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AN INTERNATIONAL AND ISLAMIC PERSPECTIVE OF HAMAS

AMY CHIANG*

God is its goal;
The Messenger is its Leader.
The Qur'an is its Constitution.
Jihad is its methodology, and
Death for the sake of God is its most coveted desire.

—Hamas¹

INTRODUCTION

In recent times, no group has sparked as much controversy as Hamas. While it won democratic elections in January 2006, the United States, the European Union, and Israel categorize Hamas as a terrorist organization.² How could a “terrorist organization” emerge as a political victor? To understand this group better it is important to evaluate it under international humanitarian law and Islamic law.

Analyzing Hamas using only international law fails to take into account that Hamas is an organization that claims to derive its principles from Islamic law. Hence, if Hamas can ever be persuaded to renounce violence, it must be rooted in the laws and principles of Islam. As stated above, the Qur'an is Hamas's Constitution, thus, according to Hamas, Islamic law takes precedence over international law. While the global community can use international law to condemn Hamas as a terrorist organization, this does nothing to further the peace process. Islamic law must be used as an instrument to bring Hamas to the negotiating table.

* J.D. Candidate, Chicago-Kent College of Law, 2008. I begin this work in the name of God. Anything good in this note comes from God, and all defects in this work come from my own human weakness. I would like to thank my family, especially my husband, Qasim Riaz, for all his patience and support throughout law school. I would also like to thank Professor Henry H. Perritt, Jr. and Edward C. Harris for their guidance and advice on this note. Finally, I would like to thank the Chicago-Kent College of Law Library staff for always assisting me with my research questions.

1. Hamas Charter art. 8, *reprinted in* KHALED HROUB, *HAMAS POLITICAL THOUGHT AND PRACTICE* app. at 272 (2000).

2. *Who are Hamas?*, BBC NEWS, Jan. 25, 2007, http://news.bbc.co.uk/2/hi/middle_east/1654510.stm.

This note will discuss and explore relevant international law and apply it to the Israeli/Palestinian conflict. Special attention is given to the recent Hamas election victory. This note will also analyze how Hamas's military tactics violate international law. Next, it will consider the general principles of Islamic law, the Islamic law of war, and humanitarian principles during times of war. Finally, an analysis of Islamic law is applied to Hamas's actions.

While it may be clear that Hamas violates international law, the answer under Islamic law is not as clear. As with any religion, Islam is subject to a variety of interpretations. Moreover, the Israeli/Palestinian conflict and its intricacies contribute to favorable Hamas rulings. However, Islam can be used to convince Hamas to renounce violence and restart the peace process.

I. HISTORY OF HAMAS

On December 14, 1987, a few days after the first intifada (Palestinian uprising), Hamas released an official communiqué announcing its existence.³ Hamas is an acronym for *Harakat al-Muqawama al-Islamiya* (Islamic Resistance Movement), and an Arabic word that means zeal.⁴ Hamas describes itself as a Palestinian national liberation movement that struggles to liberate the occupied territories and recognize the legitimate rights of the Palestinians.⁵ Hamas consists of three wings: social, political, and military.⁶ Hamas is guided by the principles of Islam and Islam serves as its frame of reference as seen by their key documents: a charter, political memoranda, and communiqués.⁷ While its early documents call for the establishment of an Islamic state in all of Palestine, in the mid-1990s statements from top Hamas officials call for Israel's withdrawal from lands occupied in the 1967 war, the end of Israeli occupation, the formation of a Palestinian state, and a solution to the refugee issue.⁸

3. KHALED HROUB, *HAMAS: A BEGINNER'S GUIDE* 12 (2006).

4. MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* 8 (2006).

5. HROUB, *supra* note 3, at 17.

6. LEVITT, *supra* note 4, at 9.

7. See HROUB, *supra* note 1, at app. 263–312.

8. Sara Roy, *Religious Nationalism and the Palestinian-Israeli Conflict: Examining Hamas and the Possibility of Reform*, 5 CHI. J. INT'L L. 251, 253 (2004).

II. INTERNATIONAL HUMANITARIAN LAW

The four Geneva Conventions comprise the bulk of what we call international humanitarian law. The first three Conventions cover protection of the wounded and sick, the shipwrecked, and prisoners of war.⁹ The Fourth Geneva Convention protects civilians from arbitrary treatment and violence and it addresses occupied territories.¹⁰ Additionally, two new draft treaties were adopted in the 1970s.¹¹ Protocol I laid out new rules on international armed conflict, while Protocol II established rules for non-international armed conflicts.¹²

The Geneva Conventions are binding on 175 States, and every one of the 191 members of the United Nations has ratified them.¹³ Protocols I and II are ratified by 163 States, including four out of five¹⁴ permanent members of the Security Council.¹⁵ Additionally, governments, the United Nations, and the International Committee of the Red Cross (ICRC) invoke both Protocols during times of armed conflict.¹⁶ Thus, a strong argument can be made that all four Conventions and Protocols I and II are customary international law.

III. DOES INTERNATIONAL LAW APPLY TO THE PALESTINIAN CONFLICT?

The 1907 Hague Regulations address the concept of belligerent occupation. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."¹⁷ The Fourth Geneva Convention and Protocols I and II were adopted to supplement the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land ("1907 Hague Convention"), along with its annexed

9. Hans-Peter Gasser, *International Humanitarian Law*, in A MANUAL OF INTERNATIONAL HUMANITARIAN LAWS 204, 214 (Naorem Sanajaoba ed., 2004).

10. *Id.*

11. *Id.* at 215.

12. *Id.*

13. *Id.* at 214; Demian Casey, Note, *Breaking the Chain of Violence in Israel and Palestine: Suicide Bombings and Targeted Killings Under International Humanitarian Law*, 32 SYRACUSE J. INT'L L. & COM. 311, 319 (2005).

14. The United States is the only permanent member who has not ratified the Protocols, although it is a signatory.

15. Casey, *supra* note 13, at 319.

16. *Id.*

17. Hague Convention IV Respecting the Laws and Customs of War on Land, Annex art. 42, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention IV].

Regulations ("1907 Hague Regulations").¹⁸ The Fourth Geneva Convention is devoted to protecting civilian rights during times of war. The inhabitants of occupied territories are protected by all the provisions in the Fourth Convention that relate to civilian populations as a whole, by the Hague Regulations, and by the thirty-two articles of the Fourth Geneva Convention that are devoted to occupied territories.¹⁹ Since Israel occupies Palestinian territory, the Palestinian people should be afforded all the rights and protections given to them under international law.

Israel, however, denies that the Fourth Geneva Convention applies to its occupation of the Palestinian territories.²⁰ The Israeli government claims it voluntarily applies international humanitarian law.²¹ The Israeli government adopted the "missing reversioner" theory, where it argues that the Fourth Geneva Convention only applies when a legitimate sovereign has been displaced.²² Israel argues that since neither Jordan in the West Bank nor Egypt in Gaza were legitimate sovereigns in 1967 (because they gained the territory in their fight against Israel during the war in 1948), Israel's presence in the West Bank and Gaza did not displace a sovereign.²³ Therefore, their presence cannot be an occupation; rather, it is an "administration" in the absence of a legitimate sovereign, a situation that the Fourth Geneva Convention does not cover.²⁴ The Israeli government also argues that Israel gained the West Bank and Gaza as part of a defensive conquest, and since there was no prior sovereign, legal title is conferred on Israel.²⁵ These arguments have received little respect or endorsement from the international community, and most of the world community adopts the view that Israel's maximum legal claim to Palestinian territories is based on its control pursuant to the law of belligerent occupation, which imposes duties under the Hague and Fourth Geneva Conventions.²⁶

18. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 89 (2003).

19. Gasser, *supra* note 9, at 248.

20. Imseis, *supra* note 18, at 93.

21. Casey, *supra* note 13, at 320.

22. Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 125, 131 (Emma Playfair ed., 1992).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 132, 134.

IV. RECENT PALESTINIAN ELECTIONS—JANUARY 2006

In January of 2006 Hamas shocked the world when it gained seventy-four of the 132 seats in the Palestinian Parliament.²⁷ To understand the implications of the election, it is necessary to explore the various Palestinian groups, including the Palestinian Liberation Organization (PLO), the Palestinian Authority (PA), and Hamas.

A. *Palestinian Liberation Organization (PLO)*

On June 1, 1964, the PLO was founded, and in 1968 it adopted the Palestinian National Charter.²⁸ The charter states that the Palestinian people have a legal right to establish a state, it defines the Palestinian people and their objectives, and it provides that the PLO will act as an international representative on behalf of all Palestinians.²⁹ Accordingly, the PLO is responsible for the activities of the Palestinian people while they struggle to liberate their land and practice their right of self-determination.³⁰ The charter defines the Palestinian people as “those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father—whether inside Palestine or outside it—is also a Palestinian.”³¹ Thus, the PLO represents Palestinians who live outside the West Bank and Gaza. The PLO’s goal is to give the Palestinians an opportunity to return to their homeland to exercise their right of self-determination.³²

In 1969, the General Assembly passed resolutions that recognized the Palestinians’ status as a people, the importance of their participation in resolving the Palestine question, and their right to self-determination.³³ In 1974, the General Assembly invited the PLO to participate in plenary meetings of the General Assembly concerning Palestine, and in a later resolution the Assembly requested the Secretary General to establish contact with the PLO on all matters concerning the questions of Palestine.³⁴ In the same session, the General Assembly granted the PLO observer status, inviting it

27. Joel Greenberg, *Hamas Asserting its Authority: Lawmakers Rescind New Abbas Powers*, CHI. TRIB., Mar. 7, 2006, at 1.

28. Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT’L L. & POL’Y 27, 49 (1997).

29. See Palestine National Charter, available at <http://www.state.gov/p/nea/rls/22573.htm>.

30. *Id.* art. 26.

31. *Id.* art. 5.

32. Dajani, *supra* note 28, at 50.

33. *Id.* at 41.

34. G.A. Res. 3236 (XXIX), ¶ 7, U.N. Doc. A/9631 (Nov. 22, 1974).

to participate in the work of the General Assembly and of all international conferences convened by the General Assembly or other United Nations organs.³⁵ Further, the PLO is recognized by over 100 states, of which sixty accord the PLO full diplomatic status.³⁶

The PLO has a legislative branch (the Palestine National Council, or PNC), and an Executive Committee.³⁷ In 1988, in response to the first Palestinian uprising (intifada), the PNC voted to adopt the Palestinian Declaration of Independence, which proclaimed the establishment of a Palestinian state with Jerusalem as its capital.³⁸ Israel regarded the PLO as a terrorist organization and refused to recognize the declaration, but by 1989, 114 nations extended some form of recognition to the Palestinian state. However, most of these countries recognized the state as a legal aspiration rather than an existing reality.³⁹ The declaration did little to alter the status of Palestine as a state, but it attempted to affirm the international legitimacy of the Palestinian cause.

