"IHL" as "Islamic Humanitarian Law": A Comparative Analysis of International Humanitarian Law & Islamic Military Jurisprudence Amidst Changing Historical Contexts

Omar Yousaf

Follow this and additional works at: https://scholarship.law.ufl.edu/fjil

Recommended Citation
Available at: https://scholarship.law.ufl.edu/fjil/vol24/iss2/6

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.
NOTE

"IHL" AS "ISLAMIC HUMANITARIAN LAW": A COMPARATIVE ANALYSIS OF INTERNATIONAL HUMANITARIAN LAW & ISLAMIC MILITARY JURISPRUDENCE AMIDST CHANGING HISTORICAL CONTEXTS

Omar Yousaf

I. INTRODUCTION ................................................................. 440

II. SOURCES OF LAW .............................................................. 441
   A. International Humanitarian Law .................................. 441
   B. Islamic Law ............................................................... 442

III. JUS AD BELLUM ................................................................. 448

IV. CIVILIAN IMMUNITY AND DISTINCTION ................................. 451
   A. International Humanitarian Law .................................. 451
   B. Islamic Law ............................................................... 455

V. THE COMBATANT'S PRIVILEGE AND PRISONERS OF WAR .......... 460
   A. International Humanitarian Law .................................. 460
   B. Islamic Law ............................................................... 462

VI. ISLAMIC LAW AND INTERNATIONAL HUMANITARIAN LAW
    WITHIN THE INTERNATIONAL FRAMEWORK .......................... 467

VII. CONCLUSION ......................................................................... 468

* Omar Yousaf is a graduate student at American University. Enrolled in the university's dual-degree program, he recently graduated from American University's Washington College of Law, obtaining his J.D., in Spring 2012. Currently, he is completing his Masters coursework at the American University in Cairo. The author would like to acknowledge and thank Professors Robert Goldman and Hays Parks of American University's Washington College of Law. This piece originally began as a seminar paper for their course on International Humanitarian Law. As noted, some of the ideas presented in this piece are attributable to them, as presented in course supplements and other materials distributed in class. The author would also like to thank Imam Zia Makhdoom and Ustadh Sami Shamma, a doctorate candidate at the Hartford Seminary and a visiting lecturer at Trinity College, for their contributions and overview of the Islamic arguments presented in this piece.
I. INTRODUCTION

International Humanitarian Law (IHL) is *lex specialis* in armed conflict.\(^1\) The rules and provisions constituting contemporary IHL developed over time as shifting social currents mandated the cooperation of humanitarian norms and military conduct.\(^2\) The past decade has been particularly important in the evolution of IHL, as the "War on Terror" has been preeminent in the wake of the 2001 terrorist attacks.\(^3\) Because many of the post 9/11 conflicts take place in, or involve, Muslim majority states, there has been a surge of interest in "Islamic Law" and its regulation of armed conflict.\(^4\) In this regard, Islamic military jurisprudence has been brought to the forefront.

But within this emerging discourse, there are arguments that Islam is incompatible with contemporary norms of warfare for various reasons.\(^5\) While such an assertion can be criticized for its oversimplification, a closer analysis is imperative toward understanding Islam’s relationship with contemporary IHL. However, this Note is not of an apologetic nature, so as to forcibly push a conciliatory objective. Instead, this Note is premised on the belief that many of the humanitarian ideals of IHL are universal in nature, and can in fact be found not only within Islamic tradition, but in many traditions worldwide. Therefore, the aim of this Note is to explore the relationship between Islam and IHL with respect to particular regulations of armed conflict.

Specifically, this analysis will illustrate the similarities between Islamic military jurisprudence and IHL, while demonstrating that most of the inconsistencies between the two are due to the social contexts in which they were formulated, not an innate incompatibility. As such, an underlying theme of this Note is that relevant principles of armed conflict must be looked at through the prism in which they were formulated because that will help establish their continued relevance today.

The Note will begin with an introduction to the relevant sources of law in each respective tradition so as to illustrate their legitimacy and their influence on the regulation of armed conflict. Then the analysis

---

2. See ROBERT GOLDMAN & HAYS PARKS, INTERNATIONAL HUMANITARIAN LAW 47 (Spring 2011) (on file with author).
5. See *id.* at 268-73 (focusing on Islamic understanding of apostasy and the rejection of the discursive value of international law by certain militant groups).
will discuss the importance of *jus ad bellum*, and how the socio-historical contexts that underlie the justifications of going to war have shaped the laws that regulate the conduct of war. Next, the discussion will turn to a comparative analysis of particular principles related to the regulation of armed conflict, including civilian immunity and the principle of distinction (including the distinction between civilian and military objectives), the combatant’s privilege, and prisoners of war (POWs). The Note will then conclude by demonstrating that Islam can stay true to its own traditions, while working within, and contributing to, the broader international framework.

**II. SOURCES OF LAW**

**A. International Humanitarian Law**

The rules governing armed conflict have long been established in history. Unrestricted to particularly western traditions, historical regulations of armed conflict can be found in Biblical, Oriental, Hindu, and Islamic teachings. The writings of various intellectuals such as St. Ambrose, St. Augustine, St. Thomas Aquinas, Francisco de Vitoria, Francisco Suárez, and Hugo Grotius were also highly influential in shaping the historical guidelines for the laws of war. However, their writings are more relevant to *jus ad bellum* and the Just War tradition, and will be expanded upon below.

As will be discussed more extensively in the ensuing section, the social contexts underlying relations among nations have evolved over the centuries. The modern *jus in bello* reflects this outgrowth of the rules that have historically governed armed conflict. The underlying motivation for the development of the modern *jus in bello* is premised upon the recognition that unnecessary violence and destruction not only destroys a shared set of values, but moreover is immoral, wasteful, and

---

6. Goldman & Parks, supra note 2, at 3.

7. See Deuteronomy 20:10-20 (King James) (providing regulations and prohibiting the slaying of women, children and livestock, and the cutting down of trees used for food); 2 Kings 6:20-23 (King James) (providing that the king of Israel was forbidden from slaying the captives that appeared before him in Samaria); Sun Tzu, The Art of War 75-77 (Samuel B. Griffith trans., 1963) (providing guidelines with respect to waging war and offensive strategy); Book of Manu, Seventh Book, ¶¶ 90-93, reprinted in Leon Friedman, The Law of War, A Documentary History 3 (1972) (limiting the types of weapons used and who may be targeted in combat); see also Goldman & Parks, supra note 2, at 3-7 (providing these excerpts, including Islamic regulations).


9. Goldman & Parks, supra note 2, at 47.

10. Id.
counterproductive to the attainment of political objectives.\textsuperscript{11}

Contemporary IHL is composed of essentially two branches.\textsuperscript{12} First, the rules regulating the methods and means of warfare were codified into the 1907 Hague Convention No. IV; these rules are often called the Law of The Hague.\textsuperscript{13} Second, the rules protecting the victims of armed conflict are contained in the 1949 Geneva Conventions; these provisions afford protection to the wounded, sick, shipwrecked, POWs, and civilians.\textsuperscript{14} The 1977 Protocols to the Geneva Conventions merged these two branches together, bringing the regulation of hostilities and the protection of war victims under a single system of treaty obligations.\textsuperscript{15} Although treaties are only binding upon ratifying parties, some of these provisions are considered to be customary law, thus making them obligatory on all parties, whether they have ratified the provisions or not.\textsuperscript{16} This Note will focus on, but is not limited to these instruments, including the Geneva Conventions and the subsequent Protocols to particular provisions of International Humanitarian Law.

