Just Wars, Holy Wars, and Jihads

Christian, Jewish, and Muslim Encounters and Exchanges

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The advent of an international legal regime governing war and peace has had an obvious and profound impact on Muslim articulations of jihad. As postcolonial Muslim states acceded to the United Nations Charter, the Geneva Conventions, and other treaties that make up this legal regime, they contributed to the claim that public international law is a universally accepted set of principles and procedures, the first such in history. This claim of universality threatened to make Islamic theories of world order, articulated in the classical jurists’ works on syar’, completely obsolete. In practice, Muslim states had never fully conformed to the principles of syar’ even at the time of its development, long before European penetration fundamentally altered their behavior. Yet now, with the rise of international law, the syar’ was threatened not just by desuetude but also by supersession, if not outright renunciation. International law was something that no Muslim statesman, jurist, or activist could ignore.

This chapter explores the different reactions that the rise of international law elicited among Muslim theorists. I divide the responses into three broad categories. The first group I call the assimilationists. They treat the syar’ largely as a historical and now obsolete theory of world order. The assimilationists accept the universality of public international law and argue that through the accession of Muslim states to the international legal regime, most Muslims also do so. The second group is the accommodationists, who coalesce around the claim that while international law appropriately governs the conduct of Muslim states in international society as a whole, Islamic law could and should have a role in the mutual relations of Muslim states. In other words, they see the potential for an Islamic international law alongside public international law. Potential conflict of laws is minimal, in the accommodationist view, because the basic Islamic principles governing international relations are fundamentally compatible with those underlying modern international law. The third group is the rejectionists, who view
international law as an alien code imposed on Muslims by Europeans. The rejec-
tionists affirm the superiority of Islamic law over public international law and call
for its application by Muslim states, not just in their relations with each other but
also in their relations with non-Muslim states. These three categories are ideal
types; there are, of course, nuances within each of these general positions, and
few writers fit perfectly into one camp or another. Still, the three groups do repre-
sent, I believe, an accurate expression of the spectrum of Muslim responses to the
advent of international laws on war and peace.

Development of International Law

International law on war and peace consists of a diverse set of principles, expecta-
tions, and aspirations stipulated in treaties, declarations, legal rulings, and cus-
tom. This complex and growing body of law deals with both the legal grounds for
war (jus ad bellum) and the restraints governing the conduct of war (jus in bello).
The latter are generally termed the laws of war or the laws of armed conflict.

The legitimate grounds for war is, of course, a topic with deep roots in Western
just war theory, but until the twentieth century, little effort was made by states to
codify principles governing their resort to war. In the nineteenth-century Concert
of Europe, war was viewed as an instrument of power politics, a "continuation of
politics by other means," as famously described by Clausewitz.1 Resort to war was
tempered by the prudence of statesmen pursuing ideally an enlightened notion of
their national interests.

The Hague Convention for the Pacific Settlement of International Disputes
(1899, revised in 1907) signaled the development of a new perception of war. It
called on states to resolve conflicts through diplomacy, commissions of inquiry,
and ad hoc arbitration tribunals. It established the Permanent Court of Arbitra-
tion, which has evolved today into an institution that, unlike the better-known
International Court of Justice, mediates disputes involving both state and non-
state parties.

The carnage of World War I gave impetus to the strengthening of laws and in-
institutions for the nonviolent resolution of international conflicts. Article 12 of
the Covenant of the League of Nations (1920) required member states to submit
international conflicts for "arbitration or judicial settlement or to enquiry by the
[League] Council." States that launched wars in contravention of the covenant's
procedure for resolving disputes were threatened under Article 16 with war
against all league members. The Kellogg-Briand Pact (1928) went further than the
covention in renouncing war altogether as a legitimate instrument of national
policy.

Neither the covenant nor the pact prevented the outbreak of World War II, but
the UN Charter (1945) reaffirmed their essential principles while creating a pu-
tatively more effective collective security mechanism in the Security Council. The
charter retained the principle of renunciation of threats or use of force against
any state (Article 2), qualified only by the legitimacy of self-defense against
armed aggression (Article 51). The framers of the charter left "aggression" unde-
finite, and a number of legal scholars have argued for the value of such an ap-
proach.2 Nevertheless, the UN General Assembly has adopted resolutions
specifying what constitutes aggression. The assembly's Declaration on Principles
of International Law concerning Friendly Relations (1970) legitimizes armed
struggles for decolonization and, in making the colonial power the aggressor
state, sanctions third-party support for national liberation struggles. Or Decem-
ber 4, 1974, the General Assembly adopted the Definition of Aggression Resolu-
tion, which lists such "traditional" acts as cross-border invasion, bombardment,
and blockade but also includes violations of the terms under which the armed
forces of a state are allowed by another state to enter or operate in its territory.
Because both of these resolutions were adopted by the General Assembly and not
the Security Council, their status as international law is disputed, and they are
generally treated as "soft" or customary law.

