ‘Western’ agenda rather than an internal priority of the developing countries”; (2.) local NGOs are made more fragile by having to depend on Western political and financial support instead of local constituencies and funding sources; and (3) local and international NGOs are not accountable to the local societies of developing countries that they claim to serve.)

comparative legal inquiry, but also anticipates an evolving rapport between Islam and international law more generally.³⁰ Ultimately Mayer’s prescient sense of this “shifting nexus” between Islam and international human rights law, one attuned to “an era of unsettling changes to the status quo,” helps to explain the human-rights orientation of today’s prodemocracy movements, their appeals to freedom and, importantly, their look to Islam as a defining inspiration and guarantor of that freedom.

There is no question that a similar process of harmonizing Islamic and international norms is also occurring for international humanitarian law today, though this process has not been as carefully studied or understood, due in some measure to the precensureship which Mayer describes. But if much of what Mayer observes is descriptive, not only of the limits in the comparative study of Islamic and international human rights law, but for the laws of war more generally, it is also due to the analytical barriers in the study of Islamic law proper, which I examine in the following section. Similar “barriers to entry” in the comparative study of Islam and international humanitarian law include: cultural objections that prevent robust inquiry into Islamic and international laws of war; the way in which such cultural inhibitions have gained traction even among independent scholars; how such closed doors aid self-serving noncompliant governments which too often repurpose narratives of resistance for antithetical ends; and, finally, the calcification of Islamic law itself as a casualty of this process. I turn to these next.

1.2 Analytical Barriers in Studying Islamic Law

If Islam is often made off limits *before* actual academic or policy inquiry occurs, five key analytical barriers in the study of Islamic law proper forestall its especial promise in applying Islamic

³⁰ Mayer, *The Islam and Human Rights Nexus*, *supra* note 15, (noting that the vital relationship between Islam and human rights “is too often viewed as being static” when instead “the relationship is complex and mutable” and sensitive to “an era of unsettling changes to the status quo” and to “shifting political dynamics”). Elsewhere, Mayer observes that Organization of Islamic Cooperation (formerly Conference) (OIC) member states have changed their approach to this nexus: instead of demanding exceptions to IHRL based on conflicting principles of Islamic law, they now appeal to the “traditional values” of culture and religion—a tactic “indicative of a current trend to assert that human rights universalism can coexist with cultural particularisms” while continuing to “exploit culture and religion to curb human rights” in practice. See A.E. Mayer, *Islam and Human Rights: New Perspectives in Recent United Nations Discussions*, Sept. 16, 2010, Duke Law & Duke Islamic Studies Center, Duke University, available at <http://www.law.duke.edu/news/story?id=5285&u=26>.

resources to contemporary problems of security—from the widespread use of civilians in hostilities (terrorism, human shielding, child soldiers) to asymmetric tactics and more general problems of human security.³¹

Perhaps the most trenchant barriers in the study of Islamic law today is the obsession with Islamic legal history at the expense of contemporary Islamic law, including comparative inquiry into the hybrid European legal systems of most Muslim-majority states.³² To put this point differently, Islamic legal

³¹ Predictably, security and security studies are contested terms. See the special issue on “The Evolution of International Security Studies,” including Barry Buzan & Lene Hansen, *Beyond the Evolution of International Security Studies?* 41 *SECURITY DIALOGUE* 659 (2010); Pinar Bilgin, *The ‘Western-Centrism’ of Security Studies: ‘Blind Spot’ or Constitutive Practice?* 41 *SECURITY DIALOGUE* 615 (2010); Steven E. Miller, *The Hegemonic Illusion? Traditional Strategic Studies in Context*, 41 *SECURITY DIALOGUE* 639 (2010). Generally, definitions of security range from traditional national security concerns—strategic studies, defense policy, grand strategy, and realist state-centric and military force emphases, such as “the study of the threat, use and control of military force” (Walt 1991:212) and matters involving the survival of state and society (Weaver 1996: 48)—to expansive international security and human security concerns, which comprise social, economic, environment and climate, food and development, personal security issues, as these forces implicate the international community and endanger individuals in far greater ways than states. For a general definition, see Stephen Walt, *The Renaissance of Security Studies*, 35 *INT’L STUDIES Q.* 211 (1991); Ole Wæver, *Securitization and Desecuritization*, in RONNIE D. LIPSCHUTZ, *ON SECURITY* (1995); for traditional strategic or defense policy notions, see HARVEY SAPOLSKY, EUGENE GHOLZ, AND CAITLIN TALMADE, *U.S. DEFENSE POLITICS: THE ORIGINS OF SECURITY POLICY* (2008); STEPHEN VAN EVERA & SIDHARTH SHAH eds., *THE PRUDENT USE OF POWER IN AMERICAN NATIONAL SECURITY STRATEGY* (2010); Barry R. Posen, *Stability and Change in U.S. Grand Strategy*, 51 *Orbis* 561 (2007); for human security, see Ralph Pettman, *Human Security as Global Security: Reconceptualising Strategic Studies*, 18 *CAMBRIDGE REV. INT’L AFF.* 137(2005) and Roland Paris’s critique, *Rational and Irrational Approaches to Human Security: A Reply to Ralph Pettman*, 18 *CAMBRIDGE REV. INT’L AFF.* 479 (2005); for international security, see BARRY BUZAN & LENE HANSEN, *THE EVOLUTION OF INTERNATIONAL SECURITY STUDIES* (2009). Compare Mohammed Ayooob, *Defining Security: A Subaltern Realist Perspective*, in KEITH KRAUSE & MICHAEL C. WILLIAMS, *CRITICAL SECURITY STUD.* 130 (1997), which defines security (or insecurity) as relationality, a matter of “vulnerabilities, both internal and external, that threaten to, or have the potential to, bring down or significantly weaken state structures, both territorial and institutional, and regimes.” For the breadth of security studies, see Clementine Burnley et al., *Definitions, Concepts and Geospatial Dimensions of Security*, in B. JASANI ET AL., *REMOTE SENSING FROM SPACE: SUPPORTING INTERNATIONAL PEACE AND SECURITY* (2009); Alethia Cook, *Securitization of Disease in the United States: Globalization, Public Policy, and Pandemics*, 1 *RISK, HAZARDS & CRISIS IN PUB. POL.* 1 (2010).

³² See Haider Ala Hamoudi, *The Muezzin’s Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 *AM. J. COMP. L.* 423, 423-424 (2008), (“The central flaw in the current approach to shari’a in the American legal academy is the reliance on the false assumption that contemporary Islamic rules are derived from classical doctrine” in which students “focus their energies on obsolete medieval rules” which “bear no relationship” to how “modern Muslims approach shari’a” and, further, given “the structural pluralism of the rules of the classical era,” there is “no sensible way that modern rules could be derived from classical doctrine, either in letter or in spirit, and all efforts to do so have largely failed”). Hamoudi goes on to note:

As with all historical approaches to the law, the past becomes no more than an invention of the present, a means to validate an approach rather than any true reflection of the practices and norms of a previous era. Thus, modern Islamic rules are not a resurrection of classical era rules, but rather are largely the product of mediation among competing influences in Muslim society. . . [t]he two major influences are, on the one hand, resistance, clothed in Islamic rhetoric, against the dominant global economic and political order in order to create a separate Muslim sphere within which the Muslim polity may operate, and on

history casts an enormously long shadow on the study of Islamic law to the point that foremost legal historian Wael Hallaq can write: “Until recently, and with the single, partial exception of Ottoman law, there has been very little serious work treating Islamic law between the 4th/10th and the 10th/16th centuries,” making this “expansive period” of legal history “depressingly a *terra incognita*.”³³ Likewise, Hallaq adds, though the formative and modern periods are “two of the most studied epochs in the history of Islamic law, they [also] remain comparatively unexplored”³⁴—with the interim, modern (beginning ca. 1800, and understood as entangled with European colonialism), and contemporary periods nearly as bereft of systemic research, especially in the West.³⁵ It is difficult to overstate the liability of this complex

the other, the need to engage the broader global order, commercially and politically, in order to restore some level of political and economic power to the Muslim world.

³³ Wael B. Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse*, 2 UCLA J. ISLAMIC & NEAR EASTERN L. 1, 2-3 (2002-2003) (attributes to Orientalist doctrine the “particular emphasis” placed “on the early, formative period of Islam” and “the distinct unevenness in the manner in which Orientalism has treated the history of Islamic law.” Both the modern period, “which began with the Ottoman and Egyptian reforms about a century and a half ago,” and “the ‘origins’ of Islam in general and of Islamic law in particular were and continue to be, comparatively speaking, the focus of much...Orientalist discourse, . . . despite the fact that there is an abundant supply of information from this middle period to study and analyze”). See also Wael Hallaq, *The Formation of Islamic Law*, in *THE FORMATION OF THE CLASSICAL ISLAMIC WORLD* (Lawrence Conrad, ed., 2003). But see David Powers disagreement with these assessments in his extended review, *Wael B. Hallaq on the Origins of Islamic Law: A Review Essay*, 17 ISLAMIC L. & SOC. 126, 133; 140-143; 149 (2010). For how the Orientalist project “appropriated Islamic law as a field of knowledge,” see WAEL HALLAQ, *SHARĀ’A: THEORY, PRACTICE, TRANSFORMATIONS* 1-6 (2009). Others have added elements to this historical narrative, including the birth of the Shiite legal tradition in reaction to Sunni orthodoxy, see DEVIN J. STEWART, *ISLAMIC LEGAL ORTHODOXY: TWELVER SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM* (1998).

³⁴ WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW*, 1-2 (2005) (an “index of the state of scholarship on the formative period is the fact that, to date, there has not been a single volume published that offers a history of Islamic law during the first three or four centuries of its life.” Though some works bear “titles that contain the designation ‘Origins’ and ‘Islamic law’ or ‘Islamic jurisprudence,’” yet “[n]one” can “boast content that truly reflects what is implied in these titles,” since all are “specialized studies that – however meritorious some of them may be – endeavor to study the formative period through a rather narrow lens”). These titles include: JOSEPH SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1950); HARALD MOTZKI, *THE ORIGINS OF ISLAMIC JURISPRUDENCE: MECCAN FIQH BEFORE THE CLASSICAL SCHOOLS* (1991, trans. Marion H. Katz 2002); Y. DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR’AN, THE MUWATTA’ AND MEDINAN ‘AMAL* (1999). Powers, *supra* note 33, adds two to this list, though the Schacht volume is both an introductory work and a distillation of scholarly analysis produced elsewhere: N.J. COULSON, *A HISTORY OF ISLAMIC LAW* (1964) and JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* (1964). Hallaq explains that in his attempts “to sketch the outlines of the formative period, presenting a general survey of the main issues that contributed significantly to the formation of Islamic law,” the present work “differs from its above-mentioned predecessors, which offer topical or partial treatments rather than a synthesized picture of formative legal development.”

³⁵ Hallaq, *supra* note 34, 1-2; 2-3 (describing the formative “origins” period of Islamic law, the first three centuries in which “the legal system arose from rudimentary beginnings” and “developed to the point at which its constitutive features had acquired an identifiable shape”). For Hallaq, Islamic law’s core “attributes” are fourfold: (1) the evolution of a complete judiciary, with a full-fledged court system and law of evidence and procedure; (2)

obsession with the history of Islamic law—and, at the same time, the lack of neutral, systematic inquiry on the subject—or to speculate about its motivation. At a minimum, it amounts to a lost historical narrative that prevents attempts to synthesize past to present and thereby undermines our ability to gain perspective on today’s newest challenges using Islamic legal resources. Such an absent genealogical narrative not only keeps us disoriented about new problems of conflict within an Islamic ambit, it forestalls creative responses that tap the rich capacity of Islamic law for the present. Most subtly, this poverty in historical understanding allows homogenizing narratives about the very terms “Islam” and “Islamic law” to continue apace, including such uses in both extremist and misinformed agendas—a point I return to in the following section.³⁶

To complicate matters, part of this obsession with medieval Islamic history is “an odd reversal in which history speaks *as present*,” as Lama Abu-Odeh notes, whereby the study of Islamic law, particularly among Islamic law scholarship in powerful U.S. universities, “bears no relationship to how such courses are taught in the Islamic world itself” and, further, amounts to a “fantasy” about a “foundational” authentic “identitarian” category “shared by all ‘Muslims’” based on “religious/legal beliefs” and a “teleological notion of history.”³⁷ This fantasy narrative of the “supremacy of Islamic law”

the full elaboration of a positive legal doctrine; (3) the full emergence of a science of legal methodology and interpretation reflecting a large measure of hermeneutical, intellectual and juristic self-consciousness; and (4) the full emergence of the doctrinal legal schools, presuming the emergence of various systemic, juristic, educational and practice-based elements. Hallaq argues that “until recently” scholars presumed the period ended during the middle of the third century (ca. 860 AD), following Schacht’s findings, and that more recent research indicates “Islamic law came to contain all its major components” around the middle of the fourth/tenth century, an entire century later. Hallaq’s concern with the “complex” task of plotting beginnings stems from trying to overcome the over reliance on “unproven assumptions,” not “real historical evidence,” such as the “Orientalist creed that the Arabia of the Prophet was a culturally impoverished region, and that when the Arabs built their sophisticated cities, empires and legal systems, they could not have drawn on their own vacuous cultural resources” but “freely absorbed the cultural elements of the societies they eventually conquered, including (but especially) the Byzantino-Roman and Sasanid civilizations.” For a lucid introduction to Islamic law, see MOHAMMAD HASHIM KAMALI, *SHARIA LAW: AN INTRODUCTION* (2008).

³⁶ For policy implications, see U.S. Administration confusion with respect to current prodemocracy movements, see Adam Entous & Julian E. Barnes, *U.S. Wavers on Regime Change*, WALL ST. J., 5 Mar. 2011; John YoO, *Opinion: We Don’t Need U.N. Approval to Save Libyan Lives*, WALL ST. J., 5 Mar. 2011.

³⁷ Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 792-793 (2004). Abu-Odeh explains:

They certainly bear no relationship to my own legal education at the Faculty of Law in Jordan University. To graduate with a law degree, I was instructed on the Civil Code, the Criminal Code, the Commercial

assumes “the ‘spirit’ of Islamic law marches through history unencumbered by the world’s contingencies” and ignores the ubiquity of the “European legal transplant” in the Islamic world.³⁸ U.S. Islamic law scholars often indulge “an elaborate discussion of, say, the medieval ‘sunni legal thought’ when the topic of rights and constitutionalism” is raised—“as *if* contemporary constitutions of the Islamic world, constructed out of such post-enlightenment ideas, are of no relevance whatsoever.”³⁹ Abu-Odeh similarly cites an example in which Osama Bin Laden is tried “according to medieval Islamic criminal rules, *as if* this were a law to which contemporary Muslims relate, or are even aware of, when they have adjudicated their criminal cases for over a century now in courts that are enactments of twentieth-century European criminal jurisprudence.”⁴⁰ If mentioned at all, European-derived domestic law is seen as “a foreign import” or “a thing to be displaced and replaced with something more authentic”—even though it informs “the positive law of the Islamic world” including “its codes, treatises, law reports, legal institutions, legal curricula.”⁴¹ “Giving Islamic law an overarching analytical status in our approach to law in the Islamic world,” Abu-Odeh concludes, not only “distorts our understanding of legal phenomena in these countries,” but misunderstands that Islamic law is only one of the constitutive elements of law that “has been de-centered by the [European] transplant” and thus “transformed” in the process—its treatises turned into codes, its *qadis*, modern judges, its internal logic “reduced to a rule structure positivized in a code and dependent on state enforcement.”⁴²

Code, Corporation Law, Civil and Criminal Procedure, Evidence...etc., all codes designed to mimic, repeat, and copy European codes. My education on Islamic law was limited to three courses which I had to take in a different school called the Department of Sharia and included a course on Marriage and Divorce, one on Inheritance and Wills, and one on Islamic Jurisprudence. Nine credits on Islamic law for the four years I was studying law in an Islamic country!”

See also Abdullahi Ahmed An-Naim, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1 (2010).

³⁸ Abu-Odeh, *supra* note 37, at 791-2.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 811.

⁴² *Id.* at 824 (noting, “Islamic law is now largely ‘privatized’ in voluntary acts of ritual and worship and consultation with religious figures as to how to treat one’s wife and the religiously acceptable way to invest one’s money. . . [A]s Talal Al-Assad argues in *Formations of the Secular*, a separation between law and morality, religion being relegated to the latter, has entered the Islamic world and has cut off the continuous, normative

While it would take more space than available here to explore why the study of Islamic law has been largely relegated to the past and to a narrow slice of it, I briefly list several enabling conditions—though these are by no means comprehensive. In western academia one proximate cause is methodological, the long arm of Orientalist historiography in its traditional fixation on canonical texts and classical exegesis at the expense of contemporary practice in ways post-Saidian analysis must more carefully probe.⁴³ The point is not to malign the careful, painstaking work of classical Islamology or research in history, hermeneutics, philology, linguistics, orthography etc.—work too often slighted in short-sighted U.S. research budgets in the humanities today—but to question the equation of historical textual inquiry with the meaning and practice of Islamic law in general. Second, a still entrenched, essentially British Victorian era disciplinary division of labor segregates Islamic inquiry in the humanities, history, ethics, religion, and textuality, from empirical research in the social sciences on governance, society, and politics, so that experts from these respective fields may neither know nor engage each another’s work and thus neglect the interdisciplinary synthesis needed for policy-relevant contemporary inquiry.⁴⁴ Third, the dearth of translations (between English, Arabic, Persian, Urdu, Dari, Pashto, etc.) has meant little intercourse between western and nonwestern Islamic legal scholarship with the invariable checks and balances that cross-cultural inquiry brings. Fourth, a hamstrung independent publishing tradition in many Muslim states, owing from systemic underinvestment in public discourse

and juridical hold Islamic law had had on Muslims, covering the whole spectrum of one's life-acts”). See TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003).

⁴³ See *supra* note 38 for Hallaq’s interpretation of the role of Orientalism in this historiography. While I agree generally, the “strategic agenda” is not coherent or the sole motivating factor—most obviously because Orientalism persists even as strategic powers and their instruments change over time, in many cases drastically.

