

RESEARCH ARTICLE

Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition

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This essay is one of the first collaborative efforts to identify the underlying norms embedded in diverse traditions of Islamic law as these apply to contemporary Muslim communities experiencing conflict or transitioning from conflict. This long overdue endeavor draws upon comparative legal analyses, postconflict justice traditions, global governance, and empirical conflict studies to explore why Islamic legal norms are not often used as a resource for restraint and guidance in contemporary conflict settings. In exploring this puzzle, the authors make the case for strengthening commensurate Islamic and international conflict norms for complex conflicts and postconflict tradition. We also situate Islamic postconflict justice norms—which are too often confined to religious and natural law discussions—into contemporary problems of security policy, conflict prevention, and problems of governance. We indicate the many benefits of such a comparative approach for citizens of diverse Muslim and Arab states and communities, trying to build pathways out of conflict, and for humanitarian and human rights practitioners working in such arenas toward similar goals. An additional, important benefit in excavating such *shari'a* norms is in providing the intellectual basis to counter politicized, extremist, and instrumentalist uses of Islamic law to justify extreme uses of political violence across the Middle East, Central and South Asian, and African regions.

Keywords: Postconflict justice; postconflict transition; Islamic law; norms; *shari'a*; governance; conflict; conflict prevention; international law; international humanitarian law; international human rights law; the laws of armed conflict; extremism; political violence; Islamism

Introduction

Identifying the norms underlying diverse traditions of Islamic law, especially as these apply to Muslim communities experiencing conflict or transition from conflict, is a long overdue endeavour. As one of our co-authors, M. Cherif Bassiouni has written, contemporary Islamic legal thinking in the vital area of post-conflict justice 'has been impaired by the lack of development in the techniques and application of... the goals and policy of the *shari'a*.¹ Such a needed contribution would benefit citizens in Arab and Muslim-majority nations trying to build locally intelligible pathways out of conflict. It would also help humanitarian and human rights practitioners working in conflict zones toward similar ends and aid international lawyers trying to bridge the gap between international law and Islamic law paradigms in conflict settings.

Yet, perhaps a far more transformative benefit of excavating *shari'a* norms lies in their ability to provide the intellectual basis to counter contemporary extremist and instrumentalist uses of Islamic norms to justify political violence toward innocents across the Middle East, Central and South Asian, African regions, and beyond. The largely exegetical task of identifying and clarifying such norms is, however, beyond the slim scope of this essay—and beyond the work of any single individual author. Rather, the purpose of this essay is to explore why—using interdisciplinary social science and comparative international legal analyses—such Islamic legal norms are not often invoked as a resource for restraint and guidance in conflict and

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¹ M. Cherif Bassiouni, *Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 253.

post-conflict settings. Not only do the authors explore this puzzle, we make the argument for strengthening commensurate norms governing conflict in both Islamic and International Humanitarian Law traditions.

To do this, our approach situates religious and natural law discussions in contemporary problems of security policy and governance.² That makes this collaborative work cross-cultural, reliant on legal pluralism, and also interdisciplinary, in ways reflective of 'policy-relevant scholarship' in the international law and security arenas.³ It is worth recalling that such border-crossing and translational work has shaped breakthrough moments in intellectual history: the late medieval recovery of Aristotle in the Latin West, for instance, which went on to spark modern philosophy, including the philosophy of law, occurred by virtue of Averroës' Aristotelean commentaries, which made possible Aquinas's own influential conception of natural law that came to anchor the universal idea of the rule of law captured in legitimate governance.⁴

As the 'religious'⁵ or 'sacred'⁶ law of Islam, *shari'a* is often defined as 'an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects'.⁷ This body of norms places 'on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules'.⁸ In the contemporary post-9/11 moment, it is critical to recognise two assumptions that have—for better or worse—framed Islamic legal scholarship. First, on the negative side, scholars have too often approached Islamic law within theological terms, even conflating law with theology, despite the fact that discourses of religion and law function in profoundly different ways in society. Law—no matter how important its inspiration—amounts to a system of rules enforced through social and political mechanisms and institutions to govern human, worldly behaviour.

Second, on the positive side, scholars have routinely noted that *shari'a* does not comprise the whole of Islamic law—far from it. As John Esposito explains, Islamic law refers to both *shari'a* and *fiqh* (Islamic jurisprudence), as well as other doctrinal sources and opinion (such as *hadith*), whereas *shari'a* is God's 'divine law' contained in the Qur'an and *Sunna*. *Fiqh* refers to earthly efforts by jurists to interpret *shari'a*.⁹ Islamic law is grounded in the *shari'a* and derived from it through interpretation by jurists, and hence, *shari'a* is a normative source of Islamic law, not its entire body.¹⁰ To make a comparison, if public international law generally is comprised of agreements between states, customary rules considered by states to be legally binding (i.e. *opinio juris*), case law, and general principles, *shari'a* amounts to the "general principles" of Islamic law—the legal precepts and touchstones that orient different schools of thought, juristic opinion, and state-specific implementations of Islamic norms. While there is no question that religious ideals frame such precepts—the divine, the afterlife, moral standards of behaviour, the good life—these questions by no means exhaust the legal content of *shari'a* principles, which at bottom are resolutely practical.

We, therefore, use Islamic law to refer to all elements of the *shari'a* and other manifestations of *fiqh*, and we reserve *shari'a* itself for the core, transcendental principles evident in the corpus and sources of Islamic law. Notably, Islamic law has different internal legal regimes and schools that cover most aspects of human conduct, both collective and individual, and it includes many legal techniques for prevention and punishment, victim remedies, and reconciliation.¹¹ What one might call the policy dimensions of *shari'a* reflect core principles and historical priorities evident in Islamic law applied (however badly) in practice.

² For background on legal pluralism, religion, and policy, see Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism in Development' (2011) 3 Hague Journal on the Rule of Law 1–17; Bryan S Turner & Berna Zengin Arslan, 'Shari'a and Legal Pluralism in the West,' (2011) 14 European Journal of Social Theory 139–159; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012); and Sherman Jackson, 'Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity' (2006) 30 Fordham Int'l LJ 158.

³ See Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012).

⁴ For Thomas Aquinas's Aristotelian-inspired shift from revealed to natural theology in *Summa Theologica* (1273), see the text itself, Part II: Ethics, and Robert Pasnau, *Thomas Aquinas on Human Nature: A Philosophical Study of Summa Theologiae 1a 75–89* (Cambridge University Press 2002); for a discussion of Ibn Rushd's role in the western dissemination of Aristotle, see Robert Pasnau, 'The Islamic Scholar Who Gave Us Modern Philosophy' (2011) 32 *Humanities*. (Noting by the mid-13th century, the philosophical curriculum at emerging European universities 'had become thoroughly Aristotelian, and the great guide to Aristotle was none other than Averroës, who became known in the Latin West as simply "the Commentator," which "remained the case all the way into the modern era"').

⁵ Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2005), 1. See also, Mohammed Hashim Kamali, *The Introduction to the Shari'ah* (Oneworld Publications 2008) and Mohammed Hashim Kamali, *Principles of Islamic Jurisprudence* (I.B. Tauris & Company 1999); Abbas Amanat & Frank Griffel eds, *Shari'a Law in the Contemporary Context* (Stanford University Press 2007).

⁶ Gerhard Bowering, ed, *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2012) 497.

⁷ Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press 1982) 1.

⁸ *ibid*.

⁹ John L. Esposito, *Oxford Dictionary of Islam* (Oxford University Press 2003) 148.

¹⁰ Bassiouni (n 1) 13–15; 40–43.

¹¹ *ibid* 39.

These include the pursuit and preservation of public order in a regulated society; the protection of the rights and dignity of individuals, albeit with an eye toward collective order, continuity, and stability; and specific prohibitions and appropriate penalties, including distinctive modalities of victim compensation and individual and social reconciliation.¹² The Islamic legal system is both normatively comprehensive and, yet, flexible in adapting to different contexts and challenges,¹³ as *shari'a* principles orient the legal system in changing times and radically different contexts.

Yet, such norms have also routinely been ignored or distorted by governments, religious leaders, and conflict actors, many of whom claim to be acting precisely in accordance with Islamic law.¹⁴ The propensity to confuse Islamic norms and Islamist extremist practices, notably in conflict settings or areas with unstable or low governance, is evident in recent statements made by terrorist organisations, detailed in extremist magazines such as *Dabiq* or *Rumiyyah*. Such confusion is also surprisingly widespread—among local religious authorities, nonviolent political groups, large swaths of Arab and Muslim publics, even scholars and well-meaning officials in democracies. Recent Pew public opinion polls, for instance, indicate broad-scale acceptance by many of propositions generally untenable in *shari'a* normative frameworks.¹⁵ At its core, such confusion depends upon a lack of understanding of well-established *shari'a* norms in the context of specific issue areas (i.e., pillage in warfare or rape). It also stems from applying over-inclusive elements of Islamic law to these issues, including any and all historical sources, local authorities' opinions, uninformed decisions, or politically-motivated interpretations (a classic example is blasphemy laws).

Confusion and lack of rigor is not only to blame for this conundrum. Stakeholders, religious authorities, political leaders, even Muslim scholars have been slow to clarify these matters by identifying exactly what counts as Islamist extremism. While many individuals, organisations, and governments have begun to systematically address these oversights in light of recent atrocities committed by such groups as Al-Qaeda, Islamic State in Iraq and Syria (ISIS), Boko Haram, and al-Shahbab, for many past decades silenced has replaced urgently needed discussion. Members of the public are not only left in confusion about how Islamic traditions are different from extremist distortions, but also what they might do about rising extremisms among diverse Muslim communities, including those that claim the Islamic label. Thus, beyond making the case for the role of *shari'a* principles for addressing new conflict trends and post-conflict settings, a second vital goal of this essay is to sensitise broad audiences to the capacity of Islamic law to prohibit many types of violent conduct and offer internal measures for conflict prevention, punishment, and reconciliation.¹⁶

We begin the discussion of Islamic legal contributions to post-conflict challenges with these premises: first, that Islamic conflict norms apply in peacetime, conflict, and post-conflict settings, functioning to both prevent human harm and ameliorate conflict;¹⁷ and second, that Islamic law is broadly compatible in many

¹² For a full description of these norms, see Bassiouni (n 1).

¹³ See M. Cherif Bassiouni's distinction between laws and legal systems, on the one hand, and 'justice values' on the other in 'Perspectives on International Criminal Justice' (2010) 50 *Virginia Journal of International Law* 270 (noting that legal systems 'have existed in organized societies as far back as anthropological studies have been able to record, but their substantive justice meanings and contents have varied from society to society, as well as within each society over time. Justice meanings and contents are reflected in the laws and legal systems of the world over some five thousand years; however, legal systems often reflect pragmatic social control mechanisms exercised by rulers to further their own goals. Within different civilizations the convergence between laws and legal systems on the one hand, and moral and social justice values on the other, have depended on a variety of social, political, and economic factors, and on the interactions between these factors').

¹⁴ Schacht (n 7). See, also, Muhammad Munir's account in 'The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law' (2011) 34 *Hamard Islamicus* 7–39, of the departure in Islamic legal philosophy (Tabari and Qaqidi) from the principle of distinction established by the prophet Muhammad and his four successors.

¹⁵ See Pew Research Center, 'Concerns about Islamic Extremism on the Rise in the Middle East, Levels of Support for Suicide Bombing over Time' <<http://www.pewglobal.org/2014/07/01/concerns-about-islamic-extremism-on-the-rise-in-middle-east/pg-2014-07-01-islamic-extremism-11/>> accessed 24 July 2017, in which support for suicide bombing is significant in various places, 46% in 2014 in the Palestinian Territories, actually a decline from 70% in 2007; 18% supporters in Turkey in 2014; 15% in Jordan in 2014, a decline from a highpoint of 57% in 2005.

¹⁶ For the decline of classical Islamic jurisprudence and Islamic rationalism and humanism, see Khaled Abou El Fadle, *The Great Theft: Wrestling Islam from the Extremists* (Harpers 2007); Herbert A Davidson, *Alfarabi, Avicenna and Averroes on Intellect* (Oxford University Press 1992); and Mohammed Abed al-Jabri, *Arab-Islamic Philosophy: A Contemporary Critique* (Center for Middle Eastern Studies 1999).

¹⁷ Bassiouni (n 1) 249:

The term "post-conflict justice" is preferable to "transitional justice" because in many non-English languages, the word "transitional" modifies the word "justice", rather than indicating the application of certain modalities of justice in states going through a transitional period. Justice cannot be transitional, though understandably there are in every nation's history transitional periods during which justice may be applied in different ways so as to achieve particular sociopolitical needs. Post-conflict justice and transitional justice employ similar mechanisms and modalities, including the international legal obligation to pursue accountability and prevent impunity whenever international humanitarian law (IHL) and international human rights law (IHRL) require it. This is frequently the case in societies that have been affected by

ways with core principles in international law and its respective regimes, including international humanitarian law (IHL), but also international human rights law, which is beyond the scope of this essay. From this vantage point, what becomes clear is how contemporary polarised discussions of the role of Islamic law in current conflicts is inadequate: it is time to move beyond the Islam/not Islam dichotomy to explore what Islamic legal traditions say about conflict and transition, and why such restraints are too rarely implemented by Muslim-majority governments.

I. Post-Conflict Justice: the Role of Islamic Law

Few observers of international affairs could fail to notice the intensity of conflict in and across the Middle East, Central and South Asia, and North and East Africa today, including in Syria, Nigeria, Libya, Iraq, Afghanistan, Pakistan, Sudan, Somalia, Kenya, Mali, Yemen, Gaza, among other places. Likewise, few could miss the resulting toll of sectarian violence on civilian victims – a toll that includes lasting, disorienting pain, suffering, and insecurity. Too little rigorous discussion has, in turn, examined the prevalent use of force by Muslim conflict actors – both state and non-state actors alike – against other Muslim communities and its deleterious effects in fuelling cycles of recurring violence.¹⁸

To complicate these matters, some of the worst excesses in the use of force are regularly justified by appeal to Islamic traditions, including by such groups as Boko Haram, Al Shabaab, ISIS, Hamas, Al-Nusra, Al Qaeda (in its many branches), among thousands more.¹⁹ Such irregular uses of force that break all known bounds of lawful hostilities constitute one of the main threats to global security. Such unaccountable behaviour has contributed to worldwide increases in terrorist incidents, particularly for specific Muslim-majority states.²⁰

In the end, witnesses to such atrocities and victims of such violence often pose this troubling and too often silenced question: 'can this be Islam?'. In testimonies by such groups engaged in violence or in talking directly with perpetrators, we too have wondered: 'why are you doing this?', especially as such practices

violent conflicts, large-scale victimization, and social disruptions. These situations and others cause states to stop functioning effectively or deliver services, including the preservation of the peace and security, public order, and justice. A state in this condition is often referred to as failed or failing'.

