

## HOW ISLAMIC IS ISLAMIC INTERNATIONAL LAW?

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The issue I want to discuss with you today touches on the very essence of our work, that is: how do we know what Islamic international law really *is*? What roads do we take, what methods do we use to discover the true facts and meaning of what we call Islamic international law?

Not so long ago I was asked to write the entry on Islamic international law for the Oxford Encyclopedia of international law. Piece of cake, I thought: just categorize the topics, and list the main authors. But it turned out to be a mindboggling exercise. So many different approaches, so many agenda's, both hidden and open, so many opinions, so many different outcomes!

I got the strong impression that scholars talk more about Islamic international law in terms of what it *should be*, or what they *want it to be*, than what it *is*. And with that last remark I do not mean the quintessential theory of a legal system called Islamic international law. No, I mean international law as reflected in the practice of its players.

In this lecture, I will make a call for the study of Islamic international law, not as a static system of law, but as a system that is developing by practice. And by doing so, the question to what extent this branch of law can be considered specific in its own right and merits the adjective 'Islamic', will be answered in due course.

To make my point, I will take you through three parallel trajectories that have shaped our view of Islamic international law.

### *Practice and theory*

The first of these is the historical trajectory. With this I mean the development of international rules by Muslim practitioners and scholars during the first centuries of Islam. With practitioners I mean the men who had to make the decisions in the field, like the prophet, his generals, the successor caliphs.

The scholars were the men who, often decades or even centuries later, tried to come to an understanding of these practices, and to deduct from them a comprehensive set of rules. Here we see the first separation between what Islamic international law was, on the ground, and what people wanted it to be, in the books.

For a long time among modern academics, the study of these books dominated. And I would argue that the legal approach that so many academics took was an obstacle more than it was helpful in understanding this thing called Islamic international law.

Here I need to make a small sidestep. One would assume that modern academics would treat Islamic international law as a branch of Islamic law. But it is not: they appear to be two completely different fields of study, each with its own scholarship. And while most modern scholars of Islamic law are anthropologists, philologists or historians, Islamic international law is dominated by lawyers. That has its consequences.

As one of the few lawyers studying Islamic law, I experienced some serious clashes of academic civilizations. The anthropologists accuse us, lawyers of thinking that a law represented reality, while we, lawyers complain that the anthropologists do not understand the systematics of the legal system they are studying.

But I daresay that the anthropologists have a point, because lawyers do have the tendency to look at law as self-sustained comprehensive system of rules with their own logic and structure. And, what is more, lawyers often see laws as a reflection of reality. It is with this perspective that modern legal academics came with a fixed system of international law that they called Islamic, and that they discussed within the terms of that system itself.

It is only recently that scholars have pointed at the interaction between practice and law that has shaped Islamic international law. They have introduced in their research a historical approach, and studied what was actually happening at the time that a Muslim scholar put his ideas of international law on paper. It turns out that medieval Islamic scholars who are considered authorities on international law, were themselves children of their time.

For example, the execution of prisoners of war was prohibited by all Islamic schools of law in the first centuries of Islam, but later that the prohibition was only upheld by the Shiite and Hanafite schools.<sup>1</sup> And it was shown that Sarakhsi, one of the great scholars of Islamic international law, was influenced in his thinking by the tribulations of his time.<sup>2</sup>

This interaction between action on the ground and reflection in the study chambers is what has been shaping Islamic international law, and my argument is that we as students of Islamic international law need to study exactly that. But I will get back to that later on. Let us now move to the next trajectory of the study of Islamic international law.

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<sup>1</sup> Lena Salaymeh, 'Legal Historiography – a Case Study in International Law' in: Lena Salaymeh (ed.). *The Beginnings of Islamic Law: Late Antique Islamic Legal Traditions*, Cambridge: Cambridge University Press, 2016, 43-83.

<sup>2</sup> Ahmed Al-Dawoody, 'Al-Sarakhsi's Contribution to the Islamic Law of War,' 14 *UCLA Journal of Islamic & Near East Law* 29 (2015).

## *Comparative law*

This is what I call the trajectory of comparative law. Ever since the early twentieth century, scholars have tried to squeeze Islamic international law in the paradigm of modern international law. In doing so, they use modern terminology to describe a century-old system. It is interesting that this endeavor was at first primarily undertaken by Arab Muslim scholars trained and schooled in modern civil and common law systems.<sup>3</sup>

The articles of these legal scholars were written mostly in French and English, and appeared in American and European legal journals. These scholars did not only do so to merely inform the mostly Western readership of these journals about an alternative legal system. These scholars took part in a larger debate, an international discussion on what law systems could be considered member of the group of legal families of the world.