**B. Islamic Law**

The word "\textit{Shari'ah}" is defined as a "way" or "path," such as to water.\textsuperscript{17} It is the way that leads to the source, or more specifically, to God.\textsuperscript{18} As such, Ash-Shari'ah is the Divine Law, an "ideal pattern for the individual's life and the Law which binds the Muslim people into a single community."\textsuperscript{19} There exist, therefore, explicit commands and injunctions within the texts themselves. But as will be discussed below, the Law also allows for scholars and jurists to develop rules from the texts when the texts do not explicitly address a particular issue or situation. The rules deducted from the Islamic sources (collectively referred to as \textit{fiqh}) are jurisprudential attempts to understand and

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{17} Faraz Rabbani, \textit{What is the Shariah? A Path to God, a Path to Good}, SEEKERS GUIDANCE (Mar. 8, 2011), http://seekersguidance.org/blog/2011/03/what-is-the-shariah-a-path-to-god-a-path-to-good-faraz-rabbani/.
  \item \textsuperscript{18} SEYYED HOSSEIN NASR, IDEALS AND REALITIES OF ISLAM 85 (Revised ed. 2000). See also TARIQ RAMADAN, RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION 359-60 (2009) (providing that scholars have historically circumscribed the meaning of "ash-Shari'a" as either the encompassing definition of "the path leading to the source" or the narrower "corpus of general principles of Islamic law extracted" from its sources).
  \item \textsuperscript{19} NASR, supra note 18.
\end{itemize}

https://scholarship.law.ufl.edu/fjil/vol24/iss2/6
ascertain the law.\textsuperscript{20} The science of such deduction and extrapolation (\textit{usul al-fiqh}) is concerned with the sources, their order of priority, and the methods of deducing legal ruling.\textsuperscript{21} Thus, \textit{fiqh} is essentially the law itself, whereas \textit{usul al-fiqh} is the methodology of the law.\textsuperscript{22} Furthermore, the process of formulating legal norms is also critically dependent upon classifying that which is \textit{ibadat} (norms of worship) and that which is \textit{mu'amalat} (social affairs or transactions with society).\textsuperscript{23}

The sources of Islamic Law provide its governing regulations, either directly in the texts, or alternatively through sophisticated juristic techniques that extrapolate, interpret, and develop applicable rules of law. These sources are divided into primary and supplemental sources.\textsuperscript{24} The Qur'an and the Sunnah (the normative practices of the Prophet (pbuh)) constitute the primary sources, whereas numerous interpretative techniques, including \textit{ijma} (scholarly consensus), \textit{qiyas} (analogical reasoning), \textit{maslaha} (consideration of the public welfare), \textit{urf} (custom), \textit{ijtihad} (unprecedented judicial doctrinal development), and treaties, comprise the supplementary sources.\textsuperscript{25}

The principle source of the Shari'ah is the Qur'an.\textsuperscript{26} Islamic tradition holds that the Qur'an was revealed over a period of more than two decades (610-632 C.E.) to the Prophet Muhammad (pbuh).\textsuperscript{27} As the literal Word of God, Muslims believe that the Qur'an is infallible.\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{20} Noel J. Coulson, \textit{A History of Islamic Law} 75 (W. Montgomery Watt ed., 1964).
  \item \textsuperscript{21} Mohammad Hashim Kamali, \textit{Principles of Islamic Jurisprudence} I (2003).
  \item \textsuperscript{22} Id. at 2.
  \item \textsuperscript{23} M. Cherif Bassiouni & Gamal M. Badr, \textit{The Shari'ah: Sources, Interpretation, and Rule Making}, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 135 (2002). See also Ramadan, supra note 18, at 20-21 (providing that the basic rule governing \textit{ibadat} and \textit{'aqidah} [creed] mandates that “only what is written is allowed, and any addition or change is considered as a blameworthy, dangerous, or condemnable innovation (\textit{bid'a})” whereas in the sphere of \textit{mu'amalat}, the rule is the opposite, in that “everything is allowed, except that which is explicitly forbidden by scriptural sources or scholarly consensus”). This distinction is significant because it establishes which types of acts may be adjusted to evolving contexts (i.e., some of those classified as \textit{mu'amalat}) and which are immutable (\textit{ibadat}).
  \item \textsuperscript{24} Bassiouni & Badr, supra note 23, at 140-41.
  \item \textsuperscript{25} Id. at 139-41.
  \item \textsuperscript{26} Id. at 139.
  \item \textsuperscript{27} Id. at 148. Muslims are obligated to follow any mention of The Prophet Muhammad with a short invocation, “\textit{Allāh} Allāhu ṭalāyu wa-sallīm,” roughly translated as “May Allah honor him and grant him peace.” It will be abbreviated here as “pbuh.” See Qur'an 33:56, \textit{available at} http://quran.com (“Allah and His angels send blessings on the Prophet: O ye that believe! Send ye blessings on him, and salute him with all respect.
Qur’an is laced with injunctions and declarations that dictate various aspects of the human experience, including armed conflict. Furthermore, the Qur’an is not held by Muslims to be limited to a particular time and place. Instead, the scripture is to apply to all times and places, as its eternal principles may be applied through re-articulated historical models so as to adapt to evolving social contexts.

Supporting the Qur’an is the other primary source of Islamic Law, the Sunnah of the Prophet Muhammad (pbuh), which consists of his divinely inspired normative practices as expressed in his actions, oral pronouncements, or concurrence of others’ actions. The Qur’an actually provides the authority of the Sunnah as a source of law: “Ye have indeed in the Messenger of Allah a beautiful pattern (of conduct) for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah.” Within the Sunnah are the codified traditions and sayings of the Prophet (pbuh), collectively known as ahadith (plural of hadith).

While the Qur’an is the primary source looked to in the determination of legal rulings, the Sunnah (and consequently the hadith) are used to either corroborate respective Qur’anic injunctions, or to deduce legal rulings and guidelines that cannot be found in the Qur’an. The collection of many hadith traditions occurred after the

---

29, 2012). Thus, it must be read and understood in Arabic to understand it in its pure form. Any translations into non-Arabic languages are better understood as attempts to help non-Arabic speakers better comprehend it. As such, aspiring scholars and jurists face rigorous language requirements, and non-jurist Muslims are encouraged to put forth their best effort to learn Qur’anic Arabic. Notwithstanding this exception for Qur’anic Arabic, Islam expressly prohibits the recognition of Arabs as superior to non-Arab peoples simply by virtue of their being Arab or speaking Arabic.

29. See Qur’an 16:89, available at http://quran.com (last visited Feb. 29, 2012) (noting the Qur’an provides a source of guidance) (“One day We shall raise from all Peoples a witness against them, from amongst themselves: and We shall bring thee as a witness against these (thy people): and We have sent down to thee the Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims.”).


31. See id. at 639 (noting that the principles in the Qur’an are general in nature and may guide in multiple ways); see also RAMADAN, supra note 18, at 17-20 (differentiating between immutable and eternal principles and adaptive historical models).

32. Bassioune & Badr, supra note 23, at 139, 150 (also providing that “sunnah” generally means an established practice that others follow as an example; in the context of the law, it refers to the practice of the Prophet (pbuh)).


34. See Bassioune & Badr, supra note 23, at 151 (noting that the hadith are part of the Sunnah).

35. See Bassioune & Badr, supra note 23, at 139 (noting that the hadith are used to
death of the Prophet (pbuh). Given that the hadith are distinguished from the Qur'an (the Divine Word), scholars focused on two elements of every reported saying of the Prophet (pbuh) in an effort to verify its authenticity: the content of the saying and the chain of transmission (isnad).

The first qualification observed the saying's inherent plausibility and compatibility with the Qur'an, while the second required that each person in the chain of transmission be one of high ethical standing (thus trustworthy), and that narrators in any two successive links in the chain must have been contemporaries and must have lived at the same place or otherwise proven to have met each other. Consequently, there emerged a rigorous science of hadith which classified the prophetic traditions on the basis of their strength or authenticity. Therefore, unlike the Qur'an, a particular hadith may be open to fallibility if it is deemed to be particularly weak or unreliable. However, the potential frailty of a single hadith does not undermine the significance of the Sunnah as the secondary legal source in Islam, given the importance the Qur'an gives the Sunnah and its supplemental character.

When the Qur'an and Sunnah do not adequately govern a given situation, jurists have recourse to a number of supplementary or secondary sources. An early discussion between the Prophet (pbuh) and Mu'adh ibn Jabal illustrates this methodological ranking of the sources:

Narrated Mu'adh ibn Jabal: Some companions of Mu’adh ibn Jabal said: When the Apostle of Allah (peace be upon him) intended to send Mu’adh ibn Jabal to the Yemen, he asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah’s Book. He asked: (What will you do) if you do not find any guidance in Allah’s Book? He replied: (I shall act) in accordance with the Sunnah of the Apostle of Allah (peace be upon him). He asked: (What will

interpret some of the Qur'an’s verses).