Thus, during the past century, international law has made strides toward cur-
tailing the legitimate use of force and thereby expanding the possibilities for
peaceful resolution of international disputes. Its focus has largely been on inter-
state rather than intrastate conflicts, the type of wars that have proved the most
frequent and destructive since World War II. The debate on the right of humani-
tarian intervention that gained ground in the 1990s and led to UN endorsement
in 2005 of a "responsibility to protect" evinces international recognition that
resolve to force may be legitimate in circumstances quite different from traditional
cross-border aggression.

International law governing the conduct of war dates back to the mid-nineteenth
century, when the onset of industrial warfare dramatically increased the level of
destruction that modern armies could wreak. This technological development oc-
curred simultaneously with the increase of wars of nationalism, which blurred dis-
tinctions between combatants and noncombatants. The laws of armed conflict that
developed in response to the upsurge of total war restrict the ways belligerents
engage each other on the battlefield, the weapons and tactics that may be employed,
and the treatment of prisoners of war and civilian populations. The first two areas
are the focus of the so-called Hague Law, because the bulk of initial agreements
restricting actual combat emerged out of conferences held at the Hague. The treat-
ment of prisoners of war, including those wounded and disabled, and the protec-
tion of civilian populations form the substance of international humanitarian law
(IHL), or Geneva Law, as it is often called, because many of the conventions on
these issues bear the name of this city.3

The St. Petersburg Declaration (1856) marks the beginning of formal interna-
tional efforts to impose limits on the conduct of war. The declaration opens by
stating a principle that would guide the subsequent development of the law of
armed conflict: "The only legitimate object which states should endeavor to
achieve during war is to weaken the military forces of the enemy." Seven years later, the International Committee of the Red Cross (ICRC) was founded in Geneva, creating an organization dedicated to gaining international recognition for the rights of combatants, prisoners of war, and civilian populations. Its first achievement was the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, now known as the First Geneva Convention. The Second Geneva Convention, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, followed in 1906. And in 1929, the Third Geneva Convention was adopted to provide for the humane treatment of prisoners of war.

The Hague Convention of 1899 expanded dramatically the scope of treaty law concerned with the conduct of war. It included the Convention with Respect to the Laws and Customs of War on Land (Hague II) and an adaptation of the First Geneva Convention to the conditions of maritime warfare (Hague III). In addition, the conference adopted a convention and three declarations banning certain types of weapons, namely, projectiles launched from balloons, projectiles that diffuse "asphyxiating or deleterious gases," and hollow-point bullets. The Hague Convention of 1907 elaborated on and adapted many of the provisions of the 1899 convention, focusing particularly on the conduct of naval warfare. Following World War I, which saw the extensive use of chemical warfare, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare was adopted in 1925 as an amendment to the Hague Convention.

The atrocities of World War II led to the prosecution of German and Japanese war criminals by international tribunals at Nuremberg and Tokyo, the adoption of the Genocide Convention (1948), and, in 1949, the revision of the first three Geneva Conventions and the addition of a fourth convention regulating the treatment of civilians in war zones and in occupied territory. Two additional protocols were adopted in 1977, the first elaborating on rules governing international conflict and the second focusing, for the first time, on the conduct of internal wars.

The post-World War II era has also witnessed significant developments in efforts to outlaw or curtail the use of certain types of weapons. Weapons of mass destruction have received the greatest attention. The development, production, and stockpiling of biological weapons were banned under the Biological Weapons Convention of 1972 and likewise for chemical weapons under the Chemical Weapons Convention of 1992. Although the testing and proliferation of nuclear weapons have been restricted by a number of agreements, including the Partial Test Ban Treaty (1963), the Nuclear Nonproliferation Treaty (1968), and the Comprehensive Test Ban Treaty (1996, not yet in force), no treaty yet exists banning their use. The UN General Assembly has passed a number of resolutions to this effect, and in 1996, the International Court of Justice issued an advisory opinion that could be read as effectively outlawing the use of nuclear weapons. Other agreements deal with more ordinary yet highly lethal weapons: the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980, with later protocols) and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997).