Israel and the United States did not recognize the PLO until 1993.⁴⁰ In Oslo, Israel and the PLO signed the Declaration of Principles, but only after PLO Chairman Yasser Arafat sent a letter to Israeli Prime Minister Itzhak Rabin stating that Israel had the right to exist in peace and security, that the PLO renounced the use of force against Israel, and that the articles in the Palestinian National Charter that opposed Israel's right to exist were inoperative and invalid.⁴¹

While the PLO is made up of many political parties, the Fatah group has always dominated and controlled the PLO.⁴² Yasser Arafat was the Committee Chairman from February 1969 until his death in November of 2004.⁴³ The current Chairman of the PLO is Mahmoud Abbas.⁴⁴

35. G.A. Res. 3237 (XXIX), U.N. Doc. A/9631 (Nov. 22, 1974).

36. Math Noortmann, *Non-State Actors in International Law*, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS 59, 68 (Bas Arts et al. eds., 2001).

37. Dajani, *supra* note 28, at 51.

38. Palestine Declaration of Independence, G.A. Res. 43/827, Annex III, U.N. Doc. A/43/827 (Nov. 18, 1988).

39. Dajani, *supra* note 28, at 59–60.

40. *Id.* at 53.

41. John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?* 30 CORNELL INT'L L.J. 717, 720 (1997).

42. Robert H. Mnookin, Ehud Eiran & Sreemati Mitter, *Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians*, 6 NEV. L.J. 299, 333 (Winter 2005/2006).

43. Samah Jabr, *New Hamas Government Trumps Old PLO*, WASH. REP. ON MIDDLE EAST AFFAIRS, May–June 2006, at 13, 45.

44. *Id.*

B. Palestinian Authority (PA)

Israel and the PLO signed the Declaration of Principles in 1993.⁴⁵ This document established a framework for further negotiations regarding the status of the Occupied Territories; in the interim, it established a Palestinian self-governing authority called the Palestinian Authority (PA).⁴⁶ The PA's power and structure are enumerated by the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (IA).⁴⁷ The Palestinians are given a larger role in the territories' administration even though they are still under Israeli occupation.⁴⁸ Further, the agreement clearly indicates that the PA is separate from the PLO.⁴⁹ Moreover, the Interim Agreement specifically prohibits the PA from participating in international negotiations that could influence its international status.⁵⁰ Thus, the PA has a limited role in local governance within the occupied territories.

Originally, the PA consisted of a Palestinian Legislative Council (PLC, or the PA's Parliament) with limited legislative authority, and a President with executive authority.⁵¹ The members of the Council and the President are both democratically elected.⁵² Yasser Arafat once served as the President of the PA,⁵³ but a prime minister position was created in 2003 to devolve power away from Yasser Arafat's powerful but dysfunctional presidency.⁵⁴ It is the president's job to pick the prime minister, in cooperation with the largest party in Parliament, which is now Hamas.⁵⁵

C. PLO v. PA

The PLO and PA are functionally and legally divided groups. As noted above, the PLO is the independent and international voice of the Palestinian people (not just the Palestinians living in the West Bank and Gaza). However, the PLO lacks direct authority over the Palestinians living

45. Dajani, *supra* note 28, at 60.

46. *Id.* at 61.

47. *Id.*

48. *Id.*

49. Sanford R. Silverberg, *Diplomatic Recognition of States in Statu Nascendi: The Case of Palestine*, 6 TULSA J. COMP. & INT'L L. 21, 39 (1998).

50. Dajani, *supra* note 28, at 68.

51. *Id.* at 61.

52. *Id.*

53. *Obituary: Yasser Arafat*, BBC NEWS, Nov. 11, 2004, http://news.bbc.co.uk/2/hi/middle_east/890161.stm.

54. *UK Welcomes Mid-East 'Road Map'*, BBC NEWS, Apr. 30, 2003, http://news.bbc.co.uk/2/hi/uk_news/politics/2989689.stm.

55. *Q&A: Hamas Election Victory*, BBC NEWS, Jan. 26, 2006, http://news.bbc.co.uk/2/hi/middle_east/4650300.stm.

in the West Bank and Gaza because the PA directly governs these areas. While the PLO can act on behalf of the Palestinian people on an international level, the PA serves the interest of the Palestinian population within the occupied territories. In short, the PLO exists to secure the Palestinians a right to govern themselves, and the PA was established as a government with limited authority to serve the local needs of the Palestinians living in the occupied territories.⁵⁶

It is worth noting that until recently, the PLO and PA were fundamentally intertwined. The PLO negotiated the creation of the PA, the two organizations shared a leader in Yasser Arafat, and both were run by the Fatah political party.⁵⁷ Further, members of the PA Parliament, by virtue of their office, hold seats in the PLO National Council.⁵⁸

Recently, the distinctive functions of the PLO and PA have blurred. While the Interim Agreement prohibits the PA from engaging in any external relations, the PA has negotiated with international players in recent years. The Quartet (the United States, Russia, European Union, and the United Nations) drafted the "road map" for peace that would eventually lead to a permanent Palestinian state.⁵⁹ The draft never mentions the PLO, but the PA's government and security roles are highlighted throughout.⁶⁰ Further, all the negotiations regarding the "road map" have taken place between the Quartet and Mahmoud Abbas in his role as the PA's President.⁶¹ In his own words, Abbas stated that "[t]he political objective of the Palestinian Authority is to end the occupation that started in 1967, establish an independent Palestinian state, and find a just and agreed upon solution to the issue of the refugees under Resolution No. 194."⁶² His statement further signifies that the PA's role is not limited to local Palestinian affairs. The PA seems to be gaining wider legitimacy among the international community, and while it is technically the PLO who represents the Palestinian people on an international level, it is the PA who has been on the forefront of the "road map" negotiations. If the peace process is revived, it is likely

56. Dajani, *supra* note 28, at 74.

57. *Id.* at 72.

58. Khalil Shikaki, *The Palestinian Elections: Sweeping Victory, Uncertain Mandate*, J. DEMOCRACY, July 2006, at 116, 124.

59. Michael Emerson & Nathalie Tocci, *Road Maps and Final Destinations for Israel and Palestine I* (Ctr. for Eur. Pol'y Stud. Middle East and Euro-Med Project, Working Paper No. 12, 2003).

60. *Id.* at 17-20.

61. See, e.g., Yossi Beilin, Op-Ed., *Road Maps and Dead Ends*, N.Y. TIMES, Oct. 20, 2005, at A27.

62. Kenneth Stein, *In Mahmoud Abbas's Own Words*, POLICY BRIEFS (Wash. Inst. for Near East Policy, Washington, D.C.), Jan. 7, 2005, <http://www.washingtoninstitute.org/pdf.php?template=C05&CID=2225>.

that the PA will continue to negotiate with the international community on behalf of the Palestinian people.

D. Hamas as a National Liberation Movement

Until the recent elections, Hamas refused to participate in any national elections because the PA grew out of the Oslo Accords, which Hamas considered illegitimate.⁶³ Since Hamas is now a part of the PA, members of the Quartet are demanding that Hamas meet the peace-related obligations that the PLO and PA agreed to after the Oslo Accords, including recognizing Israel and renouncing violence.⁶⁴ Since Hamas has refused these demands, the United States and European Union halted all aid to the PA, compromising the survival of the Hamas-led government.⁶⁵

The First Geneva Protocol of 1977 classifies armed conflict as international where people are “fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination.”⁶⁶ National liberation movements were prevalent after World War II.⁶⁷ While there are no objective criteria to determine the existence of national liberation movements, the movements have some general characteristics.⁶⁸ The essential characteristic of national liberation movements is their “international legitimation based on the principle of self-determination.”⁶⁹ Their international status is based on their political goals, namely, their struggle to free themselves from colonial rule, racist regimes, or alien occupation.⁷⁰ While nothing in Protocol I requires a movement to control territory, some scholars argue the movement is given international status because it acquires territory, or at least strives to.⁷¹ Other scholars argue that a movement must be recognized by the regional organization in

63. Khaled Hroub, *A “New Hamas” Through Its New Documents*, J. PALESTINE STUD., Summer 2003, at 6.

64. Shikaki, *supra* note 58, at 116.

65. *Hamas Faces European Aid Threat*, BBC NEWS, Jan. 29, 2006, http://news.bbc.co.uk/2/hi/middle_east/4660648.stm.

66. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1390 [hereinafter Protocol I].

67. ANTONIO CASSESE, INTERNATIONAL LAW 140 (2d ed. 2005).

68. HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 138 (1988).

69. CASSESE, *supra* note 67, at 140.

70. *Id.*

71. *Id.* at 141. Cassese argues that the movement must strive to acquire effective control over a people living in a territory; otherwise, they could not be recognized as members of the international community. *Id.*

the area to qualify as a national liberation movement.⁷² For instance, the League of Arab States is the regional organization that recognizes the PLO as a national liberation movement.⁷³ Additionally, a debate also exists as to whether a movement's international status turns on international recognition of the organization's political goals.⁷⁴ Further, to gain rights and be subject to obligations, the organization must have an organization that can represent the movement and negotiate with other states or international organizations.⁷⁵

The rights and duties of these movements include: the right to self-determination, the obligation to follow the rules of war, the rights and obligations of treaty making, and the right to claim respect and protection for people represented by their organization.⁷⁶

In Prime Minister Ismail Haniyeh's cabinet platform, he stated that the goals of his government were, in part, to resist the occupation, to provide security in Palestinian areas, and to develop relations at the regional and international levels to serve the interests of the Palestinian people.⁷⁷ These are the basic characteristics and goals of a national liberation movement.

According to the Hamas Charter, Hamas's goal is to liberate Palestine and return it to its rightful place.⁷⁸ Hamas strives to liberate Palestine by resisting the Israeli occupation, and seeks to serve and spread Islam.⁷⁹ Hamas sought to acquire territory to fulfill this goal.⁸⁰ Although the League of Arab States has only recognized the PLO as a national liberation movement, this factor on its own does not defeat the argument that Hamas is likewise a national liberation movement. While the international community has recognized the Palestinian right to self-determination and endorsed the idea of a Palestinian state, Hamas has not gained international recognition because of its militant tactics. While Hamas is a representative organization capable of negotiating with the international community, the international community will not negotiate with a Hamas-led government.

The question is whether the international community may refuse to deal with a Hamas-led PA where it previously recognized the PA. There

72. See Leslie C. Green, *Low-Intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493, 503 (1997).

73. WILSON, *supra* note 68, at 145.

74. Noortmann, *supra* note 36, at 67–68.

75. *Id.*

76. CASSESE, *supra* note 67, at 141–42.

77. Hroub, *supra* note 63.

78. The Hamas Charter, *supra* note 1, at art. 9.

79. HROUB, *supra* note 3, at 26.

80. *Id.* at 19.

are no objective criteria to determine a government's legitimacy, thus, each state evaluates a foreign government's legitimacy through its own criteria.⁸¹ Since recognition is at the discretion of each sovereign, there is a debate over whether governmental recognition is a legal question, or a purely political question.⁸² The prevailing view is that recognition is an optional and political act.⁸³ In *Guaranty Trust Co. v. United States*, the Supreme Court accepted this view when it stated "[w]hat government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."⁸⁴

Since the Cold War, the legitimacy of a government has been heavily dependent on the government's democratic character.⁸⁵ However, a democratically-elected government, like Hamas, can lose its legitimacy because its exercise of power conflicts with substantive elements of democracy.⁸⁶ For example, the U.N. General Assembly disqualified South Africa's government for using its power to implement a racist apartheid regime.⁸⁷ Thus, while Hamas was democratically elected and announced it plans to form a unity government with Fatah, the Quartet refuses to recognize a Hamas-led government unless it renounces violence, recognizes Israel, and meets the obligations of previous agreements between the Israelis and the Palestinians.⁸⁸ This is parallel to the PLO's situation. Even though the U.N. and other governments recognized the PLO as the legitimate international representative of the Palestinian people, it was not until the PLO recognized Israel and renounced violence that Israel and the United States recognized the PLO as the representative of the Palestinian people.⁸⁹ Thus, there is no legal obligation for any state to recognize a Hamas-led government.

