Islam and international humanitarian law: From a clash to a conversation between civilizations

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In a world increasingly portrayed as beset by the 'clash of civilizations', especially between the West and Islam,[1] the universality of international humanitarian law (IHL) is increasingly threatened. What role can IHL, a product of European civilization, have in regulating the relations *between* civilizations?

Some scholars have, in the past, addressed this question by attempting to demonstrate that the core precepts of humanitarian law are shared by non-European civilizations, for example comparing the traditions, customs and laws of warfare in Islam with IHL.[2] With few exceptions,[3] these comparative analyses have two shortcomings. First, they tend to reduce both legal traditions (the Islamic and the Western) to static, monolithic constructs. Both are in fact complex legal traditions, both dynamic (varying over time) and plural (made up of varying sub-traditions).[4] Second, these comparative analyses tend to exhibit a subtle orientalism,[5] taking the Western system as a yardstick against which the adequacy or compatibility of the oriental Islamic 'other' is measured.[6]

This study attempts to introduce a historical element into this discussion. It suggests that the modern interaction between Islamic and Western civilizations has played an important part in shaping humanitarian law as we now know it. Looking to this historical interaction, it attempts to identify a mode of understanding humanitarian law that accommodates different 'civilizations'. This historical approach also avoids the pitfalls of the comparative analysis approach: it allows shifts in sub-traditions to emerge, and prevents us from assuming that either system stands in a privileged position.

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The innovative influence of Islam on European laws and customs of war stretches back at least as far as the Crusades.[7] Delivering a course at the Hague Academy of International Law in 1926, Baron de Taube speculated that the modern public international law of declarations of war was a direct descendant of Islamic doctrine, having passed into chivalric codes during the Crusades, through the Christian church and

1 See, for example, Samuel P. Huntington, "The clash of civilizations?", *Foreign Affairs*, Vol. 72, No. 3, Summer 1993, p. 22. Compare Leon T. Hadar, "What green peril?", *Foreign Affairs*, Vol. 72, No. 2, Spring 1993, p. 27; contrast Judith Miller, "The challenge of radical Islam", *Foreign Affairs*, Vol. 72, No. 2, Spring 1993, p. 43.

2 See, for example, M. K. Ereksoussi, "Le Coran et les Conventions humanitaires", *Revue internationale de la Croix-Rouge*, No. 503, November 1960, pp. 641-650; Sobhi Mahmassani, "The principles of international law in the light of Islamic doctrine", *Recueil des cours*, 1966-I, p. 201; R.C. Algase, "Protection of civilian lives in warfare: A comparison between Islamic law and modern international law concerning the conduct of hostilities", *Military Law and Law of War Review*, 1977, p. 246; Yadh ben Achour, "Islam et droit international humanitaire", *Revue internationale de la Croix-Rouge*, No. 722, March-April 1980, p. 59; Hamid Sultan, "La conception islamique" in *Les dimensions internationales du droit humanitaire*, Pedone, UNESCO, Paris, and Institut Henry Dunant, Geneva, 1986, pp. 47-60; Said El-Dakkak, "Le droit international humanitaire entre la conception islamique et le droit international positif", *Revue internationale de la Croix-Rouge*, No. 782, March-April 1990, p. 111; J. Busuttil, "'*Slay them wherever you find them*': Humanitarian law in Islam", *Revue de droit militaire et de droit de la guerre*, Vol. 30, 1991, pp. 111-145; Mohammed Bedjaoui, "The Gulf War of 1980-1988 and the Islamic conception of international law" in Ige F. Dekker and Harry H.G. Post (eds), *The Gulf War of 1980-1988*, T.M.C. Asser Institute, The Hague, 1992, p. 282; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study,* Kluwer Academic, Norwell, MA, 1994; K. Bennoune, "As-Salamu 'Alaykum? Humanitarian law in Islamic jurisprudence", *Massachussets Journal of IL*, 1994, pp. 605-643; Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Éditions A. Pedone, Paris, 1997. Other useful expositions of classical Islamic warfare doctrine can be found in Majid Khadduri, *The Islamic Law of Nations*, *Shaybani's Siyar* , The John Hopkins Press, Baltimore, 1966; Majid Khadduri, *War and Peace in the Law of Islam*, Johns Hopkins University Press, Baltimore, 1984; James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, Greenwood Press, Westport, CT, 1990; Edward J. Jurji, "The Islamic theory of war", *Moslem World*, Vol. 30, 1940, pp. 332-342; R. Peters (trans. and annot.), *Jihad in Mediaeval and Modern Islam: The chapter on jihad from Averroes' Legal Handbook 'Bidayat al Mudjtahid' and The Treatise 'Koran and Fighting' by the late Shaykh Al-Azhar, Mahmud Shaltut*, E.J. Brill, Leiden, 1977; and G. Conrad, "Combat and prisoners of war in classical Islamic law: concepts formulated by Hanafi jurists of the 12th century", *Revue de droit pénal militaire et de droit de la guerre*, 1981, pp. 269-307.

3 Notably Bedjaoui, *op. cit*. (note 2).

4 On the notion of legal traditions see particularly H. Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford, 2000.

5 On the concept of orientalism see Edward Said, *Orientalism*, Penguin Books, Harmondsworth, 1978.

6 See ben Achour, *op. cit*. (note 2), p. 59.

7 See for example Marcel Boisard, "On the probable influence of Islam on western public and international law", *International Journal of Middle East Studies*, Vol. 11, 1980, pp. 429-50.

on into the modern law of war.[8] Christopher Weeramantry has also offered evidence of the influence of Islamic doctrine in the writings of Hugo Grotius on the law of combat.[9]

There has, however, been little analysis of the role of Islam in shaping the modern European law of war and its progeny — international humanitarian law. This paper attempts to fill that gap, examining the influence of Islam on IHL since the acceptance of the Ottoman Empire as a sovereign State within the European State system, usually identified with its accession to the Treaty of Paris in 1856.[10]

The study is necessarily limited in two important respects. First, it provides only an overview, a rough outline, of the historical interaction of Islam and international humanitarian law. Second, it deals primarily with the conduct of hostilities, and not their causes – the *jus in bello*, and not the *jus ad bellum*.

1856 to 1899: the Islamic 'other' and the emergence of international humanitarian law

Islam and Islamic players are widely — but incorrectly — assumed to have had an insignificant role in the early development of international humanitarian law. From the entry of the Ottoman Empire into the European States' legal system in 1856 until the first Hague Peace Conference in 1899, Islamic players assumed only a minor role in the burgeoning development of the public international law of warfare. On close inspection, that role is revealed as highly significant in both the internationalization and humanization of the European law of war. As this section of the study demonstrates, Islam at first represented a critical oriental 'other' against which the emerging modernist law of war delineated itself. Because of its own universalist and humanist tendencies this law was, however, forced to accommodate subjects from different cultural-legal systems and consequently to abandon its

8 Baron Michel de Taube, "Études sur le développement historique du droit international dans l'Europe orientale" in *Recueil des Cours*, 1926-I, p. 341, pp. 393-394. See also *1907 Hague Convention Relative to the Opening of Hostilities*, Oct. 18, 1907, 36 Stat. 2259, 2271 (pt. 2) TS No. 538, 1 Bevans 619. Said El-Dakkak, in contrast, states that "*la conception islamique ne pose pas comme condition l'existence d'une guerre au sens traditionnel du terme, c'est-à-dire, selon une conception qui implique, outre l'existence de faits d'armes, l'exigence de la déclaration de guerre entre deux ou plusieurs Parties*." See El-Dakkak, *op. cit.* (note 2), p. 112.

9 Christopher G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Houndmills, 1988, pp. 149-158.

10 *Declaration Respecting Maritime Law*, Paris, 16 April 1856.

Christian roots. Islam thus prompted the definition of international humanitarian law in secular, universalist terms.