The most recent milestone in the evolution of an international legal regime governing military conduct is the creation of the International Criminal Court under the Rome Statute of 1998. It establishes the first permanent international institution to prosecute individuals for genocide, crimes against humanity, and war crimes.

As this body of international law evolved, Muslim involvement in its formulation was sporadic and minor until after World War II. The Ottoman empire acceded to the First Geneva Convention in 1865, and Qatar and Persia followed in 1874. Ottoman and Persian delegations were present at the 1899 and 1907 Hague Peace Conferences. The delegates—"westernized and westernizers," as James Cocksley characterizes them—made little attempt to inject Islamic rulings on the conduct of war into the deliberations, but "as a result of the Islamic delegations' interventions, the Hague Peace Conferences officially confirmed the principle of religious non-discrimination as a central tenet of IHL."

Rather than the substance of IHL, it was the red cross symbol adopted in 1864 that emerged as the most contentious issue for the Ottoman empire and later other Muslim states. The Ottomans, during their war in 1876 with Serbia and later Russia, declared that they would display a red crescent emblem instead of the red cross, because the latter evoked the Crusades and thus was offensive to their soldiers. The Russians initially challenged the Ottomans' move but eventually agreed to respect the red crescent emblem as long as the Ottomans reciprocated for the red cross. This proved to be merely the opening round of a prolonged controversy over the emblem.

Once the red crescent had been tacitly accepted as an alternative emblem, other states also moved to have their own distinctive emblems recognized, including Persia, which proposed a red lion with sun, based on the Qajar insignia. Realizing that a Pandora's box had been opened, the ICRC mobilized efforts, official and unofficial, to reinstate the red cross as the unique symbol of the movement. The 1908 conference that drafted the Second Geneva Convention unanimously adopted a resolution denying any religious origins or connotation to the emblem. Likewise, numerous ICRC spokesmen gave accounts of how the red cross symbol was adopted in attempts to establish its purely secular origins and significance. These efforts proved in vain. Upon the insistence of Turkey, Persia, and Egypt, the 1929 conference that drafted the Third Geneva Convention formally approved the red crescent and the red lion with sun for use only by those national societies already using them, hoping thereby to limit their use. This effort also failed. As new Muslim-majority states gained independence and acceded to the Geneva Conventions, they adopted, with
very few exceptions, the red crescent symbol for their own national societies. Iran dropped the use of the red lion with sun and adopted the red crescent soon after the Iranian Revolution.  

Muslim engagement in efforts to broaden the scope of the laws of war would not be prominent until the negotiations for the 1977 Geneva Protocols. At that time, a number of Muslim states, motivated primarily by the Palestinian conflict against Israel, pressed for the adoption of the second protocol elaborating the rights of irregular fighters. But again, they did so without recourse to any specifically Islamic injunctions.

International Law and Siyar

As a result of international law’s distinctively Western origins and the generally peripheral role played by Muslims in its development, international law’s relationship to the jihad tradition is fundamentally different from its relationship to the just war tradition. As Ann Elizabeth Mayer observes: “The West today deals with international law as a familiar and integral component of Western civilization that has evolved pari passu with Western culture and religion over centuries.” This is certainly not to say that the laws of war and peace are fully embraced by just war theorists, but the objections are more along the lines of refinements and not fundamental challenges. “In contrast,” Mayer continues, “the Islamic doctrines of war and peace have been part of a juristic culture that has remained closer to its premodern roots.” In other words, when Muslims engage with international law as Islamic scholars or jurists, their point of reference is the siyar, the theory of world order developed more than a millennium ago that was never fully implemented but never fully rejected or revised, either. For many Muslims, therefore, international law is not an outgrowth of their own culture’s previous discourses and practices; it is a rival system to the authentically Islamic system.

This is not to say that the classical Islamic laws of war and peace are essentially incompatible with modern international law. As argued in the introduction to this book, the classical theory of jihad shares many substantive points with just war theory, and inasmuch as these just war principles underlie the evolution of modern international law, the principles of jihad are also compatible with international law. But the jihad tradition evinces far less creative rethinking and adaptation in the modern period than does the just war tradition. The difference between the two traditions is seen in the fact that few modern international lawyers would feel bound by the writings of Hugo Grotius, whereas expositors of Islamic laws of war and peace ineluctably turn to the eighth-century jurist Muhammad al-Shaybani as an authority. Even those Muslims who embrace or accommodate international law cannot ignore the legacy of siyar. Their task is to reconcile or otherwise deal with certain basic conflicts between siyar and modern international law.

