

SYMPOSIUM ON TWAIL PERSPECTIVES ON ICL, IHL, AND INTERVENTION

ISLAMIC CONTRIBUTIONS TO INTERNATIONAL HUMANITARIAN LAW: RECALIBRATING TWAIL APPROACHES FOR EXISTING CONTRIBUTIONS AND LEGACIES

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This short essay focuses on the involvement of Muslim-majority state leadership in the pre-World War II development of international humanitarian law (IHL), including their appeals to Islamic norms.¹ This historical snapshot reveals how national leaders joined debates during conferences leading up to the revised 1949 Geneva Conventions, the heart of modern IHL. Such accounts complicate our assumptions about the cultural and national composition of public international law as “Western,” and shed light on global hierarchies involving modern Arab and Muslim states and their investment in such norms. The essay argues by example that, ultimately, in Third World Approaches to International Law (TWAIL)² more emphasis is needed on history, traditions of governance, and states’ distinctive responses to macrostructural pressures—rather than on static notions of identity, resistant narratives, and presumed shared ideologies. TWAIL seeks alternatives to international law’s presumed oppressive role in Western-non-Western power dynamics, and new ideas and opportunities for a “third-world” legal scholarship beyond current global underdevelopment dynamics.³ Yet too rarely have scholars probed deeply into the history of third-world⁴ participation and leadership in developing international law norms, particularly at the state level or from the semi-periphery.⁵ In fact, non-Western

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¹ See James Cockayne, *Islam and International Humanitarian Law*, 84 INT’L REV. RED CROSS 597 (2002); Mohamed Badar, *Ius in Bello under Islamic International Law*, 13 INT’L CRIM L. REV. 593 (2013); AHMED MOHSEN AL-DAWOODY, *THE ISLAMIC LAW OF WAR* (2011).

² James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography*, 3 TRADE, L. & DEV. 26 (2011); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT’L COMMUNITY L. REV. 355 (2008).

³ Mutua writes: “The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West . . . Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation. This broad dialectic of opposition to international law is defined and referred to here as Third World Approaches to International Law (TWAIL).” See Makau Mutua, *What Is TWAIL?*, 94 PROC. ANN. MTG. ASIL 31 (2000); Madhav Khosla, *TWAIL Discourse: The Emergence of a New Phase*, 9 INT’L COMMUNITY L. REV. 291 (2007) (arguing for three phases of concerns: colonialist, hegemonic uses of international law by powerful nations; international legal institutions embedded in North-South politics of globalization; and extreme post-9/11 violations of norms).

⁴ For social scientific debate of “Third World,” see Carl E. Pletsch, *The Three Worlds, or the Division of Social Scientific Labor, circa 1950–1975*, 23 COMP. STUD. SOC. & HIST. 565 (1981); Vicky Randall, *Using and Abusing the Concept of the Third World*, 25 THIRD WORLD Q. 41 (2004).

⁵ *But see*, Muhammad Munir, *Islamic International Law*, 20 HAMDARD ISLAMICUS 37 (2012); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY & THE MAKING OF INTERNATIONAL LAW* (2005); SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY & INTERNATIONAL LAW* (1996); ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW* (2014).

leaders have played a role in the pre-World War II period of lawmaking and have used existing cultural and legal traditions to do so. Accounting for this history makes for a more accurate, inclusive, and culturally-grounded approach to the law made by and for states. More pointedly, it reaffirms that cornerstone premise of sovereignty—in all of its diverse national expressions—an idea challenged today by global political-economic forces.⁶

In comparative international law, legal history, and Islamic studies, it is fairly well established that Islamic norms historically governing use of force are broadly compatible with principles of the international law of war. Beyond Quranic verses, the classic example is Abu Bakr's instructions to Arab armies invading Syria on the eve of the *Ridda* wars (632/3 CE) in which the prophet Muhammad's first successor sought to defeat and reintegrate rebellious Arab tribes into the newly-formed Islamic empire or caliphate.⁷ In laying out some of the first humanitarian norms—prohibitions against “treachery,” pillage, the killing of children, women, the elderly—Abu Bakr helped legitimize a young politico-religious community in its own early relations of rule, and defined lasting standards for conduct in warfare.⁸ Many scholars see an early Islamic footprint in the very idea of international law, its emphasis on treaties, and IHL.⁹