⁴⁴ It is noteworthy and worth pursuing in comparative inquiry that the revolutionary work of Egyptian Sayyid Qutb, Pakistani Islamist Syed Abul Al’a Mawdudi, and Iraqi Shi’i jurist Muhammad Baqir al-Sadr refutes this Cartesian distinction in favor of Islamic holistic forms of human association and social relations that form a continuum between morality and sociality. See also Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 249, 251 (2008), (noting this “deep and venerable tradition” of theoretical imagining, a kind of Islamic social science, takes place within the language of law: “the study of the body of Islamic rules, norms, and laws developed by jurists,” instead of an “Islamic” social science of economics or history).

and longstanding state censure,⁴⁵ has removed deliberation over policies and their rationale in law from public scrutiny and even kept the best scholars in the dark.⁴⁶ Last, an obsession with the medieval heyday period of Islamic law, a thing of which to be indisputably proud, has merged with romantic atavistic appeals to a glorified pre-fall, pre-colonial Muslim world, even in western academic scholarship, thus supporting a revivalist Islam that distracts from contemporary problems of Muslim modernization and economic globalization and how these macrostructural phenomena are solved, often expediently, in law and policy.⁴⁷ Taken in sum, these and other factors narrow robust inquiry into Islamic law in the here and now and in its actualized diversity.

The second obstacle for understanding Islamic law in its potential for addressing contemporary security issues stems from the paucity of scholarship on that branch of humanitarian law known as the *jus in bello*, the law governing the conduct of parties in war.⁴⁸ John Kelsay, much of whose life work

⁴⁵ See UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), ARAB FUND FOR ECONOMIC AND SOCIAL DEVELOPMENT, THE ARAB HUMAN DEVELOPMENT REPORT 2003: BUILDING A KNOWLEDGE SOCIETY 67, 78 (2003): "In terms of quantity, and notwithstanding the increase in the number of translated books from 175 per year [total] during 1970-1975 to 330, the number of books translated in the Arab world is one fifth of the number translated in Greece. The aggregate total of translated books from the Al-Ma'moon era to the present day amounts to 10,000 books—equivalent to what Spain translates in a single year." The Report also notes that "A book that sells 5,000 copies is considered a bestseller." Compare the contemporary dearth of translation with Hayrettin Yücesoy, *Translation as Self-Consciousness: Ancient Sciences, Antediluvian Wisdom, and the 'Abbasid Translation Movement*, 20 JOURNAL OF WORLD HISTORY 523, 523 (2009): "One of the most enduring achievements of the 'Abbäsid caliphate (750–1258) was the support of the translations of most of the major works of ancient Greek, Persian, and Indian philosophies and sciences into Arabic from the eighth through the tenth centuries" in a "translation movement" which "breathed a new life into much of the intellectual legacy of the ancient world and opened new doors for cross-cultural scholarly engagement among a large cast of intellectuals, administrators, and rulers over many generations." The translation movement also "inspired the intellectual life of Muslim societies until modern times and affected the scientific and scholastic growth of the Latin West for centuries."

⁴⁶ See the Mohammed bin Rashid Al Maktoum Foundation (MBRF) and the UNDP REGIONAL BUREAU FOR ARAB STATES (UNDP/RBAS) ARAB KNOWLEDGE REPORT 2009: TOWARDS PRODUCTIVE INTERCOMMUNICATION FOR KNOWLEDGE 60-91 (2009), for programs dedicated to solving this well-known problem. See also the Cambridge, UK educational charity and publisher, Islamic Texts Society, which produces English translations of "works of traditional importance to the Islamic faith and culture, including editions of hitherto unpublished manuscripts, and also sponsors contemporary works on Islamic subjects by scholars from all parts of the world," available at <http://www.its.org.uk>.

⁴⁷ The obvious exception is emergent work on Islamic finance. See Hamoudi *supra* note 31; for Hamoudi's review of Noah Feldman's work, see *Orientalism and THE RISE AND FALL OF THE ISLAMIC STATE*, 2 MIDDLE EAST L. & GOVERNANCE: INTERDISC. J. 1(2008) (attributing such romantic dreams to still current orientalist approaches to Muslim polities, law, and sharia).

⁴⁸ For a fuller discussion of the *jus in bello*, Latin for the law in war, which comes into force and governs the conduct of parties engaged in international and noninternational armed conflicts, see *infra* 18-20. If restraint in the use of force evolved from chivalric, as well as religious just war traditions, the term is a modern one—a largely twentieth century development in positivist legal, humanitarian, and politically-realist responses to modern

comprises comparative historical inquiry on this subject, has noted the curious intellectual ‘dead-end’ for this tradition of writing by Muslim jurists during the post-war nationalization of the Ottoman Empire and Turkey’s subsequent strenuous secularity. Compared to the “classical” writing, “one is first struck by the scarcity of the *jus in bello* materials,” Kelsay writes, and “unlike [the] classical theorists, contemporary Muslim thinkers seem mostly interested in the *jus ad bellum*,” the rules governing the terms by which a state may resort to the use of force in its international affairs.⁴⁹ Kelsay attributes this decline to “the recent history of Islam,” to the Young Turks’ decision in 1924 to abolish the Ottoman Caliphate, thus doing away “with one of the most important institutions of classical Islam” and, thus, reordering state affairs away from Sunni traditions and authority.⁵⁰ In the aftermath, “Muslims who [had] been doing the most thinking about the conduct of war” were not “doing so as self-conscious developers of the tradition of Islamic thought.”⁵¹

Importantly, without the unifying mechanism of the Caliph, modern conduct of hostilities questions devolved into two approaches: apologetics for Islamic notions of defensive and even offensive war, a genre still popular today, and justifications for revolutionary and often violent political struggle.⁵²

“world” wars. See Robert C. Stacey, *The Age of Chivalry* in MICHAEL HOWARD ET AL., *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (1994); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 26-39 (3rd edn., revised 2008); JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS, 1200–1740* (1975); G.I.A.D. Draper, *Review (of J.T. Johnson): The Just War Doctrine*, 86 *YALE L. J.* 370 (1976); Michael Howard, *Temperamenta Belli: Can War Be Controlled?* in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT*, (1979); G.I.A.D. Draper, *Grotius’s Place in the Development of Legal Ideas About War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, eds., HEDLEY BULL et al. (1990); Robert Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *YALE J. INT’L L.* 48, 56-64 (2009).

⁴⁹ JOHN KELSAY, *ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS* 69 (1993). For a succinct description of the demise of classical jurisprudence with relevance to law of war issues, see Khaled Abou El Fadl, *Islam and the Theology of Power*, 221 *MIDDLE EAST REP.* 28, 31 (2001).

⁵⁰ Kelsay, *supra* note 49, at 69.

⁵¹ *Id.*

⁵² In the first case, Kelsay, *supra* note 49, at 70, is thinking of Mahmud Shaltut’s argument for defensive war/jihad in *THE KORAN AND FIGHTING*, which begins, interestingly with a discussion on *THE EXEMPLARY METHOD OF KORAN INTERPRETATION* (1977); in the second case, he is thinking of examples like the Palestine Liberation Organization (PLO) in which armed struggle against Israel “spoke the language of Arab nationalism and drew less on Islamic traditions than on models of revolutionary struggle or ‘people’s war’ developed by the Vietnamese or the Algerians in their struggles against colonialism.” See 5 RUDOLPH PETERS, *JIHAD IN MEDIAEVAL AND MODERN ISLAM: THE CHAPTER ON JIHAD FROM AVERROES’ (D. 1198) LEGAL HANDBOOK BIDAYAT AL-MUDJTAHID; AND THE TREATISE KORAN AND FIGHTING BY THE LATE SHAYKH AL-AZHAR, MAHMUD SHALTUT (D. 1963)*, *Religious Texts Translation Series* (trans., R. Peters 1977).

Both genres emphasized the *jus ad bellum*, the law justifying the resort to force, not conduct during hostilities (whatever the *casus belli*), and this writing was often framed within Arab nationalisms rather than within Islamic law proper.⁵³ In later decades this notable gap was filled by activist philosophers (Qutb, Maududi), thinkers associated with the Muslim Brotherhood and related organizations, and a new generation of scholar-activists promulgating a warrior asceticism that abandoned the strict discipline and language of the law.⁵⁴

A key aspect of this second obstacle for understanding the possibilities of Islamic law today is the post-9/11 tendency in and beyond western academia to fixate on the concept of *jihad* (a *jus ad bellum* question) as the *sin qua non* of Islamic law and to weigh in on its meaning often without relevant contexts or concepts.⁵⁵ The deluge of publications over the last decade on Islam and war, terrorism, militancy,

⁵³ Kelsay, *supra* note 49, at 74, anticipates the pendulum swing back to Islamic *jus in bello* writing in post-Revolution Iran as part of the effort “to implement Islamic norms in all phases of social and political life” in which leaders revisited classical *jus in bello* to define war with Iraq as “Islamic warfare,” designated Saddam Hussein as an apostate, and distinguished guilty and hence targetable leaders.

⁵⁴ See John Kelsay, *Bin Laden’s Reasons: Interpreting Islamic Tradition*, CHRISTIAN CENT. 26 (2002) (noting “Shari’a reasoning is, in effect, a kind of transgenerational conversation among Muslims regarding the implications of these signs and about the behaviors that are most consistent with the ideal way and which therefore will lead to happiness in this world and the next”).

⁵⁵ Interdisciplinary work in comparative religion, ethics and politics, legal history and rebellion, and strategic studies, to name a few prominent fields, has now begun to reframe *jihad* into more richly contextualized terms. See A. Sachedina, *From Defensive to Offensive Warfare: The Use and Abuse of Jihad in the Muslim World*, J. COFFEY & C. MATHEWES, RELIGION, LAW, AND THE ROLE OF FORCE: A STUDY OF THEIR INFLUENCE ON CONFLICT AND ON RESOLUTION (2003); LOUAY SAFI, PEACE AND THE LIMITS OF WAR: TRANSCENDING CLASSICAL CONCEPTION OF JIHAD (2001); SOHAIL HASHMI & JACK MILES eds., ISLAMIC POLITICAL ETHICS (2002); KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW (2001); Dima Adamsky, *Jihadi Operational Art: The Coming Wave of Jihadi Strategic Studies*, 33 STUD. IN CONFLICT & TERRORISM 1 (2010). For critiques of the equation of *jihad* with “holy war” see, Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 JOURNAL OF CONFLICT & SECURITY LAW 321 (2005); PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM: A READER, *supra* note 52; Abdulaziz Sachedina, *The Development of Jihad in Islamic Revelation and History*, JAMES TURNER JOHNSON & JOHN KELSAY, CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION (1990). M.C. Bassiouni, *Evolving Approaches to Jihad: From Self-defence to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT’L L. 119, 121-122, note 8, (2007) writes:

The record of jihad is far from clear, and the Muslim religious establishment has historically failed to clarify it. Thus, the contemporary politicization of jihad is due in part to the absence of a coherent and authoritative doctrinal body of interpretation on the subject. Credible secular Muslim scholars have also failed to counterbalance the views of politically and economically motivated clerics with reform notions of jihad. As result, jihad as political violence has become nothing more than a revolutionary doctrine to justify those who engage in it by appealing to the legitimacy of their self-proclaimed ends . . . There are contradictions in the evolving doctrines and applications of jihad throughout Islam’s fifteen centuries. These uncorrected contradictions by responsible Muslim clergy have led to the contemporary rationalizations of unbridled violence in the name of Islamic jihad. Such doctrines and their contemporary applications should be unequivocally rejected and condemned.”

religious extremism, and so forth, often frame their analyses predominantly or even exclusively within this single concept—as if this substitutes for an understudied body of law, a missing modern *jus in bello* tradition, or the complexity of the contemporary Islamic legal system in general. Even now this tendency has not been adequately critiqued for its role in displacing robust inquiry into a modern Islamic *jus in bello* tradition.⁵⁶ As Edward Jurji noted already in 1940, “the Islamic conception of war cannot be sufficiently understood by limiting attention to the jihad phenomenon.”⁵⁷

Most perniciously, the dominance of the *jihad* literature has distorted our very sense of the debate that Muslims across many contexts are today involved in, especially young people—a serious debate, as Hallaq points out, over political ethics.⁵⁸ This *topos*, revived with the Iranian Revolution, involves permissible, ethical, and meaningful ways to deal with conflict, social discord, and disunity, particularly when it comes from inside your community (i.e., illegitimate governance) as well as from foreign interventions. It is this transnational conversation which is bearing fruit today in networked prodemocratic social movements across Muslim and Arab worlds—not *jihad*. Sadly, cultural objections fixated on how misunderstood *jihad* is in the West miss too the fact that precious few scholars, Muslim or otherwise, have recovered or modernized the Islamic laws of war—arguably the earliest tradition of humanitarian thinking the world has ever known.⁵⁹

Bassiouni also remarks: “Of note is that contemporary jihad has never been advocated in the Muslim world to advance democracy and the rule of law, or to fulfill the inherent goodness and tolerance of Islam”—perhaps until today.

⁵⁶ An exception is Ali & Rehman, *supra* note 55, at 321, (“classical Jihad ideology” is often “deployed to cast doubts on the compatibility of Islam with modern norms of international law as enunciated in the United Nations Charter” in a move enabled by “the fact that Islamic international law and Islamic laws of armed conflict have not received due attention in western legal scholarship”—as well as elsewhere).

⁵⁷ Edward Jurji, *The Islamic Theory of War*, 30 *MOSLEM WORLD* 332, at 332 (1940).

⁵⁸ WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* vii (2009).

⁵⁹ Islamic law of war literature often falls into two groups: studies of the classical period and post-9/11 terrorism studies (often without scholarly familiarity with debates in Islamic legal history). Moreover, Islamic war and peace literature is often equated with *jus ad bellum* writing, particularly with reference to modern subjects. For classical discussions of Islamic warfare doctrine, see MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR* (1966); MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955); JOHNSON & KELSAY (1990), *supra* note 55; Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 *MUSLIM WORLD* 144 (1999); Edward J. Jurji, *The Islamic Theory of War*, 30 *MOSLEM WORLD* 332 (1940); RUDOLPH PETERS, *JIHAD IN MEDIAEVAL AND MODERN ISLAM* (1977); G. CONRAD, *Combat and Prisoners of War in Classical Islamic Law: Concepts Formulated by Hanafi Jurists of the 12th Century*, *REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DELLA GUERRE* 269 (1981); J. Busuttil, *Humanitarian Law in*

A third barrier to contemplating Islamic law for contemporary security is a missing thread of inquiry into not only the commonalities between international humanitarian law and Islamic law, but the Islamic contribution to the evolution of international law (and not just in the distant past) and to the laws of war tradition in particular, as well as their intertwined histories. Recent work has just begun to return to where Marcel Boisard, Majid Khadduri, and even Gamal Badr left off in the 1970s by examining the “harmonies” of international and Islamic law.⁶¹ But not enough substantive inquiry has investigated

Islam, 30 MIL. L. & L. WAR REV. 113 (1991); M. HAMIDULLAH, MUSLIM CONDUCT OF STATE: BEING A TREATIES ON SIYAR, THAT IS ISLAMIC NOTION OF PUBLIC INTERNATIONAL LAW, CONSISTING OF THE LAWS OF PEACE, WAR AND NEUTRALITY, TOGETHER WITH PRECEDENTS FROM ORTHODOX PRACTICES AND PRECEDENT BY A HISTORICAL AND GENERAL INTRODUCTION (1977): 61–72. For modern application of classical discussions, see Shaheen Sardar Ali and Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SECURITY L. 321, 338-342 (2005); SHERIFA D. ZUHUR & YOUSSEF H ABOUL-EINEIN, ISLAMIC RULINGS ON WARFARE, Strategic Studies Institute, U.S. Army War College, Carlisle Barracks, PA (2004); Karima Bennoune, *As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT’L L. 605 (1994); Sohail Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in THE ETHICS OF WAR AND PEACE: RELIGIOUS AND SECULAR PERSPECTIVES 146-152 (T. Nardin ed. 1996); Ahmed Zaki Yamani, *Humanitarian International Law in Islam: a General Outlook*, 7 MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES 189 ((1985); Anisseh Van Engeland, *The Differences and Similarities Between International Humanitarian Law and Islamic Humanitarian Law: Is There Ground For Reconciliation?* 10 J. ISLAMIC L. & CULTURE 81 ((2008); Ray Murphy & Mohamed El Zeidy, *Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War*, 9 INT’L CRIM. L. R. 623 (2009); M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defence to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT’L L. 119 (2007); and Ayatollah Mohaghegh Damad, *International Humanitarian Law in Islam and Contemporary International Law*, in ISLAMIC VIEWS ON HUMAN RIGHTS: VIEWPOINTS OF IRANIAN SCHOLARS 253 (Esmail Salami, ed. 2001).

⁶⁰ An important, recent exception (writing in English) is Ahmed Mohsen Al-Dawoody’s dissertation *WAR IN ISLAMIC LAW: JUSTIFICATION AND REGULATIONS* (2009). See also Marcel Boisard, *On the Probable Influence of Islam on Western Public and International Law*, 11 INT’L J. MIDDLE EAST STUD. 429 (1980), which is explicit about the Islamic contribution at least to international law; KHADDURI (1955), *supra* note 59; Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187 (1978), which provides an unusual and historically rich framework for making comparisons. See also MUHAMMAD TALAAT AL-GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* (1968). For emergent work, see Muhammad Munir’s critique of Khadduri’s reliance on Tabari in *The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law*, Working Paper, 27 March 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1797045; *The Prophet (Peace be Upon Him)’s Merciful Reforms in the Conduct of War: The Prohibited Acts*, 2 INSIGHTS: SIRAH SPECIAL ISSUE 183 (2010).

⁶¹ For more recent examples of the compatibilities thesis, see Ray Murphy & Mohamed M. El Zeidy, *Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War*, 9 INT’L CRIM. L. REV. 623 (2009); James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations*, 84 INT’L REV. OF THE RED CROSS 597 (2002); James Busuttil, *‘Slay them wherever you find them’: Humanitarian Law in Islam*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 111 (1991); Niaz Shah, *ISLAMIC LAW AND THE LAW OF ARMED CONFLICT: THE ARMED CONFLICT IN PAKISTAN* (2011); Sheikh Wahbeh al-Zuhili, *Islam and International Law*, 87 INT’L REV. OF THE RED CROSS 269 (2005); Fred Donner, *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* 31-70 in *JUST WAR AND JIHAD: HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITIONS* (in John Kelsay and James Turner Johnson, eds., 1991); Van Engeland, *supra* note 59. For a critique of the compatibility thesis in light of

Islamic *contributions* to public international law, comparing Islamic and international *jus in bello*, or understanding the role that Islamic leaders and Islamic norms have played in the evolution of humanitarian law. Such inquiry might, at the very least, explore Islamic representatives and their arguments at various international peace conferences (Hague, Geneva) where interstate treaties and agreements regulating warfare were developed, or it may investigate the role of a great number of Muslim-based humanitarian organizations in the contemporary laws of war and conflict arena today, including the limits of Shari'a discourse in this context.⁶² Nor have such inquiries recognized, as Mohammad Hashim Kamali stresses, the central role that “harmonizing” methodologies play at the core of Islamic law itself, particularly evident in the obligation of *ijtihad*.