For transitional or post-conflict justice and its causes, see Stewart Patrick, *Weak Links: Fragile States, Global Threats, and International Security* (Oxford University Press 2011); T Olson et al, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (USIP 2010); Rosalind Shaw et al, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010); Hakeem Yusuf, *Transitional Justice, Judicial Accountability, and the Rule of Law* (Routledge 2010); Steven Ratner et al, *Accountability For Human Rights Atrocities in International Law: Beyond The Nuremberg Legacy* (Oxford University Press 2009); Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007); Naomi Roht-Arriaza & Javier Maríezcurrena, eds, *Transitional Justice In The Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press 2006); Ruti Teitel, *Transitional Justice* (Oxford University Press 2002); and Neil Kritz ed, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP 1995).

¹⁸ For data on internal Muslim conflicts, see M. Cherif Bassiouni, *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia 2010); and Corri Zoli, Emily Schneider & Courtney Schuster, 'Armed Conflict in Muslim States, 1947–2014: Does Conflict Look Different under International Humanitarian Law?' (2014) 40 North Carolina Journal of International Law and Commercial Regulation 679.

¹⁹ For an innovative treatment of nonstate actors, including foreign fighters, see Thomas Hegghammer, 'The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad' (2010) 35 International Security 53 (noting 'a salient feature of armed conflict in the Muslim world since 1980 is the involvement of so-called foreign fighters, that is, unpaid combatants with no apparent link to the conflict other than religious affinity with the Muslim side'). Hegghammer finds foreign fighter mobilisation is key to understanding transnational Islamist militancy and that such fighters impact the conflicts they join by promoting sectarian violence and indiscriminate tactics, empowering transnational terrorist groups, and in volunteering for war providing a 'principal stepping-stone for individual involvement in more extreme forms of militancy'. Also see, West Point, Combating Terrorism Center (CRC) 'Zawahiri's Letter to Zarqawi' (2005), 9 <<https://www.ctc.usma.edu/v2/wp-content/uploads/2013/10/Zawahiris-Letter-to-Zarqawi-Translation.pdf>> accessed 24 July 2017. Addressing Al Qaeda in Iraq (AQI)'s military strategy to spark a violent civil war within Islam; after first congratulating Zarqawi 'for what God has blessed you with in terms of fighting battle in the heart of the Islamic world, which was formerly the field for major battles in Islam's history, and what is now the place for the greatest battle of Islam in this era . . . according to what appeared in the Hadiths of the Messenger of God about the epic battles between Islam and atheism', Zawahiri asks: but 'can the mujahedeen kill all of the Shia in Iraq? Has any Islamic state in history ever tried that? And why kill ordinary Shia considering that they are forgiven because of their ignorance?'; Abu Bakr Naji, *The Management of Savagery* (Will McCants ed, 2006), and Abu Bakr Naji, *Governance in the Wilderness: Edarat Al Tawwahush* (2008); *Taliban 2009 Rules and Regulations Book* (M. Sangin Valley). For commentary on the Muslim dimension to this issue, see Azeem Ibrahim, 'What is the Greatest Global Threat to Muslims?' (2014) *Al Arabia* <<http://english.alarabiya.net/en/views/news/middle-east/2014/08/16/What-is-the-greatest-global-threat-to-Muslims-.html>> accessed 16 August 2014.

²⁰ In 2015, the top ten counties with the most attacks were Iraq, Afghanistan, Pakistan, India, Nigeria, Egypt, Philippines, Bangladesh, Libya, and Syria. See U.S. State Department, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism (2015) <<https://www.state.gov/j/ct/rls/crt/2015/257526.htm>> accessed 24 July 2017.

directly contradict longstanding Islamic legal principles. Invariably, the response is that 'the end justifies the means'.²¹ Implicitly, what one sees in this rebuttal is a response situated in a discourse of 'resistance' to foreign or domestic oppression or to policies by other states. It is not, then, a rejection of Islamic norms *per se* but a chain of justifications. Conflict behaviours are excused and even defended as necessary by agents of such violence and their often political supporters in light of these commonly mentioned mitigating factors: the fundamental asymmetry of many conflicts, the strength of western actors, the double standards of U.S. foreign policy etc.²² Even well-meaning advocates of conflict resolution are seduced by such fundamentally flawed and self-defeating logics of 'resistance'.²³ Mobilising the charge of 'Islamophobia' against those who ask the question, 'is this Islam?', is likewise self-defeating and distorting, most obviously, because it forgoes the opportunity to explain the specific differences between *shari'a* principles and Islamist rationales for indiscriminate violence.

From a long gaze, progress has actually been made on post-conflict justice mechanisms across the diverse Arab state system and the broad Muslim world, though it is often hard to see.²⁴ Less than fifty years ago, one could not open a dialogue about conflict behaviour or post-conflict transition with individuals engaged in Islamist militancy. However, recently, reconciliation and transition laws and initiatives have been passed in Morocco, Tunisia, and Egypt, in which governments are well aware of militant tactics and rationales; current efforts are ongoing in Afghanistan, Iraq, and Libya to develop rule of law resources; and specific measures are underway to create an international tribunal for Syria, among other efforts.²⁵ No doubt, all of these initiatives have limits and flaws. But in the span of only several decades, many polities have moved from a position of essentially zero conflict and reconciliation mechanisms to increasing discussion and use of these tools to redress complex problems of transition, including broad-scale crimes and even atrocities.

Nevertheless, the number of recent armed conflicts in Muslim-majority states has created countless victims and deployed warfare practices that violate both international and Islamic law irrespective of whether one defines such incidents as internal, civil wars, domestic violence, international armed conflict, sectarian violence, insurgencies, acts of isolated violence, or transnational terrorism. It is worth repeating, as interdisciplinary scholars have long pointed out, that these normative regimes, international and Islamic law, are commensurate on many core principles, from the principle of distinction, which prohibits targeting non-combatants, to the general protection of the principle of humanity in warfare.²⁶ Muslim-majority

²¹ See Cherif Bassiouni's role in chairing three international commissions that investigated the aftermaths of wars (during the course of the wars). Having talked to both victims and perpetrators during the conflict and after, invariably the argument is that 'the end justifies the means'.

²² Graham Fuller, *A Sense of Siege: The Geopolitics of Islam and the West* (Westview Press 1995) and Bassam Tibi, *Political Islam, World Politics and Europe* (Routledge 2007). Note that 'Political Islam legitimates its resort to violence by reference to an "Islam under siege"' as Tibi notes in 'The Political Legacy of Max Horkheimer and Islamist Totalitarianism' (2009) 48 *Telos: Critical Theory of the Contemporary* 14. See, also, Christina Hellmich, 'How Islamic is al-Qaeda? The Politics of Pan-Islam and the Challenge of Modernisation' (2014) 7 *Critical Studies on Terrorism* 241. (Noting in bin Laden's writings from 1994–2011, a set of idealistic, Pan-Islamic sentiments 'not based on the main schools of Islamic theology' but result from 'a crisis of meaning of Islam in the modern world'); and Jeroen Gunning & Richard Jackson, 'What's So 'Religious' about 'Religious Terrorism?'' (2011) 4 *Critical Studies on Terrorism* 369–388.

²³ For the critique of Islamism as a 'creative space for political articulations of protest' against inequities, global capitalism, modernity, etc., see Bassam Tibi, 'The Political Legacy of Max Horkheimer and Islamist Totalitarianism' (2009) 48 *Telos: Critical Theory of the Contemporary* 7–15. (Noting such views like Buck-Morss 'could not be more wrong when they invoke Critical Theory to endorse Islamism' and 'remain blithely oblivious to the fact that a religious fundamentalism, and not a progressive movement, is at work'). See also Susan Buck-Morss, 'Critical Theory and Islamism' in *Thinking Past Terror: Islamism and Critical Theory on the Left* (Verso 2003) 41–56; Roxanne Euben, *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Modern Rationalism: A Work of Comparative Political Theory* (Princeton University Press 1999); and Khaled Abou El Fadl, 'Islam and the Theology of Power' (2001) 221 *Middle East Report* 28–33.

²⁴ For both broad trends and country-specific cases, see Kathrine Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton 2011); Lutz Oette, *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate 2013); and Tazreena Sajjad, *Transitional Justice in South Asia: A Study of Afghanistan and Nepal* (Routledge 2013); Independent International Commission of Inquiry on the Syrian Arab Republic, United Nations Human Rights Office of the High Commissioner, <<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>> accessed 22 May 2017.

²⁵ In fact, a reflexive account of US and coalition rule of law efforts during the post-9/11 wars has still not been written, despite the heavy scrutiny of political, strategic, and military performance. For initial research, see Eric Talbot Jensen & Amy M Pomeroy, 'Afghanistan Legal Lessons Learned: Army Rule of Law Operations' ed, Michael Schmidt, *The War in Afghanistan: A Legal Analysis*, 85 *International Law Studies* (Naval War College 2009).

²⁶ For some examples, see Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2005); James Cockayne, 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations' (2005) 84 *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 597–626.

governments advocating for these respective regimes also reveal a history of collaboration with non-Muslim states during international peace conferences.²⁷

But few scholars within the Islamic tradition have asked some of the following 'first order' questions, central to this inquiry: where do the resources (the inspiration, concepts, political will, institutional capacity, and leadership) come from for mitigating conflict and, in cases of war and political crises, for advancing post-conflict justice, reconciliation, and successful transition? Are these tools, both practical and analytical, confined to specific cultures and histories, advanced best by states and international and nongovernmental organizations, or merely a product of good timing and luck? What happens when various norms involved in reconciliation clash? How are certain constituencies—ethnic and religious minorities, groups excluded by virtue of gender and sexuality, tribal and local power affiliations, the vanquished in battles—marginalised or privileged in post-conflict outcomes in ways that pave the way for future stability or instability? How might we advance the limited progress already made in reconciliation measures across diverse Muslim communities (and beyond) in ways that further anchor conflict reduction and post-conflict justice norms in institutional supports and in increased awareness?

At its core, the essay explores the underappreciated role that Islamic norms might play in post-conflict transition processes. We are interested both in how Islamic law is a critical, albeit underutilized, resource in reducing harm in conflict settings and in providing useful norms, concepts, and guidelines for states, conflict actors, and third party mediators in post-conflict reconciliation and transition. Within the corpus of Islamic law, despite the limits of its modern interpretation and application, there are numerous core principles, some of which we describe herein, designed to reduce conflict and human harm, pave the way for justice and reconciliation, and rebut abuses of power in the context of warfare and civil strife.

At the same time, however, we are aware that Islamic legal norms are being repurposed today for disparate political uses, including exacerbating violence. Extremists are innovative and proactive in seizing the strategic initiative and in distorting the content of *shari'a* for battlefield use.²⁸ In these contexts, Islamic norms are bracketed or abused by non-state, as well as state, actors under the 'ends justify the means' rationale and to enable political repression.²⁹ The most recent example of this involves ISIS's declaration of a new caliphate in erstwhile Iraq, Syria, Jordan, Lebanon, and parts of Turkey, Palestine, and Cyprus,³⁰ as well as the group's now spectacular use of atrocities to pacify and 'terrify' local populations.³¹ Such conduct is steeped in an appeal to 'purifying Islam' through violence³² and includes ethnic and religious cleansing

²⁷ See Corri Zoli, 'Islamic Contributions to International Humanitarian Law: Recalibrating TWAIL Approaches for Existing Contributions and Legacies' (2016) 109 AJIL Unbound 271; Abdullah Ahmed An-Naim, 'Islam and International Law: Toward a Positive Mutual Engagement to Realize Shared Ideals' (2004) American Society of International Law 159–168; and Sheikh Wahbeh al-Zuhili, 'Islam and International Law' (2005) 87 International Review of the Red Cross 269–283.

²⁸ C Zoli & E Schneider, 'Shari'a Courts Move to the Battlefield' (2014) Harvard Law School National Security Journal <<http://harvardnsj.org/2014/02/sharia-courts-move-to-the-battlefield-jabhat-al-nusra-opens-a-legal-front-in-the-syrian-civil-war/>> accessed 22 February 2014.

²⁹ For military manuals that attest to this use, see: Abu Bakr Naji, *The Management of Savagery* (Will McCants ed, 2006); *Layeha or Taliban Rules and Regulations Book* (2010). For analyses of the *Layeha*, see Kate Clark, 'The *Layeha*: Calling the Taliban to Account' (2011) Afghanistan Analysts Network, AAN Thematic Report (2011) <<http://www.afghanvoice.org.uk/avfm1/pdfs/LayehaMain.pdf>> accessed 24 July 2017. For primary sources, such as strategic letters between commanders, see West Point, Combating Terrorism Center (CTC), Harmony Program, based on U.S. Department of Defense seized documents: <<https://www.ctc.usma.edu/programs-resources/harmony-program>> accessed 24 July 2017.

³⁰ In 'This is the Promise of Allah' posted on the Twitter account of al-Itisaam Media Foundation, al-Furqan Media, and the al-Hayat Media Center (which provides English, French, German, and Russian translations for western audiences), disseminated through the general jihadist Global Islamic Media Front (GIMF), Ibrahim Awwad Ibrahim Ali al-Badri al-Samarrai (*nom du guerre*, Abu Bakr al-Baghdadi) announced the new caliphate (29 June 2014) by the armed jihadist organization, comprised of former Iraqi Baathists and Sunni jihadists from Iraq and the Syrian civil war, foreign fighters, among others. In the speech, Bagdadi demanded all jihadi factions pledge allegiance to the Islamic State, as the 'legality' of their organizations is now void, and they must 'end this abhorrent partisanship, dispersion, and division, for this condition is not from the religion of Allah at all'. See Aron Zelin, 'al-Furqān Media Message from the Islamic State's Shaykh Abū Muhammād al-'Adnānī al-Shāmī: 'This Is the Promise of God' <<http://jihadology.net/category/al-furqan-media/>> accessed 29 June 2014.

³¹ Aside from the group's own documentation of mass atrocities, reliable analysis has also linked the group to criminal networks involved in extortion, mass killings, kidnapping, rape, smuggling, destruction of cultural property, ethnic cleanings, among other crimes. See Amnesty International, 'Humanitarian Efforts Failing the Hundreds of Thousands Forced to Flee Ethnic Cleansing in Northern Iraq' <<http://www.amnesty.org/en/news/iraq-mass-displacement-northern-iraq-2014-08-11>> accessed 12 August 2014; 'Barbaric Sexual Violence Perpetrated by Islamic State Militants in Iraq: UN' Joint Statement Special Representative of the Secretary-General on Sexual Violence (SRSG) in Conflict, Zainab Hawa Bangur, and Special Representative of the Secretary-General for Iraq, Nickolay Mladenov, which urged the immediate protection of civilians <<http://www.uniraq.org/index.php?lang=en>> accessed 14 August 2014.