If the compatibility thesis is well-known,¹⁰ less explored are Islamic contributions to the shared history of public international law, modern Muslim leadership in IHL,¹¹ and the too-rarely-treated role of Muslim states in the early Geneva and Hague diplomatic conferences. In fact, when we think of the 1949 Geneva conference, convened to update existing Hague and Geneva law, rarely do attendees from Afghanistan, Egypt, Iran, Lebanon, Pakistan, Syria, Turkey, and Albania spring to mind. Not only did delegates from these Muslim-majority states take part in deliberations, they signed the resulting agreements known as the revised Geneva Conventions of Aug. 12, 1949, including the unprecedented Fourth Convention covering civilians in war.¹²

It is worth noticing several features of this contribution. Firstly, and empirically, one sees an increase over time (see below) in Muslim state conference participation, a trend that continues until the 1960s, after which many states—partly through the Organization of Islamic Cooperation—begin to develop culturally-specific interpretations of international law with complex motives and results.

⁶ See UN Charter art. 2(1), “The Organization is based on the principle of the sovereign equality of all its Members.”

⁷ See FRED M. DONNER, MUHAMMAD & THE BELIEVERS (2010); and FRED M. DONNER, EARLY ISLAMIC CONQUESTS (1986). For Quranic verses echoing related norms, see YUSUF ALI, THE HOLY QUR'AN 47.4; 2.205; 48.25 (1934)—*but see id.* at 59.5 and 47.4.

⁸ Abu Bakr's instructions include: “Oh army, stop and I will order you [to do] ten things; learn them from me by heart. You shall not engage in treachery; you shall not act unfaithfully; you shall not engage in deception; you shall not indulge in mutilation; you shall kill neither a young child nor an old man nor a woman; you shall not fell palm trees.” See THE HISTORY OF AL-TABARI Vol.10: THE CONQUEST OF ARABIA (Fred M. Donner trans., 1983); RUDOLPH PETERS, ISLAM & COLONIALISM 23 (1979) (noting other schools using the Prophet and Quran i.e. 59.5 permitted these acts, justified them, and refuted Abu Bakr's prohibitions, as the “deeds of the companions can never abrogate deeds of the Prophet”).

⁹ For non-Western contributions in Africa studies, see Emmanuel G. Bello, *Shared Legal Concepts between African Customary Norms & International Conventions on Humanitarian Law*, 23 MIL. L. & L. WAR REV. 285 (1984). *But see*, Modirzadeh on incompatibilities in Islam and IHRL, Naz K. Modirzadeh *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts & Minds*, 19 HARV. HUM. RTS. J. 191 (2006).

¹⁰ MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (2005). See Cockayne, *supra* note 1; AL-DAWOODY, *supra* note 1.

¹¹ See Emilia Justyna Powell, *Islamic Law States and Peaceful Resolution of Territorial Disputes*, 69 INT'L ORG. 777 (2015).

¹² For Conference sources cited, see JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, 1899 (1920) [hereinafter SCOTT 1920]; A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES CONCERNING THE LAWS & USAGES OF WAR (1909); JAMES BROWN SCOTT, THE GENEVA CONVENTION OF 1906 FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD (1916) [hereinafter SCOTT 1916]; 1-3 FINAL RECORD OF THE DIPLOMATIC CONFERENCE, GENEVA, APR. 1-12 AUG. 1949 (1968).

