

ARTICLE

THE “GOD GAP” IN INTERNATIONAL AFFAIRS: MISSING CROSS-CULTURAL CONVERSATIONS IN INTERNATIONAL HUMANITARIAN LAW AND ISLAMIC JURISPRUDENCE

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I. THE “GOD GAP” IN GLOBAL AFFAIRS

Until recently, one unexpected point of agreement across the social sciences was an aversion to religion. Fields as diverse as political science, anthropology, cultural studies, international law, and development studies, among others have shown a longstanding squeamishness in tackling the subject.¹ In public and international affairs, Daniel Philpott

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1. The contemporary social science literature addressing this gap is vast. For milestone examples in a broad debate, see generally BRYAN S. TURNER, *THE RELIGIOUS AND THE POLITICAL: A COMPARATIVE SOCIOLOGY OF RELIGION* (2013); Daniel Philpott, *Has the Study of Global Politics Found Religion?*, 12 ANN. REV. POL. SCI. 183-202 (2009); Anna Grzymala-Busse, *Why Comparative Politics Should Take Religion (More) Seriously*, 15 ANN. REV. POL. SCI. 421-42 (2012); Carolyn M. Warner & Stephen G. Walker, *Thinking about the Role of Religion in Foreign*

described how political scientists were not only “behind” in religious inquiry in politics, but slow to catch up in identifying the late twentieth-century emergent role of religion as a force in public and international life—even after 9/11 when religiously motivated political actors made this link undeniable.² This gap in analysis belongs, Philpott explains, to the “secularization thesis” in western framings of global politics from the Westphalia (1648) narrative forward.³ 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 Despite the spectacular way in which religion has

Policy: A Framework for Analysis, 7 FOREIGN POL’Y ANALYSIS 113-35 (2001); BRYAN S. TURNER, RELIGION AND MODERN SOCIETY: CITIZENSHIP, SECULARISATION AND THE STATE (2011); Jonathan Fox, *Religion: An Oft Overlooked Element of International Studies*, 3 INT’L STUD. REV. 53 (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); cf. Sultan Tepe & Betul Demirkaya, *(Not) Getting Religion: Has Political Science Lost Sight of Islam?*, 4 POL. & 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 & Carole Rakodi, *Revisiting Religion: Development Studies Thirty Years On*, 39 WORLD DEV. 45 (2011).

2. Daniel Philpott, *The Challenge of September 11 to Secularism in International Relations*, 55 WORLD POL. 66 (2002); see also Philpott, *supra* note 1, at 184 (noting that while there was “genuine neglect, religion’s absence was never complete”). For some exceptions, see DOUGLAS JOHNSTON & CYNTHIA SAMPSON, RELIGION, THE MISSING DIMENSION OF STATECRAFT (1994); MARK 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 Ronald Inglehart, *Is There a Global Resurgence of Religion?*, PEW FORUM ON RELIGION & PUBLIC LIFE, <http://www.pewforum.org/2006/05/08/is-there-a-global-resurgence-of-religion/> (last visited Nov. 21, 2016). 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—although, 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.

3. For the interesting case of reversal, see THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS (Peter L. Berger ed., 1999) (declaring the 21st century desecularized or “God’s Century”).

4. *Id.* (arguing such theories “reason as if religion has disappeared from politics”). For the interpretation of the phrase “God’s Century,” see Timothy Samuel Shah & Monica D. Toft, *Why God is Winning*, 155 FOREIGN POL’Y 28-43 (2006). For the authors’ full account of the phenomenon, see MONICA DUFFY TOFT ET AL., GOD’S CENTURY: RESURGENT RELIGION AND GLOBAL POLITICS (2011). For the role of fundamentalist religion and law in these processes, see GABRIEL A. ALMOND ET AL., STRONG RELIGION: THE RISE OF FUNDAMENTALISMS AROUND THE WORLD (2002); John L. Comaroff, *Reflections on the Rise of Legal Theology Law and Religion*

entered contemporary American political consciousness in the last two decades, robust theoretical and methodological tools to shift inquiry from a default secularism, particularly in national and international security inquiry, are still in short supply.⁵

If this is true academically, it is especially true in statecraft. A two-year study by the *Chicago Council on Global Affairs* concluded that U.S. foreign policy is "handicapped by a narrow, ill-informed and uncompromising [w]estern secularism" that "feeds religious extremism, threatens traditional cultures, and fails to encourage religious groups that promote peace and human rights."⁶ Though attributing extremisms to gaps in U.S. academic discourse is a causal stretch, Chris Seiple, President Emeritus 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 This lack of innovation still defines U.S.-Muslim outreach efforts, notably at the U.S. Department of State and in the Executive Office of the President, and in security and counterterrorism efforts.⁹ Without new ideas or methods, practitioners tend to polarize policymaking in countless ways: rejecting religion out of hand; or in an opposite tendency, embracing its role in foreign policy without its measured integration with other priorities; reducing religious ideologies to individuals, groups, movements, or factions; and injecting newly valued religious discourse into foreign policy engagements in ways that result in unintended policy consequences.

in the Twenty-First Century, 53 SOC. ANALYSIS 193-216 (2009).

5. Tepe & Demirkaya, *supra* note 1.

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)* (2011), <https://www.thechicagocouncil.org/publication/engaging-religious-communities-abroad-new-imperative-us-foreign-policy>; David Waters, 'God Gap' Impedes U.S. Foreign Policy; Task Force Says, WASH. POST (Feb. 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/23/AR2010022305103.html>.

7. Waters, *supra* note 6.

8. *Id.* 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).

9. For U.S.-Muslim relationship-building and outreach initiatives in the Executive 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, 74 Fed. Reg. 6533 (Feb. 9, 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. 31, 2001).

If a “god gap” in U.S. policy in international affairs remains a shortcoming, one aided by the absence (until recently) of robust social science engagements with religion, a more serious paradox exists with respect to Islam.¹⁰ As discussions of religion in public life have increased, there are equivalent complex pressures on the study of Islam, particularly comparatively and especially in law and security studies.¹¹ Such pressures do not belong only to familiar “orientalist” narratives of ignorance or bias toward Islam in the West.¹² They arise from core historical shifts prompted by globalization and the resultant challenges of studying the rise of religious diversity worldwide. The processes of globalization have increased cultural and religious diversity on a global scale. Not only is religion occupying a more prominent place in twenty-first century life—despite earlier projections of its decline—religious identity is becoming more politically salient, posing new challenges to governance. Sociologist Bryan Turner describes increasing “tensions” between “state and religious actors” over religious pluralism in domestic and international spaces:¹³ from rising political and social exclusions and violence, structural discrimination against certain groups, limits on religious freedom and expression, to forced displacement and migration. Governments’ divergent policy responses are, in turn, informed by preexisting relationships between religion and state in each society, many currently undergoing intense pressures and change. Such challenges have forced states and other actors to redefine the boundaries of religion

10. Berger, *supra* note 3 (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”).

11. Tepe & Demirkaya, *supra* note 1, at 223 (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. Samuel P. Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22 (1993) (defining global conflict in civilizational-religious terms and included Islam). For the use of the “clash of civilizations,” see Bernard Lewis, *The Roots of Muslim Rage*, ATLANTIC MONTHLY 48 (1990); Ervand Abrahamian, *The U.S. 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).

12. 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); Abdul Latif 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).

13. See *THE SOCIOLOGY OF SHARI’A: CASE STUDIES FROM AROUND THE WORLD* (Adam Possamai et al. eds., 2015).

reflected in instruments of governance.

In academic inquiry, scholars have long lamented neglected research topics pertinent to the study of Islam: areas studies in international affairs, exceptionalist approaches to Arab and Middle East societies; marginalized support and programming for certain regions of the world, including languages; the interjection of partisan politics into fields ostensibly committed to basic scientific research; even self-censure by academics on such topics as Islam and international human rights law. In international and comparative legal and security studies, the result of these limits has been a stilted rapport involving Islamic societies on questions of comparative governance, security challenges, and legal norms—despite the fact that Islamic traditions have much to share in understanding the contemporary international security environment, the special challenges of violent extremism, and context-specific solutions.

The main purpose of this Article is, thus, to set out a preliminary case for such a rapport, one that brings together interdisciplinary scholarship in international law and security studies, and demonstrates in the specific case of Islamic and International Humanitarian Law (IHL) the potential to identify shared conceptual tools and common assessments of cross-cutting international security challenges.¹⁴

In the following subsections, I first outline key barriers in social science and comparative research on Islamic law and its implications.¹⁵ I

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.*, the “law of international armed conflict”). YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 13-14 (2004); *see also* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (4th ed. 2005). IHL relies upon customs, treaties, and general humanitarian principles (of distinction, proportionality, unnecessary suffering, and military necessity). The bulk of *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, *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 *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 U.N. 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.

15. ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (4th ed. 2006). For her reflection on this nexus, see *The Islam and Human Rights Nexus: Shifting Dimensions*, 4 *MUSLIM WORLD J. HUM. RTS.* 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*

then 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. Lastly, I take up the insights possible when these regimes are brought together to critically reflect upon such challenges.

II. SELF-IMPOSED ANALYTICAL BARRIERS IN STUDYING ISLAMIC LAW

Five key analytical barriers in the comparative and contemporary study of Islamic law forestall its promise in applying Islamic analytical resources to contemporary problems of international security—from the widespread use of civilians in hostilities (terrorism, human shielding, child soldiers) to asymmetric tactics and more general problems of human security.¹⁶

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; (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. & ISLAMIC L.* 27, 27 (2003).