This discussion originated in Europe in the nineteenth century and sprouted from the Darwinist tendency to classify all species, cultures, races, religions in the world. And this urge for classification was also extended to law systems.

Given the fact that this was primarily a European and American discussion, there was consensus on the civil and common law systems as main members of this international family, but much less so on all other legal systems. The assumption was that law ought to be a rational system, and for that reason a separate classification was made for 'religious law systems.'

This classification still stands, by the way, and I always find it intriguing that one has been unable to find a definition for this legal family other than that it is founded on divine and thus irrational inspiration. But that is another discussion.

From the 1920s to the 1950s, Muslim legal scholars engaged in this debate. By doing so, they put Islamic international law on the map. I have the distinct impression that they felt responsible, and perhaps even proud, to inform the larger legal community of this alien system of Islamic international law. But they did not explain Islamic international law as a self-contained system in its own right, with its own logic and terminology. No: it was explained in the modern international law terminology of the 20<sup>th</sup> century.

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<sup>3</sup> See, e.g., Cardahi, Choucri (1937) "La conception et la pratique du droit international privé dans l'islam", *Académie du Droit International. Recueil des Cours*. 60: 511–650; Edmond Rabbath, 'Pour une théorie du Droit International Mussulman', 6 *Revue Egyptienne de Droit International*, 1950 (1) 1–23; Rehid, Ahmed (1937) "L'islam et le droit des gens". *Académie de droit international. Recueil des Cours*. 60 (VII): 375–506; Mahmassani, Subhi (1961) "Principles of International Law in the light of the Islamic doctrine" *Académie de droit international. Recueil des Cours*. 177: 201–328.

That exercise posed several problems that are still echoing today. Because when one wants to compare two things, or systems, what then is the measuring stick to be used? Ideally, that should be an objective measuring stick with a neutral terminology. But we have not yet been able, or willing, to develop such neutral terminology.<sup>4</sup>

As a result, we are confronted with a modern Western scholarship that mostly describes and analyzes Islamic international law with the use of modern international law terminology.

### *Competition*

With this comparative approach, another feature was introduced into the study of Islamic international law that we still find today: competition. Some scholars are almost apologetic in their endeavors to explain that Islamic international law is not some obscure, archaic, tribal law from long time ago, but can stand among the other recognized systems of international law. Other scholars sway almost to the other side by trying to prove that modern international law is not superior, but actually indebted to Islamic international law.

I would say that, ever since the 1980s, this competitive edge to the exercise of comparing these two legal systems, made scholars feel compelled to not merely try to understand Islamic international law as such, but to either justify or disprove it as a legal system that lives up to the modern standards of international law.

This is best illustrated with one of the branch studies of Islamic international law, known as 'Islam and human rights'. The use of the 'and' in between Islam and human rights has been sufficient to present this topic as a contradiction, or a paradox at best, and the scholars, willingly or unwillingly, put themselves to the task of proving or disproving the contradiction between Islam and human rights.

The urge to prove or disprove the compatibility between Islamic and modern international law is even noticeable among modern Muslim theologians who stand in the century-old tradition of the Islamic legal science called *Fiqh*. This counts for both Sunni and Shia.

An example is the so-called Azhari school, a group of prominent Muslim scholars who during the twenty wrote about international relations.<sup>5</sup> Their focus was on the issue of war, and their combination of a thorough knowledge of Islamic legal science

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<sup>4</sup> See discussion hereof by Nesrine Badawi, 'Regulation of armed conflict: critical comparativism', 37 *Third World Quarterly* 11, 1990, (2016).

