

Modernized Islamic International Law Concepts as a Third World Approach to International Law

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Abstract

This paper attempts a re-reading of classical Islamic international law concepts and their meaning for a contemporary Third World critique and re-construction of public international law. It analyses how modernized Islamic international law concepts are employed to criticize the international legal order as one that legalizes and upholds the subordination of the Muslim World. The first part of the paper will assess the contemporary relevance of Islamic international law concepts, and how their classical meanings shifted and were re-interpreted as a reaction to foreign domination, challenging dominant understandings of the post-Second World War international legal order. The second part will elaborate how these re-interpreted concepts of Islamic international law fit into the tradition of the Third World Approaches to International Law (TWAIL). Thirdly, the normative regime of occupation law is exemplified as a law serving foreign domina-

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tion, and thereby failing to reflect the sense of justice as laid down in contemporary concepts of the Muslim “others of international law” (*A. Orford*). TWAIL thereby serves as a fruitful approach for analyzing the tensions that exist between international law and Islamic international concepts on the question of occupation law: Modernized Islamic international law concepts remain globally relevant in that there is more to them than a religious take on international law. They can be read as an Islamic response to the universal problem of foreign domination. As such, modernized Islamic concepts of international law take a Third World Approach to International Law.

I. Introduction

Any legal system, regardless of the nature of its origin, is to be understood as the reflection of the society of which it is a creation. It is in this sense that the nature of both Islamic international law as well as post-Second World War international law must be understood both as powerful systems of rules and norms of reference, but also as legal narratives rooted in, and consequently shaped by, the historical, political, economic, and cultural environment in which they were constituted. Islamic international law, once itself possessing a strong imperial character, has reacted to changing perceptions of threat, and re-interpreted its international legal concepts to cope with encroachments on its jurisdiction, territory and faith. In the following, the transformation of meanings of Islamic international law concepts will be traced from early Islam to the present, showing the process of resistance to the prevailing international order and displaying similarities of a critique of international law known as the Third World Approaches to International Law (TWAIL).

It should be clarified, however, that the legal Islamic doctrines presented in the following do not represent the official positions of Muslim majority states vis-à-vis the international system. When operating in the international arena, generally all states whatever status or importance they give to Islamic law acknowledge international law and make no reference to Islamic international law concepts relating to peace and war.¹ In fact, in today’s interna-

¹ In fact, few of the 57 self-declared Muslim states that are members of the Organization of Islamic Cooperation (OIC) object to the customs and rules of contemporary international law. On the contrary, international law to them is often one of the few defences against Western domination. It is in particular the Israeli-Palestinian conflict where the lack of enforcement of norms of international law is heavily criticised, given that international law would

tional arena of nation-states, the discussion and application of Islamic concepts of public international law has been of little relevance since the creation of modern public international law after the Second World War²; the concepts remain relevant to the public international law debate nonetheless. Official statements aside, recent Muslim debates over the two Iraq wars bear a strong relation to Islamic international law, addressing both legal and moral dimensions.³ Moreover, the concept of the domain of Islam and the need to protect and defend it by *jihad* has been employed by some Muslim legal scholars as a widely resonating religio-legal argument responding to Western domination. Both concepts crystallize the tensions between Islamic and post-Second World War understandings of international law, especially in how foreign domination is legalized by international law.

new more to the advantage of the Palestinians if adhered to more precisely, *M. Berger*, *Islamic Views on International Law*, in: P. Meerts (ed.), *Culture and International Law*, 2008, 105 (111). The official argument often runs that it is the lack of enforcement or the infamous double standards, not as will be argued here, that international law *per se* is used for domination.

² While some member states of the OIC have hardly appealed to Islamic rules of international law given the secularization of politics on the international level, with nationalist terms outweighing religious terms, some legal scholars argue that contemporary public international law does not in general contradict the basic principles of Islamic international law, and that therefore Muslim majority countries are effectively applying Islamic law. See *R. Peters*, *Islam and Colonialism: The Doctrine of Jihad in Modern History*, 1979, 159. An important exception in this respect is human rights. Many writings on Islamic law and international law aim for a better understanding of the relationship between the two and how their interaction can be explored to enhance international relations and law. *M. Baderin*, Introduction, in: *M. Baderin* (ed.), *International Law and Islamic Law*, 2008, xiii et seq.

