

*Modern Islamic International Law Between Accommodation and Resistance:  
The Case of Israel and BDS*

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## 1. Islamic International Law and Contemporary World Order

The place of Islamic law in general law, and Islamic international law in particular, in relation to the contemporary global order remains controversial. Not only do numerous Muslim states expressly incorporate Islamic law as part of their domestic legal order,<sup>1</sup> or even claim that it forms the basis of their legal order,<sup>2</sup> even non-Muslim states with significant numbers of Muslim minorities recognize aspects of Islamic law as part of their domestic positive law.<sup>3</sup> Even in European states and North America, where Islamic law is not part of the public legal order, Islamic law often becomes embroiled in the legal system through principles of private international law or private commercial or family law arbitration.<sup>4</sup> The continued persistence of Islamic law as part of the established public law systems of numerous jurisdictions, and in the private law of liberal democracies, of course, is not without its critics, with regularly accusations leveled against Islamic law for perpetuating human rights abuses, particularly, against women and religious minorities.<sup>5</sup>

Relatively less attention, however, has been given to Islamic international law. In scholarly circles, studies have largely focused on the earliest, expansionary phase of the caliphate in which the basic principles of classical Islamic international law were first articulated, receiving their systematic treatment in the works of Muḥammad b. al-Ḥasan al-Shaybānī, and 20<sup>th</sup> century developments which appear to revise radically classical Islamic conceptions of world order.<sup>6</sup> This literature largely assumes that classical Islamic international law assumed that the Islamic state would expand until it ruled all of humanity, at which point the need for Islamic international law would come to an end.<sup>7</sup> On the other hand, secondary scholarship on modern Muslim conceptions of Islamic international law assume either that Islamic conceptions of international order have largely become irrelevant for Muslim states, either

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<sup>1</sup> Most Muslim-majority states continue to base their family law on Islamic law, even if non-Islamic law has displaced Islamic law in all other areas.

<sup>2</sup> This would include states as disparate in outlook and temperament as the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the Islamic Republic of Iran, each of which, by its constitution, claims to follow an Islamic legal order.

<sup>3</sup> Such non-Muslim states include, among others, such unlikely candidates as Israel, India and Singapore.

<sup>4</sup> See, for example, Pascale Fournier, "The Reception of Muslim Family Laws in Western Liberal States," *Women Living Under Muslim Laws*, Dossier 27 (2006), pp. 67-79.

<sup>5</sup> See, for example, Bassam Tibi, "Islamic Law/*Shari'a*, Human Rights, Universal Morality and International Relations," 16,2 *Human Rights Quarterly* (1994), pp. 277-99, and Abdullahi A. An-Naim, "Religious Minorities Under Islamic Law and the Limits of Cultural Relativism," 9,1 *Human Rights Quarterly* (1987), pp. 1-18.

<sup>6</sup> The great 20<sup>th</sup> century scholar of Islamic international law, Majid Khadduri, exemplifies both these trends. See Muḥammad b. al-Ḥasan al-Shaybānī, *The Islamic Law of Nations: Shaybānī's Siyar*, translated by Majid Khadduri (The Johns Hopkins Press: Baltimore, 1966) (discussing classical Islamic international law) and Majid Khadduri, "Islam and the Modern Law of Nations," 50,2 *The American Journal of International Law* 358-72 (1956).

<sup>7</sup> Khadduri's description of classical Islamic international law as requiring Muslims to subdue all non-Muslim powers, with any peace between Muslim and non-Muslim powers being only temporary, is fairly representative of scholarly wisdom. Khadduri, *Islamic Law of Nations*, pp. 16-17.

because they have become officially secular, e.g., Turkey, or because their modernist understanding of Islamic law, whether in the domestic or international sphere, allows them to endorse unqualifiedly the modern law of nations that emerged from the European practice of international law.<sup>8</sup> This latter claim rests largely on the political repudiation by Muslim states, and the religious repudiation by influential 20<sup>th</sup> century religious scholars, of offensive warfare (*jihād*). As a result, the classical doctrine of permanent expansion of the Islamic state through waging war against non-Muslims has been transformed into a doctrine limited exclusively to defensive war.<sup>9</sup> While accommodation is often seen as a one-way street, pursuant to which Islamic law accedes to the superior, even irresistible, might of the western powers who are the author of contemporary norms of international law, a careful consideration of the development of International Humanitarian Law over the last one-hundred and fifty years suggests a more complex story.<sup>10</sup>

One obvious issue separating the Muslim world from the western world, and has produced radically different conceptions of international obligations, is the creation of the State of Israel. The claim of virtual convergence between modern Muslim conceptions of international law and what Khadduri calls “the modern law of nations” (or conventional international law) can be tested in how Muslim jurists understand the State of Israel and its position in the international system from an Islamic perspective. This paper will begin by considering “*jihād*-revisionism,” i.e., interpretations of *jihād* that emerged in the Muslim world that rejected, from an internal religious perspective, the permissibility of aggressive warfare. It will then consider the views of 20<sup>th</sup> and 21<sup>st</sup> century Muslim jurists who, from the internal perspective of Islamic law, endorse the general compatibility of the post-World War II international order with Islamic norms of international order, while at the same time rejecting the legitimacy of the State of Israel and maintain that resistance to the Zionist project is a religious duty. The paper will then consider the views of the 20<sup>th</sup> century Egyptian jurist, ‘Abd al-Razzāq al-Sanhūrī, regarding modern Islamic law and draw out the implications of his legal theories for the articulation of a systematic modern Islamic international law, and how it would apply to the problem the State of Israel poses to an Islamic conception of world order.

Sanhūrī, unlike the other authors whose views are considered in this essay, approaches the question of a modernized Islamic international law from the perspective of his project to create a modernized Islamic legal system that could serve as the basic law for independent Muslim peoples. Part of his project entailed a reconceptualization of the classical Caliphate as a league of “Eastern” states, and so raises questions of international law as well as the reform of domestic Islamic law. While Sanhūrī’s writings in his work on the caliphate did not expressly deal with the problem of the State of Israel, his project to create a modern Islamic international law as part of a modernized Islamic law that is also a universal conception of justice points the way to a humanistic conception of Islamic law that authorizes resistance to the Zionist project using modes consistent with a universal, non-sectarian conception of justice. The paper will argue that the Boycott, Divestment and Sanction (“BDS”) movement, in fact, represents in an exemplary fashion the Islamic and humanistic ideals that Sanhūrī pursued over his

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<sup>8</sup> Khadduri, “Modern Law of Nations,” p. 370.

<sup>9</sup> In classical Islamic law, *jihād* as a legal term applies to armed conflict between a Muslim power and a non-Muslim power. It was divided into two sub-categories, offensive war (*jihād al-ṭalab*) and defensive war (*jihād al-daf*). Defensive war, however, even after modern religious reforms, would still be deemed to be *jihād*.

<sup>10</sup> See James Cockayne, “*Islam and international humanitarian law: From a clash to a conversation between civilizations.*” International Review of the Red Cross, Vol. 84, No. 847, pp.597-626 (2002).

lifetime, both as a scholar of Islamic and comparative law, and as the legal draftsman responsible of the Egyptian Civil Code of 1949 and the codes of numerous other Arab states. BDS, therefore, provides modern Islamic international law with a practical example that can be adopted and developed to provide a universal model for resistance to violations of international law.

## 2. Theological *Jihād*-Revisionism in the 20<sup>th</sup> Century: Maḥmūd Shaltūt and Aḥmad al-Marāghī

*Jihād*-revisionism appears to have taken express literary reform in the inter-war period in Egypt, largely in the context of theological apologetics defending Islam against the common European charge that it had spread only by virtue of the force of arms. Maḥmūd Shaltūt, a traditionally-trained cleric born in 1893, was a member of the reformist wing of al-Azhar that took its inspiration from the teachings of Muḥammad ‘Abduh. Shaltūt wrote two treatises on the subject of *jihād* from his perspective as an Islamic modernist, the first in 1933 titled *al-Da‘wa al-Muḥammadiyya wa-l-Qitāl fī’l-Islām* [*The Muhammadan Mission and Fighting in Islam*], and the second in 1948 titled *al-Qur‘ān wa’l-Qitāl* [*The Quran and Warfare*].<sup>11</sup> Substantively, Shaltūt was eager to provide a theory of *jihād* that was consonant with the obligations of Egypt (and other independent, or soon to be independent, Muslim-majority states) within the emerging world order of independent nation states that had, as a matter of positive international law, prohibited aggressive war.<sup>12</sup>

To do this, Shaltūt engaged in a radical critique of traditional Quranic exegesis, arguing that the traditional, verse-by-verse method of understanding revelation, led to the absurd proposition, among some exegetes, that some seventy verses in the Quran had been abrogated. In contrast to this method, Shaltūt argued that a more holistic reading of the Quran which took into account all verses relevant to a certain topic – in this case fighting – and interpret them together. According to Shaltūt, when the Quran is read properly, in this holistic fashion, it is impossible to escape the conclusion that Quran loves peace and detests violence, including, war.<sup>13</sup> He then asserted that Islam endorses the concept of free faith, as evidenced by numerous Quranic verses which appeal to human beings’ reason to affirm the unity of God and the unity of religious truth. Thus, forced conversion to Islam is fundamentally incompatible with the Quran’s teachings as is evidenced by the Quran’s consistent appeal to human reason as the basis for accepting its truth.<sup>14</sup> In addition, Shaltūt denied the salvific value of forced conversion on the Day of Judgment, and therefore was senseless.<sup>15</sup>

With respect to the permissibility of fighting, Shaltūt asserted that the core Quranic teaching on fighting is that it is permitted to prevent religious persecution, including persecution of the followers of other religion,<sup>16</sup> and must cease when religious persecution comes to an end.<sup>17</sup> As for the Quranic verse stating “Fight those who believe not in God and in the Last Day and who do not forbid what God and His

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<sup>11</sup> This latter work has been translated by Rudolph Peters and is included in his book *Jihad in Classical and Modern Islam* (Princeton: Markus Wiener, 1996).

<sup>12</sup> The Kellogg-Briand Pact renouncing the use of force to settle international disputes was signed in 1928. Afghanistan, Egypt and Turkey had signed on to the pact by the time it went into effect in 1929, and Persia signed on shortly thereafter. See *Kellogg-Briand Pact of 1928*, available at [http://avalon.law.yale.edu/20th\\_century/kbpact.asp](http://avalon.law.yale.edu/20th_century/kbpact.asp) (last viewed, March 3, 2016).