IHL as we now know it differs greatly from the European law of war as it was in 1856, an artefact of the law of nations of the *respublica christiana*, embedded in the notion of a shared, pan-European Christian culture.[11] The European international law of war prior to 1856 largely treated those outside the European State system — notably American Indians and Muslims — as passive objects of the law, rather than as active subjects. The lesser protection offered to Muslims was exemplified by the crusade doctrine within the *jus ad bellum*, which legitimized war against Islam as 'just war', a manifestation of God's disapproving judgment.[12] The humanist trend of Europe's early Renaissance began to erode this asymmetry. Vittoria, while not countenancing the assimilation of treatment of Christian and Muslim men, the latter being infidel, suggested that it was unlawful to kill Muslim children (who are innocent) and women (who are presumed innocent).[13] Henry Dunant's insistence at Solferino in 1859, however, that the humanitarian assistance he and others spontaneously organized to relieve the suffering of soldiers should be offered to "Frenchmen and Arabs, Germans and Slavs" alike was, however, fundamentally different.[14]

What motivated Dunant's humanitarian response? Undoubtedly, Dunant was himself driven by a basic internationalism. What is often overlooked, though, is the extent to which his internationalism was coloured by a Christian ethic. The first steps towards a humanist international law limiting the conduct of war were explicitly framed in terms of "Christian charity".[15] Prior to founding the Red Cross movement, Dunant had founded an internationalist organization called the *Alliance universelle des Unions chrétiennes de jeunes gens* (Christian Unions), the purpose of which was to organize Christian youth on an international scale to perform works of Christian charity.[16] Similarly, while Dunant's primary purpose in travelling to Solferino

11 See for example Ahmed Rechid, "L'Islam et le droit des gens", *Recueil des Cours*, 1937-II, p. 371, pp. 378-380.

12 See Johnson and Kelsay, *op. cit.* (note 2); see also de Taube, *op. cit.* (note 8), pp. 387-390.

13 F. Vittoria, "The second relection on the Indians, or on the law of war made by the Spaniards on the barbarians" in A. Carnegie (ed.), *De Indis et de iure belli relectiones* (trans. J.P. Bate), New York, 1917, p. 179 (36).

14 H. Dunant, *A Memory of Solferino*, ICRC, 1986 (first published in French in 1882), excerpted in Pierre Boissier, *Histoire du Comité International de la Croix-Rouge: De Solferino à Tsushima*, Henry Dunant Institute, Geneva, 1978, p. 35. See also *ibid.*, p. 213, on the differing approaches to the European and Ottoman powers in the provision of medical assistance during the Crimean War.

15 *Ibid.*

16 *Ibid.*, pp. 11-12. See also ICRC, *La guerre et la charité*, ICRC, Geneva, 1866.

was to meet with Napoleon III to receive his authorization for a speculative business venture in Algeria, he was also propelled by an intention to deliver to the Emperor a manuscript he had written, entitled *L'Empire de Charlemagne rétabli ou Le Saint-Empire Romain reconstitué par Sa Majesté l'Empereur Napoléon III*.[17] The common thread between the humanitarian movement born at Solferino and Dunant's vision of a reinstated pan-European Christian empire under Napoleon III's leadership was Dunant's faith in the application at the international level of an "*esprit du christianisme*".[18] The Red Cross was not, in Dunant's conception, a purely secular organization, but an international body of 'Samaritans'[19] in the best tradition of Christian charity, tending to the wounded, sick and vulnerable. Such an essentially Christian enterprise could not, it would seem, easily accommodate Islamic participants or values.

If we look closely, however, we find Islamic roots subtly intertwined with these Christian roots from the very beginning. Boissier's account of the Battle of Solferino in his *History of the International Committee of the Red Cross* encapsulates the subconscious contrasting of the Christian humanitarian movement with an Islamic 'other'. Boissier hints that the terrible casualties at Solferino which prompted Dunant's humanitarian response were the result of the refusal by Islamic troops, fighting for Napoleon III, to give their Austrian adversaries quarter, despite the Austrian commander's appeal for respect for the "*droit des gens*".[20] Other sources suggest that the casualties resulted from the unexpected French tactics of shelling the Austrian reserve lines.[21] Whatever the truth, Boissier's account points to an early and fundamental distinction between Islamic 'barbarism' and Christian 'charity'.

Islamic players were confined to this passive role of 'other', against which the international humanitarian law movement contrasted and defined itself, for some time. No Islamic States were present at the Conference held in Geneva in 1863 which gave birth to the Red Cross Committee. Turkey did, however, ratify the 1864 Geneva Convention in 1865.[22] Persia followed in 1874,[23] the same year that Turkey was present at

17 See Richard Deming, *Heroes of the International Red Cross*, ICRC, New York, 1969, pp. 5, 8-10, 14.

18 Dunant writing in *Notice sur la Régence de Tunis* (1858), quoted in Boissier, *op. cit.* (note 14), p. 17.

19 Dunant writing in *La guerre et la charité*, *op. cit.* (note 16).

20 Boissier, *op. cit.* (note 14), pp. 24-25.

21 See, for example, Deming, *op. cit.* (note 17), p. 7.

22 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, Geneva, 22 August 1864. Turkey ratified the Convention on 5 July 1865.

23 On 5 December 1874.

the Brussels Conference which was extremely significant in the codification of the laws and customs of war. In 1868, Turkey took part in both the Conference revising the Geneva Convention[24] and the St Petersburg Conference,[25] which famously defined the parameters of the humanitarian law of war by declaring "[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".[26] In all these fora, though, Islamic participants played only minor roles. Moreover, what contribution they made was framed not in any Islamic discourse, but in the discourse of the European State system. Islamic players and Islamic rhetoric wielded little power or influence within this system, and correspondingly little power in the development of international humanitarian law.

The very possibility of achieving effective participation by Islamic players within the new IHL framework was doubted by many of the European powers. The French representative in Constantinople, Jägerschmidt, wrote to the Red Cross International Committee on 15 March 1868, explaining why he saw little prospect of successfully establishing a National Red Cross Society in Turkey:

"*On a, dans toute affaire, à lutter à Constantinople contre une force d'inertie dont rien ne peut donner l'idée; et il faudrait des efforts inouïs pour obtenir la formation sur le papier d'un comité qui ne fonctionnerait jamais et dont les Turcs ne comprendront jamais l'utilité, eux qui ramènent tout à la Providence et n'admettent pas qu'on cherche à se soustraire à ses décrets. Je sais toute la peine que nous avons eue à obtenir de la sorte qu'elle adhérât à la Convention de 1864, à laquelle elle ne comprenait absolument rien; elle a fini par se rendre lorsqu'on lui a expliqué qu'il ne s'agissait que d'apposer sa signature, pour faire comme tout le monde, au bas d'un acte d'accession qu'on lui a présenté et qui ne devait l'engager en rien.*"[27]

Jägerschmidt's comments indicate a belief not only that active participation in IHL mechanisms was beyond the capacities of the Turkish State, the sick man of Europe, but also that the new IHL approach was beyond Turkish comprehension. In effect, the belief was that Christian charity was

24 Turkey was one of the original signatories to the *Additional Articles relating to the Condition of the Wounded in War*, Geneva, 20 October 1868.

25 Turkey also signed and ratified the *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, St Petersburg, 29 November/11 December 1868.

26 *Ibid*.

27 Quoted in Boissier, *op. cit.* (note 14), p. 288.

not to be expected of Muslims. International humanitarian law was — and, so believed those like Jägerschmidt, should remain — a Christian law.

This gulf between Christian players and Islamic others was bridged largely as a result of the leadership of Gustave Moynier, who effectively led the Red Cross movement after Dunant was bankrupted. Moynier acknowledged that international humanitarian law was a Christian artefact,[28] but insisted that its universal application was justified on the basis both of "*la science positive*"[29] and a natural law ("*la philosophie naturelle*")[30] transcending the particularities of any one religion. The humanitarian trend in the international law of war was, he argued, an expression of "*la conscience publique*",[31] "*d'idées d'ordre supérieur*"[32] and of "*solidarité internationale*"[33]. As he saw it in 1888,

"[l]es promoteurs de la Croix-Rouge ne lui ont imprimé le sceau d'aucune religion particulière, et le drapeau arboré en 1863 doit être, malgré sa croix, considéré comme non moins neutre en religion qu'en politique."[34]

The importance of Moynier's contribution to the definition of the Red Cross movement was twofold. First, his leadership effected a change in the normative basis of the movement away from Christianity to a universal secularism predicated on a combination of natural law and international positivism. Second, Moynier worked to ensure the application of this law to and by followers of all religions, including Islam: he was a prime mover in the establishment of an Ottoman Red Cross Society in 1868.[35]

It was also during Moynier's tenure that civil war broke out in the Balkan region of the Ottoman Empire in 1875 between Christian insurgents and the Islamic government, the Sublime Porte. This civil war confronted the Red Cross movement with two key but interrelated issues: the relationship between the humanitarian principles of the movement and a) sovereignty, and b) Christianity. By forcing the Red Cross movement to address

28 In 1888 Moynier wrote that in the Red Cross "*il est impossible de ne pas voir un produit de la civilisation chrétienne*": G. Moynier, *Les causes du succès de la Croix-Rouge*, monograph, Geneva, 1888, republished as "Introduction" in *Le Mémorial des vingt-cinq premières années de la Croix-Rouge*, ICRC monograph, Geneva, 1888, excerpted in Boissier, *op. cit.* (note 14), p. 455.