³ In 1991 and 2003, the question was whether waging war against fellow Muslim countries is in accordance with Islamic law, and whether collaboration with non-Muslim military forces was allowed. Religio-legal (state affiliated) scholars in Saudi-Arabia, a US ally, answered in the affirmative. The presence of US-American, non-Muslim military in Saudi-Arabia, home to two of the holiest sites of Islam, caused intense debates with the majority of Muslim legal voices condemning their presence. *Y. Haddad*, *Operation Desert Storm and the War of Fatwas*, in: *M. K. Masud/B. Messick/D. S. Powers* (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas*, 1996, 297 et seq.

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II. Redefined Islamic International Law Concepts as a Response to the Modern International Order and to Foreign Domination

1. Formative and Classical Islamic International Law Concepts

Muslim jurists derived norms of Islamic law from first-order readings of sacred texts to the extent possible. The same is true for the rules of Islamic international law, also called *siyar*. *Siyar* is an Arabic term that in its literal translation means “paths”. While in its singular form it refers to the emulated life of the Prophet *Mohammad* of the first century of the Islamic calendar/seventh century Common Era (C. E.), in the plural form it denotes the relation of Muslims to non-Muslims in times of peace and war.⁴

Muslim jurists began the systematic articulation of the principles of Islamic international law in the ninth century C. E. (third century of the Islamic calendar). *Muhammad ibn al-Hassan al-Shaybani* (d. 805 C. E.), often called the *Hugo Grotius* of Islamic international law, was the first to present a systematic approach to international law in his work *The Shorter Book on Muslim International Law (Kitab al-siyar al-saghir)*.⁵ Islamic international law thus is for the most part a compilation of rules that allow for binding international agreements rather than an imposition of a set of mandatory universal rules.⁶ In fact, Islamic international law is a misleading term: In the classical understanding, Islamic international law is not to regulate the relationship of nation-states towards each other, but is to provide Muslims with a code of conduct. Therefore, its rules are first and foremost a point of reference for Muslim individuals.⁷ Ever since Islamic legal scholarship ex-

⁴ A. Afsaruddin, *Views of Jihad Throughout History*, in: M. Baderin (note 2), 97 et seq.

⁵ Translated by M. Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, 1966. For a Third World deconstruction of European history and ideas as pronounced by protagonist *Hugo Grotius* as “among the architects of early modern colonial rule”, see B. S. Chimni, *A Just World under Law: A View from the South*, *Am. U. Int'l L. Rev.* 22 (2007), 199 (202).

⁶ M. Fadel, *International Law, Regional Developments: Islam*, in: R. Wolfrum (ed.), *MPEPIL*, 2010, online edition, margin number 58, available at <<http://www.mpepil.com>>.

⁷ Whether non-Muslims regard these rules as equally referential or not, is of no concern to the classical understanding of Islamic international law, R. Peters (note 2), 136. Of course, if an Islamic critique of international law is to be taken seriously today, the critique is to be integrated into “modern” international law, both by states and individuals, and by Muslims and non-Muslims. A further modern critique concerning the translation of *siyar* as Islamic international law is voiced by A. A. An-Na'im, as there can only be one international law, “but it has to be truly international by incorporating relevant principles from different legal traditions, instead of the exclusive euro-centric concept, principles and institutions of international law commonly known today. When the essential nature and purpose of international law are

isted, every generation of jurists faced the challenge of discerning the historically incidental aspects of the traditions from those with a lasting, normative relevance.