IHL CONFERENCE	PARTICIPATING ISLAMIC NATIONS	TOTAL STATES (DELEGATES)	PARTICIPATING STATE SIGNATORIES (ICRC TREATY DATABASE)
Geneva Diplomatic Conference, Aug. 8-22, 1864, <i>Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field</i> (Higgins 1909)	None	12	Persia (1874) Turkey (1865)
First Hague International Peace Conference, May 18-Jul. 29, 1899, <i>Final Act of the International Peace Conference, 29 July</i> (Scott 1920)	Turkey Persia	26	Persia (1899) Turkey (1899)
Geneva Diplomatic Conference, Jun. 11-Jul. 6, 1906, <i>Conference for the Revision of Geneva Convention 1864, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field</i> (Higgins 1909; Scott 1916)	Persia	35	Persia (1906) Turkey (1907) Afghan. (1922) Egypt (1923)
Second Hague Peace Conference, Jun. 15-Oct. 18, 1907, <i>Final Act of the Second Peace Conference, 18 Oct. 1907</i> (Scott 1920)	Turkey Persia	45	Persia (1907) Turkey (1907)
Third Geneva Diplomatic Conference, Jul. 1-27, 1929, <i>Final Act, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field; Convention relative to the Treatment of Prisoners of War, 27 Jul. 1929</i> (Scott 1920)	Egypt Persia Turkey	46	Egypt (1929) Persia (1929) Turkey (1929)
Fourth Geneva Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, Geneva, Switzerland, Apr. 22-Aug. 12, 1949 (Berne 1968)	Afghanistan Albania Egypt Iran Lebanon Pakistan Syria Turkey	58	Afghanistan (1949) Albania (1957) Egypt (1949) Iran (1949) Lebanon (1949) Pakistan (1949) Syria (1949) Turkey (1949)

Secondly, an emphasis is placed on “humanity” as a collective project by Conference participants in keeping with the IHL framework. Less noted, though important—in light of TWAIL critiques of empire—is how often such humanitarian priorities emerge from an expressly imperial framework and its philosophy of *largesse*, notably by Persian and Turkish representatives (both coming from empires).

Two examples bundle these points: Note the following declaration by General Mirza Khan, the first delegate of Persia to the 1899 Hague Peace Conference:

The Russian Government having done Persia the honor of inviting it . . . and His Imperial Majesty the Shah, my august sovereign, having deigned to choose me to undertake this honorable mission. . . . All these marks of interest impose upon me the duty of adding also on my side . . . support of the great cause which is that of all humanity and with which we have here to deal.¹³

To refute critics who detect arrogance in the Emperor of Russia’s initiative, Khan relays this story:

Permit me, gentlemen, to cite to you a proof of [Emperor Nicholas II’s] . . . elevated sentiments. In the first year after my appointment . . . [for] Persia at the Russian Court, I was accompanying on my horse the Emperor who was going from the Winter Palace to the Field of Mars . . . to be crowned. As

¹³ SCOTT 1920, *supra* note 12, at 305 (Hague, June 23, 1899).

I was somewhat ill that day, I fainted and slipped from my horse. The Emperor, seeing this, stopped his brilliant cortege and did not continue . . . until I had been put in a carriage. . . . Several times [he] sent his aides-de-camp to learn of my condition. Our celebrated poet Saadi has . . . describe[d] pride: “Its glance is like that of a king who causes his army to pass before him.” The young Emperor, an autocrat of 26 years of age, who, for the first time, after his accession to the throne, was passing in review a brilliant army of 30,000 men, did not, in that moment of legitimate pride, forget an accident . . . to a stranger. . . . He who acts thus can not be selfish, and . . . the initiative that he has taken for this Conference, can only proceed from a . . . noble heart. Gentlemen, let us fulfil our duty before the civilized world, and not discourage Their Majesties.¹⁴¹⁵

At the end of the 1907 Conference, the Turkish first delegate Turkhan Pasha echoed Khan’s support for the peace endeavor, shared humanitarianism, and commitment to resulting norms: “My Government has given its full and entire adhesion to the humanitarian principles laid down by the Geneva Convention of 1864.”¹⁶