29 ICRC, *La neutralité des militaires blessés*, pamphlet presented at the Paris Exhibition, excerpted in Boissier, *op. cit.* (note 14), p. 268.

30 *Ibid.*

31 *Ibid.*, p. 267.

32 *Ibid.*

33 ICRC, *La guerre et la charité*, excerpted in Boissier, *op. cit.* (note 14), p. 262.

34 *Ibid.*

35 *Ibid.*, pp. 287-289.

these issues, the Balkan crisis provided the occasion for a fundamental definitional process of international humanitarian law.

The Balkan crisis tested the relationship between the humanitarian principles of IHL and sovereignty on at least three fronts.

First, it raised the question of whether the Red Cross mandate extended to internal conflicts or was limited to armed conflict between States. If it was confined to inter-State conflict, as the traditional approach to sovereignty suggested, then the Red Cross had no role to play in the intercivilizational conflict raging within the Ottoman Empire's boundaries. Moynier's advocacy of Red Cross intervention in the monthly *Bulletins* sent to the National Red Cross Societies[36] was crucial in ensuring that the Red Cross *did* assume a role in the conflict, setting an important precedent. Moynier justified this interpretation of the mandate by reference to a universalist humanism transcending statism. In Moynier's opinion, accession to the 1864 Geneva Convention did not simply establish rules applicable in situations of international armed conflict, rules applicable *between* sovereign States: it amounted to a "profession of faith, a moral code" binding in *all* circumstances, even *within* sovereign States.[37] Humanitarian principles thus transcended sovereignty — at least at an epistemological level; but those principles could not necessarily be applied unless States had submitted themselves to that application.

Second, the crisis highlighted the role of National Red Cross Societies in States not directly participating in, but affected by, a conflict: the massive flow of refugees into countries abutting the areas of hostilities, such as Serbia and Montenegro, raised the question of whether National Societies owed a duty of assistance to those fleeing to their countries. The quick response of the Red Cross, including its intervention in Montenegro to help establish a National Society there, established a clear precedent that National Red Cross Societies should assist in these situations.[38] Their primary allegiance was to the movement and its humanitarian principles, not to the nation-State within which they were constituted.

Third, the crisis served to emphasize the extent to which the Red Cross movement was dependent on the nation-State system as a host and resource for its activities. This became clear in Turkey. The problem was not simply, as

36 *Ibid.*, pp. 393-394.
37 *Ibid.*, p. 394.
38 *Ibid.*, pp. 391-398.

Jägerschmidt's comments had in part suggested, one of bureaucratic inertia. Rather, as the founder of the Ottoman Red Cross Society himself recognized, the core problem was the complete lack of solidarity between Ottoman subjects (who would be expected to supply medical aid to wounded soldiers through the Society) and the Ottoman army.[39] The mechanisms which had been chosen for the implementation of international humanitarian law — standing National Societies working closely with centralized government bureaucracies to provide medical assistance — were (and remain largely) rooted in the context of modern nation-States. They presupposed the nationalist solidarity that had been developed by the centralized States of Western Europe. The Ottoman Empire was not a modern nation-State, but an empire made up of diverse national units held together by Islamic faith and rule. This different constitutional basis affected the very potential for the implementation of humanitarian law by the prime Islamic player of the day. Thus the effective implementation of humanitarian principles was constrained by the framework of sovereignty within which IHL was embedded.

The Balkan crisis also raised the question of the relationship between IHL's humanitarian principles and Christianity.

Moynier's approach to the question of Red Cross involvement in internal conflict was crucial in taking the movement beyond Dunant's Christian internationalism. Moynier portrayed international humanitarian law as a universal moral code, transcending religious divisions. By acceding to the 1864 Geneva Convention, the Ottoman State had spontaneously undertaken to observe this code, not only in its dealings with Christian States, but also in its internal affairs.[40] Moynier's strategy inherently presented the Red Cross as not simply a universal, but also a *secular*, organization.

It was, however, the very emblem of the Red Cross which became a semiotic cipher for this controversy. In many ways the controversy over the emblem, still with us today, cuts to the central question in this study: whether international humanitarian law, as an artefact of Christian civilization, can accommodate other civilizations.

The emblem became an issue after Montenegro and Serbia, which were parties to the 1864 Geneva Convention, intervened in the civil war on

39 *Ibid.*, p. 288.

40 In 1882, in *La Croix-Rouge, son passé, son avenir*, Moynier repeated this sentiment, characterizing the Convention as "*une déclaration, comme une reconnaissance de certaines lois d'ordre supérieur, auxquelles telle ou telle nation s'honore de se soumettre spontanément, et dont le caractère impératif est absolu.*" *Ibid.*

the side of the Christian minorities. Turkish troops failed at first, in violation of Turkey's obligations as a party to the Geneva Convention, to recognize the protection conferred by the red cross emblem. Despite new Turkish laws clarifying this protection and the penalties for its violation adopted under pressure from the International Committee of the Red Cross (ICRC), the violations continued. These violations were not due to the ignorance of the troops, but to their deliberate targeting of the cross, which "gave offence to Muslim soldiers",[41] largely because they associated it with the Crusades. Although all parties agreed that the red cross had not been adopted in 1863 as a consciously religious symbol, they could not fail to see that such protestations were having little effect on the offence felt at the sight of the cross by Turkish troops in the field or the resultant bloodshed. So dire was the situation that when the Red Cross of Romania offered to send badly needed medical supplies to the Ottoman Society, the latter had to refuse because it could not guarantee the safety of the Romanian personnel.[42] The only solution was to push for the immediate introduction of a second protective emblem with an Islamic heritage which would at least allow the Turkish Society to carry out its work, namely the red crescent.

In throwing its weight behind this proposal, the ICRC adopted the fundamentally pragmatic approach to the realization of humanitarian ideals which it continues to manifest to this day. In the January 1877 edition of the *Bulletin* it wrote to the National Societies that if the signatory States wished:

"que les principes d'humanité qu'ils professent, pénètrent de proche en proche chez tous les peuples, quelle que soit leur religion, une question de forme extérieure ne doit pas être un obstacle insurmontable au développement de ces principes chez les peuples non chrétiens… On pourrait admettre même la modification de la croix rouge pour les États non chrétiens."[43]

After some correspondence,[44] the utilization of the red crescent in place of the red cross was allowed for the duration of the conflict. When Russia entered the war to lend further support to the Slav Christian minorities, it carefully negotiated guarantees with the Turks for the mutual recogni-

41 *Message from the Sublime Porte to the Federal Council, 16 November 1876*, quoted in the *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877, pp. 35-37, p. 36.

42 Boissier, *op. cit.* (note 14), p. 401.

43 *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877; see also Boissier, *op. cit.* (note 14), p. 402.

44 See communications reproduced in the *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877, pp. 35-37; No. 30, April 1877, pp. 39-47; No. 31, July 1877, pp. 83-91; No. 32, October 1877, pp. 147-154.

tion of the two emblems (red cross and red crescent), though to little avail, since the massacres of red cross wearers continued.[45] The red crescent had, however, arrived, and remains to this day recognized as a distinctive protective emblem alongside the red cross.

Why was the emblem such a sticking point? At one level, the answer is obvious — the historical associations of the cross and its inappropriateness as a symbol of impartiality and neutral assistance. That the original committee should have chosen it as their emblem indicates, above all, that their internationalism was, at the very least, a subconsciously European phenomenon, taking no account of Islamic (or other) sensibilities. Even more, though, the emblem and its interpretation became a cipher for a larger debate about the self-definition of international humanitarian law. On the one hand, there were those (both European and Islamic) who recognized the cross as a religious emblem and suggested that different religions and civilizations should be accorded equal weight within IHL by recognition of their own emblems. Others adopted a more modernist, secularist approach, suggesting that there was no role for religious symbolism within IHL, which represented a natural human law that transcended religious particularities and should be represented by one unitary symbol of humanitarianism. The emblem was — and remains — important because it raises the issue of how a secular universalist system of governance and law can accommodate religious values. How can the two systems coexist? It is this question that lies at the heart of the encounter between Islam and European law within IHL.