36. See Aisha Y. Musa, Hadith as Scripture: Discussions on the Authority of Prophetic Traditions in Islam 1 (2008); see also Bassiouni & Badr, supra note 23, at 139 (noting the need to continue the process of interpreting the Qur’an after the Prophet’s (pbuh) death).


38. Id.

39. Id.

40. Id. at 152.

41. See Qur’an 33:21, available at http://quran.com (last visited Feb. 29, 2012) (noting the example set by the Prophet (pbuh)); see also Coulson, supra note 20, at 58-59 (providing Imam ash-Shafi’i’s opinion that the Sunnah cannot be abrogated).

42. Bassiouni & Badr, supra note 23, at 152-53.
you do) if you do not find any guidance in the Sunnah of the Apostle of Allah (peace be upon him) and in Allah’s Book? He replied: I shall do my best to form an opinion and I shall spare no effort. The Apostle of Allah (peace be upon him) then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Apostle of Allah to find something which pleases the Apostle of Allah. 43

Thus, the Shari’ah allows for a rational articulation of the law when the two primary texts inadequately address a given situation. This is a necessary element for the Shari’ah to be applicable at all times and in all places. 44 Employing these methodologies has historically been the preserve of Islamic scholars (ulama), as Islamic Law may be described as a “jurist’s law,” as opposed to a “legislator’s law” or a “judge’s law,” as in the West. 45

A detailed discussion of these supplementary sources exceeds the scope of this analysis, but they should be mentioned here to highlight the rationally-based juristic techniques that underlie their application. 46 The exchange cited above between the Prophet (pbuh) and Mu’adh ibn Jabal not only provides a methodological deduction, but also an example of the doctrine of ijtihad (unprecedented doctrinal development). 47 Muslim jurisprudence developed additional methods for making deductions in compliance with the Shari’ah, including the doctrines of ijmā (consensus) and qiyās (analogy). 48

Initially, those recognized as being more knowledgeable in particular matters were the ones who contributed to the formation of ijmā; in later times up until the present, consensus would be formed by jurists qualified to formulate their independent personal opinions (known as mujtaḥidin). 49 Universal consensus results in a binding obligation. 50 In comparison, qiyās is a rational doctrine toward approaching an unprecedented or new situation in which an analogical deduction is

45. Id. at 136-37.
46. See id. at 140-41, 152-60.
47. See id. at 141 n.12; see also Bernard Weiss, Interpretation in Islamic Law: The Theory of Ijtihad, 26 AM. J. COMP. L. 199 (1978) (providing an overview of the doctrine of ijtihad).
48. See Bassiouni & Badr, supra note 23, at 140-41, 153-57; see also COULSON, supra note 20, at 59-60 (providing Imam Ash-Shafi’i’s articulation of ijma and qiyas as the third and fourth sources of law, after the Qur’an and Sunnah).
50. See Kamali, supra note 21, at 228.
made from the Qur’an or Sunnah to ensure compliance with Shari’ah.\footnote{11}

In addition to these sources, the concept of siyar is also important, particularly with respect to international law and foreign affairs.\footnote{12} Siyar is essentially the ways in which the Prophet (pbuh) dealt with war and peace in his lifetime.\footnote{13} The eleventh century jurist—As-Sarakhsi defined siyar in the jurisprudential sense as describing:

The conduct of the believers (Muslims) in their relations with the unbelievers of enemy territory as well as with people with whom the believers have made treaties, who may have been temporarily (musta’man – the subject of a state which was at war with a Muslim state and granted safe conduct to enter Muslim territory) or permanently dhimmi – (the non-Muslim subject of a Muslim state) in Muslim land; with apostates, murtaddun . . . and with rebels . . . .\footnote{14}

Thus, siyar is essentially a form of foreign relations or international law.\footnote{15}

In addition to As-Sarakhsi, some of the earliest and most renowned jurists have either used or referred to siyar, including Muhammad ibn al-Hasan Ash-Shaybani, Imam Abu Hanifa, Imam Ash-Shafi’i, and Abd ar-Rahman al-Awza’i.\footnote{16} While the Qur’an and Sunnah remained integral, siyar had additional secondary sources such as the practices of the khulafa (caliphs) that did not contravene the Qur’an and Sunnah (arguably similar to analyzing state practice), juridical opinions, treaties, instructions (given to military commanders, ambassadors, and other state officials), and custom.\footnote{17}

The early works of siyar dealt primarily with jihad.\footnote{18} In Arabic, the word “jihad” itself means to struggle or exert the utmost effort (juhd) to achieve a goal.\footnote{19} Despite claims by contemporary intellectuals that the spiritual understanding of jihad is primarily a modern conceptualization,
traditional scholarly writings, including those of Ibn Qayyim al-Jawziyya (d. 1350 C.E.), illustrate a comprehensive understanding of jihad. According to Ibn Qayyim, there are four types of jihad: (i) "jihad al-nafs, the struggle to purify the self by gaining knowledge in religion and then acting accordingly;" (ii) "jihad against the source of evil inclinations, Satan;" (iii) "jihad against disbelievers. . . . [which can] include struggles by the heart, tongue, property, or hand;" and (iv) "jihad against [the unbelievers and] hypocrites."

Although the objectives of this Note are focused on the regulations of armed conflict, understanding the comprehensiveness and complexity of jihad is important for a proper analysis, especially considering the interrelatedness of these categories. For example, Ibn Qayyim mentioned that "jihad against the enemies of God is actually a branch of the first type, [because] no one can struggle against an enemy without first being in a state of struggle against [their] own ignorance and lack of religious knowledge." It is therefore imperative to acknowledge and respect the comprehensive nature of jihad.

III. JUS AD BELLUM

Contemporary IHL is primarily concerned with the conduct of hostilities, and not necessarily with the existence of a just cause for the initiation of those hostilities. However, a brief overview of the justifications for armed conflict is necessary to understand the fluid historical framework within which the Islamic rules of armed conflict must operate. While jus in bello is the set of rules governing armed conflict, jus ad bellum is concerned with the justifications for going to war. Jus ad bellum, or the Just War doctrine, was initially formulated as a theological, rather than a legal concept. Early Christians found military service to be incompatible with their religious principles, until the fourth century with the development of the belief that the frontiers of Christianity should be extended, even if that required some

60. Id. at 1-3. See also Bernard Lewis, The Crisis of Islam: Holy War and Unholy Terror 31-42 (2004) ("For most of the fourteen centuries of recorded Muslim history, jihad was most commonly interpreted to mean armed struggle for the defense or advancement of Muslim power. . . . For most of the recorded history of Islam, from the lifetime of the Prophet Muhammad onward, the word jihad was used in a primarily military sense. . . . The predominantly military use of the term continued into relatively modern times.").
61. Al-Tabari, supra note 59, at 3-4.
62. Id. at 3.
63. See Goldman & Parks, supra note 2, at 47.
64. Id. at 7.
65. Id.
modification in practicing their high ethical standards.66

Consequently, various jurists and theologians worked toward the development of a framework for the justification of war. St. Ambrose (339-97 C.E.) was the first Church representative to enter the secular arena, stressing the importance of justice in all dealings with enemies, while St. Augustine is often credited with coining the term “Just War.”67 Saint Thomas Aquinas (1226-1274 C.E.), Francisco Suarez (1548-1617 C.E.), and Francisco de Vitoria (1480-1546 C.E.) were also important in the development of jus ad bellum.

Of particular importance are St. Aquinas’ three conditions for a just war: (i) authority of a sovereign; (ii) requirement of a just cause (“namely that those who are attacked should deserve it on account of some fault”); and (iii) “the belligerents should have a rightful intention, so as to advance good or avoid evil.”69 Hugo Grotius (1583-1645 C.E.) incorporated and expanded upon many of these ideas.70 The historical underpinnings of the just war tradition would eventually lead to the development of the modern jus in bello.