Most Muslim jurists reasoned over international relations as a jurisprudential division of the world in domains of peace, war and treaty.⁸ Conceptionally, classical Islamic law governing international relations distinguished between the domain of Islam (*dar al-Islam*), where Islamic law reigned and the political power lied with the Muslim community, and the domain of war (*dar al-harb*), comprising territories which were outside the scope of Islamic sovereignty and where the religious and political rules of Islam were consequently not implemented. A third, intermediate category of the domain of treaty (*dar al-'ahd*) was applied to states at peace with an Islamic state, through peace treaties, conciliation or truce agreements, generating mutual recognition and prohibition of hostility. The treaty-based nature of Islamic international law enabled the Islamic state to enter peaceful relations with non-Muslim states. The dichotomous division of the world into domains ascertained the respective jurisdiction, Muslim, non-Muslim and treaty-based.⁹ The distinction of these domains, however, has no textual support, neither in the Qur'an nor in the Prophetic traditions (*Sunna*), the textual sources of Islamic law. The concepts as well as their competing interpretations and implications were elaborated and heavily debated by jurists of the different Islamic schools of legal thought, revealing legal understandings as historically embedded, reflecting the needs and conditions of particular Muslim communities as well as their subsequent Islamic states. The tripartite concept reflected a statement of facts that is well-known to scholars of international law, namely that war divides the international community into parties: belligerents, in particular the states involved in war,

clarified in the present global context, I will argue, one will find that Islamic law can be fully supportive of the possibility of international law", A. A. An-Na'im, Islamic Law and International Law, abstract from the presentation at the 2004 Annual meeting of the American Association of Law Schools Workshop on Islamic Law, available at <<http://www.aals.org/am2004/islamiclaw/international.htm>>. See also S. Ali, Resurrecting Siyar Through Fatwas? (Re) Constructing "Islamic International Law" in a Post-(Iraq) Invasion World, Warwick School of Law Research Paper No. 2012/8 (2012), 1 (10), available at <<http://ssrn.com/abstract=2055154>> or <<http://dx.doi.org/10.2139/ssrn.2055154>>.

⁸ Famous jurist *Mohammad Shafi'i* (767-820 C.E.), eponym of the *Shafi'i* school of law considered the world to be only one indivisible domain, see W. Al-Zuhili (sometimes also spelled *Zuhayli*), Islam and International Law, Int'l Rev. of the Red Cross No. 858 (2005), 269, (278).

⁹ See also M. Fadel (note 6), margin number 9.

and non-belligerents as well as neutrals.¹⁰ While the domains are not a prescription of the Islamic religion *per se*, they reflect a juristic description of a state of war between Muslims and non-Muslims¹¹ and yet came to inform the normative framework of warfare.

A particular concern to the jurists of Islamic international law is the scope and limitations of legal and legitimate use of force in international relations. Here the meanings and interpretations of *jihad* become central. The elemental meaning of the term *jihad* is “striving”, “exertion” or “struggle”. In the Qur’an, the term is regularly linked to the phrase “in the path of God” (*fi sabil Allah*). Muslim scholars consensually agreed that striving and struggling for the sake of God entails multiple and potentially different meanings that may be ascribed to *jihad* in various contexts.¹² Thus *jihad* in the Qur’an includes, but is not limited to, armed struggle *per se* but a righteous cause before God. Reducing *jihad* to the arena of force in international relations is thus already a concession made to tense international realities, though this reductionism does not do justice to the rich Islamic scholarly tradition.¹³ In light of a legal interest in the use of force in international law, the following will predominantly focus on *jihad* as an armed struggle.

Significantly, from the early, formative period of Islam what *jihad* meant was very much a product of historical circumstances that confronted the Muslim community. When the Muslim community was still small and persecuted by the powerful pagan Meccans, the early revealed verses of the Qur’an on *jihad* refer to self-defense for those who were being wronged, but also to patience and forbearance (Qur’an, 42:40-43; 29: 59; 16:42).¹⁴ Both the defensive and non-violent dimensions of *jihad* were underlined. When subsequently the first Islamic polity was set up and questions concerning peace and war arose, a specific Qur’anic verse (22: 39-40) permitting killing (Arabic: *qital*) was revealed: Where both just cause and righteous intention exist, fighting in self-defense against an unyielding enemy may become obligatory (2: 216). The Qur’an further asserts that it is the obligation of Muslims to defend those who are oppressed and cry out to them for help (4:75), except against a people with whom Muslims have concluded a

¹⁰ W. Al-Zuhili (note 8), 278, the Arabic word for “holy” *muqaddas*, is not applied to war (*harb*) in Islamic juristic terminology. See also T. Asad, *On Suicide Bombing*, 2007, 11.