What emerges from this review of the early years of international humanitarian law is the important role of Islam as an 'other' against which the law could define itself. At first, this took on the traditional dynamics of orientalism, in which the European Christian system drew strength into its own self-image (Christian 'charity') from denigration of the oriental Islamic 'other' (Turkish 'barbarism'). While both the Ottoman Empire and Persia participated in the IHL system on a formally equal footing, IHL was seen as inherently alien to Islamic values and systems.

Slowly, however, encounters with Islam and the universalizing tendencies of IHL's proponents, particularly Gustave Moynier, forced the law to adopt a secular modernism which transcended this primitive orientalism. IHL began to define itself in a way that attempted to accommodate the differences of the Islamic system, whether they were semiotic (such as the

45 See Boissier, *op. cit.* (note 14), p. 405.

emblem) or systematic (such as the difficulty of working within Ottoman administrative structures). This forced process of self-definition contributed much to the identity of the Red Cross movement and shaped the operation of much of IHL as we now know it. What remained troubling, however, was that the entire framework of action within IHL was based upon the notion of nation-State sovereignty, drawn from a European Christian tradition and alien to Islam.

1899-1945: Islam within international humanitarian law - umma, nation-States or civilization?

There are similarities between the roles Islamic representatives played in the emergence of international humanitarian law until 1899 and in its subsequent development. In both cases, that role appears minor at first sight; in both cases, Islamic participation was concerned with issues central to IHL and the form it was to take. From 1899 to 1945, the key issue was the compatibility of IHL, predicated on humanism and sovereignty, with Islam, predicated on the word of Allah and a universal community of faith.

Two Islamic delegations — from the Ottoman Empire and Persia — were present at the 1899 and 1907 Hague Peace Conferences.[46] Between them, they represented the majority of Muslims then on earth and were accordingly perceived as the representatives of Islam.[47] All the same, the individual delegates were both westernized and westernizers.[48] Both delegations were active in all domains of the Conference, though as 'small powers' both were relatively unassertive. However, their comments were particularly important in continuing the discussion on the ability of international humanitarian law to accommodate differing religious heritages.

As a result of the Islamic delegations' interventions, the Hague Peace Conferences officially confirmed the principle of religious non-discrimination as a central tenet of IHL. At the 1899 Conference the Persian delegation obtained assurances that the rule against the destruction of cultural or religious property did not distinguish mosques from other types of religious

46 See Arthur Eyffinger, *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World,* Kluwer Law International, The Hague, 1999; William I. Hull, *The Two Hague Conferences and their Contributions to International Law*, Ginn & Company, Boston, 1908; reprinted Kraus Reprint Co., New York, 1970.

47 Compare Eyffinger, *op. cit.* (note 46), p. 97.

48 *Ibid.*, pp. 170-171, 193-194.

property.[49] Both the Ottoman and the Persian delegations secured recognition by some other delegations of their own protective emblems (the red crescent and the red lion and sun, respectively) in place of the red cross emblem.[50] This suggested that international humanitarian law could accommodate a range of different religious heritages and civilizations. However, the proliferation of neutral emblems threatened to undermine IHL's efficacy by abandoning the idea of one simple, universally recognized emblem. Discussion focused, therefore, on whether the religious overtones of the red cross were real or perceived. While other non-European delegations, such as the Japanese and Chinese, indicated that their States attached no religious significance to the sign of the red cross,[51] the Islamic States (and Siam) refused to accept the cross alone.[52] Given their stiff opposition, an uneasy compromise was reached. In 1899, the red cross remained the only formally sanctioned emblem, while some delegations gave more or less open recognition to the red crescent and red sun and lion. The 1906 Geneva Revision Conference specifically restated the general rule of the unity of the distinctive sign, while authorizing the Ottoman Empire and Persia to formulate reservations.[53]

The semiotic supremacy of the cross was simultaneously reinforced by formally recognizing it as a non-religious symbol: the inversion of the Swiss flag, long associated with neutrality.[54] In fact, it is far from clear whether the red cross was conceived as the inversion of the Swiss heraldic emblem, as the 1906 Conference suggested. The discussions at the 1863 Conference which led to the adoption of the emblem were poorly minuted, but what we do know of them suggests that the path to the emblem almost certainly did *not*

49 See Hull, *op. cit.* (note 46), pp. 253-4. Ironically, throughout the 1899 Conference, the Turkish delegation was dogged by allegations of religious discrimination within the Ottoman Empire of the Armenian Christian minority: see Eyffinger, *op. cit.* (note 46), pp. 349-351.

50 Eyffinger, *op. cit.* (note 46), pp. 268, 277-278, 279.

51 Boissier, *op. cit.* (note 14), p. 499.

52 See Hull, *op. cit.* (note 46), pp. 114-115, 118.

53 See François Bugnion, "The red cross and red crescent emblems", *International Review of the Red Cross*, No. 272, October 1989, p. 408; Hull, *op. cit.* (note 46), p. 118; see also *Actes de la Conférence de Révision réunie à Genève du 11 juin au 6 juillet 1906*, Imprimerie Henry Jarrys, Geneva, 1906, pp. 17, 63, 160-164, 175, 199, 214, 260 and 286.

54 See Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, Art. 18: "As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, shall be retained as the emblem and distinctive sign of the Army Medical Services."

lead from the Swiss flag.[55] What is more important, though, than whether the emblem was *originally* conceived as a Christian emblem is how quickly and forcefully its secular interpretation was adopted as official doctrine, as the 1906 Conference brought home.[56]

The debates over the emblem also revealed that the fundamental divisions within the Islamic community were not simply religious, but civilizational. Two emblems, not one, were tacitly accepted as emblems for the Islamic powers involved in the conferences, Turkey and Persia. Their emblems — the red crescent and the red lion and sun — were representative not simply of different strands within Islam, but of deeper civilizational heritages pre-dating Islam. This was only reinforced by Turkey's retention of the red crescent following Ataturk's secularizing reforms in the 1920s.

This emblematic differentiation pointed to deep divisions within the notional *umma*. Those divisions began to multiply as the fracturing forces of modernity and nationalism took hold within the Islamic world. Bulgaria, an Ottoman principality still under Turkish suzerainty, was represented by a separate but subordinate sub-delegation in 1899. In 1907 the seats and signatures of her delegation were counted as independent of those of her suzerain.[57] The unity of the *umma* as an agent within the international humanitarian law system was further challenged by the creation of new nation-States in the post First World War peace conferences[58] and the abolition of the Caliphate, though this proliferation of Islamic nation-States did increase the absolute number of Islamic delegations involved in international conferences.

This quickly had important ramifications, leading to the official, rather than tacit, recognition of the use of the red crescent and red sun and lion by those States already using them (Turkey and Egypt; Persia), in Article 19 of the Geneva Convention of 27 July 1929.[59] On the face of it, the proliferation

55 See Boissier, *op. cit.* (note 14), pp. 105-107, 499.

56 Boissier suggests that the delegates at the 1899 Conference believed the version of events they enshrined, despite its inaccuracy. He notes that it was a version of events which "*Moynier lui-même a très curieusement accréditée dans plusieurs de ses écrits.*" Given Moynier's other efforts to promote the secularist moment in the Red Cross movement, it is perhaps not so curious that he should have accredited such a secularist version of events: *ibid.*, p. 499.

57 See Hull, *op. cit.* (note 46), pp. 11, 13; Eyffinger, *op. cit.* (note 46), pp. 96-99.

58 See D. Lloyd George, *The Truth About the Peace Treaties*, Victor Gollancz, London, 1938, especially at Chapters XXII-XXVI.

59 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, Art. 19:

"As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed

of Islamic States therefore increased Islamic power to shape international humanitarian law and reinforced the protection of Islamic identity within the IHL system.

The reality was, however, quite different. The grudging acceptance by European powers of the formally equal participation of Islamic States within the system of public international law came only "at the moment of the decline of the power which gave it meaning, the Ottoman Empire".[60] The 'integration' of Islamic States into the modern community of nations in fact amounted to a form of 'subjugation', a kind of Europeanization predicated upon the reconstitution of the Islamic *umma* in distinct nation-State units.[61] Islamic participation in the nation-State system and in fora developing the body of IHL did not, this interpretation suggests, start from a position of equality.