I want to mention one additional aspect of the commensurability issue as it forms the bulk of my argument in the following section where I show that intensifying global debate over humanitarian legal norms today in both Islamic and international law traditions is a response to tectonic shifts in warfare and global conflict now occurring in the post 9/11 security environment. If these shifts have helped raise these norms and their gaps to new heights of global discussion and debate, this moment is a reflexive one and overwhelmingly positive—if such discussions, particularly in the Islamic context, are framed in ways that reflect the complexity of our changing international security environment. In our present international security context which goes beyond the dynamics and norms proper to the post-Cold War period, these legal regimes are both playing a seminal role for different audiences in reframing international security questions today—with implications for how we develop national and international security policies. This transnational role, for better or worse, as Hallaq notes, has *always* been a distinctive feature of law in the Islamic tradition. There is thus a commonality, indeed, a symmetry, to the challenges that these legal regimes face and embody today: heightened interest in humanitarian law is, at bottom, a means to bring into discussion new and changing ethical standards to bear on new species of armed conflict.

‘militant Islam,’ see Robert Barnidge, *Islam and International Humanitarian Law: A Question of Compatibility?* 40 ISRAEL Y.B. HUM. RIGHTS. 257 (2010).

⁶² Naz Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RIGHTS. J. 191 (2006); Jamal Krafess, *The Influence of the Muslim Religion in Humanitarian Aid*, 858 INT’L REV. OF THE RED CROSS (2005).

The fourth barrier is the continual bracketing of this longstanding transnational role of Islamic law in favor of narrow comparativist or regional/area studies approaches and explanations, especially in western academia—despite the international basis of Islamic law, the transnational nature of the *ummah*, the cross-national structure of the Islamic law schools (*madh'habs*), and the diffuse vocabulary of Islamic norms that define diverse Muslim societies and identities.⁶³ It is difficult to find an appropriate analogue to explain this strange telescoping of Islamic legal inquiry: it would be as if one attempted to reduce the identity of “international law” to United States ratified international treaties and conventions. Not only is Islamic law in general not amenable to the prism of national context, in many ways it makes a farce—or a historical anomaly—out of the very construct of the nation which, as such, remains a root cause of many modern problems of Muslim state legitimacy. Without a transnational sense of Islamic law as a vocabulary for social and political duties and rights, cohesion among diverse identities, and discussions of political ethics, especially in the core commitment to justice, it is very difficult to understand, for instance, how today’s prodemocracy protest movements can spread, often seamlessly, across national and regional contexts or implicate entirely different political regimes while being intelligible by diverse constituencies facing radically different political and social challenges.

The last barrier is the serious disconnect between Islamic law and problems of security—the core concern of this essay. As I explore in the following section, most academic and policy focus remains on Muslim politics or geopolitics—not on the legal basis of security policy in Muslim contexts.⁶⁴ Yet, again, for purposes of analogy, it would be remarkable on any other urgent international security policy topic—

⁶³ This is not to suggest, as Jan Michel Otto’s work (2010, 2008) makes clear, that national comparativist work is not critical. See JAN MICHEL OTTO, *SHARI’A INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* (2010) and his policy report, *SHARI’A AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY* (2008). See also, S. FERRARI & A. BRADNEY, eds., *ISLAM AND EUROPEAN LEGAL SYSTEMS* (2000), which Shaheen Sardar Ali & Javaid Rehman call in *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SECURITY L. 321, 322, n.4, “a rare, though useful contemporary European perspective on Islam.”

⁶⁴ We know a great deal about the Middle East, North Africa, Arab and Muslims communities in national, regional, and geopolitical contexts, and we have specialists on these matters in and beyond academia in government and policy ‘think tanks.’ But few scholars, especially in the United States—least of all those prioritizing policy-relevant research—examine the legal basis (international, Islamic) of security policy in Muslim-majority contexts. For a curious exception in the Islamization of knowledge vein, see ABDUL HAMID ABUSULAYMAN, *TOWARD AN ISLAMIC THEORY OF INTERNATIONAL RELATIONS: NEW DIRECTIONS FOR METHODOLOGY AND THOUGHT* (1993).

nuclear proliferation or failed states, for instance—to offer policy analysis without ever mentioning the legal infrastructure that defines the relevant norms and frames the behavior of actors (including nonstate actors) in that respective arena. That such an approach is permissible in the case of Islam—and implicitly Islamist forms of religious extremism—reiterates an unhelpful exceptionalism that still applies to academic and policy analyses of Islamic law today, as well as to Arab and Muslims communities more generally.⁶⁵

2.0 Global Crisis in Humanitarian Legal Norms in the Post-9/11 Security Climate

I turn now to the second prong in my argument, framed more squarely within matters of security policy: the symmetry between these respective legal regimes in light of intensifying post-9/11 debate over our changing international security climate. Both Islamic and international humanitarian law are faced with global scrutiny and identity crises, albeit for different reasons: both share a dizzying array of interests and claims (including political and transnational ones) attached to them; both have undergone appropriation and use by parties and agendas seeking to accomplish goals far from their original or drafters' design; and both are increasingly unsettled by new global conflict trends to which they must adapt or risk diminished legitimacy.

Given these challenges and the enabling factors specific to each regime, the question is one of innovation: what might Islamic and international humanitarian law, when taken together, offer by way of resources in confronting these challenges? And how might thoughtful scholars and practitioners attentive to the urgency of cross-cultural dialogue on security matters today maximize this moment?

2.1 Challenges for Contemporary International Humanitarian Law:

⁶⁵ For this debate in political science and area studies and a critique of exceptionalism proper, see George Lakoff, *The Reality of Muslim Exceptionalism*, 15 J. DEM. 133 (2004); Peter Gran, *Contending with Middle East Exceptionalism: A Foreword*, 6 ARAB STUD. J. 6 (1998); and Amira El-Azhary Sonbol, *Questioning Exceptionalism: Shari'a Law*, 6 ARAB STUD. J. 76.

Few recent developments have pressured the laws of war more than the U.S. promoted ‘global war on terrorism’ which did not easily fit into any existing armed conflict category in the Four Geneva Conventions and framed protracted military campaigns with various, contradictory, and often dubious legal status.⁶⁶ It is important to recall that the laws of war are part of public international law, the body of rules governing relations between states, and the bulk of humanitarian law is contained in the four revised Geneva Conventions of 1949 and their Additional Protocols of 1977, protecting civilians and persons no longer fighting (i.e., wounded, shipwrecked, prisoners of war, civilians in conflict zones), and the earlier Hague Conventions (1899, 1907), restricting the means and methods of warfare.⁶⁷ Equally important to

⁶⁶ Geneva Conventions I-IV share in common the first three articles, known as “common articles.” Common articles 2 and 3 of Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, for instance, read:

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict, at <http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument>.

⁶⁷ The *jus in bello* are often construed as the merging of two streams of law emerging from conferences in Geneva (1863, 1949) and at the Hague (1899, 1907), determining respectively the rights and responsibilities of belligerents in the conduct of hostilities and the restrictions on the means and methods of warfare. See Geoffrey Corn and Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 791-795 (2008); for a critique of this position, see Dinstein (2004), *supra* note 14, at 12-14.

remember is that international humanitarian law is *lex specialis* that applies only during armed conflicts, which are themselves defined according to two types: international (between states) or noninternational (internal or civil wars) armed conflicts.⁶⁸ The ‘global war on terror’ was neither a conflict between states nor an internal conflict but a transnational conflict across many territories involving nonstate actors. In this respect, it exposed an aporia in the modern law of war.

The policy invention of the ‘global war on terrorism’ as a new category of armed conflict which allowed near limitless war alone would have been challenging enough for existing humanitarian law, but the U.S. pressure on these rules included other now familiar items: the legal reissuing of the ‘enemy combatant’ status designation to deny traditional Geneva Convention III protections to Qaeda detainees and other nonconventional fighters; executive overreach in adjudicating torture with implications for international convention compliance in general, not to mention due process procedures; domestic court-level controversies over the *habeas corpus* rights of suspected terrorists, which ultimately succeeded in pushing back on executive authority.⁶⁹ Taken together, these and many other items began to raise

⁶⁸ See International Committee of the Red Cross (ICRC), BASIC RULES OF THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS (1988), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0365.pdf. For debates and discussion of the *lex specialis* status of IHL, how that has evolved over time, and how other legal regimes, particularly international human rights law, is increasingly applied during and within armed conflicts, see Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1 (2004). For problems with convergence, see Geoffrey Corn, *Mixing Apples and Hand Grenades The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUM. LEGAL STUD. 52 (2010).

⁶⁹ See Sean D. Murphy, *Evolving Geneva Convention Paradigms in the ‘War on Terrorism’: Applying the Core Rules to the Release of Persons Deemed ‘Unprivileged Belligerents,’* 75 GEO. WASH. L. REV. 1148 (2007); Gabor Rona, *An Appraisal of US Practice Relating to ‘Enemy Combatants,’* 10 Y.B. INT’L HUM. L. 232 (2007); David Glazier, *Playing by the Rules: Combating Al Qaeda Within The Law of War*, 51 WILLIAM & MARY LAW REVIEW 1 (2009); Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, 85 INTERNATIONAL LAW STUDIES (2009); W.M. Reisman, *Rasul v. Bush: Failure to Apply International Law*, 2 J. INT’L CRIM. JUST. 973 (2004); Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL L. REV. 1; Matthew C. Waxman, *Dismantling Guantanamo: Facing the Challenges of Continued Detention and Repatriation: Guantanamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE WES. RES. J. INT’L L. 245 (2009). Also see, Jennifer Elsea & Michael Garcia, Congressional Research Service (CRS) Report for Congress RL33180: *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* (3 Feb. 2010), Federation of American Scientists, available at <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>; see also related court cases: *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 538-39 (2004); *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008); *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 55-56 (D.D.C. 2009).

questions and concerns about once taken-for-granted modern humanitarian norms.⁷⁰ Such questions were by no means academic, but comprised real and often acute challenges for states and the international community, particularly as the Geneva Conventions are one of the few universal legal instruments to which all nations of the world are signatories, including all Muslim-majority states.⁷¹

But similar crises in the laws of war, though less often discussed, are also occurring beyond U.S. domestic legal contexts. Not only have other national and international courts been, in many cases, as intensively involved in contention over the laws governing new problems of warfare, the tensions between humanitarian standards and new battlefield tactics have raised still unanswered questions for governments and for international security policy in general (i.e., targeted killing, rendition, human shielding, unprivileged belligerency, lawfare, direct participation in the hostilities, the rise of private military contractors in combat roles).⁷² Two issues capture this legal trend best at the international level. First, an emergent empirical conflict literature has begun to document a post-Cold War global shift in conflict patterns from once predominant state versus state conflicts to low-intensity noninternational

⁷⁰ The legal discussion of this development is vast. See Michael Schmitt, *21st Century Conflict: Can the Law Survive*, 8 MELBOURNE J. INT'L LAW 443 (2003); Gabor Rona, *International Law under Fire—Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror,'* 27 FLETCHER FORUM WORLD AFF. 60 (2003); Derek Jinks, *The Applicability of the Geneva Conventions to the 'Global War on Terrorism,'* 46 VIRGINIA J. INT'L L. 165(2006); WILLIAM C. BANKS, *NEW BATTLEFIELDS, OLD LAWS: FROM THE HAGUE CONVENTION TO ASYMMETRIC WARFARE* (2011); Claude Bruderlein, *The End of Innocence: Humanitarian Protection in the 21st Century*, in *CIVILIANS IN WAR* (Simon Chesterman, ed., 2001); Mohammad-Mahmoud Ould Mohamedou, *Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States*, HPCR (July 2005), available at http://www.hpcrresearch.org/pdfs/Non-Linearity_of_Engagement.pdf; Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on Terror*, 7 THEORETICAL INQ. L. 97 (2005); Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339 (2010); Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education's Responses to Terrorism*, 60 J. LEGAL ED. 373 (2011); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. L. & INT'L L. 429 (2010); MICHAEL N. SCHMITT, JELENA PEJIC & YÖRĀM DINŠTEIN, *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN* (2007).

⁷¹ The last two nations, Nauru and Montenegro, signed the 1949 Geneva Conventions on June 27 and August 2 2006, respectively, amounting to the first time in modern history that an international treaty had been signed by all the world's states. For this discussion, see state parties to the Geneva Conventions of 12 August 1949, available at <http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=375&ps=P>.

⁷² See Michael Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 292 (2008-09); Eyal Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, 42 TEL AVIV UNIV. L. FAC. PAPERS 1 (2004): 1-34; Nils Melzer, *TARGETING KILLING IN INTERNATIONAL LAW* (2008).

conflicts involving nonstate entities, especially civil wars.⁷³ This development raises serious concerns about the relevance of the state-centric *jus in bello* for regulating contemporary warfare.⁷⁴ New conflicts are often fought by irregular forces, for instance—nonstate fighters, transnational armed groups, terrorist networks—many of whom use equally nonconventional tactics. Such tactics, indeed, are *deliberately* designed to violate the laws of war as a means to gain tactical advantages over stronger adversaries who, in turn, remain constrained in their compliance with the rules (known as lawfare).⁷⁵ In probing such “new

⁷³ For burgeoning datasets on armed conflicts of various types, see the *UCDP/PRIO Armed Conflict Dataset* from the Uppsala Conflict Data Program (UCDP) at the Department of Peace and Conflict Research, Uppsala University and the Centre for the Study of Civil War (CSCW) at the International Peace Research Institute, Oslo (PRIO), available at <http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/>; the *Correlates of War Project (COW)* datasets, available at <http://www.correlatesofwar.org/> and <http://dvn.iq.harvard.edu/dvn/dv/cow/>; and Gary LaFree & Laura Dugan, *Global Terrorism Database, 1970-2010*, at <http://hdl.handle.net/1902.1/16332>, National Consortium for the Study of Terrorism and Responses to Terrorism (2011, V1). For analysis that shows the changing nature of global conflict, see Lotta Harbom & Peter Wallensteen, *Armed Conflict, 1989–2006*, 44 J. PEACE RESEARCH 623 (2007) and *UCDP/PRIO Armed Conflict Dataset (version 4-2009)*, available at <http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/Armed-Conflicts-Version-X-2009/>; ANDREW MACK, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY (2005); HUMAN SECURITY REPORT PROJECT, HUMAN SECURITY REPORT 2009/2010: THE CAUSES OF PEACE AND THE SHRINKING COSTS OF WAR (2010); Monty Marshall & Ted Gurr, *Peace and Conflict 2005*, Center for International Development & Conflict Management (CIDCM), University of Maryland, College Park, MD; and STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, SIPRI YEARBOOK 2009: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY (2009). See also Thomas Hammes, *Fourth Generation Warfare: Our Enemies Play to Their Strength*, 142 ARMED FORCES J. 40 (2004).

⁷⁴ As J.M. Henckaerts notes, humanitarian treaty law “does not regulate in sufficient detail a large proportion of today’s armed conflicts, that is, non-international armed conflicts, because these conflicts are subject to far fewer treaty rules than are international conflicts.” JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005). See the U.S. response in John Bellinger & William Haynes, *U.S. Government Response to International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. OF THE RED CROSS (2007), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p443/\\$File/irrc_866_Bellinger.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p443/$File/irrc_866_Bellinger.pdf). See also MARCO SASSOLI & ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 82-90 (2 ed. 2006); and KEITH E. PULS, LAW OF WAR HANDBOOK (International and Operational Law Department, Judge Advocate General’s Legal Center, Charlottesville, Virginia: 2005).

⁷⁵ For this debate, see *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law* (Cambridge, Jan 27-29, 2003), Program on Humanitarian Policy and Conflict Research (HPCR), Harvard University; Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE WES. RES. J. INT’L L. 61 (2010); Melissa Waters, *‘Lawfare’ in the War on Terrorism: A Reclamation Project*, 43 CASE WES. RES. J. INT’L L. 327 (2010); Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L. J. 163 (2011); Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> and *Commentary: Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146 (2008).

war” developments transforming contemporary battlefields, some international legal scholars have begun to ask whether the traditional “law can survive” and identified troubling weaknesses and “fault-lines.”⁷⁶

Second, combined with the added pressure of gaps in the law between what it was designed to cover (conflicts between states) and today’s dominant conflict paradigm (internal and transnational conflicts), as well as new unaccounted for actors and tactics, there is intensifying uncertainty over what constitutes this very corpus of law.⁷⁷ A recent controversial ICRC (2005) Study identified 161 rules found to be customary international humanitarian law—that is, binding—regardless of the fact that many are set out in treaties not ratified by some states. Several influential states disagreed, for instance, with the ICRC assessment and its methodologies.⁷⁸ Likewise, customary rules often spell out in greater detail the obligations of parties in noninternational conflicts, and they often apply in both international and noninternational armed conflicts: for instance, treaty law does not expressly prohibit attacks on civilian

⁷⁶ See Schmitt, *supra* note 70; see also *The Vanishing Law of War: Reflections on Law and War in the 21st Century*, HARV. INT’L REV. 64 (2009).