While Hamas lacks international recognition of its political goals, it nevertheless maintains the essential characteristic of a national liberation movement, which is to free Palestine from occupation. Thus, it can qualify

81. Jean d'Aspremont, Note, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 879 (2006).

82. Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 120 (2002).

83. *Id.*

84. 304 U.S. 126, 137 (1938).

85. d'Aspremont, *supra* note 81, at 887.

86. *Id.* at 910.

87. *Id.* at 911.

88. Richard Galpin, *Hamas Chief Set for Moscow Talks*, BBC NEWS, Feb. 25, 2007, http://news.bbc.co.uk/2/hi/middle_east/6395737.stm.

89. Imseis, *supra* note 18, at 84.

as a national liberation movement that has the right to a limited international legal personality.

V. INTERNATIONAL HUMANITARIAN LAW APPLIED TO HAMAS

International humanitarian law recognizes international conflicts and non-international conflicts.⁹⁰ Wars between two or more states are international conflicts, while fighting that occurs within one state are non-international (or internal) conflicts.⁹¹ However, under Article 1(4) of Protocol I, wars of national liberation are considered international armed conflicts.⁹² Israel and the United States are not a party to this treaty.⁹³ However, no state fighting against a national liberation movement has ever acknowledged it was fighting an international conflict, and since World War II no state has accepted that a national liberation movement had the right to use force against it.⁹⁴ This, however, does not mean that international law does not apply to the conflict. It is significant that many states ratified Protocol I with Article 1(4) because it illustrates that many states consider the movements legitimate under international law.⁹⁵ If states did not believe in their legitimacy they could have continued to treat national liberation movements as subjects to domestic law.⁹⁶ Hence, the Palestinian struggle for self-determination is an international conflict.

Combatants are members of the armed forces of a party to a conflict.⁹⁷ Only a combatant is entitled to fight and eligible to be killed, but the combatant must stay within the limits of international law.⁹⁸ Article I of the 1907 Hague Convention lists the requirements of a lawful combatant. Regular armies, militias, and volunteer corps must satisfy four conditions: (1) they must be commanded by a person responsible for his subordinates; (2) they must have a fixed, distinctive emblem that is recognizable from a distance; (3) they must carry arms openly; and (4) they must conduct their operations in accordance with the laws and customs of war.⁹⁹

90. Gasser, *supra* note 9, at 223.

91. *Id.*

92. *Id.* at 224.

93. Orna Ben-Naftali & Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT'L L.J. 233, 256 (2003).

94. WILSON, *supra* note 68, at 124.

95. *Id.* at 129.

96. *Id.*

97. Protocol I, *supra* note 66, art. 43(2).

98. Gasser, *supra* note 9, at 227.

99. Hague Convention IV, *supra* note 17, art. 1.

The Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) lists the criteria for a combatant to qualify as a POW.¹⁰⁰ Generally, members of regular armed forces are entitled to POW protection as long as they are captured while in uniform.¹⁰¹ However, members of militias or volunteer corps, including organized resistance movements, had to fulfill several conditions to receive POW status. Article 4A(2) provides that:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

The goal of Protocols I and II was to create new rules for irregular forces and to relax the Hague and Geneva Convention standards.¹⁰² Article 43 of Protocol I provides a new definition of armed forces.¹⁰³ It states that:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.¹⁰⁴

Paragraph (2) of the same article states that members of the armed forces, other than medical personnel and chaplains, are combatants and have the right to directly participate in hostilities.¹⁰⁵ Next, Article 44 provides that “[a]ny combatant, as defined in Article 43, who falls into the

100. Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

101. ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, AM. SOC’Y OF INT’L LAW, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW (2002), <http://www.asil.org/taskforce/goldman.pdf>.

102. Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT’L L. REV. 1, 23, (2005).

103. *Id.* at 24.

104. Protocol I, *supra* note 66, art. 43(1).

105. *Id.* art. 43(2).

power of an adverse Party, shall be a prisoner of war.”¹⁰⁶ Thus, Article 43 eliminates the distinction between regular armed forces and irregular voluntary corps, militias, and other organized resistance movements.¹⁰⁷ Protocol I places all of a party’s armed forces on equal legal ground and requires that all combatants, not just irregulars, be under a responsible command.¹⁰⁸

Protocol I also contains a more expansive rule of distinction that makes it more difficult for combatants to lose their POW status.¹⁰⁹ Paragraph (3) of Article 44 states that “[i]n order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”¹¹⁰ Thus, having a fixed emblem is not an essential requirement for members of the armed forces to receive POW status.¹¹¹ If a combatant fails to distinguish himself, he may be liable for breaching the laws of war, but he does not lose his status as a combatant or POW.¹¹²

A combatant will lose his POW status if he does not comply with the additional requirements in Article 44(3). This Article states that:

There are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) During each military engagement, and (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Section (b) has been interpreted to mean that a combatant is required to carry arms openly from the moment he is visible while going to the place where the attack will start.¹¹³ If a combatant is caught while not fulfilling section (b) he forfeits his status as a lawful combatant and cannot enjoy the protections given to prisoners of war.¹¹⁴ However, the combatant is still entitled to humane treatment and a regularly conducted trial as prescribed by the Geneva Conventions.¹¹⁵

106. *Id.* art. 44(1).

107. Shumate, *supra* note 102, at 24.

108. GOLDMAN & TITTEMORE, *supra* note 101, at 17.

109. *Id.* at 19.

110. Protocol I, *supra* note 66, art. 44(3).

111. CASSESE, *supra* note 67, at 406 (citation omitted).

112. GOLDMAN & TITTEMORE, *supra* note 101, at 20.

113. CASSESE, *supra* note 67, at 407.

114. Protocol I, *supra* note 66, art. 44(4).

115. Gasser, *supra* note 9, at 263.

Further, Article 45(1) presumes that a person who takes part in the hostilities is a POW if he claims that status, if he appears to be entitled to the status, or if his Party claims it for him.¹¹⁶ If it is unclear whether combatants belong to one of the legitimate belligerent categories, they enjoy the protection of the present Convention until such time that their status can be determined by a competent tribunal.¹¹⁷

As a national liberation movement, Hamas should be entitled to apply Protocol I's relaxed standards to its members, but it currently does not enjoy these standards. Under Article 96(3), armed forces of national liberation movements do not receive all the protections of the Geneva Conventions and Protocol I unless the movement formally accepts all the attendant obligations.¹¹⁸ They accept these obligations when they make a unilateral declaration of adhesion and compliance and send it the Swiss government as depository.¹¹⁹ To date, Hamas has made no such declaration, and in the past it has stated that it will only be bound by Islamic Law.¹²⁰ Therefore, the relaxed combatant and POW standards in Protocol I do not apply to Hamas. According to the Third Geneva Convention, in order for Hamas members to enjoy prisoner of war status they must comply with the four original requirements stated in the Hague Convention.¹²¹ Hamas does not comply with these requirements because its members have no fixed distinctive sign recognizable at a distance, and they do not carry arms openly.

Moreover, Israeli courts reject the argument that Hamas members are freedom fighters.¹²² Israel considers Hamas a terrorist organization and its members terrorists.¹²³ Israeli courts typically charge members with crimes relating to terrorist activities and try them under Israeli domestic law, thus, Israel does not consider Hamas members to be POWs.¹²⁴

116. Protocol I, *supra* note 66, art. 45(1).

117. Third Geneva Convention, *supra* note 100, art. 5.

118. George H. Aldrich, *Why the United States Should Ratify Additional Protocol I*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 127, 135 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

119. Protocol I, *supra* note 66, art. 96(3); Green, *supra* note 72, at 504.

120. Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 747 (2005).

121. Third Geneva Convention, *supra* note 100, art. 4(A)(2).

122. Emanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1189 (2002).

123. *Id.*

124. See Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721, 724 (2001).

VI. HAS HAMAS VIOLATED INTERNATIONAL HUMANITARIAN LAW?

A. War Crimes

Broadly defined, war crimes are violations of the law of war; however, in *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) set out a more precise definition.¹²⁵ War crimes consist of: (1) an infringement of a rule of international humanitarian law; (2) the rule must be customary in nature or be a part of an applicable treaty; (3) the violation must be serious, which means the broken rule must protect important human values and must involve grave consequences for the victim; and (4) the violation of the rule under customary or conventional law must entail individual criminal responsibility of the person breaching the rule.¹²⁶

There is no list of war crimes under customary law, but the Rome Statute of the International Criminal Court lists violations of international humanitarian law that qualify as war crimes.¹²⁷ The Rome Statute is not customary law, but the elements of the crimes are taken from customary law such as the Geneva Conventions and Protocols I and II.¹²⁸ The Rome Statute's definitions are supplemented by a text that lays out the elements of each crime.¹²⁹ Together, these documents provide clear definitions of genocide, crimes against humanity, and war crimes.¹³⁰

The possible war crimes that are applicable to Hamas under Article 8 of the Rome Statute are: willful killing, intentionally attacking the civilian population, and intentionally launching attacks that cause excessive incidental death, injury, or damage.¹³¹ The Elements of Crime text details the elements of each of these crimes. The last two elements of each crime are the same: "[t]he conduct took place in the context of and was associated with an international armed conflict" and "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict."¹³²

125. CASSESE, *supra* note 67, at 437.

126. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (ICTY Ap. Ch. Oct. 2, 1995).

127. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

128. Casey, *supra* note 13, at 322.

129. Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, U.S., Sept. 3–10, 2002, *Official Records*, pt. II(B), U.N. Doc. ICC-ASP/1/3 [hereinafter Assembly on States Parties].

130. Rome Statute, *supra* note 127, art. 8.

131. *Id.* arts. 8(2)(a)(i), 8(2)(b)(i), 8(2)(b)(iv).