Mohammed Bedjaoui has suggested that the nation-State system drove Islamic law from the field of public law at the constitutional, administrative and international levels and produced Islamic scholarship characterizing itself as a *merely* private law.[62] In many respects this appears true, at least in relation to humanitarian law. The participation of Islamic delegations in the inter-war IHL conferences was framed not in terms of Islam but of public international law, and few Islamic scholars addressed, during this time, the relationship between classical Islamic doctrine and humanitarian law. As John Kelsay emphasizes, Islamic scholars' participation in the development of IHL since this period has worked from *within* this law and has not attempted, until recently, to develop an independent Islamic approach to limiting the conduct of armed hostilities.[63]

forces. Nevertheless, in the case of countries which already use, in place of the Red Cross, the Red Crescent or the Red Lion and Sun on a white ground as a distinctive sign, these emblems are also recognized by the terms of the present Convention."

See *Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la Révision de la Convention du 6 juillet 1906 pour l'Amélioration du Sort des Blessés et Malades dons les Armées en Campagne, et pour l'Elaboration d'une Convention relative au Traitement des Prisonniers de Guerre, réunie à Genève du 1er au 27 juillet 1929*, Imprimerie du Journal de Genève, Geneva, 1930, pp. 19, 247-254, 570, 615 and 666.

60 John Strawson, "Encountering Islamic law", available at ‹http://www.iiu.edu.my/deed/lawbase/jsrps.html›.

61 Majid Khadduri, "Islam and the modern law of nations", *American Journal of International Law*, Vol. 50, 1956, pp. 353-372, p. 358; Strawson, *op. cit.* (note 60), notes that Persia adopted a constitution based on the Belgian model in 1906, and was followed by Egypt in 1923.

62 Bedjaoui, *op. cit.* (note 2), pp. 295-296.

63 See John Kelsay, "Islam and the distinction between combatants and noncombatants", in Johnson and Kelsay, *op. cit.* (note 2), p.197, pp. 207-8.

There was, however, a significant trend between the wars that sought a way of retaining a distinctly Islamic character for this participation within public international law. With the *umma* divided, how could Islamic nation-States maintain and represent their collective identity within public international law? The answer presented by a number of Islamic scholars drew on Articles 9 and 38 of the Statute of the Permanent Court of International Justice. Article 9 provided:

"At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world."[64]

Article 38(3) then provided that the Court should apply, *inter alia*, "[t]he general principles of law recognized by civilized nations". These Islamic scholars argued that Islam constituted precisely one of the 'main forms of civilization' to which the Statute referred, and that Islamic law was one of the 'principal legal systems of the world', and that, accordingly, the Court was obliged to recognize Islamic law as a *source* of international law.[65] The idea was not confined to scholarly discussion, but was also formally submitted to the League of Nations and then, on its replacement, to the Conference of States creating the United Nations.[66]

This approach involved a characterization of international law as a universal system reaching across multiple civilizations, and thereby offered advantages to Islam by placing it on a level footing with European civilization and underscoring the supranational character of Islam within the public international legal system. It also represented two significant concessions: first, an apparent abandonment of any objection to the validity of the public international law system in Islamic States based on its cultural, historical and religious specificity (an argument which was to arise again in the context of human rights); and a recognition of the normative superiority of a system of secular law above Islamic law, at least between States.

64 Statute of the Permanent Court of International Justice, adopted pursuant to Article 14 of the League of Nations.

65 See "Proceedings of international conferences on comparative law of 1932, 1937, in *Bulletin trimestriel de la Société de législation comparée*, 1937, pp. 346-7.

66 See Memoranda presented in September 1939 to the League of Nations and on 17 April 1945 to the United Nations Conference in San Francisco; see also Mahmassani, *op. cit.* (note 2), p. 222. Articles 9 and 38(1)(c) of the Statute of the International Court of Justice, appended to the United Nations Charter, reproduce Articles 9 and 38(3) of the PCIJ Statute almost verbatim.

In the narrower sphere of IHL, this *civilizational* approach played out in two ways: first, in the active and routine participation of Islamic States in the State-based IHL system, signifying an accommodation by Islamic actors of international humanitarian law as a means of constructively engaging with non-Islamic actors within the international community; and second, in the formal recognition of the red crescent and red sun and lion, the protection of civilizational symbols within this larger IHL model. Nevertheless, the dominant characteristic of the encounters between IHL and Islam between 1899 and 1945 was the increasing importance of nationalism in the approach adopted by Islamic players.

1945-1977: Islam, nationalisms and international humanitarian law

From 1945 to 1977, Islamic representatives played important roles in reshaping international humanitarian law to deal with the realities of post-colonial conflict. Their participation was marked, however, not by transnational Islamism but by nationalism.

The controversies[67] which led to the 1973 call[68] for a diplomatic conference to amend the 1949 Geneva Conventions[69] included significant conflicts involving Islamic nationalist movements: the Arab-Israeli conflict that broke out in 1948, which squarely raised the question of the threshold of application of humanitarian law and the place of national liberation movements within it;[70] the Suez crisis of 1956; the Indo-Pakistani conflict of

67 See Elihu Lauterpacht, "The legal irrelevance of the 'state of war'", *ASIL Proceedings* 1968, pp. 58-68; Julius Stone, *Of Law and Nations*, 1974, p. 427 ff. Particularly important in this debate was the contribution by the Egyptian legal expert Georges Abi-Saab, both in his writings (see particularly G. Abi-Saab, "Wars of national liberation and the laws of war", *Annales d'Études Internationales*, Vol. 3, 1972, p. 93) and as an Egyptian delegate at the 1974-1977 Conference which led to adoption of the two Additional Protocols: see Jean J.A. Salmon, "Les guerres de libération nationale" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 55. See also the Reports by the Secretary-General entitled *Respect for Human Rights in Armed Conflict*, e.g. UN A/7720, 20 November 1969.

68 See Res. XXIII of 12 May 1968, *Final Act of the International Conference on Human Rights*, Tehran, 22 April - 13 May 1968 (A/Conf. 32/41); UNGA Res. 2444 (XXIII), 13 January 1969.

69 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; *Official Commentary to the 1949 Geneva Conventions*, Jean Pictet (ed.), ICRC, Geneva, 1965.

70 Dietrich Schindler, "State of war, belligerency, armed conflict" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 3 and 8.

September 1965;[71] and especially the Algerian war of liberation in the late 1950s and early 1960s, in which France's failure to recognize Algerian belligerency prevented Islamic insurgents from availing themselves of numerous protections under IHL.

At the resulting conference, Islamic participants — both States and non-State entities (most notably the Palestine Liberation Organization (PLO)) — played an important role in formulating Article 1 of Additional Protocol I to the Geneva Conventions,[72] which extended the protections of IHL to those fighting colonial domination, foreign occupation or racist regimes.[73] Article 1 (and even the presence of non-State entities) represented a fundamental shift in humanitarian law, beyond the statist model upon which it had long been predicated. This radical shift was, in many ways, the direct product of pressure from Islamic players. But it is crucial to realize that the identities of the latter were based primarily not on Islam, but on nationalism.[74]

The acceptance by international humanitarian law of the role of non-State entities was reflected in another shift, legitimizing the different methods of warfare such entities were forced to adopt. While modern nation-States could conduct conventional warfare through standing armies, non-State entities lacking such a centralized military bureaucratic infrastructure were often compelled to adopt guerrilla tactics, beyond what was permitted under the 1949 Geneva Conventions. As a result, the forms of violence to which they had recourse were largely outside IHL. Islamic participants played an important role in bringing these activities within the

71 *Ibid*., pp. 9-10.

72 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977.

73 See Protocol I, *op. cit*. (note 72), Art 1(4). This text was adopted in draft in 1974 by a vote of 70 in favour (22 of which were States with an Islamic majority), 21 against (0 Islamic States) and 13 abstentions (1 Islamic State). At the final vote in 1977, the same text was passed by 87 for (24), 1 against (Israel), and 11 abstentions (0): see Salmon, *op. cit*. (note 67), pp. 65-66. The PLO was permitted to send a delegation to the conference (as were other recognized national liberation movements) and was seen by many of the Western States as the intended beneficiary of this expansion of international humanitarian law: see George H. Aldrich, "Prospects for United States ratification of Additional Protocol I to the 1949 Geneva Conventions", *American Journal of International Law*, Vol. 85, No. 1, 1991, p. 6. On the contribution by Georges Abi-Saab, Egyptian delegate, see *op. cit*. (note 67).