<sup>13</sup> Peters, pp. 61-62.

<sup>14</sup> Ibid., pp. 62-64.

<sup>15</sup> Ibid., p. 70.

<sup>16</sup> Ibid., p. 73.

<sup>17</sup> Ibid., pp. 74-75.

Messenger have forbidden, and who follow not the religion of truth among those who were given the Book, until they pay the *jizya* with a willing hand, being humbled,”<sup>18</sup> Shaltūt argued that this verse is not a command (or even a grant of permission) to fight unbelievers solely on account of their unbelief; instead, he argued that this verse applied only to those groups of unbelievers, including scripturalists, who participated in the religious persecution of Muslims,<sup>19</sup> or otherwise indicated their intention to resist the call to Islam violently.<sup>20</sup> Shaltūt therefor concluded that the Quran permits fighting for only three reasons: defense against aggression, protecting the Islamic mission and defending religious freedom.<sup>21</sup> Against claims of some classical commentators that Quranic teachings encouraging requiting evil with good, and calling people to Islam with wisdom and beautiful admonition, were abrogated by the revelation of verses permitting, and at times obligating, fighting, Shaltūt maintained that the teachings of these verses continued to apply robustly, but on the condition that adherence to those principles of “forgiveness and pardon . . . do not infringe on pride and honor.”<sup>22</sup>

Al-Marāghī, like Shaltūt, was an Azhari-trained cleric who hailed from a family of religious scholars (including his father who was Shaykh al-Azhar). He published his multi-volume commentary on the Quran – called *Tafsīr al-Marāghī* – in Cairo in 1946.<sup>23</sup> Al-Marāghī’s views on Quranic teachings on war can be characterized as responding to two charges: that Islam spread through compulsory conversion, and that the Quran sanctions aggressive warfare against persons solely on the basis of their status as non-Muslims.

For the first point, al-Marāghī relied on the plain meaning of *al-Baqara*, 2:256 which provides “There is no compulsion in religion. Truth is clearly distinguished from error, so whoever rejects false gods, and believes in God has grasped tightly to the firmest bond which shall not be split. God is all-hearing and all-knowing.” Al-Marāghī took this verse to mean that faith cannot result from compulsion, but instead relies on evidence and proof, and accordingly, it is forbidden to compel anyone to adopt Islam. Not only did he use this verse to discredit non-Muslim critics of Islam, he also used it to criticize unnamed “partisans of Islam” who claimed that non-Muslims are obliged to choose either between accepting Islam or fighting a war with the Muslims.<sup>24</sup>

For al-Marāghī, the concept of free faith was relevant not only to provide the terms on which people may adopt Islam, but it also implied that no one can be forced to abandon Islam. Accordingly, he stated that “[The Muslims] did not permit persons to adopt Islam under compulsion, just as they did not permit anyone to compel [Muslims] to abandon it.”<sup>25</sup> The concept that no compulsion in religion is a shield protecting the religious freedom of Muslims is the conceptual tie between religious freedom and religiously-sanctioned fighting. Thus, he stated that protecting Muslims from forced conversion required “that we have deterrence and strength by which we can protect our religion and our persons

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<sup>18</sup> *Al-Tawba*, 9:29.

<sup>19</sup> Peters, *Ibid.*, pp. 77-78.

<sup>20</sup> *Ibid.*, pp. 98-99. Shaltūt referenced the murder of the Prophet Muhammad’s ambassador by Shuraḥbīl al-Ghassānī, a vassal of the Byzantine ruler, and the decision of the Persian emperor to tear up the Prophet’s letter inviting him to Islam.

<sup>21</sup> *Ibid.*, p. 79.

<sup>22</sup> *Ibid.*, p. 81.

<sup>23</sup> Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Marāghī* (Cairo: *Muṣṭafā al-Bābī al-Ḥalabī*, 1953-73), 30 vols. in 10.

<sup>24</sup> *Ibid.*, 3:16.

<sup>25</sup> *Ibid.*, 3:18.

against those who would attempt to persecute us on account of it or commit aggression against us, for God has commanded us to call to His path using wisdom and beautiful admonition, and that we should debate those holding contrary views using the best means, with the stipulation of freedom to preach and security from persecution.”<sup>26</sup> He argued that *jihād* was ordained in order to protect Muslims from religiously-motivated persecution, on the one hand, and to insure freedom to preach Islam, on the other.<sup>27</sup> When Muslims are subject to religiously-based persecution, however, al-Marāghī seems to recognize an exception to the rule of free faith. Thus, in order to prevent religious persecution and increase Islam’s strength to deter others from the persecution of Muslims, Muslims are allowed either to compel the obstinate to accept Islam, or bring them under the political suzerainty of the Islamic state in which case they pay a tax (*jizya*) in exchange for protection. In both cases, the justification given is defensive: to protect Muslims from the persecution of enemies.<sup>28</sup>

The centrality of freedom from persecution and freedom to preach to al-Marāghī’s theory of jihad is also evident in his commentary on *al-Tawba* 9:29. According to al-Marāghī, this verse, which authorized Muslims to wage war against scripturalists, was revealed in connection with the emerging conflict between the nascent Islamic state and Byzantium,<sup>29</sup> and far from commanding warfare against non-Muslim scripturalists, it simply laid out the rules that applied when Muslims fought them: in contrast to the struggle against the Arab pagans, in which case permanent peace could only be established by their entry into Islam, war with non-Muslim scripturalists would terminate if they agreed to submit politically to the Islamic state and pay the *jizya*. The conditions on which Muslims were permitted to fight non-Muslim scripturalists, however, were unchanged, namely, “aggression against you or your territories, oppression or religious persecution of you, or threats against your security and safety, as the Byzantines had done, and [those actions were] the occasion for the Tabūk campaign.”<sup>30</sup> As a general principle, therefore, al-Marāghī argued that fighting is obligatory under Islam only “in defense of truth and its people, and to protect [the right to] call [others to Islam],” and that while the battles fought by the Prophet and his companions in the first forty years of Islamic history satisfied this condition, subsequent battles were driven by political considerations.<sup>31</sup>

### 3. Legal Revisionism: Muḥammad Abū Zahra, Wahba al-Zuḥaylī and Yūsuf al-Qaraḍāwī

While theologians such as Shaltūt and Marāghī argued for a radical reinterpretation of theological understandings of *jihād*, other Muslim scholars operating in the post-World War II era penned works questioning classical Muslim conceptions regarding Islamic international law. Building on the theological arguments of theological reformers like Shaltūt and Marāghī, the Egyptian jurist Muḥammad Abū Zahra, a traditionally-trained but reform-minded jurist who was a professor of Islamic law at Cairo University’s Faculty of Law, and the prominent Syrian scholar of Islamic law and member of the influential Islamic

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Battles with Byzantine forces began during the Prophet’s lifetime, starting with Mu’ta in northwest Arabia (now a part of Jordan) where a relatively small contingent of Muslim soldiers – 3,000 or so – met a much larger number of Byzantines who inflicted upon the Muslims a crushing defeat, and followed by the Tabuk campaign in which the Prophet marshaled a large army and marched to the Byzantine frontier, only to return to Madina without engaging the Byzantines in battle.

<sup>30</sup> Ibid., 10:95.

<sup>31</sup> Ibid., 10:92.

law committee of the Organization of Islamic Cooperation, Wahba al-Zuhaylī, both affirmed the fundamental compatibility of the post-World War II order and Islamic conceptions of world order.<sup>32</sup> For these authors, the fact that the post-World War II order prohibited aggressive war, recognized the right of peoples to self-determination, and respected human rights, including, the right of freedom of religion and state neutrality toward Islam, rendered classical Islamic law's division of the world into Islamic territory, and non-Islamic territory obsolete, and effectively transformed the world into one legal territory from the perspective of Islamic law. In light of the dramatic changes that took place in international relations since the birth of Islam in the 7<sup>th</sup> century, it was appropriate for Muslim jurists to revise their presumption that relations between Muslims and non-Muslims was hostile to a presumption of friendliness and peace.<sup>33</sup> For Zuhaylī, this meant that the juristic division of the world in the foundational period of Islamic history into Islamic territory (*Dār al-Islām*) and non-Islamic territory (*Dār al-Ḥarb*) was a purely empirical and hence contingent categorization that had to be abandoned once the presumption of friendliness and peace replaced that of war and conflict.<sup>34</sup> At the same time, however, Zuhaylī affirmed the continuing validity of the notion of Islamic territory (*Dār al-Islām*) toward which Muslims had particular duties, a concept that plays a crucial role in their understanding of the problem of Zionism, as will be explained in greater detail below.<sup>35</sup>

The positions of reformist Muslim jurists such as Abū Zahra and al-Zuhaylī largely reinforced the official position of Muslim-majority states to affirm the basic norms of the post-World War II order, but as substantial numbers of Muslims grew increasingly disillusioned with the post-World War II order, reaffirmation of classical Islamic positions regarding international relations became more common.<sup>36</sup> The trend to reject the legitimacy of the post-World War II system of international relations was accelerated with the rise of Islamic militant groups in the last quarter of the 20<sup>th</sup> century. These groups denied legitimacy both to the post-World War II international order and the domestic order in the Muslim world, declaring the governments of Muslim-majority states to be apostates. From their perspective, the entire world constituted non-Islamic territory, and it was their task to reconstitute a legitimate Islamic order.<sup>37</sup>

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<sup>32</sup> Muḥammad Abū Zahra, *al-'Alāqāt al-Dawliyya fī'l-Islām [International Relations in Islam] (al-Dār al-Qawmiyya li'l-Ṭibā'a wa'l-Nashr: Cairo, 1964)*; Wahba al-Zuhaylī, *al-'Alāqāt al-Duwalīyya fī'l-Islām: Muqārana bi'l-Qānūn al-Dawlī al-Ḥadīth [International Relations in Islam: a Comparison with Modern Law] (Mu'assasat al-Risāla: Beirut, 1981)*. Abū Zahra was a prolific author and advocate of substantive Islamic law reform, penning scores of books on Islamic legal history as well as works in support of modern Islamic legal reforms. Al-Zuhaylī, also a prolific author in his own right, albeit more deferential to the tradition than Abū Zahra, is the author of the influential work, *al-Fiqh al-Islāmī wa Adillatuhu [Islamic Jurisprudence and its Proofs] (Damascus: Dār al-Fikr, 1984)*.

<sup>33</sup> Al-Zuhaylī, pp. 17-18.

<sup>34</sup> Ibid., p. 17.