132. Assembly of States Parties, *supra* note 129, art. 8(2)(a)(i)

These two elements are fulfilled. As explained above, the current conflict is international, and Hamas is aware that an armed conflict exists. After Hamas's election victory in January 2006, Hamas leader Mahmoud Zahar declared, "We do not recognize the Israeli enemy, nor his right to be our neighbor, nor to stay (on the land), nor his ownership of any inch of land. . . . We are interested in restoring our full rights to return all the people of Palestine to the land of Palestine."¹³³

B. Willful Killing

The term willful killing comes from Article 147 of the Fourth Geneva Convention.¹³⁴ Killing a protected person is a "grave breach" of the Fourth Geneva Convention.¹³⁵ Protected persons are "those who, at a given moment in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."¹³⁶ Further, murders of all kinds are prohibited against those not taking an active part in the hostilities.¹³⁷

The Elements of Crime text lists the elements for willful killing: (1) the perpetrator killed one or more persons; (2) such person or persons were protected under one or more of the Geneva Conventions of 1949; and (3) the perpetrator was aware of the factual circumstances that established that protected status.¹³⁸

When Hamas targets public establishments such as restaurants and buses, its members may be liable for willful killing because they kill one or more persons, the persons killed are protected persons under the Geneva Conventions, and Hamas is aware of their protected status. Israeli civilians are considered protected persons under the Geneva Conventions. A civilian is someone who is not a member of an organized armed force or a party to a conflict.¹³⁹ Civilians are protected until they take direct part in hostilities.¹⁴⁰ However, participation in hostilities only causes a loss of protection while the civilians participate in hostilities.¹⁴¹ Thus, even though military

133. Anti-Defamation League, Hamas Fact Sheet, http://www.adl.org/main_israel/hamas_facts.htm (last visited Oct. 29, 2006).

134. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

135. *Id.* art. 147.

136. *Id.* art. 4.

137. *Id.* art. 3.

138. Assembly of States Parties, *supra* note 129, art. 8(2)(a)(i).

139. Protocol I, *supra* note 66, art. 50.

140. *Id.* art. 51(3).

141. *Id.*

service is mandatory for all males and females in Israel,¹⁴² while they are off-duty they are considered civilians, and are a protected class. Further, if there is any doubt whether a person is a civilian, that person shall be considered a civilian.¹⁴³ Hamas is aware of this status even if it does not agree with it. After an attack on a restaurant in 2001, Hamas leader Sheikh Ahmad Yassin said, "The Geneva Convention protects civilians in occupied territories, not civilians who are in fact occupiers. All of Israel, Tel Aviv included, is occupied Palestine. So we're not actually targeting civilians—that would go against Islam."¹⁴⁴

Thus, all the elements of willful killing are fulfilled, and Hamas perpetrators may be held liable for this specific war crime.

C. *Intentionally Attacking the Civilian Population*

Article 51 of Protocol I protects the civilian population from attack. It outlaws targeting the civilian population or individual civilians, and it prohibits attacks or threats that spread terror among the civilian population.¹⁴⁵ As stated earlier, civilians enjoy this protection as long as they do not directly participate in the hostilities.¹⁴⁶ Civilians will lose their protected status while they participate in hostilities, but they cannot be killed at other times when they do not pose a threat to others' lives.¹⁴⁷

The Elements of Crime text lists the elements for intentionally attacking the civilian population: (1) the perpetrator directed an attack; (2) the object of the attack was civilian objects, not military objectives; and (3) the perpetrator intended such civilian objects to be the target of the attack.¹⁴⁸

When Hamas targets public establishments its members may be liable for intentionally attacking the civilian population. Intent is illustrated by the choice of target, and the claims of responsibility. One senior Hamas leader noted that "the main thing is to guarantee a large number of enemy will be affected."¹⁴⁹ Further, Hamas claims responsibility for its attacks.¹⁵⁰

142. See Ayelet Shachar, *Whose Republic? Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 259 (1999).

143. Protocol I, *supra* note 66, art. 50(1).

144. HUM. RTS. WATCH, ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CIVILIANS 54–55 (2002), available at <http://www.hrw.org/reports/2002/isrl-pa/> [hereinafter ERASED IN A MOMENT].

145. Protocol I, *supra* note 66, art. 51(2).

146. *Id.* art. 51(3).

147. AMNESTY INT'L, ISRAEL AND THE OCCUPIED TERRITORIES: ISRAEL MUST END ITS POLICY OF ASSASSINATIONS (2003), available at <http://www.amnesty.org/en/library/asset/MDE15/056/2003/en/dom-MDE150562003en.pdf>.

148. Assembly of States Parties, *supra* note 129, art. 8(2)(b)(ii).

149. ERASED IN A MOMENT, *supra* note 144.

Hamas argues that since Israel requires mandatory military service and requires reserve duty up until a certain age, Israeli citizens are legitimate targets of attack. Sheikh Yassin stated:

They are all in the military, men and women. . . . They wear civilian clothes inside Israel, and military clothes when they are with us. . . . The 20,000 or 30,000 reserve soldiers, where did they come from? Are they not part of the Israeli people? Were they not civilians?¹⁵¹

However, Protocol I clearly states that civilians are protected as long as they do not take part in hostilities.¹⁵² Even if every person on a targeted bus was subject to reserve duty, they are still protected citizens. Thus, Hamas members may be liable for the war crime of intentionally attacking the civilian population.

D. Excessive Incidental Death, Injury, or Damage

Article 51 of Protocol I protects citizens from indiscriminate attacks, which include: (1) attacks not directed at a specific military objective; (2) attacks that use a method or means that cannot be directed at a specific military objective; or (3) attacks that use a method or means that cannot be limited, and thus strike military objectives and civilians or civilian objects without distinction.¹⁵³ This Article is part of customary international law.¹⁵⁴

The Elements of Crime text lists the elements for excessive incidental death, injury, or damage: (1) the perpetrator launched an attack; (2) the attack caused incidental death or injury to a civilian, damage to civilian objects, or widespread, long-term and severe damage to the environment, and the death, injury, or damage was of such an extent that it was clearly excessive in relation to the concrete and direct overall military advantage anticipated; and (3) the perpetrator knew that the attack would have such an effect.¹⁵⁵

When Hamas targets public establishments, its members may be liable for excessive incidental death, injury, or damage because they target civilians with knowledge that incidental civilian deaths will occur. Their objective is to force the withdrawal of Israelis from their land, but this does not mean that they can target civilians. Further, Hamas knows that its attacks

150. See Anti-Defamation League, Major Terrorist Attacks in Israel, http://www.adl.org/Israel/israel_attacks.asp (last visited Nov. 4, 2006).

151. ERASED IN A MOMENT, *supra* note 144.

152. Protocol I, *supra* note 66, art. 51(3).

153. *Id.* art. 51(4).

154. CASSESE, *supra* note 67, at 416.

155. Assembly of States Parties, *supra* note 129, art. 8(2)(b)(iv).

will cause incidental death or injury, and it picks targets to fulfill this objective. As mentioned above, a Hamas leader stated that “the main thing is to guarantee a large number of enemy will be affected.”¹⁵⁶ The enemies are Israelis, and while Hamas does not consider them civilians, under international humanitarian law, they are civilians and should be protected from indiscriminate attacks. Thus, Hamas members may be liable for the war crime of excessive incidental death, injury, or damage.

While the international world condemns Hamas as a terrorist organization, some may wonder how Hamas won its election victory when it seems clear that it violates international law. The fact is that Hamas’s political victories correspond heavily with the political environment at the time of the elections.¹⁵⁷ Hamas’s popularity drops when Palestinians are hopeful that peace can be made with Israel.¹⁵⁸ However, when there is a high level of frustration with the peace process, Hamas’s popularity increases.¹⁵⁹ Another reason for Hamas’s popularity among Palestinians is its social work.¹⁶⁰ Hamas provides structured education, health, and welfare services to the poor.¹⁶¹ It was well known that Hamas would even give monthly help to employees of the Fatah-led PA when their income was considered to be below the poverty level.¹⁶² Hamas’s recent 2006 election victory can be attributed to the increase in Israeli military aggression, its social services, and the failure of the corrupt Fatah-led PA to broker peace.¹⁶³ Thus, Hamas’s victory is not necessarily an endorsement of its military tactics by the Palestinian population.

VII. UNDERSTANDING ISLAMIC LAW

While it is useful to analyze Hamas under international law, it is also necessary to explore Islamic law because Hamas derives its principles from Islam.¹⁶⁴ Islamic international law is called *as-siyar*.¹⁶⁵ However, international Islamic law is not separate from domestic Islamic law—it is merely an extension of Islamic law that governs relations of Muslims with non-

156. ERASED IN A MOMENT, *supra* note 144.

157. HROUB, *supra* note 3, at 79.

158. *Id.*

159. *Id.*

160. *Id.* at 70.

161. *Id.*

162. *Id.* at 71.

163. *Id.* at 80.

164. *Id.* at 18.

165. Literally the term means motion, but Islamic jurists use it when referring to the conduct of the state in its relationships with others.

Muslims.¹⁶⁶ The siyar is a self-imposed system of law and it is binding on those who profess Islam as their faith.¹⁶⁷

There are four main sources that make up Islamic law: the Qur'an, the sunnah, ijma', and qiy'as.¹⁶⁸ The Qur'an is the word of God as revealed to Prophet Muhammad.¹⁶⁹ The sunnah are the traditions of the Prophet Muhammad and are made up of his actions and sayings. The sunnah helps interpret the Qur'an. Many scholars preserved these actions and sayings in written form, which are called hadith. Ijma' is a consensus among Islamic jurists.¹⁷⁰ When consensus is reached among Islamic jurists, ijma' occurs, and the rule or opinion is considered law.¹⁷¹ Qiy'as means analogical deduction and it can only be used if there is no guidance from the Qur'an, sunnah, or ijma'.¹⁷² Shari'at law is the interpretation of all these principle sources, and it is an all-embracing code of life for Muslims.¹⁷³

In addition to the principle sources, Islamic international law is also comprised of treaties and peace agreements with non-Muslims, official statements and instructions of the Caliphs¹⁷⁴ to their commanders, and the writings of eminent Muslim jurists.¹⁷⁵ When the International Court of Justice decides disputes, it applies international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and teachings of the most highly qualified publicists.¹⁷⁶ The sources of Islamic international law fit into these categories. The Qur'an and hadith are general principles of law, the sunnah and local practices are custom, treaties with non-Muslims are conventions, and ijma' and qiy'as are teachings.¹⁷⁷

166. MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBĀNĪ'S SIYAR* 6 (1966).

167. *Id.*

168. See Farooq A. Hassan, *The Sources of Islamic Law*, 76 AM. SOC'Y INT'L L. PROC. 65, 65-67 (1982).

169. *Id.* at 66.

170. *Id.* at 67.

171. *Id.*

172. Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SECURITY L. 321, 325 (2005).

173. Nayer Honarvar, *Beyond the Veil: Women's Rights in Islamic Societies*, 6 J.L. & RELIGION 355, 362 (1988).

174. The Caliphs were Prophet Muhammad's successors.

175. KHADDURI, *supra* note 166, at 8-9.

176. See Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055.

177. KHADDURI, *supra* note 166, at 9.

VIII. WAR IN ISLAM

While this note has focused on *jus in bello* (law in war), it is necessary to give a brief overview of *jus ad bellum* (law of war) in Islam because it is a topic that is greatly misunderstood. It automatically colors the perception of Islam and organizations that claim to adhere to its principles, like Hamas. Thus, a general overview of war in Islam follows.