16. Predictably, security and security studies are contested terms. See the special issue on “The Evolution of International Security Studies.” 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” and matters involving the survival of state and society—to expansive international security and human security concerns, which comprise social, economic, environment and climate, food and development, and 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 STUD. Q.* 211, 212 (1991); Ole Wæver, *Securitization and Desecuritization*, in RONNIE D. LIPSCHUTZ, *ON SECURITY* 48 (1995). For traditional strategic or defense policy notions, see HARVEY SAPOLSKY ET AL., *U.S. DEFENSE POLITICS: THE ORIGINS OF SECURITY POLICY* (2008); THE

One of the most trenchant barriers is the interdisciplinary obsession with the history of Islamic law—in legal studies, political science, terrorism studies, and elsewhere—at the expense of contemporary Islamic law, including comparative inquiry into hybrid European legal systems in most Muslim-majority states.¹⁷ There is a two-step problem here. First, as sociologist Said Amir Arjomand points out, relying on Hodgson's terminology, "there is an alarming tendency in the conventional wisdom to identify what is 'Islamic' . . . culture and civilization by deriving it from Islamic jurisprudence (*fiqh*)."¹⁸ In short,

PRUDENT USE OF POWER IN AMERICAN NATIONAL SECURITY STRATEGY (Stephen Van Evera & Sidharth Shah eds., 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); Roland Paris, *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 Ayoob, *Defining Security: A Subaltern Realist Perspective*, in KEITH KRAUSE & MICHAEL C. WILLIAMS, *CRITICAL SECURITY STUDIES* 130 (1997) (defining 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 BHUPENDRA 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).

17. 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, 423-24 (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 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.

Id.

18. SAID AMIR ARJOMAND, *PERSO-ISLAMIC POLITICAL ETHIC IN RELATION TO THE SOURCES OF ISLAMIC LAW* 82 (Mehrzaed Boroujerdi ed., 2013). Arjomand notes that he is using "Islamicate" in Hodgson's sense:

Islamic culture—never mind what is properly religious—arises from many sources beyond Islamic law generally and *fiqh*, specifically. To put this point differently, the history of Islamic law casts an enormously long shadow on the study of Islam and Islamic law—in ways that displace accurate assessments of its evolution, its current diverse role in Muslim-majority governance, and its relation to other areas of social inquiry, including politics and conflict.

Second and relatedly, as legal historian Wael Hallaq notes, the shadow of Islamic legal history has distorted the very meaning and corpus of Islamic law in general: “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,” he notes, making this “expansive period” of legal history “depressingly a *terra incognita*.”¹⁹ Likewise, Hallaq adds, though the formative and modern

The adjective “Islamic,” correspondingly, must be restricted to “of our pertaining to” Islam *in the proper, the religious, sense*, and of this it will be harder to persuade some . . . just as when one speaks of Christian literature one does not refer to all the literature produced in Christendom . . . Unfortunately, there seems to be no adjective in use for the excluded sense—“of or pertaining to” the society and culture of Islamdom. . . . I have been driven to invent a term, “Islamicate.” It has a double adjectival ending on the analogy of “Italianate,” “in the Italian style,” which refers not to Italy itself directly, not to just whatever is to be called properly Italian, but to something associated typically with Italian style and with the Italian manner. Rather similarly . . . “Islamicate” would refer not directly to the religion, Islam, itself, but to the social and cultural complex historically associated with Islam and the Muslims, both among Muslims themselves and even when found among non-Muslims.

MARSHALL HODGSON, *THE VENTURE OF ISLAM, VOLUME 1: THE CLASSICAL AGE OF ISLAM* 59 (1974).

19. Wael B. Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse*, 2 *UCLA J. ISLAMIC & NEAR E. L.* 1, 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 generally* Wael B. Hallaq, *THE FORMATION OF ISLAMIC LAW* (Lawrence Conrad ed., 2004); *but see* David Powers, *Wael B. Hallaq on the Origins of Islamic Law: A Review Essay*, 17 *ISLAMIC L. & SOC.* 126, 133; 140-43; 149 (2010) (disagreeing with these assessments in his extended review). For how the Orientalist project “appropriated Islamic law as a field of knowledge,” *see* Wael Hallaq, *SHARĪ‘A: THEORY, PRACTICE, TRANSFORMATIONS* 1-6 (2009) [hereinafter HALLAQ, *SHARĪ‘A*]. 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) [hereinafter STEWART, *ISLAMIC LEGAL ORTHODOXY*].

periods are actually “two of the most studied epochs in the history of Islamic law, they [also] remain comparatively unexplored”²⁰—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.²¹ It is difficult to overstate the liability of this complex obsession with Islamic legal history—and, at the same time, the lack of systematic inquiry on the subject. At a minimum, it amounts to a lost historical narrative that prevents synthesis of past to present and thereby prevents the 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 within an Islamic ambit, it forestalls creative responses that tap the rich

20. WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 1-2 (2005). 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.” Hallaq created an “index of the state of scholarship on the formative period. 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.” JOSEPH SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1950); HARALD MOTZKI, *THE ORIGINS OF ISLAMIC JURISPRUDENCE: MECCAN FIQH BEFORE THE CLASSICAL SCHOOLS* (Marion H. Katz trans. 2002) (1991); YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR’AN, THE MUWATTA’ AND MEDINAN ‘AMAL* (1999). Powers, *supra* note 19; NOEL J. COULSON, *A HISTORY OF ISLAMIC LAW* (1964); JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* (1982).

21. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW*, *supra* note 20, at 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) 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).

capacity of Islamic law for the present. More subtly, this poverty in historical understanding allows homogenizing narratives about the very terms “Islam” and “Islamic law” to continue apace, including their use in both extremist and misinformed agendas—a point we return to in the following Part.²²

Legal scholar Lama Abu-Odeh sums up best the implications from this obsession with medieval Islamic history, calling it “an odd reversal in which history speaks as present,” whereby the study of Islamic law, particularly among Islamic law scholarship in elite U.S. universities, “bears no relationship to how such courses are taught in the Islamic world itself” thus, amounting to a “fantasy” about a “foundational” authentic “identitarian” category “shared by all ‘Muslims’” based on “religious/legal beliefs” and a “teleological notion of history.”²³ This fantasy narrative of the “supremacy of Islamic law” 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 actual Islamic world itself.²⁴ 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.”²⁵ 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

22. 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., (Mar. 5, 2011), <http://www.wsj.com/articles/SB10001424052748703580004576180522653787198>; John Yoo, *Opinion: We Don't Need U.N. Approval to Save Libyan Lives*, WALL ST. J., (Mar. 5, 2011), <http://www.wsj.com/articles/SB10001424052748703580004576180332886448822>.

23. Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 792-93 (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 Code, Corporation Law, Civil and Criminal Procedure, Evidence . . . , 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!

Id. at 791. See generally Abdullahi Ahmed An-Naim, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1 (2010).

24. Abu-Odeh, *supra* note 23, at 791-92.

25. *Id.*

adjudicated their criminal cases for over a century now in courts that are enactments of twentieth-century European criminal jurisprudence."²⁶

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, [and] legal curricula."²⁷ "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."²⁸ The recent study of these transformations, an increasing focus of interdisciplinary scholarship in the work of Hamoudi, Clark, Lombardi, Lynch, Feldman, Powell, Ahmad, among others, especially after the Arab Spring on such matters as constitutional hybridity, is playing "catch up" and facing residual, trenchant assumptions about the relative influence of Islamic legal history and other forms of cultural relativism, which frame and constrain inquiry.

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—although 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.²⁹ The point is not to malign the careful, painstaking

26. *Id.*

27. *Id.*

28. *Id.* at 823.

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 and juridical hold Islamic law had had on Muslims, covering the whole spectrum of one's life-acts.

TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003).

29. See *supra* note 19. For Hallaq's interpretation of the role of Orientalism in this historiography. While I agree generally, the "strategic agenda" is not coherent nor the sole motivating factor—most obviously because Orientalism persists even as strategic powers and their instruments change over time, in many cases drastically.

work of classical Islamology or research in history, hermeneutics, philology, linguistics, orthography—work too often slighted in short-sighted U.S. research budgets in the humanities—but to question the equation of historical textual inquiry with the meaning and practice of contemporary Islamic law in general. This oversimplified approach to law across the vast and diverse societies associated with Islamic culture, religion, and strong Muslim constituencies has much to do with the current methodological and theoretical limits scholars have placed on themselves and comparative inquiry in ways that are beginning to change.

Second, a still entrenched, essentially British Victorian-era of disciplinary divisions of labor still segregates Islamic inquiry in the humanities, on the one hand, including history, ethics, religion, and textuality, from empirical research, on the other hand, in the social sciences and matters of governance, society, and politics. Experts from these respective fields may neither know nor engage each other's work, thus deprioritizing in scholarly practice the interdisciplinary synthesis needed for innovation in contemporary inquiry.³⁰ Third, the dearth of translations (among English, Arabic, Persian, Urdu, Dari, and Pashto) has meant little intercourse between both western and non-western Islamic legal scholarship and within non-western schools of thought with the invariable checks and balances that cross-cultural inquiry brings. Fourth, a hamstrung independent publishing tradition in many Muslim societies, owing from systemic underinvestment in public discourse, public education, and longstanding state censorship,³¹ has removed such

30. 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 VA. J. INT'L L. 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).

31. See U.N. DEVELOPMENT PROGRAM, 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 J. WORLD HIST. 523, 523 (2009): "One of the most enduring achievements of the 'Abbasid

discussion and deliberation from public scrutiny and even kept the best scholars in the dark.³² Last, an obsession with the medieval heyday period of Islamic law, a thing of which to be indubitably 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, by autocratic governments in law and policy.³³ Taken in sum, these and other factors narrow robust inquiry into Islamic law in the here and now, in its actualized diversity, and in its complex links to other social spaces (politics and economics).

The second obstacle to a more robust research agenda for comparative inquiry in contemporary cross-cultural law and security issues stems from the paucity of scholarship in the Islamic tradition on that branch of humanitarian law known as *jus in bello*, the law governing the conduct of parties in war.³⁴ John Kelsay, much of whose work comprises

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.”