<sup>35</sup> Ibid., p. 105.

<sup>36</sup> See, for example, 'Abd al-Karīm Zaydān, *Majmū'at Buḥūth Fiqhiyya [Collected Essays in Islamic Law] (Mu'assasat al-Risāla: Beirut, 1975)* and Muḥammad Khayr Haykal, *Struggle and War in Islamic Statecraft [al-Jihād wa'l-Qitāl fī'l-Siyāsa al-Shar'iyya]*, vol. 1 (*Dār al-Bayāriq: Beirut, 1993*).

<sup>37</sup> One could in fact argue that this is precisely what Dā'ish, by proclaiming a caliphate, and then arguing that Muslims have a duty to immigrate there, claims to be doing. In this context, it is important to distinguish between Muslim militant groups such as the Palestinian Hamas and the Lebanese Hizbollah from groups such as al-Qa'ida and Dā'ish insofar as the former are essentially national liberation movements, albeit with Islamic referents, and do not reject the basic legitimacy of the international order or the legitimacy of post-colonial Muslim nation states.

Yūsuf al-Qaraḏāwī, largely to respond to the growing influence of Islamic militant groups who denied legitimacy to Muslim states and the international order, published a two-volume work on Islamic international law in 2008, in which he defended the notion that Muslim-majority states, even if they were deficient in applying Islamic law, indeed, even if they claimed to be wholly-secular, such as the Republic of Turkey, continued to be part of *Dār al-Islām*.<sup>38</sup> Qaraḏāwī had little choice but to defend the Islamic legitimacy of these non-ideal (from his perspective) Muslim governments because only if those regimes are legitimate could he legitimate the modern system of international relations. The legitimacy of the post-World War II system of international relations in Qaraḏāwī's understanding depends on the comprehensive system of treaty relations that govern the relations of post-World War II states, whether Muslim-majority or non-Muslim-majority states. At the center of this web of treaties sits the United Nations, whose decisions he recognizes as having binding power over Muslim states and individuals. The moral legitimacy of the post-World War II order, including the decisions of the United Nations, is based on the notion that these treaties were negotiated and agreed to by the governments of Muslim-majority states, who, as valid representatives of the Muslim community, are capable of morally binding Muslims to the content of those treaties because Islam commands its adherents to abide by their agreements.<sup>39</sup> Qaraḏāwī, unlike Zuḥaylī, however, does not reject the scriptural or rational basis of classical division of the world between Islamic territory and non-Islamic territory. Because the basis of world peace in his view is treaty and not common belief, he argues that the relationship of Muslim states to non-Muslim states is determined by treaty relations. Hence, the territories of non-Muslim states relative to Muslim states is a relationship of treaty (*Dār 'Ahd*).<sup>40</sup>

#### 4. Zuḥaylī and Qaraḏāwī on the State of Israel

Despite the fact that both Zuḥaylī and Qaraḏāwī reject the classical division of the world into Islamic territory and non-Islamic territory and the derivative notion that Muslims are under a perpetual obligation to subdue non-Islamic territory, they both categorically reject the possibility of peaceful relations with Israel. Qaraḏāwī, for example, states that Muslims, by virtue of their extensive treaty relations with non-Muslim powers, are at peace with all such powers, with the exception of Israel. Israel is described as a hostile non-Muslim power, *Dār Ḥarb*, and therefore a presumption of hostility continues to exist with respect to it.<sup>41</sup> For Zuḥaylī, the primary obstacle to peace with Israel is the *religious* obligation of Muslims to defend Islamic territory. Palestine was historically part of Muslim territory, and as is the case with any other Muslim territory, a duty of defensive *jihād* applies to defend that territory against foreign invasion, and where local Muslims are unable to withstand the invaders, their Muslim neighbors are under an obligation to provide sufficient support those under attack until such time as they are able to liberate that territory from non-Muslim control and restore it to Muslim rule.<sup>42</sup>

Qaraḏāwī does not depart in substantial respects from Zuḥaylī's line of argument as to why peace with Israel is inconceivable, while adding that the general duty of Muslims to defend Islamic territory from invasion, and then to liberate it if it comes under non-Muslim control, is even greater in

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<sup>38</sup> Yūsuf al-Qaraḏāwī, *Fiqh al-Jihād*, 2 vols. (Cairo: *Maṭba'at Wahba*, 3<sup>rd</sup> ed., 2009), 2: 893-95.

<sup>39</sup> *Ibid.*, 2: 895.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p. 900.

<sup>42</sup> Zuḥaylī, p. 105.

the case of Palestine, given its religious significance.<sup>43</sup> In justifying Israel's unique position in modern Islamic international law, however, Qaraḍāwī goes beyond the argument that Muslims are under a religious obligation to provide mutual support in the case of invasion by non-Muslims, however, by emphasizing the uniquely political aspects of Israel's creation that distinguishes it from other non-Muslim states. First, its relatively recent creation: as recently as one hundred years ago, the idea of Jewish state in Palestine would have been seen as preposterous. Second, it came into existence only as a result of the Zionist movement's political cunning, its ability to deploy brute and overwhelming force, and the weakness of the Muslim community at the time it began its project. Third, it was midwived through the direct intervention of Great Britain in its role as the mandatory power over Palestine, which used its position to aid and abet the growth of Zionist institutions, including, turning a blind eye to its establishment of armed militias, while impeding the Palestinian Arabs from arming themselves in an effective manner. Fourth, the Israeli state came into existence only as a result of the force of arms and the support of western powers. Fifth, in connection with the creation of its state, the Zionist movement committed grave crimes, forcibly seizing Palestinian land through the use of arms and massacres and expelling the Palestinians from their territory.<sup>44</sup>

He concluded his argument explaining why Israel must be deemed to constitute *hostile* non-Muslim territory (*Dār ḥarb*) with respect to Muslims by saying:

“For these reasons, Islamic law deems Israel, in its relations to Muslims, to be hostile non-Muslim territory (*Dār ḥarb*) because it occupied a part of their lands, and colonized it, in the manner of settler-colonialism combined with ethnic cleansing – insofar as it expelled its people, taking their place through means of force and usurpation – and committing in connection with that crimes that no religion (*dīn*), morality (*khuluq*), law (*qānūn*), or custom (*urf*) permits.”<sup>45</sup>

He also quoted a fatwa given by the senior scholars of al-Azhar on January 1, 1956 which prohibited, from the perspective of Islamic law, the conclusion of a final peace (*ṣulḥ*) with Israel insofar as such a treaty would entail,

“confirming the usurper in his usurpation, and recognition of the rightness of his possession over what he usurped, and enabling an aggressor to remain in possession of the fruits of his aggression. All revealed laws, and all systems of positive laws concur in the prohibition of usurpation, and the duty to return what has been taken through usurpation to its rightful owner. They also spur the true owner to defend himself and to demand vindication of his rights.”<sup>46</sup>

Without questioning the factual predicate of Qaraḍāwī's arguments against the Zionist project, it is not clear why it follows from the past and ongoing illegal actions of the Zionist movement and the State of Israel, that Islamic law should classify it as *Dār Ḥarb*. Were that classification to be taken literally, it would imply the absence of common norms regulating interactions between Israelis, on the one hand, and Palestinian Arabs, on the other.<sup>47</sup> It is clear, however, that Qaraḍāwī does not believe,

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<sup>43</sup> Qaraḍāwī, p. 901.

<sup>44</sup> Ibid. 900-01.

<sup>45</sup> Ibid. 901.

<sup>46</sup> Ibid. 904.

<sup>47</sup> In classical Islamic law, *Dār al-Ḥarb* essentially meant a state of nature where the only law that applied was one of capture or conquest. Muslims, when in *Dār al-Ḥarb*, were unilaterally bound by the strictures of Islamic



for example, that Muslims, even in the context of hostile relations with Israelis, would be permitted to enslave them, or to treat their captured prisoners of war outside the framework of the Geneva conventions.<sup>48</sup> It is also the case that he, and other Muslim jurists, including, for example, the senior jurists of al-Azhar who declared in their fatwa of 1956 prohibiting, from the perspective of Islamic law, conclusion of a permanent peace (*ṣulh*) with Israel, also believed that, prior to the establishment of the State of Israel in 1948, there were certainly commonly-held rules that governed the interactions of Muslims and non-Muslims. The 1956 fatwa of al-Azhar, for example, said that all revealed laws prohibit usurpation, as do all systems of positive law, and each of them, far from requiring victims of injustice to relinquish their claims, spur them to pursue their claims diligently, and defend themselves against usurpers. Qaraḍāwī, likewise, claims that “no religion, morality, law, or custom” permitted the Zionists to do what they did to the Palestinians, prior to the creation of the State of Israel in 1948, or permitted the State of Israel to treat the Palestinians in the fashion it has since 1948. The very fact that Muslim jurists, in condemning Zionism, assume a shared body of international norms that regulates the dispute between Zionism and Palestinians, suggests that Zionism and Israel are not outside the law, as would be the case if Islamic law classified it as *Dār al-Ḥarb*, but rather the Zionists and the State of Israel are *law-breakers*, of one sort or the other.<sup>49</sup>

It may seem that the distinction between being outside the law, and being a law-breaker, is a highly technical distinction of little moral relevance. In fact, from the perspective of Islamic law, the distinction is substantive insofar as Islamic law treats law-breakers differently from a party that is outside the law. Most significantly, it imposes important restraints on the way one can pursue his claims. Classifying Israel as *Dār Ḥarb*, however, would imply that only minimal restraints apply in prosecuting the conflict with Israel. And indeed, while Muslim jurists have focused, correctly, on the injuries that Zionism and the State of Israel have caused to Palestinians and the Muslim world, they have not given similar attention to the remedies that are appropriate to resist Zionist and Israeli aggression and have all too easily reached the conclusion that Israel is part of *Dār al-Ḥarb*, despite the implication such a position entails in terms of an absence of common rules regulating the interactions between Israel and its neighbors.

While Bassam Tibi’s claim that Muslims “make no effort to accommodate the outmoded Islamic ethics of war and peace to the current international order” is clearly exaggerated,<sup>50</sup> the failure on the part of Muslim jurists such as Zuḥaylī and Qaraḍāwī to develop a comprehensive theory regarding the appropriate response to violations of the international order – other than relapsing to the category of *Dār al-Ḥarb* – undermines the potential of developing a fully articulated Islamic conception of international law that would offer a more intellectually satisfying response to the remedial weakness of contemporary international law. At the same time, the opinions of the Muslim jurists surveyed in this

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law, but those norms did not bind non-Muslims. See generally, Mohammad Fadel, “History of Islamic International Law,” *Max Planck Encyclopedia of Public International Law*, ed. Dr. Frauke Lachenmann et al. (Oxford), ¶¶ 8-9.