³² For recent commentary, see Lawrence Wright, 'ISIS's Savage Strategy in Iraq' (2014) *New Yorker*; Alex Bilger, 'ISIS Annual Reports Reveal a Metrics-Driven Military Command' (2014) Institute for the Study of War; Aaron Zelin, 'The Massacre Strategy' (2014) *Politico*; Aaron Zelin, 'al-Furqān Media presents a new video message from the Islamic State of Iraq'; Al-Shām, 'Clanging of the

of minorities, many of whom predate the arrival of Arabs and Islam in the region. Even while most imams and the ulema in general, including populist Islamist clerics like Yusuf al-Qaradawi, whose audience numbers in the millions, have declared such practices in violation of *shari'a*, ISIS supporters number in the tens of thousands. From Europe alone, over 7,000 'foreign terrorist fighters' have joined their efforts, which thousands of social media supporters cheer on.³³ Critics point out that ultraconservative clerics' disavowal of jihadists is belied by the fact that they share many values, including the dream of the Islamic caliphate. Transnational financial patronage reveals a similar ironic message, lip-service condemnation while offering fungible financial support, though ISIS methods are shifting from wealthy donors to self-financing through criminal plunder.³⁴ Largely categorised as 'political Islam' or Islamism, such efforts are finally being subject to critical, historical, scholarly analyses and strong condemnation by coalitions of regional governments.³⁵

What has not yet been addressed in sufficient detail is how Islamic law is exceedingly rich as a normative resource in both spelling out the *shari'a* violations that such jihadist behaviour entails and by offering principles for restraining conflict behaviour, reducing harm to vulnerable populations, and in specifying the terms for post-conflict justice and reconciliation. This core tension, between rule of law possibilities and regressive abuses of the law for diverse Islamist and jihadist agendas, frames our analyses. Accordingly, we are mindful of the importance of strengthening research examining Islamic legal contributions to conflict and post-conflict transition, while critiquing its contrary use by Islamist organizations.

Moving forward in such an endeavour invariably requires acknowledging divergent voices and perspectives, including those practitioners working 'on the ground' in conflict settings where Islamic norms are invoked. After more than a decade and a half since 11 September 2001 attacks, a robust, interdisciplinary discussion of Islam, Islamic law, and political Islam is occurring in the western academy among experts from Islamic studies, international law, history, sociology, policy, and security communities. Yet, a significant challenge in this work, which must be mentioned, has been precisely in developing cross-cultural, cross-disciplinary rapport across national boundaries in ways that do not shy away from asking the hard questions, including why many non-western based scholars have been slow to address these topics in their own scholarship.³⁶ Those with long experience in Muslim societies know the barriers to such research and dialogue are many: lack of support for such work, censorship and rigid or homogenous approaches to studying Islamic law, even profound misunderstandings circulated by authorities in public spaces. Anecdotally, one co-author who has been frequenting mosques in Egypt for over 30 years has noticed a sizeable portion of imams routinely referring to practitioners of the Jewish and Christian faiths as 'kaffirs', a prejudicial distinction by an authority that both contradicts Islamic norms and dehumanizes and hierarchizes others by virtue of their belief systems.

But perhaps the most serious obstacle to building a scholarly rapport on post-conflict traditions within Islamic law involving non-western partners is the dearth of social and cultural institutional contexts – in education, civil society, public media, political and policy dialogue – in which to foster open, pluralistic dialogue.³⁷ Put another way, the lack of attention to Islamic norms as a resource in conflict and post-conflict resolution reflects deeper human development deficits across much of the Arab and Muslim world today: in

Swords, Part 4' (2014) *Jihadology* <<http://jihadology.net/2014/05/17/al-furqan-media-presents-a-new-video-message-from-the-islamic-state-of-iraq-and-al-sham-clanging-of-the-swords-part-4/>> 14 June 2014; Terence McCoy, 'The Calculated Madness of the Islamic State's Horrifying Brutality' (2014) Washington Post.

³³ 'Qaradawi Says "Jihadist Caliphate" Violates Sharia' Al Arabiya News <<http://english.alarabiya.net/en/News/middle-east/2014/07/05/Qaradawi-says-jihadist-caliphate-violates-sharia.html>> accessed 5 July 2014. For efforts to map numbers of recruits, including from EU countries, see Pieter Van Ostaeyen, 'The Clear Banner: Update on the Belgians in Syria' (2014) *Jihadology* <<http://jihadology.net/2014/05/07/the-clear-banner-update-on-the-belgians-in-syria/>> accessed 7 May 2014.

³⁴ See Alex Bilger, 'ISIS Annual Reports Reveal a Metrics-Driven Military Command' Institute for the Study of War <<http://understandingwar.org/backgrounder/isis-annual-reports-reveal-military-rganization#sthash.T36nywjb.dpu>> accessed 22 May 2014; Hannah Allam, 'Records Show how Iraqi Extremists withstood U.S. Anti-Terror Efforts' McClatchy <<http://www.mcclatchydc.com/2014/06/23/231223/records-show-how-iraqi-extremists.html#storylink=cpy>> accessed 23 June 2014; and Patrick B. Johnston & Benjamin Bahney, 'Hitting ISIS Where It Hurts: Disrupt ISIS's Cash Flow in Iraq' The New York Times <<http://www.nytimes.com/2014/08/14/opinion/disrupt-isiss-cash-flow-in-iraq.html>> accessed 13 August 2014.

³⁵ See Bassam Tibi, *Islamism and Islam* (Yale University Press 2012).

³⁶ See Saudi Grand Mufti Sheikh Abdul Aziz al-Sheikh's recent statement that the 'enemy number one' of Islam is the 'ideas of extremism, radicalism, and terrorism', which 'have nothing to do with Islam', in 'ISIS is Enemy No. 1 of Islam'; Saudi Grand Mufti, Al Arabiya News <<http://english.alarabiya.net/en/News/middle-east/2014/08/19/Saudi-mufti-ISIS-is-enemy-No-1-of-Islam.html>> accessed 19 August 2014.

³⁷ Hisham Melhem, 'Enough Lies, the Arab Body Politic Created the ISIS Cancer' Al-Arabia News <<http://english.alarabiya.net/en/views/news/middle-east/2014/08/16/Enough-lies-the-Arab-body-politic-created-the-ISIS-cancer.html>> accessed 16 August 2014. (Noting ISIS may reject al-Qaeda but like al-Qaeda, it is the illegitimate child of modern political Islam that grew and expanded in what the Arabs refer to as قنصل أحلا قنصل بـلـا, an 'embracing environment,'... so that the "ugly truth is that the ISIS cancer was produced by a very ill and weak Arab body politic").

the public education systems and credentialing institutions that produce imams; in the role of governance to promote inclusivity, tolerance, power sharing, stability, and public administrative performance; in media programs that advocate political discrimination, excuse violence, or pathologize minorities; in local governing regimes in which tribal opinions substitute for classical Islamic norms; in social and political movements that use 'resistance' to justify violence, repression, human rights abuses, and sectarian dynamics that target certain groups and beliefs systems for political marginalization, even violence.³⁸

It is for these reasons that this work is not only timely, but urgent, an opportunity to engage emergent scholarship and build cross-cultural bridges needed in the present moment.

II. Global Conflict Trends and Limited Post-Conflict Resources

In conflict studies, social scientific methodologies and legal analyses share a common commitment to 'case facts', the empirical facts of any given situation which inform the conduct and choices by individuals, groups, or state actors. There are, in fact, few collective action problems as complex and confusing as war, as captured in the evocative notion of 'the fog of war'. But there is another reason to stay close to the facts on the matter of Islamic law and war: few topics, particularly in the post-9/11 era, have elicited so much confusion and controversy and unleashed such sensitivities. In contemplating the role of Islamic law in conflict and post-conflict transition it is, thus, imperative to rely on evidence-based analyses and to take into account multiple perspectives to shift discussion from ever-present polemics to interdisciplinary investigation and dialogue.

A. Changing Conflict Dynamics, Few Tools for Post-Conflict Transition

Understanding conflict and post-conflict dynamics for Muslim-majority states has especial urgency in the contemporary moment, given the changing global landscape of armed conflict. In certain obvious ways, the story of global conflict is a positive one. By many measures, global conflicts in total (since their high point in World War II) show a decline in wars of all types, as well as in overall battle deaths, as indicated in the Uppsala University Armed Conflicts & Reported Battle Deaths dataset (see **Figures 1 & 2**).³⁹ Such declines include both interstate and intrastate conflict and combatant deaths for both conflict types. In **Figure 1**, the dark blue area shows how intrastate (civil, internal) wars, which peaked in the 1990s, comprise the majority of post-World War II conflicts, though their total number has also since decreased.

Yet, if empirical research reveals a decline in war from its mid-century highpoint, such relatively good news captured in the 'decline in war' thesis must be tempered by new global conflict trends and dynamics.⁴⁰ New, more variable and complex forms of conflict are on the rise, along with irregular, unconventional, and often transnational conflict actors, increasingly adept at spreading their networks far and wide and in destabilizing whole regions, not only states.⁴¹ The recent encroachment of foreign terrorist fighters into Iraq, Syria, and Lebanon, and their return to their homelands to continue their attacks, is an exemplar of this trend.⁴²

Relatedly, such conflict actors leverage state weakness in their zones of influence, bond, compete, or spar with other extremist groups, and integrate with transnational criminal networks to erode existing, local governance. Such conflict practices, in turn, are supported by sophisticated, often illicit financial models with transnational implications far beyond the local site of conflict or its victimized communities. What such irregular conflict practices leave behind is billion-dollar resource theft, transnational networks of foreign patrons and charities, trafficking in precious resources and human persons, kidnapping, narcotics, even wildlife poaching and trade, all of which threatens whole communities and hastens food security risks.⁴³

³⁸ For one of the strongest discussions of the use of 'Sharia reasoning' by militants 'to legitimate or justify a course of action in terms associated with Islamic jurisprudence' see John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2007) 3.

³⁹ Nils Petter Gleditsch, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg and Håvard Strand 'Armed Conflict 1946–2001: A New Dataset' (2002) 39 *Journal of Peace Research* 615.

⁴⁰ See Human Security Report Project, *Human Security Report 2013: The Decline in Global Violence: Evidence, Explanation, and Contestation* (Human Security Press 2013); Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking 2011); Joshua Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide* (Plume 2012); and John Mueller, 'War Has Almost Ceased to Exist' (2009) 124 *Political Science Quarterly* 297–321.

⁴¹ See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press 2013); Martin van Creveld, *The Transformation of War* (The Free Press 1991); Elaine Denny & Barbara Walter, 'Ethnicity and Civil War' (2014) 51 *Journal of Peace Research* 199–212; and William C Banks, *New Battlefields, Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press 2011).

⁴² Corri Zoli & Emily Schneider, 'Shari'a Courts Move to the Battlefield: Jabhat al-Nusra Opens a Legal Front in the Syrian Civil War' (2014) *Harvard National Security Journal*.

⁴³ See the Johan Bergenas, 'Killing Animals & Buying Arms: Poaching and Wildlife Crime—A Conservation, Development and Security Challenge' (2014) <https://www.stimson.org/sites/default/files/file-attachments/killing_animals_buying_arms_WEB_1.pdf>

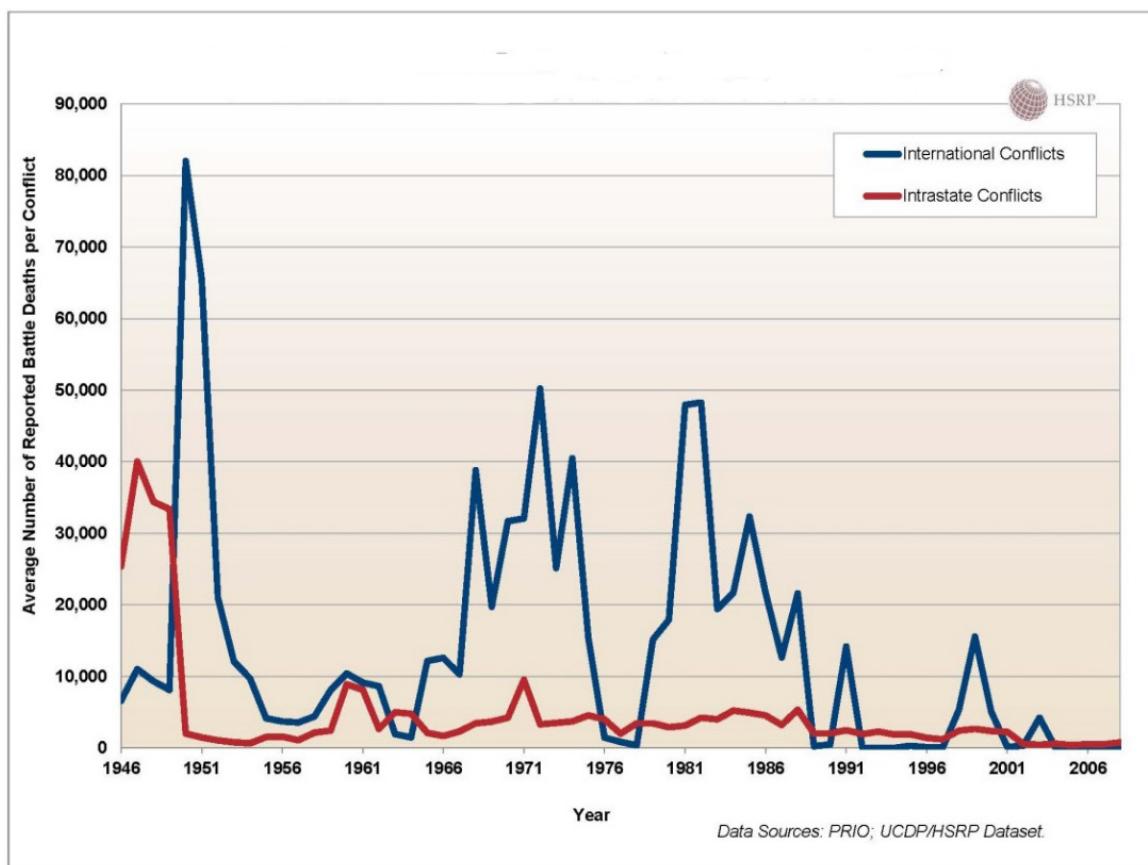


Figure 1: Reported Battle Deaths per State-Based Conflict, 1946-2008 (PRIO).