Today one of the few Arabic words people think they understand is *ji-had*. The term is often incorrectly translated as “holy war.”¹⁷⁸ The word comes from the root *jahd*, which means effort or struggle.¹⁷⁹ Most Muslims believe that jihad is an inner struggle against the *nafs*.¹⁸⁰ In a hadith, Prophet Muhammad told his companions after returning from battle that they had returned from the minor jihad to the major one. They asked what the major jihad was, and he replied, “it is jihad against the *nafs*.”¹⁸¹ In another hadith, Prophet Muhammad also stated that “it is the greatest jihad to speak words of justice and truth to an oppressive ruler.”¹⁸² Generally, jihad is the struggle against or resistance to something for the sake of a goal. Thus, it can mean peaceful actions, as well as actions relating to war.

There is a debate among Islamic legal scholars about when the use of force is authorized. Generally, scholars can be categorized as classic or modernist. Most classic scholars wrote during a time when the Islamic empire was expanding, so much of their writing revolves around offensive wars rather than defensive wars.¹⁸³ Defensive wars were fought to save Muslim lives and property from aggression, and this is sanctified in the Qur'an.¹⁸⁴ Defensive wars are considered *fard'ayn*, an obligation of every able-bodied Muslim.¹⁸⁵

Classic scholars divided the world into two parts: *dar al-Islam* (abode of Islam) and *dar al-harb* (abode of war), and a perpetual jihad existed

178. See Farhan Bokhari, *Jihad Culture Runs Deep in Pakistan*, FIN. TIMES, July 27, 2005 at 9; Youssef M. Ibrahim, *Silence is a Danger to Islam*, USA TODAY, Sept. 8, 2004, at 15A; Tracy Wilkinson, *Pope Issues a Rare 'Sorry'*, L.A. TIMES, Sept. 18, 2006, at A1.

179. Ali Bulaç, *Jihad*, in AN ISLAMIC PERSPECTIVE: TERROR AND SUICIDE ATTACKS 63, 67 (Ergün Çapan ed., Nagihan Halilglu et al. trans., 2004).

180. See generally *id.* at 68–69. (explaining that *nafs* signifies a love for the material world. Bulaç goes on to explain that humans have two natures, a worldly nature and a spiritual nature. The goal of humanity is to place the spiritual nature above the worldly nature, and this would be conquering the *nafs*).

181. *Id.* at 70 (citation omitted).

182. *Id.* at 73 (citation omitted).

183. Sohail H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in ISLAMIC POLITICAL ETHICS 194, 205 (Sohail H. Hashmi ed., 2002).

184. See Holy Qur'an, *Surah Ash-Shura* 42:39 (“And those who, when an oppressive wrong is done to them, take revenge.”).

185. Hashmi, *supra* note 183, at 205.

between the two.¹⁸⁶ Majid Khadduri explained that jihad meant a permanent state of war existed, but not continuous fighting.¹⁸⁷ Actual warfare (*qital*) was used only as a last resort.¹⁸⁸ The first step was to invite the non-Muslim state to allow the preaching of Islam in their state; if the ruler denied this invitation, he was offered to incorporate his people within the Islamic state as protected non-Muslims, and if he still refused, then this could be grounds for open hostilities.¹⁸⁹ However, participation in an offensive war against *dar al-harb* was a *fard kifaya*, an obligation on those who were capable (typically able-bodied, financially stable Muslim males).¹⁹⁰ This type of war had to be commanded by the ruler of the Islamic state—the ruler decided when to start fighting, when to avoid it, and when to end it.¹⁹¹

Most scholars agreed that the object of jihad was not conversion by the sword, since it would be contrary to Qur'anic verses.¹⁹² These scholars believed that the goal of jihad was to subjugate the states that refused to allow the preaching of Islam.¹⁹³ However, there are some scholars that believe that Muslims have an obligation to fight non-believers unless they accept Islam.¹⁹⁴

The modernists begin by pointing out that the expressions *dar al-Islam* and *dar al-harb* are not found in the Qur'an or sunnah.¹⁹⁵ These expressions developed during the Islamic expansion. While the Qur'an does divide humanity into believers and non-believers, modernists argue that the Qur'an cannot be interpreted to suggest that a perpetual state of war exists between the two categories.¹⁹⁶ Modern scholars, such as Mohammad Talaat al-Ghunaimi and Muhammad Abu Zahra, argue that jihad can only be a war of self-defense.¹⁹⁷ Support for this notion can be found in the sunnah. Prophet Muhammad never attacked a tribe because it did not believe in

186. *Id.* at 204–05.

187. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 64 (1955).

188. Hashmi, *supra* note 183, at 205.

189. Bassam Tibi, *War and Peace in Islam*, in *ISLAMIC POLITICAL ETHICS*, *supra* note 183, at 175, 177.

190. Hashmi, *supra* note 183, at 205.

191. JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* 62 (1997).

192. See generally Holy Qur'an, *Surah Al-Baqarah* 2:256 ("There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path"); *id.* 10:99 ("And had your Lord willed, those on earth would have believed, all of them together. So, will you then compel mankind, until they become believers.").

193. Hashmi, *supra* note 183, at 207.

194. See KHADDURI, *supra* note 187, at 75.

195. Tibi, *supra* note 189, at 177.

196. Hashmi, *supra* note 183, at 207.

197. *Id.* at 208.

Islam.¹⁹⁸ The wars he was involved in were aimed at ending an attack that was initiated against the Muslims or stopping an imminent attack.¹⁹⁹

While the debate is unsettled, it is important to be aware of the different views of jihad.

IX. ISLAMIC HUMANITARIAN LAW

The Qur'an provides the basis for *jus in bello* (laws in war): "And fight in the Way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors."²⁰⁰ The limits of war are found in the sunnah, and from the practices of the caliphs that followed.

There are only small differences between the conduct of war in Islam and international law.²⁰¹ It is important to realize that the Geneva Conventions came centuries after Islam had already guaranteed certain basic protections. Islam restricted methods of war and weapons as well as permissible targets. While warfare has changed over the centuries, the principles set forth in Islam are just as relevant today.

The right to life is one of the most basic and inalienable rights in Islam. The Qur'an states that "if anyone killed a person not in retaliation of murder, or to spread mischief in the land—it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind."²⁰² Thus, from an Islamic point of view an unjust killing is equated to killing all mankind. This is because an unjust killing allows for the possibility that any human can be killed indiscriminately, and this supports disrespect for life.²⁰³ Since Islam holds life in such high esteem, it is only logical that this belief would carry over into Islamic rules of war.

A. Humanitarian Law in Military Orders

Before Prophet Muhammad sent Usama ibn Zayd to fight the Byzantine army, he gave him the following instructions:

Fight in God's path, fight for God. Fight the aggressors who deny God. Do not be cruel to people. Do not go against your covenant. Do not cut down fruit bearing trees. Do not slaughter livestock. Do not kill the pious

198. Hamza Aktan, *Acts of Terror and Suicide Attacks in the Light of the Qur'an and the Sunna*, in AN ISLAMIC PERSPECTIVE: TERROR AND SUICIDE ATTACKS, *supra* note 179, at 27.

199. *Id.*

200. Holy Qur'an, *Surah Al-Baqarah* 2:190.

201. Tibi, *supra* note 189, at 180.

202. Holy Qur'an, *Surah Al-Ma'ida* 5:32.

203. Ergün Çapan, *Suicide Attacks and Islam*, in AN ISLAMIC PERSPECTIVE: TERROR AND SUICIDE ATTACKS, *supra* note 179, at 102, 104.

who are secluded in monasteries, engaged in worship, children, or women. Do not wish to encounter the enemy. You may not be aware of it, but you may face a test with them.²⁰⁴

Prophet Muhammad told another commander, Abd al-Rahman ibn Awf, "Do not spoil the goods that you have seized, do not go against your covenant, and do not amputate the organs of the corpses. Do not kill children."²⁰⁵ Further, Prophet Muhammad prohibited burning or drowning in battle because it caused unnecessary suffering.²⁰⁶ The caliphs that came after Prophet Muhammad echoed these directions. Abu Bakr, the first caliph after Prophet Muhammad, gave these orders to the Muslim army before they marched towards Syria:

Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have developed their lives to monastic services; leave them to that to which they have devoted their lives.²⁰⁷

Umar ibn Al-Khattab, the second caliph, told the commanders of the Muslim army:

Do not mutilate when you have power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor, but try to avoid them at the time of the encounter of the two armies, and at the time of the heat of victory, and at the time of expected attacks.²⁰⁸

Ali, the fourth caliph, ruled when an internal conflict took place among the Muslims.²⁰⁹ This would be the equivalent of a non-international conflict. When he commanded the army he told them:

If you defeat them, do not kill a man in flight, do not finish off a wounded man, do not uncover a pudendum, or mutilate the dead, do not rip open a curtain or enter a house without permission, do not take any of their property, and do not torture or harm their women even though they may insult your leaders, and remember God, perhaps you will have knowledge.²¹⁰

204. Aktan, *supra* note 198, at 33.

205. *Id.* at 34

206. Hyder Gulam, *Islam, Law and War*, https://elaw.murdoch.edu.au/issues/2006/2/eLaw_Islam%20law%20and%20war-191006.pdf (last visited Nov. 12, 2006).

207. HILMI M. ZAWATI, *IS JIHĀD A JUST WAR? WAR, PEACE, AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW* 90 (2001).

208. *Id.*

209. See 2 MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: THE EXPANSION OF ISLAM IN THE MIDDLE PERIODS* 13 (1974).

210. ZAWATI, *supra* note 207, at 91.

B. Combatants

The Qur'an states: "And fight in the way of God those who fight you, but transgress not the limits. Truly, God likes not the transgressors."²¹¹ In Arabic the phrase "those who fight you" denotes participation.²¹² Thus, those who "participate" would be considered combatants.²¹³ Another examination of the Arabic reveals an even deeper meaning. The verb "fight" is imperative and it belongs to a category of collective verbs that implies that the action must be done by more than one person.²¹⁴ Thus, the verse should be read as "'Do not fight anyone unless they fight you. Fighting is thus justified if you fight the enemy and the enemy fights you. It is not justified against anyone who does not fight the Muslims, and it is necessary to make peace.'"²¹⁵ Most scholars agree that there are certain types of people that are protected from harm because they do not have the ability to harm the Muslim army.²¹⁶ The real debate among scholars exists in the classification of combatants and non-combatants.

Wahba al-Zuhayli, a professor of Islamic law at the University of Damascus, argues that combatants include those who directly or indirectly prepare themselves for battle.²¹⁷ Thus, he includes soldiers, heads of state, military leaders, and even military medics or postal carriers.²¹⁸ Abu al-A'la Mawdudi, the founder of Jama'at-i Islam, disagrees with al-Zuhayli and argues that only those that are engaged in fighting are combatants.²¹⁹ However, Mawdudi proscribes to a medieval theory of combatant, which defines combatants as those who take part in fighting, or those who have the physical or mental ability to fight.²²⁰ Thus, according to this theory most adult males are not protected. Noncombatants are those that do not have the physical or mental ability to fight, or those who do not normally participate in fighting.²²¹ Mawdudi includes women, children, the elderly, the sick,

211. Holy Qur'an, *Surah Al-Baqarah* 2:190.

212. Çapan, *supra* note 203, at 106.