Jihad and the Geneva Conventions

At the broadest conceptual level are basic epistemological differences. International law, whether it is seen as derived from natural law, as much of humanitarian and human rights law is, or from positive law, expressed in treaties among states, is firmly secular in foundation. By contrast, the shari’a, of which siyar was one branch, was conceptualized as divine law, as revealed in God’s dispensation, the Qur’an, and expounded by God’s messenger, Muhammad, through the hadith literature compiled centuries after his death. The Qur’an and hadith present no systematic or, some might argue, consistent theory of world order in general or laws of war and peace in particular. Thus, it was left to the jurists to develop such a theory through interpretation of the Qur’an and the sunna, or example, of the Prophet. Some scholars were more willing than others to undertake creative legal reasoning (ijtihad) than others. Nevertheless, all saw their jurisprudence (fiqh) not as human lawmaking but as an exercise in trying to discern God’s law.

International law, or specifically public international law, regulates the interactions of states with one another. The siyar, on the other hand, established rules of behavior for the Muslim state (which in the classical theory was envisioned as a single, unified entity) and Muslim individuals in their interaction with non-Muslim political groups and individuals or with Muslim rebels, apostates, and criminals. It was conceived as a unilateral legal system binding only on Muslims, with no assumptions of reciprocity or accountability from those outside the Muslim umma (community). It was thus not “international” law at all. The siyar did validate diplomacy, treaties, and truces with non-Muslims, but by engaging in such activity, non-Muslims did not come within the legal framework of Islamic law, unless they agreed to dhimmī status, through which they accepted Islamic sovereignty while retaining a degree of communal autonomy. Those who did not accept dhimmī status remained outside of Islamic law, and both they and the Muslims were bound only by the specific provisions of their mutual agreement. If there were any assumptions at all about a “law of peoples” on the part of Muslim jurists, they were what might be called a rudimentary notion of natural law.

The principal sources of international law are treaties and custom. The siyar is primarily “jurists’ law”; it is contained in the intellectual output of scholars working more than a millennium ago. Since custom, or state practice, was never accepted as a legitimate source of siyar, Islamic laws of war and peace were more theoretical than practical from their origins. The problem was compounded not just by dramatic changes in the international system and the technology of war but also by the intellectual conservatism that set in after the collapse of the Abbasid empire in the mid-thirteenth century. The generations of jurists who followed busied themselves with preserving their legal heritage rather than revising it.

This approach is evident even among twentieth-century Muslim commentators on Islamic international law. The earliest extended treatises in Western languages by Muslim authors date from the period between the two world wars. In 1929, Najib Armanazi, a Syrian, published his doctoral dissertation titled _La loi_
et le droit international" (Islam and International Law), written at the University of Paris. The Indian scholar Muhammad Hamidullah (d. 2002) published in 1935 his doctoral dissertation submitted to the University of Bonn on neutrality in Islamic law. Hamidullah published a greatly expanded English edition of the work titled The Mission Conduct of State in 1942. This book underwent several revisions in the following decades and became a standard reference for students of Islamic international law. Ahmed Rechid, a Turkish legal scholar, published "Islam et le droit des gens (Islam and the Law of Nations)" in 1937. Armanazi and Hamidullah focus almost exclusively on classical works of ijar as they elucidate Islamic laws of international relations. Their references to Muslim practice are confined mainly to the era of the Prophet and the first four caliphs. Rechid, however, devotes considerable space to Ottoman practices, particularly in the field of conflict of laws, reflecting no doubt his prior experience as a legal adviser to the Turkish Ministry of Foreign Affairs.

For their part, Muslim states adapted to their changing circumstances and adopted various extra-shari'a norms in their statecraft. As Nuri Yurdusev shows in chapter 9 of this book, the Ottomans began to accommodate themselves to European custom by the mid-fifteenth century. In the twentieth century, all post-colonial Muslim states readily acceded to the modern international legal regime. All are members of the United Nations; seven are charter members, including the kingdom of Saudi Arabia. All are signatories to the Geneva Conventions. This leads to the fundamental question: Through their practice, have not Muslim states all renounced any place for a distinctively Islamic international law? The answer would seem to be yes, especially as far as relations between Muslim states and non-Muslim states are concerned. But this answer must be qualified by the observation that not infrequently, and especially in their mutual relations with one another, Muslim statesmen still invoke Islamic values and doctrines, including jihad, as if they are still relevant. Moreover, as I discuss in the conclusion of this chapter, Muslim states have taken a tantalizing step toward the creation of an institution that would give substance to the claim that Islamic international law is more than just a historical artifact.