32. See, for programs dedicated to solving this well-known problem, the Mohammed bin Rashid Al Maktoum Foundation (MBRF), <http://www.mbrf.ae/>, and the UNDP REGIONAL BUREAU FOR ARAB STATES (UNDP/RBAS) ARAB KNOWLEDGE REPORT 2009: TOWARDS PRODUCTIVE INTERCOMMUNICATION FOR KNOWLEDGE 60-91 (2009). See also the Cambridge, U.K. 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,” <http://www.its.org.uk>.

33. The obvious exception is emergent work on Islamic finance. See Hamoudi, *supra* note 30; Haider Ala Hamoud, *Orientalism and “The Rise and Fall of the Islamic State,”* 2 MIDDLE E. L. & GOVERNANCE: AN INTERDISC. J. 81 (2008) (reviewing Noah Feldman’s book, *The Fall and Rise of the Islamic State* and attributing such romantic dreams to still current orientalist approaches to Muslim polities, law, and sharia).

34. For a fuller discussion of *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* text accompanying notes 60-67. 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 “world” wars. See generally Robert C. Stacey, *The Age of Chivalry, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Michael Howard et al. eds., 1994); and see LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 26-39 (3d ed. 2008); JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200–1740* (1975); G.I.A.D. Draper, *Book Review, The Just War Doctrine*, 86 YALE L.J. 370 (1976); MICHAEL HOWARD, *TEMPERAMENTA BELLI: CAN WAR BE CONTROLLED?* (1979);

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.³⁵ 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.³⁶ 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.”³⁷ Too often, we see the implications of this absent Islamic Law of war tradition in the warfare tactics embraced recently, using the imprimatur of Islamic legal authority, by jihadist and transnational Islamist extremist organizations.

Importantly, as Kelsay notes, without the unifying mechanism of the Caliph in articulating or inventing an often-norm based policy approach to these regional and international matters, modern conduct of hostilities questions devolved into two relatively unimaginative approaches: apologetics for Islamic notions of defensive and even offensive war, a genre still popular today, and, relatedly, justifications for revolutionary and often violent political struggle.³⁸ Both genres likewise emphasized *jus ad bellum*, the law justifying the resort to force, not the rules for ethical conduct during hostilities (whatever the *casus belli*), and this writing was often framed within Arab nationalisms rather than within

G.I.A.D. DRAPER, GROTIUS’S PLACE IN THE DEVELOPMENT OF LEGAL IDEAS ABOUT WAR (Hedley Bull et al. eds., 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).

35. 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 E. REP. 28, 31 (2001).

36. KELSAY, *supra* note 35, at 69.

37. *Id.*

38. In the first case, *id.* 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 generally 5 RUDOLPH PETERS, JIHAD IN MEDIEVAL 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* (Rudolph Peters trans., 1977).

Islamic law proper.³⁹ In fact, recent pockets of western academic scholarship within the framework of Islamic legal history and within relatively iconoclastic historical interpretive traditions, such as mysticism, have dominated debate over conflict matters—rather than examining contemporary Muslim-majority states' policy statements and directives (often by appeal to Islamic norms). In later decades this notable gap was filled by political activist philosophers (Qutb, Maududi), thinkers associated with the Muslim Brotherhood and related organizations, many who merged the apologetics and conflict advocacy genres into a well-developed philosophical program. Thus, a new generation of scholar-activists promulgating a warrior asceticism was born, one that abandoned the strict discipline and language of the law.⁴⁰

Within this highly narrowed and segmented field of inquiry on Islamic approaches to conflict and law of war norms, key artifacts of this narrowed field of debate began to rise to near global prominence.⁴¹ 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 *sine qua non* of Islamic law and to weigh in on its meaning often without relevant contexts, military or policy practice, or intellectual concepts.⁴² The deluge of publications over the last decade on Islam and

39. KELSAY, *supra* note 35, at 74 (anticipating 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).

40. 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").

41. An important, recent exception (writing in English) is Ahmed Mohsen Al-Dawoody's dissertation. AHMED MOHSEN AL-DAWOODY, *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 E. STUD. 429 (1980) (discussing the Islamic contribution at least to international law); KHADDURI, *infra* note 45; Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187 (1978) (providing 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). See Muhammad Munir, *The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law*, Working Paper (Mar. 27, 2011) (critiquing Khadduri's reliance on Tabari), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1797045; *The Prophet's (Peace be Upon Him) Merciful Reforms in the Conduct of War: The Prohibited Acts*, 2 INSIGHTS: SIRAH SPECIAL ISSUE 183 (2010).

42. 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 generally Abdulaziz Sachedina, *From Defensive to*

war, terrorism, militancy, religious extremism, and so forth, often frame their analyses largely or even exclusively within the study of this single legal concept—as if it substitutes for an understudied history, body of law, missing modern *jus in bello* tradition, or the complexity of the contemporary Islamic legal system as it interfaces with Muslim-majority states policies. Even now this tendency has not been adequately understood in displacing robust inquiry into a modern Islamic *jus in bello* tradition.⁴³ As Edward Jurji already noted in 1940, “the Islamic conception of war cannot be sufficiently understood by limiting attention

Offensive Warfare: The Use and Abuse of Jihad in the Muslim World, JOSEPH I. COFFEY & CHARLES T. 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); ISLAMIC POLITICAL ETHICS (Sohail Hasmi & Jack Miles eds., 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 J. CONFLICT & SECURITY L. 321 (2005); RUDOLPH PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM: A READER (2005) [hereinafter PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM]; Abdulaziz Sachedina, *The Development of Jihad in Islamic Revelation and History*, in CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION (James Turner Johnson & Joh Kelsay eds., 1990) [hereinafter CROSS, CRESCENT, AND SWORD]. M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defence to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT’L L. 119, 121-22 (2007):

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.

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. *Id.*

43. An exception is Ali & Rehman, *supra* note 42, 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).

to the jihad phenomenon.”⁴⁴ Sadly, cultural objections fixated, in turn, on how misunderstood *jihad* is in the West simply recycled the problem of narrowed inquiry, missing the fact that precious few scholars, Muslim or otherwise, have recovered or modernized Islamic laws of war—arguably the earliest tradition of humanitarian thinking the world has ever known.⁴⁵

The prevalence of discussions of *jihad* is not the only artifact of narrowed cross-cultural academic inquiry, however. Similar dynamics are rife in framing discussions of the rise of the Islamic State of Iraq and Syria (ISIS) and other contemporary political Islamist movements in the region, including discussions of a renewed caliphate. It is as if ISIS’ political pronouncements do not take place within a context set by twentieth-century conflict advocacy literature, not to mention Muslim-majority states’ conflict practice. Instead scholars “reach” for exotic

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

45. 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 generally MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR* (1966) [hereinafter KHADDURI, *THE ISLAMIC LAW OF NATIONS*]; MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955); CROSS, *CRESCENT, AND SWORD*, *supra* note 42; Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 MUSLIM WORLD 144 (1999); Jurji, *supra* note 44, at 332; PETERS, *supra* note 38; 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 DE LA GUERRE 269 (1981); James Busuttil, (Slay Them Wherever You Find Them) *Humanitarian Law in Islam*, 30 MIL. L. & L. WAR REV. 113 (1991); MUHAMMAD 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* 61-72 (1977). For modern application of classical discussions, see Shaheen Sardar Ali & Javid Rehman, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SECURITY L. 321, 338-42 (2005); SHERIFA D. ZUHUR & YOUSSEF H. ABOUL-ENEIN, *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* 146-52 (Terry Nardin ed. 1996); Ahmed Zaki Yamani, *Humanitarian International Law in Islam: a General Outlook*, 7 MICHIGAN Y.B. INT’L LEGAL STUD. 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); Ayatollah Mohaghegh Damad, *International Humanitarian Law in Islam and Contemporary International Law*, in *ISLAMIC VIEWS ON HUMAN RIGHTS: VIEWPOINTS OF IRANIAN SCHOLARS* 253 (Esmaeil Salami ed., 2001).

shores in Islamic millenarianism and mysticism, which remain minor influences. Most perniciously, the dominance of the *jihad* literature has distorted the sense of the debate that Muslims across many contexts are actually involved in today, especially young people—a serious debate, as Hallaq points out, over legitimate governance and political ethics, much of which was featured in Arab Spring social mobilizations.⁴⁶ These *topoi*, revived, some argue, with the Iranian Revolution itself, involve permissible, ethical, and meaningful ways to deal with social conflict, 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 still occurring at the present time which is animating networked social movements across Muslim and Arab worlds—not *jihad*. It is an unfortunate measure of many ordinary citizens' appraisal of the prospect of these discussions to effect change that those from especially conflict-affected states are “voting with their feet” and migrating at great personal cost to themselves and their families to other regions of the world.

A third barrier to contemplating Islamic law for contemporary problems of security and governance is a missing thread of inquiry into not only the commonalities between international law and Islamic law, but also the Islamic contribution to international law (and not just in the distant past) and to the laws of war tradition in particular, as well as their interwoven 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 commonalities and “harmonies” in international and Islamic law.⁴⁷ But not enough substantive inquiry has investigated 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,

46. HALLAQ, SHARĪĀ, *supra* note 19, at vii.

47. 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); Busuttill, *supra* note 45, at 111; 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*, in *JUST WAR AND JIHAD: HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITIONS* 31-70 (John Kelsay & James Turner Johnson eds., 1991); Van Engeland, *supra* note 45. See Robert Barnidge, *Islam and International Humanitarian Law: A Question of Compatibility?* 40 ISRAEL Y.B. HUM. RTS. 257 (2010) (critiquing the compatibility thesis in light of “militant Islam”).

Geneva) where interstate treaties and agreements regulating conflict rules 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.⁴⁸ Nor have such inquiries recognized, as Mohammad Hashim Kamali stresses, the role that "harmonizing" methodologies play at the core of Islamic law itself, particularly evident in the obligation of *ijtihad*.