⁷⁷ As the International Commission on Intervention and State Sovereignty (ICISS) Report, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre: 2001) 4, notes, the “most marked security phenomenon since the end of the Cold War has been the proliferation of armed conflicts within states.” See HERFRIED MÜNKLER, *THE NEW WARS* (2005); MARY KALDOR, *NEW AND OLD WARS. ORGANIZED VIOLENCE IN A GLOBAL ERA* (1999); PAUL GILBERT, *NEW TERROR, NEW WARS* (2004); IVAN ARREGUIN-TOFT, *HOW THE WEAK WIN WARS—A THEORY OF ASYMMETRIC CONFLICT* (2005); James Cockayne, *The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law*, 88 INT’L REV. OF THE RED CROSS (2006); E. Melander, M. Oberg, and J. Hall, *Are ‘New Wars’ More Atrocious? Battle Severity, Civilians Killed and Forced Migration Before and After the End of the Cold War*, 15 EUROPEAN J. INT’L REL. (2009); and for a critique, see, Edward Newman, *The ‘New Wars’ Debate: A Historical Perspective is Needed*, 35 SECURITY DIALOGUE 173 (2009). For a subset debate on asymmetric warfare, particularly in military scholarship, see Coral Bell, *The First War of the Twenty-First Century—Asymmetric Hostilities and the Norms of Conduct* (Canberra, Australia: Strategic and Defense Studies Center, 2001); Frederick Teo Li-Wei, *Rethinking Western Vulnerabilities to Asymmetric Warfare*, 28 J. SINGAPORE ARMED FORCES (2002); Colin S. Gray, *Thinking Asymmetrically in Times of Terror*, PARAMETERS 5 (2002); S. Metz & D.V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts*, Strategic Studies Institute Report, U.S. Army War College (2001).

⁷⁸ U.S. officials John Bellinger and William J. Haynes disagreed with the ICRC Study methods for determining state practice, noting it overemphasized states’ written materials, such as military manuals, rather than relying on the traditional standard of operational practice during armed conflicts. Likewise, they faulted its reliance on “nonbinding resolutions of the UN General Assembly,” noting that “States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.” See International Committee of the Red Cross, Geneva, Switzerland, ICRC (2008) Publication 0943, *Violence and the Use of Force*: 14-15.

objects in noninternational armed conflict, though customary international law does.⁷⁹ Another aspect of this uncertainty about the very integrity of the laws of war is the collapse or convergence in once separate and distinct legal branches and regimes—between *ad bellum* and *in bello* rules, and between humanitarian law and human rights law, occupation law, and domestic national security law—in ways that may finally admit fundamental inadequacies in the laws of war.⁸⁰ The result has been a veritable identity crisis over what constitutes the laws of war with obvious implications for compliance and for regulating new battlefields.

I want to raise one last issue before I turn to similar crises besetting modern Islamic law: the matter of this law's contemporary politicization. All modern war scholars from von Clausewitz forward presume that war is inseparable from politics, that war is, indeed, a form of politics or policy by other means (namely violence). One key virtue of humanitarian law, however, has been its ability to structurally reduce politics and political maneuvering by states in favor of protecting all civilians (and *hors de combat*) in conflict settings, regardless of their side in the conflict or whether the armed conflict itself is lawful or just. This neutral application of the *jus in bello* is largely a product of the “bright line” distinction between *in bello* and *ad bellum* norms—the latter comprising the separate rules governing whether a state may lawfully resort to the use of force in the first place (in the event of self-defense,

⁷⁹ Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, at 178 (2005). Some states have balked at this view of customary law: see Bellinger & Haynes, *supra* note 78, at 445.

⁸⁰ For early statements of convergence between IHL and IHRL, see G.I.A.D. Draper, *The Ethical and Juridical Status of Constraints in War*, 55 MIL. L. REV. 169 (1972) and Theodor Meron, *The Humanization of Humanitarian Law*, 94 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000); for leading analysis in human rights norms as they impact contemporary use of force issues, see Watkin (2004), *supra* note 68; for a comprehensive review of the debate itself, see Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL L. REV. 648 (2007); for an argument against convergence, see Naz Modirzadeh, *The Dark Side of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 U.S. NAVAL WAR C. INT'L L. STUD. (Blue Book) Series 349 (2010); Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISRAEL L. REV. 453 (2007). For *ad bellum* and *in bello* convergence, see Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221 (1983); Alexander Orakhelashvili, *Overlap and Convergence: The Interaction between Jus ad Bellum and Jus in Bello*, 12 J. CONFLICT & SECURITY L. 157 (2007); Marco Sassòli, *Jus ad Bellum and Jus in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated*, in STU INT'L L. & ARMED CONFLICT: EXPLORING THE FAULTLINES 241 (Michael Schmitt & Jelena Pejic eds. 2007).

Security Council authorization, and, arguably, humanitarian intervention, codified in Article 2[4] of the United Nations Charter). That is, “resort to force” rules are distinct from “conduct during hostilities” rules so as to ensure that states and their militaries follow proper conduct in warfare (i.e., targeting only other combatants, practicing military necessity, respecting the rights and procedures due to prisoners of wars, the sick, wounded, medics, religious professionals, etc.) regardless of how they feel about the war itself.⁸¹ This distinction between *in bello* (conduct in warfare) and *ad bellum* (resort to war) rules, thus, aids in the neutral application of the laws of war at times of high intensity as states must comply whether they deem a war desirable or lawful or whether they perceive adversaries to be professional soldiers or ruthless (i.e., terrorists). This bifurcated, measured, and rule-based approach increasingly applies many of the same rules to noninternational conflicts, thus, constraining how states may treat their own citizens in the often merciless cases of internal rebellion and civil war. Likewise, humanitarian law comes into force in the event of a *de facto* armed conflict and does not depend upon the declared or formal recognition of war—a process understood implicitly since the nineteenth century as a political one.⁸²

Thus, though humanitarian law is rooted in customary precepts dating back to ancient and medieval notions of chivalry, ethics, and religion, the laws of war are modern instruments tied to the late nineteenth and early twentieth-century positivist treaty era in which sovereign states began to codify rules to regulate what was increasingly understood as the legal reality of war. More specifically, humanitarian law belongs to the post-Hague shift in understandings of war as a legitimate device of national policy and right of statehood to the *jus contra bellum* period of “war avoidance,” placing limits on suffering during war, and the renunciation of aggressive war altogether (in the UN Charter and related instruments).⁸³ In

⁸¹ See Sloane (2009) *supra* note 41, for a seasoned treatment of the limits and importance of this distinction.

⁸² See Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 37 INT’L REV. OF THE RED CROSS 553 (1997).

⁸³ These include typically the Kellogg–Briand Pact or General Treaty for the Renunciation of War (signed 27 August 1928, registered in the League of Nations Treaty Series on 4 September 1929), *available at* http://avalon.law.yale.edu/20th_century/kbpact.asp; *see also* the London Charter of the International Military Tribunal (or Nuremberg Charter) 8 August 1945, which defined the procedures for the Nuremberg trials and the definition of crimes against peace, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>. *See*, JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK at 13, 5-15 (International and Operational Law Department, The Judge

this respect, many of today's challenges stem from the simultaneous strength and Achilles heel of the laws of war in light of post-Cold War asymmetric conflict: this law is largely intelligible and practicable within a state-centric framework of international relations.

If such weaknesses are increasingly clear, the underestimated strength of the state-based international system stems from the same source: the fact that states are still the most powerful means to execute the law in the international system and thus to protect vulnerable populations in conflicts. In this way, when humanitarian law becomes politicized—as in the global war on terrorism where it was, as a matter of policy, selectively applied, or when states abide by the rules depending on whether they deem a conflict or its adversaries lawful—it becomes less effective as a universal tool to mitigate human suffering in conflict settings, a demonstrable benefit of the modern laws of war.⁸⁴ Likewise, in the asymmetric context, when civilian settings are systematically made into battlefields, noncombatants targeted or conscripted (including child soldiers), and powerful states baited into indiscriminate uses of force in what amounts to global political theater, the ability to make good on the ICRC's standard definition of humanitarian law as “the laws and customs aiming to limit the effects of armed conflict for humanitarian reasons” proves exceedingly difficult.⁸⁵ In many respects, this politicization of the laws of war—something that states in the positivist treaty era had anticipated, built into, and thus “contained” in

Advocate General's Legal Center and School, U.S. Army Charlottesville, Virginia, 2010). For the national policy theory of force, see CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret, eds., and trans. 1976, rev. 1984); and for the contemporary shift toward human rights based approaches, see Meron (2000), *supra* note 80.

⁸⁴ The state-centric paradigm is particularly vulnerable given the increasing prevalence of noninternational and transnational armed conflicts initiated and conducted by nonstate parties that take advantage of powerful states' compliance with the law (known as lawfare, see *supra* note 75).

⁸⁵ See *supra* note 53; For the standard definition, see ICRC, *Legal Fact Sheet: What is International Humanitarian Law* (31-07-2004), available at <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm>. See also, Harvard University Program on Humanitarian Policy and Conflict Research (HPCR), International Humanitarian Law Research Initiative (2009), *IHL Primer Series 1: What is IHL?*, available at http://ihl.ihlresearch.org/_data/global/images/IHLRI_Primer1_WhatIsIHL_revJune2009.pdf; JEFF A. BOVARNICK ET AL., *LAW OF WAR DESKBOOK*, (International and Operational Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, 2011). Some of the first modern documents include: FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (1863), issued as General Order 100 to the Union Army during the American Civil War; the 1863 (First) Geneva Convention; the 1868 St. Petersburg Declaration; the 1874 Brussels Declaration; and *THE LAWS OF WAR ON LAND* (1880), known as the Oxford Manual. See DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* (1988), as well as JEAN S. PICTET, *COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK ARMED FORCES IN THE FIELD* (ICRC, Geneva, 1952).

the process of their development—is the greatest threat to contemporary humanitarian law and to the vulnerable persons it would protect today.

2.2 Islamic Law as a as “Global Issue”:

Though transnational contestation over Islamic law did not begin with 9/11, when religious actors framed their operations within Islamic jurisprudence and garnered global media attention to do so, the controversy was significantly heightened.⁸⁶ Instead, as many have argued, the “so-called modern Islamic resurgence” began at least in the late 1970s with the Iranian Islamic Revolution, a core aspect of which was “the call to restore the Shari’a, the religious law of Islam” to a dominant role in governance—a call that has since “grown ever more forceful” in “generating religious movements, a vast amount of literature, and affecting world politics.”⁸⁷ No doubt, the appeal to classical doctrine by foreign Arab fighters joining Afghan mujahedeen against Soviet forces in that decisive Cold War proxy war in Afghanistan put teeth into this Islamic legal renaissance in the 1990s. In any case, that answered call, including the rise of Islamist movements over the last three decades, has prompted Islamic law to “increasingly occup[y] center stage in the language and practices of politics” both in “the Islamist camp itself” but also “in the western world.”⁸⁸ In the post-9/11 moment, as An-Naim explains, the “public role of Islamic Law” has thus become “a global issue.”⁸⁹

⁸⁶ For ongoing discussions advocating or justifying prohibited tactics under Sharia, see Abu Zubayr Adel al-Abab, Shariah Official for Al-Qaeda in the Arabian Peninsula (AQAP), *Online Question and Answer Session* (18 Apr. 2011), The International Center for the Study of Radicalisation (ICSR), King’s College London, trans., by ICSR Atkin Fellow Amany Soliman, *available at* http://www.icsr.info/news/attachments/1306407042ICSR_Abab__Translation.pdf. See also this longstanding opinion, voiced in this case by BERNARD LEWIS & BUNTZIE ELLIS CHURCHILL, *ISLAM: THE RELIGION AND THE PEOPLE* at 151 (2008), “At no time did the classical jurists offer any approval or legitimacy to what we nowadays call terrorism. Nor indeed is there any evidence of the use of terrorism as it is practiced nowadays.”

⁸⁷ HALLAQ, *ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005), *supra* note 34, at 1.

⁸⁸ HALLAQ, *SHARI’A*, *supra* note 33, at vii (2009).

⁸⁹ Abdullahi Ahmed An-Naim, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 *MOD. L. REV.* 1, at 2 (2010).

But if Islamic law, much like the laws of war, has achieved a curious mix of global scrutiny and fascination today, its roots have not been as clearly understood or probed.⁹⁰ In his provocative call for a longer, far more complex accounting for this modern revivalism (with extremisms at its edges), Hallaq believes that the events of September 11 should be “seen as the tip of the iceberg,” the “culmination” of “a massive historical process” that “originated a century and a half ago and that in time intensified with disastrous results,” and, further, that of “all the factors that may account for the Islamic fundamentalists’ acts and world-view, law stands foremost.”⁹¹ Put differently, we are witnessing the politicized landscape in this case of Islamic law, though its modern identity crisis remains very different in diagnosis than that of international humanitarian law: it involves the misrecognition of the eminently legal nature of Islam, as Hallaq stresses here, and, more subtly, the deliberate misinterpretation of this modern legal crisis through the lens of politics, a point I will address shortly.

Hallaq is one of the few scholars who consistently explains the “present predicament” facing Muslims globally as a crisis of law, a crisis of legal infrastructure⁹² and, in turn, emphasizes how this legal crisis with its bundled cultural identity dimensions has combined with a broader global scrutiny to prompt unprecedented contention over what constitutes the very meaning of Islam.⁹³ Hallaq’s long-gaze historical view, then, depends upon this prior critical insight: an appreciation of “the full force of the cultural role Islamic law” has played over thirteen centuries, the fact that Islam is essentially “a religion

⁹⁰ Wael B. Hallaq, ‘*Muslim Rage’ and Islamic Law*, (54) HASTINGS L. J. 1705, 1707 (2003).

⁹¹ *Id.* at 1706.

⁹² *Id.*

⁹³ HALLAQ, ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005), *supra* note 34, 1; 2 (In his “index of the state of scholarship on the formative period (600-900 CE),” understood as the first three to fourth centuries post-hijri (AH), Hallaq notes that “there has not been a single volume published that offers a history of Islamic law during the first three or four centuries of its life,” though several works have been published: “[n]one, however, can boast content that truly reflects what is implied in these titles, all three volumes being specialized studies that – however meritorious some of them may be—endeavor to study the formative period through a rather narrow lens”). Hallaq also notes in *Islamic Legal Studies as Colonialist Discourse* (2002-03), *supra* note 33, at 3: “Until recently, and with the single, partial exception of Ottoman law, there has been very little serious work treating Islamic law between the 4th/10th and the 10th/16th centuries,” so that “the legal history of this expansive period remains depressingly a *terra incognita*.” Others have added critical elements to this standard historical narrative, including the birth of the Shiite legal tradition in reaction to Sunni orthodoxy in DEVIN J. STEWART, ISLAMIC LEGAL ORTHODOXY: TWELVER SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM (1998). *But* David Powers disagrees with these assessments in his extended review, *Wael B. Hallaq on the Origins of Islamic Law: A Review Essay*, 17 ISLAMIC L. & SOC. 126, at 133; 140-143; 149 (2010). The modern period (beginning ca. 1800) is understood as entangled with European colonialism.

and culture of law,” and that “to be a Muslim means to live by the law.”⁹⁴ Law is not only “the defining characteristic of Muslim societies and civilizations throughout the centuries and in every corner of the Islamic world,”⁹⁵ Hallaq recounts, it is “the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.”⁹⁶ He explains:

. . . Islam is a religion of law. . . Islam means nothing if religious law were to be extracted from it. . . Unlike Sunday prayer, which is the Christian’s main ritual connection to God, a Friday prayer, for the Muslim, will not do. There is so much more that is needed, a legal ritual, a divine law, a way of life and, in short, a comprehensive system of belief and practice that generates an immediate connection between the Muslim individual and his Lord. This has been the reality of Muslims for over thirteen centuries, a reality that had continued uninterrupted in the ancient Semitic Near East from the time of Hammurabi. To say that a millennial genealogy positing an intimate connection between law and ancient divinities had long persisted in Near Eastern cultures is merely to state the obvious.

If western religion is, thus, not an adequate analogue for Islam, neither is western law.⁹⁷ Not only has “there never been a culture in human society so legally oriented as Islam,” Hallaq explains, this legal system went beyond “resolving conflicts or negotiating social and economic relationships” to comprising “a theological system, an applied religious ritual, an intellectual enterprise of the first order, a cultural

⁹⁴ *Id.*

⁹⁵ *Id.* Hallaq continues: “Islamic law governed the Muslim’s way of life in literally every detail, from political government to the sale of real property, from hunting to the etiquette of dining, from sexual relations to worship and prayer. It determined how Muslims conducted themselves in society and in their families; how they designed and ordered their cities and towns; and, in short, how they viewed themselves and the world around them. If Islamic civilization, culture, or state ever constituted a regime of any kind, it was one of nomocracy.”

⁹⁶ Hallaq, *Muslim Rage* (2003), *supra* note 90, at 1707, reiterates these early observations made by the father of Islamic legal history in the West, which continue: “[T]he whole life of the Muslims, Arabic literature, and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law,” in JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW at 1 (1964). While reasonable people may disagree, Hallaq is on firm ground for this particular claim from Joseph Schacht forward.

⁹⁷ It is worth noting how often experts fail to register the distinctive cultural role of the law in Islam and, instead, try to analogize Islam with western religions (i.e., western Christianity), which remain largely socially compartmentalized and often detached from political life. In fact, the analogy is not to Christianity but to secularism in the West; both secularism and Islam are deeply pervasive sensibilities that respectively drive dominant modes of social thought and behavior. See CALHOUN (2011) *supra* note 9; ASAD (2003) *supra* note 42.

pillar of far-reaching dimensions and, in short, a world-view that defined both Muslim identity and even Islam itself.”⁹⁸

If Islam is thus changing now—much like international humanitarian law—few scholars have captured the preeminent place that the law is playing in this process, the modern implications of this legal role, or the fact, as Hallaq puts it, that Islamic law has also become in the process a “tool of modernity” to understand, negotiate, and interpret such changes.⁹⁹ To complicate matters, in this modern process whereby “Islamic law now command[s] the world’s attention,”¹⁰⁰ the Shari’a itself has become distorted “beyond recognition,” its “principles and practices in the past” conflated with its “highly politicized reincarnations.”¹⁰¹ Understanding how and why this is so involves complex processes too numerous to

⁹⁸ Hallaq, *Muslim Rage* (2003) *supra* note 90, at 1707.

⁹⁹ HALLAQ, SHARĪ’A (2009) *supra* note 33, at vii. See also Bassiouni, *Evolving Approaches to Jihad* (2007), *supra* note 55, at 145, in which he notes: “Jihad in Islamic history has a mixed record. Quite clearly, however, it is subject to interpretation, and has been subject to manipulations, essentially for political reasons or in order to achieve a political goal. It is also the subject of different interpretations in the four traditional Sunni schools, as well as in the different Shi’a doctrines. Precisely because of that mixed record, there is nothing that prevents the development of a contemporary doctrinal approach to jihad which would be equivalent to the contemporary international law of self-defense subject to the limitations on the methods and means of warfare in accordance with contemporary international humanitarian law.”