Moving from the broad conceptual level to the specific rulings on war and peace, modern Muslim commentators again face a number of important differences between ijar and international law. Under jus ad bellum, the first issue they must grapple with is the classical theory's bifurcation of the world into two opposing spheres: dar al-Islam and dar al-harb. Dar al-Islam was ideally a single political entity, governed by a single ruler, the imam/caliph. In reality, dar al-Islam was not united even at the time the classical theory was being developed, and as the centuries passed, Muslim jurists found ways to rationalize the existence of separate Muslim states. Most Muslim scholars and activists are reconciled today to the legitimacy of multiple Muslim states, but the principle of state sovereignty that lies at the heart of international law remains to be fully reconciled with the Islamic ethical ideals of Muslim unity and fraternity.

Dar al-harb was defined as territory where the shari'a was not enforced, and as such, the classical theorists conceived of it as populated by benighted peoples. Muslims were called upon by God to bring the light of Islam to them, through peaceful proselytizing, if possible, and, if not, through war. The residents of dar al-harb could elect to submit to Muslim sovereignty as dhimmis, upon which their territory was considered absorbed into dar al-Islam. The expansionist jihad to which the classical jurists devoted so much attention is an obvious and glaring problem for modern Muslim theorists who would accommodate the ijar to international law.

Under jus in bello, Islamic injunctions do enjoin discrimination and proportionality. But as we delve deeper into the specific opinions of the different legal schools, we find a number of provisions that dilute the force of these principles. Discrimination in war meant refraining from the intended killing of women and children. Many jurists added various categories of males to this list, including the elderly and infirm, farmers and merchants, monks, and others removed from society. But this notion of discrimination is not equivalent to the modern principle of noncombatant immunity. All able-bodied, adult male prisoners, whether they were previously engaged in fighting or not, could be executed upon the decision of the Muslim commander, unless they had surrendered with an explicit guarantee of security (aman). All of the enemy population, military and civilian, could be held for ransom or sold in slavery.

Classical jurists also gave Muslim commanders wide latitude in terms of the weapons and tactics they could employ in overcoming the enemy. They could besiege towns with large numbers of civilians trapped inside, cut off the water supply, fire incendiary devices, and flood the enemy.

Finally, the classical Islamic theory contains no formal provisions for punishing Muslim commanders or troops who violate restrictions on the proper conduct of jihad. Under Islamic law, a Muslim who kills a fellow Muslim is both morally and legally accountable. But a Muslim soldier who violates the rules of war against a non-Muslim enemy, either military or civilian, is at most morally accountable, meaning that he will be judged and punished by God in the hereafter, not by humans in this life.

These are merely some of the most prominent conflicts between the ijar and modern international law. All Muslim theorists, if they are to be intellectually credible, must address these basic concerns, whether their goal is to assimilate, accommodate, or reject international law.

The Assimilationists

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applicability in the modern age. Pragmatically, it has no applicability because the conditions of international relations today are fundamentally different from those in which the theory was elaborated. Morally, it has no applicability because it is grounded in neither the Qur'an nor the sunna but on unidentified, non-Islamic sources that influenced the classical jurists who developed it. Thus, for the assimilationists, the impetus to comment on the shari'a is not great; they assume that public international law is practically and normatively binding on Muslims. Muslim jurists who have contributed to the development of international law during the past century have most often done so without invoking Islam in their profession.

Majid Khadduri (d. 2007) is the best-known and most influential scholar of the Islamic laws of war and peace in the West. He was an Iraqi Christian, not a Muslim, but this fact seems to be unknown or unintelligible to a number of Muslim and non-Muslim commentators on his work. His impact on the study of the Islamic theory of international relations is certainly comparable to that of any contemporary Muslim scholar, so he merits inclusion in this discussion. Khadduri was not only a scholar of Islamic law and philosophy and Middle Eastern history and politics, but he was also a lawyer and diplomat who participated in the drafting of the UN Charter as a member of the Iraqi delegation. He wrote a number of articles and books on Islamic theories of international relations, including the survey War and Peace in the Law of Islam and a translation of one of the seminal works in shari'a, a treatise by the jurist al-Shaybani. There is a paradox here. Through his scholarship, Khadduri revived interest in classical Islamic theory, among both Muslims and non-Muslims, but through his career as a diplomat and his reflections on the place of Islamic theory in the modern age, he consigned this theory largely to the past.