<sup>48</sup> Qaraḍāwī, 1:266-70. Qaraḍāwī, in these passages, written before the rise of Dā’ish, condemns what he calls “the products of the practical jurisprudence of the Islamist warmongers (*āthār fiqh al-hujūmiyyīn al-‘amaliyya*).”

<sup>49</sup> There are two kinds of law-breakers in Islamic law, rebels (*bughāt*), or brigands (*muḥāribūn*). The essential difference between the two is that rebels are not subject to criminal liability, while brigands are. Accordingly, one might say that the distinction relates to the difference between civil and criminal culpability.

<sup>50</sup> Bassam Tibi, “War and Peace in Islam,” Bassam Tibi, in *The Ethics of War and Peace*, ed. Terry Nardin (Princeton: Princeton University Press, 1996) p. 140.

article were, in the first instance, those of theologians engaged in a religious apologetic project, not a systematic, constructive legal project.

That does not mean that no modern Muslim attempted such a project. In fact, the 20<sup>th</sup> century Egyptian jurist, ‘Abd al-Rāziq al-Sanhūrī, as is well-known, did attempt a systematic and comprehensive reconstruction of Islamic law so as to make it both fully modern and fully Islamic. While his writings on international law were only incidental to his overall project of Islamic law reform, and as far as I know, he never wrote a scholarly analysis of the status of the State of Israel from the perspective of modern Islamic international law as he understood it, his writings on international law and modern Islamic law nevertheless point the way to the outlines of a systematic legal response to the creation of the State of Israel that goes beyond the partial response of the Muslim jurists surveyed above. The next part of this paper will discuss Sanhūrī’s theory of a modernized Islamic law, and its relationship to international law.

##### 5. Sanhūrī’s Conception of Modern Islamic Law and its Relationship to Modern International Law

Numerous scholars have written extensively on Sanhūrī’s efforts to produce a reconstituted modern system of Islamic law that reconciles historical Islamic law to modern principles of legality.<sup>51</sup> There is no need to rehearse the details of his law reform project in this context except to emphasize the central aims of his project of a *modernized* Islamic law. First, he argued for distinguishing Islamic law’s purely legal elements from its religious elements, the latter being enforceable only through the conscience of individual believers. Only the former body of rules would constitute the resources for developing a modernized Islamic law.<sup>52</sup> Second, once the religious elements of historical Islamic law are separated from its purely legal elements, those rules can be modernized by extracting from the particular rulings of historical Islamic jurisprudence abstract and general legal concepts which, because they are universal, are amenable to application across all times and places. From his perspective, historical applications of Islamic law are no more and no less than particular specifications of Islamic law’s universal principles and so do not, in themselves, bind subsequent generations or regions.<sup>53</sup> Accordingly, Sanhūrī argued that Islamic law should itself be considered a source of law for humanity, in the same way that Roman law is understood as a universal source of law. Indeed, as a result of his vociferous advocacy on behalf of Islamic law’s place as a constituent component of humanity’s common legal heritage, he succeeded in having it recognized at a 1932 conference at The Hague on comparative law as “one of the major sources of law.”<sup>54</sup>

The universality of Islamic law’s applicability (or its potential applicability) regardless of religious commitment does not mean that non-Muslims are compelled to affirm principles that their religious

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<sup>51</sup> For more on al-Sanhūrī and his contributions to modern Islamic law, see Enid Hill, “The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzāq al-Sanhūrī, Egyptian Jurist and Scholar”, Parts I and II, 3,1 *Arab Law Quarterly* (1988), pp. 33-64 and 3,2 *Arab Law Quarterly* (1988), pp. 182-218; ‘Amr Shalakany, “Between Identity and Distribution: Sanhūrī, Genealogy and the Will to Islamise, 8,2 *Islamic Law and Society*, pp. 201-244 (2001); ‘Amr Shalakany, “Sanhūrī and the Historical Origins of Comparative Law in the Arab World,” in *Rethinking the Masters of Comparative Law*, ed. Annelise Riles (Portland: Hart Publishing, 2001); and, Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932-1949)* (Boston: Brill, 2007).

<sup>52</sup> Hill, Sanhūrī, Part II, p. 184. See also, ‘Abd al-Razzāq al-Sanhūrī, *al-Sanhūrī min Khilāl Awrāqihī al-Shakhsīyya [hereinafter, “Sanhūrī’s Diary”]*, edited by Tawfiq al-Shāwī and Nādiya al-Sanhūrī (Cairo: Dār al-Shurūq, 2005), pp. 143-44.

<sup>53</sup> *Sanhūrī’s Diary*, p. 144.

<sup>54</sup> Hill, Sanhūrī, Part I, p. 35.

principles reject, for it would not be universal if it did not fully respect the religious convictions of non-Muslims.<sup>55</sup> This commitment to guarantee to non-Muslims religious equality in the context of law (narrowly understood) led Sanhūrī to adopt two ancillary principles. First, non-Muslim legal scholars and social scientists would work side by side with Muslims in discovering the universal principles of Islamic law and specifying how those principles should be applied in the modern world. Second, non-Islamic legal systems are themselves a legitimate source of Islamic law and complement and complete it, insofar as they do not contradict the principles of Islamic law, and are otherwise consistent with the needs of the modern age.<sup>56</sup>

Sanhūrī's efforts to reform Islamic law domestically, however, was part of a project that was organically connected to creating a peaceful and progressive post-colonial and post-Ottoman world order. The modernization of Islamic law along the lines he proposed was critical to providing a solid foundation of the progress of the "eastern peoples," i.e., the peoples who historically constituted Islamic civilization. With the collapse of the Ottoman Empire, the peoples of the east faced the twin threats of chauvinistic nationalism as exemplified in Kemalism in Turkey, and religious chauvinism, each of which threatened the peace of the eastern peoples. A reconstituted caliphate, based on a modernized, non-sectarian conception of Islamic law in the manner he outlined, could solve both problems. Instead of a centralized caliphate, he proposed a "League of Eastern Nations" that would respect the self-determination of the various Muslim and eastern peoples constituting the "East," but their unity would be preserved through their joint commitment to following a reformed, non-sectarian conception of Islamic law.<sup>57</sup>

He rejected the objection that his proposed "League of Eastern Nations" would pose a threat to Europe.<sup>58</sup> He emphasized that the modernized Caliphate which he envisaged would be a crucial step toward achieving the good of humanity (*al-maṣlaḥa al-insāniyya*) and promoting true global human brotherhood built on mutual trust (*al-rūḥ al-ʿālemiyya al-insāniyya al-mabniyya ʿalā al-thiqa al-mutabādala waʾl-ukhuwwa al-ṣādiqa*).<sup>59</sup> He also denied that his project of a revived Caliphate in the form of a "League of Eastern Nations" would be inconsistent with the aspirations of establishing a global organization of states along the lines envisioned by the League of Nations that had been established after the conclusion of World War I; indeed, he even envisioned that the member states of the League of Eastern Nations would necessarily have to be members of the League of Nations, and that the League of Eastern Nations itself would even strive to have institutional membership in the League of Nations.<sup>60</sup> In his conception of the League of Eastern Nations, however, enforcement mechanisms of international law would be much stronger, despite recognition of the sovereignty of the individual states. Accordingly, he contemplated that membership in the League of Eastern Nations would entail

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<sup>55</sup> Sanhūrī's *Diary*, pp. 144-45; and, 'Abd al-Razzāq al-Sanhūrī, *Fiqh al-Khilāfa wa Taṭawwuruhā li-Tuṣbiḥa 'Uṣbat Umam Sharqiyya [hereinafter, "Fiqh al-Khilāfa"]*, edited and translated into Arabic from the French by Tawfīq Muḥammad al-Shāwī and Nādia 'Abd al-Razzāq al-Sanhūrī (Cairo: *Mu'assasat al-Risāla*: Cairo, 2000, 4<sup>th</sup> ed.), p. 340 and 347.

<sup>56</sup> Sanhūrī's *Diary*, p. 145.

<sup>57</sup> *Fiqh al-Khilāfa*, p. 340 and 352.

<sup>58</sup> *Ibid.*, pp. 356-57.

<sup>59</sup> *Ibid.*, pp. 357-58.

<sup>60</sup> *Ibid.*, p. 361.

mandatory arbitration of members' disputes with an Eastern International Court of Justice (*maḥkamat 'adl sharqiyya*), and the establishment of special committees for the protection of religious minorities.<sup>61</sup>

Insofar as Sanhūrī intended his vision of a modernized caliphate/League of Eastern Nations to align with the universal aspirations of the League of Nations, one might question the need for his proposed caliphate.<sup>62</sup> Indeed, he admits that in an ideal world, there would not be a need for it, but he defended it on the grounds that League of Nations, as originally envisioned, had been unrealistic in its aspirations, and that the existence of regional organizations, like his proposed League of Eastern Nations, could help the League of Nations achieve its universal goals.<sup>63</sup> It would also help Muslim peoples, currently struggling under the yoke of colonialism, achieve their self-determination and independence, while reducing the risk that incipient nationalism could become chauvanistic.<sup>64</sup>

For Sanhūrī, then, the ultimate goal of a reformed Islamic law was to allow the Muslim world (the "East") to develop peacefully as part of a global community that sought to achieve true global brotherhood.<sup>65</sup> By modernizing Islamic law, Islamic law could provide the foundations of a universal system of justice that could be deployed for the benefit of easterners in their national project(s), while at the same time strengthening the bonds of common human fraternity.

#### 6. A Sanhūrīan Approach to Modern Islamic International Law

Sanhūrī, to my knowledge, did not address the question of Zionism and Palestine in any of his public writings.<sup>66</sup> As Part 4 of this paper points out, while 20<sup>th</sup> century Muslim theologians and jurists engaged in substantial doctrinal reform to accommodate classical conceptions of world order to 20<sup>th</sup> century developments in international law, they objected to the establishment of a Jewish state on grounds that can be considered neutral, e.g., establishment of a Jewish state entails dispossession of the Palestinian people, acquisition of territory by force, and racial discrimination, and religious, e.g., Palestine is part of historically Muslim territory (*Dār al-Islām*) and Muslims have a religious obligation to liberate land invaded and occupied by non-Muslims. I suggested that their response to Zionism, exemplified by the views of someone like al-Qaraḍāwī, for example, suffer from a degree of conceptual incoherence insofar as he affirms the moral legitimacy, from an internal Islamic perspective, of contemporary international institutions as modes of global governance, but then resorts to the classical Islamic conception of *Dār al-Ḥarb* to conceptualize the remedies available to Muslims when the rules of the international system are breached.