One additional aspect of the commensurability thesis is worth mentioning here as it forms the bulk of the argument in the following Part: the global role of that Islamic law has long played. In the present international security context, given tectonic shifts in warfare practices and changing global conflict dynamics, both Islamic and international law regimes governing conflict are both playing a central role for different audiences in reframing international security norms today—with implications for how we develop future security policies. What is important to understand is that this transnational role, for better or worse, as Hallaq argues, has *always* been a distinctive feature of law in the Islamic tradition. That role should not be underestimated as a means for global discussions of Islam and Islamic law and the role it may play in helping communities manage the pressures of global conflict, as well as providing accountability measures for governments and other actors engaged in conflict. Equally important, there is a commonality, indeed, a symmetry, to the challenges facing these legal regimes: heightened interest in humanitarian law is, at bottom, a means to bring into discussion changing ethical standards as these bear on new species of armed conflict. Such shifts are raising these norms and their gaps to new heights of global discussion, an overwhelmingly positive development—if such discussions are framed in ways reflective of the complexity of the changing international security environment.

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—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.⁴⁹ It is difficult to find an appropriate analogue to

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

49. This is not to suggest, as Jan Michel Otto's work 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) [hereinafter OTTO, SHARI'A INCORPORATED]; JAN MICHEL OTTO, SHARI'A AND

explain this strange telescoping of Islamic legal inquiry that occurs today: it would be as if one attempted to reduce the identity of “international law” to one state’s or region’s 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, itself, remains problematic for Muslim state legitimacy. Without a transnational sense of Islamic law as one 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 (or social movements espousing violence for that matter) can spread, often seamlessly, across national and regional contexts or implicate entirely different political regimes while being intelligible by diverse constituencies in radically different political and social contexts. The challenge, of course, is to recognize the transnational status of Islamic law, itself bound up with complex social and ideological movements, and to separate that discourse and tradition from actual people and identities.

The last barrier is the serious disconnect between Islamic law and problems of conflict and security—the core concern of this essay. As I explore in the following Part, most focus remains on Muslim politics or geopolitics—not on the legal basis of security policy in Muslim contexts.⁵⁰ Yet, again, for purposes of analogy, it would be remarkable on any other urgent international security policy topic—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

NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY (2008) [hereinafter OTTO, SHARI’A AND NATIONAL LAW IN MUSLIM COUNTRIES]. See also ISLAM AND EUROPEAN LEGAL SYSTEMS (Silvia Ferrari & Anthony Bradney eds., 2000) (cited by Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SECURITY L. 321, 322, n.4 (calling it “a rare, though useful contemporary European perspective on Islam”)).

50. We know a great deal about the Middle East, North African, 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 ABU SULAYMAN, *TOWARD AN ISLAMIC THEORY OF INTERNATIONAL RELATIONS: NEW DIRECTIONS FOR METHODOLOGY AND THOUGHT* (1993).

communities more generally.⁵¹

III. GLOBAL CRISIS IN HUMANITARIAN LEGAL NORMS IN THE POST-9/11 SECURITY CLIMATE

I turn now to the second prong in the argument, framed more squarely within matters of conflict and security policy: the symmetry between these respective legal regimes in light of intensifying post-9/11 debate over the 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 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? How might thoughtful scholars and practitioners attentive to the urgency of cross-cultural dialogue on security matters maximize this moment?

A. Challenges for Contemporary International Humanitarian Law

With the exception of attacking civilians far from recognized battlefields for declared religious reasons, few recent developments have pressured the laws of war more than the U.S.-promoted "global war on terrorism," which did not fit easily into any existing armed conflict category in the four Geneva Conventions, and which framed protracted military campaigns with various, contradictory, and often dubious legal status.⁵² It is important to recall that the laws of war are part of public

51. For this debate in political science and area studies and a critique of exceptionalism proper, see Sanford 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); Amira El-Azhary Sonbol, *Questioning Exceptionalism: Shari'a Law*, 6 ARAB STUD. J. 76 (1998).

52. Geneva Conventions I-IV share in common the first three articles, known as "common articles." Common arts. 2 & 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, at <http://icrc.org/iHL.nsf/FULL/365?OpenDocument>:

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

international law, the body of rules governing relations between states. The bulk of humanitarian law is contained in twin legal agreements: the four revised Geneva Conventions of 1949 and their Additional Protocols of 1977, which were first designed to protect civilians and persons no longer fighting (*i.e.*, the wounded, the shipwrecked, prisoners of war, civilians in conflict zones); and the earlier Hague Conventions (1899, 1907), restricting the means and methods of warfare, which were subsequently merged with Geneva rules.⁵³ Equally important, 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)

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.

53. 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 & 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, 791-95 (2008); DINSTEIN, *supra* note 14, at 12-14 (critiquing this position).

armed conflicts.⁵⁴ The “global war on terror” was neither a conflict between states nor an internal conflict but a transnational conflict across many territories involving many state and nonstate actors. In this respect, it exposed an aporia in the modern laws of war.

The policy invention of the “global war on terrorism” as a kind of new category of armed conflict, which allowed for near limitless war, would alone have been challenging for existing humanitarian law. But the U.S. pressure on these rules included other now familiar, disruptive items: the legal reissuing of the “enemy combatant” status designation to deny traditional Geneva Convention III protections to al-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; U.S. domestic court-level controversies over *habeas corpus* rights of suspected terrorists, which ultimately led to some push back on executive authority.⁵⁵ Taken together, these and many other items began to raise questions and concerns about the once taken-for-granted modern norms of humanitarian law.⁵⁶ Such questions were by no means academic, but

54. 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).

55. See generally 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 U.S. 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 WM. & MARY L.R. 1 (2009); Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, 85 INT’L L. STUD. (2009); W. Michael 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 (2009); 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 WESTERN RES. J. INT’L L. 245 (2009). See also Jennifer Elsea & Michael Garcia, CRS Report for Congress RL33180: Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court (Feb. 3, 2010), Federation of American Scientists, available at <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>; see also *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).

56. The legal discussion of this development is vast. See generally Michael Schmitt, *21st Century Conflict: Can the Law Survive?*, 8 MELB. 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,

comprised real and often acute challenges for states and for 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.⁵⁷

But similar crises in the laws of war, though less often discussed, were also occurring at the same time 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 old laws governing new problems of warfare, the tensions between humanitarian law standards and new battlefield tactics have raised still often unanswered questions for governments and for international security policy in general, including such issues as permissible targeted killing, rendition, human shielding, unprivileged belligerency, lawfare, direct participation in the hostilities, and the rise of private military contractors in combat roles.⁵⁸

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 international (state-versus-state) conflicts to low-intensity, noninternational conflicts involving nonstate entities, especially in civil wars.⁵⁹ This development raises serious concerns about the relevance of

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/sites/default/files/publications/Non-Linearity_of_Engagement.pdf; Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on Terror*, 7 THEORETICAL INQUIRIES 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 ET AL., *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN* (2007).

57. 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. See *Treaties, State Parties, and Commentaries: Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, Aug. 12, 1949, available at <http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=375&ps=P>.

58. See Michael Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009); Eyal Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, 42 TEL AVIV UNIV. L. FAC. PAPERS 1-34 (2004); NILS MELZER, *TARGETING KILLING IN INTERNATIONAL LAW* 449, 449-53 (2008).

59. For burgeoning datasets on armed conflicts of various types, see *Data on Armed Conflict*, Prio.org, available at <http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/>; *The Correlates of War Project*, available at <http://www.correlatesofwar.org/>; *Correlates*

the state-centric *jus in bello* for regulating contemporary warfare.⁶⁰ Moreover, such new conflicts are often fought by irregular forces—nonstate fighters, transnational armed groups, terrorist and criminal networks—many using equally nonconventional tactics (terrorism, human shielding, sanctuaries). Such tactics, indeed, are deliberately designed to violate the laws of war, often in their focus on targeting protected persons, as a means to gain tactical advantages over stronger adversaries who, in turn, remain constrained in their compliance with the rules (known as lawfare).⁶¹ In probing such “new war” developments that are transforming contemporary battlefields, some international legal scholars have asked whether the traditional law can survive and identified troubling weaknesses and “fault-lines.”⁶²

of War (Paul F. Diehl) Daaverse, at <http://dvn.iq.harvard.edu/dvn/dv/cow>; Gary LaFree & Laura Dugan, *Global Terrorism Database, 1970-2010*, 1 START Terrorism Data Archive Dataverse (2011), at <http://hdl.handle.net/1902.1/16332>. For analysis that shows the changing nature of global conflict, see Lotta Harbom & Peter Wallensteen, *Armed Conflict, 1989–2006*, 44 J. PEACE RES. 623 (2007); Data on Armed Conflict, *supra*; 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 G. MARSHALL & TED ROBERT GURR, PEACE AND CONFLICT 2005 (CIDCM 2005); 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).

60. 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 (2d ed. 2006); KEITH E. PULS, LAW OF WAR HANDBOOK, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, JUDGE ADVOCATE GENERAL’S LEGAL CENTER, CHARLOTTESVILLE, VIRGINIA: 2005.

61. For this debate, see Derek Jinks, *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 Univ.; 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 Univ., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>; *Commentary: Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146 (2008).

62. See Schmitt, *supra* note 58; see also *The Vanishing Law of War: Reflections on Law and War in the 21st Century*, HARV. INT’L REV. 64 (2009).

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.⁶³ A recent 2005 ICRC 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 with the ICRC assessment and its methodologies.⁶⁴ 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 objects in noninternational armed conflict, though customary international law does.⁶⁵ 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 distinctions, areas, and even regimes—between *ad bellum* and *in bello* rules, for instance, and

63. ICISS, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 4 (Dec. 2001) (noting 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); Erik Melander et al., *Are ‘New Wars’ More Atrocious? Battle Severity, Civilians Killed and Forced Migration Before and After the End of the Cold War*, 15 EUR. 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* (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); Steven Metz & Douglas V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts*, Strategic Studies Institute Report, U.S. Army War College (2001).