¹¹ W. Al-Zuhili (note 8); S. Jackson, *Jihad and the Modern World*, *The Journal of Islamic Law and Culture* 7 (2002), 1 (18).

¹² A. Afsaruddin (note 4), 98. P. Heck, *Jihad Revisited*, *The Journal of Religious Ethics* 32 (2004), 95 (98).

¹³ See the overview of the theological and philosophical dimensions of *jihad* during the first six centuries of Islam, P. Heck (note 12).

¹⁴ See also A. Afsaruddin (note 4), 97.

treaty (8:72). Some of the battles fought during the lifetime of the Prophet *Mohammad* occasioned the revelation of some forthright verses urging the Muslims to fight the unbelievers (e.g. 9:5, 9:29). In other Qur'anic verses (e.g. 2:93; 2:193; 8:61) it is evidenced that should hostile behavior on the part of the opponents of Islam cease, then the reason for engaging them in war also ceases to exist.¹⁵ The reoccurring binary between Muslims and non-Muslims, and the fact that Qur'anic instructions to fight are often expressed as being based on a difference of religion are to be explained by the reality that the only people the Prophet and the early Muslim community had to fear were non-Muslims.¹⁶ It was not their unbelief in Islam that had to be feared but their real or perceived aggression towards Muslims that had been the object of the Qur'anic verses, as otherwise Islam orders respect for monotheistic religions. Also, in the pre-nation state era, the concept of nationality was non-existent in both the doctrine and practice of (not only) Islamic law. Instead, status was determined according to religion.¹⁷

These Qur'anic verses laid the foundation for early scholarly literature and debate on both a sound legal methodology for systematizing legal rules as well as on the substantial conditions and nature of *jihad*.¹⁸ For *jihad* as an armed struggle to be Islamically justified, a row of foundational aspects had to be clarified: *jihad* had to be declared by a person in legitimate authority over the community of Muslims, it had to aim for a just cause (to ward off the threat to Islam posed by the enemy), with a right intention (in the pursuit of God's order), and with a sound hope of success (as stated in 2:195).¹⁹ Only then was *jihad* conceived of as an obligation, i.e. a duty that was non-

¹⁵ A. Afsaruddin (note 4), 98.

¹⁶ To underline this fact, S. Jackson quotes and emphasises the following statement by Alexis de Toqueville as he writes of 19th century France: "The unbelievers of Europe attack the Christians as their political opponents rather than as their religious adversaries." Democracy in America, Vol. I, 314, 1835, as quoted by S. Jackson (note 11), 15.

¹⁷ Consequently, the *jihad* doctrine is applicable only to, classically speaking, wars between Muslims and non-Muslims. Separate rules governing warfare with non-Muslim powers (*jihad*) and warfare within the domain of Islam (known as *hurub al-masalih* or "wars [for the public interest]") existed. Inner-Muslim wars would be wars against rebels (*bughat*), apostates (*murtaddun*), and brigands (*muharibun*). Conflicts between Muslim rulers were treated as civil war (*fitna*). Rules concerning inner-Muslim peace agreements took the form of reconciliation (*sulh*) and thus followed different rules from those peace agreements with non-Muslim states. On inner-Muslim use of force see K. Abou El Fadl, Rebellion and Violence in Islamic Law, 2001; M. Fadel (note 6), margin numbers 19 et seq. The focus on the dynamics of the doctrine of *jihad* shall explain the elaborations on international wars (Muslim/non-Muslim) only. The use of force in inner-Muslim conflicts will thus be bracketed.

¹⁸ See, for instance, renowned early jurist *Shafi'i's* concern of legal categories in discussing *jihad*, *Shafi'i*, Kitab al-Umm, Vol. 4, 1973, 169 et seq.; see also P. Heck (note 12), 119.