213. *Id.*

214. Sohail H. Hashmi, *Saving and Taking Life in War: Three Modern Muslim Views*, in *ISLAMIC ETHICS OF LIFE ABORTION, WAR, AND EUTHANASIA* 129, 138 (Jonathan E. Brockopp ed., 2003).

215. *Id.*

216. Khaled Abou El Fadl, *Between Functionalism and Morality: The Juristic Debates on the Conduct of War*, in *ISLAMIC ETHICS OF LIFE ABORTION, WAR, AND EUTHANASIA*, *supra* note 214, at 103, 117.

217. Hashmi, *supra* note 214, at 139.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

wounded, the blind, the insane, travelers, and clergy.²²² Just as in international humanitarian law, all these people would be protected unless they gave up their immunity by participating in the fighting.²²³ However, Malik, an early Islamic jurist, went so far as to warn against killing women and children who take part in hostilities because the Prophet forbade killing women and children.²²⁴

Beyond Prophet Muhammad's commands to the Muslim army, there are other incidents in his life that support the idea of protection for non-combatants. At the end of one battle Prophet Muhammad saw a corpse of a woman among the dead and he asked those present about her presence. They told him she was killed by Khalid ibn Walid's army. The Prophet told one of them to run to Khalid and tell him that he forbade the killing of children, women, and servants.²²⁵ Further, the Prophet abandoned a siege at Taif because it would end with the deaths of innocent women and children who would be harmed or killed by catapult shots.²²⁶

Since medieval times, Islamic jurists have recognized that noncombatants will be killed unintentionally.²²⁷ Islamic theory excuses Muslim soldiers for unintentional killings.²²⁸ Al-Zuhayli argues that with the advancement of military technology, the loss of life that would normally be protected is inevitable.²²⁹

Thus, while there is some debate on the exact classification of non-combatants in Islamic jurisprudence, the Islamic legal rules that were developing 1400 years ago foreshadow contemporary humanitarian tenets. It was not until 1907 that Article I of the Hague Convention defined combatants.²³⁰ Under the Hague Convention, combatants must be commanded by a responsible person, they must have a fixed distinctive emblem recognizable from a distance, they must carry arms openly, and they must conduct their operations in accordance with the laws and customs of war.²³¹ Under the Geneva Conventions and the Additional Protocols, "protected persons" include the wounded, sick, and ship-wrecked members of the armed forces and civilians, prisoners of war, civilian internees, civilians on the territory

222. *Id.*

223. *Id.*

224. Karima Benounne, Note, *As-Salāmu 'Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605, 630 (1994).

225. Aktan, *supra* note 198, at 33.

226. *Id.* at 41.

227. Hashmi, *supra* note 214, at 140.

228. *Id.*

229. *Id.*

230. Hague Convention IV, *supra* note 17, Annex art. 1.

231. *Id.*

of the enemy, and civilians in occupied territories.²³² Centuries before these people were protected by the Geneva Conventions, the Prophet and the caliphs were already commanding the Muslim army not to harm these categories of people.

Further, the early Muslim army would fulfill the combatant requirement under the Hague Convention. With regard to the first requirement, during the Prophet's life he always acted as the military commander and was responsible for the Muslim army.²³³ After his death, the caliphs appointed commanders to lead the Muslim army, often appointing a second or third commander if the others were killed in battle.²³⁴ Thus, during the early Islamic empire the Muslim army always had a responsible commander that would fulfill this requirement. With regard to a fixed emblem, there may be some evidence that the Prophet wore a special robe during military battles.²³⁵ In the Battle of Badr, the first battle in Islam, it is reported that Muslim fighters wore special signs made out of wool.²³⁶ However, there is no other proof that the Prophet required the army to wear any type of specific clothing or uniforms.²³⁷ During the Prophet's time weapons were carried openly. The opposing forces would meet each other on the battlefield, and before the armies engaged each other it was customary for duels to take place.²³⁸ Finally, Muslim soldiers were required to conduct themselves in accordance with the laws of war as seen by the Prophet's and caliphs' military orders.

C. Prisoners of War

The Qur'an states: "So, when you meet those who disbelieve, smite (their) necks till when you have killed and wounded many of them, then bind a bond firmly. Thereafter (is the time) either for generosity (i.e. free them without ransom), or ransom until the war lays down its burden."²³⁹ According to this verse, prisoners were to be freed, ransomed, or exchanged for Muslim prisoners. At the time, custom dictated that the prisoner belonged to his captor, but under Islamic law a prisoner of war

232. Gasser, *supra* note 9, at 227.

233. See SAYYID AMEENUL HASAN RIZVI, BATTLES BY THE PROPHET: IN LIGHT OF THE QUR'AN 26 (2002).

234. See MAHMOOD AHMAD GHADANFAR, COMMANDERS OF THE MUSLIM ARMY 34 (Muhammad Ayub Sapra ed., Jamila Muhammad Qawi trans., 2001).

235. Bennoune, *supra* note 224, at 631.

236. *Id.*

237. *Id.*

238. RIZVI, *supra* note 233, at 14.

239. Holy Qur'an, *Surah Muhammad* 47:4.

belonged to the state.²⁴⁰ This is parallel to the Geneva Conventions in that prisoners of war are not controlled by individuals or military units, but are in the care of the state, since it is the state that is a party to the Geneva Conventions.²⁴¹ The Islamic head of state had the last word on what was to happen to prisoners of war.²⁴² The best course of action was the release of prisoners. For example, after the Battle of Badr Prophet Muhammad released seventy prisoners on the condition that they teach illiterate Muslims how to read and write.²⁴³ After the Battle of Hunain it was reported that the Prophet released 6000 prisoners without conditions or ransom.²⁴⁴ Prisoners of war were also to be treated kindly. Prophet Muhammad stated:

They are your brothers. God has put them in your hands; so whosoever has his brother in his hands, let him give food to eat out of what he himself eats and let him give him clothes to wear out of what he himself wears, and do not impose on them a work they are not able to do themselves. If at all you give them such work, help them carry it out.²⁴⁵

This is parallel to Article 13 in the Third Geneva Convention which states, "Prisoners of war must at all times be humanely treated."²⁴⁶ Just as the Prophet allowed prisoners to do work, Article 49 of the Third Geneva Convention allows the Detaining Power to utilize prisoners of war for labor.²⁴⁷ However, the Prophet added the condition that prisoners should receive help from the Muslims.

Additionally, there are reports that Muslim soldiers would feed their prisoners before themselves, and if they did not have enough food they would release prisoners.²⁴⁸ Similarly, Article 26 of the Third Geneva Convention requires that prisoners be given sufficient food to keep them in good health.²⁴⁹ Further, there are reports that it was an Islamic practice to allow representatives from the enemy force to visit the prisoners for the purpose of counting them.²⁵⁰ Likewise, the ICRC is allowed to visit prisoners of war.²⁵¹

There was an incident where a Muslim soldier told a Persian captive not to be afraid, but then killed him. When the second caliph, Umar ibn Al-

240. MAHER HATHOUT, *JIHAD VS. TERRORISM* 25 (Samer Hathout ed., 2002).

241. Gasser, *supra* note 9, at 241.

242. HATHOUT, *supra* note 240, at 25.

243. Gulam, *supra* note 206, at 156.

244. *Id.*

245. *Id.* at 155.

246. Third Geneva Convention, *supra* note 100, art. 13.

247. *Id.* art. 49.

248. Gulam, *supra* note 206, at 155.

249. Third Geneva Convention, *supra* note 100, art. 26.

250. Bennoun, *supra* note 224, at 633.

251. *Id.*

Khatab, heard this he wrote to the commander of the army and stated: "As God as my witness, if I hear anyone has done this, I shall cut his neck."²⁵² While it has been reported that Prophet Muhammad killed some prisoners, it has been argued that this was only for specific prisoners that committed crimes prior to the start of hostilities.²⁵³ This is analogous to the prosecution for crimes committed outside the scope of hostilities, or due to violations of humanitarian law.²⁵⁴ Thus, there are many parallels between Islamic law and international law relating to prisoners of war.

D. Tactics and Weapons

While the Prophet and the Caliphs forbade killing livestock and burning crops, later Islamic scholars have given contrary rulings. This may be evidence that the theory of jihad shifted for political reasons. For instance, Abu Hanifa, an early Islamic jurist, ruled that everything the army could not control should be destroyed, including houses, churches, trees, clocks and herds.²⁵⁵ Another early Islamic jurist, Shafi, stated that anything lifeless could be destroyed, including trees, but animals could only be killed if the army thought they would strengthen the enemy.²⁵⁶

Islam has also laid down rules for permissible tactics and weapons. First, the enemy should not be killed by burning due to the hadith: "Do not punish a creature of God with the punishment of God."²⁵⁷ Most jurists have ruled that using poisoned weapons against the enemy is unlawful.²⁵⁸ However, Abu Hanifa allowed the use of catapults and flooding against the enemy.²⁵⁹ Abu Hanifa explained his ruling and stated that if the Muslims halted their attacks because they feared killing noncombatants, they would not be able to fight at all.²⁶⁰ Abu Hanifa's justification was consistent with other medieval Islamic scholars of the time. Many early Islamic jurists believed that Muslim forces should exercise discrimination in war, but if there is collateral damage it is the enemy's fault because they made protection of noncombatants impossible.²⁶¹ This is similar to the principle of

252. Hilmi M. Abdul Rahman, *Just War, Peace and Human Rights Under Islamic and International Law* 114 (1997) (unpublished Master of Arts thesis, McGill University) (on file with Chicago-Kent Law Review).

253. Bennoune, *supra* note 224, at 635.

254. *Id.*

255. KHADDURI, *supra* note 187, at 103.

256. *Id.*

257. Hashmi, *supra* note 214, at 140.

258. ZAWATI, *supra* note 207, at 42.

259. Hashmi, *supra* note 183, at 212.

260. *Id.*

261. *Id.*

proportionality, which states that a belligerent must refrain from launching an attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁶² In evaluating the proportionality of the attack to the collateral damage, it is the *overall* military advantage, i.e., both the gains from the specific attack and the possible implications and ramifications to the enemy, that must be taken into account.²⁶³ Thus, while Abu Hanifa’s opinion may contradict Islamic law, it could be parallel to the laws of international armed conflict.