¹⁰⁰ Anver M. Emon, *Review: Wael B. Hallaq, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005), 76 UNIV. TORONTO Q., 343 at 344 (2007). Bassiouni, *Evolving Approaches to Jihad* (2007), *supra* note 55, at 121, in keeping with this historical narrative, faults “the Muslim religious establishment” for “historically fail[ing] to clarify it,” which is “due in part to the absence of a coherent and authoritative doctrinal body of interpretation on the subject.”

¹⁰¹ HALLAQ, SHARĪ’A (2009), *supra* note 33, at vii. There is no shortage of debate over the definition and composition of the Shari’a or the range of resulting perspectives (i.e., essentialists equate Shari’a with revealed rules, while social contextualists see these norms as multiple and products of specific contexts), separate, even antithetical schools of jurisprudence (*madhabs*) and modes of jurisprudential reasoning (*fiqh*), including habits of mind, decision-making processes, and analytical rules developed between scholars in conversation with one another over time (i.e., consensus or *ijmā*, reasoning by analogy or *qiyas*), and other modes of what Kelsay simply terms “sharia reasoning.” See JOHN KELSAY, *ARGUING THE JUST WAR IN ISLAM* (2007), at 44-48, where he also notes that Shari’a norms frame discussions of military ethics so that conduct of hostilities questions often get stalled over such definitional conundrums. See generally K.S. VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW*, at 1 (2005): “There is no such thing as a, that is one, Islamic law, a text that clearly and unequivocally establishes all the rules of a Muslim’s behaviour. There is a great divergence of views, not just between opposing currents, but also between individual scholars within the legal currents, of exactly what rules belong to Islamic law. The jurists have had to learn to live with this disagreement on and variety in the contents of the law.” OTTO, *SHARIA INCORPORATED* (2010), *supra* note 63, at 25, 23-26: “Like its counterpart ‘Islamic law’ the term ‘sharia’ is surrounded with confusion between theory and practice, between theological and legal meanings, between internal and external perspectives, and between past and present manifestations,” as well as the four distinct ways in which the term sharia is used throughout the course of this 12 nation comparative study, i.e., divine abstract sharia, as classical sharia, as historically transferred sharia, and as contemporary sharia.” OTTO, *SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES* (2008), *supra* note 63, at 7: “When people refer to the sharia, they are in fact referring to their sharia, in

treat here: not the least, the misrecognition of the eminently legal nature of Islam, as mentioned, but also the misinterpretation of the nature of this modern legal crisis through the lens of politics—a process shaped in no small part by the technical administrative history of European colonialism.¹⁰²

What is missed in reducing Islam’s modern identity crisis to “primarily political” causes are the very Islamic legal checks and balances historically evolved to preserve “the distinction between worldly power and the province of the law”—mechanisms sorely needed today.¹⁰³ A core feature of Islamic law, as most legal historians know, is that political sovereigns, at least until European interventions (and far longer in cases of untouched emirates, like Saudi Arabia), dared not challenge the supreme authority of the divine law or the jurists and judge-custodians responsible for its interpretation. This “hands-off” approach to the law, central to Islamic jurisprudential roles and traditions, rendered the law “remarkably independent throughout twelve centuries of Islamic history”¹⁰⁴ and made politics distinctively “subsidiary to law and entirely subservient to it, from the rise of Muhammad to the early nineteenth century.”¹⁰⁵ Not

the name of the eternal will of the Almighty God,” and *The Compatibility of Sharia with the Rule of Law: Fundamental Conflict between Civilisations? Within Civilisations? Or between Scholars? Or between Scholars?* in KNOWLEDGE IN FERMENT DILEMMAS IN SCIENCE, SCHOLARSHIP, AND SOCIETY, 137-154, at 141-2 (Adriaan in ’t Groen et al. eds., 2007). For a different empirical examination of compatibility, see Mashood A. Baderin, *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?* 1 HUM. RIGHTS L. REV. 263 (2001).

¹⁰² Hallaq, *Muslim Rage* (2003) *supra* note 90, at 1716. I do not wish to distract from the argument but it is worth emphasizing how hard this recognition is to come by, so that even subject matter experts find it difficult to fathom the noncommensurability between Islam and other religions (i.e., Christianity), or that Islam—and Islamic law—has a unique cultural role to play among and throughout diverse Muslim communities. As Hallaq notes:

. . . Islam is a religion of law. . . Islam means nothing if religious law were to be extracted from it. Accordingly, to be a Muslim means to live by the law. Unlike Sunday prayer, which is the Christian’s main ritual connection to God, a Friday prayer, for the Muslim, will not do. There is so much more that is needed, a legal ritual, a divine law, a way of life and, in short, a comprehensive system of belief and practice that generates an immediate connection between the Muslim individual and his Lord. This has been the reality of Muslims for over thirteen centuries, a reality that had continued uninterrupted in the ancient Semitic Near East from the time of Hammurabi. To say that a millennial genealogy positing an intimate connection between law and ancient divinities had long persisted in Near Eastern cultures is merely to state the obvious

¹⁰³ *Id.* at 1706, 1708.

¹⁰⁴ *Id.* at 1708. Ahmed Mohsen Al-Dawoody in his dissertation *War in Islamic Law: Justification and Regulations* (2009), at 261, makes a similar case but holds jurists themselves more squarely responsible for the series of internal crises proper to Islamic law and Islamic legal norms with respect to conflict and warfare more specifically.

¹⁰⁵ Hallaq, *Muslim Rage* (2003) *supra* note 90, at 1708, writes: “No ruler or political might could challenge the divine law and its spokesmen. The rich, the powerful, and the poor, from sultan to pauper, all stood as equals in the presence of the humble, informal Muslim court to receive judgment. There were no special rules for the mighty, and none could question their eternal submission to the law of God. The Law was deemed to stand above

only was Islamic law's elemental respect for the separation of law from politics equivalent in many ways to western legal paradigmatic separations of church and state,¹⁰⁶ this distinction enshrined "the rule of law" as an "inalienable feature of the Muslim body politic and legal culture."¹⁰⁷ In turn, the erosion of this core value for separating law and politics hardwired into the Islamic legal ethic remains a critical factor in Islamic law's modern identity crisis and contemporary politicization.

I will only briefly reiterate several historical processes that helped to undo this distinctive feature of Islamic law: an increasingly direct form of colonial rule and the imposition of the western secular state apparatus in British India, Dutch Indonesia, and throughout the Ottoman Empire; the codifying of Islamic norms into static rules that undercut the interpretive authority and freedom of jurists, judges, and lawyers and reshaped the status of the law; and the transfer of authority from traditional legal elites, who had controlled educational institutions and local economies (i.e., the charitable trusts or *awqaf*), to new representatives of a now centralized state apparatus. Such developments, in turn, ended the legal constraints on political authority that were once indicative of Islamic polities and zones of influence.¹⁰⁸ The classic example of these converging trends was Governor General of Bengal Warren Hastings's (1773-1785) redesign of a multi-tiered legal system that positioned British administrators at the top,

anything human." Even critics of this narrative, who argues that sharia embedded traditional institutions, contracts, and relationships that could not change and adapt quickly enough to accommodate economic advances, like Timur Kuran, *Why the Middle East Is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation*, 18 J. ECON. PERSPECTIVES 71 (2004), note that generally-recognized rule of law traits were maintained within the Islamic legal model until at least the modern period.

¹⁰⁶ Hallaq, *Muslim Rage* (2003) *supra* note 90, at 1708.

¹⁰⁷ *Id.*

¹⁰⁸ See Rudolph Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified?* in SHAPING THE CURRENT ISLAMIC REFORMATION, 82-95 (B.A. Roberson, ed., 2003). According to Hallaq, *Muslim Rage* (2003) *supra* note 90, at 1712, traditional legal specialists not only lost their positions as judges, legal administrators, and court officials, but they also lost their teaching posts—the "backbone of their very existence as a profession"—which "constituted a *coup de grace*" that robbed them of "their procreative faculties" and their ability "to extend their intellectual pedigree." This "ruin of the traditional law college" where jurists, judges, and jurisconsults were trained was "the ruin of Islamic law, for the college's compass of activities epitomized all that had made Islamic law what it was." See also Wael B. Hallaq, *Can the Shari'a Be Restored?* 21-53 in ARAB LEGAL SYSTEMS IN TRANSITION (Barbara Stowasser & Yvonne Haddad eds., 2004).

replaced local *qadis* and *muftis* (relegated to advisors on Islamic law and soon phased out of the hierarchy altogether) with British judges/tax-collectors, and demoted Muslim judges to civil matters.¹⁰⁹

Codification of the law was, however, in many ways equally central to this restructuring. British colonials made no secret of their befuddlement with Islamic legal pluralism—the embedded scholarly discussions (not statutes) comprising *fiqh* that enabled scholars to determine the law (rather than an interpretation) in any given instance. To British magistrates this “uncontrollable and corrupted mass of individual juristic opinion” forced the need for experts, in this case, Oxford Orientalist Sir William Jones, to build “a complete digest of Hindu and Mussulman law” to serve as a “check on the native interpreters of the several codes.”¹¹⁰ Jones’ translations codified Islamic law for the first time and helped displace jurists’ hermeneutical methods that constituted the “organic link” between divine texts and “positive legal stipulations” which had once formed “the backbone of Islamic law,” and thus, severed “the only link between the divine and the human.”¹¹¹ Ending the exegetical authority of jurists, *qadi*, and *mufti*—the core professional cadre of this jurists’ law—in excising the divine from this religious law, undermined “an independent legal system that could restrain the powers of the new autocracies.”¹¹² Happily unhampered, these new authorities began to invoke the law expediently, both to shore up their own “thwarted political legitimacy” and to craft the simulacrum of nonexistent public consensus.¹¹³ By the time that Ottoman possessions (with the exception of Turkey) were divided between the French and British in the infamous 1916 Sykes-Picot Agreement, the Muslim world, except impoverished kingdoms, had interned alien political models with a very different role for the law.

Reducing Islamic law’s modern identity crisis to politics thus prevents seeing one of Hallaq’s most dramatic insights: the implication of this modern identity crisis for contemporary problems of

¹⁰⁹ WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW, at 85 (2009).

¹¹⁰ *Id.* at 86, quoting BERNARD COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA, 69 (1996).

¹¹¹ Hallaq, *Muslim Rage* (2003) *supra* note 90, at 1713.

¹¹² *Id.* at 1714.

¹¹³ *Id.* at 1713, 1714. This period involved importing “an endless variety of European codes, at times lock, stock, and barrel,” i.e., the Ottoman Penal Code of 1858, closely modeled after the French Penal Code of 1810 and in 1860, in which the Ottomans adopted as their own, without change or adaptation, the French Commercial Code of 1807. See also Peters, *Jurists’ Law* (2003), *supra* note 107.

conflict and security—and their source in problems of political legitimacy. There is little doubt, Hallaq forecasts, that in implementing such reforms colonial authorities had little idea “they were introducing a deadly combination that would one day produce a troubled and explosive area of the world” or that “pushing traditional Islamic law aside and rendering it inoperable” meant an end to the rule of law and, in turn, “opening of a major gap, a virtual black hole, created without any real substitution or replacement.”¹¹⁴ With ubiquitous colonialist-created nation-states, “a new political order” emerged “without the benefit of the traditional legal structures that had systemically controlled political authority,” including sovereign access to absolute power and wealth (concentrated in civil society but administered by the traditional legal profession). In the ultimate of ironies, emergent autocracies “harnessed” the best modern technologies (despite antimodernist rhetorics) to enhance their regimes with “brutal and tragic consequences” and, in the process, refashioned the meaning of Islamic law accordingly into “little more” than “the chopping off of hands, the stoning of victimized women, and public floggings”—so that, in a strange reversal, the harshest of criminal penalties came “to embody and symbolize the vast entity” once known for its progressive approach to punishment that in its heyday was equivalent with mercy.¹¹⁵ If one of the greatest oversights about Islam is the cultural role of the law, a close second is this equation of Islamic law with absolutist policies borne of expediency—the hapless argument made normative by extremists in a dual victory for wildly emboldened political autocracies and historical counter-reformation.¹¹⁶

¹¹⁴ *Id.* at 1714. Hallaq continues: “By the 1970s, the Muslim world had been, legally speaking, dramatically Westernized,” and it was “only the law of personal status that continued to retain provisions from the traditional Islamic law, although this area too was codified.” Thus, the century from the 1870s to the 1970s “tells a story of colossal alienation” whereby Muslims were alienated from and deprived of their religious values and traditional law, a process that explains “the recent rise of the Islamist and fundamentalist movements throughout the Muslim world” and in which the Iranian Revolution amounted to “merely the first of a series of popular calls for the so-called “resurgence of fundamentalist Islam.”

¹¹⁵ *Id.*

¹¹⁶ Most scholars concede the modern demise of Islamic law, but Hallaq emphasizes the role in this process of nineteenth-century administrative restructuring through direct colonial rule and the imposition of a western secular state apparatus which instituted an instrumentalist role for the law. See Hallaq, *Can the Shari'ah be Restored* (2004), *supra* note 107, at 22 (“the shari'a is no longer a tenable reality. . .[but] met its demise nearly a century ago. . . ushered in by the material internalization of the concept of nationalism in Muslim countries. . .”). Hallaq describes the effects of this transformation:

Today, this wholesale politicization of Islamic law is a high-water mark of the post-9/11 security environment and “a significant cornerstone in the reaffirmation of Islamic identity,” one stretching across many nations and into the very meaning of the idea of Islam itself.¹¹⁷ To put this point differently, as religion has become a political force in contemporary global affairs and in national as well as international security concerns, Islamic law has played a starring role in that process. Yet, if such a politicization of Islamic law is now familiar, it is critical to emphasize that a missing modern Islamic *jus in bello* tradition has aided and abetted this process and, as such, offers a potential antidote to continued misuses of Islamic law today. At the core of the contemporary politicization of Islamic law—one that brings with it deeply felt matters of Muslim identity—is a lack of modern inquiry on Islamic humanitarian law in postwar legal scholarship, even as global debate over Islamic law rages over questions of contemporary conflict, war, and resistance.¹¹⁸ The cursory treatment of the modern laws of war and of the *jus in bello* more specifically has been an enabling factor in the current use and abuse of Islamic law for political gain and violence.¹¹⁹

I treat in the following section a canonical example from Islamic jurisprudence of how this dearth of modern inquiry on Islamic humanitarian law in postwar legal scholarship has aided today’s politicization of Islamic law, both in the effects of limited modern writing on the *jus in bello* in contrast to the strength of the classical legacy, and in the fascinating textual history of the Qur’an itself, which

If the traditional ruler considered himself subject to the law and left the judicial and legislative functions and authority to the ‘ulama, the modern state reversed this principle, thereby assuming the authority that dictated what the law is or is not. The ruler’s traditional role was generally limited to the appointment and dismissal of judges, coupled with the enforcement of the qadi’s decisions. Interference in legislative processes, in the determination of legal doctrine, and in the overall internal dynamics of the law was nearly, if not totally, absent. The modern state, on the other hand, arrogated to itself the status of a legislator, an act that assigned it a place above the law. Legislative interference, often arbitrary, has become a central feature of modern reform and in itself is evidence of the dramatic shift in the balance of legal power.”

¹¹⁷ HALLAQ, ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005), *supra* note 34, at 1.

¹¹⁸ Kelsay notes that in post-Revolution Iran there was in certain respects a return to modern Islamic *jus in bello* writing—but often for strictly politically-expedient reasons, for instance, designating Saddam Hussein an apostate and hence targetable under Islamic law.

¹¹⁹ Kelsay *supra* note 49, at 74-75 notes that in some respects post-Revolution Iran reversed this dearth of modern Islamic *jus in bello* writing as compared to “classical” writing, but often for politically expedient reasons: i.e., designating Saddam Hussein an apostate and, hence, as targetable.

reveals a lasting circumspection toward war hardwired into subsequent jurisprudential norms in ways that go far beyond facile equations of Islam with peace.¹²⁰ This example also demonstrates what I call in the next and final section, the first ‘lesson learned’ from Islamic jurisprudence: namely, that legal source material approached through the lens of contemporary security concerns—in dialogue with comparable modern legal regimes contemplating hostilities—can strengthen a modern Islamic *jus in bello*, which itself would go a long way in answering contemporary problems of security and in advancing cross-cultural security policy discussions today.

2.3 Neglecting the Islamic *Jus in Bello*: Opportunities for Absolutism and Extremism

As every Muslim knows the Qur’an was no book, no written material object, until Mohammad’s first companion Abu Bakr Sadiq’s compilation of the manuscript after the prophet’s death (632 AD) and, slightly later, Uthman’s own recension (653 AD).¹²¹ The story goes that Abu Bakr, the first Caliph, began collecting all the verses of the Qur’an as memorized by Muhammad’s trusted companions (*sahaba*), including those written on bits of parchment, leather, rocks, even trees, after the battle of Yamama—part of the devastating Ridda Wars (sectarian wars of apostasy) against Arabian tribes fought upon

¹²⁰ For standard English translations, aside from the nineteenth-century authors J.M. RODWELL, *THE KORAN: TRANSLATED FROM THE ARABIC* (1861) and E.H. PALMER, *THE KORAN* (1880), scholars typically refer to MOHAMMED MARMADUKE PICKTHALL, *THE MEANING OF THE GLORIOUS QUR’AN* (1938); ARTHUR J. ARBERRY, *THE KORAN INTERPRETED* (2 vols., 1955); M.A.S. ABDEL HALEEM, *THE QUR’AN: A NEW TRANSLATION* (2004); ABDULLAH YUSUF ALI, *THE HOLY QUR’AN: TEXT, TRANSLATION, AND COMMENTARY* (1937); and MAJID FAKHRY, *AN INTERPRETATION OF THE QUR’AN: ENGLISH TRANSLATION OF THE MEANINGS* (2002). For a history of translations, see ISMET BINARD & HALIT EREN, *WORLD BIBLIOGRAPHY OF TRANSLATIONS OF THE MEANINGS OF THE HOLY QUR’AN: PRINTED TRANSLATIONS 1515–1980* (ed., Ekmeleddin Ihsanoglu, 1986). For interesting emerging online sources see: the Tanzi Qur’an Navigator Project, available at <http://tanzil.net/#1:5>, which offers the original text in Arabic; the Medina Mushaf (or Mushaf al-Madinah an-Nabawiyyah) project with multiple translations, supported by the King Fahad Complex for Printing of the Holy Qur’an, available at <http://www.Qur’ancomplex.net/>, developed by Hamid Zarrabi-Zadeh; the *Online Qur’an Project*, available at <http://community.al-Qur’an.info/>, developed by Iman Mohammad Kashi and Uwe Hideki Matzen; *The Internet Sacred Texts Archive*, available at <http://www.sacred-texts.com/isl/htq/index.htm>, that enables readers to compare the Arabic Unicode text (surah by surah) against established translations (i.e., Ali, Pickthall, Palmer, and Rodwell); and the somewhat limited *Compendium of Muslim Texts* at the Center for Muslim-Jewish Engagement (CMJE), University of Southern California, available at <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/> and <http://msawest.net/islam/>. See also Abdur Rahim Kidwai, *Translating the Untranslatable: A Survey of English Translations of the Qur’an*, *MUSLIM WORLD BOOK REVIEW*, 66 (1987).