¹⁹ See also S. Mahmoudi, The Islamic Perception of the Use of Force in the Contemporary World, in: M. Baderin (note 2), 103 (107).

justiceable by Islamic jurisdiction but rather constituted a religio-moral claim substantiated by a legal framework. As was to be expected of a vibrant scholarly community, every single aspect of this obligation caused divergent opinions. So while, for instance, jurists from the Arabic peninsula (Hijaz), like *Sufyan al-Thawri* (d. 778 C. E.), argued that *jihad's* nature was primarily defensive, and that only defensive *jihad* may be considered an obligation on the individual, Syrian jurists, like *Abu Amr Abd al-Rahman ibn Amr Al-Awza'i* (d. 773 C. E.), made the case that even offensive force may be regarded obligatory.²⁰ Islamic juristic tradition thus distinguished between a defensive *jihad* (waged whenever Islam was attacked) and an offensive *jihad* (pro-active and with the purpose of guaranteeing Muslim rule).²¹ It is telling that at the same time “offensive jihad” gained prevalence, the Syrian Umayyad Empire (second/eighth century) was engaged in border warfare with the Byzantines and that there was a perceived need by the elites to justify these hostilities on a theological and legal basis.²² It can be evidenced that throughout pre-modern Islamic history, the offensive aspects of *jihad* as invoked in 9:5 and 9:29, were drawn onto whenever imperial aims were to be realized, thus revealing an adopted imperial character of Islamic law.²³

But the offensive character of *jihad* shifted in the face of external aggression: It was again when the domain of Islam faced a threat to its political, territorial, and legal integrity that the classical conceptions of *jihad* as offensive were re-examined and shifted another time towards a defensive character. The dynamic was instigated by the Crusades at the end of the eleventh century C. E. and, to a certain extent, by the Mongol invasions in the thirteenth C. E.²⁴ These invasions point to a significant turning-point in the Islamic history of international law: While previous invaders of the domain of Islam had always been quick to recognize Islamic law and acknowledge

²⁰ See *A. Afsaruddin* (note 4), 99.

²¹ For a discussion on the purpose of offensive *jihad*, see *S. Jackson* (note 11), 16 et seq., based on the assumption that “only Muslims would permit Muslims to remain Muslims” and that *jihad* was seen “not only as a means of guaranteeing the security and freedom of the Muslims but as virtually the *only* means of doing so”. (italics in the original, *ibid.*, 17).

²² *A. Afsaruddin* (note 4), 98; *P. Heck* (note 12), 106; *F. Donner*, *The Sources of Islamic Conceptions of War*, in: *J. Kelsay/J. T. Johnson* (eds.), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, 1991, 31 (34).

²³ The role of jurists in imperial projects is not always transparent. It would be misleading to plainly suggest that the state “simply ‘bought’ the leading jurists of the day, but that the Islamic framework in which these jurists worked was primarily an imperial one”. *P. Heck* (note 12), 113.

²⁴ If the Crusades heightened the rhetorical significance of *jihad* as defence of the political and territorial integrity of the domain of Islam, the same cannot be said of the Mongol invasions, which were simply too extensive to make such concerns meaningful, *P. Heck* (note 12), 115.

the religio-legal authority of the caliph, Crusaders and Mongols both had their own traditions of universal order. According to *Paul Heck*, it was not the invasion of the domain of Islam as such that was so unsettling to Muslim jurists, but its sub-ordination to an imposed non-Islamic order. The experience of the Crusades as the first major and lasting incursion eventually led to a greater (re-)appreciation of *jihad* as self-defense of the legal integrity of the Islamic order.²⁵ Clearly, threat to the Muslim polity promoted re-articulations of the theory of *jihad*. The emphasis was increasingly given to *jihad* not as an offensive means of bringing new territory under Islamic jurisdiction, but as defense against foreign domination.²⁶

These historic events also brought along a change in the normative understanding of *jihad*, with relevancy still today.²⁷ The conceptions of offensive or defensive *jihad* in light of foreign invasions consolidated understandings regarding the type of the respective obligation to fight *jihad*. On the one hand, offensive *jihad*, ensuring Muslim rule through the expansion of the *domain of Islam*, was considered to be a collective obligation (*fard kifaya*), an obligation of which the fulfillment by a sufficient number of Muslims is the responsibility of the whole community. Thus, as long as an adequate number of Muslims realized the obligation, the remaining community was not obliged to take up arms. On the other hand, defensive *jihad* as initiated through an external attack on the Muslim community necessitated an obligation of the individual (*fard 'ayn*). Individual obligation entailed that all Muslims participate in the struggle against the invading enemy or at least all those in the geographical proximity of the attack. Geographical proximity indicated not only the territory immediately exposed to the attack, but the regions closest to it if the number of Muslims in the immediately exposed territory was not sufficient to repel the aggression²⁸ which could gradually include all Muslims if necessary.