Pasha also emphasized a third element, deference to his government as a means to reiterate the core legal principle of noninterference:

The Turkish delegation, considering that the work of this Conference has been a work of high loyalty and humanity, destined solely to assure general peace by safeguarding the interests and the rights of each one, declares, in the name of its Government, that it adheres to the project . . . on the following conditions: (1) It is formally understood that recourse to . . . commissions of inquiry and arbitration, is purely facultative and could not . . . assume an obligatory character or degenerate into intervention; (2) The Imperial Government itself will be the judge of the cases where its interests would permit it to admit these methods without its abstention or refusal . . . being considered by the signatory States as an unfriendly act.¹⁷

This third theme of equal respect for sovereignty also draws a firm line between permissible scrutiny of international—but not domestic—state use-of-force behavior. As Pasha notes: “It goes without saying that in no case shall the means in question be applied to matters of a domestic nature.”¹⁸ Humanitarianism embedded in state sovereignty is often missed in contemporary international law discussions, including those on Muslim state behavior.¹⁹

Fourthly, within this discourse of reciprocity and civility, distinctive traditions of culture and religion are emphasized, but again in ways that support the general IHL project, as when Pasha raises the Red Crescent at the 1907 Hague Conferences:

¹⁴ *Id.* at 306 (Hague, Jun. 23).

¹⁵ The work of Saadi Shirazi (d. 1291) adorns the UN entrance. See SAADI SHIRAZI, *Rose Garden, THE MANNERS OF KINGS* (1258): “All human beings are members of one frame; Since all, at first, from the same essence came. When time afflicts a limb with pain; The other limbs at rest cannot remain. If thou feel not for other’s misery, A human being is no name for thee.”

¹⁶ SCOTT 1920, *supra* note 12, at 63.

¹⁷ SCOTT 1916, *supra* note 12, at 100.

¹⁸ *Id.* at 683.

¹⁹ For a critique of Elias’s treatment of sovereignty as a barrier to international law reform see, James T. Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olanvale Elias*, 21 LEIDEN J. INT’L L. 317 (2008).

[My Government] has, like the other Powers, rendered respect to Switzerland by the recognition of the hospital flag formed by the interversion of the Federal colors, but it has believed it necessary . . . to use the Red Crescent upon a white background for its military ambulances.²⁰

Governments at the conference, he explained, “have been kind enough to accept the principle of the reciprocal recognition of the Red Cross and the Red Crescent as distinctive emblems of hospital ships.”²¹ Likewise, Secretary General to the Ministry for Foreign Affairs, Noury Bey, declared: “whenever Turkish relief ships have to perform their mission, the emblem of the Red Cross will be replaced . . . by the Red Crescent.”²² In response to Persian delegate Khan’s request for explanation, the committee noted that the expression “institutions dedicated to religion” thus “applies to all institutions of that kind, churches, temples, mosques, synagogues, etc., without any discrimination between the diverse forms of worship”—a point “already affirmed at Brussels in 1874.”²³

Lastly, in addition to religious and cultural matters, delegates exhibited moral, as well as legal innovation and leadership, using eloquence and logical reasoning. In 1899 Pasha successfully proposed amending Article 46 to hasten postconflict transition:

At the proposition of his Excellency Turkhan Pasha, it is decided to word the second paragraph as follows: “They must take into account the rules of military honor.” The President observes . . . [this] affords some guaranty to the conquered party that humiliating conditions will not be imposed on him. Article 46 thus amended is adopted.²⁴

In keeping with the military expertise structurally embedded in IHL, many delegates were experienced military professionals, including General Khan of Persia; Abdullah Pasha, Division General on the staff of the Military House of the Sultan; and Mehemed Pasha, Rear Admiral.²⁵ Military honor was something well-established and specific: the internalized codes of behavior—considered virtues—afforded even enemies in defeat.²⁶ Such notions of honor inform the moral reasoning behind Turkhan Pasha’s practical recommendation.