But what is the place of jus ad bellum within the legal framework of Islam? Understanding the justifications for war is critical toward understanding contemporary rules regulating armed conflict. Despite modernist critiques alleging the contrary, the Islamic legal system is not one of stasis.71 The renowned Egyptian jurist, Shihab al-Dil al-Qarafi (d.684/1285 A.H./C.E.), asserted that a ruling is still valid only if the contextual realities upon which it was based are still intact, and if it maintains the same implications as it had at the time the ruling was originally made.72 According to Al-Qarafi therefore, “[h]olding to rulings that have been deduced on the basis of custom, even after this custom has changed, is a violation of Unanimous Consensus and an open display of ignorance of the religion.”73

In support of this notion, a recent Saudi scholar, Adil Qutah, has expanded on this topic and asserted four requirements that a jurist must know in order to avoid mistakes and issue rulings that are based on sound interpretations: (i) “the meaning the relevant texts had among the

67. Id. at 4-6.
68. Id. at 4-16.
69. Id. at 9.
70. Id. at 24-36.
71. Sherman A. Jackson, Jihad and the Modern World, 7 J. Islamic L. & Culture 1, 7-8 (2002); see also Coulson, supra note 20, at 4-7 (providing that the Shari’ah is not rigid, as Islamic legal modernism represents an amalgam of both the classical tradition which held that law is “imposed from above” with eternally valid standards to which society must conform and a modern approach recognizing that societal needs shape the law).
73. Id. at 9.
Arabs at the time of revelation, [and] the custom that informed this meaning;” (ii) “the customs prevailing at the time the classical jurists handed down the rulings;” (iii) the prevailing norms and institutions of society in which modern-day jurists attempt to apply their rulings; and (iv) “the habits, customs, and proclivities” of the people whose situation is to be addressed in the current context. 74

Moreover, it is important to understand how relevant legal provisions will apply amidst changing contexts. In his piece, “Jihad and the Modern World,” Dr. Sherman Jackson explores the contextual dichotomy that exists between the pre-modern world, which he defines as dominated by a “state of war,” and the contemporary international structure dominated by a contrasting “state of peace.” 75  But far from being unique to Islamic history, Dr. Jackson illustrates that the “state of war” dominated the pre-modern world in general, with vestiges lingering on even into nineteenth century America. 76  It is within this context that many of the Islamic stipulations governing armed conflict were enacted, and it is within this same context that they must be understood.

However, the transition into the contemporary “state of peace” has brought many questions as to the applicability of these provisions within this modern framework. 77  From an Islamic prism, Qur’anic and classical articulations of jihad were informed by a perennial “state of war.” 78  Thus, the assumed relationship among nations and peoples in the pre-modern world was one of hostility, and jihad was “the only means of preserving the physical integrity of the Muslim community.” 79  However, in the period following World War II, these relationships have seemingly fallen into a “state of peace,” as exemplified by various international covenants and conferences, including The Hague Regulations, the Geneva Conventions, the Additional Protocols, and other like instruments.

Therefore, the ensuing discussion will be framed within the framework of this contextual evolution. Far from being stagnant, one of the primary objectives of the Shari’ah is that it remains eternally applicable to regulate the conduct of persons through its ability to adapt to shifting social currents. 80  In this regard, Islamic regulations of warfare are very compatible with modern regulations, and although there are certain disagreements, they are not reflective of a sluggish

74. Id.
75. See generally id.
76. Id. at 16.
77. See id. at 18.
78. Id.
79. Id. at 18-19.
80. See COULSON, supra note 20, at 4-7.
legal system. Instead, IHL and the Shari’ah share similar objectives in their regulation of armed conflict, notwithstanding differences that may be unique to their respective structural inclinations. The ensuing parts will now turn to a comparison and analysis of each system’s approach to particular aspects of armed combat, and how they may or may not be complimentary in this regard.

IV. CIVILIAN IMMUNITY AND DISTINCTION

A. International Humanitarian Law

The competing principles of “necessity and humanity” create a tension in IHL by attempting to balance certain humanitarian protections against distinct military aims and objectives.\(^8^1\) But before the emergence of contemporary international rules and norms, wars in the Middle Ages did not distinguish between the property belonging to the enemy sovereign or to its subjects pursuant to looting or wanton destruction.\(^8^2\) All subjects, old or young, male or female, could be “slaughtered at will or imprisoned for ransom.”\(^8^3\) Thus, wars throughout the fifteen and sixteenth centuries were deemed to be “total” in nature.\(^8^4\)

However, the writings of various individuals such as Balthazar de Ayala, Hugo Grotius, and Dr. Francis Lieber began pushing for more protections for innocent persons and property.\(^8^5\) For example, Grotius argued that “one must take care, so far as possible, to prevent the death of innocent persons. . . [and that] enemy property should be subject to destruction only for reasons of military necessity.”\(^8^6\) Additionally, Dr. Lieber, within the context of the U.S. Civil War, is credited with producing the first codification of traditional rules regulating armed conflict, known as the “Lieber Code.”\(^8^7\)

Over time, the laws of war were further codified, with various rules proclaiming that civilians who did not directly take up arms were immune from intentional attacks, that enemy property could be destroyed only if the destruction might weaken the enemy’s military strength, that laying waste to a countryside could only be justified if accompanied by a corresponding military advantage, and that any suffering inflicted on noncombatants must be justified by a compelling

---

81. Goldman & Parks, supra note 2, at 289.
83. Id. at 40.
84. Id. at 39.
85. Id. at 40-41.
86. Id. at 40.
87. Id. at 41.
military advantage. At the dawn of the twentieth century, these emerging rules were further codified into various agreements, including the Convention Respecting the Laws and Customs of War on Land (1907) and the Convention Concerning Bombardment by Naval Forces in Times of War (1907), which regulated armed conflict on land and sea (collectively, they were part of the Law of The Hague).

These regulations continued to evolve over time, leading to the emergence of a new understanding of “civilians” at the Geneva Conventions in 1949. Humanitarian concerns for the well-being of the civilian population led to prohibitions on various acts, including collective punishment, inhumane treatment, torture, and perfidy. Influenced by the modern notion that law was made not only for states but for their citizens as well, international law began to recognize civilians as a distinct category, whereas the laws of armed conflict previously focused exclusively on states’ interests rather than those of civilian populations.

In contemporary IHL, the basic rule protecting civilian immunity asserts that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Thus, the parties to the conflict have a twofold duty to: (i) distinguish between civilians and combatants, and between civilian objects and military objectives; and (ii) direct their military operations only against military objectives.

Moreover, both parties, not just the attacking party, now have a duty to protect the civilian population, as the negative obligation not to attack or harm implied by the word “respect” also obligates the attacked party not to harm the civilian population under its control. Common Article 3, which is broader in approach, mandates that each party to the conflict

---

88. Id. at 40-41.
89. Id. at 42 n.19.
91. Id. at 19.
92. Id.
94. See id.
must afford protection to persons taking no active part in the hostilities. 96

In defining what civilians are to be protected from, Article 49 of Additional Protocol I defines an attack as an act of violence against an adversary, whether offensive or defensive. 97 But more importantly for purposes of this analysis, Article 49(2) states that the provisions of Additional Protocol I relating to attacks apply to all attacks wherever committed, including the national territory belonging to a party to the conflict but under the control of an adverse party. 98 These provisions therefore apply to the entire civilian population of the states in conflict, including those situated in the national territory of a party to the conflict but under the control of an adverse party. 99 This application of Article 49 illustrates the shift toward a "state of peace" because, unlike the pre-modern practices mentioned above, civilians in hostile territory are now afforded protections.