Two articles published by Khadduri during the 1950s, "Islam and the Modern Law of Nations" and "The Islamic System: Its Competition and Co-Existence with Western Systems," outline most clearly his views on the role of Islamic law in the modern age. Both essays open with the claim that Christendom and Islam had developed historically as two opposing civilizations, "each advocating a world order sharply in conflict with the other. . . . The modern world, the world of the two opposing ideologies were at the outset so exclusive and inextensible that each deemed the destruction of the other as absolutely necessary for its survival." Such an intractably hostile stance could not be maintained for long, Khadduri continues, and so "after a long period of competition and warfare by virtue of which each came to the inevitable conclusion that its moral and political principles could not be imposed on the other," both civilizations began to adapt to the necessities of coexistence.

The triumph of pragmatism over ideology, Khadduri writes, resulted in a "thorough re-examination" by Muslims of their earlier "legal theory of foreign relations." He cites three changes embraced by Muslim powers, in particular the Ottoman empire: the separation of religious doctrine from the conduct of foreign relations; acceptance of the possibility of peaceful intercourse among nations of different religions; and the territoriality of law, which undergirds the idea of sovereign states. Still, despite the thorough revision in Islamic principles of statecraft, "neither Islam nor Christendom [was yet] prepared to meet on a common ground and modify their religious principles for the purpose of developing a law of nations based on equality and reciprocity." Had the Ottoman empire been integrated into the European system during the formative period of the law of nations (by which Khadduri means the sixteenth century), this law might have become universal much earlier in time, he suggests. "Twentieth-century Islam found itself completely reconciled to the Western secular system," Khadduri concludes. "The active participation of Muslim states in international councils and organizations demonstrates Islam's willingness to take active part in the promotion of international peace and security and its support of the development of the modern law of nations." In particular, jihad has become "an obsolete weapon." By this Khadduri means the notion of expansionist jihad, for elsewhere he clarifies: "Even those publicists who objected to the secularization of the internal law of Islam have accepted marked departures from the traditional Muslim law governing Islam's foreign relations. Almost all of them, who often invoked the jihad against Western encroachment on Islam, repudiated the idea that the jihad is offensive in character."

Khadduri ends one of his essays by acknowledging that some Muslim jurists (those I have labeled accommodationists) maintain that the modern law of nations, in order to meet the needs of "an expanding world community," should incorporate elements of Islamic law. They often base their claims, Khadduri notes, on Article 38 of the Statute of the International Court of Justice, which "permits the adoption of new maxims of law from the legal systems of civilized nations."

What principles might Islamic civilization contribute to the further development of international law? Khadduri suggests two: (1) recognition of the individual as a subject of international law; and (2) that moral principles should not be divorced from law, for "the historical experiences of Islam, indeed the historical experiences of all mankind, demonstrate that any system of law, whether municipal or international, would become meaningless if divorced completely from moral principles." He hastens to add, however, that the moral principles he has in mind are not based on specific religious doctrines. "Religious doctrine as a basis for the conduct of the state created friction and continuous warfare with other nations; but religion in terms of moral principles prompted the Muslims to observe humane principles embodied in their law during their hostilities with other nations."

The Accommodationists

The accommodationist strand of Muslim response is characterized by the acknowledgment that most aspects of the shari'a are incompatible with modern international relations but that through renewed interpretive activity (ijtihad), the moral
values of Islam could provide the basis for a new and distinctive Islamic international law. This Islamic law might then be enforced as a form of "regional law" among Muslim states. A number of distinguished Muslim jurists have espoused some form of this accommodationist line, including 'Abd al-Razzag al-Sanhuri, Subhi Mahfouz, Muhammad 'Abd al-Mun'im, and Walba al-Zubayli. I will focus here on the arguments of the Algerian diplomat and former judge of the International Court of Justice, Mohammed Bedjaoui.