Moreover, Persian delegate Khan extends the moral bonds of military honor to statesmanship in general, offering this insight on *vinculum juris*, “the bond of law,” what we might call today “norm compliance”:

His Excellency admits . . . the obligatory character of the Convention is not very pronounced and that the *vinculum iuris* may be broken without difficulty. But the nations of the world do not allow themselves to be guided solely by legal conceptions . . . and the Convention, weak as it may be from a legal standpoint, will nevertheless be of great moral value as the expression of the conscience of the civilized world.²⁷

Acknowledging the weakness of the instrument, Khan agrees “with the eminent orators who have endeavored to show, with great authority, the obstacles that may be met on the road and the gaps presented by the

²⁰ SCOTT 1916, *supra* note 12, at 63 (Hague, Jul. 20).

²¹ *Id.*

²² SCOTT 1920, *supra* note 12, at 454.

²³ *Id.* at 67.

²⁴ *Id.* at 484 (Hague, May 30, 1899).

²⁵ For this core element of IHL, see Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 *TEX INT’L L.J.* 338 (2012).

²⁶ PAUL ROBINSON, *MILITARY HONOUR & THE CONDUCT OF WAR* (2006).

²⁷ SCOTT 1920, *supra* note 12, at 525 (Hague, Oct. 16, 1907, Annexes).

Convention under preparation.”²⁸ Yet he seeks to persuade fellow delegates to join the Convention with this reasoning:

[T]he advantages of a world-wide arbitration Convention are so great and the guarantee that it will give to the world at large is so considerable, that it is the duty of the Conference to brave the obstacles . . . and to leave to our successors . . . the task of filling the gaps.²⁹

Again, the bedrock appeal to humanitarianism and sovereignty help him make the case: “The great merit of this Conference in the eyes of the world . . . is that all national consciences are equal in it, and that each of the States which we here represent has a right to its share of justice and of truth.” He continues:

We know that, unfortunately, this great cause will not triumph between to-day and to-morrow; but that is an additional reason why its defenders should show themselves persevering and faithful. . . . As for me . . . I bring, in the name of my Government, one stone for an edifice, the foundations of which were dug by our predecessors, who have the gratitude of all mankind, without regard to country, continent, or race. It is merely a question now of building little by little, until our successors can celebrate the glorious completion.³⁰

Khan’s successors are, of course, “us”—today’s legal scholars, practitioners, military professionals, diplomats, and others engaged in global governance—in this open, generous, and tacit dialogue Khan begins with the future.

Among many other indicators of Muslim state leadership in this generative moment in international law, it is worth underscoring one of the strongest motifs that drives Conference participants—*building norms*—especially as it contrasts so emphatically with the mood of today: eroding norms, stressed systems of international order, and wilting resolve against efforts to undercut the architecture itself (i.e. lawfare). For this reason, among others, it is critical to revisit these early debates in the life of the law and to press for more nuanced accounts of diverse state actors in that process.

This essay has assumed the changing phases of TWAIL discourse, albeit with attention to the limits of “third-worldist” conceptions of opposition, skepticism toward discursive purity, and appreciation of the dangers of political advocacy in scholarship. It is, however, important to reiterate that examining the contributions of Muslim states and other non-Western contributions to public international law is by no means to weaken the need for TWAIL perspectives in legal scholarship. On the contrary, the goal is to strengthen the account of the role of law in contemporary global dynamics, while underscoring its multicultural pedigree and the ongoing, central role that states play in international norm making.³¹

²⁸ *Id.*

²⁹ *Id.* (Hague, Oct. 16, 1907, Annexes).

³⁰ *Id.*

³¹ See Khosla, *supra* note 3, and SINYA, *supra* note 5, at 1; Nahed Samour, *Is there a Role for Islamic International Law in the History of International Law?*, 25 EUR. J. INT’L L. 313 (2014); and for a contemporary example, Niaz A. Shah, *The Use of Force under Islamic Law*, 24 EUR. J. INT’L L. 343 (2013).