Islam also deals with the issue of reciprocity. The Qur’an states, “Then whoever transgresses the prohibition against you, you transgress likewise against him. And fear Allah, and know Allah is with the pious.”²⁶⁴ Thus, Muslim soldiers may deal with the enemy on a reciprocal basis while on the battlefield.²⁶⁵ However, the verse states that Muslim soldiers must exercise self-restraint, so if the enemy were to kill and mutilate Muslim bodies, the Muslims would not be allowed to imitate the enemy.²⁶⁶ Further, even when warfare and killing is authorized, it cannot be excessive. The Qur’an states: “And do not kill anyone whose killing Allah has forbidden, except for just cause. And whoever is killed wrongfully, we have given his heir the authority. But let him not exceed limits in the matter of taking life.”²⁶⁷ Thus, Muslim fighters should not kill when they cannot distinguish between civilians and combatants. This is similar to the principle of distinction, which states that it is prohibited to deliberately attack civilians.²⁶⁸

Few Islamic scholars have written on current topics such as nuclear or chemical weapons. Al-Zuhayli does not limit the possibility of acquiring such weapons as a deterrent against enemies, but he says that Muslims should not be the first to use such weapons because it would cause the death of noncombatants.²⁶⁹

Thus, while Hugo Grotius is often considered to be the father of the modern law of nations, it is important to be aware that many principles of

262. Protocol I, *supra* note 66, art. 57(2)(a)(iii).

263. CASSESE, *supra* note 67, at 418 (emphasis added).

264. Holy Qur’an, *Surah Al-Baqarah* 2:194.

265. ZAWATI, *supra* note 207, at 67.

266. See Hashmi, *supra* note 183, at 212.

267. Holy Qur’an, *Surah Al-Isra* 17:33.

268. Protocol I, *supra* note 66, art. 51.

269. Hashmi, *supra* note 214, at 142.

modern international law can be found in Islamic international law.²⁷⁰ While it may not be important who the father of international law is:

It is important to be aware of the comparative sources from which rules of our modern law may have come. This realization is, to say nothing else, helpful in making the norms of this law more acceptable to numerous nations as truly a law of nations and not merely a contemporary evolution of the last 200 years of the norms of European public law.²⁷¹

X. ISLAMIC LAW APPLIED TO HAMAS

While international humanitarian law clearly condemns Hamas's military strategy, there is a rigorous debate among Muslims on the legality of its actions. The Islamic legal arguments against the operations rely on the prohibition of killing noncombatants and the prohibition against suicide.²⁷² Sheikh Muhammad Sa'id Tantawi, head of Egypt's Al-Azhar mosque and university, declared that the Shari'a "rejects all attempts on human life, and in the name of the Shari'a, we condemn all attacks on civilians, whatever their community or state responsible for such an attack."²⁷³ Similarly, Sheikh Muhammad bin 'Abdalla as-Sabil, member of the Saudi council of senior clerics, spoke against suicide attacks when he stated that "any attack on innocent people is unlawful and contrary to the Shari'a."²⁷⁴ On the other hand, Sheikh Yusuf al-Qaradawi, head of the Sunni studies department at Qatar University, opposed these rulings based on the premise that Israelis were not civilians, but combatants in a war of occupation waged against Palestinians.²⁷⁵ He noted that both men and women serve in the military and can be drafted.²⁷⁶ Likewise, Abd al-Azim al-Mit'ani, a lecturer at Al-Azhar University, stated that "it is a fact that Israel is one big military camp. There is no real civilian there. It is the Palestinians' right to hit all the inhabitants of Israel as they can."²⁷⁷ Al-Mit'ani further argued that the Prophet's prohibition against targeting women, children, and the elderly did not apply to the Palestinian bombers because the Prophet was referring to ordinary wars between two armies, and the situation in Palestine is differ-

270. Hassan, *supra* note 168, at 74.

271. *Id.*

272. Haim Malka, *Must Innocents Die? The Islamic Debate over Suicide Attacks*, MIDDLE EAST Q. Spring 2003, at 19, 21.

273. *Id.*

274. *Id.*

275. *Id.* at 22.

276. Yotam Feldner, *Debating the Religious, Political and Moral Legitimacy of Suicide Bombings: The Debate over Religious Legitimacy* (Middle East Media Res. Inst. Inquiry & Anal. Series, Paper No. 53, 2001), available at <http://www.memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA5301>.

277. Malka, *supra* note 272, at 23.

ent because the Palestinians are facing an enemy that attacks indiscriminately.²⁷⁸ A Hamas military leader commented:

Our stand is not to target children, the elderly, or places of prayer—even though these places of prayer incite the killing of Muslims. Up until now we have not targeted schools . . . nor do we target hospitals, even though they are an easy target. That is because we are working in accordance with certain values . . . we don't fight Jews because they are Jewish but because they occupy our lands. So if children are killed it is something outside of our hands.²⁷⁹

The underlying debate revolves around the status of Israelis as combatants. As previously discussed, there is a wide range of opinions on who may be classified as a combatant; it is doubtful, however, that any of the classical Islamic scholars previously cited would confer combatant status on an entire nation. Al-Zuhayli stated that combatants included anyone who prepared for battle either directly or indirectly, while Mawdudi defined combatants as those who take part in fighting, or those who have the physical or mental ability to fight.²⁸⁰ Certainly not every Israeli citizen prepares himself for battle. While the Defense Service Law imposes a duty on Israeli citizens who reach the age of eighteen (both male and female) to serve in the military, the Minister of Defense has discretion to exempt certain persons.²⁸¹ This exemption is granted to many male and female ultra-Orthodox Jews who are full-time religious students, as well as to Arab-Israeli citizens.²⁸² Section 40 of the Defense Service Law automatically exempts a Jewish woman from regular and reserve service if she makes a written declaration before a judge that states her religious convictions prevent her from performing military service, that she observes Jewish dietary laws, and that she does not ride in vehicles on the Sabbath.²⁸³ The law does not require an investigation into whether the declaration is genuine.²⁸⁴ Additionally, many Israelis refuse to participate in military service for reasons of conscience.²⁸⁵ Thus, there are many Israelis that are exempt from military service or refuse to fight. These individuals do not prepare for battle or take any part in the fighting whatsoever and thus cannot be considered combatants under Islamic law.

278. *Id.*

279. ERASED IN A MOMENT, *supra* note 144, at 51.

280. Hashmi, *supra* note 214, at 139.

281. Shachar, *supra* note 142, at 259.

282. *Id.*

283. Amnesty Int'l., *Israel: The Price of Principles: Imprisonment of Conscientious Objectors* 4, AI Index MDE 15/049/1999, Sept. 1, 1999, available at <http://www.amnesty.org/en/library/info/MDE15/049/1999> [hereinafter *Conscientious Objectors*].

284. *Id.*

285. *Id.* at 6.

The military requirement lasts three years for men and two years for women.²⁸⁶ Thereafter, men and women are required to perform a period of reserve service each year until men reach fifty-one and women reach twenty-four.²⁸⁷ While women serve with men, they are still largely prohibited from positions with a "direct combat" label.²⁸⁸ Thus, even though Israeli citizens may be called up for duty each year, this does not mean they can always be classified as combatants according to Islamic principles. Reservists do not prepare themselves for battle until they are called to service, nor do they take part in fighting unless they are called. Thus, the argument that all Israeli citizens are combatants that are entitled to be attacked is weak.

Islam's prohibition of suicide can be found in the Qur'an and hadith. The Qur'an states, "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves. Surely, Allah is Most Merciful to you."²⁸⁹ Additionally, there are many hadiths where the Prophet prohibits suicide and states that the punishment for suicide is hell.²⁹⁰ While there is consensus that suicide is prohibited, some Islamic jurists do not categorize Hamas attacks as suicide bombings, but martyrdom operations.²⁹¹ Qaradawi states that suicide applies to someone who kills himself for personal reasons, while a martyr sacrifices himself in self-defense on behalf of the entire Muslim community.²⁹² Tantawi joined this opinion when he stated that "the suicide operations are of self-defense and a kind of martyrdom, as long as the intention behind them is to kill the enemy's soldiers, and not women or children."²⁹³ On the other hand, Sheik Abd Al-Aziz bin Abdallah Al-Sheik, a cleric in Saudi Arabia, stated that:

I am not aware of anything in the religious law regarding killing oneself in the heart of the enemy's rank, or what is called "suicide." This is not part of Jihad, and I fear that it is merely killing oneself. Although the Qur'an permits and even demands the killing of the enemy, this must be done in ways that do not contradict the Shari'a.²⁹⁴

286. Shachar, *supra* note 142, at 259.

287. *Conscientious Objectors*, *supra* note 283, at 4.

288. Shachar, *supra* note 142, at 259.

289. Holy Qur'an, *Surah An-Nisa* 4:29.

290. Çapan, *Suicide Attacks and Islam*, *supra* note 203, at 102.

291. Malka, *supra* note 272, at 22.

292. *Id.* at 22-23.

293. Feldner, *supra* note 276.

294. *Id.*

The martyrdom classification is based on the premise that Hamas is killing combatants instead of civilians. As noted previously, the argument that all Israeli civilians are combatants is weak.

Modern Islamic jurists also rely on the theory of necessity to condone martyrdom operations. Qaradawi allows martyrdom operations even when there are civilian casualties because he states:

Israeli society is militarist in nature. Both men and women serve in the army and can be drafted at any moment. If a child or an elderly is killed in such an operation, he is not killed on purpose, but by mistake, and as a result of military necessity. Necessity justifies the forbidden.²⁹⁵

Further, Sheikh Ahmad Yasin, founder and spiritual leader of Hamas stated, "Once we have warplanes and missiles, then we can think of changing our means of legitimate self-defense. But right now, we can only tackle the fire with our bare hands and sacrifice ourselves."²⁹⁶ During medieval times the theory of necessity was used to legitimize acts that were normally prohibited under the Qur'an and sunnah.²⁹⁷ One justification for necessity is the public welfare of the Muslim community.²⁹⁸ For instance, Al-Ghazali, an early Islamic jurist, stated that if a non-Muslim enemy threatened to take Islamic territory and kill all the Muslims, it would be permissible to use actions that were prohibited in the Qur'an and sunnah.²⁹⁹ Al-Ghazali's threshold was high and required that nearly all Muslims face extermination before the theory could be invoked.³⁰⁰ On the other hand, Shaybani, one of the foremost writers on the siyar, would allow the Muslim army to flood, fire, or bombard a city even if women, children, and the elderly were inside because if they were not allowed to, the Muslims would be unable to go to war at all.³⁰¹

The next justification for necessity is the principle of reciprocity.³⁰² The Qur'an states, "So whoever commits a hostility against you, respond to him with a similar hostility. And fear God, and know that God is with those that restrain themselves."³⁰³ Many medieval jurists believed that reciprocity allowed the Muslim army to use indiscriminate methods if the enemy used them first.³⁰⁴ However, after every Qur'anic verse permitting recip-

295. *Id.*

296. Malka, *supra* note 272, at 19.

297. Hashmi, *supra* note 214, at 146.

298. *Id.*

299. *Id.* at 147.