But who and what exactly is being protected? Article 50(1) of Additional Protocol I defines a civilian in the negative, as any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention, the latter including "members of the armed forces of a Party to the conflict" (i.e., members of the militia or volunteer corps); "members of other militias and members of other volunteer corps" that fulfill the relevant conditions as defined in the provision; "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;" and "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form... regular armed units. ..." 100

Civilians are also not members of the armed forces, as defined in Article 43 of Additional Protocol I. 101 Additionally, persons directly linked to the armed forces, released prisoners of war, reservists, retired members of the armed forces in occupied territory, civilians employed in the production, distribution and storage of munitions of war, and civilians participating in hostilities all fall under the rubric of "civilian," with the "civilian population" being composed of all individuals defined

97. Additional Protocol I, supra note 93, art. 49.
98. Id. art. 49(2).
99. BOTEHE ET AL., supra note 95, at 289.
100. Additional Protocol I, supra note 93, art. 50; Third Geneva Convention, supra note 96, art. 4 §§ (1), (2), (3), (6).
101. See Additional Protocol I, supra note 93, art. 43.
as "civilian."\textsuperscript{102} The International Committee of the Red Cross (ICRC) has also defined civilians as, 
"all persons who are neither members of the armed forces of a party to the conflict nor participants in a lève en masse..."\textsuperscript{103}

In addition to persons, these protections also extend to objects and places as well.\textsuperscript{104} Article 52 of Additional Protocol I mandates that civilian objects "shall not be the object of attack or of reprisals."\textsuperscript{105} Civilian objects are negatively defined as all objects that are not military objectives, with the latter defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."\textsuperscript{106}

This definition establishes that a military objective, synonymous with "lawful target," is not limited to military bases, but includes objects that contribute to a party's ability to conduct war.\textsuperscript{107} But in order for an object to be a "military objective," it must meet the two-prong definition of Article 52: there must be (i) an effective contribution to military action; and (ii) a definite military advantage to be gained by harming it in the circumstances ruling at the time.\textsuperscript{108} Therefore, a building or structure unrelated to military objectives, such as a shopping mall or university, cannot be attacked per se, unless it was being employed in a manner so as to transform it into a military objective, in which case it may offer a military advantage.

Alternatively, a military base or other such institution that contributes to a military action is subject to attack. During Operation Desert Storm, some examples of military objectives included "[l]eadership command facilities; [e]lectrical production facilities powering military systems; [s]cud missile production and storage facilities, launching equipment and positions; [o]il refining and distribution facilities; [r]ailroads and bridges connecting Iraqi military forces with logistics depots and storage areas; and Iraqi military units, equipment and personnel in Kuwait."\textsuperscript{109}

\textsuperscript{102} Id. art. 50(2); Bothe et al., supra note 95, at 293-94.
\textsuperscript{104} See Additional Protocol I, supra note 93, art. 52.
\textsuperscript{105} Id. art. 52(1).
\textsuperscript{106} Id. art. 52(2).
\textsuperscript{107} See id.
\textsuperscript{108} Id. art. 52.
It is important to understand that Article 52 makes it clear that any military advantage is applicable only in the circumstances ruling “at the time” of the attack. Thus, if an object offered a military advantage before an attack was launched, but no longer does so, then that object may no longer be attacked. For example, if military personnel took refuge on a university campus and began launching attacks from there, then the campus could be classified as a military objective subjecting it to attack. But if the military personnel have left, then the university campus may no longer be attacked. Moreover, similar to the protections afforded to civilians, if there is any doubt as to whether an object normally dedicated to civilian purposes is effectively contributing to military action, then it shall be presumed not to be used in such a manner. So if it is unclear that attacks are being launched from the university campus, then that campus cannot be treated as a military objective, until proven otherwise. There is, therefore, a presumption in favor of nonaggression.

B. Islamic Law

Islam expressly forbids arbitrary killing:

On that account: We ordained for the Children of Israel that if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people...  

Moreover, hostilities must be conducted only against enemy combatants: “Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors.” These Qur'anic injunctions are further corroborated by prophetic traditions that unambiguously prohibit the killing of innocent parties:

Do not kill any old person, any child or any woman.

“Do not kill the monks in monasteries” or “Do not kill the people

---

110. Additional Protocol I, *supra* note 93, art. 52(2).
111. *Id.* art. 52(3).
who are sitting in places of worship.”

It is narrated on the authority of Abdullah that a woman was found killed in one of the battles fought by the Messenger of Allah (may peace be upon him). He disapproved of the killing of women and children.

It is narrated by Ibn ‘Umar that a woman was found killed in one of these battles; so the Messenger of Allah (may peace be upon him) forbade the killing of women and children.

Abd al-Rahman b. Ka‘b reported that the Apostle of Allah (may peace be upon him) prohibited those people who killed Ibn Abi al-Huqaiq* from killing women and children. One of them said: The wife of Ibn Abi al-Huqaiq shouted out and disclosed our presence and I raised my sword but, remembering the command of the Apostle of Allah (may peace be upon him), restrained myself. Had it not been so, we would have rid of her also.

Similar distinctions extend to the natural environment as well: “Do not kill a child, nor a woman, nor an old man, nor obliterate a stream, nor cut a tree . . .”

Islamic history shows an implementation of these injunctions to protect those who are not participating in the conflict. After the death of the Prophet (pbuh), Abdullah ibn Abi Qahafa, more commonly known as Abu Bakr, was chosen as the first khalifah (caliph) of the emerging Islamic empire. In an address to a Muslim army setting out for Byzantine controlled Syria, he gave the following instructions:

I consider these steps to be a virtue in the path of the Lord. You will find some people who imagine they have devoted their lives to Allah (the hermits), leave them to their work; you will find


118. *Imam Malik, Muwatta*’ 200 (Mohammad Rahimuddin trans., 1980).


some people who shave their heads in the middle (the Magi), strike them with your swords. I instruct you in ten matters: Do not kill women or children, nor the old and infirm; do not cut fruit bearing trees; do not destroy any town; do not cut the gums of sheep or camels except for purposes of eating; do not burn date-trees nor submerge them; do not steal from booty and do not be cowardly.²¹

This injunction is invaluable to a proper analysis because it has multiple commands that are expressly similar to contemporary IHL, including bans on pillaging (“do not steal from booty”),²² protection of the natural environment (“do not cut fruit bearing trees,” arguably prohibiting the use of starvation as a method of warfare (“do not cut fruit bearing trees” and “do not cut the gums of sheep or camels except for purposes of eating”)²³ and most relevant here, explicitly prohibiting the killing of women, children, the elderly, and people devoted to monastic services.²⁴ Similarly, Umar b. Abd al-'Aziz, when he was the caliph, wrote the following to one of his administrators:

We have learnt that whenever the Apostle of Allah (may peace be upon him) sent out force, he used to command them: Fight taking the name of the Lord. You are fighting in the cause of the Lord with people who have disbelieved and rejected the Lord; do not commit theft, do not break vows; do not cut ears and noses, do not kill women and children. Communicate this to your armies. If God wills! Peace be upon you.²⁵

Furthermore, a historical analysis of jurisprudential thought also reveals that these protections were indoctrinated into practice. On the basis of numerous ḥadīth (some of which were mentioned above), Islamic jurists distinguished between who is and who is not a permissible target in war.²⁶ They differentiated between two categories: al-muqatilah/ahl al-qital/al-muharibah (combatants, fighters/warriors) and ghayr al-muqatilah/ghayr al-muharibah (noncombatants, non-fighters/non-warriors).²⁷

The minority position of this discourse advocated that “the Islamic

²¹ Malik, supra note 118, at 200.
²² Id.
²³ Id.
²⁴ Id.
²⁵ Id.
²⁶ See id.
²⁷ Id. at 201.
²⁹ Id.
casus belli is the unbelief of the Muslims’ enemies, [and] that, apart from women and children, anyone who refuses to pay the jizyah is a legitimate target in war.”130 The majority of jurists, however, held that the Islamic casus belli is the enemy’s aggression and not necessarily their unbelief.131 As such, this majority used qiyas to extend the categories of noncombatants specifically declared by the Prophet (pbuh) to be immune from being targeted in warfare.132 These categories include: women and children; the aged, the blind, the sick, the incapacitated, and the insane; the clergy, al-asif (in this context it refers to “anyone who works for, or is paid by, the enemy to do services in the battlefield”), farmers, craftsmen, and traders.133

Although there was arguably some disagreement among Muslim jurists as to the proper course of conduct if there were captives, women, or children among the opposing army, these disagreements were much more reflective of the contextual underpinnings of the pre-modern “state of war.”134 For example, Ash-Shafi’i stated, “[t]he Muslims may raid them at night and during the day, and if they hit any women or children, there is no need to pay blood money (‘aql), to be punished, or to pay expiation.”135 This ruling may be based on a hadith which seems to permit the killing of women and children in night raids if read at face value: “It is reported on the authority of Sa’b b. Jaththama that the Prophet of Allah (may peace be upon him), when asked about the women and children of the polytheists being killed during the night raid, said: They are from them.”136