¹²¹ MUHAMMAD MUSTAFÀ AL-AZAMI, *THE HISTORY OF THE QUR’ANIC TEXT FROM REVELATION TO COMPILATION: A COMPARATIVE STUDY WITH THE OLD AND NEW TESTAMENTS* (2003).

Muhammad's seventh-century death. Abu Bakr's reasoning was that of sheer posterity: in the battle against apostates, 700 *Qurra'*, those who had memorized the Qur'an by heart, were killed, including Sālim, Muhammad's first pedagogue, entrusted to teach the Qur'an.¹²² Because the Qur'an was an oral text guarded in the memories of the faithful (known as *ḥāfidh*), military campaigns were an imminent threat to the integrity of the Qur'an and, thus, to the budding community of Islam, the *ummah*.¹²³ It should be no stretch, from the reference point of treaty-based international law and its foundational charter, to imagine how a text—particularly a conduct-driven one—might establish and authorize a community.

Perhaps, this is the time to recall that Islamic law itself is a translation of “al-Qanūn al-Islāmī,” which scholars often equate with Sharī'a, literally, the “path” that Muslims travel implicitly in the prophet Muhammad's footsteps toward a pious and compliant life in Islamic terms—one not limited to legal matters.¹²⁴ There is thus a core normative supposition to Islamic law familiar to western audiences, that behavior should be commensurate with an Islamic notion of the good life, itself dependent upon the practical example of the prophet and the meaning of Islam as “submission to God.” But if Islamic law thus embodies a praxis-based normative ethics, one in which Muhammad's footsteps (in the *sunna*) play an epistemic role, less familiar is Islam's core commitment to justice—a value, perhaps, equivalent in degree, to a western privileging of happiness or pleasure from J.S. Mill forward.¹²⁵ That notion of

¹²² See PROPHETIC COMMENTARY ON THE QUR'AN (TAFSEER OF THE PROPHET), Sahih al-Bukhari's Vol. 6, Book 60, No. 201, (trans., M. Muhsin Khan), *Religious Texts Database*, University of Southern California (USC), Center for Muslim-Jewish Engagement (CMJE), compendium hadith compiled by USC Muslim Students Association at <<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/060.sbt.html>>.

¹²³ See SAYYID SIDDIQ HASAN, REFLECTIONS ON THE COLLECTION OF THE QUR'ĀN (trans., A.R. Kidwai, 1999). For a rare public discussion of the discover of early manuscripts of the Qur'an (the Sana'a manuscripts, discovered during renovation of the great Mosque of Sana in Yemen in 1972), renewed interest in a critical edition of the text, and increased scholarship, see Toby Lester, *What is the Koran*, 283 ATLANTIC MONTHLY 43 (1999), available at <http://www.theatlantic.com/past/docs/issues/99jan/koran.htm>. For physical and dating aspects of the discussion, see Yasin Dutton, *An Umayyad Fragment of the Qur'an and Its Dating*, 9 J. QUR'ANIC STUD. 57 (2007). Apparently with no indigenous expertise to conserve the badly damaged manuscripts, Qādī Ismā'īl al-Akwá, President of the General Organization of Antiquities and Libraries, initiated the effort to secure external specialists to conserve the manuscripts.

¹²⁴ For problems with the very expression “Islamic law,” particularly, how western notions of law encroach on our understanding of the distinctiveness of sharia, see HALLAQ, *supra* note 33, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS 1-3 (2009).

¹²⁵ Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 VA. J. INT'L L. 249, 251, n. 4 (2007-08), notes SCHACHT, INTRODUCTION TO ISLAMIC LAW (1964), which describes Islamic

justice—emanating from the divine (not the state), intrinsically sacred as such, and encapsulated in the law—proves to be one of the most important counterpoints to potential political abuses of power for Muslim communities, applicable to the laws of war as well.¹²⁶

Two additional dimensions of Islamic law are worth mentioning. Though there is little universal agreement or even generally-accepted rules for standardizing Islamic legal sources, typically scholars rely, first and foremost, on the Qur'an¹²⁷ and then the *sunna*, the sayings and doings of the Prophet Muhammad, as these were narrated, collected, and relayed by others over time in the often disputed *hadith*.¹²⁸ It is important to keep in mind, however, that both the *sunna* and the *hadith* are themselves

law as the “epitome of Islamic thought” and “the core and kernel of Islam itself,” and which Hallaq critiques in *The Quest for Origins or Doctrine?*, *supra* note 33, at 1 (2002-03): “When Joseph Schacht, in one of the most famous statements opening his influential *An Introduction to Islamic Law*, characterized Islamic law as the ‘most typical manifestation of the Islamic way of life, the core and kernel of Islam itself,’ he was making a statement not so much about what Muslims themselves thought, as about what the Orientalist doctrine had for long been.”

¹²⁶ For a discussion of the affective role of justice in Islam, see M. Cherif Bassiouni, *The Shariā and Post-Conflict Justice*, Post-Conflict Justice and Islam Workshop Position Paper, 4 Nov. 2010, Washington DC, United States Institute of Peace (USIP), at 6, available at <http://insct.syr.edu/events/postconflict-justice-and-islam/>. Bassiouni notes: “Islam is a way of life, a code of inter-personal and collective conduct for humans on earth, and a guide for that which is connected to final judgment by the Creator. Justice is the cornerstone of this holistic approach. Contrary to what many Shariā scholars advocate, justice is not narrow, formalistic, rigid, and blind. Instead, justice is inspired by the overriding divine attributes of compassion and mercy. With regard to human justice, it is to be pursued as a value-oriented goal, thus it must necessarily be constantly adapted as to its methods, modalities, and means in order to achieve the best possible outcomes which fulfill its goals.”

¹²⁷ For a discussion of the material, historical, and interpretive complexity of the Qur'an as a source, see M.M. BRAVMANN & ANDREW RIPPIN, *THE SPIRITUAL BACKGROUND OF EARLY ISLAM: STUDIES IN ANCIENT ARAB CONCEPTS* (2009); ANDREW RIPPIN, *THE QUR'AN AND ITS INTERPRETATIVE TRADITION* (2005); JOHN WANSBROUGH, *QUR'ANIC STUDIES: SOURCES AND METHODS OF SCRIPTURAL INTERPRETATION* (2004); Gerd Puin, *Observations on Early Qur'an Manuscripts in Sana'a*, in *THE QUR'AN AS TEXT* 107-111 (ed., Stefan Wild, 1996); Fred Donner, *The Qur'an in Recent Scholarship: Challenges and Desiderata* 29-50 and Devin Stewart, *An Evaluation of Qur'anic Emendations Proposed in Medieval and Modern Scholarship* 225-245 in *THE QUR'AN IN ITS HISTORICAL CONTEXT* (Gabriel Said Reynolds ed., 2008). As Nicolai Sinai & Angelika Neuwirth write in *QUR'AN IN CONTEXT: HISTORICAL AND LITERARY INVESTIGATIONS INTO THE QUR'ANIC MILIEU* 1 (N. Sinai, A. Neuwirth, & M. Marx, eds., 2010): “The academic discipline of Qur'anic studies today is most strikingly characterized, not by any impressive scholarly achievements of the field itself, which has been appropriately diagnosed by Fred Donner as being in ‘a state of disarray,’” but as a “veritable litany” of lacunae, when compared to biblical or classical studies. These include: “There is no critical edition of the text, no free access to all of the relevant manuscript evidence, no clear conception of the cultural and linguistic profile of the milieu within which it has emerged, no consensus on basic issues of methodology, a significant amount of mutual distrust among scholars, and—what is perhaps the single most important obstacle to scholarly progress—no adequate training of future students of the Qur'an in the non-Arabic language and literatures and cultural traditions that have undoubtedly shaped its historical context.” For a critique of this view, see AL-AZAMI, *HISTORY OF THE QUR'ANIC TEXT: FROM REVELATION TO COMPILATION*, *supra* note 21, (2003).

¹²⁸ In addition to the Qur'an and the Prophetic *sunna*—often described in terms of customary practice or transmitted *hadith*—scholars generally include scholarly consensus (*ijma*) and legal reasoning (*qiyas*) in its various modes as the third and fourth sources of Islamic law. But as M.H. Kamali, *Methodological Issues in Islamic*

categories for organizing writing and, as such, contested terms—both in their meaning and in their inclusion of specific authors and ideas—in a debate more than a millennium old.¹²⁹ Having said that, the *sunna* are at once scripture (sacred discourse) and legal sources for two intertwined reasons specific to this law: first, they comprise the actual life practices of the Prophet and, thus, function as primary sources, whereas the *hadith* are secondary narrative reports about that life (which came to include words and deeds beyond the Prophet i.e. his companions and successors).¹³⁰ Second, within the Sharī'a framework, which places high value on the Prophet's ethical and practical model and its commensurability with a society's governance, the *sunna* amount to a kind of customary law—however personalized—whereby imitating the Prophet's precedent is akin to legal precedent.¹³¹ How such premises inform a given society and at

Jurisprudence, 11 ARAB L. Q. 3 (1996) and An Naim, *Mahmud Muhammad Taha and the Crisis in Islamic Law Reform: Implications for Inter-religious Relations* 25 J. ECUMENICAL STUD. 1 (1988), point out, in expanding what constitutes sources of admittedly divine law, one begins to leave the genre of revelation for that of reason and jurisprudence. For helpful recent discussions of *hadith* debates and truth and reliability protocols, see Jonathan A.C. Brown, *Did the Prophet Say It or Not?: the Literal, Historical and Effective Truth of Hadiths in Sunni Islam*, 129 J. AM. ORIENTAL SOC. 259-85 (2009) and *Even if It's Not True, It's True: Using Unreliable Hadiths in Sunni Islam*, 18 ISLAMIC L. & SOC. 1 (2011).

¹²⁹ For an overview of this issue, see J.A.C. BROWN, HADITH: MUHAMMAD'S LEGACY IN THE MEDIEVAL AND MODERN WORLD (2009); H.M. KAMALI, A TEXTBOOK OF HADITH STUDIES: AUTHENTICITY, COMPILATION, CLASSIFICATION AND CRITICISM OF HADITH (2009); and AISHA MUSA, HADITH AS SCRIPTURE: DISCUSSIONS ON THE AUTHORITY OF PROPHETIC TRADITIONS IN ISLAM (2008). For reference to Sunni and Shi'ite hadith collections in Arabic, see J.A.C. BROWN, HADITH: OXFORD BIBLIOGRAPHIES ONLINE RESEARCH GUIDE 5-6 (2010). See HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 16 (2009): it is worth remembering that in addition to the Qur'an, God's revealed word, the human messenger, the Prophet Mohammad, provides in "the exemplary nature of his autobiography" the second source for Islamic law and models proper, indeed, extraordinary, behavior and conduct for Muslims, particularly since the very premise of Islam is that existing Judeo-Christian traditions were on the wrong path. The Prophetic *sunnah*, as Hallaq describes, address both mundane matter of domestic civil law, such as private property, and the ethical meaning for those specific rules i.e., "He who unlawfully appropriates as much as one foot of land. . . , God will make seven pieces of land collapse on him when the Day of Judgment arrives") thus, linking the Prophetic *sunnah* with the area of property law.

¹³⁰ The *sunnah*—as prophetic practice—reveals the distinctiveness of Islam as first and foremost a religion of practice, of social behavior, and serves as a reminder that the *hadith* were post-Prophet inventions which, in principle, were discouraged by the Prophet, along with any recordings of his words, in deference to his primary mission: the transmission of the Qur'an. For helpful discussions of this still unsettled debate, beginning in the first century after the Prophet Muhammad's death (d. 632) between Malik b. Anas (d. 796) and his student al-Shafi'i (d. 820) over whether the Prophetic *sunnah* constitute customary communal practice (in Medina) or the transmitted accounts of the Prophet's precedent (*hadith*). See M.M. BRAVMANN, THE SPIRITUAL BACKGROUND OF EARLY ISLAM (2009); WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997); HALLAQ, SHARĪ'A *supra* note 33, at 273 (2009); YASIN DUTTON, THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWATTA, AND THE MADINAN AMA (1999); JONATHAN BROCKOPP, EARLY MALIKI LAW: IBN 'ABD AL-HAKAM AND HIS COMPENDIUM OF JURISPRUDENCE (2000). Generally scholars find an historical evolution of the *sunna* from communal practice to a later alignment with Muhammad's precedent.

¹³¹ See Fatih Okumus, *The Prophet as Example*, 18 STUD. INTERRELIGIOUS DIALOGUE 82 (2008).

what level—history, cultural norms, domestic law and its specific areas (i.e., family law)—is a matter of robust debate.¹³²

Returning to the story of the Qur'an's compilation, as relayed by Sahih al-Bukhari's *hadith*, it was clear to the early caliphs, particularly as military campaigns in and directly after Muhammad's life increased, that each time a *Qurra'* died, a copy of the Qur'an was forever lost and along with it the message of Islam.¹³³ As the second caliph Umar said to the first caliph Abu Bakr: "I am afraid there will be more casualties among the *Qurra'*" on "other battlefields, whereby a large part of the Qur'an may be lost, unless you collect it." Realizing the magnitude of this loss presumes an understanding of the status of the Qur'an, or the Arabic Recitation, as the literal word of God. The Qur'an was essentially the revealed message to Muhammad by the angel Gabriel beginning in the year 610 AD, when a sleeping Muhammad was enjoined to "recite, recite, recite!" the initial three verses of what would become, over a period of 23 years and many visits by Gabriel later, the full revealed text.¹³⁴ As recitations came to Muhammad over his life, for instance, he would repeat them to his companions, who would then memorize them—in fact, as verses were added, the text reorganized, followers would have to memorize the text in light of additions—and ultimately Gabriel helped Muhammad structure the 114 revealed verses into appropriate and important sequences and chapters (or *suras*).¹³⁵ Thus, throughout Muhammad's life the Qur'an was not only an oral, living, aggregate, and fluid text, but a collective project whereby the companions in their act of memorization helped create Islam.

¹³² On the jurisprudential side, see Mohammad Kamali, *Methodological Issues in Islamic Jurisprudence*, *supra* note 128 and PRINCIPLES OF ISLAMIC JURISPRUDENCE 4 (1991; 3 ed. 2003, revised) in which Kamali notes: "The Arabic texts on *usul al-fiqh* itself are on the whole devoted to a treatment of the sources, and methodology of the law, and tend to leave out its history of development. The reverse of this is true with regard to works that are currently available on the general subject of Islamic jurisprudence in the English language. Works of Western authorship on this subject are, broadly speaking, primarily concerned with the history of jurisprudence, whereas the juridical subject matter of *usul al-fiqh* does not receive the same level of attention as is given to its historical development."

¹³³ Mohammad prohibited carrying written copies of the Qur'an into battle.

¹³⁴ Ismail Poonawala, *Translatibility of the Qur'an: Theological and Literary Considerations, Translation of Scripture*, A JEWISH Q. REV. SUPP. 151-192 (1990), Proceedings the Annenberg Research Institute Conference (15–16 May 1989).

¹³⁵ See KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE, *supra* note 132, at 17 (1991).

This revelation was, moreover, unique: the last of God’s seven messengers (from Abraham to Jesus Christ) was presented not only with God’s last communiqué but with his most explicit missive, a course correction for his existing peoples (Jews and Christians) who had gone hopelessly astray. The Arabic Recitation thus restored the faithful to God’s rightful path by making that path absolutely indelible in the messenger’s life. Hence, the lasting legal status of the biographical *sunna*, Muhammad’s footsteps, which shaped the Sharī’a as both divine path and literal reference point for Islamic law (far more than doctrinal debates over the content of the Sharī’a, for instance).

Bukhari’s *hadith* captures these existential issues, as debated by the first and second caliphs, Abu Bakr and Umar ibn al-Khattab, as they tried to persuade Muhammad’s primary scribe, Zaid ibn Thabit Al-Ansari, to compile all the verses of the Qur’an into a complete book. When confronted with Umar’s concern about the threat of war to the oral Qur’an and, hence, to Islam, Abu Bakr asks him incredulously, but “[h]ow can I do something which Allah’s Apostle [Mohammad] has not done?” Umar presides in this first round of still ongoing debate over authority and authorship in Islam, by responding, “[b]y Allah, it is (really) a good thing,” after which, he and Abu Bakr set about to convince Zaid. They tell him: “You are a wise young man and we do not suspect you (of telling lies or of forgetfulness), and you used to write the Divine Inspiration for Allah’s Apostle,” so “[t]herefore, look for the Qur’an and collect it (in one manuscript).” It is noteworthy that the Qur’an had to be actively looked for, its writing an act of transcription and compilation of verses held by many people.