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<sup>61</sup> Ibid., p. 360 n.2.

<sup>62</sup> Ibid., p. 361.

<sup>63</sup> Ibid., pp. 361-63. He pointed out that despite the League of Nation's desire to replace power's role in international relations with law, it remained the case that great powers continued to pursue their interests through power.

<sup>64</sup> Ibid., p. 363.

<sup>65</sup> Indeed, he dedicated his research on the modern caliphate to "every Easterner who is able to reconcile his religious, national and ethnic loyalties with his loyalty to the East, his greater home, and the even greater global home: mankind (*ilā kulli sharqī yastaṭī an yuwaḥḥiqqa bayna intimā'ātihi al-dīniyya wa'l-qawmiyya wa'l-irqiyya wa bayna intimā'ihī ila al-sharq waṭanihi al-kabīr wa intimā'ihī ilā al-waṭan al-'ālamī al-akbar: al-insāniyya*)."

<sup>66</sup> Sanhūrī did, however, participate as part of the government of Egypt's official delegation to the United Nations on the question of Palestine. It is also clear from his private diary that he did not think very highly of the Zionist project. *Sanhūrī's Diary*, p. 382.

Sanhūrī's theoretical approach to modern Islamic law in general, and modern international Islamic law in particular, offers a more principled route to fashioning remedies to violations of the international order, such as those committed by the State of Israel, than simply exiling a wrongdoer from the international system, which would be the result if we agreed with Qaraḏāwī's conclusion that Islamic law deems Israel to be *Dār al-Ḥarb* relative to Muslims. Following Sanhūrī, we identify three areas of Islamic law as a source of universal law that are particularly relevant to fashioning a response to Zionism and the State of Israel: the legal difference between relations of war and those of peace; the private law of usurpation; and, finally, duties of third-parties toward true owners. Building on concepts taken from these three areas of Islamic law, I will conclude this article by showing how BDS responds in an exemplary fashion to these universal principles of Islamic law.

a. Distinguishing War, Truces and Permanent Peace

Classical Islamic law recognized three possible relations that could exist between the Islamic state<sup>67</sup> and non-Muslim states. The first was when no relations existed at all. In such a case, such a polity would be classified as *Dār Ḥarb*, not because there was necessarily a war between that polity and the Islamic state, but in the absence of formal legal relations, Islamic law was incapacitated from recognizing any entitlements of persons in such territory.<sup>68</sup> Conversely, residents of the *Dār al-Ḥarb* owed no duties of recognition toward persons or property under the Islamic state's jurisdiction. Accordingly, the legal category of *ḥarb* recognized a class of relations that existed outside of law entirely, except insofar as Islamic law placed internal restraints on Muslims or the Islamic state in its dealings with such a polity or individuals resident in that polity. In the absence of law, the only entitlements were possessory, and conquest was an effective means for the transfer of possession of goods and even persons, if they are captured and enslaved by a stronger party.

Upon conclusion of a truce<sup>69</sup> between the Islamic state and a non-Muslim state, each side, at a minimum, commits to a policy of non-aggression toward the other party and its nationals. From the perspective of Islamic law, this means that Islamic law, from the moment the truce is concluded, can now recognize the inviolability (*'iṣma*) of the other party's territory and the property and persons of the other party as constituted by the other party's law at the time of the truce. In other words, Islamic law will take the division of property rights as they exist from the moment the truce is concluded as establishing the baseline of property rights belonging to persons living on the other party's territory and will not question how such persons came into possession of their property. Because it is only a truce, however, Islamic law does not express an opinion as to the justice of the other state's legal regime, and in the extreme case, if the law of the other state is one of capture, Islamic law will recognize their property rights under their law for so long as the truce remains in force.<sup>70</sup> Non-aggression is the

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<sup>67</sup> Classical Islamic law assumed the existence of one unitary Islamic polity. After the breakup of the caliphate into numerous territorial states, this assumption no longer obtained, but from a legal perspective, all such Muslim polities continued to be understood to form one legal territory which constituted the *dār al-islām*.

<sup>68</sup> Fadel, "History of Islamic International Law," ¶ 25.

<sup>69</sup> Numerous terms could be used to describe a truce, including, *hudna*, *'ahd*, *muwāda'a*, *mīthāq* or *amān*, among others.

<sup>70</sup> See, for example, al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, ed. Muḥammad Ḥasan Muḥammad Ḥasan Ismā'īl al-Shāfi'ī (Beirut: *Dār al-Kutub al-'Ilmiyya*, 1997), 5:34 (if the law of a pagan king allows his subjects to enslave another Islamic law recognizes them as slaves to the extent they are considered slaves under the law of that pagan king).

minimum content of a truce, but such a treaty could include many more complex provisions, including, obliging the Islamic state to defend the other party from attack by third-parties, or anything else the parties wished to include in their treaty.<sup>71</sup>

Non-Muslims could establish a thicker relationship with the Islamic state by entering into an agreement of protection (*dhimma*) with the Islamic state,<sup>72</sup> but such an agreement required the non-Muslim state to abandon its law and to adopt Islamic law, at least with respect to all secular matters.<sup>73</sup> Accordingly, a pagan king who wished to enter into an agreement of protection with non-Muslims could not stipulate, for example, that he could continue to act in accordance with pagan laws that entitled him to deal with his subjects as he wished, including, by killing them or engaging in other arbitrary acts. By agreeing to enter into this relationship with the Islamic state, the pagan king's territory becomes part of the Islamic state, and it is forbidden for Muslims to acquiesce to injustice when it is in their capacity to prevent it.<sup>74</sup> Another crucial feature of the relationship of *dhimma* from the perspective of classical Islamic law was its character as a permanent undertaking from the Islamic state to the non-Muslims under its protection not to treat them as enemies: although non-Muslims could repudiate the relationship, the Islamic state could not.<sup>75</sup>

The highest degree of solidarity, however, was reserved for those who adopted Islam as a religion. For these, Islamic law prohibited the relation of war entirely. This did not mean that Muslims never fought one another; rather, it meant that when Muslims did engage in mutual conflict it was governed by a distinct set of mutually binding rules articulated by the jurists under the doctrine of rebellion (*baghy*) or the rules governing rebels (*aḥkām al-bughāt*). Unlike conflict with hostile non-Muslim states, in which Islamic law only governed the conduct of Muslim combatants, the Islamic rules of civil war governed both parties to the conflict, and sought to separate "legitimate" rebels from mere criminals, both by requiring that the rebels have a quasi-legitimate cause (*ta'wīl*), and that they follow particular rules of targeting in the course of their campaign, among other requirements.<sup>76</sup> The law of rebellion included important restraints on the combatants, including, the obligation to provide quarter to defeated enemies, the prohibition against wanton destruction of their property, and the obligation to return property seized from the rebels at the conclusion of hostilities.<sup>77</sup> Combatants were exempt from the ordinarily applicable norms of tort in the event that they destroyed property or killed or injured enemies during the rebellion, but only if they followed the laws of conflict. Otherwise, they would be

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<sup>71</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5:113 (Muslims are allowed to enter into a truce a term of which that they will defend the other territory and the persons on that territory to the same extent they would defend themselves and those under their protection (*ahl al-dhimma*)). For a brief overview of the kinds of provisions that were historically included in such "truces," see Fadel, "History of Islamic International Law," ¶¶ 26-37.

<sup>72</sup> Under the contract of protection, Muslims agree to protect non-Muslims from oppression (*daf' al-zulm*) to the same extent that they protect themselves from injustice. See, al-Sarakhsī, *al-Mabsūṭ* 10:85.

<sup>73</sup> Ibid. (A *dhimmī* is someone who agrees to be bound by Islamic law in all matters that relate to secular human affairs (*mā yarjī' ilā al-mu'āmalāt*)).

<sup>74</sup> Ibid. ("*al-taqīr 'alā al-zulm ma'a imkān al-man' minhu ḥarām*").

<sup>75</sup> Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī, *al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qādī wa'l-Imām*, ed. 'Abd al-Fattāḥ Abū Ghudda (Aleppo: *Maktab al-Maṭbū'āt al-Islāmiyya*, 1967), p. 191.

<sup>76</sup> For a detailed overview of the history and doctrine of the Islamic law of rebellion, see Khaled Abou el Fadl, *Rebellion and Violence in Islamic Law* (New York: Cambridge University Press, 2001).

<sup>77</sup> See, for example, Abū'l Barakāt Aḥmad b. Muḥammad b. Aḥmad, *al-Sharḥ al-Ṣaghīr*, ed. Muṣṭafā Kamāl Waṣfī (Cairo: Dār al-Ma'ārif, n.d.), 4:428-29.

held liable, either civilly or criminally for their conduct.<sup>78</sup> Because all relations within *Dār al-Islām* were governed by law, war could not, as a conceptual matter, exist among persons within its territory, and for that reason, peace treaties executed between Muslim states were denominated with the term *ṣulh* (reconciliation), rather than with any of the terms used for a truce that Muslims used to designate their treaties with non-Muslim powers.<sup>79</sup>

The classical Islamic conception of war and peace believed that permanent peace could only be realized when everyone was subject to Islamic law, whether as a result of religious belief, or through agreeing to the protection of the Islamic state.<sup>80</sup> While this would not eliminate violence and conflict, it would ensure that all exercises of violence would be subject to legal regulation, and would be restrained.<sup>81</sup> The possibility of perpetual peace between Muslims and non-Muslims through the relationship of *dhimma*, however, provides a conceptual anchor for imagining perpetual peace in the contemporary age without grounding it in shared religious belief. As the Ḥanafī jurist al-Sarakhsī (d. 490/1096) explained, the fundamental feature of the contract of *dhimma* is that Muslims are obligated to provide non-Muslims the same protection against injustice that they provide to themselves, in exchange for which the non-Muslims agree not to fight the Islamic state.<sup>82</sup> Relying on Sanhūrī's conception of a modernized Islamic international law, permanent peace can therefore be achieved with non-Muslim powers on the basis of a commitment to the equal protection of the law. In other words, the permanent peace that is the aspiration of modern international law, from the perspective of modern Islamic international law, requires neither common belief in Islam, nor adoption of substantive Islamic law. Rather, it requires a credible commitment to the equal treatment of Muslims living under the authority of non-Muslim regimes.<sup>83</sup> Conversely, to the extent a state wishes to claim the benefits that accrue from an international system of perpetual peace, while reserving for itself the right to treat its

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<sup>78</sup> Ibid., p. 430.