64. 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 U.N. 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, PUBLICATION 0943, *VIOLENCE AND THE USE OF FORCE* (2008).

65. 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, 178 (2005). Some states have balked at this view of customary law. See Bellinger & Haynes, *supra* note 60, at 445.

between humanitarian law and human rights law, occupation law, and domestic national security law.⁶⁶ 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 humanitarian law's contemporary politicization. Modern strategic scholars from Clausewitz onward presume that war is inseparable from politics, that war is, indeed, a form of politics or policy by other means (namely violence), as in Clausewitz's famous dictum. One key virtue of humanitarian law, however, has been its ability to structurally reduce states' political maneuvering by protecting all civilians (and *hors de combat*) in conflict settings, regardless of their side in the conflict or whether the armed conflict itself was lawful or just. This neutral application of *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, Security Council authorization, sovereign permission, and arguably, humanitarian intervention, codified in Article 2[4] of the U.N. 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 combatants; practicing military necessity; respecting the rights and procedures due to prisoners of wars, the sick, wounded, medics, religious professionals) regardless of how or why the conflict began.⁶⁷ This distinction between *in bello* (conduct in warfare) and *ad bellum* (resort to war) rules, thus, aids in the

66. 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); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000). For leading analysis in human rights norms as they impact contemporary use of force issues, see Watkin, *supra* note 54. 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 Ius ad Bellum and Ius 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, *Ius ad Bellum and Ius in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated*, in INT'L L. & ARMED CONFLICT: EXPLORING THE FAULTLINES 241 (Michael Schmitt & Jelena Pejic eds. 2007).

67. See Sloane, *supra* note 34 (discussing a seasoned treatment of the limits and importance of this distinction).

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 criminals (*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.⁶⁸ In 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.⁶⁹

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 and set of norms to mitigate human suffering in conflict settings, a demonstrable benefit of the modern laws of war.⁷⁰ Likewise,

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

69. 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. Humanitarian law belongs to the post-Hague shift in understanding 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 U.N. Charter and related instruments). These include typically the Kellogg-Briand Pact or General Treaty for the Renunciation of War (signed Aug. 27, 1928, registered in the League of Nations Treaty Series on Sept. 4, 1929). The Avalon Project, Kellogg-Briand Pact 1928, *available at* http://avalon.law.yale.edu/20th_century/kbpact.asp; see also The Avalon Project, Nuremberg Trial Proceedings Charter of the International Military Tribunal Vol. 1 (Aug. 8, 1945) (defining 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 (2011). For the national policy theory of force, see CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret, eds., trans. 1976) (rev. 1984); Meron, *supra* note 66 (discussing the contemporary shift toward human rights based approaches).

70. 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). Dunlap, *supra* note 61.

in the asymmetric context, when civilian spaces 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.⁷¹ In many respects, this politicization of the laws of war—something that states in the positivist treaty era had built into and thus "contained" through specific legal mechanisms (*i.e.*, bright line distinction between *jus in bello* and *jus ad bellum*)—is the greatest threat to contemporary humanitarian law and to the vulnerable persons it would protect today.

B. Islamic Law as a "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.⁷² 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

71. See International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research, IHL Primer Series: Issue #1, "What is IHL" (June 2009), available at <http://www3.nd.edu/~cpence/ewt/IHLRI2009.pdf>. 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; BOVARNICK ET AL., *supra* note 69. 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); see also 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).

72. 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* (Apr. 18, 2011), The International Center for the Study of Radicalisation (ICSR), King's College London, trans., by ICSR Atkin Fellow Amany Soliman, available at <http://icsr.info/2011/05/translation-of-al-qaeda-sheikhs-online-lecture/>. See also BERNARD LEWIS & BUNTZIE ELLIS CHURCHILL, ISLAM: THE RELIGION AND THE PEOPLE 151 (2008) (stating "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").

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.”⁷³ 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.”⁷⁴ In the post-9/11 moment, as An-Naim explains, the “public role of Islamic Law” has thus become “a global issue.”⁷⁵

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.⁷⁶ 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.”⁷⁷ 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 troubling interpretations of the eminently legal nature of Islam, as Hallaq stresses, and, more subtly, the deliberate abuse of this modern Islamic identity crisis to serve the ends of largely repressive 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 infrastructure⁷⁸ 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.⁷⁹ Hallaq’s long-gaze view depends upon this

73. HALLAQ, ORIGINS AND EVOLUTION OF ISLAMIC LAW, *supra* note 20, at 1.

74. HALLAQ, SHARI’A, *supra* note 19, at vii.

75. An-Naim, *supra* note 23, at 2.

76. See Wael B. Hallaq, “Muslim Rage” and Islamic Law, 54 HASTINGS L.J. 1705, 1706-07 (2003).

77. *Id.* at 1706.

78. *Id.* at 1707.

79. HALLAQ, ORIGINS AND EVOLUTION OF ISLAMIC LAW, *supra* note 20, at 1-2 (stating in his “index of the state of scholarship on the formative period” (600-900 CE), understood as the first three to four centuries post-hijri (AH), that “there has not been a single volume published

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 and culture of law,” and that “to be a Muslim means to live by the law.”⁸⁰ While this claim is a source of rich debate,⁸¹ law for Hallaq is not only “the defining characteristic of Muslim societies and civilizations throughout the centuries and in every corner of the Islamic world,”⁸² it is “the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.”⁸³ He explains further:

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

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.”). *See also* Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse*, *supra* note 19, at 3. *See also* STEWART, ISLAMIC LEGAL ORTHODOXY, *supra* note 19 (adding critical elements to this standard historical narrative, including the birth of the Shiite legal tradition in reaction to Sunni orthodoxy). *But see* Powers, *supra* note 19, at 126, 133, 140-43, 149 (disagreeing with these assessments in his extended review).

80. Hallaq, “*Muslim Rage*” and *Islamic Law*, *supra* note 76, at 1707, 1715.

81. *See* ARJOMAND, *supra* note 18, at 82. “Islamicate” is Hodgson’s term—in contrast to “Islamic,” “pertaining to Islam in the proper, the religious, sense”—for “‘of or pertaining to’ the society and culture of Islamdom.” Thus, “‘Islamicate’ would refer not directly to the religion, Islam, itself, but to the social and cultural complex historically associated with Islam and the Muslims, both among Muslims themselves and even when found among non-Muslims.” HODGSON, *supra* note 18, at 59.

82. Hallaq, “*Muslim Rage*” and *Islamic Law*, *supra* note 76, at 1707.

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.

Id.

83. *Id.* (“[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.” JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964)). While reasonable people may disagree, Hallaq is on firm ground for this particular claim from Joseph Schacht forward.

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.⁸⁴ 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 pillar of far-reaching dimensions and, in short, a world-view that defined both Muslim identity and even Islam itself.”⁸⁵

Much disagreement exists—particularly among the disciplines—over the role of law and its definition within an Islamic tradition. Nevertheless, if Islam is changing now, few scholars have captured the nature of these changes, nor the preeminent place that the law seems to be playing in this process, nor the modern implications of this legal role—or, as Hallaq puts it, how Islamic law has become in the process a “tool of modernity” to understand, negotiate, and interpret such changes.⁸⁶ To complicate matters, in this modern process whereby “Islamic law now command[s] the world’s attention,”⁸⁷ *Shari’a* itself has become distorted “beyond

84. 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 ET AL., *supra* note 8; ASAD, *supra* note 28.

85. Hallaq, “*Muslim Rage*” and *Islamic Law*, *supra* note 76, at 1707-08.

86. HALLAQ, *SHARI’A*, *supra* note 19, at vii. See also Bassiouni, *supra* note 42, at 145.

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.

Id.

87. Anver M. Emon, *Wael B. Hallaq*, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005), 76 *UNIV. TORONTO Q.* 343, 343-44 (2007) (book review). See also Bassiouni, *supra* note 42, at 121 (keeping with this historical narrative and faulting “the Muslim religious establishment”

recognition," its "principles and practices in the past" conflated with its "highly politicized reincarnations."⁸⁸ Understanding how and why this is so involves complex processes too numerous to treat here, not the least, the misinterpretation 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.⁸⁹ That is, 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

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."

88. HALLAQ, SHARI'A, *supra* note 19, 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 44-48 (2007) (noting 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 I (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.

Id.; OTTO, SHARI'A INCORPORATED, *supra* note 49, at 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.*, "as divine abstract sharia, as classical sharia, as historically transferred sharia, and as contemporary sharia.")). OTTO, SHARI'A AND NATIONAL LAW IN MUSLIM COUNTRIES, *supra* note 49, at 8 ("When people refer to the sharia, they are in fact referring to their sharia, in the name of the eternal will of the Almighty God."); and Otto, *The Compatibility of Sharia with the Rule of Law: Fundamental Conflict Between Civilisations? Within Civilisations? Or Between Scholars?*, in KNOWLEDGE IN FERMENT DILEMMAS IN SCIENCE, SCHOLARSHIP, AND SOCIETY 137, 141-42 (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. RTS. L. REV. 263 (2001).

89. Hallaq, "Muslim Rage" and Islamic Law, *supra* note 76, at 1715-16. 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.

preserve “the distinction between worldly power and the province of the law”—mechanisms sorely needed today.⁹⁰

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.”⁹¹ In Hallaq’s opinion, this independence made politics distinctively “subsidiary to law and entirely subservient to it, from the rise of Muhammad to the early nineteenth century.”⁹² Not 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,⁹³ this distinction enshrined “the rule of law” as an “inalienable feature of the Muslim body politic and legal culture.”⁹⁴ 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 can 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

90. *Id.* at 1706, 1708.