74 See, for example, Article 22 of the Palestine National Covenant, 1968, in Yehuda Lukacs (ed.), *Documents on the Israeli-Palestinian Conflict, 1967-83*, Cambridge University Press, Cambridge, 1984, p. 142.

scope of IHL, particularly in reformulating the notion of 'combatant'.[75] Interventions by Islamic delegates were particularly notable with regard to the legitimacy of the use of disguise and conditions relating to the open bearing of arms, issues Islamic national liberation groups (such as the PLO and Algerian groups) had already had to confront during operations.[76]

The Arab-Israeli conflict coloured all Islamic participants' interventions during the 1974-1977 Conference and the other participants' responses to them. The issue of the commission of inquiry was one example. Towards the end of the Conference, the Third World countries suggested making obligatory the international commission of inquiry mechanism that was to be established under draft Article 90 of Protocol I — at least with respect to violations of humanitarian law in occupied territories. What could have been a relatively 'neutral' issue thus became imbued with important political consequences, since any such mandatory commission of inquiry might quickly be used in the Arab-Israeli context. The proposal was rebuffed by the joint efforts of the Soviet bloc (which was by then suspicious of international arbitration *per se*) and the West, which saw it as an anti-Israeli ruse.[77] In this way, Islamic nationalisms may have unintentionally impeded the development of humanitarian law, at the same time as they were making the enormous contributions discussed above.

By 1977, Islamic players were clearly committed to working within the IHL framework. Not only were they using the nation-State system upon which it was predicated to develop the law to their own ends, but they were also employing a deliberately secular, humanist discourse as a means of justifying their actions to the community of nations. So much is clear from Yasser Arafat's 1974 speech to the United Nations General Assembly, in which he attempted to portray the Palestinian national liberation movement as a nationalist movement justified by humanist principles rather than religious sentiment:

"Since its inception, our revolution has not been motivated by racial or religious factors. Its target has never been the Jew, as a person, but racist

75 Protocol I, *op. cit.* (note 72), Arts 42-45.

76 See Salmon, *op. cit.* (note 67), pp. 103-104, 108-109. At one point the Arab countries presented a proposal for the absolute prohibition of attacks on objects designed for civilian use, such as houses, dwellings and means of transport, irrespective of whether they were used for military purposes: see Charles Lysaght, "The attitude of western countries" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 349, p. 364.

77 See Luigi Condorelli, "Les pays afro-asiatiques" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 386, pp. 394-5.

Zionism and aggression. In this sense, ours is also a revolution for the Jew, as a human being. We are struggling so that Jews, Christians and Muslims may live in equality, enjoying the same rights and assuming the same duties, free from racial or religious discrimination."[78]

Arafat's words reflect the trend of the previous 75 years: the suppression of particularized Islamic identity within the discourse of international humanitarian and public international law more generally, perhaps in an effort by Islamic actors to use those systems to their own ends, or perhaps a less controlled process of civilizational subjugation. However, at strategic points during the 1974-1977 conference, signs began to emerge of a fundamental change of attitude by some Islamic players towards the public international legal system in general, and especially towards IHL; a number of them began in particular to portray the Islamic legal order as an *alternative* to international humanitarian law rather than as a contributor to it. The records of discussions on Additional Protocol II,[79] which regulates internal conflicts, contain a few crucial indications of the emergence of this scepticism towards IHL.[80] These were early signs of a revolutionary move by some Islamic players away from the humanist basis of the IHL legal order to the theocratic normativity of Islam. The shift took root in the years to come and, as we shall see, now poses a fundamental challenge to the secular universalism of humanitarian law.

1977-1998: Humanist and religious universalisms – competing or compatible?

The Islamic Revolution in Iran signalled a revival of theocratic Islamic ideology and politics which fundamentally changed the relationship between Islamic players and the public international legal system, including IHL. Islam and humanitarian law are increasingly treated as competing normative systems. In this section, I examine two specific episodes to demonstrate this rivalry: the Iran-Iraq war of 1980-1988 and the gender controversy in the negotiation of the Rome Statute of the International Criminal Court.

78 Lukacs, *op. cit.* (note 74), p. 174.

79 *Op. cit.* (note 72).

80 See Howard S.Levie (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Martinus Nijhoff, Dordrecht, 1987, p. 5 (Egypt on compatibility of draft Protocol II with Islam), p. 65 (Saudi Arabia on compatability of Article 1 with Islamic law doctrine of full respect and protection for all human beings regardless of colour or race) and p. 301 (Saudi Arabia on penal provisions).

Following the Islamic Revolution, the Islamic Republic of Iran appeared to abandon nationalism in favour of a radical and universalist Islam. This shift from nationalist particularity to Islamic solidarity was expressed within the discourse of international humanitarian law by the note of 4 September 1980 in which Iran announced that it was adopting the red crescent emblem as the distinctive sign of its armed forces' medical services, instead of the red lion and sun.[81]

The conflict which broke out between Iran and Iraq in 1980 raised the question of how this Islamic solidarity would affect each party's conduct during hostilities. Outwardly, at least, both States appeared to be willing to work within the framework of international humanitarian law, as numerous public documents show.[82] The substantive reality was, however, quite different, both sides apparently violating IHL on a number of occasions.[83] Such discrepancies between rhetoric and action are not, unfortunately, unusual in IHL and do not tell us much about the commitment of either State to Islamic norms rather than those of IHL.

The rhetoric directed not at the external, international community but at each party's own internal constituency is more revealing. In domestic fora, the Iranian leadership consistently defined the war as a struggle to protect Islam against an "Iraqi non-Muslim Ba'thist" blasphemer (Saddam Hussein).[84] In contrast, the Iraqi leadership presented the war first as necessary to protect Iraqi sovereignty against an Iranian "revolution without borders" and later as a defence of Iraqi territorial integrity against Iranian aggression.[85] Iran looked to Islamic norms, while Iraq looked to public international law.

81 "Adoption of the red crescent by the Islamic Republic of Iran", *International Review of the Red Cross*, No. 219, November-December 1980, pp. 316-317.

82 See for example *Letter dated 28 June 1984 from the Deputy Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, UN Doc. S/16649, 28 June 1984; *Statement dated 17 July 1989 by the Foreign Ministry of the Islamic Republic of Iran*, UN Doc. S/20470, 19 July 1989, Annex.

83 See for example ICRC, Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of 12 August 1949 concerning the conflict between the Islamic Republic of Iran and Republic of Iraq, Geneva, 7 May 1983, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 978; and ICRC, Second Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of 12 August 1949 concerning the conflict between the Islamic Republic of Iran and Republic of Iraq, Geneva, 10 February 1984, reprinted in *ibid*., p. 982; see also UN Doc. S/RES/540 (31 October 1983).

84 See Shahram Chubin and Charles Tripp, *Iran and Iraq at War*, I.B. Tauris and Company Ltd., London, 1988, p. 38.

85 Kelsay, *op. cit*. (note 63), p. 213.

These different approaches were not, however, merely rhetorical. They also impacted on the conduct of each party within the hostilities. The Iraqi High Command justified its deliberate targeting of Iranian civilians to its own people through *Kriegsräson*, arguing that humanitarian constraints did not apply in a 'war of survival' and that it was legitimate to target Iranian civilians to reduce their support for their leadership's military policy.[86] The argument received short shrift in international fora.[87] The Iranian leadership conversely adapted the notion of a 'people's war' which the PLO and other Islamic national liberation movements had so successfully pioneered in the 1970s, giving it an Islamic twist.[88] Iranian military planners aimed, they announced, to "do away with conventional warfare methods" in favour of "Islamic warfare".[89] This had two crucial implications for Iranian war planning: first, victory was to be defined not by outcomes (destruction of the enemy's military) but by process (the manifestation of faith through self-sacrifice); second, an Islamic people's war permitted war only against the heretical Iraqi leadership and not the faithful Iraqi people, who could be turned against that leadership.[90]

In some ways, this approach seemed to sit comfortably with international humanitarian law, arguing as it did for a distinction between Iraqi civilians and military structures. As time went on, it became clear that there was one major disjuncture between the two approaches: the object of Iranian military action was not that identified in the St Petersburg Declaration — the weakening of the military forces of the enemy — but a personal manifestation of faith through the spilling of one's own, or an infidel's, blood.[91] Human life was not valued in and of itself, but as a manifestation of subjugation (*islam*) to Allah. This both encouraged self-martyrdom and characterized those lives not conducted in the spirit of *islam* as inherently disposable. Preferential treatment was to be given to 'believer' over 'loyalist' prisoners of war.[92] When it became clear in 1984 that the Iraqi *shi'i* would not revolt against their Ba'thist government, Iranian plan-

86 *Ibid*., p. 215; Chubin and Tripp, *op. cit*. (note 84), p. 60.