Bedjaoui contributed a lengthy analysis of the Iran-Iraq War in light of the principles of Islamic law to an anthology titled The Gulf War of 1980–1988: The Iran-Iraq War in International Legal Perspective. 24 He concludes this essay by asking two pertinent questions. First, does an Islamic legal order even exist today, "when that order not only appears to have undergone no evolution since the seventh century but also transpires in practice to have found little favour with Muslim States in their respective relations?" And second, how might an Islamic legal order, "were it to be recognized, updated and applied...to co-exist with the universal legal order, in accordance with the relevant provisions of the United Nations Charter?"25

The answer Bedjaoui gives to the first question is no—"Islamic law has no modern relevance." More particularly, Islamic international law still remains, regrettably, a law of speculation pursued for purely academic purposes." He blames the stagnation of Islamic law partly on Western scholars and jurists, who historically denied Muslim contributions to the development of their own legal system. Thus, Islamic law was treated as an alien system of law when European states disseminated their own law of nations in the tracks of imperialism. 26 Muslim jurists by and large accepted the European interpretation of Islamic law, according to Bedjaoui, and it is these Muslims to whom he assigns principal responsibility for the "decadence" of Islamic law. "With a few rare exceptions, jurists from the newly independent Muslim countries have succumbed to the easy temptation of lazingly imitating the West instead of meeting the more demanding needs of creativity." 27

But instead of resigning himself to the complete obsolescence of Islamic law, Bedjaoui declares that Muslims can and should find a place for Islamic law in international relations. He writes: "I can restrain myself no longer from appealing to all jurists in the Muslim world to take greater personal responsibility and mobilize more efficiently in a decisive effort of creativity, instead of confining themselves to an attitude of slavish imitation which often results in strangling lifeless artificial limbs of foreign legal origin on living human communities" (emphasis in original). 28

Finally, Bedjaoui turns to his second question on how a revived Islamic law might coexist with international law. He observes that by becoming parties to the UN Charter, Muslim states did not foreclose the possibility of establishing "their own regional organs within which Islamic law could have enjoyed every opportunity of a revival." Muslim states have, in fact, moved to create such "regional" organizations, the most prominent being the Organization of the Islamic Conference, founded in 1969 and today consisting of fifty-seven members. Yet, as Bedjaoui notes, "so far that Organization does not appear to have produced any clear undertaking to ensure the development and modernization of Muslim public international law by adapting it to the new structure of the international community and having it applied in inter-Islamic relations." 29 Should it ever do so, Bedjaoui is confident that no fundamental incompatibility will arise between the newly formed Islamic international law and public international law. In the case of the Iran-Iraq War, for example, "one arrives at virtually the same legal analysis...whatever the 'key' be used, whether that of public international law or that of Islamic law."30

The Rejectionists

At the forefront of Muslim opinion rejecting international law are, of course, the spokesmen of militant Islamic groups. Not just the leaders of al-Qaeda but most extremist groups have long expressed their contempt for the United Nations and for international law, which they dismiss as tools for Western hegemony. In 1993, the same cell that planned and executed the bombing of the World Trade Center was plotting to bomb the UN headquarters. In 2003, one of the first targets of al-Qaeda in Iraq was the newly established UN office in American-occupied Baghdad. Osama bin Laden addressed international law directly in his so-called Letter to America, released on October 6, 2002. In it, he does not condemn or reject international law directly, perhaps a reflection of the Western audience to which the message is aimed. What he rails against are the double standards and hypocrisy that the United States demonstrates with respect to international law. He cites four cases: The United States touts policies to prevent nuclear proliferation, but it exempts Israel. The United States pays lip service to the UN and UN resolutions, but it supports Israel despite its refusal to comply with UN resolutions. The United States demands the censure and prosecution of individuals it labels war criminals while at the same time demanding that its troops be granted immunity from prosecution. The United States claims that it supports human rights while it flouts international law in its treatment of Muslim prisoners. "What happens in Guantanamio is a historical embarrassment to America and its values, and it screams into your hypocritical faces: What is the value of your signature on any agreement or treaty?"31