91. *Id.* at 1708. Ahmed Mohsen Al-Dawoody in his dissertation, *War in Islamic Law: Justification and Regulations* (Aug. 2009) 261 (unpublished Ph.D. dissertation, University of Birmingham) (on file with the University of Birmingham Research Archive), 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.

92. Hallaq, “*Muslim Rage*” and *Islamic Law*, *supra* note 76, at 1708:

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 anything human.

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

93. Hallaq, “*Muslim Rage*” and *Islamic Law*, *supra* note 76, at 1708.

94. *Id.*

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.⁹⁵ The classic example of these converging trends was Governor General of Bengal Warren Hastings' (1773-1785) redesign of a multi-tiered legal system that positioned British administrators at the top, 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.⁹⁶

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.”⁹⁷ Jones’s 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.”⁹⁸ Ending the exegetical authority of jurists, *qadi*, and *mufti*—the core professional cadre of this jurists’ law—and excising the divine from this religious law, undermined “an independent legal system that could restrain the powers

95. 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*” and *Islamic Law*, *supra* note 76, 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?*, in ARAB LEGAL SYSTEMS IN TRANSITION 21 *passim* (Barbara Stowasser & Yvonne Haddad eds., 2004).

96. Wael Hallaq, AN INTRODUCTION TO ISLAMIC LAW 85 (2009).

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

98. Hallaq, “*Muslim Rage*” and *Islamic Law*, *supra* note 76, at 1713.

of the new autocracies.”⁹⁹ 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.¹⁰⁰ 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 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, the “opening of a major gap, a virtual black hole, created without any real substitution or replacement.”¹⁰¹ 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 which in its heyday was equivalent with

99. *Id.* at 1714.

100. *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*, *supra* note 107.

101. *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.”

mercy.¹⁰² If one of the greatest oversights in the study of Islam is the cultural role of the law, a close second is this misplaced equation of Islamic law with absolutist policies, themselves borne of expediency—the hapless argument made normative by both extremists and emboldened political autocracies in a dual victory for a historical counter-reformation.¹⁰³

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.¹⁰⁴ To put this point differently, as religion has become a political force in contemporary global affairs and in national as well as international security policy 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 cultural and religious 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.¹⁰⁵ “The cursory treatment of the modern

102. *Id.*

103. 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 that instituted an instrumentalist role for the law. See Hallaq, *Can the Shari'ah be Restored*, *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:

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.

104. HALLAQ, ORIGINS AND EVOLUTION OF ISLAMIC LAW, *supra* note 20, at 1.

105. KELSAY, *supra* note 35, at 74-75 (noting that in post-Revolution Iran there was in certain respects a return to modern Islamic *jus in bello* writing—but often for strictly politically

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.”¹⁰⁶

That is, one canonical example of how this dearth of modern inquiry on Islamic humanitarian law in postwar legal scholarship has aided today’s politicization of Islamic law—despite the classical legacy—is in the fascinating textual history of the Qur’an, which reveals a lasting circumspection about war hardwired into subsequent jurisprudential norms in ways that go far beyond facile equations of Islam with peace.¹⁰⁷ This example also demonstrates what I call in the next and final Part, the first “lesson learned” from Islamic jurisprudence: namely, that legal source material[s] approached through the lens of contemporary security can strengthen a modern Islamic *jus in bello*, which itself would go a long way in answering contemporary problems of conflict and in advancing cross-cultural security policy discussions today.

C. 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 Saddiq compiled the manuscript after the prophet’s death (632 AD) and in an event that

expedient reasons, for instance, designating Saddam Hussein an apostate and hence targetable under Islamic law.).

106. *Id.*

107. For standard English translations, aside from the nineteenth-century authors, see J.M. RODWELL, *THE KORAN: TRANSLATED FROM THE ARABIC* (1861) and E.H. PALMER, *THE KORAN* (1880) (referring 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); 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* (Ekmeleddin Ihsanoglu ed., 1986). For interesting emerging online sources, see Tanzi Qur’an Navigator Project, available at <http://tanzil.net/#1:5> (offering the original text in Arabic); 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, and developed by Hamid Zarrabi-Zadeh, available at <http://www.Qur’ancomplex.net/>; the *Online Qur’an Project*, developed by Iman Mohammad Kashi and Uwe Hideki Matzen, available at <http://community.al-Qur’an.info/>; *The Internet Sacred Texts Archive*, available at <http://www.sacred-texts.com/isl/htq/index.htm> (enabling 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 REV.* 66 (1987).

occurred, slightly later, Uthman's own recension (653 AD).¹⁰⁸ 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 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.¹⁰⁹ Because the Qur'an was an oral text guarded in the memories of the faithful (known as *hāfīdh*), military campaigns were a direct and imminent threat to the integrity of the Qur'an and, thus, to the budding community of believers, the *ummah*.¹¹⁰ 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 Sharīa, 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.¹¹¹ There is thus a core normative supposition in Islamic law again familiar to western audiences, that behavior should be commensurate with an Islamic notion of the good life,

108. 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) [hereinafter AL-AZAMI, *THE HISTORY OF THE QUR'ANIC TEXT FROM REVELATION TO COMPILATION*].

109. See PROPHETIC COMMENTARY ON THE QUR'AN (TAFSEER OF THE PROPHET), Sahih al-Bukhari's Vol. 6, Bk. 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>.

110. See SAYYID SIDDIQ HASAN, *REFLECTIONS ON THE COLLECTION OF THE QUR'ÂN* (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, Qādi Ismā'īl al-Akwá, President of the General Organization of Antiquities and Libraries, initiated the effort to secure external specialists to conserve the manuscripts.

111. For problems with the very expression "Islamic law," particularly, how western notions of law encroach on our understanding of the distinctiveness of shari'a, see HALLAQ, *SHARI'A*, *supra* note 19, at 1-3.

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.¹¹² That notion of justice—emanating from the divine, not the state—is intrinsically sacred as such and encapsulated in the law, and proves to be one of the most important counterpoints to potential political abuses of earthly power, applicable to the laws of war as well.¹¹³

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, scholars typically rely, first and foremost, on the Qur’an and then the *sunna*,¹¹⁴ the sayings and doings

112. Haider Ala 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, *supra* note 83, which describes Islamic 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 19, at 1:

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.

113. 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, Nov. 4, 2010, Washington D.C., U.S. 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.

Id.

114. For a discussion of the material, historical, and interpretive complexity of the Qur’an as a source, see MEIR MAX 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* (Stefan Wild ed., 1996); Fred Donner, *The Qur’an in Recent Scholarship: Challenges and Desiderata* 29, & Devin Stewart, *An Evaluation*

of the Prophet Muhammad, as these were narrated, collected, and relayed by others over time in the often disputed *hadith*.¹¹⁵ It is important to keep in mind, however, that both the *sunna* and the *hadith* are categories for organizing writing and, as such, interpretive and contested terms—both in their meaning and in their inclusion of specific authors and ideas—in a debate more than a millennium old.¹¹⁶ Having said that, the *sunna* are

of Qur'anic Emendations Proposed in Medieval and Modern Scholarship 225, both 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* (Angelika Neuwirth et al. 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.

Id.; but see AL-AZAMI, *THE HISTORY OF THE QUR'ANIC TEXT FROM REVELATION TO COMPILATION*, *supra* note 108 (critiquing this view).

115. 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 see* Mohammed Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, 11 *ARAB L.Q.* 3 (1996) & An Naim, *Mahmud Muhammad Taha and the Crisis in Islamic Law Reform: Implications for Inter-religious Relations* 25 *J. ECUMENICAL STUD.* 1 (1988) (expanding what constitutes sources of admittedly divine law where one begins to leave the genre of revelation for that of reason and jurisprudence.). *See generally* 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), *Even if It's Not True, It's True: Using Unreliable Hadiths in Sunni Islam*, 18 *ISLAMIC L. & SOC.* 1 (2011) (discussing *hadith* debates and truth and reliability protocols).

116. For an overview of this issue, *see* JONATHAN A.C. BROWN, *HADITH: MUHAMMAD'S LEGACY IN THE MEDIEVAL AND MODERN WORLD* (2009) [hereinafter BROWN, *HADITH*]; MOHAMMED HASHIM KAMALI, *A TEXTBOOK OF HADITH STUDIES: AUTHENTICITY, COMPILATION, CLASSIFICATION AND CRITICISM OF HADITH* (2009); AISHA Y. 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* BROWN, *HADITH*, *supra*, at 5-6. *See* HALLAQ, *AN INTRODUCTION TO ISLAMIC LAW*, *supra* note 96, at 16. It is worth remembering that in addition to the Qur'an, God's revealed word, the human messenger, the Prophet Muhammad, 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 *sunna*, 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

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 and their direct reports).¹¹⁷ Second, within the Shari'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 personified—whereby imitating the Prophet's precedent is akin to legal precedent.¹¹⁸ How such premises inform a given society and at what level—history, cultural norms, domestic law and its specific areas (*i.e.*, family law)—is a matter of robust debate.¹¹⁹

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

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 *sunna* with the area of property law.

117. The *sunna*—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 *sunna* constitute customary communal practice (in Medina) or the transmitted accounts of the Prophet's precedent (*hadith*), see BRAVMANN & RIPPIN, *supra* note 114; WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997); HALLAQ, SHARI'A, *supra* note 19, at 273; 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.

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

119. See Kamali, *Methodological Issues in Islamic Jurisprudence*, *supra* note 115; MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 4 (3d ed. rev. 2003) (1991).

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.

Id.

along with it the message of Islam.¹²⁰ 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 itself, 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.¹²¹ 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 rememorize 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*).¹²² 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.