But the words “They are from them”137 do not mean that these persons are not to be distinguished from enemy combatants. Instead, it means that because women and children probably live in the homes of the enemies, it is difficult to make a distinction between the two groups at nighttime, and there is a likelihood of them being killed unintentionally.138 Therefore, the Shari’ah, similar to IHL, expressly forbids the killing of civilians, while acknowledging that civilian casualties may be a tragic consequence of legitimate military

130. Id.
131. Id.
132. Id.
133. Id. at 112-15.
134. See id. at 111.
135. Al-Tabari, supra note 59, at 63 (narrated by al-Rabi’).
137. Id.
A further illustration of distinction within Islamic jurisprudence can be found in another writing of Ash-Shafi‘i:

If they [the disbelievers] use Muslim or non-Muslim young boys as [human] shields while the Muslims are engaged in battle, it is permissible to shoot the enemy combatants but not the Muslims or the young boys; and if they are not engaged in battle, I would prefer them to stop [the warfare] until they are able to fight them without using [them] as [protective] shields. [The same is true] if they show them the children and say: If you fight us, we will put them to death, and [if the Muslims are using] naphtha, fire, and water, [which] is like [using a] mangonei.140

This statement directly correlates with IHL’s prohibition of human shields.141 Interestingly, Imam Ash-Shafi‘i actually preferred to stop fighting until the human shields were removed, a clear indication of the preference Islam gives to the preservation of life amidst warfare. Thus, any contemporary use of human shields, as allegedly done in the Palestinian territories by groups such as Hamas, has no moral basis in either Islam or IHL. Moreover, the historical examples above prove that civilian immunity and distinction is entrenched within Islamic discourse.

139. Article 57’s (Additional Protocol I) discussion of feasible precautions implies that requisite damage, injuries, or casualties are a possibility, and that a party should not be held liable if they do everything within their power to minimize or avoid these consequences. See Additional Protocol I, supra note 93, art. 57(2)(a)(ii). Similarly, IHL generally does not provide for absolute immunity. See, e.g., id. A good example is that of civilians located within close proximity of a legitimate military objective at the time of an attack. Although the civilians may not be directly attacked, the attacking party may not be held responsible for civilian injuries or casualties from their attack on the military objective, provided the attacking party does not directly target the civilians or the requisite harm to the civilians is not excessive in comparison to the military necessity of the attack. See id. arts. 52(1), 57, 91.; see also TRIALS OF WAR CRIMINALS BEFORE THE NUERNBURG MILITARY TRIBUNALS, 1253 (1948), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf (“Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war.”).

140. AL-TABARI, supra note 59, at 63.

141. Additional Protocol I, supra note 93, art. 51(7).
V. THE COMBATANT’S PRIVILEGE AND PRISONERS OF WAR

A. International Humanitarian Law

Any recognized member of a state’s armed forces or a member of an organized armed group of a party to the conflict is entitled to particular protections embodied within the combatant’s privilege.142 Everyone in uniformed armed service is entitled to the privilege, except for medical personnel and chaplains.143 A fundamental aspect of that privilege, as provided in Article 57 of the Lieber Code, is that a combatant enjoys immunity for his actions, including killing, wounding, or other warlike acts that the combatant commits in the line of duty.144 Combatants are therefore immune from prosecution for their warlike acts, given that such acts do not violate the laws of war, even if such actions would be criminal under municipal law.145 Moreover, a privileged combatant is also entitled to particular protections as a POW upon capture by enemy forces.146 In contrast, unprivileged combatants do not enjoy the combatant’s privilege nor POW status.147 Examples of unprivileged combatants include nationals of the Detaining Power, spies,148 and mercenaries.149 Although a discussion of unprivileged combatants is outside the scope of this analysis, it remains imperative to mention them in order to distinguish them from privileged combatants.

Identifying the scope of the privileges afforded to combatants has become increasingly difficult. As warfare has advanced, so too have the methods and means by which wars are fought. Guerilla fighters and armed non-state actors have increasingly partaken in hostilities, making it difficult to establish concrete guidelines.150 The 1907 Convention Respecting the Laws and Customs of War on Land (Hague IV) and the Third Geneva Convention of 1949 extended the combatant’s privilege to organized resistance movements of a State Party to a conflict.

142. GOLDMAN & PARKS, supra note 2, at 438.
143. Additional Protocol I, supra note 93, art. 43(2).
146. Additional Protocol I, supra note 93, art. 44. See also Third Geneva Convention, supra note 96, art. 4.
147. See Third Geneva Convention, supra note 96, art. 4.
148. Additional Protocol I, supra note 93, art. 46.
149. Id. art. 47.
(including militias and volunteer corps). Article 4(A) also lists additional persons entitled to POW recognition upon falling into enemy control, including persons who are allowed to accompany the armed forces without being members thereof, and members of a non-occupied territory who spontaneously take up arms to resist an invading army "without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war." It is important to remember that POW status is only conferrable in international conflicts. There is no POW status in non-international armed conflicts, as states are usually unwilling to extend any type of legitimacy to internally based armed actors. However, there are several examples of states allocating POW treatment to enemy combatants in civil war type situations, including the U.S. Civil War (1861-1865), Nigeria in 1967, and the Republic of Vietnam's treatment of Vietcong guerrillas in the 1960s.

Moreover, Additional Protocol I now defines the "armed forces" of a Party to a conflict as consisting of "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party." Historically, the Hague Regulations of 1907 and the Third Geneva Convention distinguished between two types of armed organizations whose members are entitled to the combatant's privilege and POW treatment: (i) the armed forces of a Party to the conflict; and (ii) independent militias and volunteer corps that conformed to the four requirements mentioned. An individual fighting a private war on his own cannot be taken into consideration.

This concept also represents a change from Article 4A(2) of the Third Geneva Convention, in that it recognizes that resistance movements in occupied territories might be under an anonymous collegial command for security purposes, and that a Party to the conflict is bound to accord POW status to captured forces of an adversary even if that government is not recognized by the capturing state (a principle that may also be applicable to an armed struggle for self-determination

152. Third Geneva Convention, supra note 96, art. 4(A).
153. BOTHE ET AL., supra note 95, at 244.
154. Id.
155. GOLDMAN & PARKS, supra note 2, at 470.
156. Additional Protocol I, supra note 93, art. 43.
157. BOTHE ET AL., supra note 95, at 233-34.
158. See id. at 237.
pursuant to particular requirements under Articles 1(4) and 96(3)).\footnote{Id. at 237-38.}

Thus, a quick comparison illustrates the differences concerning who may be entitled to these particular protections. The regular military, organized resistance groups, members of armed forces who profess allegiance to a government or authority not recognized by a Detaining Power, and members of a lève en masse are all entitled to both the combatant’s privilege and POW status.\footnote{See id. at 233-45.} However, permanent medical personnel and chaplains, civilians who accompany the armed forces, and individuals who belong or have belonged to the armed forces of the occupied nation detained by the Occupying Power for that reason are all entitled to POW status but not the combatant’s privilege.\footnote{Id. at 239.} Lastly, private citizens engaged in combat are entitled to neither POW status nor the combatant’s privilege.\footnote{See id. at 233-41.}

\section*{B. Islamic Law}

Recognizing that much of the Islamic \textit{jus in bello} developed within the pre-modern “state of war” that preceded the development of contemporary IHL, there is no indication that combatants, as understood in Islamic jurisprudence, were liable for their legal warlike acts committed in the line of duty. Therefore, they probably enjoyed something similar to the combatant’s privilege. There are, however, certain regulations that predate similar IHL provisions. For example, there was a general recognition that combatants should have reached puberty or adulthood, effectively prohibiting children from fighting in combat.\footnote{An example is shown in a \textit{hadith} when Ibn Umar was turned away from fighting because he was 14 years old at the time: “Narrated Al-Bara: I and Ibn ‘Umar were considered too young (to take part) in the battle of Badr and the number of the Emigrant warriors were over sixty (men) and the Ansar were over 249.” \textit{Sahih Bukhari}, vol. 5, book 59, no. 292, \textit{available at} http://www.sahih-bukhari.com/Pages/Bukhari_5_59.php.}