Zaid predictably replies with Abu Bakr’s initial concern, “[h]ow dare you do a thing which the Prophet has not done?” As an aside, he also relays the sheer difficulty of the task: “[b]y Allah, if he [Abu Bakr] had ordered me to shift one of the mountains (from its place) it would not have been harder for me than what he ordered me [to do].” But, ultimately, as Zaid notes, “I kept on arguing with him about it till Allah opened my bosom for that which He had opened the bosoms of Abu Bakr and Umar.” Afterward, Zaid “start[s] locating Qur’anic material and collecting it from parchments, scapula, leaf-stalks of date palms, and from the memories of men (who knew it by heart)” —noting that he had “found with Khuzaima two verses of Surat-at-Tauba which I had not found with anybody else.” Such written verses of

the first Qur'an were then validated by the memory of two *sahaba*—a critical aspect of constituting the text—and the final manuscript was kept by Abu Bakr, and after his death, with Umar, who, before he died, gave it to his daughter, one of Muhammad's widows, Hafsa bint Umar, a *ḥāfidh*. Later, 'Uthman ibn Affan, the third Caliph, ordered a rescension of the text from Abu Bakr's manuscript (held by Hafsa) and of the various existing oral texts memorized by the faithful, especially those alive during Muhammad's life. The curious fact, however, which even modern scholarly discoveries unwittingly demonstrate, is that when Uthman compared Abu Bakr's original manuscript to his own and to the existing oral texts, those carefully tended for nearly two decades after Muhammad's death, the versions were replications: the Uthman rescension and the Abu Bakr manuscript were the same, a demonstration to believers of the sacred message of the material artifact.¹³⁶

Thus, in addition to the familiar prohibition against war that scholars associate with Islam (defined as peace) often embodied in selective Qur'anic content, the material history of the book and its role in constituting the *ummah* reveals a much sharper, pragmatic, even survival-based circumspection toward warfare subsequently hardwired into Islamic jurisprudence, evident in this case in Bukhari's *hadith*.¹³⁷ This vigilance with respect to conflict stems not only from the role of the community of believers in generating the sacred book but, at a literal level, from the community-based nature of this law. There was a primal recognition that the fates of this community and this law were inseparable and that warfare was the signal enemy to both. At a literal level then, insofar as the complete Qur'an resided in the memories of Muhammad and his followers, and insofar as the community was born in the practice of constituting the text,¹³⁸ war—as the early caliphs could plainly see—threatened the existence of Islam.¹³⁹

¹³⁶ FRED MCGRAW DONNER, *THE EARLY ISLAMIC CONQUESTS* (1986).

¹³⁷ In fact, the Bukhari's *hadith* have the highest status of truth.

¹³⁸ AL-AZAMI, *HISTORY OF THE QUR'ANIC TEXT: FROM REVELATION TO COMPILATION*, *supra* note 21, (2003).

¹³⁹ Moreover, as campaigns became wars of conquest new converts in large numbers, many of whom did not speak Arabic, added to the ranks of the faithful, thus, threatening the integrity of the Qur'an from another angle i.e., translation from Arabic was traditionally understood as blasphemy and, hence, to be Muslim means Arabic literacy.

We know well Muhammad's own repeated emphasis for restraint in war and the explicit rules for conduct in hostilities developed in the post-*hijrah* Medina revelation period in early Islamic treatises on military jurisprudence, ethics, and international law, antecedents in many ways to the now familiar modern law of war subjects (i.e. treatment of noncombatants, refugees, and prisoners of war, permissible conduct on the battlefield and limits on weapons, protection of adversaries' assets, rules about plunder, etc.). What we understand less is how these norms arose from the protection and even the expansion of the metacommunity of Islam and, as such, ground a dispersed Islamic normative identity. The issue is not only that the bedrock legal source of the Qur'an contemplates the whole community, much like modern humanitarian norms codify the general interests of "humanity"—albeit balanced with the security of sovereign states, the privileged units through which such protections are largely executed.¹⁴⁰ The issue is that this elemental *jus contra bellum* impulse at the heart of Islamic law is either lost or neglected, even though it informs core related concepts such as classical *jihad* (in its martial sense) which essentially made *all* strife prohibited within the community of Islam, except in cases of wars against unbelievers. In fact, this early forgotten Islamic prohibition against war within the community as a delimiting standard is more progressive than modern international humanitarian rules for noninternational conflicts or civil wars, which have only recently evolved to apply Geneva standards to internal conflicts. Without the context of this early survival-oriented prohibition against war it is nearly impossible to understand the impetus behind the Islamic *jus in bello* or, more pointedly, to see how effective modern Islamist opposition movements have been in removing the Islamic normative framework from contemporary warfare questions.

¹⁴⁰ Beyond the Qur'an, the Prophetic *sunna*, and critical *hadith*, scholars often focus on Abu Bakr's ten rules for the Muslim army which argues for restraint, protected persons and property, and even freedom of religion; 'Abd al-Rahman al-Awza'i (d. 774) and Muhammad ibn al-Hasan al-Shaybani's (d. 803) expansionist Islam and the first rules for jihad; and Ibn Rushd (d. 1098) and Taqi al Din Ibn Taymiyyah's (d. 1328) systematic justifications for war, as well as scattered modern texts. See TAQI AL DIN AHMAD IBN TAYMIYYA, *AL-SIYASA AL SHAR'IYYA FI ISLAH AL RA'I WA AL-RA'IYYA (Governance according to Shari'a Law in Reforming Both)*; Sohail Hashmi, *Interpreting the Islamic Ethics of War and Peace*, ISLAMIC POLITICAL ETHICS: CIVIL SOCIETY, PLURALISM, AND CONFLICT 204 (2002); John Kelsay, *I-Shaybani and the Islamic Law of War*, 2 J. MILITARY ETHICS 2 63 (2003).

Thus, even as the Rashidun Caliphate (the first four rightly guided rulers) embraced the necessity of defensive wars, which ultimately became wars of apostasy for expanding Islam, they embedded this tipping point—a sensitivity to when wars of expansion morphed into wars of attrition for believers—into jurisprudential practice thereafter. It is in no small part to protect a burgeoning Islam that the classicists take great care in developing guidelines for conduct in hostilities and define these norms as insider/outsider dynamics, which exhibit obvious modern limits. Nonetheless, the resulting international aspirations of Islamic law that such prohibitions inculcated—and which Roman jurists copied early on—are only one part of this complex legacy, suggestive of this law’s utility as an instrument for managing the complexity of conflicts (especially internal wars and transnational conflicts) and of recognizing when the demands of civilization and posterity outweigh the objectives of war. This is the first lesson learned.

3.0 Lessons Learned from Islamic Jurisprudence:

In this last section, I outline five lessons for contemporary security in contemplating the pressures on humanitarian law in both its international and Islamic variants for moving forward in asymmetric environments. These lessons are organized by several underlying questions at stake throughout this essay: What can these shared global identity crises teach us about new challenges of warfare as these are bound up with religion and politics more generally? Or to put this question differently, which important lessons for innovating humanitarian law do we miss if we politicize or polarize Islamic and international humanitarian law? I first summarize these lessons and then turn to some description of the most salient insights.

First and foremost, contemporary problems of security can be addressed through available Islamic norms in ways that both address and offset an inadequate modern Islamic *jus in bello* tradition and, at the same time, deny extremists the theological ground to define contemporary Islamic law according to the conflict settings of their own making. Second, from this normative basis, Islamic law offers distinctive and underexplored methodological strengths, including legal pluralism and legal innovation that may aid in adapting humanitarian law in general to asymmetric environments. Third,

taking Islamic law seriously helps forecast the complex role that religion and religious-based actors and identities are playing not only in global affairs but in emerging international legal norms with implications for security. Fourth, treating Islamic law as a global player in security discourse provides the added benefit of requiring us to contemplate use of force norms in cross-cultural terms and to define international standards inclusively. Fifth and last, insofar as Islamic law has had to manage the paradox that now confronts international humanitarian norms—the eclipse of the state actor in hostilities—it represents a leading-edge indicator for avoiding certain mistakes, notably problems of accounting for nonstate actors and noncompliance.

To restate the first and most critical lesson learned, the missing modern *jus in bello* tradition is, as mentioned, a gap that allows new problems of security to go unanswered on an Islamic model (i.e., terrorism, torture, rules for armed conflict that resists foreign intervention), misperceives key drivers of conflict and insecurity (i.e., government illegitimacy, repressive policies), and leaves room for extremists and other political opportunists to fill the gap with distorted ideologies that further their own often nonrepresentative political agendas.¹⁴¹ This last element should not be underestimated: political Islamists happily and consistently fill the legal void by proffering their own rules for hostilities, from threshold determinations in defining what counts as an armed conflict (or self-defense) to new rationales for targeting noncombatants.¹⁴² Moreover, in doing so, such deployments of political Islamic interpretations

¹⁴¹ For a fascinating example of a contemporary Salafi cleric working to open dialogue with Muslim youths about this gap, through the Al-Maghrib Institute, see Andrea Elliot, *Why Yasir Qadhi Wants to Talk About Jihad*, THE NEW YORK TIMES, 17 March 2011, available at <http://www.nytimes.com/2011/03/20/magazine/mag-20Salafist.html>; Yasir Qadhi, *The Lure of Radicalism and Extremism Amongst Muslim Youth*, MUSLIM MATTERS, 18 October 2010, available at <http://muslimmatters.org/2010/10/18/yasir-qadhi-the-lure-of-radicalism-amongst-muslim-youth/>. In THE NEW YORK TIMES profile, Qadhi admits that support for the Palestinian cause was “a pathway” for severe anti-Semitism and he strongly identified with political Salafiya, which included religious intolerance such as declaring Sufis and Shia “heretics.”

¹⁴² A recent, unusual example analyzing Taliban use of Islamic *jus in bello* norms—and their departure from scholarly consensus—is Muhammad Munir, *The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law*, 93 INT’L REV. OF THE RED CROSS 1 at 22 (2011) (arguing that Islam is used as rhetoric, as a source of unity, and to mobilize fighters, “not as a guarantee for compliance with the Islamic law of war”). Munir makes specific mention that as mujahideen (holy warriors) of the Islamic Emirate of Afghanistan, the Taliban are under obligation to abide by the rules of Islamic law in conduct of hostilities and that while the Layha code for fighters places limits on suicide attacks and civilian casualties and in “limiting the effects of war, banning some forms of torture, and ruling out non-discrimination based on tribal origin, language, or

of Islamic norms for war are definitively not *lex specialis*: they are designed to leverage the opportunity of conflict and crises to set into motion new normative architectures that socially secure their own political interests and positions of authority. Islamists have, however, been able to seize this ideological advantage as they are one of the few vanguard groups willing to make modern *in bello* rules, just as they have benefited most from the deferral of these issues by religious authorities and Muslim governments who have ceded the field of theological-legal debate on security matters. In contrast to this trend, emergent problems of conflict and security, particularly warfare tactics evolved within the same Islamic horizon of terms, can be answered through Islam's ample legal resources—*jus contra bellum* prohibitions evident in the material history of the Qur'an, the model of Muhammad's own life practices in conflict settings detailed in the *sunna*, early *jus ad bellum* restrictions associated with *jihad*, and the classical Islamic *jus in bello*. This updating work, however, has yet to be done.

Contemporary scholars, including those in western academia, can help this process by exploring this gap, offering explanations for the “curious inversion” between modern and medieval Islamic writing on warfare, the fact that medieval writers focused “much more on concerns of legitimate means of warfare (*jus in bello*),” whereas modern writers “concentrate[d] heavily on *jus ad bellum* while devoting very little attention to the *jus in bello*.”¹⁴³ Yet, advancing our understanding of this gap must address the

geographical background,” it does show respect for some fundamental Islamic humanitarian rules. Moreover, he notes, many of its rules have “no basis either in Islamic law or in international humanitarian law and may even contradict both of them,” including those on the possible execution of POWs, the punishment of contractors, suppliers, and drivers, the introduction of *ta'zir* as a punishment for captives at the discretion of the judge for common criminals (who cannot be punished under *hudud*, *qesas*, *syasa*). Likewise, acts of perfidy allowed by the Layha (i.e., suicider feigning civilian status) “are to be considered perfidy in both divine law and humanitarian law,” and rules that combatants attempt to dress and look the same as the local people so as to resist identification “violate the principle of distinction between combatants and civilians and endanger the civilian population.”

¹⁴³ Sohail Hashmi, *Saving and Taking Life in War: Three Modern Muslim Views*, 89 MUSLIM WORLD 158, 158-9 (1999), notes the “majority of medieval writers began with a consensus on the ground for war (*jus ad bellum*), which held jihad to be both a war of defense as well as a war for the expansion of a *pax Islamica*” which, like others of the *pax* (Britannica, etc.) did not necessarily mean the absence of war. Hashmi also notes that the conformity between “international norms of behavior in wartime” and “Islamic injunctions on humane behavior toward the enemy” in a set of standards which Muslim jurists helped to develop are now normative among Muslim states; but such developments have also meant that incompatible features of medieval Islam are “obsolete” and modern Islamic writing on war is seen as unnecessary. For a general overview of classical Islamic *jus in bello*, keeping in mind Fred Donner's caution about, see KHADDURI (1955) at 51-137; and (1966) at 75-103, both *supra* note 59; AL-DAWOODY (2009), *supra* note 60, at 194-260; ZUHUR & ABOUL-ENEIN (2004), *supra* note 59, at 6-28; KELSAY

habitual noncompliance with *both* Geneva and Islamic rules by most Muslim state (and nonstate) actors, of which the rise of international terrorist activities justified on Islamic terms is a kind of subspecies.¹⁴⁴ Sohail Hashmi, for instance, offers a postcolonial cautionary tale by explaining this modern neglect as a product of Muslim scholar's own reactivity to "Western apprehensions of jihad" which then set the dominant terms for modern Islamic legal inquiry.¹⁴⁵ He also cites a lack of "free discussion" of modern *jus in bello* topics (i.e. assassination, terrorism, rape, insurgency, torture, violations of Islamic law) in "the repressive political atmospheres" in which many scholars worked and work.¹⁴⁶ Al-Dawoody, by contrast, finds this once-robust tradition fit for the classical period when war was the norm, but that "[c]ontemporary Muslim scholars [did] the opposite of their classical predecessors" and neglected "the Islamic *jus in bello* in the context of modern war" because "international society had already come to an agreement on the prohibition of offensive wars" and international law and the Geneva Conventions "satisf[ied] the same objectives as those of Islamic law."¹⁴⁷ Though changing paradigms of warfare must

(1993) *supra* note 49, at 57-76; RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* (2005) at 1-42; YAMANI (1985), *supra* note 59; EL FADL (1999), *supra* note 59; BASSIOUNI (2007), *supra* note 55; and *Jihad and the Islamic Law of War* (2009), The Royal Aal Al-Bayt Institute for Islamic Thought, Jordan, 31-46, available at http://www.rissc.jo/docs/jihad_final.pdf.

¹⁴⁴ AL-DAWOODY (2009), *supra* note 60, at 374, 375 underscores "the potential contribution these humane Islamic *jus in bello* norms could provide to the international society's efforts to humanize international armed conflicts" today and, further, how these contributions would "have been greater if modern Muslim scholars had addressed the same concerns as their classical predecessors in light of modern war situations." Likewise, he, much like Hashmi and Hallaq, fault Muslim governments and weak political institutions, including the "state domination of religious institutions" that have "weakened public trust in some state-salaried Islamic scholars" and added to fundamentalist groups' "own extreme interpretations and applications of Islam" as an alternative. Such are the strange fruit of state-sponsored cultural homogenizing strategies in their use of Islam, which have only strengthened extremist discourses that, then, substituted for a timely *jus in bello* response.

¹⁴⁵ Hashmi, *Saving and Taking Life in War*, *supra* note 143, at 158 (1999).

¹⁴⁶ Hashmi, *Saving and Taking Life in War*, *supra* note 143, at 158-9 (1999).

¹⁴⁷ AL-DAWOODY (2009), *supra* note 60, at 374 (noting "Some contemporary scholars have concluded that the Islamic rules governing the conduct of Muslims in war "[i]n many respects...actually supercede[s] the Geneva Conventions"). See also Troy S. Thomas, *Prisoners of War in Islam: A Legal Inquiry*, 87 MUSLIM WORLD 44, 52 (1997). Al-Dawoody (2009), at 194, notes that not only have the classical Muslim jurists "paid the greatest part of their attention to the Islamic *jus in bello*. . . while paying little attention to the Islamic *jus ad bellum*. . .," in the case of both international and non-international wars, contemporary Muslim writers have paid "no attention to addressing the Islamic *jus in bello*," especially those that "can be applied to contemporary war contexts," and Western scholars have focused "solely on giving various interpretations of the Islamic *jus ad bellum*, but have almost ignored the Islamic *jus in bello*." For mention by others of the inversion thesis, see PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM* (2005), *supra* note 52, at 119; Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 MUSLIM WORLD 144, 150-151 (1999); *Islam and the Theology of Power*, 221 MIDDLE EAST REPORT 28, 30, (2001).

be appreciated, it would seem hard to argue that international norms suffice when few modern Muslim actors (state, nonstate) follow the former and, in turn, often justify their lapse on the basis of the latter. In any case, these accounts point to incipient inquiry that must be strengthened, perspectives and research added, so that problems of humanitarian norms, Islamic and in international law, engage current challenges of security policy.

If emergent problems of warfare can be confronted through Islamic legal norms, a second lesson emerges from this normative basis: Islamic methodological strengths, including legal pluralism and legal innovation, are potential tools for updating humanitarian law in asymmetric environments. Since descriptions of Islamic legal pluralism (beginning with colonialist charges of incoherence) are well known, I briefly note how certain mechanisms of legal innovation may, in some respects, add to or even surpass international humanitarian law's adaptive capacity.¹⁴⁸ These include, for instance, *ijtihad*, or the juristic right of independent reasoning, and some of its respective reasoning styles, tools, processes, and approaches, especially *fatwas* or legal opinion in response to a socially-relevant question, and cultural knowledge or custom as it impinges upon legal opinion (*urf*).¹⁴⁹

¹⁴⁸ WAEL HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* (2001) at 241 has best shown how legal innovation presumes legal pluralism, noting that "the solution to the very problematic created by the multiplicity of opinion in the formative and even post-formative periods turned out to be itself the salvation of the legal system during the later stages of its development." "Without this multiplicity," he adds, "legal change and adaptability would not have been possible." He continues: "The old adage that in juristic disagreement there lies a divine blessing is not an empty aphorism, since critical scrutiny of its juristic significance proves it to be unquestionably true."