Perhaps the most detailed and sophisticated treatment of the international law of war penned by a skeptical Muslim writer is that of Abu al-Ala al-Mawdudi (d. 1979) in Al-Jihad fi al-Islam (Jihad in Islam). Mawdudi began this work in 1926 as a series of articles in the Urdu-language newspaper Al-Jami'at, and the complete book was first published in 1930. 32 At the end of his book, Mawdudi included a lengthy essay on the development and content of the modern law of war. Here, he takes the reader through the main points of the Hague Conferences
of 1899 and 1907, the Covenant of the League of Nations, and the post-World War I conferences on arms control. Turning from international law to state practice, he contends that World War I had demonstrated the abject failure of Western humanitarian principles, but in spite of the catastrophe of that conflict, Western nations showed no signs of altering their behavior. International law, for Mawdudi, is nothing more than rhetorical camouflage for great power politics.\textsuperscript{39} Mawdudi's intent in Al-Jihad fi al-Islam is to demonstrate the distinctiveness and superiority of the Islamic laws of jihad, which are of divine origin, over all other systems, including international law. He concludes with the following gist of his comparison between Islamic law and international law: First, international law cannot be defined as "law" in any true sense. It is entirely subject to the whims and self-interests of states, in particular the great powers. Under such circumstances, how can one establish any objective standards for determining the lawfulness of state behavior? Second, if international laws generally have little relevance to interstate behavior, the laws of war are especially irrelevant. States constantly resort to the notion of military necessity to set aside the military conventions they have previously signed. Third, since international law is not based on transcendent moral principles, as is the case with Islamic law, and it binds only those states that consent to be bound by treaty, the laws of war are speedily cast aside when war breaks out. One state withdrawing from its treaty obligations is enough to bring about the collapse of the entire edifice of international law, as the law of reciprocity dictates that states match the deeds of their opponents lest they lose the strategic advantage. Fourth, even though Islamic law predates Western law by more than thirteen centuries, international law has not added in any notable way to the humanitarian principles that Islam legislated in the conduct of war. Fifth, Western laws of war limit only the means, not the ends, of war. Thus, they do not prevent wars of conquest and plunder. Islamic law, in contrast, strictly limits both the means and the ends of war.

Having charted the differences between the two legal systems in sharp relief, Mawdudi concludes: "Compared to Western laws, Islam's law of war is more correct, beneficial, logical, and solid."\textsuperscript{40} He never explicitly rejects Muslim adherence to international law, but we can infer that he would ask why, after his analysis, any Muslim of sound mind would choose international law over Islamic law.

Conclusion

The advent of international law has yielded divergent responses from Muslim theorists. Nevertheless, I believe that the trend is overwhelmingly in favor of the assimilationist or accommodationist view. The rejectionist position is propounded by a limited number of the most conservative scholars and activists. Even rejectionist theorists who bitterly criticize international law in their writings fail to effect or even advocate radical changes in state policies when they are in a position to do so. The Jama'at-I Islami, the party that Mawdudi led for nearly thirty years in Pakistan, never demanded that its nation withdraw from the United Nations or the international legal regime in general or the treaties specifically governing the laws of war that Pakistan had signed. The same is true of Khomeini in Iran and the Taliban leadership in Afghanistan. They may have been rejectionist theoreticians, but they were also politicians. As such, they accommodated themselves to the reality that their states operated in an international political and legal system far removed from what they considered ideal.

Despite the evidence indicating that Muslims accept the authority of international law, either begrudgingly or wholeheartedly, it would be a mistake, I think, to dismiss altogether any role for Islamic values or legal principles in contemporary international relations. The most concrete manifestation of the continuing vitality of the accommodationist position is the decision by the Organization of the Islamic Conference (OIC) in 1981 to create the International Islamic Court of Justice (IICJ). This institution emerged out of popular concerns about the inability of the OIC to resolve the Iran-Iraq War. But trouble arose soon after the OIC adopted the resolution to create the court. The statute of the IICJ was not approved until 1987. According to it, the court has jurisdiction over disputes referred to it by the OIC member states. It is also to render advisory opinions, or fatwas, on legal questions referred to it by the other organs of the OIC. To all intents and purposes, it is to operate as an Islamic version of the International Court of Justice. The defining characteristic of this court, however, is that its sole source of law would be the sharia. Its eleven judges are envisioned as being the leading experts in sharia's provisions on international law.\textsuperscript{35}

Everything is in place for this court to begin its operations, even its headquarters in Kuwait. Yet it has never convened because the court's statute has not been ratified by the requisite two-thirds majority of OIC member states. The failure of most states to ratify, the very decision to set the ratification number so high and the earlier disputes over the statute itself all point to a stark reality of the OIC. It is an intergovernmental organization founded on the rhetoric of Islamic universalism but mired ever since in the politics of its squabbling and ideologically divided member states. So, unfortunately, because the IICJ is not likely to meet anytime soon, we lack the presence of an authoritative body that may resolve such basic questions as whether a modern Islamic law of war and peace is possible and how this law relates to public international law.

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Notes

Jihad and the Geneva Conventions

23. Ibid., 52.
25. Ibid., 292.
26. Ibid., 294–96.
27. Ibid., 296.
28. Ibid.
29. Ibid., 297.
30. Ibid., 298–99.
34. Ibid., 596–600.