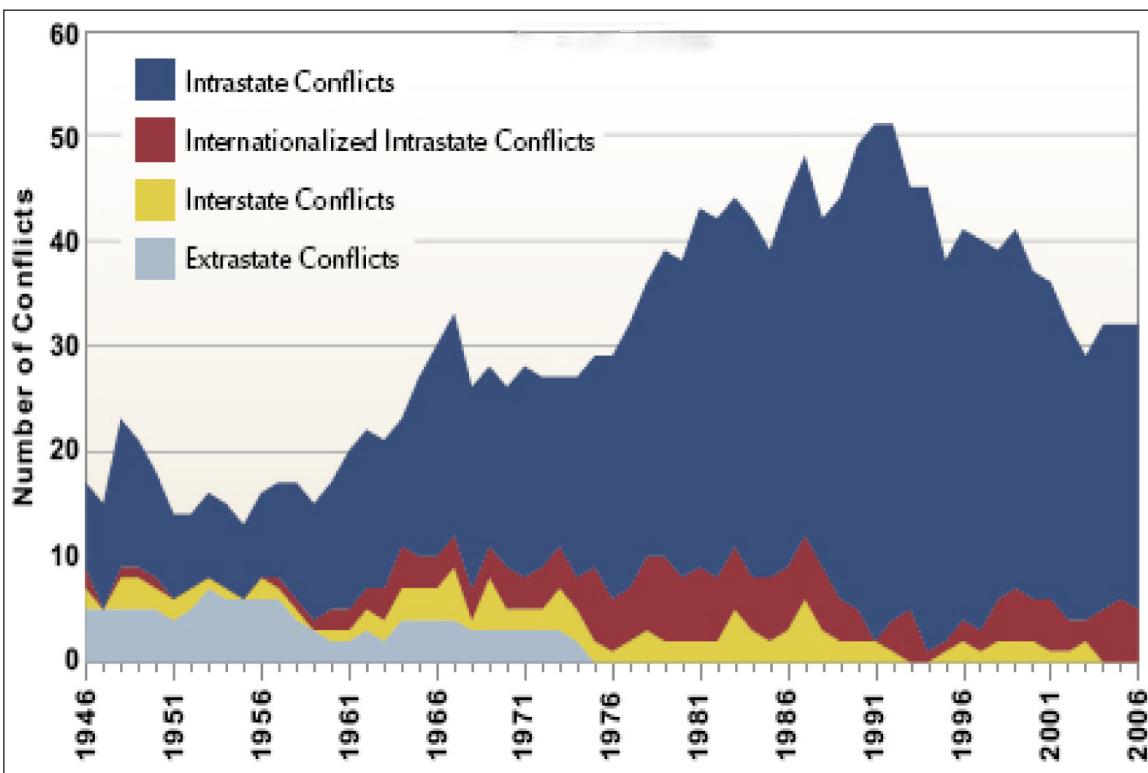


Figure 2: State-Based Conflicts by Type, 1946–2006 (UCDP/PRIO).

In such networks, many based both on relationships of convenience and broadly shared Islamist warfare practices and ideologies, classical Islamic norms and prohibitions are also casualties. For instance, various analysts have begun to track how kidnapping and other forms of hostage taking, expressly prohibited in the Quran as *hirābah*, have become a lucrative business strategy for Al Qaeda, affiliates and competitors, as well as non-state armed groups in West Africa. Their increased practice has both eroded longstanding prohibitions against kidnapping under Islamic law and prompted iconoclastic attempts to justify such acts.⁴⁴ Ironically, as kidnapping and hostage taking, also prohibited under Common Article 3 of the Geneva Conventions and elsewhere, gain prevalence in asymmetric warfare, even international human rights lawyers who ought to know better become confused about this customary norm.⁴⁵

Irregular tactics and weapons of war, as scholars, such as Assaf Moghadam identify, show similar dynamics of spread, as in the tactic of suicide bombing, prohibited under Islamic and international law, but now a “go to” method of asymmetric warfare used far beyond the Middle East.⁴⁶ Likewise, strategic manuals—Abu Bakr Naji’s *The Management of Savagery* (2006), as well as Al Qaeda and Hamas field manuals—specifically treat and advocate for, often with keen self-awareness, violations of well-established principles of Islamic law.⁴⁷

These conflict dynamics animating the global landscape today thus invite renewed attention to post-conflict transition, stability, and reconciliation efforts. In this new warfare environment, powerful actors use force in unpredictable, direct, and civilian-focused ways, deliberately stir up ethnic and religious sectarianism, destabilize whole regions, and create complex human security crises, including massive displacement which further undercut development and empower illicit economies. The need for constructive post-conflict pathways is urgent in the current security environment in part because conditions have shifted so that wars appear endless, the terms for reconciliation have stalled, global development deficits persist, and simmering conflicts disproportionately afflict Africa and the Muslim world (see **Figure 3** for Regional Conflicts).⁴⁸

accessed 24 July 2017, which maps links between terrorism, criminal, and political networks that threaten whole species and promises to exacerbate food and climate security issues.

⁴⁴ See Sadia Tabassum for a discussion of ‘hirabah’ (which includes highway robbery and kidnapping) and rebels, ‘Combatants, Not bandits: The Status of Rebels in Islamic law’ (2011) 93 International Review of the Red Cross 121–139; and Muhammad Munir, ‘Compatibility between Anti-Terrorism Legislation and Shari'a' (2011) 8 Pakistan Journal of Islamic Research 93–107.

⁴⁵ See Kenneth Roth ‘Can you tell if Hamas tunnel used to attack/capture combatant (IHL allows) or take hostage/attack civilian (illegal)?’ <<https://twitter.com/KenRoth/status/501809183264899072/photo/1>> accessed 24 July 2017. For prohibitions, see Geneva Convention Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 1 (b); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art. 34 and 147. See also Jean-Marie Henckaerts & Louise Doswald-Beck, ICRC, *Customary International Humanitarian Law VI: Rules* (Cambridge University Press 2009) and the International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205.

⁴⁶ Assaf Moghadam, ‘Motives for Martyrdom: Al-Qaida, Salafi Jihad, and the Spread of Suicide Attacks’ (2008) 33 International Security 46–78; and *The Globalization of Martyrdom: Al Qaeda, Salafi Jihad, and the Diffusion of Suicide Attacks* (Johns Hopkins University Press 2008).

⁴⁷ (n 2); see also, Muhammad Munir, ‘The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law’ (2011) 93 International Review of the Red Cross 81–102. These arguments and their philosophical roots can be traced back to Syed Qutb Shaheed’s *Milestones (Ma'alim fi al-Tariq)* (Qazi Publications 1964).

⁴⁸ Zoli et al, ‘Muslim Majority State Armed Conflict & Compliance (MSACC) Dataset’, Syracuse University <<http://insct.syr.edu/our-work/projects/insct-databases/>> accessed 24 July 2017. Note that NIAC refers to noninternational armed conflicts; IAC to interstate conflicts; and IAC-MM to Muslim-majority only belligerents in interstate conflicts.

MSACC data tracks all Muslim states (defined by OIC membership) involved in armed conflict and compliance with IHL from 1947–2014 and is thus distinctive in empirical conflict research in that the threshold for qualification as an armed conflict is based strictly on legal jurisprudence rather than political measures such as battle-related deaths. By utilizing the IHL definition of armed conflict and drawing from the International Criminal Tribunal for the Former Yugoslavia, the Geneva Conventions of 12 August 1949, and the First and Second 1977 Protocols Additional to the Geneva Conventions of 12 August 1949, two IHL recognized types of armed conflict, international armed conflicts (IAC) where state actors fight one another, and noninternational armed conflicts (NIAC) where a state actor fights a nonstate armed group, simplifies unnecessarily complex conflict determinations. We also use a relevant subset to IACs: international armed conflicts between Muslim states (MM-IAC). From these data, we show broad conflict patterns for all Muslim states: the 56 OIC states were involved in a total of 121 conflicts: 70 NIACs and 51 IACs, including 22 exclusively between Muslim state belligerents (MM-IAC). Of all Muslim states, only 10 were not involved in any armed conflict: Benin and Gabon in Africa; Guyana in the Americas, Brunei-Darussalam, Kazakhstan, the Maldives and Turkmenistan in Asia; and Bahrain, Qatar, and the U.A.E. in the Middle East. Thus, the remaining 46 countries were involved in 121 total conflicts, which results in an average of 2.63 conflicts per country in the framing period. The states involved in the most conflicts (in descending order) were: Yemen (12); Iraq (10); Egypt (8); Uganda (7); Afghanistan, Pakistan, Somalia, Saudi Arabia and Syria (6). The states with the fewest conflicts were: Burkina Faso, Gambia, Guinea, Guinea-Bissau, Mauritania, Mozambique, Sierra Leone, Togo, Tunisia, Suriname, Malaysia, Tajikistan, Uzbekistan, Albania and Oman, all which logged only one conflict. When broken down into time periods, during the Cold War period, more conflicts were of an international character than noninternational, and beginning in the Islamic Revolution period, most conflicts became internal. The lion-share of armed conflicts belong to the Africa region, which saw a total of 55 armed conflicts, comprised of 19 IACs (8 of which were exclusively between Muslim states) and 36 NIACs. Total conflicts in the other regions are as follows: 44 Middle East total conflicts, including 21 NIACs, 23 IACs, and 11 MM-IACs between Muslim states; 18 total

The growing complexity of the global conflict landscape is also occurring against the backdrop of a demonstrated reluctance on the part of strong states and traditionally-law abiding members of the international community (the United States, United Kingdom, Canada, EU members, among others) to intervene in even limited or non-military ways in crises.⁴⁹ This is true not only in Syria, where death and displacement have risen to over 400,000 and 9 million persons, respectively, but in Ukraine, Libya, South Sudan, Central African Republic, Kenya, Nigeria, Mali, Iraq, and elsewhere.⁵⁰

In short, the complexity of present conflict dynamics make such pathways and tools for successful post-conflict transition vital, and yet so scarce.⁵¹ The urgent need for post-conflict resources and the scarcity of such tools is one of the fundamental paradoxes of our time.

B. Impact on Muslim States and Communities

Nowhere is this paradox of persistent conflict and few post-conflict tools more profoundly felt than in Muslim-majority states and communities. As scholars note, complex conflicts are occurring across the diverse Muslim world, especially in the Middle East, Africa, South and Central Asia, in ways disproportionately impacting civilians, displaced persons, and youth populations (See **Figure 3** for Total Conflicts by Region, 1947–2014). One serious indicator of the need for post-conflict tools in light of complex conflict is evident in the spate of resurgent conflicts in post-Arab Spring states and, more pointedly, in the failure of revolutionary aspirations to translate into stable and inclusive governance.⁵² The original wave of Tunisian protests (beginning on 17 December 2010 after Mohamed Bouazizi's self-immolation) has given way to unacceptable levels of violence and entrenched political crises in Syria, Libya, Iraq, Afghanistan, Egypt, Bahrain, Yemen, Lebanon, and elsewhere.

There are, no doubt, longstanding structural factors at work in these governance and conflict dynamics, outlined in successive UN development reports.⁵³ They include human development deficits, as mentioned, authoritarian regimes and limited representative governance, severe economic and demographic crises, resource, climate and energy issues, sectarian violence, and weak political and civil society institutions.⁵⁴ Much of the International Committee of the Red Cross's (ICRC) operations are, notably, carried out for these regions' victims, be they prisoners, displaced persons, families of detainees, or other persons requiring

conflicts in the Asia region, including 10 NIACs, 8 IACs, and 3 MM-IACs. By contrast, Europe had 1 IAC and 2 NIACs and the Americas recorded only 1 NIAC. Each conflict was also examined for evidence of compliance or noncompliance with IHL provisions: violations were found from reliable reports on the actions of states in direct opposition to IHL, as exemplified by the Four Geneva Conventions of 12 August 1949, the First and Second 1977 Protocols Additional to the Geneva Conventions of 12 August 1949, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, the Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction. Of a total of 151 conflicts (70 NIACs, 81 IACs, and 42 IACs exclusively between Muslim states), a state in a conflict is more likely to violate IHL than comply with IHL. Of a total of 81 IACs, states complied with IHL in 40 conflicts (49.4%); of a total of 70 NIACs states complied in eight NIACs (11%), while in 62 NIACs (88%) IHL was violated. Thus, noninternational conflicts—traditionally civil or internal wars—are more likely to produce violations. Also, out of a total of 42 MM-IACs, states complied with IHL in 24 conflicts (57%) and violations were recorded in 18 of these conflicts (42%). Excluding the 10 countries that did not participate in any armed conflicts, the 24 countries with the highest and lowest violations are ranked below: the 12 countries with the *highest total number of violations* are Iraq (47), Afghanistan (42), Yemen (27), Somalia (24), Pakistan (23), Sudan (22), Libya (19), Lebanon (19), Egypt (18), Uganda (18), Iran (16), and Indonesia (15). Four of these countries are in Africa, five are in the Middle East region, and three are in the Asia region. The 12 countries with the *lowest total number of violations* are Saudi Arabia (3), Suriname (2), Turkey (2), Oman (1), Burkina Faso (0), Cameroon (0), Gambia (0), Togo (0), Tunisia (0), Malaysia (0), Jordan (0), and Kuwait (0).

⁴⁹ Stephen Walt, 'The Bad Old Days are Back' *Foreign Policy* (2 May 2014).

⁵⁰ See Syrian Observatory for Human Rights' data documents <<http://syriahr.com/en>>; David Crane, 'Syrian Accountability Project', SU College of Law/ INSTC <<http://syrianaccountabilityproject.org/>> accessed 24 July 2017; 'UN: 9 million Syrians Now Displaced as Conflict Ticks into Fourth Year' *Al Jazeera* (14 March 2014).

⁵¹ Monty G Marshall & Benjamin R Cole, 'Global Report 2011: Conflict, Governance & State Fragility' (Center for Systemic Peace 2011); Lotta Themér & Peter Wallensteen, 'Armed Conflict, 1946–2012' (2013) 50 *Journal of Peace Research* 509–521; *Human Security Report 2009/2010: The Causes of Peace & Shrinking Costs of War* (Oxford University Press 2011).

⁵² Marie Allanson et al, 'Armed Conflict in the Wake of the Arab Spring' (2013) SIPRI Yearbook.

⁵³ See United Nations Development Program (UNDP), Arab Human Development Reports (AHDR) 2002–2009, including the most recent report: 'Arab Human Development Report 2009: Challenges to Human Security in the Arab Countries' (2009) <<http://www.arab-hdr.org/publications/other/ahdr/ahdr2009e.pdf>> accessed 24 July 2017.

⁵⁴ For compelling analysis that examines the role of economic and political institutions and their centrality and inclusivity, see Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Random House 2012) and Acemoglu & Robinson's work generally, including, Daron Acemoglu, Simon Johnson, and James A Robinson, 'Institutions as a Fundamental Cause of Long-Run Growth' (2005) 1 *Handbook of Economic Growth* 385–472.