This revelation was, moreover, unique: the last of God's seven messengers (including Abraham and 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. This was one of the most pedagogical of the divine messages in the Abrahamic (Judeo-Christian-Islamic) lineage. Hence, the lasting legal status of the *sunna*—Muhammad's footsteps—which shaped the Shari'a as both divine path and literal reference point for Islamic law (far more than doctrinal debates over the content of the Shari'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. This move was, in fact, controversial. 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

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

121. Ismail Poonawala, *Translatability of the Qur'an: Theological and Literary Considerations, Translation of Scripture*, A JEWISH Q. REV. SUPP. 151-92 (1990); Proceedings the Annenberg Research Institute Conference (May 15–16, 1989).

122. See KAMALI, *supra* note 119, at 17.

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 is an act of transcription and compilation of verses held by many people in many places.

Zaid predictably replies with Abu Bakr’s own 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, which is itself instructive: “[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*. Many Islamic feminists have taken note that a woman—understood as a scholar herself—preserved and guarded the Islamic tradition.

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.¹²³

Thus, in addition to the familiar prohibition against war that scholars associate with Islam 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 itself, subsequently hardwired into Islamic revelatory tradition

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

and jurisprudence, evident in this case in Bukhari's *hadith*.¹²⁴ That is, this vigilance against conflict and war has multiple dimensions, epistemic, philosophical, genealogical, and material, much of which stems from the role of the community of believers in generating the sacred book and, at a literal level, from the community-based nature of this law. There was a primal recognition that the fate of this community, this religious tradition and law, were inseparable and that warfare itself signaled the greatest threat—both practical and doctrinal—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 and preserving the text,¹²⁵ war—as the early caliphs could plainly see—threatened the existence of Islam.¹²⁶

Many scholars have described Quranic-based—and Muhammad's own repeated emphasis for—restraint in war, as well as the explicit rules for conduct in hostilities developed in the post-*hijrah* Medina revelation period. Others have discussed these early Islamic treatises, notably Abu Bakr's famous decree, as antecedents to international law and military ethics in ways familiar to 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, and rules about plunder).¹²⁷ What is less understood is how these norms arose from the protection and even the expansionist impulses associated with the metacommunity of Islam and, as such, ground a dispersed Islamic normative identity. The issue is not only that the bedrock legal

124. SARAH RISHA, EDUCATION AND CURRICULAR PERSPECTIVES IN THE QU'RAN 69 (2015). In fact, the Bukhari's *hadith* have the highest status of truth.

125. AL-AZAMI, HISTORY OF THE QUR'ANIC TEXT FROM REVELATION TO COMPILATION, *supra* note 108, at 78.

126. 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).

127. See Abu Bakr al-Siddiq's instructions to contemporary military commanders:

Stop, O people, that I may give you ten rules for guidance on the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies; do not kill a woman, a child, or an aged man; do not cut down fruitful trees; do not destroy inhabited areas; do not slaughter any of the enemies' sheep, cow or camel except for food; do not burn date palms, nor inundate them; do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness . . . You are likely to pass by people who have devoted their lives to monastic services; leave them alone.

See FRANK MCGRAW DONNER, THE HISTORY OF AL-TABARI, VOLUME X: THE CONQUEST OF ARABIA (1983); RUDOLPH PETERS, ISLAM & COLONIALISM 23 (1979) (noting that other schools using the Prophet and Quaran, *i.e.*, 59.5 permitted these acts, justified them, and refuted Abu Bakr's prohibitions, as the "deeds of the companions can never abrogate deeds of the Prophet").

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, those privileged units through which such protections are largely executed.¹²⁸ The issue is that this elemental *jus contra bellum* impulse at the heart of Islamic law is too often 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 Islamic prohibition against war within the community as a delimiting standard is progressive in that it covers—in principle, not necessarily in practice—noninternational conflicts or civil wars, which Geneva standards only recently include. Nevertheless, without the narrative 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 this normative framework from contemporary warfare practices and questions.

Thus, even as the Rashidun Caliphate, the first four rightly guided rulers, embraced the necessity of defensive wars, which ultimately evolved into 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 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 for recognizing, more importantly, when the demands of civilization and posterity outweigh the objectives of war. This lesson—historical-narrative, exegetical—is obviously lost on contemporary extremist practitioners, no matter their veneer of Islamic jurisprudential learning.

128. 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 H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in *ISLAMIC POLITICAL ETHICS: CIVIL SOCIETY, PLURALISM, AND CONFLICT* 204 (2002); John Kelsay, *Al-Shaybani and the Islamic Law of War*, 2 J. MIL. ETHICS 63 (2003).

IV. LESSONS LEARNED FROM SHARED NORMS UNDER PRESSURE

In this last Part, I outline several lessons for contemporary security challenges in contemplating today's pressures on humanitarian law. These lessons are organized by underlying questions at stake throughout this Article: What can shared global norms—and their crises—teach us about new challenges of warfare, as these are bound up with the intensifying role of religion in geopolitics more generally? Put differently, which important lessons for innovating humanitarian law do we miss if we dismiss, politicize, or polarize changing Islamic or international norms?

First and foremost, contemporary problems of security can be addressed through available Islamic norms in ways that both identify 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. To restate the first, most critical lesson, the missing modern *jus in bello* tradition is a gap that allows new problems of conflict and insecurity to go unanswered on the basis of longstanding Islamic values, 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 distorting ideas that further their own nonrepresentative political agendas.¹²⁹

This last element should not be underestimated: political Islamists consistently fill the legal void by proffering their own rules for hostilities, including "battlefield shari'a," whether threshold determinations in defining what counts as an armed conflict (or self-defense) to new rationales for targeting noncombatants and vulnerable communities.¹³⁰

129. 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*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/20/magazine/mag-20Salafis-t.html>; Yasir Qadhi, *The Lure of Radicalism and Extremism Amongst Muslim Youth*, MUSLIM MATTERS (Oct. 18, 2010), <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."

130. See Cori Zoli & Emily Schneider, *Shari'a Courts Move to the Battlefield: Jabhat al-Nusra Opens a Legal Front in the Syrian Civil War*, HARV. L. SCH. NAT'L SEC. J. (Feb. 3, 2014), <http://harvardnsj.org/2014/02/sharia-courts-move-to-the-battlefield-jabhat-al-nusra-opens-a-legal-front-in-the-syrian-civil-war>. 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. RED CROSS 1, 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

Moreover, in doing so, such deployments of political Islamist interpretations of norms for war are designed to exploit and leverage the opportunity of crises and conflict to set into motion new normative architectures that socially secure their own positions of authority. Islamists have been able to seize this advantage as they are one of the few vanguard groups that are willing to make modern battlefield rules, just as they have benefited most from the deferral of these issues by religious authorities or governments who too often cede the field of theological-legal debate on security matters or play spoiler roles behind the scenes. 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 ample Islamic legal resources—*jus contra bellum* prohibitions evident in the material history of the Qur'an, the model of Muhammad's practices in conflict settings detailed in the *sunna*, early *jus ad bellum* restrictions associated with community building and *jihad*, and the classical Islamic *jus in bello*. This updating work, however, has yet to be done.

Contemporary scholars, including in western academia, can help by better explaining 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 heavily on *jus ad bellum* while devoting very little attention to the *jus in bello*.”¹³¹ Advancing understanding of

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 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; and 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.*, a 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.”

131. Sohail Hashmi, *Saving and Taking Life in War: Three Modern Muslim Views*, 89 MUSLIM WORLD 158, 158-59 (1999) [hereinafter Hashmi, *Saving and Taking Life in War*] (noting 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* (*e.g.*, Britannica) 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, see generally KHADDURI, WAR AND PEACE IN THE LAW

this gap, however, must address the habitual noncompliance with *both* Geneva and Islamic rules by many Muslim state (and nonstate) actors, of which the rise of international terrorist activities justified on Islamic terms is a subspecies.¹³²

Likewise, Sohail Hashmi offers a postcolonial cautionary tale against explaining this modern neglect of Islamic law as a product of Muslim scholars' own reactivity to "western apprehensions of jihad," a reactive, negative, and compensatory posture, which then sets the dominant terms for modern Islamic legal inquiry.¹³³ This posture—combined with the 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 work—is deadening to genuine exploratory scholarship.¹³⁴ Al-Dawoody, by contrast, raises a somewhat different set of concerns: he finds this once-robust tradition was fit for the classical period in which 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."¹³⁵ While I appreciate the nod toward harmonies and the

OF ISLAM, *supra* note 45, at 51-137; KHADDURI, THE ISLAMIC LAW OF NATIONS, *supra* note 45, at 75-103, AL-DAWOODY, *supra* note 41, at 194-260; ZUHUR & ABOUL-ENEIN, *supra* note 45, at 6-28; KELSAY, *supra* note 35, at 57-76; RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 1-42 (Wael B. Hallaq ed., 2005); YAMANI, *supra* note 45; El Fadl, *supra* note 45; Bassiouni, *supra* note 45; THE ROYAL AAL AL-BAYT INSTITUTE FOR ISLAMIC THOUGHT, JORDON, JIHAD AND THE ISLAMIC LAW OF WAR 31-46 (2009), http://www.rissc.jo/docs/jihad_final.pdf.

132. AL-DAWOODY (2009), *supra* note 41, at 374, 375 (underscoring "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.

133. Hashmi, *Saving and Taking Life in War*, *supra* note 131, at 158.

134. *Id.* at 158-59.

135. AL-DAWOODY, *supra* note 41, 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, *supra* note 41, at 194 (noting 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

material context to situate any law, it would seem hard to argue that international norms suffice when many modern Muslim conflict actors (state, nonstate) do not 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—in Islamic and international law—engage current security challenges.