<sup>5</sup> Mahmud Shaltut, *al-Harb wa al-Salam fi al-Islam* [War and Peace in Islam] (Cairo: n.p, n.d.); Abu Zahra, *Nazariya al-Harb fi al-Islam* [Theory of War in Islam], Cairo: Wizarat al-Awqaf, 1958; Yusuf al-Qaradawi, *Fiqh al-Jihad: Dirasa Muqarina li-Ahkami-hi wa Falfasati-hi fi Du'a al-Qur'an wa al-Sunna* [The Jurisprudence of Jihad: A Comparative Study of its Rules and Philosophy in Light of the Qur'an and the Sunna], 2 Vols. (Cairo: Wehba Press, 2009); Wahbah al-Zuhaili, *Al-'Alaqat al-Duwaliya fi al-Islam: Muqarana b-il-Qanun al-Duwali al-Hadith* [International Relations in Islam: a Comparison to Contemporary International Law], Damascus: Dar al-Fikr, 2011.

with new interpretations thereof resulted in a humanist and peaceful reading of scripture. By doing so they continued the legacy of modernist reformers like Mohamed Abduh.

Among the Shiites we see similar developments in post-revolution Iran<sup>6</sup>, and we see it in the fatwas and writings of the late Fadlallah in post-civil war Lebanon.<sup>7</sup>

These Muslim modernists, that is, both those who are trained in the modern legal tradition and those trained in Islamic classical tradition, conceive of Islamic international law as a) a comprehensive system that b) is peaceful, and only calls to arms in order to defend itself. This view has had its share of criticism<sup>8</sup> but seems to have become the general accepted view of Islamic international law. Or should I say: this has become the most wanted view?

### *Islamization*

And this brings me to the third and last trajectory of the study of Islamic international law. This is what I call the trajectory of Islamization. With that I mean the growing demand in the Muslim world, from the 1980s onwards, to make existing secular laws more Islamic. This has caused some radical developments in both the politics and legal systems of quite some Muslim majority countries.

It is therefore interesting that we see very little of this happening in the domain of international law. Mind you, many Muslim majority countries, and especially the Organization of Islamic Cooperation of which almost all Muslim majority countries are member, advocate an Islamic approach to international law.<sup>9</sup> But in reality, we see very little change in their international way of conducting state affairs. Why?

I would argue that this is the result of the general trend that we see by both Muslim scholars and Muslim majority states to consider Islamic international law being perfectly compatible with international legal standards. And this compatibility carries its own logic, because if the rules of international law are in conformity with Islamic law, then international law can be considered to actually be Islamic law.

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<sup>6</sup> Mohammad H. Faghfoory in 'Shi'ite Islam' (in Gregory Reichberg and Henrik Syste, *Religion, War and Ethics*, Cambridge University Press, 2014, 389-470) discusses Ayatullahs Murtada Mutahhari, Ni'matullah Salihi Najafabadi, and Mostafa Mohaghegh Damad.

<sup>7</sup> Muhammad Hussein Fadlallah and Ahmed Fadlallah, *Kitab al-Jihad: Taqreer li-Bahth Samahat Ayatollah al-'Uzma al-Sayyid Muhammad Hussein Fadlallah* [Book of War: Account of the Study of his Excellency the Supreme Ayatollah sayyid Muhhamd Hussein Fadlallah] (Beirut: Dar al-Malak, 1998)

<sup>8</sup> David A. Westbrook argues that "Islamic law, at least as imagined by the scholars surveyed here, cannot provide a legal articulation of the world order." ('Islamic International Law and Public International Law: Separate Expressions of World Order', 33 *Virginia Journal of International Law* 819, 898 (1993). Abdul Hamid A. Abu Sulayman argues that, in order to become a comprehensive Islamic international law, a thorough re-interpretation of sources is needed (*Towards an Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought*, The International Institute of Islamic Thought, Herndon (Va.), 1987).

<sup>9</sup> E.g., Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States* (1987);

That is why we see even the most self-proclaimed Islamic states, like Iran or Saudi-Arabia, play by international rules. When these countries criticize Israel or America, for instance, they do not use Islamic jargon or refer to Islamic legal instruments, no, they demand another UN Resolution and refer to international legal standards.

Whether this behavior is a matter of scholarly principle or political expediency, I leave open for debate. But we can observe that all modern Muslim majority states that claim adherence to Islamic law, and in particular to Islamic international law, have effectively declared this law to coincide with modern standards of international law.

But if that is so – if Islamic international law has been conflated with the modern notion of international law, how ‘Islamic’ is it then still? I would argue it is not. To say that the current system of international law is not contradicting Islamic law, and therefore it can be called Islamic law, is a logic that reduces the term ‘Islamic international law’ to a pleonasm.