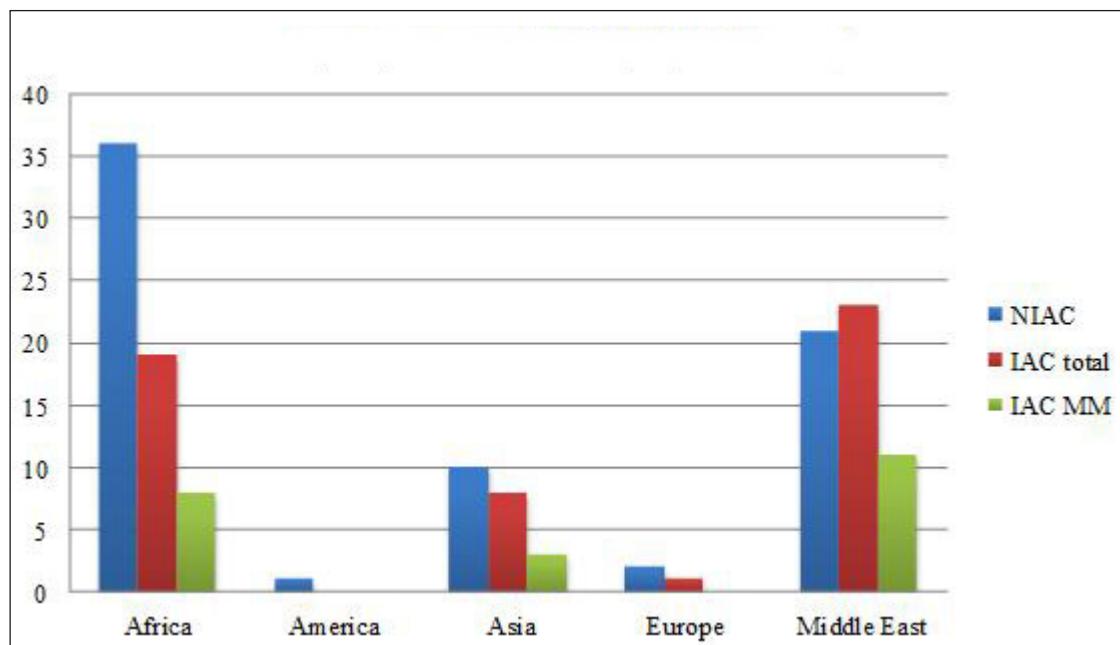


Figure 3: Conflict Totals by Region (MSACC).

support and aid.⁵⁵ Once countries become embroiled in cycles of violence, existing structural deficits are often exacerbated in ways that pitch communities toward chronic conflict and development delays, ranging from food security to unemployment.⁵⁶ Under constant crisis, the leaders and groups that come to achieve political power in these settings are often the strongest fighters—not those invested in building stable or inclusive political, civil, and economic institutions.⁵⁷ Likewise, political reconciliation efforts are often hampered by militias that refuse to disarm as a condition for their political representation.⁵⁸

Yet, despite the serious impact on stability, security, and development from these combined factors, too little research has probed problems of post-conflict resources for Muslim and Arab communities. Despite important work on post-conflict justice among exemplary scholars, work by NGOs, such as the International Center for Transitional Justice (ICTJ) and the United States Institute of Peace (USIP), and the efforts of international tribunals and stand-out prosecutors, few analysts have investigated the possible resources available within the rich tradition of Islamic law for such endeavours.⁵⁹ Robust, if neglected,

⁵⁵ International Committee of the Red Cross (ICRC) 'Debate on Humanitarian Law, Policy and Action: Protection of Victims of Armed Conflict under Islamic Law and International Humanitarian Law' (29 June 2006) <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/islamic-law-ihl-feature-010606?opendocument>> accessed 24 July 2017. See also, Masood Hyder, 'Humanitarianism and the Muslim World' (2007) *The Journal of Humanitarian Assistance: Field Experience and Current Research on Humanitarian Action and Policy* (22 August 2007) <<https://sites.tufts.edu/jha/archives/52#fn-1187829376734>> accessed 24 July 2017; ICRC International Conferences on this issue: 30 Sept–2 October 2004 International Islamic University, Islamabad; 24–25 April 2005, Yemeni Red Crescent and Aden University; 25–26 April 2006 Qarawiyin University, Fès, Morocco.

⁵⁶ Havard Hegre et al, 'The Conflict Trap' (2011) Annual Meeting of the American Political Science Association in Seattle <<http://folk.uio.no/haavarmn/ConflictTrapPaper.pdf>> accessed 24 July 2017; Paul Collier, et al, 'Breaking the Conflict Trap: Civil War and Development Policy' (World Bank Policy Research Reports 2003).

⁵⁷ Paul Collier, 'Post-Conflict Recovery: How Should Strategies Be Distinctive?' (2009) 18 *Journal of African Economies* 99–131.

⁵⁸ Mats Berdal & David Ucko, eds, *Reintegrating Armed Groups after Conflict: Politics, Violence and Transition* (Routledge 2009).

⁵⁹ For M. Cherif Bassiouni, there are too many titles to list here, but for relevant examples, see 'Combating Impunity for International Crimes' (2000) 71 *U Colo L Rev* 409; *The Islamic Criminal Justice System* (Oceana Publications 1982); 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal' (2005) 38 *Cornell Int'l LJ* 327; 'Justice and Peace: The Importance of Choosing Accountability over Realpolitik' (2003) 35 *Case W Res J Int'l L* 191; *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (Brill 2008); 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) *Law and Contemporary Problems* 9–28; 'The Time Has Come for an International Criminal Court' (1991) 1 *Ind. Int'l & Comp L Rev* 1; 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harv Hum Rts J* 11; *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff Publishers 1987); 'A Functional Approach to General Principles of International Law' (1989) 11 *Mich J Int'l L* 768; 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203–279; 'Crimes Against Humanity: The Need for a Specialized Convention' (1993) 31 *Colum J Transnat'l L* 457. Some country-specific studies, for instance, such as Matteo Tondini, *Statebuilding and Justice Reform*:

resources within Islamic law may aid and amplify such post-conflict opportunities, but these resources are too often left dormant, misunderstood, even misapplied in conflict settings. No doubt, well-described accounts of western misunderstanding of Eastern affairs may derail otherwise well-intentioned efforts. But far more troubling still are those conflict agents who deliberately distort Islamic law and apply select passages from primary sources (the Qur'an, *hadith* and *sunnah*) to justify political violence, social discrimination, and repression.⁶⁰

But a more prosaic problem explains the neglect of Islamic law resources—it is the 'primitive' level of knowledge about Islamic law across much of the Muslim world itself, a phenomenon exacerbated by development and educational deficits.⁶¹ As co-author Bassiouni notes elsewhere, in addition to complex socio-economic factors, too often "unqualified *mullahs*, *imams*, *sheikhs*, and other (self-) titled religious leaders" propagate misleading teachings of Islam in ways that set back progress in the law or even help to link 'theological and legal doctrinal developments to political violence in the Muslim world'.⁶² Part of this educational deficit stems from the intellectual history of Islamic law itself. Tenth century CE Sunni scholars, for complex historical reasons and valid concerns about the splintering of the *ummah* in light of invasions in previous centuries, 'pulled back the reins on intellectual openness' that had once facilitated Islamic legal discussion and innovation, thus, ushering in a rigid literalism in interpretation, which still holds in many places today.⁶³ For these and other reasons, authorities on Islamic law, especially in relation to the laws of war, human rights, and criminal law, are far too few, and even scholars with deep understanding of these areas of Islamic law may work in relative isolation or are subject to free speech constraints in their home nations.

Such neglect of Islamic legal resources in facilitating post-conflict justice limits available, local, and otherwise potentially powerful tools for transition.

III. Moving Past Traditional Approaches to Post-Conflict Justice

Post-conflict transition processes are often reduced to 'transitional justice', the rule-based processes designed to redress large-scale human rights violations, crimes, and atrocities committed during massive social upheaval.⁶⁴ Among international and development circles, key international norms, judicial mechanisms, and procedural steps are seen as applicable to most conflict, including criminal prosecution, standing tribunals, truth-seeking commissions, memorials, reparations, etc.

But insofar as the desired outcome is stability, including restoring governance, other elements (social and political trust) as well as inclusive, effective, and responsive systems, go hand in hand with post-conflict transition. Post-conflict justice strategies must also make sense locally, given the particulars of history and underlying conflict drivers, so as to move communities from recurrent conflict to political

Post-Conflict Reconstruction in Afghanistan (Routledge 2010), incorporate local ownership in the analysis, but relegates Islamic Law to a traditional strategy.

⁶⁰ See John Esposito, *Unholy War: Terror in the Name of Islam* (Oxford University Press 2002); and Quintan & John Kaltner, 'Killing in the Name of Islam: Al-Qaeda's Justification for September 11' (2003) 10 *Middle East Policy* 76–92.

⁶¹ Bassiouni (n 1) 5. For a critique of the Saudi educational system's omissions, for instance, see the interview with clinical psychologist Abdullah al-Garni who socially reintegrates recovering jihadists through a program combining mental health therapy, traditional Islamic legal arguments combating jihadist ideology, and job training. Joseph Braude, 'Saudi Psychologist on Jihadism, Clerical Elites, and Education Reform: An Interview with Abdullah Al-Garni' (2014) Foreign Policy Research Institute <<http://www.fpri.org/articles/2014/04/saudi-psychologist-jihadism-clerical-elites-and-education-reform>> accessed 24 July 2017. Part of the Kingdom's security establishment, Al-Garni, offers a window into the establishment in arguing for expansive education reform to preempt religious radicalization, faulting activist clerical elites for Islamic teachings that aid terrorist recruiting, and making the case for permitting the teaching of philosophy and logic. He notes 'for one thing I would like to see a lifting of the ban on teaching philosophy and logic in Saudi universities. . . We hear today about the "Frankfurt School" of philosophy – but there was once a "Baghdad school" under the Abbasid empire. . . Al-Kindi, Averroes, and Avicenna. No, philosophy is not forbidden. No, logic is not forbidden. We can teach it. We can modify it. We can tailor it based on our societal norms'. Al-Garni also mentions the importance of 'educational boards that certify teachers – and also have the power to revoke the certification of a teacher – on the basis of objective criteria'.

⁶² Bassiouni (n 1) 6. See also Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (Harpers 2005).

⁶³ Bassiouni (n 1) 8. In the broader theological, philosophical and jurisprudential debate, this moment is known as the closing of the gate or door of 'ijtihad' (independent reason). See Frank E Vogel, 'The Closing of the Door of *Ijtihad* and the Application of the Law' (1993) 10 *American Journal of Islamic Social Sciences* 396–401; Wael Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of *Ijtihad*' (1986) *Studia Islamica* 129–141 and 'Was the Gate of *Ijtihad* closed?' (1984) 16 *International Journal of Middle East Studies* 3–41; Rudolph Peters, 'Idjtiād and Taqlīd in 18th and 19th century Islam' (1980) *Die Welt des Islams* 131–145; and Bernard Weiss, 'Interpretation in Islamic law: The theory of *ijtihad*' (1978) 26 *The American Journal of Comparative Law* 199–212.

⁶⁴ M. Cherif Bassiouni et al, *The Chicago Principles on Post-Conflict Justice* (International Human Rights Law Institute 2006). See also the work of the International Center for Transitional Justice (ICTJ) in New York <<http://www.ictj.org/en/index.html>> accessed

accommodation.⁶⁵ At a minimum, effective post-conflict transition approaches must, therefore, dream bigger than mere criminal prosecution or retribution-style justice to create conditions for sustainable peace. Aside from the ill-fit of the term 'transitional justice' for countries with Islamic traditions, in Afghanistan and Iraq, for instance, it is clear that the challenges of post-conflict transition, including the contours of post-conflict rule of law and justice, have threatened to undermine any arguable gains made during combat.

As part of the legacy of the last decade plus of fighting in Afghanistan and Iraq, coalition policymakers, military lawyers, and members of intergovernmental organizations and NGOs have all, in very different ways, begun to identify a fuller understanding of the factors that advance post-conflict stability. From those chastening experiences, a sober view of post-conflict stability has emerged which comprises four relevant insights. There is now some consensus that post-conflict reconstruction, first and foremost, rests upon multiple pillars. Five are often cited as essential to a 'conflict-proof' state. These include (1) security; (2) justice and reconciliation; (3) social and economic well-being and development; (4) governance, participation, and inclusion; and (5) robust and diverse civil society institutions.⁶⁶ Second, practitioners and experts now understand that in cases of severe or protracted conflict, no single state, not even militarily dominant ones, can supply all needed resources for conflict transition. Such responsibilities must be shared (from resources to coordination) with multiple stakeholders, including local elites, government officials, publics, regional states, international organizations, among others.

Third, post-conflict success depends as much on political and practical solutions as political will, a state's ability to form inclusive internal coalitions of constituencies, whether these are defined economically, politically, ethnically, and religiously.⁶⁷ Fourth and most important for our purposes, while strong states and coalitions now understand what transition takes (often by making mistakes), helping states 'plug into' available resources, international norms, programs, and resources, is a priority, even while it is difficult given cross-cultural obstacles. Given these challenges, scholars and practitioners on the ground may help make the link between conflict states' need for post-conflict transition resources and the available resources within cultural contexts, including Islamic law, especially for regions that absorb a large share of the world's attention and aid.

A. Departures from Islamic Conflict Norms in the Muslim World

Conflicts involving Muslim state actors and non-state actors, irrespective of whether victims are Muslims or non-Muslims, often violate Islamic law without accountability, even though Islamic law is clear as to its norms in armed conflict.⁶⁸ Some of these norms are preemptory and mandatory in their application, but they are not applied, which shows dereliction of duty on the part of political leaders in both state and non-state contexts alike, as well as lax accountability by thought leaders.⁶⁹ It is thus imperative for scholars

⁶⁵ 24 July 2017. In the international arena, post-conflict justice aims to establish or restore peace and security, stability, democracy, and good governance, and includes these modalities:

1. International/national prosecutions for all or some perpetrators of international and national crimes;
2. Establishing truth commissions or truth-telling bodies;
3. Providing victims with various remedies, reparations, and acknowledgement of their victimization;
4. Providing administrative and political sanctions for perpetrators to prevent them from access to power and thus repeating their misdeeds;
5. Memorializing events and educational programs to preserve historical memory and to strengthen social resolve against the repetition of victimization;
6. Instituting legal, administrative, and political reform to prevent the recurrence of conflicts; and
7. Providing support for the rule of law to restore public trust, promote human rights and enhance democracy and good government. See the Chicago Principles for a full discussion.

⁶⁶ See USIP Afghanistan, including 'Support for a Successful Afghan Political Transition' (2013) and 'Progress in Peacebuilding' (2012) <<http://www.usip.org/category/countries/afghanistan>> accessed 24 July 2017.

⁶⁷ 'Post-Conflict Reconstruction: A Joint Project of the Center for Strategic and International Studies (CSIS) and the Association of the United States Army Task Framework' (2002); <<http://csis.org/files/media/csis/pubs/framework.pdf>> accessed 24 July 2017; Craig Cohen, 'Measuring Progress in Post-Conflict Stabilization & Reconstruction' (2006) USIP <<http://www.usip.org/sites/default/files/resources/srs1.pdf>> accessed 24 July 2017.