It is also interesting to note that while warfare is primarily thought of as a masculine endeavor, as illustrated by the current debate in the United States over women’s service in the military (i.e., serving on the frontlines), Islamic history does provide examples of women fighting in combat. During the Battle of Uhud (3 A.H./625 C.E.), two women were noted for their participation:

Among those fighters, two women stood out for their energy and vigor: Um Sulayym and especially an Ansar woman called Nusaybah bint Kab, who had initially come to carry water and aid

\begin{flushleft}
159. \textit{Id.} at 237-38.
160. \textit{See id.} at 233-45.
161. \textit{Id.} at 239.
162. \textit{See id.} at 233-41.
163. An example is shown in a \textit{hadith} when Ibn Umar was turned away from fighting because he was 14 years old at the time: “Narrated Al-Bara: I and Ibn ‘Umar were considered too young (to take part) in the battle of Badr and the number of the Emigrant warriors were over sixty (men) and the Ansar were over 249.” \textit{Sahih Bukhari}, vol. 5, book 59, no. 292, \textit{available at} http://www.sahih-bukhari.com/Pages/Bukhari_5_59.php.
\end{flushleft}
the wounded, and who eventually stepped into the battle, took a sword, and fought the Quraysh. The Prophet had never intended or advised women to fight, but when he saw Nusaybah’s spirit and energy in the battle, he praised her behavior and prayed to God to protect her and grant her victory and success.164

The Prophet (pbuh) thus respected the equal humanity of these women by praising their valor in combat while at the same time forbidding the killing of non-combatant women as discussed above. Therefore, while contemporary IHL provisions on combatant status provide a useful guideline for contemporary Muslim jurists to look at, the rich history of similar Islamic regulations suggests that jurists can rely on their own traditions in crafting a modern framework of privileged combatants.

Additionally, Islam explicitly calls for the well-treatment of individuals captured in the course of armed conflict: “And they feed, for the love of Allah, the indigent, the orphan, and the captive, (Saying), ‘We feed you for the sake of Allah alone: no reward do we desire from you, nor thanks.’”165 Prophetic traditions corroborate this Qur’anic assertion: “The Prophet (peace be upon him) says: ‘I command you to treat captives well.’”166 An analysis of the Sunnah also illustrates that the gratuitous release of prisoners was a common practice of the Prophet (pbuh).167

An example can be found in the Battle of Badr (2 A.H./624 C.E.), the first major battle of the newly established Muslim state in Medina, in which a group of approximately three hundred Muslim soldiers fought approximately one thousand Qurayshi warriors.168 After a stunning Muslim victory, in which approximately seventy prisoners of war were captured, only two were executed, and the rest set free upon the paying of ransom.169 The Prophet (pbuh) explicitly ordered the well-treatment of the prisoners:

Ibn Katheer (may Allaah have mercy on him) said: “Ibn ‘Abbaas said: in those days their prisoners were mushrikeen; on the day of Badr the Messenger of Allaah (peace and blessings of Allaah be upon him) commanded them to be kind to their prisoners, so they

167. SALMI ET AL., supra note 53, at 127.
168. ABU SULAYMAN, supra note 52, at 99-100.
169. Id.
used to put them before themselves when it came to food . . . Mujaahid said, this refers to the one who is detained, i.e., they would give food to these prisoners even though they themselves desired it and loved it.”

However, it is important to note that this was a time of significant confusion, as dealing with prisoners of war was a new phenomenon for the emerging Muslim community. The preeminent practice, in accordance with concepts of total war, probably advocated killing the prisoners. But after deliberating between ransom and execution, the Prophet (pbuh) chose to proceed with the former option. Islamic tradition holds that the following verse of the Qur’an was revealed in relation to this incident: “It is not fitting for a prophet that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter: And Allah is Exalted in might, Wise.”

Legalism has led some Muslim writers to argue that the preceding verse is not the ruling on POWs, but that this latter one is:

Therefore, when ye meet the Unbelievers (in fight), smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom: Until the war lays down its burdens. Thus (are ye commanded): but if it had been Allah's Will, He could certainly have exacted retribution from them (Himself); but (He lets you fight) in order to test you, some with others. But those who are slain in the Way of Allah,- He will never let their deeds be lost.

But an apologetic approach dilutes the importance of the ruling's context. Therefore, in accordance with the objectives of this analysis, the parts of Surat al-Anfal dealing with the Battle of Badr, including the former verses, must be looked at more closely.

Some of the verses advising the Prophet (pbuh) to take extreme measures in order to protect the Muslim community were inserted, on

172. See id.
173. Qur'an 8:67; see also ABU SULAYMAN, supra note 52, at 100 (asserting that this ayah was revealed in relation to this incident).
174. Qur'an, 47:4; see also ABU SULAYMAN, supra note 52, at 100 (making the argument that some claim that the cited verse is the ruling on POWs).
175. See ABU SULAYMAN, supra note 52, at 101.
the Prophet’s (pbuh) orders, in Surat al-Anfal instead of Surat al-Ahzab, the latter of which refers to the Battle of the Ditch and the Battle of Banu Qurayzah in the context of Muslim victory. Surat al-Anfal deals particularly with the pressures facing the emerging Muslim community and serves as a guide for Muslims in similar circumstances. The relevant ayaat from Surat al-Anfal therefore reveal a reaction to the impending peril faced by the Muslims as a community under threat, while the actions against POWs illustrate the plausibility of treating prisoners humanely.

Historically, classical jurists gave Muslim commanders discretion in how to deal with POWs. They could be “(1) beheaded [executed], (2) enslaved, (3) released [by] ransom; (4) exchanged for Muslim prisoners; or (5) simply released.” But as shown above, executing POWs was reserved for exceptional cases, particularly when the safety of the Islamic State was in jeopardy. Moreover, it was not part of the Sunnah to enslave a free person. As for those individuals who were slaves of Muslims, they were not subjected to some of the torments found in common forms of slavery, as they were entitled to certain rights, including the right to work for their eventual emancipation.

Additionally, prisoners were often released through ransom, and sometimes in exchange for performing various services for the Muslim community, such as teaching others how to read and write. It was also a common practice of the Prophet (pbuh) to gratuitously release prisoners of war, exemplified by the time he used the State’s treasury funds to compensate Muslim soldiers who were asked to part with their booty of slaves after the Muslim victory over the Hawazin in Hunayn. The demands for the humanitarian treatment of POWs (protection of life, the right to humane treatment, the right to food) are therefore found in both contemporary IHL and in the Shari’ah. In fact, traditional Islamic discourse even asserts that POWs who happen to be family members, such as parents and children, should not be separated from one another.

A lot of contemporary discourse, however, has sensationalized the account of Banu Qurayza as Islam’s authorization of the indiscriminate killing of POWs. Traditional sources hold that during the Battle of the

176. Id. According to traditional Islamic belief, any religious instruction offered by the Prophet (pbuh) was divinely ordained and not of his own discretion. See id.
177. Id. at 101-02.
178. SALMI ET AL., supra note 53, at 126.
179. See id.
180. Id.
181. Id. at 126-27.
182. Id. at 127.
183. Id.
184. Id.
Trench (5 A.H./627 C.E.), the tribe of Banu Qurayza broke an established covenant with the Muslims, an act that essentially amounted to an act of treason, endangering the preservation of the Muslim community.\footnote{185} After the battle, sources hold that the men of Banu Qurayza (allegedly numbering at least 600) were all beheaded and the women and children were sold into slavery.\footnote{186}

Many argue that the treatment of POWs described in this account is the established or preeminent ruling on POWs in Islam. But a more thorough analysis, part of which is premised on the argument that the relevant historical accounts were not as meticulously scrutinized for accuracy as other sources, reveals quite the contrary.\footnote{187} Injunctions that mandated severe punishments or actions in warfare were motivated by the preservation of the Muslim community, which was certainly endangered by such acts of treason.\footnote{188} Moreover, the Banu Qurayza agreed to have the Prophet (pbuh) delegate the duty to prescribe their punishment to a chief of one their former allied tribes, Sa’d bin Mu’adh of the Banu Aws.\footnote{189} Thus, the Banu Qurayza’s punishment was of an exceptional nature, and not the norm in POW treatment.