On the other hand, if that makes people happy, and international law more accepted, then I will be the last person to complain. But it renders the discussion to a political game of semantics rather than to a scholarly inquiry into the nature of Islamic international law. That term, to me, is then only reserved for the Islamic historical legal science and its legal model on international relations. The study of *Islamic* international law is then reduced to a mere theoretical and historical exercise, not unlike the study of Roman law.

### *New developments*

But – and here comes a big ‘but’: since the 1990s we have been overtaken by new developments that we may definitely call ‘Islamic international law.’ While scholars like us are still deliberating an overall theory of Islamic international law, and the state practitioners have equated Islamic international law with modern international law, a third party has arisen: non-state actors.

They have taken an interesting and unprecedented direction in elaborating forms of Islamic international law. These forms are of two kinds: one is in the domain of war and violence, the other is in the domain of sustainable development.

The first category of non-state actors is those with militant tendencies. I am talking about the Taliban, Hezbollah, Hamas, Al Qaeda, ISIS, and many others. All are acting in an international context, and all refer to the sources of Islamic law to define and justify their actions. These references are often documented. The mentioned ayatollah Fadlallah served as the house theologian for Hezbollah, like al-Makdisi was for Al Qaeda, and both scholars have been prolific in their writings. Similarly, the

Taliban have promulgated their own laws of war, called the Layeha.<sup>10</sup> Even ISIS recorded its twisted but consistent views on international relations.<sup>11</sup>

And in doing so, they have all given new interpretations to the sacred sources, and in many instances have deviated from the standards set by Islamic orthodoxy and by modern mainstream views on what Islamic international law is – or should I say, what it should be?

The second category is also non-state actors with a distinct Islamic profile, but their goal is what we nowadays call sustainable development, which often touches on international law as it includes human rights, women's rights, good governance and ecological rights. These state actors are individuals, more than organizations, and they are active all over the world: Indonesia, Pakistan, Iran, Turkey, Egypt, Morocco, Great-Britain, America.<sup>12</sup> They make use of Islamic theological and legal discourse and just like the Muslim militants, they give it their own reading and interpretation.

But unlike their militant peers, they are mostly unseen by the outsiders, including us, academics. We have a preference for the militants: most scholarship produced by academics about Islamic international law is about the rules of war and peace. It is quite remarkable, therefore, that the Assistant General Secretary of the United Nations Development Program said in 2009: 'the role of Islam could be one of the decisive factors tipping the planet towards a sustainable future'.<sup>13</sup>

These are just two examples of recent developments in the domain of international law. And here I think it is absolutely justified to speak of *Islamic* international law, given the elaborate and almost obsessive efforts of these non-state actors to base their actions on Islam.

Scholars all over the world, Muslim or not Muslim, may disagree with *how* these actors practice Islam, and argue that their interpretations are contrary to Islamic orthodoxy, but that does not deny the fact that the sources and tenets of Islamic theology and law are the starting points for their reasoning. These non-state actors are definitely working within the domain of Islamic international law.

This brings us back to the complex relation between practice and scholarship. Islamic international law is not an ancient system that needs to be explored and explained to an ignorant or unwilling audience. It is alive and a 'kicking, although

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<sup>10</sup> Niaz A. Shah, 'The Taliban Layeha for Mujahidin and the Law of Armed Conflict,' *International Humanitarian Legal Studies* 3 192 (2012).

<sup>11</sup> Mohamed Elewa Badar, 'The Self-Declared Islamic State (Da'esh) and *Ius ad Bellum* under Islamic International Law', *The Asian Yearbook of Human Rights and Humanitarian Law* 1, 1 (2017).

<sup>12</sup> E.g., D. Vincenti, '*Green Islam*' and social movements for sustainability. *Socio-ecological transitions in Muslim-majority countries*, (PhD thesis), Rome, LUISS University Guido Carli, 2017; L. Wersal, 'Islam and Environmental Ethics: Tradition Responds to Contemporary Challenges' *Zygon*, 30 (1995), 451-459.

<sup>13</sup> O. Kjørven, speech UNDP at Istanbul meeting on climate change 5-7- July 2009, 'UN celebrates Muslim Seven Year Eco Plans'.

not necessarily in ways that we may agree with, or we might have foreseen. And it is happening right under our noses.

That means that we must move away from our desks and out of our libraries, and into the field: a lot of work needs to be done. And I would argue that in doing so we lawyers are in desperate need of historians, philologists and anthropologists to make sense of what is happening. It might set us back on the course of what Islamic international law *is*, rather than what it should be, or what we want it to be.