⁶⁸ Jack Goldstone et al, 'Global Model for Forecasting Political Instability' (2010) 54 *American Journal of Political Science* 190–208; Ted R Gurr et al, 'Forecasting Instability: Are Ethnic Wars & Muslim Countries Different?' (2005) *Global Policy*.

⁶⁹ Bassiouni (n 1) 285. See also Majid Khadduri, *The Law of War and Peace in Islam* (Luzac 1941); Niaz Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (Routledge Research in the Law of Armed Conflicts 2013); and Ahmed Al-Dawoody, *The Islamic Law of War* (Palgrave/Macmillan 2011).

⁷⁰ Notice recent Saudi official critique of the religious establishment on this issue: Abdulkajeed al-Buluwi, 'Saudi Arabia Toughens Stance on Jihadist Groups' (2014) *Al-Monitor*. King Abdullah bin Abdulaziz warned on 1 August 2014 of the dangers of armed jihadist groups that declare Muslims infidels and permit the bloodshed of innocents, followed by a statement criticizing the

to address the gap between a robust, if underappreciated, conflict norm tradition within Islamic law, and conflict actors' conduct during and after conflict. Studies consistently show a correlation between conflict and lack of economic development and low or repressive political governance. But one key neglected factor beyond socioeconomic or political variables is the absence of a substantive Islamic legal tradition that identifies available core norms incumbent upon Muslim religious, political, and social leaders in conflict and post-conflict settings. Such a unified account of Islamic norms, particularly in crises, would do a great deal to undercut distortions of Islamic law, as well as perceived divergences between Islamic law and international law, often used to justify recurrent conflicts today.⁷⁰

At the very least, clarifying Islamic law guidelines in post-conflict settings would aid in pressuring conflict actors to consider Islamic norms in restraining their conduct and in anchoring post-conflict transition initiatives in Islamic conceptions of justice and reconstruction.⁷¹

B. Our Approach: Compatibilities and Beyond

Our contention is that *shari'a* is not only compatible with contemporary approaches to post-conflict justice modalities, widely used in the international community, but also *appropriate* for use in Muslim societies.⁷² Examples of such shared norms include, *inter alia*, prioritizing accountability and the rejection of impunity, which prevents states from giving blanket amnesties or pardons to those who have committed serious transgressions against others. Moreover, grounding contemporary post-conflict processes⁷³ in classical and contemporary Islamic legal doctrine make its more accessible to Muslim societies seeking historically meaningful legal mechanisms to deal with the aftermath of conflict. The argument as presented, however, is not simply one of substantive compatibility, but one of normative obligation: that is, Islamic law, by its very nature and terms, demands action in post-conflict situations. This fact that must be remembered by those opposed to the concept of post-conflict justice as alien, irreligious, or incoherent, and even by those who approach Islamic law through what Khaled Abou El Fadle calls 'apologetics'.⁷⁴

Saudi religious establishment for remaining silent and not assuming its duty regarding terrorism, <<http://sabq.org/06hgde>> and <<http://www.al-monitor.com/pulse/originals/2014/08/saudi-opposition-salafist-jihadist-groups.html#ixzz3B7m1DKeV>> accessed 24 July 2017.

⁷⁰ For instance, in 2008, religious leaders in Afghanistan refused to allow President Karzai to grant blanket amnesty to those implicated in past wars as such amnesty violated tenets of Islamic law. In Iraq, when U.S. Army lawyers tried to implement rule of law programs, building up police expertise in forensics, due process, etc., their efforts were stymied by local authorities who felt such procedures violated their local view of Islamic norms. Recent constitutional processes in Iraq, Afghanistan, Tunisia, Egypt, and elsewhere have foundered over Islamic legal principles, including debate over where international standards and Islamic law diverge (i.e. human rights, governmental checks and balances, independent judiciaries). Egypt's first democratically-elected government was ousted over what many felt were contested visions of Islamic values, for instance, with similar debates occurring in Tunisia, Bahrain, Jordan, and even Turkey. Recently, Afghan President Karzai refused to sign the U.S. Bilateral Security Agreement in part because he felt U.S. counterterrorist raids on Afghan homes violated Islamic norms of privacy. These are some of the many examples of how Islamic law creates both opportunities and obstacles for successful post-conflict transition. See Corri Zoli & Emily Schneider, 'Privacy in Muslim Constitutions: Karzai's Refusal to sign the BSA' (2014) *Washington Post*.

⁷¹ Khaled Abou El Fadl, 'Conflict Resolution as a Normative Value in Islamic Law: Handling Disputes with Non-Muslims' in *Faith-Based Diplomacy Trumping Realpolitik* (Douglas Johnston ed, Oxford University Press 2003) 178–209.

⁷² Bassiouni (n 64). Compatibilities arguments can be taken too far, however. See Bassam Tibi, 'Islamism and Democracy: On the Compatibility of Institutional Islamism and the Political Culture of Democracy' (2009) 10 *Totalitarian Movements and Political Religions* 135–164.

⁷³ Bassiouni (n 1) 250.

⁷⁴ See Khaled Abou El Fadle, 'Islam and the Theology of Power' (2001) 221 *Middle East Report* 33. Fadle notes that the 'predominant intellectual response to the challenge of modernity in Islam has been apologetics'. Such efforts by commentators 'defend the Islamic system of beliefs from the onslaught of Orientalism, Westernization, and modernity by simultaneously emphasizing the compatibility and supremacy of Islam' and responding to intellectual challenges 'by adopting pietistic fictions about the Islamic traditions' while 'eschew[ing] any critical evaluation of Islamic doctrines' and 'celebrat[ing] the presumed perfection of Islam'. Common claims attribute any valuable institution as 'first invented by Muslims', including that 'Islam liberated women, created a democracy, endorsed pluralism, protected human rights and guaranteed social security long before these institutions ever existed in the West'. Their main effect is 'to contribute to a sense of intellectual self-sufficiency that often descended into moral arrogance', neglect 'self-critical and introspective insight', and 'embraced the projection of blame and a fantasy-like level of confidence'. So that '[e]ffectively, apologists got into the habit of paying homage to the presumed superiority of the Islamic tradition, but marginalized this idealistic image in everyday life'. For additional discussions of apologists, see Nelly Lahoud, 'The Islamists and Apologists' in *Political Thought in Islam: A Study in Intellectual Boundaries* (Routledge 2013) 13–31; John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2007) 4. (Dismissing apologetics 'that Islam has nothing to do with violence of this [militant] type') and Karima Bennoune, 'As-Salamu Alaykum-Humanitarian Law in Islamic Jurisprudence' (1993) 15 *Michigan Journal of International Law* 605.

Our approach thus grounds contemporary post-conflict processes within classical and contemporary Islamic legal principles.⁷⁵ Yet, our endeavour is not simply that of compatibility, as mentioned, but one compelled by essential elements in Islamic law itself, that of peace, accountability, truth, justice, and forgiveness. Such Islamic cornerstone principles, legal prescriptions and proscriptions, apply, despite little attention by traditional Muslim scholars, to contemporary arenas *not* addressed by the *shari'a* in this age of changing conflict dynamics and globalization.

We assert that classical approaches to the *shari'a* and Islamic law, particularly those areas enumerated under the auspices of criminal justice and classical Islamic international law, not to mention, the breadth and depth of the discourse concerning human dignity throughout Islamic law, offer specific pathways by which to explore Islam's approach to conflict and post-conflict justice. At the same time, our reliance on the legal theoretical approaches of *maqasid al-shari'a*, the higher goals and values of Islamic law which must be implemented into legislation and jurisprudence, and *siyasa al-shari'a*, the government policy associated with preserving *shari'a* values and norms, adds historical context and overall purpose to interpretations of the Qur'an and the *Sunna*. These historically-based, legal methods of interpretation can be used as the basis to move past unhelpful or stagnant historical literalisms to address limitations on the use of force, the prohibition of jihadist and rebellious violence, or post-conflict justice.⁷⁶

1. Shari'a Normative Obligations

Post-conflict modalities comprise several value-oriented goals embedded in international and domestic criminal justice for retributive and deterrence purposes:⁷⁷ reconciliation between nations and peoples, providing relief and redress to victims, bringing closure to victims, establishing and recording truth, putting to rest past grievances, and preventing future conflicts. Such values are also reflected in the spirit of the *shari'a*, as we show in more detail below, and they are reflected in international legal obligations, which in accordance with the *shari'a*, are binding on Muslim states as treaty obligations.⁷⁸

Such obligations arising under international criminal law, for instance, include the duty to prosecute *jus cogens* international crimes, peremptory norms against which no derogation is permissible, such as genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices.⁷⁹ With the exception of war crimes, these prohibitions apply in times of war and peace, whereas war crimes apply only in times of war, but extend without discrimination to 'protected persons' (non-combatants, POWs, the injured and sick, medical personnel, and so forth) and to prohibited targets (medical facilities, civilian and public property, religious and cultural structures, cultural property, etc.).⁸⁰

⁷⁵ Bassiouni (n 1) 249–287. This approach is based on Bassiouni's chapter 5, 'The Shari'a, Islamic Law, and Contemporary Post-Conflict and Transitional Justice' and informed by a traditional orthodox Sunni perspective that transcends the limitations to a single school of the four recognized schools of jurisprudence. The reason for choosing this method is to avoid criticism of the positions advanced herein by those Muslims who distort Islam on the basis that the approach is not in conformity with classical methods.

⁷⁶ *Maqasid al-Shari'a* often loosely translated as the higher goals and objectives of Islamic law, is an exegetical approach intended to ensure that the value-oriented goals of the *shari'a* are prioritized and achieved through legislation and jurisprudence. See Mohammad H Kamali, *Maqasid al-Shariah Made Simple* (The International Institute of Islamic Thought 2008); Adis Duderija, ed *Maqasid al-Shari'a and Contemporary Reformist Muslim Thought: An Examination* (Springer 2014); A Al-Raysuni, *Imam al-Shatibi's theory of the higher objectives and intents of Islamic law* (The International Institute of Islamic Thought 2005); and A W Dusuki & S Bouheraoua, 'The framework of *maqasid al-shari'ah* and its implication for Islamic finance' (2011) 2 Islam and Civilisational Renewal 316. Greater consideration for the *maqasid* would thus outweigh and offer a kind of counterbalance to the rigidity of strict legalism, which had manifested itself in the past twelve centuries of Islamic legal history. The word *siyassa* literally means 'policy' but its historic application has always been focused on governance. See Tibi Bassam, 'John Kelsay and 'Sharia Reasoning' in Just War in Islam: An Appreciation and a Few Propositions' (2011) 53 *Journal of Church and State* 4–26. Both the *maqasid* and specific norms of the *shari'a* require upholding justice, human dignity and the rule of law in addition to an implicit general obligation to prevent harm.

⁷⁷ M. Cherif Bassiouni, 'Perspectives on International Criminal Justice' (2009) 50 *University of Virginia Journal of International Law*.

⁷⁸ See Said Ramadan, *Islamic Law: Its Scope and Equity* (P R Macmillan 1961); Muhammed Hamidullah, *Muslim Conduct of State* (Sheikh Muhammad Ashraf 1977); and M. Cherif Bassiouni, 'The Protection of Diplomats under Islamic Law' (1980) 74 *American Journal of International Law* 609–33, describing how the Prophet observed international legal obligations and deemed them binding upon the *ummah*.

⁷⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53: 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. See also M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 266; *International Criminal Law* (Martinus Nijhoff Publishers 2008).

⁸⁰ Geneva Conventions (n 45). See also Convention with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 32 Stat. 1803, art. 4; Convention Respecting the Laws and Customs of War on Land (adopted

2. Missing Shari'a Literacy and Educational Gaps

The need for this discussion on Islamic law and post-conflict justice is made most apparent in light of our treatment herein of global conflict trends among Muslim-majority states, among other work detailing how these regions of diverse Muslim communities have fared in armed conflicts since the end of World War II. At a minimum, it is clear that many ordinary people have been the victims of significant conflict, violence, and suffering over the past several decades. Perhaps counterintuitively, the deaths arising from this violence have come overwhelmingly at the hands of Muslims. Thus, irrespective of the legal characterization of these conflicts (as international, transnational, or purely internal), the need for post-conflict justice exists and, more importantly, has too long been overlooked among Muslim communities in their normative traditions.

Upon closer examination, it is also evident that Muslim-majority states in which conflicts have occurred in the past half century include in large part failed and troubled states or those with some attributes of troubled states, including weak governance and a deficit in human development. In the latter case, this means that, among other factors, levels of literacy are low, including popular knowledge of the *shari'a* and Islamic law. Often, the general population in these states, including most imams who are one principal source of public and popular learning, has only rudimentary knowledge of Islamic law.⁸¹ Likewise, this religio-legal knowledge is frequently distorted by laypersons claiming theological expertise, or those erroneously repeating what they believe are authoritative views. Even in more developed societies, most Muslims have over-simplified notions of Islamic law, which are frequently distorted by local cultural practices. Curricula in theological institutions, likewise, offer little by way of teaching critical thinking, as pedagogies are often reliant on memorization.

This education deficit has further been augmented by a centuries-long approach wherein the majority of Muslim scholars have come from a linguistic, grammarian background that emphasizes knowledge of the Arabic language and philology in which progressive development is limited or nonexistent. The result is a lack of universal and critical perspectives on even traditional scholarship, not to mention contemporary opinion.⁸² This explains why critical and progressive intellectual output in the past century in Islamic law has not met the challenges of the times, including those of post-conflict justice.⁸³

At the same time, one cannot fail to notice that although there is ample writing on almost every aspect of theology, philosophy, and law among Muslim jurists, there has been very little that has brought together the diversity of this intellectual production. In the field of law in particular, 'the absence of explanatory restatements and codifications is evidence of both a lack of consensus among scholars and, arguably, the timidity of scholars in bridging gaps and forging progressive consensus'.⁸⁴ As Bassiouni notes '[i]t is precisely because of this lack of synthesis that Islamic law in general has not progressed much since the 12th century C.E.',⁸⁵ and, further, in Muslim states in which it has progressed, 'the progress has been hesitant or tentative, and without much continuity or relevance to contemporary issues'.⁸⁶

Since the 1960s, more has been accomplished in the modern secular legislation of Muslim states than in centuries past, with implications for hybrid legal systems and the integration of several elements of Islamic law.⁸⁷ Similar progress has not been made in Islamic law, on the subject of controlling and

⁸¹ 18 October 1907, entered into force 26 January 1910) 36 Stat. 2277, art. 4.

⁸² Bassiouni (n 1) 255.