300. *Id.*

301. KHADDURI, *supra* note 166, at 101-02.

302. Hashmi, *supra* note 214, at 148.

303. Holy Qur'an, *Surah Al-Baqarah* 2:194.

304. Hashmi, *supra* note 214, at 148.

reciprocity is a verse ordering restraint and forgiveness.³⁰⁵ Al-Zuhayli, a modern Islamic scholar, stated:

In the arena of battle, the ends justify the means, according to the Islamic view. This does not mean that the desire for victory subsumes humanitarian principles, which limit necessity or military requirements, whether they relate to the methods of fighting and the destruction of enemy installations and military fortifications, or to issues relating to enemy person and the seizing of their property.³⁰⁶

Hamas relies more on the idea of reciprocity to condone its military tactics. Hamas states that its attacks are in response to the killing of Palestinian civilians by Israelis.³⁰⁷ From Hamas's inception in 1987 through April 2006, the Israeli human rights organization B' Tselem reported that 1,426 Israelis, military personnel, and civilians were killed by Hamas (and all other Palestinian factions combined), compared with 5,050 Palestinian civilians killed by Israel during the same years.³⁰⁸ Further, Hamas states that there will be an immediate halt to its attacks as soon as Israel declares it will do the same.³⁰⁹ While Hamas was founded in 1987, its first suicide attack did not take place until 1994, and the attack was in direct response to the killing of twenty-nine Palestinian worshippers inside the Abrahamic Mosque by an Israeli settler.³¹⁰ Prior to 1994, Hamas's policies were to only target legitimate military targets.³¹¹

While Hamas's necessity and reciprocity arguments have more legitimacy within Islamic law, Hamas does not need to use such tactics. As noted previously, the Qur'an and sunnah revolve around restraint and forgiveness. Just because innocent Palestinian civilians are killed does not mean that Hamas has to resort to the same actions. Moreover, Hamas's tactics have not produced many tangible results for ordinary Palestinians. This is more of a reason for Hamas to implement the Islamic principles of restraint and mercy. Implementing these principles will gain the newly-elected Hamas government international recognition and a chance to negotiate a Palestinian state.

It is interesting to note that virtually all the above clerics condemn attacks outside of Palestine. For instance, Qaradawi, the cleric that lends the most support to Hamas, condemned the September 11th attacks on the

305. *Id.*

306. *Id.*

307. HROUB, *supra* note 3, at 52.

308. *Id.* at 54–55.

309. *Id.* at 52.

310. *Id.*

311. *Id.*

United States.³¹² He stated: "The Palestinian who blows himself up is a person who is defending his homeland. When he attacks an occupier enemy, he is attacking a legitimate target. This is different from someone who leaves his country and goes to strike a target with which he has no dispute."³¹³

Similarly, Tantawi stated that "jihad in Islam was ordained in order to support the oppressed and defend sacred places, human lives, personal funds, occupied land, and so on. Terrorism, on the other hand, is an aggression and an insistence on killing innocent people, civilians, and peaceful people."³¹⁴

Since the September 11th rulings and the rulings on Palestine seem contradictory, we must ask what is unique about the Israeli/Palestinian conflict. Hamas's primary argument is based on reciprocity. As noted above, a disproportionate number of Palestinian civilians have been killed, but Israel also commits other international violations. In 1967 the United Nations Security Council passed Resolution 242, which called for an end to the Israeli occupation of lands acquired by force.³¹⁵ Since 1967, there have been at least four additional resolutions calling for an end to the occupation, and calling for Israel to meet its obligations to the Palestinians as a belligerent occupier.³¹⁶

United Nations Security Council Resolution 446 determined "that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East."³¹⁷ While the Security Council has tried to pass more resolutions on the illegality of Israeli settlements, the United States has abstained from voting on these proposed resolutions.³¹⁸ Further, when Israeli citizens build settlements in the West Bank and Gaza the Israeli government violates Article 49 of the Fourth Geneva Convention, which states that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."³¹⁹ The International Court of Justice recently released an advisory opinion on the legality

312. Malka, *supra* note 272, at 22.

313. *Id.*

314. *Id.* at 26.

315. S.C. Res. 242, ¶ 1, U.N. Doc. S/RES/242 (Nov. 22, 1967).

316. Asli U Bali, *International Law & Rights-Based Remedies in the Israel-Palestine Conflict: Settlements*, 28 HASTINGS INT'L & COMP. L. REV. 387, 394-395 (2005).

317. S.C. Res. 446, ¶ 1, U.N. Doc. S/RES/446 (March 22, 1979).

318. George E. Bisharat, *Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict*, 28 HASTINGS INT'L & COMP. L. REV. 319, 321 (2005).

319. Fourth Geneva Convention, *supra* note 134, art. 49.

of Israel's separation barrier.³²⁰ In the opinion it held that the settlements were illegal pursuant to Article 49(6) of the Fourth Geneva Convention.³²¹

Additionally, in 2001, Israel began construction of a security barrier to separate Israel from the West Bank.³²² Israel cited the increasing number of terrorist attacks as justification for the barrier.³²³ Since Israel's construction infringed on large sections of Palestinian land, the barrier is the focus of intense criticism.³²⁴ It is argued that Israel is de facto annexing Palestinian territory, and that the barrier is not for security reasons.³²⁵ Further, the route Israel chose for the barrier encompasses Israeli settlements in the Palestinian territory, which are regarded as illegal.³²⁶ Lastly, Palestinians who live beside the barrier are subject to land expropriations and limited access to vital services, which is an infringement on their human rights.³²⁷ In 2004, the International Court of Justice released an advisory opinion on the barrier.³²⁸ It found that the construction in Palestinian territories was illegal, and that Israel was obligated to cease construction, dismantle the structure already built, repeal or render ineffective all legislative acts related to it, and make reparations for the damages caused by the barrier.³²⁹ The court was unconvinced that the barrier was for security purposes and held it infringed on several rights, including freedom of movement and the right to work, health, education, and an adequate standard of living.³³⁰

Beyond the settlements and the barrier, Israel also engages in house demolitions. Since 2004, 1,713 homes have been demolished for alleged military purposes.³³¹ The demolitions have left 12,541 people homeless.³³² Article 53 of the Fourth Geneva Convention prohibits the destruction of real or personal property by an Occupying Power unless "such destruction is rendered absolutely necessary by military operations."³³³ Even if Israel

320. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf> [hereinafter *Advisory Opinion on Wall Construction*].

321. *Id.*

322. Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540, 540 (2006).

323. *Id.*

324. *Id.*

325. *Id.* at 541.

326. *Id.*

327. *Id.*

328. Advisory Opinion on Wall Construction, *supra* note 320, at 201.

329. *Id.*

330. *Id.* at 189–198.

331. See B'Tselem, Demolition for Alleged Military Purposes, <http://www.btselem.org/english/Razing/Statistics.asp> (last visited Feb. 7, 2007).

332. *Id.*

333. Fourth Geneva Convention, *supra* note 134, art. 53.

argues that the Fourth Geneva Convention does not apply, Article 23 of the Hague Regulations states it is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."³³⁴ Israeli house demolitions are not military necessities; rather, they are punitive measures. Israeli law allows a military commander to order the forfeiture of any home if there is reason to suspect illegal acts, and after the land is forfeited the commander may destroy the house or the structure or anything growing on the land.³³⁵ The fact that the demolitions are punitive measures defeats any assertion that they are military necessities. Therefore, they violate international humanitarian law.

Israel also illegally targets medical personnel and hospitals. Article 20 of the Fourth Geneva Convention states, "Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected."³³⁶ The Palestinian Red Crescent Society, the main provider of medical care in the Palestinian territories, documented 174 attacks on its ambulances by Israeli soldiers and settlers between September 29, 2000, and March 15, 2002.³³⁷ Even the ICRC released a press release in April 5, 2002, stating that it was forced to limit its members' movements in the West Bank because the Israeli army attacked its staff.³³⁸ Article 18 of the Fourth Geneva Convention prohibits attacks on civilian hospitals.³³⁹ However, the Union of Palestinian Medical Relief Committees, the largest nongovernmental health provider, reported its Medical Equipment Loan center, Optometry center, and School of Community Health sustained heavy damages during the second intifada.³⁴⁰

Beyond these specific violations, human rights organizations (including Amnesty International and Israel's own B'Tselem) have issued numerous statements criticizing Israel for its human rights violations.³⁴¹ Some violations include torture of over 50,000 Palestinians, deportation of over

334. Hague Convention IV, *supra* note 17, Annex art 23(g).

335. See B'Tselem, Demolition for Alleged Military Purposes: International Humanitarian Law, http://www.btselem.org/english/Razing/Humanitarian_Law.asp (last visited Dec. 14, 2007).

336. Fourth Geneva Convention, *supra* note 134, art. 20.

337. Lama Jamjoun, *The Effects of Israeli Violations During the Second Uprising "Intifada" on Palestinian Health Conditions*, SOC. JUST.: GLOBAL THREATS TO SECURITY, 2002, at 53, 56.

338. *Id.*

339. Fourth Geneva Convention, *supra* note 134, art. 18.

340. Jamjoun, *supra* note 337, at 58.

341. Imseis, *supra* note 18, at 68.

1,500 Palestinians, and the expropriation of Palestinian natural resources such as water, quarries, and trees.³⁴²

While the focus of this note is not a critique of Israel's actions, its aggression plays a major role in Palestinian behavior and politics, as well as how Muslims across the world view the conflict. Hamas uses Israeli violations to justify its own attacks. While Hamas may violate international law, it still receives support because the international community fails to enforce international law against Israel. Moreover, Israel's aggression also makes it easier for Islamic leaders to condone Hamas's military tactics.

However, the solution to the problem cannot be a never-ending circle of finger pointing. While Islam is subject to many interpretations, Hamas can be presented with a strong argument that suicide bombing is contrary to Islamic law. Suicide bombing cannot be justified based on the notion that all Israeli citizens are combatants, and if Israeli citizens are not combatants the idea that the operation is martyrdom instead of suicide is weakened. While the theories of necessity and reciprocity hold more legitimacy, Islam is a religion that is based on mercy, self-restraint, and forgiveness. These concepts should be stressed. Moreover, its tactics are not the optimal way to achieve peace. If reciprocal measures are not working, Hamas should now attempt to practice the self-restraint described in the Qur'an and sunnah. Hamas's militant tactics have put a chokehold on its ability to govern and broker peace for the Palestinians, thus, this is the ideal time to present it with an Islamic argument to alter its policies.

CONCLUSION

Islamic humanitarian law clearly coincides with many principles adopted in international humanitarian law. With so many similarities, it does not seem possible that the two frameworks could come to completely opposite conclusions regarding suicide bombing. Suicide bombing seems contrary to a religion that equates an unjust killing with the killing all of mankind.³⁴³ Israeli aggression and the lack of international intervention are often cited as justifications for suicide bombings.³⁴⁴ Thus, it is essential that the world community intervene to force Israel to comply with international law. If Muslims believe that Israel can be held accountable for its violations, and that Israel can conform to international law, the chances for peace will increase exponentially.

342. *Id.*

343. See Holy Qur'an, *Surah Al-Maidah* 5:32.

344. ERASED IN A MOMENT, *supra* note 144, at 52.

It is then up to the Muslims to unite and present an argument to Hamas that suicide bombings do not coincide with Islamic law. The Palestinians have a legitimate right of self-determination that the international community recognizes. If Hamas is going to lead the Palestinian people to the realization of this right, Islam must be used as the basis to bring them to the table. Hamas cares little if it violates international law because Islam is its basis. Thus, it is imperative that the Muslim world unite to persuade Hamas that its tactics are not only contrary to Islamic law, but are not furthering the Palestinian cause.