<sup>79</sup> Fadel, "History of Islamic International Law," ¶ 38.

<sup>80</sup> The possibility of permanent peace poses certain philosophical problems that are beyond the scope of this paper, but it should be clear that the classical Islamic conception that permanent peace could be realized only if all of humanity was subject to one law did not necessarily entail the related idea that all of humanity had to be subject to one state. Until the rise of European imperialism in the 19<sup>th</sup> century, and the demise of the Ottomans at the end of World War I, Muslim states continued to operate under the notion that, although independent with respect to one another with respect to the territory under their respective control, their mutual relations were governed by the norms of Islamic law. Fadel, ¶ 40. The Islamic theory of perpetual peace through common adherence to Islamic law is best understood therefore as an affirmation of the idea that perpetual peace is possible when everyone has an adequate motivation to follow the law. For that reason, apostasy could not be tolerated because it amounted to a rejection of the law after having submitted to it.

<sup>81</sup> For that reason, the violence authorized under the law of rebellion was intended to restrain and deter the rebels (*rad'*), rather than to kill them (*qatl*), as is the goal in the war with enemies. Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, on the margins of *al-Sharḥ al-Ṣaghīr*, ed. Muṣṭafā Kamāl Waṣfī (Cairo: Dār al-Ma'ārif, n.d.), 4:429.

<sup>82</sup> Al-Sarakhsī, *al-Mabsūṭ* 10:85 ("'*alā al-muslimīn al-qiyām bi-daf' al-ẓulm 'an ahl al-dhimma ka-mā 'alayhim dhālika fī ḥaqq al-muslimīn* (Muslims are obliged to act to repel injustice committed against protected persons just as they are obliged to do so with respect to Muslims)").

<sup>83</sup> See, for example, Mullā Khusrū Muḥammad b. Farāmūz b. 'Alī, *Durar al-Ḥukkām Sharḥ Ghurar al-Aḥkām (Dār Ihyā' al-Kutub al-'Arabiyya*, n.d., electronic resource, University of Toronto Libraries) 1:283, and 'Abd Allāh b. Maḥmūd b. Mawdūd al-Mawṣilī, *al-Ikhtiyār Ta'īl al-Mukhtār* (Cairo: Maṭba'at al-Ḥalabī, 1937) 4:119 (each citing a statement attributed to 'Alī b. Abī Ṭālib, the fourth of the rightly guided caliphs according to the Sunnīs, and the first of the Imāms according to the Shī'a, that "non-Muslims only agreed to pay taxes (*jizya*) [to the Islamic state] so that their lives and property would be like our lives and property (*innamā badhalū al-jizya li-takūna amwāluhum ka-amwālinā wa dimā'uhum ka-dimā'inā*).").

Muslims differently from its non-Muslim citizens, its reservation is either a legal nullity, or it cannot be admitted to the regime of permanent peace. Such a state can only have the status of a state that enjoys a truce, but not permanent peace, under Islamic international law, as was the case with the pagan king who wished to enter a relationship of *dhimma* with the Islamic state, but wanted to reserve the right to continue to engage in acts of injustice against his own subjects.

#### b. Usurpation in Classical Islamic Law

From a functional perspective, the transition from a state of war to a state of peace in Islamic law entails the gradual evolution in the recognition of the other's property rights from that of mere possession, which is provisional and defeasible by virtue of superior force, to universal recognition that can only be defeated by a valid legal claim after permanent peace is established.<sup>84</sup> As for the status of individual property rights within the territory of the Islamic state, they are perfected as against the Islamic state once a holder of a possessory right enters into legal relations with the Islamic state.<sup>85</sup> Accordingly, the Islamic state was obliged to protect the rights of proprietors against trespass (*ta'addī*) or usurpation (*ghaṣb*)<sup>86</sup> by third-parties. Likewise, a contract of sale was void to the extent that the consent of the seller was obtained by coercion. In such a case the ordinary remedy would be to return the item to the seller. If the party exercising the coercion was the state, however, and its use of coercive power was lawful, the sale was effective to pass good title.<sup>87</sup>

As for private persons who usurped the property of others, Islamic law imposed upon them a duty of restitution, various monetary liabilities, and the possibility of criminal punishment.<sup>88</sup> If the usurped property was real property, the true owner was given the option of either retaking possession of his land, including all improvements made thereon by the usurper, subject to a set-off of the value of those improvements after their removal from the property and an add-on of the costs of restoration of the land to its original condition, or compelling the usurper to restore the land to its original state.<sup>89</sup> Finally, a usurper could not transfer good title to wrongfully seized property, whether by sale, gift, or inheritance, if the transferee knew of the usurpation.<sup>90</sup> We can say with confidence, then, that a

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<sup>84</sup> In the absence of permanent peace, if non-Muslims seized the property of Muslims or protected persons and carried it back to their territory, the property rights of the true owner, whether a Muslim or a protected person, was, from the perspective of classical Islamic law, extinguished. Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5:34-35 (if non-Muslims invade Muslim territory, and carry off property belonging to Muslims and reach their territory, the Muslim true owners lose their claim to the property, even if those non-Muslims subsequently return to Islamic territory with the very goods they forcibly took).

<sup>85</sup> Fadel, "History of Islamic International Law," ¶¶ 10-15.

<sup>86</sup> Usurpation is defined as "The coercive taking of property without claim of right, in a manner that does not satisfy the elements of the crime of brigandage." Al-Dardīr, 3:581.

<sup>87</sup> Al-Dardīr, 3:18 (noting that a coerced sale is void). Al-Ṣāwī noted that if the owner was forced to sell for a lawful reason, e.g., to discharge a lawful debt, or to expand the street or the town's cathedral mosque, then the sale is valid. Al-Ṣāwī, 3:18.

<sup>88</sup> Al-Dardīr, 3:583 (a usurper is subject to criminal punishment (*uddiba*)) and 584-602 (detailing the remedies applicable to cases of usurpation).

<sup>89</sup> *Ibid.*, 593-94.

<sup>90</sup> *Ibid.* 605 ("the purchaser from a usurper, his heir, and his donee, if they know of the usurpation, are usurpers, and the entirety of the law of usurpation applies to them (*al-mushtarī min al-ghāṣib wa wāriṭahu wa mawhubahu in 'alimū bi'l-ghaṣb fa-ghuṣṣāb yajrī fihim jamī' mā jarā fihī*)).



universal principle of Islamic law is that usurpation can never result in good title, and that the law must afford the true owner an effective *in rem* remedy against the usurper.<sup>91</sup>

c. Third-party Duties Toward the True Owner

As described above, Islamic law insisted that anyone with knowledge of the fact that land had been usurped could not receive good title to that land. The importance Islamic law afforded the rights of true owners as against usurpers and those who took from a usurper is also manifested in other details of Islamic law, such as its substantial rejection, at least in the case of land, of the good faith purchaser for value rule.<sup>92</sup> In our opinion, the prioritization of the rights of the true owner over that of the good faith purchaser for value represents the kind of specifications of basic rules that Sanhūrī suggested could vary by time and place, but should not be confused as the fundamental principle of Islamic law that those who knowingly receive usurped property can never obtain good title to it. More important, however, is Islamic law's stance toward commercial dealings with those who are known for illicit dealings, whether because they earn their living from the distribution and sale of illicit goods, usury, defective contracts, or in our case, from the sale and commercial exploitation of usurped goods.

In circumstances where the legal system cannot provide a remedy, either for want of jurisdiction, or because the defendant may be able to resist judicial process, or his victims are unable to present legally sufficient evidence to win their cases, Islamic law relies on the community to shame the wrongdoer into respecting the property rights of his victims. One example of this is found in a case discussed by Sarakhsī, where a Muslim who is abroad in the territory of a non-Muslim state which lacks treaty relations with the Islamic state, fraudulently obtains property from a non-Muslim of that state, in breach of his undertaking (*amān*) to deal honestly with them. In such a case, Sarakhsī concluded that if the non-Muslim victim were to sue the Muslim in a Muslim court, the court would have to decline jurisdiction over the claim because the interaction occurred in non-Muslim territory which had not submitted to Islamic law. Nevertheless, the judge should not dismiss the case before giving the Muslim defendant an advisory opinion (*fatwā*) that he is under a moral obligation to satisfy the claim of his adversary. At the same time, the judge is to advise the Muslim community to avoid purchasing the goods that had been fraudulently obtained by the Muslim who breached his undertakings of honest dealings to the non-Muslim, saying that it is "foul property (*milk khabīth*)" insofar as he acquired it through sinful means.<sup>93</sup>

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<sup>91</sup> While the fundamental remedy Islamic law affords the true owner is the right to eject the usurper from his wrongful possession, Islamic law also affords the true owner certain monetary *in personam* claims that the true owner can pursue against the usurper wherever he finds him. Ibid. 598.

<sup>92</sup> Ibid. 603 (if the purchaser is ignorant that the seller was a usurper, the purchaser is not liable to the true owner for the output of the land throughout the period of his possession, because his possession was based on a prima facie claim of right (*dhū shubha*), but must return the land to its rightful owner).

<sup>93</sup> Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5:128 ("*milk ḥaṣala lahu bi-sabab ḥarām shar'an*"). Purchase of such a good was technically classified as *makrūh* – to be avoided – but not technically *ḥarām* or forbidden, insofar as he had valid title to that property. Sarakhsī also describes the case of a Muslim abroad in non-Muslim territory on the basis of security granted to him personally by the non-Muslims there of non-aggression who is able to obtain property from a non-Muslim by means of false testimony before the non-Muslim court. In that situation, a Muslim court lacks jurisdiction to compel him to return the property that was wrongfully awarded to him, but the court must give an advisory opinion (*fatwā*) that he is under a religious obligation to do so. Ibid., 39.