⁸³ Bassiouni (n 1) 249; El Fadl's (2001) discussion of the demise of the classical tradition in 'Islam and the Theology of Power' 31; Marshall Hodgson, *The Venture of Islam, V1: The Classical Age of Islam* (University of Chicago Press, 2009) 473–496.

⁸⁴ Bassiouni (n 1) 256. Examples of this can be seen in the pronouncements of local Muslim leaders and the practice of combatants in contemporary conflict situations in Muslim countries such as Somalia (1990s to present), Afghanistan (1980s to present), and Iraq (2003 to present), and also in previous conflict situations such as Bangladesh (1971). This phenomenon tragically also includes the killing of innocent civilians by perpetrators who claim justification under Islamic law, even when it is totally unfounded.

⁸⁵ Bassiouni (n 1) 253.

⁸⁶ id.

⁸⁷ id. One major exception is the Turkish Ottoman *Majallat Al-Ahkam Al-Adliya*, used in all Muslim countries which were part of the Turkish Ottoman Empire until its dismantlement in 1918, though several Arab Muslim countries continue to use it. This is the case with respect to Kuwait, whereas Saudi Arabia used the *Hanbali Majallat Al Ahkam al-Shara'ia*, which was largely influenced by Wahhabi thinking. This *Majalla* is still the source of Saudi laws, particularly with respect to criminal laws. See general introduction: The Majella (1986) 1 ARAB L Q 363; Muhammed Farouq Al-Nabhan, The Learned Academy of Islamic Jurisprudence (1986) 1 ARAB L Q 388.

⁸⁸ For example, the French civil code influenced the Egyptian civil code, which in turn has been used as a model in such countries as Algeria, Iraq, Kuwait, Syria, and others. Similarly, the Egyptian criminal code and code of criminal procedure has been used as a model in other Arab countries like Iraq and the Sudan, though the latter has modified it to include the *hudud* crimes. Pakistan and Nigeria, which are influenced by the English Common law, have also codified *hudud* crimes. All 57 Muslim states have laws regulating commerce, finance, telecommunications, and subjects related to modern globalization.

regulating armed violence, conflicts, and rebellion,⁸⁸ an impasse that has resulted in the lack of development of techniques that undergird classical Islamic law (e.g., *maqasid al-shari'a* and *siyasa al-shari'a*, the purpose and policy of the *shari'a*, respectively).⁸⁹ As the *shari'a* derives principally from the Qur'an, supplemented by the *Sunna* (insofar as it reflects an authoritative interpretation of the Qur'an), it is surprising that more scholars, both historically and in the present, have not devoted attention to the *shari'a*, and to those areas of human interaction not addressed in traditional *shari'a*. These areas cover a wide variety of human and social needs in the age of globalization: for instance, prohibition of jihadist, religious, and rebellious violence. Indeed, literal exegetes resist and even oppose *maqāsid* and *siyāssat* as a technique to preserve literalism.

3. Some Basic Observations about Shari'a and Justice

Islam regulates in a holistic manner all human relations and endeavors on earth: between the Muslim *ummah* and other non-Muslim states, internal governance of the *ummah*, inter-personal relations, and more importantly, relations between each human being and the Creator. As mentioned, Islam as a way of life, a code of inter-personal and collective conduct, is ultimately a guide for that which is connected to final judgment. The *shari'a* derives principally from the Qur'an and is supplemented by the Prophetic *Sunna* insofar as these reports of the Prophet's deeds converge with authoritative interpretation of the Qur'an on mandatory prescriptions and proscriptions.⁹⁰

In all of these matters, justice is the cornerstone of this holistic approach. That is, contrary to what many *shari'a* scholars advocate, justice is not narrow, formalistic, rigid, legalistic, strictly procedural, or blind. Instead, justice is inspired by the overriding and divine attributes of compassion and mercy. Insofar as human justice is, to be pursued as a value-oriented goal, it must be constantly adapted as to *shari'a* methods to achieve the best possible outcomes that fulfil its goals. In this respect, the Islamic criminal justice system is compatible with contemporary post-conflict justice modalities. The problem is, rather, that too often neither Muslim governments nor other actors apply the *shari'a* or contemporary international law to conflict and post-conflict justice situations.

4. Islamic International Law and Binding Treaties

Simply stated, according to the *shari'a* and Islamic public law, international legal obligations are binding on Muslim states and actors as treaty obligations.⁹¹ A treaty is a source of law in the *shari'a*, provided that the treaty's purpose and terms are in compliance with the Qur'an. Historical controversies existed on these questions, but were resolved in favour of the treaty's binding nature, even when contrary to some principle of Islam.⁹² The early history of Islam shows that treaties were probably the most important practice of the fledgling polity, as the Prophet relied on treaties to gain recognition for the *ummah*, a critical move for a new political community in search of influence. Treaties are, indeed, the best evidence of such community recognition as they presuppose an entity's capacity to carry out its international obligations. Moreover, early Muslim treaties were focused on peace and peaceful coexistence, and these treaties with non-Muslim communities were deemed compatible with Islam and its goals of coexistence with other nations and

⁸⁸ See John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2007).

⁸⁹ *Maqasid al-Shari'a* is intended to ensure that the value-oriented goals of the *shari'a* are achieved through legislation and jurisprudence. Greater consideration for the *maqasid* would outweigh the rigidity of strict legalism, which had manifested itself in the past twelve centuries of Islamic history. The word *siyāssat* literally means 'policy', but its historic application has always been focused on governance. Both the *maqasid* and specific norms of the *shari'a* require upholding justice, human dignity and the rule of law in addition to an implicit general obligation to prevent harm.

⁹⁰ Bassiouni (n 1) 39–41.

⁹¹ Bassiouni (n 1) 150–153.

⁹² This question arose with respect to the Treaty of Hudaybiyya, when the Prophet consented to return to Quraysh those of its tribe who converted to Islam and went to Madinah to join the Muslims there. The same treaty forfeited the right of Muslims to perform the hajj (without Quraysh's authorization), even though the pilgrimage to Makkah is one of the five requirements of Islam. There were other treaties ceding land occupied by the Muslim nation to Christian and non-Christian nations. This question has contemporary applications, as Muslim theologians and many Muslim believers deem any agreement with Israel or any other body ceding the Muslim holy sites in Jerusalem as unenforceable, because no treaty can compromise or affect something deemed fundamental to Islam. In the same vein, many Muslim states have placed reservations on their signing and/or ratification of human rights treaties with language to the effect that 'providing that nothing in this treaty is deemed contrary to Islamic law'. For example, Egypt submitted the following reservation to the United Nations upon its signature in 1967 of the International Covenant on Economic, Social, and Cultural Rights: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it. . ." International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

peoples. Some of these treaties, however, contained concessions by the Muslim *ummah*, and were not questioned as to their legality because of the principle *pacta sunt servanda* ('agreements must be kept'), which the *shari'a* recognizes.⁹³

The Treaty of Hudaybiyyah, signed between Prophet Muhammad and the Quraysh of Mecca in 628 CE is often understood as the seminal precedent that attests to the recognition given to treaties in Islamic legal practice. In the course of negotiations, the Prophet used two emissaries sent to Mecca on successive occasions to establish the basis for the treaty. One of them, Uthman ibn Affan, who later became the third caliph, was (falsely) reported to have been killed, notwithstanding the fact that as an emissary he should have been secure. The negotiations were thus deemed broken and forces were readied for attack as the death of an emissary was deemed a *causus belli*. When the Quraysh subsequently made it known that Uthman was indeed safe and that his person as an emissary was inviolate, the news resulted in reopened negotiations. The Quraysh then sent to the Prophet their negotiator, Suhayl, who was treated as an inviolate ambassador. The Treaty of Hudaybiyyah was signed by the Prophet and Suhayl; Ali ibn Abi-Talib, the author of the treaty, also signed it as a witness (Ali became the fourth *caliph* and is the person the Shi'a most revere as the legitimate heir to the Prophet, that these events were also witnessed by Ali ibn Abi-Talib makes them of greater significance to the Shi'a). The Treaty of Hudaybiyyah and its negotiating history demonstrates, not only the sanctity of emissaries, that any violation of an ambassador's immunity is a *causus belli*, and that no ambassador may be detained or harmed, but that in Islam the principle of *pacta sunt servanda* is recognized and has been faithfully adhered to in exemplary practice.

The writings of many scholars indicate that envoys, ambassadors, deputies, delegations, and emissaries to and from the world of Islam have been numerous throughout its history. That practice has been continued by Muslim states in their contemporary international relations since their acceptance of the two Vienna Conventions of 1961 and 1963 on diplomatic and consular relations. Today, all contemporary Muslim states are members of the United Nations and parties to the 1949 Geneva Conventions.⁹⁴ Several are parties to the Genocide Convention,⁹⁵ as well as to a number of conventions restricting or prohibiting the use of certain weapons in time of war,⁹⁶ and most are parties to the International Convention on Civil and Political Rights (ICCPR).⁹⁷ In accordance with these and other conventions, a number of obligations arise in times of conflict and peace. These treaties often include the duty to prosecute or extradite persons who commit violations of treaty obligations. These and other obligations are binding on Muslim states, and include prosecution (or extradition) of those who violate these obligations, without limitation as to rank or status under international humanitarian law. Certain conflict and post-conflict mechanisms are thus available for and binding upon many Muslim states.

5. Islamic Humanitarian Law and Human Dignity in Islam

Another concrete area of compatibility and normative obligation includes Islamic approaches to human rights and early conceptions of humanitarian law for conduct during warfare, both of which have been long recognized as core parts of Islamic public law's contribution to modern international law. Acts constituting *jus cogens*, international crimes such as the killing of noncombatants or physical harm done to civilians or

⁹³ The rule that treaties are binding on the parties and must be performed in good faith, universally accepted as the 'basis of all treaty law' is codified in Art 26 Vienna Convention on the Law of Treaties (n 79), art 26. See Hans Wehberg, 'Pacta Sunt Servanda,' (1959) 53 The American Journal of International Law 775–786; Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'clash of Civilizations' in the New World Order* (Hart 2005) 46; and Joseph Schacht, 'Islamic Law in Contemporary States' (1959) 8 The American Journal of Comparative Law 133–147.

⁹⁴ Geneva Conventions of 1949 (n 45).

⁹⁵ Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. Muslim state parties include: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Comoros, Côte d'Ivoire, Egypt, Gabon, Gambia, Guinea, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Morocco, Mozambique, Nigeria, Pakistan, Saudi Arabia, Senegal, Sudan, Syria, Togo, Tunisia, Turkey, Uganda, Uzbekistan, United Arab Emirates, and Yemen.

⁹⁶ See M. Cherif Bassiouni ed, *A Manual on International Humanitarian Law and Arms Control Agreements* (Transnational Publishers 2000).

⁹⁷ See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Muslim state parties include: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Burkina-Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bassau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Pakistan, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Uzbekistan, and Yemen.

attacks on their personal integrity, including torture and rape, also constitute crimes under the *shari'a* in these areas, in addition to various offences under Islamic criminal law.

The first application of human rights in Islam came about in what is commonly called the Treaty of Madinah in the first year of the hijra. In this agreement between the Prophet and those who followed him in migration from Mecca to Madinah, as well as the different tribes belonging to different religions including Christians and Jews who lived in and around Madinah, a covenant was established providing for equality before the law of all citizens,⁹⁸ supremacy of the law for each religious community, non-discrimination between persons of different tribes and religions, albeit with structured distinctions and discriminations, and guaranteed freedom of religion for Muslims, Christians, and Jews.⁹⁹ This was followed by the Treaty of Hudaybiyyah, as mentioned, between Muslims and their enemies in Mecca, providing for non-aggression, protection of life and property, and prisoner exchange. The most noteworthy Muslim text applicable to the law of armed conflict is the Admonition of Abu Bakr, the first caliph of Islam after the death of the Prophet, who dispensed instructions to Muslim troops before engaging in the Syrian campaign in 637 CE-12 AH.¹⁰⁰ In view of the time of its promulgation it is also seen as a precursor to the set of evolving law of war norms that contribute to contemporary international humanitarian law.

Lastly, the Jerusalem Pledge of Umar ibn al-Khattab, second caliph, following the defeat of the Romans at the Battle of Yarmuk in 638, which preceded the Muslim army's entry into Jerusalem, insisted on behalf of all Muslims and for all times to protect the religious places of worship of Jews and Christians and to allow freedom of access to them by their respective co-religionists. Subsequent practices have too often neither affirmed nor continued the application of these early commandments. However, one positive example shines through in history, the behaviour of the Muslim army under Salah Al Din al-Ayyoubi during the Fourth Crusade, which treated Christian crusaders with fairness and humanity.¹⁰¹

6. Islamic Criminal Law

Without reiterating subjects covered in detailed elsewhere, we describe Islamic law's three categories of crimes, *hudud*, *qisas* and *taz'ir*, as providing a legal baseline for prosecuting those who commit international crimes, establishing the truth about evidence and the facts, and providing for victim redress in a manner consonant with many international standards.¹⁰² Labelling crimes varies between legal systems, which is

⁹⁸ For an interesting early treatment of this issue, see Majid Khadduri 'Human Rights in Islam' (1946) 243 Annals 77–81; and M K Nawaz, 'The Concept of Human Rights in Islamic Law' (1965) 11 Howard Law Journal 326–332.

⁹⁹ The additional tax or tribute (*jizya*) required of non-Muslim "people of the book" (*Ahl Al-Kitab*) is an indication of preferential treatment toward Muslims and, hence, non-equitable relations in relation to the early Islamic state. M A Muhibbu-Din, 'Ahl Al-Kitab and Religious Minorities in the Islamic State: Historical Context and Contemporary Challenges' (2000) 20 Journal of Muslim Minority Affairs 111–127, argues that this tax was compensation for protection in war, its mention is highly limited in the Qu'ran in only one *sura* (9:29), and that the practice stems from Umar ibn al-Khattab's humiliating covenant with the defeated Syrian Christians (under Heraclius) in the first half of the 7th century which was never enforced.

¹⁰⁰ AH refers to "After Hirja" and *hirja* is the historical migration and journey by the Prophet Muhammad and his followers from Makka to Madinah in June 622 CE.

¹⁰¹ See Amin Maalouf, *The Crusades Through Arab Eyes* (Schocken Books 1989).