If emergent problems of warfare can be confronted through Islamic legal norms, a second lesson emerges: Islamic methodological strengths, including legal pluralism and legal innovation, as potent tools to aid in adapting humanitarian law to asymmetric environments. The characterization of Islamic legal pluralism—including early colonialist charges of incoherence—are well known. More specially, certain mechanisms of legal pluralism and innovation are already available within Islamic law that may add to this adaptive capacity.¹³⁶ 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 socially relevant questions, and cultural knowledge or custom as it impinges upon legal opinion (*urf*).¹³⁷ As Hallaq has described: “the solution to the very

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*, *supra* note 42, at 119; El Fadl, *supra* note 45 at 150-51; Khaled Abou El Fadl, *Islam and the Theology of Power*, 221 MIDDLE E. REP. 28, 30 (2001).

136. WAEL HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* 241 (2001) [hereinafter HALLAQ, *AUTHORITY*] (showing best how legal innovation presumes legal pluralism and 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.”).

137. See KAMALI, *supra* note 122, at 315 (defining *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.”); Wael Hallaq, *Was the Gate of Ijtihad Closed*, 16 INT’L J. MIDDLE E. STUD. 3 (1984) (defining *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 *usuil alfiqh* (legal theory) for the purpose of discovering God’s law.”). It was presumed by modern scholars “[ijtihad] 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*. *Id.* at 3. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW*, *supra* note 83, 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 settled, and a consensus

problem 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."¹³⁸ In effect, the "old adage that in juristic disagreement there lies a divine blessing is not an empty aphorism," as he explains.¹³⁹ 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."¹⁴⁰ 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-fatwa bi-taghayyur al-azman*), 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."¹⁴¹

While the intention here is not to rehearse debates over *ijtihad* or other 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 *ijtihad* often gets sidetracked by the well-known claim—initially put forth by medieval scholars—that the gates of *ijtihad* had closed by the tenth century, thus, delivering a complete, static, and orthodox legal corpus to the post-formative

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 *ijtihad*', as it was called, amounted to the demand for *taqlid*, 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 *ijtihad* is called *mujtahid*, and a person bound to practice *taqlid*, *mukallid*.

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

138. See HALLAQ, *AUTHORITY*, *supra* note 136.

139. *Id.* at 136.

140. *Id.*

141. *See id.* at 174:

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.

period.¹⁴² 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.¹⁴³ 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.¹⁴⁴

The fact that the subfields of Islamic legal practice did not develop in

142. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW, *supra* note 83, at 70-71 (although author acknowledges later minor changes at 71-72); NORMAN ANDERSON, LAW REFORM IN THE MUSLIM WORLD 7 (1976); N.J. COULSON, A HISTORY OF ISLAMIC LAW 75, 80, 85, 140-42 (1964); HAR GIBB, MODERN TRENDS IN ISLAM 13 (1947) (holding that the gate was not only closed but "never again to be reopened"); MOHAMMED HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 337-38 (1991).

143. For alternative accounts and those who question the completeness of the end to *ijtihad*, see W. Montgomery Watt, *The Closing of the Door of Ijtihad*, in ORIENTALIA HISPANICA 675-78 (J.M. Barra led., 1974) 675-678; BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH 446 (1999); Rudolph Peters, *Idjtihad and Taqlid in 18th and 19th Century Islam*, in 20 DIE WELT DES ISLAMIS 133-34 (Rainer Brunner ed., 1980) (embracing 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 17-18 (2003); HALLAQ, AUTHORITY, *supra* note 136 (substantiating an alternative premodern account in general, including Hallaq, *Was the Gate of Ijtihad Closed*, *supra* note 137); WAEL B. HALLAQ, SHARIA: THEORY, PRACTICE, AND TRANSFORMATIONS 445 (2009). But as Johansen points out, *supra*, at 447, neither Peters nor Hallaq claim that jurists' continued to embrace *ijtihad* which resulted in new legal ordinances, so we should not confuse jurists' claim to this right with their ability to actually change legal doctrine. See also JUDITH E. TUCKER, IN THE HOUSE OF THE LAW: GENDER AND ISLAMIC LAW IN OTTOMAN SYRIA AND PALESTINE 10-15 (1998); Johansen, *supra*, at 446 (discussing the "closing of the gates of al-ijtihad" by Sunni law school jurists but not as a part of dominant doctrine among Shia jurists).

144. Scholars have, thus, begun to recognize a 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*).

lock step not only affirms legal pluralism, itself intertwined with legal innovation, but serves as a 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.¹⁴⁵ Few scholars and clerics today, of course, talk about their duty of *ijtihad*—least of all in conflict settings. Too little scholarly attention, including in the western academy, 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*), and presumption of continuity (*istishab*)), thus making “all the non-revealed proofs of Shari'ah” an “embodiment of the single phenomenon of *ijtihad*.”¹⁴⁶ 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.”¹⁴⁷ 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 Shari'ah.¹⁴⁸ 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 linked with society and history—are, of course, critical assets

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

146. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE, *supra* note 142, at 315. Kamali also notes:

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.

Id. at 316.

147. *Id.* at 315.

148. *Id.*

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 mass of juristic opinion, legal doctrine, and customs—is perhaps one of the signal 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."¹⁴⁹ Therefore, not only is there a venerable tradition stretching back to the prophet Muhammad, the prophet himself practiced *ijtihad* in military matters. 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.¹⁵⁰ 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."¹⁵¹ 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 no occasion for a reprimand, or the granting of divine pardon for his mistakes."¹⁵² *Ijtihad* then is not only part of the tradition of law of war thinking from the very beginning, it is an earnest matter of duty and integrity—better for the community to err in your opinion than not having used your reasoning capacities at all.

149. *Id.* at 328. 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*."

150. *See id.* at 326-27.

151. *Id.* at 329.

152. *Id.*

With these analytical resources in mind, the third and last set of lessons involves taking Islamic law more seriously not only its internal resources—many still unearthed—but in forecasting the complex role that religion and religious-based actors will continue to play on asymmetric battlefields and in global affairs including changing legal landscapes. Global contention over Islamic law has made it abundantly clear that religion occupies a persistent role in international affairs and global governance. This complex role is, of course, double-edged: religious precepts may advance humanitarian goals in conflict settings, but they may also act as a ruse for political factionalism and sectarian policies, a means to justify political violence. Insofar as the international community must deal with the second scenario of religiously inspired uses of political force, Islamic law may be, however, a praxis-oriented resource. Islamic *jurisprudence*, often called “jurist’s law,” is itself a kind of misnomer, since Islamic law remains resolutely practical, palpably embodied in the texture of daily life—a praxis-based value system less prone to activist misuses than more ephemeral ideologies. Its curious strength is that it offers, as mentioned, a model of religiously informed legal norms which at its core eschews politics, embeds mechanisms within these norms to prevent political actors from equating legal rules with their preferential power, and positions the ethics of justice over political expediency. This is also true in matters of war: the Islamic laws of war are essentially practical rules (*i.e.*, sparing women and children, curtailing the plundering of foodstuffs, refraining from cutting down fruit bearing trees).¹⁵³ Yet, again, it is not only clerics and scholars who treat Muhamad’s practices, including actions in historic battles, as part of the law. Wide swaths of modern Islamist movements analogize their own strategic decision-making by his medieval choices. In this prosaic process of practicing such rules, walking in Muhammad’s footsteps, as it were, one theoretically grows closer to God.

Thus, treating Islamic law as a kind of influential global player in contemporary security challenges provides the added benefit of requiring analysts in international security affairs to contemplate use of force norms in cross-cultural terms and to define such international standards inclusively.¹⁵⁴ This benefit includes ensuring that problems of cultural or

153. See “*Abu Bakr On the Rules of War*,” ISLAM: FROM THE PROPHET MUHAMMAD TO THE CAPTURE OF CONSTANTINOPLE, Vol. 1 (Bernard Lewis, ed. & trans., 1974), reprinted 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 Michael J. de Goeje, 1879–1901).

154. Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in OXFORD HISTORY OF ISLAM 107 (John L. Esposito ed., 2000), available at http://acc.teachmid east.org/texts.php?module_id=2&reading_id=210&sequence=1.

linguistic translation (*i.e.*, concepts of justice or human rights) do not become problems of politics or political interest groups. There is no doubt that claims for culture have too often led either to “othering” Islam or, as in the case of overzealous cultural relativism, evading often universal standards for conflict and good governance—even while such standards are anchored in Islamic tradition. The modern *jus in bello* covers both sides in a conflict and does not, as such, determine justice in wars; thus, these norms push back against cultural relativism of any brand. But Islamic law too offers an antidote to political and cultural abuses of the law in its concept of justice. 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 view applies to earthly disputes which if not resolved properly, result in deeply socially unsettling results: not only colonial histories, regional conflicts, comprador elites, but also problems of governance, legitimacy, state-sponsored violence and repression. These issues raise troubling matters of injustice felt personally 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.

Part of recognizing Islamic law in its global, cross-cultural potential is in learning from its own leading edge confrontation with issues that now bedevil IHL—such as the eclipse of the state actor in conflict situations. Part of the complexity of Islamic law has always been its geographical impulse (in the concept of the *ummah*) which posits not a state-based or interstate architecture, but an Islamic moral-legal empire in theory to be actualized in some future. The negative, imperialist, and territorializing tendencies of this impetus are too rarely discussed today—even though they are well-known and frame recent resuscitations of the Caliphate on these terms. Ample, untapped possibilities are also available, however, in this preexisting transnational regime—not the least of which is an ethical framework for constraining transgressive behavior across the full range of actors now populating conflict settings. Those possibilities have broken through at times in recent Arab pro-democracy uprisings across widely divergent regions and regimes as constituencies rapidly inhabited a common, familiar vocabulary, including a rejection of tyranny—a position authorized by Islamic law itself. Religious authorities also have tapped this transnational moral-legal framework in trying to censure or rebut Islamists co-opting theological debate.

In all of these ways, both humanitarian regimes are engaged in an implicit dialogue, itself a joint processing and confrontation with new global conflict dynamics and warfare practices. It is up to us to link shared struggles and rebuild linked vocabularies for restraining new forms of warfare.