87 See for example UN Security Council Resolution 543, UN Doc. S/RES/543, 31 October 1983, para. 2.

88 Kelsay, *op. cit*. (note 63), pp. 215-216.

89 *Ibid*. See also Chubin and Tripp, *op. cit*. (note 84), p. 43.

90 *Ibid*., pp. 213-214; Chubin and Tripp, *op. cit*. (note 84), pp. 40-46.

91 See Chubin and Tripp, *op. cit*. (note 84), p. 40.

92 See *Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General*, UN Doc. S/16962, January 1985.

ners began, it now appears, to target civilians, beginning with the shelling of Basrah.[93]

The Islamic Revolution in Iran had, in this quiet way, flowed on into the norms of warfare. Iran had, in effect, issued a direct challenge to Islamic players to consider whether their conduct in war was governed by the norms of IHL or by Islam. No longer could Islamic players unequivocally accept that Islam was confined to the role of a contributor civilization under a neutral, secularist modern IHL canopy; instead, the two systems were now perceived to be in direct competition.

As IHL developed over the ensuing decade and the conduct in periods of armed conflict which it sanctioned became increasingly precisely defined, the question of gender relations became an important site of its contest with Islam. Nowhere was this more clear than in the negotiation of a Statute for an International Criminal Court at the 1998 Rome Diplomatic Conference ("Rome Statute").[94]

First, the gender controversy was triggered by the negotiation of provisions regulating gender balance in the personnel of the Court.[95] The Arab States opposed any attempt to impose a quota system. They successfully negotiated a compromise position removing the reference to gender and requiring States parties to take into account, in selecting the judges and other staff, the need for a "fair representation of female and male judges".[96]

Second, Islamic States challenged the definition of the term 'gender' itself and its application to substantive norms of criminality.[97] Many of them saw in the draft provisions of the Court's Statute a first step in the regulation by public international law of gender relations within their borders. While these States could accept that the application and interpretation of law by the ICC must be consistent with internationally recognized human rights, as a draft of the Statute provided, they could not accept (as the draft also pro-

93 See Kelsay, *op. cit.* (note 63), pp. 214-215; Chubin and Tripp, *op. cit.* (note 84), p. 51.

94 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9*, reprinted in 37 ILM 999 (1998). See generally Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999.

95 See Cate Steains, "Gender issues" in Lee (ed.), *op. cit.* (note 94), p. 372.

96 Rome Statute, *op. cit.* (note 94), Arts 36(8)(iii) and 44(2). See also the comments by Algeria, Egypt, Jordan, Kuwait, Libyan Arab Jamahiriya and Qatar in the 1996 *Report by the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. II (Compilation of Proposals), UNGA Official Records, Fifty-first Session, Supplement no. 22A, A/51/22 (1996) at 12.

97 See Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Nomos, Baden-Baden, 1999, pp. 164-165.

vided) that the application and interpretation of the law must be without any adverse distinction founded on the grounds of gender.[98] The Islamic States feared that, by accepting such a statement, they would at best prevent the ICC from interpreting international law in accordance with *shari'a*, and at worst place the Court in a position of judgment over domestic practices admitted as compatible with internationally recognized human rights but involving an apparent 'distinction' based on gender. This was not simply a matter of conflicting Islamic and international humanitarian law duties, but more of finding a way to allow for Islamic difference within IHL. It raised a critical question: is there a place for Islamic civilization within international humanitarian law?

The Arab Islamic States were joined in their opposition to the 'no adverse distinction' clause by conservative Christian States particularly concerned about the use of the clause to criminalize State actions aimed at discouraging homosexuality.[99] Some States appeared willing to retain the no adverse distinction clause, providing 'gender' was removed altogether, or perhaps replaced by the term 'sex', which would avoid the 'problem' of homosexuality. This proposal met with defeat at the hands of a coalition of primarily western, liberal Christian-majority States.[100]

Since 'gender' was set to stay in the Statute, the controversy shifted to the definition of that term. All participants realized that it was the sociological aspect of the concept which was problematic, so negotiations focused on language allowing for sociological difference in the construction of gender roles. Proposals including language such as "males and females, in the context of society *and the traditional family unit*" were rejected, as was "males and females in the context of *their* society".[101] The removal of 'their' in the final wording of the definition[102] is important. The Rome Statute presents a definition of gender within international humanitarian law which involves an abstracted, universal concept of society, not particularized to any civilization or tradition. Exactly how that abstracted notion is conceived and applied by the judges and Prosecutor of the ICC in any given case will play a major role in determining whether and how IHL can accommodate different civilizations.

98 Steains, *op. cit.* (note 95), p. 372.

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*, p. 374.

102 Rome Statute, *op. cit.* (note 94), Art. 7(3): "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

We can speculate how this process of accommodation may occur by looking to the third manifestation of the gender controversy in the negotiation of the Rome Statute — the definition of 'forced pregnancy'.[103] A number of Arab Islamic States, again joined by Catholic powers including the Holy See, at first refused to accept the inclusion of forced pregnancy as a crime against humanity because they feared it would impose an international obligation upon them to give forcibly impregnated women access to abortion.[104] They argued that prosecution of the conduct in question could occur through charges of rape and unlawful detention, both of which were crimes already included in the Statute. These States were opposed by a broad coalition, notably including Turkey.[105] A solution was finally reached through a special series of meetings which established the consensus position that the crime would be included along with a specific clarification that it should not be construed to interfere with national laws concerning abortion or pregnancy.[106]

The central question in the forced pregnancy debate was again whether IHL could accommodate conflicting social visions, different civilizations. Its successful resolution demonstrates that humanitarian law can work as a product of dialogue, a conversation between civilizations. The humanism of IHL may be a European and even Christian artefact, but it is a principle which all civilizations now appear to entertain.[107] What is needed in developing and applying IHL is a conversation between these civilizations to find ways in which their common humanity can be maintained and expressed, while allowing for the application of rules and norms in different civilizational contexts.

103 See Triffterer, *op. cit*. (note 97), pp. 164-165.

104 See Steaines, *op. cit*. (note 95) pp. 366-367.

105 *Ibid*.

106 *Ibid*., p. 367. Art. 7(2)(f) now provides: " 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

107 Notable in this respect is the ratification by Saudi Arabia on 28 November 2001 of the Second Additional Protocol. This is, perhaps, an important sign that at least one Islamic actor believes that international humanitarian law and Islamic law can sit comfortably together, even in situations of non-international armed conflict. It may be an important indicator of the willingness of Islamic actors to engage in that conversation of civilizations which, as I describe below, I believe lies at the heart of the future and process of IHL.

Conflict and conversation

In 1856, at the beginning of the period of interaction between Islam and international humanitarian law which this paper has reviewed, there were considerable divergences between Islamic doctrine and IHL. Today, those divergences have significantly diminished, partly as a result of the interaction between European and Islamic civilization and the adaptation of humanitarian law that interaction produced. Other writers have mapped the now substantial congruence between Islamic and IHL norms of conduct in armed conflict,[108] on such diverse issues as the subjects of those norms,[109] crimes,[110] the limitation of belligerent conduct,[111] protection of civilians[112] (including restrictions on targeting women, children and elderly persons),[113] prisoners of war,[114] restrictions on the treatment of occupied territory and property,[115] spies,[116] perfidy,[117] ruses of war,[118] illegal means of warfare,[119] and criminal responsibility.[120]

The emblem debate reminds us, however, that there is an underlying controversy which calls this apparent compatibility into question. That controversy asks, simply, how religious norms, which draw their authority from a transcendental source (Allah),[121] and humanist norms, which draw their

108 See generally Ereksoussi, *op. cit.* (note 2); Busuttil, *op. cit.* (note 2); Algase, *op. cit.* (note 2).

109 Malekian, *op. cit.* (note 2), pp. 36-38.

110 *Ibid.*, pp. 38-41 (on criminality), 45-63 (aggression), 63-73 (war crimes), 74-75 (restricted weapons), 76-78 (crimes against humanity), 79-89 (slavery), 90-93 (genocide), 94-97 (apartheid), 98-106 (torture), 107-112 (internationally protected persons), 113-115 (hostages), 116-120 (drug offences), and 132-134 (piracy).

111 Taube, *op. cit.* (note 8), pp. 390-394; Rechid, *op. cit.* (note 11), pp. 385-386; El-Dakkak, *op. cit.* (note 2), pp. 115-124; Malekian, *op. cit.* (note 2), pp. 135-147.