¹⁰² For a fuller description of each category, see Aly Mansour, 'Hudud Crimes', M. Cherif Bassiouni 'Qisas Crimes', and Ghauth Benmelha 'Ta'zir Crimes' in M. Cherif Bassiouni ed, *Islamic Criminal Justice System* (Oceana 1982) and the discussion by Bassiouni (n 1) 133–147. Briefly, *hudud* means 'limits' imposed by God (i.e., divine prescription) named in the *Qur'an* as prohibitions (i.e., in this *hadith* by the Prophet: 'avoid harm and inflict no harm on others'). These most controversial crimes and penalties include *hirabah* (highway robbery) and mandatory death by beheading, crucifixion, cutting off of the right hand and left foot, or exile or imprisonment; *zena* (adultery/fornication), punishable by stoning to death a married party, and lashing for a non-married party; *sariqa* (stealing), punishable by cutting off the hand; *shorb al-khamr* (drinking alcohol), punishable by lashing; *qadhf* (defamation of a woman's or man's chastity), punishable by lashing and two questionable crimes: *baghi* (armed rebellion against a legitimate ruler), punishable by death by beheading or lesser penalties and *ridda* (apostasy), punishable by death by beheading or lesser penalties. Many penalties are spelled out in the *Qur'an* (with the *Sunna* addressing those lacking), evidentiary and procedural requirements, for these most serious 'crimes against God' (and God's established legal and social order), though their seriousness also requires stringent evidentiary requirements that must be proven beyond a doubt. Designed for policy purposes in the days of the Prophet and first four succeeding *Khulafa'*, these and other enlightened interpretive approaches were narrowed by rigid formalism that precluded progressive interpretation. *Qisas*, which means equivalence, cover attacks on the life and physical integrity of a person, essentially murder and corporal harm. This category implies that a person committing the violation will be punished in the same way used in harming another. Often equated with retaliation, the *qisas* penalty brings redress to the victim (or the victim's heirs), who have a right to waive the equivalent harm from being inflicted on the perpetrator and instead obtain compensation (to break the cycle of violence and promote reconciliation). Compensation must be accompanied by admission of guilt, responsibility, apology, and request for forgiveness. *Ta'zir* ('to chastise or correct') are crimes with the widest latitude for judges, legislative, and executive discretion designed to reform the person being punished. In the *Qur'an* and *Sunna* there is no definitive rule for *Taz'ir* crimes, nor has Islamic legal doctrine or jurisprudence supplied a central answer beyond divergent opinions in the four *Sunni* schools and various *Shi'a* schools). *Ta'zir* offences include analogous conduct to that which is prohibited

why comparative criminal law does not regard such categories as conclusive with respect to their meaning and content. Instead, what is examined are the social interests sought to be protected (such as life, physical integrity, human dignity, etc.), the general characteristics of the crime, and the existence of related crimes (e.g., the different categories of property crimes such as theft, embezzlement, and fraud).

Consider the practice of extradition, for instance, in which the requested state seeks to determine the existence of dual criminality: inquiry focuses on whether the underlying facts constitute a crime in the legal systems of the requested and requesting state, and whether the crimes in the two legal systems have the same general meaning and purpose, irrespective of how the crimes are characterized or their legal elements. The same method can be used for purposes of ascertaining whether the *shari'a* crimes of *hudud*, *qisas*, or *tazir* correspond (and vice versa) to international crimes that require prosecution either by an internationally established body or by national criminal courts.

Moreover, obligations arising under international criminal law include the duty to prosecute *jus cogens* international crimes such as genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices also apply under Islamic law.¹⁰³

IV. Conclusion: Islamic Contributions to Post-Conflict Justice

We have noted that the same value-oriented goals of post-conflict justice are reflected in both the spirit and norms of the *shari'a* and Islamic public law. Consequently, the primary problem is how to operationalize post-conflict justice mechanisms, which depend on identifying both what the *shari'a* and Islamic public law principles are and how they are to be applied in conflict and post-conflict settings. While an expansive subject, we offer by way of conclusion several summative and exploratory instances of Islamic contribution to post-conflict justice, below.

A. Islam and Post-Conflict Justice Norms: A Summary

There are several arenas in which Islamic law may offer helpful principles and prescriptions for post-conflict settings, especially in areas of compatibility with well-established international norms pertaining to post-conflict justice. These include:

- Respect for human life, dignity and personal integrity are fundamental components of Islamic law.
- In IHL, noncombatant immunity, protection of civilians, prohibition against torture and rape, among other precepts, form core parts of Islamic law.
- Some *shari'a* crimes under the categories of *hudud*, *qisas* and *tazir* are prohibited as 'war crimes' under the Rome Statute of the International Criminal Court, 1999.
- The value-oriented goals of international post-conflict justice, including victim redress, establishment of truth, bringing closure to victims, and the prevention of conflict return, are reflected in both the *shari'a* spirit and norms.
- Justice as one of the overarching values of Islam and, in turn, of Islamic law in conflict and post-conflict settings. As in any system of justice, accountability for transgressions of legal rules is foundational.
- Islamic law prohibits granting blanket amnesties and therefore rejects impunity for serious crimes.
- Provisions for victim compensation or reparations are ingrained in the Islamic legal system, which comports with the provisions of the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 2005. This, and many other rules of Islamic criminal justice, reflect the strong emphasis on the rights of the victim under *shari'a*.

in the *Qur'an* or *Sunna* (not *hadd* or *qisas* crimes); violations of public order, safety, welfare, or protected rights of an individual as deemed by a *Khalifa* or judge; acts penalized by *Khalifa*-made laws or a judge by analogy (*qiyas*) to existing crimes. The broad discretionary powers of *Khalifa* or *qadi* cannot constitute an abuse of power or result in injustice as the unspoken premise in this grant of authority is that its exercise must fulfill Islamic norms: i.e., the judgments must be both wise and just. Modern authors go to great lengths to justify why Shari'a principles have not been applied in their entire scope to crimes of *ta'zir* and, thus, Bassiouni concludes that *ta'zir* crimes have not been subjected to the narrow scrutiny of intellectual and doctrinal analysis, save for Al-Shafe'i's doctrine.

¹⁰³ With the exception of war crimes, these prohibitions apply in times of war and peace. War crimes apply only in times of war, irrespective of whether the conflict is of an international or non-international character; they extend without discrimination to 'protected persons' (non-combatants, POWs, the injured and sick, and medical personnel) and to prohibited targets (medical facilities, civilian and public property, religious and cultural structures, and cultural property).

- At the broadest level, the pursuit of justice under Islamic law is divided into categories of transgression: some of these, the *hudud*, are basically beyond the scope of reconciliation as they are simply putative, and their underlying assumption is that they will produce a deterrent effect. More importantly, the *haad* crimes are intended to protect public order more than individual interests. Not so for the other category of crimes, the *qisas*, which is essentially reconciliation-oriented, with prosecution being optional. That means that in these cases mechanisms such as truth and reconciliation commissions can work on a collective level, as can other measures designed to provide reconciliation between groups and to prevent the reoccurrence of future conflict.

B. Redefining Challenges and Priorities: Gaps and Possibilities

If certain Islamic legal norms and prescriptions exist, that is, if tools are available, what is more often lacking is the political will, including leadership, and the institutional structures at the state and international levels to implement them. Also lacking is a supportive political and institutional cultural foundation that rejects abusive Islamic practices.

We briefly address some of these gaps below, but this list is by no means comprehensive, and identify issues of common concern by redefining contemporary challenges involving Islamic law for conflict and post-conflict settings.

1. Issues of Common Concern

Some issues of common concern include the following:¹⁰⁴

1. The identification of precisely what the *shari'a* and Islamic law are in accordance with the four Sunni and three Shi'a schools and the cultural context of their application in different countries; and assessing the historical processes of their transmission over time and contextually, including socio-economic and political factors. This issue underscores the need for, and the historical neglect of, the codification of the *shari'a* or, at the very least, the establishment of common principles and guidelines for domestic legislation as well as for Islamic public law.
2. Investigating the context, causes, and bases of Islamic legal-theological diversity, the different methods for employing and applying the *shari'a* and Islamic law, and understanding the orienting contexts for diverse interpretation. A core part of this issue remains assessing the respective rationales for accepting such diversity without rigorous and critical appraisal of the validity of diverse methodologies and outcomes in light of Islamic values.
3. Addressing corrective mechanisms for reigning in the more divergent approaches, methods, interpretations, and outcomes. This includes placing values and policy goals above procedures, techniques of interpretation (i.e., literalism), and the force of precedents, and redressing the polarization of Islamic law under conditions of globalization.
4. The relationship between power and values in Islamic-law based governance needs to be clarified, especially in light of a long history of conflict 'precipitated by the political aspirations of groups and individuals who sought power by overthrowing the *khalifa* or by seceding from the Muslim *ummah*'.¹⁰⁵ Too often an examination of the history of these military campaigns reveals victories without a single application of Islamic law or justice norms, a startling conclusion when one considers that Islam comprises a nexus of religious values in which individuals and their rights must be respected and vindicated and in which utilitarian approaches to justice (that sacrifice individuals) are prohibited. At the very least, 'Islam demands that something be done when a violation occurs'.¹⁰⁶

2. Political Institutional Culture and Leadership

A significant failure in upholding Islamic legal norms belongs to conflict actors in applying existing Islamic law norms to conflict settings. Relatedly, there has been a failure to build a political and institutional cultural foundation for the application of Islamic legal norms inside polities. Religious and civic leaders in Muslim societies have too often simply not fulfilled their obligations to express what is properly required by Islamic law. Similarly, political, social, and other thought leaders have often failed to carry out their civic

¹⁰⁴ Bassiouni (n 1) 257–259.

¹⁰⁵ ibid 281.

¹⁰⁶ ibid 284.

and moral responsibilities to express disapproval of conduct by Muslim actors in diverse arenas of conflict, which represents transgressions in both Islamic law and international law.

Importantly, some Muslim-majority states have no or fewer incidence of armed conflict, their governments have not involved their societies in interstate or intrastate wars, and, further, they exhibit no record of noncompliance with international treaty norms covering conduct during hostilities. Examples of those states engaged in no modern international (IAC) or noninternational (NIAC) conflicts (as primary belligerents from 1947–2012) as defined under IHL include: Benin, Brunei-Darussalam, Gabon, Guyana, Kazakhstan, Maldives, Turkmenistan, and the UAE. Likewise, states in the same period engaged in no recorded IHL violations are: Burkina Faso, Cameroon, Gambia, Jordan, Malaysia, Togo, even while some were engaged in armed conflicts.

These examples are important points of reference in trying to understand how and why conflict develops across the diverse Muslim world and how to advance conflict and post-conflict measures.

3. Moving Past the “Other” of Islamic Law

Having made these observations, it is also important to note, as legal historian Wael Hallaq emphasises, the recent geopolitics of Islamic law in which the traditional has become entangled with multiple discursive and political pressures which make seeing its distinctiveness and contemporary utility difficult. While Islamic law is comprised of multiple schools and traditions, which are neither static, coherent, or codified in the positivist sense, ‘to write the history of *shari'a* is to represent the Other’, Hallaq notes.¹⁰⁷ Islamic legal concepts, that is, do not fit easily within modern western precepts and scholarly definition, including the concept of ‘law’ itself, which often implicitly conveys a western standard against which Islamic law ‘could only disappoint’,¹⁰⁸ notably in its inability to distinguish between state and religion, law and morality. In short, ‘the very use of the word law is *a priori* problematic’, as its use is to ‘superimpose’ on ‘the legal culture of Islam notions saturated with the conceptual specificity of nation-state law, a punitive law that, when compared to Islam’s jural forms, lacks the same determinant moral imperative’.¹⁰⁹ A positivist conception of law may also miss Islamic law’s ‘efficient, communally based, socially embedded, bottom-top methods of control that rendered it remarkably efficient in commanding willing obedience’, especially in its period of emergence, making it in certain ways ‘less coercive’ than ‘any imperial law Europe has known since the fall of the Roman Empire’.¹¹⁰

An additional oversight is the common charge of Islamic law’s lack of integrity and authority with, again, the reference point of the nation state, not the broader *ummah*, as the standard for this charge. Accordingly, then, the ‘hands-off approach of the *shari'a* adopted as a way of life’, specific to communities that span continents, cultures, and peoples, and the ‘extraordinary diversity of *fiqh*, or legal doctrine’ is one of many forms of Islamic juristic pluralism often missed in the West, as well as the highly ornate localized relationships between legal doctrine and community practice.¹¹¹ Awareness of such issues is important as these may misconstrue or underestimate the force, appeal, and reach of Islamic legal traditions today across.¹¹²

4. Departures from Islamic Conflict Norms in the Muslim World

One of the most significant lessons in contemplating Islamic contributions to post-conflict justice involves a sober and realistic appraisal of post-Arab Spring governance challenges in the region. There is a lasting sense that such public movements and critiques, many of which referenced the *ummah* and shared Islamic norms, were met with a level of unexpected violence and repression by domestic governments not seen in generations. In the aftermath, such cross-national developments have created both an intellectual space for revisiting Islamic law in conflict settings, but also a deep scepticism about any contributions that Islamic law might make to conflict prevention, mitigation, or reconciliation moving forward. Ironically, some of the most robust spaces for these urgent discussions have been in the western academy.

¹⁰⁷ Wael Hallaq, *Shari'a: Theory, Practice, Transformation* (Cambridge University Press 2009) 1.

¹⁰⁸ *ibid* 2.

¹⁰⁹ *ibid* 2–3. Hallaq is not naive about the need to still use such limited common terms as law redefining every technical term would ‘paralyze expression’ but he is adamant about the fact that ‘Islamic law’ (or even *Shari'a* as a synonym) must be a site of circumspection: it requires awareness of the colonialist doctrine that ‘decimate[d] *Shari'a* and replace[d] it with Western codes and institutions’, a largely successful process across the Muslim world as Muslim state constitutions indicate, and equally aware of the ongoing role that linguistics play as concepts are defined in language, which delimits and controls them, as well as their related terms (i.e., reform, religion).

¹¹⁰ Hallaq (n 107) 2.

¹¹¹ *ibid* 3.

¹¹² See, for instance, Edward Said, *Culture and Imperialism* (Vintage 1994); and Bernard S Cohn, *Colonialism and its Forms of Knowledge* (Princeton University Press 1996).

Such pessimism has not been entirely pervasive: Several leaders and officials in Egypt, Jordan, and among the Gulf States and some of its outspoken clerics have been forceful in pushing for shared responses to groups like ISIS and in developing cross-Arab initiatives for strengthening Islamic law responses to current instability. Yet, there is also a sense among 'Arab Spring' activists, ordinary citizens of the 'Arab Street,' and outspoken scholars, that too many governments are conspicuously silent on recent atrocities by terrorist groups, militia, or governments themselves in these same countries and in Syria, Libya, and elsewhere. In fact, some commentators are finding extremist minorities empowered by the silent majorities, either tolerating extremist ideas or ignoring extremist conduct in violation of Islamic and international norms. In many respects, groups have begun to set the terms for global public discussion on issues related to Islamic law and justice, including dividing the world up into Muslims and non-Muslims regions and identities.

In prioritizing current challenges, the factors that we must focus on continually are how human harm committed by Muslims, whether against Muslims or non-Muslims, can be mitigated by the responsive application of Islamic law, and which legal mechanisms should be put in place to enhance compliance by Muslims with Islamic law and to prevent non-compliance.

Competing Interests

The authors have no competing interests to declare.

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