Additionally, within the contemporary climate, POW status in Islam has been particularly important in light of hostage-taking and the practice of equating hostages to POWs. Historically, hostages were exchanged with different countries to ensure that treaties between them would be respected, and the hostages were subsequently returned upon the fulfillment of treaty obligations.\footnote{190} But if the treaty was violated, hostages were treated like POWs; the Shari’ah, however, respected the rights of the hostages and forbade killing them, even if Muslim hostages held in the enemy state were killed.\footnote{191}

Contemporary arguments made by states and non-state actors to justify hostage-taking by equating hostages to POWs are ill-founded and completely unsupported by traditional Islamic discourse and contemporary IHL.\footnote{192} As discussed above, an aspect of particular Islamic rulings is that they are binding as long as they remain contextually relevant and applicable. Because the practice of hostage

\footnotesize
\begin{itemize}
\item \footnote{185} AL-MUBARAKPURI, supra note 171, at 207. See also RAMADAN, supra note 164, at 140.
\item \footnote{186} AL-MUBARAKPRI, supra note 171, at 202. For a discussion disputing the accuracy of these numbers, see W.N. Arafat, New Light on the Story of Banu Qurayza and the Jews of Medina, J. ROYAL ASIATIC SOC’Y GR. BRIT. & IR. 100, 100-07 (1976).
\item \footnote{187} See AL-MUBARAKPRI, supra note 171, at 202.
\item \footnote{188} In the United States, treason may be punishable by death under 18 U.S.C. § 2381 (2012).
\item \footnote{189} AL-MUBARAKPURI, supra note 171, at 202.
\item \footnote{190} SALMI ET AL., supra note 53, at 128.
\item \footnote{191} Id.
\item \footnote{192} See Third Geneva Convention, supra note 96, art. 3.
\end{itemize}
swapping is no longer an accepted method of diplomacy, it is probably no longer a legitimate practice. Thus, the combatant’s privilege and the POW protections afforded by IHL are in congruence with similar protections found within Islamic Law.

VI. ISLAMIC LAW AND INTERNATIONAL HUMANITARIAN LAW WITHIN THE INTERNATIONAL FRAMEWORK

Contemporary Islamic jurists and intellectuals face the challenge of adjusting particular provisions of Islamic military jurisprudence to evolving social contexts. But as indicated above, this is not an insurmountable task. One of the edicts of the Shari’ah is that it always remains applicable in regulating the conduct of human affairs, and it is up to Muslim intellectuals to establish contemporary understandings of certain provisions to achieve that end. There may be some hesitancy within Islamic circles to avoid any bid’ah (innovation), but it must be emphasized that theological or creedal beliefs (aqidah), ritual norms of worship (ibadat), or immutable aspects of the religion (thawabit) (especially those from the Qur’an and Sunnah) are not being analyzed. Instead, only those principles regulating armed conflict that were heavily dependent upon the dominant social constructs of a particular time and place are being so discussed. Contemporary approaches to these rulings would merely reflect an adaptation to historical models within shifting social constructs, not an upheaval of established religious norms.

Moreover, Islamic history is ripe with examples that illustrate the importance of entering into, and abiding by, treaties and covenants with non-Muslim parties. For example, before the beginning of his prophethood, the Prophet (pbuh) attended a meeting of the important dignitaries and chieftains of Mecca, where they took an oath and agreed to a pact known as Hilf al-Fudul to fight the corruption and injustice that had become rampant in the city. In later years, he is reported to have said, “I was present in the house of ‘Abd Allah ibn Jud’an at so excellent a pact that I would not exchange my part in it for a herd of red camels; and if now, in Islam, I were summoned unto it, I would gladly respond.”

Other examples from the Sunnah include the Medina Constitution


194. Martin Lings, Muhammad: His Life Based on the Earliest Sources 32 (2d ed. 2006).

195. Id.
(which established a pact of coexistence with the Arab and Jewish tribes upon the Muslims' emigration to the city which was known as Yathrib at that time) and the Treaty of Hudaybiyyah (a peace agreement between the Muslims and the Quraysh which included a ten year prohibition on fighting). Thus, entering into international treaties and covenants has a historical basis within the Islamic tradition, which is full of covenants and agreements that had much more general application beyond strictly religious mores.

VII. CONCLUSION

Islamic military jurisprudence is not in stasis. Generally, the IHL provisions discussed above are compatible with, if not identical to, the Shari'ah. The shift to a modern "state of peace," however, has brought the contextual applicability of particular provisions into the limelight. It will be up to contemporary Muslim scholars and intellectuals to address these challenges so as to comply with changing social constructs while remaining true to timeless Islamic principles.

Yousaf, "IHL" as "Islamic Humanitarian Law": A Comparative Analysis of In

Florida Journal of International Law

VOLUME 24  DECEMBER 2012  NUMBER 3

EDITOR-IN-CHIEF
KENDALL OBREZA

Managing Editor
MARKEY BAKAS

Articles Editors
PAYDON BROEDER
MATT NELLANS

Student Works Editors
LAUREN WAIJSMAN

Research Editors
DAVID BYRON
MATTHEW FREY
JAMES GLOVER
JULIE ICKES
ZACHARY ULLMAN

Editors-at-Large
SURYLA RAHMAN
BILL DOIRON

General Members
Benjamin Baird
Danisa Borges
Amanda Broadwell
Connor Haskins
Phil Kegler

Priya Kolli
Jared Lay
Clay Matthews
Lauren McCord
Arletys Rodriguez
Nelson Rodriguez

Ashleigh Shelver
Sean Smith
Sumer Thomas
Jourdan Weltman
Winton Wilks

FACULTY ADVISOR
BERTA ESPERANZA HERNÁNDEZ-TRUYOL

ADVISORY BOARD
SENATOR BOB GRAHAM
UNIVERSITY OF FLORIDA

STAFF EDITOR
VICTORIA A. REDD

AMBASSADOR DENNIS JETT
PENN STATE UNIV.

BERTA ESPERANZA HERNÁNDEZ-TRUYOL
UNIVERSITY OF FLORIDA
STATEMENT OF PURPOSE

The Florida Journal of International Law is a scholarly publication devoted to timely discussion of international legal issues. Its subscribers include legal scholars and practitioners from around the world. The Journal publishes three times a year and is one of four co-curricular journals produced at the University of Florida Levin College of Law. On occasion, the Journal will also have Special Editions that can be purchased in addition to its subscription.

The Journal selects its editorial board and staff from the top ten percent of students at the University of Florida Levin College of Law and from winners of the open write-on competition held once per year.

The Journal enables students to earn academic credit while honing their legal research and writing skills. Recent articles published or accepted for publication have treated subjects as varied as International Trade and Commerce law, Human Rights law, Terrorism, National Security, War Crimes Tribunals, International Environmental law, International IP (Intellectual Property), and Maritime law.
Florida Journal of International Law

The Florida Journal of International Law (ISSN 1556-2670) is a student-edited legal journal published by the University of Florida. The Journal is published three times per year. The Journal extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law in supporting and assisting the Journal in its publication of this issue.

Editorial and business address: Florida Journal of International Law, University of Florida Levin College of Law, 351 Village Dr., 218 Bruton-Geer Hall, P.O. Box 117635, Gainesville, FL 32611.

Please visit us on the web at www.fjil.org/.

The subscription rate per volume is $50.00 U.S. domestic plus sales tax for Florida residents and $55.00 U.S. international. Single issues are available for $20.00 U.S. domestic and $25.00 U.S. international.

Back numbers (volumes 1-23 inclusive) are available from: William S. Hein & Co., 1285 Main Street, Buffalo, NY 14209.

Manuscripts may be submitted to the Articles Editors:

Florida Journal of International Law
Levin College of Law
University of Florida
351 Village Drive
218 Bruton-Geer Hall
Gainesville, FL 32611
USA

(352) 273-0906

Printed by Western Newspaper Publishing Co., 537 East Ohio St., Indianapolis, IN 46204

© 2012 FLORIDA JOURNAL OF INTERNATIONAL LAW