112 Melakian, *op. cit.* (note 2), pp. 154-159; see also Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Éditions A. Pedone, Paris, 1997; Taube, *op. cit.* (note 8), p. 391, citing Abu Bakr (634 CE), p. 392 citing Marghinani; ben Achour, *op. cit.* (note 2), pp. 61-63; El-Dakkak, *op. cit.* (note 2), p. 119; Zemmali, *op. cit.* (note 2) p. 132 ; Bedjaoui, *op. cit.* (note 2), p. 292.

113 See generally ben Achour, *op. cit.* (note 2), p. 65; El-Dakkak, *op. cit.* (note 2), pp. 121-124; Zemmali, *op. cit.* (note 2), pp. 131-132; Bedjaoui, *op. cit.* (note 2), p. 290; Malekian, *op. cit.* (note 2), pp. 149-153.

114 Taube, *op. cit.* (note 8), p. 391, citing Abu Bakr (680 CE).

115 Taube, *op. cit.* (note 8), p. 391, citing Abu Bakr; p. 392, citing Marghinani's *Hidayah* (1196 CE); Zemmali, *op. cit.* (note 2), p. 133.

116 Zemmali, *op. cit.* (note 2), p. 131.

117 Taube, *op. cit.* (note 8), p. 392, citing Marghinani; El-Dakkak, *op. cit.* (note 2) pp. 116-118.

118 El-Dakkak, *op. cit.* (note 2), pp. 118-119.

119 Taube, *op. cit.* (note 8), pp. 392-3, citing Mahmoud el Mahboud's *Vikayah* (1280 CE); Bedjaoui, *op. cit.* (note 2), p. 291.

120 Malekian, *op. cit.* (note 2), pp. 172-178.

121 Cf. Rechid, *op. cit.* (note 11), p. 392.

authority from their immanent, human conception, can be reconciled. Do Islamic soldiers and diplomats owe their ultimate duty to Allah or to humanity? If rules of Islam and rules of international humanitarian law conflict, which one stands higher in the normative hierarchy?

We might attempt to wriggle out of the problem by suggesting that Islamic law is a "local custom" within public international law, binding between Islamic States, within a larger universal framework.[122] That approach would, however, create terrible problems, especially in conflicts involving parties with mixed Islamic and non-Islamic populations. Would Islamic soldiers be bound by Islamic law in relation to Islamic civilians, but by different rules of international humanitarian law in relation to other civilians? This risks reviving the mediaeval Christian doctrine of just war and undermining the universality of IHL. Moreover, it may simply be impossible to demonstrate the continuing existence of an Islamic local custom within IHL, given the degree to which Islamic States have adopted the IHL framework.[123] Any Islamic local custom which did once exist may well have fallen into desuetude.

A better solution, I suggest, is to understand international humanitarian law as a *conversation between civilizations*. Islam is just one of the civilizations (in the sense of Article 9 of the PCIJ and ICJ Statutes) engaged in this conversation, just one of the jurisprudential sources which may be tapped in the quest to identify "general principles of law recognized by civilized nations".[124]

This is not to say that international humanitarian law is a static, supranational code negotiated by different civilizations.[125] Instead, we should understand it as the *process* of conversation between civilizations, the *process of* deliberate non-violent adjustment, dialogue and negotiation between competing sources of norms governing violent conflict.[126] Treaties and other

122 See M.H. Mendelson, "The formation of customary international law", *Recueil des Cours*, Vol. 272, 1998, p. 155, pp. 215-7; G. Cohen-Jonathan, "La coutume locale", *Annuaire français de droit international*, Vol. 7, 1961, p. 119. Local customs can be bilateral (e.g. *Right of Passage over Indian Territory* (*India* v. *Portugal*), (1960) ICJ Reports 6 at 39), regional (as was considered in the *Asylum case* (*Peru* v. *Colombia*), (1950) ICJ Reports 266) or common to a "particular ideological group, or a group which shares the same policies on a specific issue, irrespective of their location": Mendelson, *op. cit*., p. 216.

123 Compare Bedjaoui, *op. cit*. (note 2), p. 295.

124 See ICJ Statute, Art 38(1)(c).

125 Compare Bartram S. Brown, "Nationality and internationality in international humanitarian law", *Stanford Journal of International Law*, Vol. 34, No. 2, 1998, pp. 347-406.

126 Compare International Law Association, *Report of the Sixty-Fifth Conference* (1992), El-Fania, Cairo, 1993, p. 4; see also Strawson, *op. cit*. (note 60).

IHL texts are, of course, records of the obligations that have been adopted by participants in that conversation during its course. The conversation is predicated upon equal participation — or, as we know it, sovereignty — so these are *self-imposed* obligations. International humanitarian law becomes a consensual process of pooling sovereignty to limit the harmful effects of violent conflict. The humanism of the process lies precisely in the commitment to creating limitations upon violent conflict; but each participant in the process remains free to perceive as they wish the source of the normative force of the obligations the process produces. Each State can characterize the ultimate source of the bindingness of IHL norms differently, *so long as that bindingness* is *recognized*. Thus for one State, the stimulus for participation in the humanitarian law process may be transcendental, while for others it may be immanent. Whatever the source of bindingness, that authority is transferred, through the sovereign consent which underpins each player's participation in the process, *on to* the legal norms and solutions which emerge from the process.[127] In this sense, IHL processes and norms reflect multiple values and multiple sources of authority: they are *multivalent*.[128]

The Rome Statute and the emblem provide excellent examples of how understanding international humanitarian law as a process of conversation between civilizations allows us to avoid both the problem of normative hierarchy and the problem of orientalism. Both involve the construction of compromise solutions through dialogue which respects difference. Each solution permitted Islamic identity to be maintained without jeopardizing Islamic participation in the IHL process. Both were produced by conversation between civilizations, *"une technique de production d'unité à partir de la pluralité reconnue."*[129]

This technique is probably compatible with Islamic doctrine, in particular *ikhtilaf* and the *hadith* indicating that "Difference in opinion … is a sign of the bounty of God."[130] In this way,

"[l]e droit islamique pourrait devenir — et devrait devenir — un facteur essentiel et efficace pour garantir l'universalisme du droit international humanitaire."[131]

127 Compare Mahmassani, *op. cit.* (note 2), p. 233.

128 On multivalence in the reconciliation of legal traditions, see Glenn, *op. cit.* (note 4), pp. 324-327.

129 Guy de Lacharrière, "Le point de vue juriste: la production et l'application du droit international dans une monde multiculturel", in R.J. Dupuy (ed.), *L'avenir du droit international dans un monde multiculturel*, Colloque, La Haye, 17-19 Novembre 1983, Martinus Nijhoff, The Hague, 1984, p. 67.

130 Glenn, *op. cit.* (note 4), p. 325; see also Bedjaoui, *op. cit.* (note 2), p. 284.

131 El-Dakkak, *op. cit.* (note 2), p. 125.

Because of its multivalence, this universalism need not be homogenizing or dominating. International humanitarian law should be able to accommodate difference. In fact, the very strength of this body of law is that it protects difference while simultaneously protecting our common humanity.[132] It offers a non-violent system for the regulation of differences,[133] a means of turning the 'clash' of civilizations into a conversation between them.

132 Compare S. Sucharitkul, "L'Humanité en tant qu'élément contribuant au développement progressif du droit international contemporain", in Dupuy (ed.), *op. cit.* (note 17), p. 415; R. J. Dupuy, "Conclusions du colloque", in Dupuy (ed.), *op. cit.* (note 128), p. 447, pp. 456-467.

133 See Glenn, *op. cit.* (note 4), p. 338.

Résumé

Islam et Droit international humanitaire : du «choc de civilisations» au «dialogue entre civilisations»

James Cockayne

Dans un monde perçu comme un «choc de civilisations», l'Islam et le droit international humanitaire apparaissent de plus en plus comme concurrents. Les comparaisons déjà tentées de l'Islam et du droit humanitaire présentent chacun des systèmes comme statique et monolithique et dénotent une certaine vision «orientaliste». Si l'on passe en revue le rôle des protagonistes musulmans dans l'évolution du droit humanitaire de 1856 à nos jours, on peut discerner la nature changeante de la corrélation qui existe entre ces deux systèmes. Face à cet «Autre» islamique par opposition auquel le droit humanitaire s'est défini, l'Islam est apparu tout d'abord comme un apport à la «civilisation», puis comme une force nationaliste, et enfin comme un concurrent du droit humanitaire. L'apport de l'Islam montre que le droit international humanitaire est lui-même un processus du «dialogue entre civilisations».