Muslim jurists generally followed the same approach toward dealings with a person known to be a wrongdoer. Accordingly, Muslim jurists taught that it was either discouraged (*makrūh*) or prohibited (*ḥarām*) to trade with a person if it was known that most of his possessions were wrongfully obtained.<sup>94</sup> This principle applied to third parties who were not in a position to know which possessions of the wrongdoer were licitly his, or which had been wrongfully taken from their true owners. As the previous section made clear, anyone who had actual notice that a particular item of property had been misappropriated would be treated as a usurper were he to come into possession of it, regardless of how he obtained it. In these other cases, it is impossible for third parties to know which property is actually his, and which is subject to the claims of third-parties, and therefore, Muslim jurists took the path of moral condemnation of dealings with such a party, even if they did not attempt to deny the validity of trades or other transfers of such property. It is important to point out in this connection that for at least some Muslim jurists, the Mālikīs, for example, the determining question was not simply the immorality of dealing with a wrongdoer; rather, it was the need to act to protect the rights of the third-party true owners who, it was assumed, would one day be able to reclaim their misappropriated property. For that reason, Mālikī jurists describe the wrongdoer, most of whose property was illicitly obtained, as being the functional equivalent of a bankrupt, due to the fact that claims against him outweigh the property in his possession.<sup>95</sup> In such circumstances, society's refusal to trade with the wrongdoer is crucial to preserving the property rights of the wrongdoer's victims by limiting their circulation and thereby reducing the burden on the true owner in reclaiming his goods.

The willingness of Muslim jurists to enlist the efforts of civil society to protect the rights of the true owners in circumstances where there is a remedial failure is illustrative of what Sanhūrī referred to as the "social" dimension of Islamic law, a feature which he deemed to be sorely lacking from both the common law and the civil law at the turn of the 20<sup>th</sup> century, and something which these two western legal systems could learn from Islamic law.<sup>96</sup> In the context of this article, however, the insistence by Muslim jurists that wrongdoers of this sort be boycotted illustrates another fundamental and universal principle of Islamic law: the obligation of third-parties not to turn a blind-eye to egregious wrongdoing, nor to aid and abet it by trafficking in goods which, although not known with certainty to have been wrongfully obtained, are likely to have been wrongfully obtained. Reducing the marketability of property and other goods in the possession of a wrongdoer by subjecting purchasers to the claims of true owners, and encouraging traders to refuse to deal with wrongdoers, is an appropriate and proportional response to wrongdoing where a formal legal remedy is difficult, if not impossible to obtain. Both of these responses in Islamic law are a more specific case of the general duty of mutual solidarity (*taḍāmun*) that Islamic law recognizes as an inherent feature of its legal order, and they ought to be readily deployed to develop appropriate responses to the dispossession of the Palestinians as a result of the creation of the State of Israel.

Having laid out these basic principles, I will now apply them to the situation in Palestine/Israel to argue that the Boycott, Divestment and Sanction movement can be understood to be precisely the kind of remedy that a modern Islamic international law along the lines envisioned by Sanhūrī would take.

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<sup>94</sup> The term used by the jurists to describe this person is *man akthar mālihi ḥarām*.

<sup>95</sup> 'Abd Allāh b. Najm b. Shās, *ʿIqd al-Jawāhir al-Thamīna*, ed. Ḥamīd Bin Muḥammad Laḥmar, 3 vols. (Beirut: *Dār al-Gharb al-Islāmī*, 2003), 3:1306.

<sup>96</sup> Shalakany, "Historical Origins of Comparative Law," p. 177.

## 7. Conclusion: Modern Islamic International Law and the Boycott, Divestment and Sanction Movement (“BDS”)

As explained in sections 2-4 of this paper, numerous 20<sup>th</sup> and 21<sup>st</sup> century Muslim jurists and theologians in the Arab Middle East devoted substantial intellectual and moral resources into revising classical Islamic conceptions of world order and in the defense of modern international law as compatible with the deeper values of Islam. At the same time, because the nature of their project was essentially theological and apologetic, they did not develop nor even attempt a systematic legal account of how modern Islamic legal sensibilities should related to contemporary non-Islamic conceptions of world order, leading to the dilemma posed by the State of Israel: while the modern revisionist school discussed in this article largely affirms the Islamic legitimacy of the modern world order, with someone as authoritative as Yūsuf al-Qaraḍāwī going so far as to declare explicitly that the decisions of the United Nations are binding for Muslims,<sup>97</sup> they at the same time not only reject the legitimacy of the State of Israel, but appeal to pre-20<sup>th</sup> century Islamic norms to organize Muslim resistance to the State of Israel. The State of Israel, however, is a member of the United Nations, and indeed, one might even say that it is, at least in part, a creature of the United Nations insofar as the United Nations offered its partition plan of Palestine in 1947, and even if Muslim states do not have direct treaty relations with Israel, the Islamically binding commitment to abide by the treaties creating the United Nations, and the subsequent decisions of the United Nations, would suggest that relying on pre-20<sup>th</sup> century Islamic legal concepts, such as deeming Israel to constitute *Dār al-Ḥarb*, to organize resistance to Israel is incoherent.

On the other hand, Qaraḍāwī also points out that no treaty that is repugnant to Islamic law has any force, and therefore it is impermissible for Muslim states to accede to treaties that contradict Islamic law.<sup>98</sup> At this point in the argument, one could point out to Qaraḍāwī that insofar as membership in the United Nations limits the kinds of actions Muslim states may legitimately take against Israel, that their membership in the United Nations itself entails a kind of tacit recognition of Israel, which he himself argues is impermissible under Islamic law. It is only a short leap from that conclusion to the conclusion that he so vehemently rejects, namely, that Islamic law prohibits membership in the United Nations. Accordingly, providing an account for the legitimacy of the United Nations, despite Israel’s membership in that organization, along with the collateral obligations that imposes on Muslim states with respect to their dealings with Israel, requires an account from the perspective of modern Islamic international law that responds to both Muslim concerns regarding the legitimacy of the State of Israel and the concerns of the modern international order to preserve global peace and prohibit the use of force to resolve international disputes. BDS, I argue, provides a model that theorists of modern Islamic international law can adopt to develop an Islamic theory of resistance to aggression within the context of a genuine commitment to permanent global peace that lies at the heart of modern international law.

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<sup>97</sup> Qaraḍāwī, 2:895 (“In any case, all of us [Muslims] are bound by the decisions of the institutions of the [United] Nations. We have members who represent us there; we pay the monetary dues that are required of us, and in every case we are bound by what membership in this organization requires in respect of undertakings and decisions (*wa lākinnanā jamī’an multazimūna bi-mā tuqarriruhu hay’at al-umam lanā a’ḍā’ yumaththilūnanā fihā nadfa’ ishtirākātīnā al-māliyya al-muqarrara ‘alaynā wa ‘alā kull ḥāl kull minnā multazim bi-mā talzam bihi ‘uḍwīyyat hādhīhī al-hay’a min qarārāt wa’l-tizāmāt*).”).

<sup>98</sup> Ibid. 896. Interestingly, the example he gives is CEDAW.

From an Islamic perspective, the State of Israel is an aggressor that has engaged in repeated and on going violations of the Palestinians' collective right to self-determination and their individual rights to life, security of person, freedom of movement, and right to property, among others. Describing Israel as the last vestige of *Dār al-Ḥarb*, as modern Arab Muslim theologians such as Zuḥaylī and Qaraḍāwī have done, would have been perfectly sensible were we living in an age in which Islamic international law was merely a series of disconnected, bilateral agreements between the Islamic state and non-Islamic states,<sup>99</sup> but it loses its force when international relations are conducted on an omnilateral basis that includes all states of the world under an umbrella of collective governance that include obligations of collective security. Accordingly, the task of modern Islamic international law is to reconcile the duties that arise under both principles – the duty of solidarity with the Palestinians as victims of historical and ongoing illegal aggression and dispossession – and their duty to the world community (not specifically to the State of Israel) – to respect the norms of the United Nations.

The BDS movement represents one such method of reconciliation. Palestinian civil society actors launched BDS<sup>100</sup> shortly after the 2005 decision by the International Court of Justice in the Hague condemning Israel's construction of a massive wall across the length and breadth of the occupied West Bank as illegal and contrary to the principles of international law.<sup>101</sup> Shortly after the call of Palestinian civil society to the world community to join in a broad global movement to boycott, sanction and divest from Israel in response to its stubborn refusal to deal with Palestinians in accordance with the norms of international law, the first Palestinian BDS Conference was held in Ramallah in 2007, out of which the BDS National Committee was formed to encourage and coordinate local and global activities in support of the BDS Movement.<sup>102</sup> From a modest start which hardly merited any one's attention, the BDS Movement has successfully galvanized supporters of Palestinian rights worldwide, and now has become the focus of intense controversy in many North American and European states as numerous grass-roots and civil society organizations have responded favorably to the BDS movement.<sup>103</sup> Predictably, pro-Zionist forces, after first dismissing BDS as irrelevant, are now mobilizing their vast political resources in an effort to stem the progress that the BDS Movement has achieved, not only in terms of more

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<sup>99</sup> Classical Islamic law assumed that international relations was conducted exclusively through bilateral agreements. Accordingly, if the Islamic state was at peace with state A, and at war with State B, and then State A conquered State B, the peace contracted with State A would automatically extend to the territory and people that were formerly part of State B, and if State B conquered State A, the people and territory of what had formerly been part of State A – and at peace with the Islamic state – would now be in a state of war with the Islamic state. Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5:12.

<sup>100</sup> For more on the background of the BDS Movement, see their web site at <http://bdsmovement.net/>.

<sup>101</sup> A summary of that decision may be found at <http://www.icj-cij.org/docket/index.php?pr=71&p1=3&p2=4&p3=6&case=131> (last viewed, February 28, 2016). The text of the decision may be found at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&code=mwp&p3=4> (last viewed, February 28, 2016).

<sup>102</sup> <http://bdsmovement.net/BNC> (last viewed, February 28, 2016).

<sup>103</sup> The BDS Movement maintains an extensive website of its own activities and news related to the movement. See <http://bdsmovement.net/category/news> (last viewed, February 28, 2016).

individuals and groups participating in BDS directly, but also in raising awareness of the intolerable conditions under which Palestinians must live their lives.<sup>104</sup>

The BDS movement has three demands. First, that Israel end its military occupation of all lands seized in the 1967 War; second, that it recognizes the fundamental rights of Palestinian citizens of Israel to full equality; and third, that Israel allow Palestinian refugees to return to their homes and restore them to their properties in accordance with international law and United Nations General Assembly Resolution 194.<sup>105</sup> The first demand is clearly in accord with international law, as it has existed since the inter-war period with the adoption of the Kellogg-Briand pact and its subsequent incorporation into the United Nations treaty. Insofar as modern Islamic law endorses the prohibition of wars of aggression and endorses the use of peaceful means to resolve international disputes, this demand is obviously consistent with both a Sanhūrīan and a theological approach to modern Islamic law. The second demand is also consistent with the argument developed above, namely, that under the evolving principles of modern Islamic international law, the condition for permanent peace is the credible commitment of a state to provide equal protection of the laws to all persons in its territory, not shared belief in Islam's truth, or the acceptance of Islamic law as a governing norm, as was the case in classical Islamic law. The third demand is consistent with Islamic conceptions of peace, namely, that the minimum content of peace is unqualified recognition of the other's possessory interests as perfected property rights. This demand in turn entails the secondary commitment to protect the property interests of the other by providing the other an effective remedy, whether against individuals or the state, for unlawful deprivations of property and other rights.