¹⁴⁹ Saif al-Din Al-Amidi defined *ijtihad* as the "total expenditure of effort in the search for an opinion as to any legal rule in such a manner that the individual senses (within himself) an inability to expend further effort," quoted in BERNARD WEISS, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 207 (1978). See KAMALI (1991), *PRINCIPLES OF ISLAMIC JURISPRUDENCE*, *supra* note 132, at 337-338. KAMALI (1991), *supra* note 132, at 315 defines *Ijtihad* as "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Shari'ah* from their detailed evidence in the sources," drawing on Amidi, *Ihkham IV*, Shawkani, *Irshad*, *Khudari*, and *Usul*. Hallaq (1984) at 3 defines *ijtihad* as "the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort" or "the maximum effort expended by the jurist to master and apply the principles and rules of *usuul alfiqh* (legal theory) for the purpose of discovering God's law." This activity, notes WAEL HALLAQ, *Was the Gate of Ijtihad Closed*, 16 INT'L J. MIDDLE EAST STUD. 3 (1984), was presumed by modern scholars "to have ceased about the end of the third/ninth century, with the consent of the Muslim jurists themselves," known as "closing the gate of *ijtihad*" or in Arabic, *insidid bab al-ijtihad*. As Joseph Schacht (1964), *supra* note 34, at 70-71 notes:

By the beginning of the fourth century of the hijra (about A.D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally

It must be said that legal innovation presumes legal pluralism in ways that Hallaq has described: “the solution to the very problematic created by the multiplicity of opinion in the formative and even post-formative periods [in Islamic law] turned out to be itself the salvation of the legal system during the later stages of its development.”¹⁵⁰ In effect, the “old adage that in juristic disagreement there lies a divine blessing is not an empty aphorism,” Hallaq explains.¹⁵¹ Considering the roles of the *mufti* and the author-jurist, these figures were authorized “to articulate, legitimize, and ultimately effect legal change” not as “a contingent, *ad hoc* feature” but as a “structural” feature “built into the very system that is Islamic law.”¹⁵² Muslim jurists and Islamic legal culture in general “were acutely aware of both the occurrence of, and the need for, change in the law, and they articulated this awareness through such maxims as “the fatwa changes with changing times” (*taghayyur al-fatwā bi-taghayyur al-azmān*), or through the explicit notion that the law is subject to modification according to “the changing of the times or to the changing conditions of society.”¹⁵³

Though the intention here is not to rehearse debates over *ijtihād* or the often idealist aspirations ascribed to independent reasoning, two facets which bear on legal resources for change in the security sector are worth mentioning. First, the creative potential of *ijtihād* often gets sidetracked by the well-known claim—initially put forth by medieval scholars—that the gates of *ijtihād* had closed by the tenth

settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications of independent reasoning in law, and that all future activity would have to be confined to the explanation, a application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of *ijtihād*', as it was called, amounted to the demand for *taklīd*, a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. A person entitled to *ijtihād* is called *mujtahid*, and a person bound to practice *taklīd*, *mukallid*.

In fact, part of the misunderstanding has arisen in its definition in opposition to *taqlīd*—understood as blind obedience to legal doctrines by established schools and jurists, treated as the norm after the gates of *ijtihād* purportedly closed. See SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ* (1996) at 73-82.

¹⁵⁰ See HALLAQ (2001), *supra* note 148.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See HALLAQ (2001), *supra* note 148, at 174, notes: “Having excluded the *qadi* and the professor as significant agents of legal change, we are therefore left with the *mufti* and the author-jurist. It is these two types of jurists – playing two distinct roles – who. . . undertook the major part, if not the entirety, of the task of articulating the law’s reaction to social and other changes.”

century, thus, delivering a complete, static, and orthodox legal corpus to the post-formative period.¹⁵⁴ Many scholars have since rejected this received wisdom, including the idea that jurists abandoned their right to independent reasoning (on issues not regulated by foundational texts) and became mechanistic practitioners of *taqlid*, adhering to prior rulings by established schools of jurisprudence.¹⁵⁵ The lion's share of confusion over this issue stems from the perennial problem of legal sources, the fact that scholars use different genres to deduce whether or not *ijtihad* was practiced after the tenth century. As Baber Johansen notes, claims of stasis, conservatism, and continuity were correct for the sacred sources (the Qur'an and *sunna*) which were not open to revision in substance or interpretation and, along with them, the *usul al-fiqh*, the fundamental legal methods, which also remained largely removed from innovation. But the broad genre of "legal practice" invites innovation and includes the works of *furu' al-fiqh* and its subgenres: the *mutun* or textbooks elucidating school-specific legal doctrine (though these did not undergo substantive development after the tenth and eleventh centuries), the *shurub* or commentaries on legal doctrine in relation to specific situations or problems, and, especially, the *fatwas*, legal opinions in response to specific current event questions or hypotheticals.¹⁵⁶

¹⁵⁴ The sources for this standard view are JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW (1964) 70-71, though as Baber points out Schacht acknowledges later minor changes at 71-72; JND ANDERSON, LAW REFORM IN THE MUSLIM WORLD (1976) 7; NJ Coulson, A HISTORY OF ISLAMIC LAW (1964) 75, 80, 85 and his treatment of some later changes at 140-142; HAR GIBB, MODERN TRENDS IN ISLAM 13 (1947), held that the gate was not only closed but "never again to be reopened"; and KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (1991) *supra* note 132 at 337-338.

¹⁵⁵ For alternative accounts and those who question the completeness of the end to *ijtihad*, see WM WATT, *The Closing of the Door of Ijtihad*, I ORIENTALIA HISPANICA (1974) 675-678; BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH (1999) 446; RUDOLPH PETERS in *Ijtihad and Taqlid in 19th Century Islam*, 20 DIE WELT DES ISLAMIS (1980) 133, for jurists' embrace of a living tradition of *ijtihad* in the work of Shah Wali Allah (d. 1762) and al-Sanusi (d. 1859), both of whom critiqued blind adherence to any legal school and posited *ijtihad* as a Muslim duty; MUHAMMAD QASIM ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE (2003) 17-18; and HALLAQ (2001), who has spent a good part of his career substantiating an alternative premodern account in general, including *Was the Gate of Ijtihad Closed* (1984), *supra* note 149; SHARIA: THEORY, PRACTICE, AND TRANSFORMATIONS, *supra* note 58 at 445. But as Johansen points out (1999), *supra* note 155 at 447, neither Peters nor Hallaq claim that jurists' continued embrace of *ijtihad* resulted in new legal ordinances, so we should not confuse jurists' claim to this right with their ability to actually change legal doctrine. Also, see JUDITH E. TUCKER'S review of Islamic legal studies on this issue, IN THE HOUSE OF THE LAW: GENDER AND ISLAMIC LAW IN OTTOMAN SYRIA AND PALESTINE (1998) 10-15; and Baber Johansen's (1999) discussion of the "closing of the gates of al-ijtihad" by Sunni law school jurists but not as a part of dominant doctrine among Shia jurists, at note 1, p. 446.

¹⁵⁶ Scholars have, thus, begun to recognize change in Islamic law between the tenth and nineteenth centuries in these forms: in introducing new legal doctrine in judicial practice explained in the commentaries (*suruh*), the responses (*fatawa*), and the treatises on particular questions (*rasa'il*)

The fact that the subfields of Islamic legal practice did not develop in lock step not only affirms legal pluralism, itself intertwined with legal innovation, but serves as a critical reminder of this point of classical consensus: the methodological centrality of *ijtihad* as the third source of Islamic law (after the Qur'an and *sunna*) and, importantly, its status as a Muslim duty, as Mohammad Hashim Kamali often stresses.¹⁵⁷ Too little scholarly attention, particularly in western academia, has been devoted to the nature of this obligation, as Kamali emphasizes, and the fact that most classical scholars derive the other main judicial methods from *ijtihad*—i.e., consensus (*ijma'*), analogy (*qiyas*), juristic preference (*istihsan*), the public interest (*maslahah*), presumption of continuity (*istishab*)—thus, making “all the non-revealed proofs of Sharī'ah” an “embodiment of the single phenomenon of *ijtihad*.”¹⁵⁸ Most interestingly, this source, unlike the revealed sources, remains in a perpetual state of development and gleans its very validity by “its harmony with the Qur'an and the Sunnah.”¹⁵⁹ That is, *ijtihad* functions as “the principal instrument of maintaining th[e] harmony between revelation (*wahy*) and reason”—the core of the much-valued essential unity of the Sharī'ah.¹⁶⁰ Thus, the juristic practice of independent reasoning is not only part and parcel of the sources and methods of Islamic law, but an expression of the value for this neglected core competency in the modern era: proficiency in harmonizing across incommensurate or attenuated realms—reason applied to revelation, the individual and history—and, as such, a critical asset for contemporary humanitarian law. Indeed, this dialectical ability encapsulated in the skill of *ijtihad* to bring together different registers of normative meaning—*sunna* and Qur'an, revelation and reason, the

¹⁵⁷ See Qur'an (Muhammad, 47:24): “Will they not meditate on the Qur'an, or do they have locks on their heart?”

¹⁵⁸ KAMALI (1991), *supra* note 132, at 315. KAMALI also notes at 316: “The subject of *ijtihad* must be a question of Shari'ah; more specifically, *ijtihad* is concerned with the practical rules of Shari'ah which usually regulate the conduct of those to whom they apply (i.e. the mukallaf). This would preclude from the scope of *ijtihad* purely intellectual (*'aqli*) and customary (*urfi*) issues, or matters that are perceptible to the senses (*hissi*) and do not involve the inference of a *hukm shar'i* from the evidence present in the sources. Thus *ijtihad* may not be exercised in regard to such issues as the createdness of the universe, the existence of a Creator, the sending of prophets, and so forth, because there is only one correct view in regard to these matters, and anyone who differs from it is wrong. Similarly, one may not exercise *ijtihad* on matters such as the obligatory status of the pillars of the faith, or the prohibition of murder, theft, and adultery. For these are evident truths of the Shari'ah which are determined in the explicit statements of the text.”

¹⁵⁹ KAMALI (1991), *supra* note 132, at 315.

¹⁶⁰ *Id.*

mass of juristic opinion, legal doctrine, and customs—is perhaps one of the signal most strengths that Islamic law offers to new security challenges.

The second and last point regarding *ijtihad* falls squarely within legal innovation on military matters. In traditional jurisprudential debate, the question has often been raised as to whether the Prophet’s own rulings are divinely inspired (*wahy*) or partake of *ijtihad*. Though the ulema have differed on whether his *shari’i* rulings fall within the scope of *ijtihad*, they have, interestingly enough, shown general agreement on this question in one subject area: the laws of war. As Kamali notes, there is general consensus among the ulema that “the Prophet practiced *ijtihad* in temporal and military affairs.”¹⁶¹ Not only then is there a venerable tradition stretching back to the prophet Muhammad himself for *ijtihad* in military matters—a prophetic precedent for Islamic legal creativity if there ever were one—but, more interestingly, many of the ulema find evidence of *ijtihad*, of the prophet’s personal reasoning, in those areas in which he erred, one of the most prominent instances of which happens to be the treatment of prisoners of war.¹⁶² As Kamali notes, “we find passages in the Qur’an which reproach the Prophet for his errors,” particularly, “a text in sura al-Anfal (8:67) [that] provides: “It is not proper for the Prophet to take prisoners [of war] until he has subdued everyone in the earth.”¹⁶³ During the battle of Badr, it is reported that seventy captives were taken prisoner and when the Prophet, after consulting with Abu Bakr, chose his recommendation to release the captives against a ransom (whereas ‘Umar b. al-Khattab thought they should all be killed), the *ayah* was later revealed which disapproved of taking ransom for captives. Elsewhere, in sura al-Tawbah (9:43), in an address to the Prophet, the text provides: “God granted you pardon, but why did you permit them to do so before it became clear to you who was telling the truth?” As Kamali notes, “[t]hese and similar passages in the Qur’an indicate that the Prophet had on occasions acted on his own *ijtihad*. . . [f]or had he acted in pursuance of a divine command, there would have been

¹⁶¹ KAMALI (1991), *supra* note 132, at 315. For “the Ash’aris, the Mu’tazilah, Ibn Hazm al-Zahiri and some Hanbali and Shafi’i ulema,” Kamali observes, “the Qur’an provides clear evidence that every speech of the Prophet partakes in *wahy*.”

¹⁶² See KAMALI (1991), *supra* note 132, at 326-327.

¹⁶³ KAMALI (1991), *supra* note 132, at 326-327.

no occasion for a reprimand, or the granting of divine pardon for his mistakes.”¹⁶⁴ *Ijtihad* then is not only part of the tradition of law of war thinking from the very beginning, it is an earnest matter of integrity—better for the community to err in your opinion than not having used your reasoning capacities at all.

The last three lessons pertain more directly to Islamic insights for contemporary conflict settings and their implications for humanitarian principles. The third lesson that Islamic law—and its global contention—has made abundantly clear is that religion occupies not only a role in global affairs today but in our changing legal norms for governing them. This complex role is, of course, double-edged. Religious precepts may, on the one hand, influence and even advance humanitarian goals in conflict settings, but they may also, on the other hand, become a ruse for politics and unrepresentative policies, a convenient means to justify political uses of force, for instance. Insofar as the international community must deal with this second scenario of religiously-inspired uses of political force, Islamic law is also a praxis-oriented resource. That is, its curious strength is that it offers, as mentioned, a model of religiously-informed legal norms that at its core eschews politics, embeds mechanisms within these norms to prevent political leaders from equating legal rules with their preferential power, and positions the ethics of justice over political expediency.

Moreover, Islamic jurisprudence—itsself a kind of misnomer, since Islamic law remains so ruthlessly practical and palpably embodied in the texture of daily life—is a praxis-based value system and, as such, in many respects less prone to activist misuses than other more ephemeral ideologies. That is, “walking the walk,” striving for commensurability with the higher but concrete standard of Muhammad’s life for the purpose of pleasing God, defines Islam’s practicality, a feature often devalued by lofty spiritual endeavors, so that religious authorities who fixate on doctrinal debates do so at their own peril with respect to this social praxis. This is true too in matters of war: it is not only that scholars treat as part of Islamic law Muhammad’s specific practices in historic battles or that a wide swath of modern resistance movements analogize their own strategic decisionmaking to those medieval choices, but that the Islamic laws of war are essentially practical rules (i.e., sparing women and children, curtailing

¹⁶⁴ KAMALI (1991), *supra* note 132, at 329.

the plundering of foodstuffs, refraining from cutting down fruit bearing trees).¹⁶⁵ In this prosaic process of practicing such rules, walking in Muhammad's footsteps, one grows, inevitably, closer to God. There is no shortage of instances in which, for instance, personal hypocrisy—reserving the daily practice of Islamic norms to the poor, the working classes, the foot soldier and not to Muslim elites or political Islamist leaders—impugns not only the individual but imperils their political or social agenda.

Fourth, from a broader perspective, taking Islamic law seriously obligates one to critically examine use of force norms in cross-cultural terms, to define international standards inclusively, and to ensure that problems of cultural or linguistic translation (i.e., concepts of justice or human rights) do not become problems of politics or political interest groups. The issue here is that claims for culture have too often led either to an “othering” of Islam on the one hand, or, as in the case of cultural relativism, a means to evade international norms for governing conduct during conflict and to rationalize illegitimate, autocratic, or failing states. The modern *jus in bello* is neutral—it covers both sides in a conflict and is no determination of justice in wars—and, as such, pushes back against cultural relativism of either brand. But Islamic law too offers an antidote to political and cultural abuses of the law in its concept of justice. That is, justice in Islam is no western notion of jurisprudential ‘fairness’ or procedural consistency, but a preoccupation with cosmic reconciliation, the idea that God’s epic eye view applies to earthly disputes and that when such disputes are not resolved properly, the result is deeply, socially unsettling. Colonial histories, regional conflicts, including the Palestinian question, comprador elites, but also problems of governance, legitimacy, human rights, including state-sponsored political violence and repression, raise

¹⁶⁵ See Abu Bakr’s *Ten Rules for the Muslim Army* in BERNARD LEWIS, *Abu Bakr On the Rules of War* (632), 213 ISLAM FROM THE PROPHET MUHAMMAD TO THE CAPTURE OF CONSTANTINOPLE, V1: POLITICS AND WAR (1974), derived from 10th century Persian scholar MUHAMMAD IBN JARIR AL-TABARI (D. 923), *TARIKH AL-RUSUL WA AL-MULUK/HISTORY OF THE PROPHETS AND KINGS* (translated and edited in 15 volumes by MJ de Goeje, 1879–1901).

O people! I charge you with ten rules; learn them well! Do not betray or misappropriate any part of the booty; do not practice treachery or mutilation. Do not kill a young child, an old man, or a woman. Do not uproot or burn palms or cut down fruitful trees. Do not slaughter a sheep or a cow or a camel, except for food. You will meet people who have set themselves apart in hermitages; leave them to accomplish the purpose for which they have done this. You will come upon people who will bring you dishes with various kinds of foods. If you partake of them, pronounce God's name over what you eat. You will meet people who have shaved the crown of their heads, leaving a band of hair around it. Go in God's name, and may God protect you from sword and pestilence.

troubling matters of injustice felt personally and impactful across Muslim communities in ways that tap into, not procedural norms, but large-scale ethical modalities reflective of transitional justice traditions and concepts of truth and reconciliation. This Islamic notion of justice is extremely powerful, evident in the Arab Spring uprisings, and is a critically important means to ensure government accountability within Islamic terms.

Fifth and last, Islamic law has suffered from a paradox since the nineteenth century that now characterizes international humanitarian law—the eclipse of the state actor in conflict situations. Part of the complexity of this issue is the geographical impulse of Islamic law (in the concept of the *ummah*) which posits—not a state-based or inter-state architecture—but an Islamic moral-legal empire in theory which is subsequently to be actualized in reality. The negative, imperialist, territorializing tendencies of this impetus are well known and, in recent contexts, Islamists have tried to resuscitate the Caliphate on these terms. But on the positive side, there are ample and untapped possibilities of this preexisting transnational legal regime—not the least of which is an ethical regime to constrain transgressive behavior among the multivariate range of actors that now populate the contemporary battlefield and conflict settings more broadly. Such possibilities are certainly evident in recent Arab prodemocracy uprisings across widely divergent regions and regimes: constituencies rapidly inhabited a common vocabulary of resistance, including an intrinsic rejection of tyranny authorized by Islamic law itself. But they are also evident in the role that religious authorities may play in censuring transnational Islamist armed groups who are engaged in theological debate over the very terms and meaning of Islamic law. More broadly speaking, such possibilities also involve a cross-cultural, cross-national conversation about the applicable contemporary Islamic norms of war suited to contemporary battlefields.



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