More interestingly, BDS does not call into question the legitimacy of the State of Israel as a state, nor does it call into question the rights of persons in Israeli territory to security of the body or personal property. Nor does it question the right of Israeli Jews to self-determination, subject to the qualification that it include an effective commitment to providing non-Jews equal protection of the laws. BDS merely invokes the Islamic and humanistic legal value of solidarity in the face of wrongdoing in circumstances in which formal legal institutions, in this case the United Nations and its member states, have failed to provide effective remedies to Israel's historical and ongoing violations of international law and the collective and individual rights of Palestinians. Unlike the theological approach of Zuḥaylī and Qaraḍāwī to modern Islamic international law, which places Israel outside the international world order

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<sup>104</sup> For example, Zionist forces in the United States are targeting state legislatures as easy places to secure anti-BDS legislation. See *Anti-BDS Legislation is Challenging 50-year American Precedent on Settlements*, Ron Kampeas, *Haaretz* (February 24, 2016), available at <http://www.haaretz.com/israel-news/1.705308> (last viewed, February 28, 2016). The likely Democratic nominee for President of the United States, Hillary Clinton, has publicly voiced her opposition to BDS. See, *In Letter, Israel Condemns Israel Boycott Movement*, Annie Karni, *Politico* (July 6, 2015), available at <http://www.politico.com/story/2015/07/hillary-clinton-letter-support-israel-donor-haim-saban-bds-119770> (last viewed, February 28, 2016). The Cameron government in the UK has also recently announced directives targeting BDS, although public opposition to his policies resulted in a dilution of what was originally proposed. See *Diluted UK Government Position on 'Israel Boycott Ban' Follows Public Outrage*, Palestinian BDS National Committee (February 18, 2016), available at <http://bdsmovement.net/2016/diluted-uk-government-boycott-ban-13720>. Recently, the Canadian House of Commons also passed a resolution condemning the BDS Movement and its Canadian supporters. See *In Canada, BDS Loses in the House of Commons But Wins on University Campuses*, Marion Kawas, *Mondoweiss* (February 25, 2016), available at <http://mondoweiss.net/2016/02/in-canada-bds-loses-in-the-house-of-commons-but-wins-on-university-campuses/> (last viewed, February 28, 2016).

<sup>105</sup> <http://bdsmovement.net/bdsintro> (last viewed, March 15, 2016).

by describing it as *Dār al-Ḥarb*, BDS focuses our attention to the specific grounds on which the State of Israel is a law breaker. Far from seeking to exclude it from the international order, BDS seeks instead to hold it accountable to the international legal order which it, like Muslim states, claims to be bound. Because Israel is part of the world legal order, and not external to it, the Sanhūrīan approach to modern Islamic international law would treat it as an irregular, or *de facto* state insofar as it is in a state of rebellion against the peaceful world order in which it claims to be a member. BDS effectively invites us to treat Israel as a “rebel” state, rather than outside the world order as such. Were Islamic international law to adopt this view of Israel, it would be in a position to give Israel qualified recognition, but only to the extent that its actions are consistent with the fundamental norms of the international order, without accepting the legitimacy of its illegal actions, such as its expulsion and continued dispossession of the Palestinians, among other things.

It is significant in this regard that when Qaraḏāwī speaks of the impermissibility of peace with Israel, he uses the Arabic term *ṣulḥ*, which in classical Islamic law was used to describe agreements that brought to an end conflicts between Muslim states. In using this term, Qaraḏāwī clearly assumes that it is impossible to recognize Israel without, at the same time, acknowledging the rightfulness of Israel’s dispossession of the Palestinians. Using the framework of the law of rebellion would allow Muslim states to recognize Israel as within the international system while at the same time insisting that it be deprived of the full benefits of the international order until such time as it complies with its duties toward the Palestinians.

One may be tempted at this point to ask, if Muslims are so committed to the goal of permanent peace that lies at the heart of the modern system of international law, why not then simply acquiesce to Israeli demands, relinquish their claims to occupied territory and abandon the rights of Palestinian refugees to return to their homes and properties on the pragmatic grounds that it is wildly unrealistic to believe that Palestinian rights will ever be vindicated? The answer ought to be clear from the preceding discussion about Islamic law’s conception of peace: peace requires an unconditional acceptance of the other’s basic entitlements. Israel’s claims to possess Palestinian lands rightfully can only be made intelligible from the perspective of Islamic law if Israel claims to have acquired that land by virtue of the rights of conquest. But that is precisely the grounds on which Israel cannot claim rightful possession because that would be an admission of its violation of the norms of modern international law prohibiting the use of force to acquire territory or to settle international disputes; moreover, were Israel to assert openly the rights of a conqueror, that would justify the conclusion that it is outside the international legal order and therefore part of *Dār al-Ḥarb*. In short, just as Qaraḏāwī’s view that Israel constitutes an exception to the Muslim world’s peaceful relations with the rest of the world is incoherent, so too, Israel’s claims that it can effectively enjoy the rights of conquest by divesting Palestinians of their lawful rights to their physical presence and their property in their ancestral home, while claiming to be a committed member of the UN, are also incoherent.<sup>106</sup> It would also contradict

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<sup>106</sup> Space does not admit a detailed overview of Israel’s policies toward Palestinians, and the various strategies it has adopted to resist acknowledging the rights of Palestinian refugees, beginning with its specious claim that Palestinians fled their homes in coordination with invading Arab armies. Regardless of the tendentious historical arguments that Israel has deployed to defend itself, arguments which are now largely recognized to be baseless, there is no dispute that the State of Israel intentionally adopted policies and laws that barred Palestinian refugees from returning to their homes and passed legislation that forfeited their properties to the state on the ground that they were “absent.” For an overview of these policies, see, for example, Sabri Jiryis, “The Legal

Islamic ethical teachings on the question of permanent peace to acquiesce to aggression. As Shaltūt argued, Islamic teachings regarding forbearance and forgiveness are not applicable when to do so would be inconsistent with “pride and honor.” Abject submission to an aggressor is the precise opposite of “pride and honor” and therefore cannot provide, from an Islamic perspective, an ethical basis for permanent peace.<sup>107</sup> Agreement with Israel on the terms it proposes, insofar as it would demand recognition of the second-class status of non-Jews in Israel, confine Palestinians in the rest of historical Palestine to ghettos, and deprive Palestinian refugees of their right to return, among other things, could only be justified on grounds of necessity, and therefore would not provide a durable ethical basis for permanent peace.<sup>108</sup>

BDS solves the conundrum of the State of Israel from the perspective of modern international Islamic law by taking Israel’s claim to be a member in good standing of the global community seriously, and therefore demands that it behave in accordance with the norms of peace – which necessarily entails recognition of the rights of the Palestinians – by acceding to the three goals that it has laid out as conditions for ending its campaign. It uses the strategy of boycotting the wrongdoer in the context of the remedial failure of formal political institutions to address the just claims of the Palestinians, just as classical Muslim jurists urged civil society to shun commercial interaction with wrongdoers. While it is unlikely that the BDS movement sees itself inspired by the ideals of modern Islamic international law, both its methods and its goals reflect universal norms of Islamic international law, its values regarding war and peace, and the obligation to protect the rights of others as a necessary entailment of a commitment to peace. Particularly in this latter respect, it exemplifies Sanhūrī’s justification for his proposed “League of Eastern Nations” as an alternative institution of world order alongside a more universal global institution. As long as the great powers only pay lip service to the ideals of global peace and right, and continue to approach global governance – and especially the Middle East – through the lens of power politics, alternative sites of global governance, with alternative sources of solidarity and alternative forums for remediation, particularly in civil society, will be needed, provided that these alternative institutions and solidarity networks work toward the ideals of global peace based in right and not power, and do not seek simply to substitute one hegemon with another. From this perspective, BDS

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Structure for the Expropriation and Absorption of Arab Lands in Israel,” 2,4 *Journal of Palestine Studies* 82-104 (1973). For historical work undermining Israel’s claim that it lacks responsibility for causing the Palestinian refugee problem, and its refusal to negotiate in good faith regarding their rights to return to their homes, see Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford, UK: Oneworld Publications, 2006), and Avi Shlaim, *The Iron Wall: Israel and the Arab World* (New York: W.W. Norton & Co., 2001), pp. 31, 54, 58 and 571. Nor is there any substantial dispute that Israel intentionally adopted policies to limit the beneficial use of confiscated Palestinian lands to Jews. See, for example, Walter Lehn, “The Jewish National Fund,” 3,4 *Journal of Palestine Studies* (1974) 74, 85 (describing Israeli strategy to transfer land of Palestinians to the Jewish National Fund (“JNF”) as part of its twin goals to preclude Palestinians from ever returning to Palestine and to insulate the JNF from liability to individual Palestinian owners) and 88 & n.44 (describing how, as a result of agreements between Israel and the JNF, the JNF’s restrictive covenants now apply to 90% of all land in Israel, “with the [obvious] implications of this for non-Jewish Israeli citizens, as for any settlement of the conflict.”). For an overview of the contradictions between Israel’s aspirations to be taken seriously as a liberal democracy, and its internal colonial policies toward Palestinians, see Shira Robinson, *Citizen Strangers: Palestinians and the Birth of Israel’s Liberal Settler State* (Stanford: Stanford University Press, 2013).

<sup>107</sup> Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5:5 (stating that it is impermissible to agree to a humiliating undertaking (*iltizām al-dhull*)).

<sup>108</sup> Ibid., 5:7 (Muslims may not accede to an agreement that entails humiliation and servility except in circumstances of confirmed necessity (*tahaqquq al-darūra*)).

is not only consistent with the ideals of modern Islamic international law, it provides an exemplar of how modern Islamic international law can develop a coherent and universal model for resistance to violators of global peace, such as Israel, while at the same time promoting the ideals of permanent peace.