Elaborations on the defensive concept of *jihad* were accompanied by abandoning important stipulations and restrictions that governed the understanding of offensive *jihad*: All those groups who were normally exempt from participating in the offensive *jihad*, e.g. minors, women, the elderly,

²⁵ *P. Heck* (note 12), 113.

²⁶ *C. Hillenbrand*, *The Crusades: Islamic Perspectives*, 1999, 246; *P. Heck* (note 12), 114.

²⁷ The Ottoman period (16th-20th century) is particularly noteworthy for yet other normative developments in the fields of international treaties, as it saw a rise in treaties contracted with many European states, with a particular emphasis on trade. See, for example, *D. Kolodziejczyk*, *Ottoman-Polish Diplomatic Relations (15th-18th Century): An Annotated Edition of "Ahdnames" and Other Documents*, 2000.

²⁸ *E. Sivan*, *La genèse de la contre-croisade: un traité damasquin du début du XII^e siècle*, *Journal Asiatique* 254 (1966), 197-224; *P. Heck* (note 12), 115.

young men who had not been granted permission by their parents, were required to participate in defensive *jihad*.²⁹

It is in light of these political realities that relying solely on the Qur'an, Prophetic traditions (*Sunna*) or the books of Islamic law for an understanding of the substance and the logic that lie behind the classical concepts of *siyar* in general, and *jihad* in particular is – obviously – not sufficient.³⁰ A closer look into the varying historical power constellations is decisive. This is what crucially informs the prevailing conceptions of Islamic international law.

2. Modernized Islamic International Law Concepts

Islamic international concepts of the pre-modern period cast their shadows upon the modern debate. The idea of *jihad* as defensive warfare was prominently elaborated on again in the Arab Muslim World in the 19th and 20th century through the still today echoing works of renowned modernist legal scholars such as *Muhammad Abduh* (1849-1905), rector of one of the distinguished centers of Sunni Muslim learning, Al-Azhar University, Cairo and his later student *Muhammad Rashid Rida* (1865-1935).³¹ *Rida*, a famous Egyptian Shari'a scholar at the Al-Azhar University, Cairo centered the legal and legitimate use of force on the principle of defense: "Everything that is mentioned in the Qur'an with regard to the rules of fighting is intended (to be understood) as defence against enemies that fight the Muslims because of their religion."³² *Mahmud Shaltut* (1923-1963) who was an Egyptian teacher of Islamic law and served as rector of Al-Azhar University, Cairo from 1958-1963 similarly declared that "from all these events it appears clearly that the Messenger only fought those who fought him, and that his fighting had no other aims than repelling oppression, warding off

²⁹ *S. Jackson* (note 11), 15 et seq. The question who is bound by *jihad* and who is excluded is central in Islamic legal literature, see, for example, *P. Heck*, (note 12), 109.

³⁰ *F. Donner* (note 22), 31 (34).

³¹ *M. Abdu*, *Al-Islam wa al-Nasraniyyah ma' al-'ilm wa al maddaniyyah* [Islam and Christianity and their Respective Attitudes towards Learning and Civilization], 1373 (1954), 62 et seq; *R. Rida*, *Tafsir al-Manar* [The Lighthouse Commentary], Vol. II, 1947, 103-104, 208-213, 312-318; Vol. III, 1947, 39; Vol. X, 1947, 167-173, 360-377; Vol. XI, 1947, 123-126; *R. Rida*, *Al-Wahy al-Muhammadi* [The Muhammadan Inspiration], 1375 (1955), 126-136. See *R. Peters* (note 2), 126.

³² *R. Rashid* as cited and translated by *R. Peters* (note 2), 127.

rebellion and aggression and putting an end to persecution for the sake of religion".³³

Significantly, *Abdub* and *Rida* later extended the defensive reasons for the *jihad* obligation to be applicable not only when the foreign aggressor attacked Muslims because of their religion but also in the event of an invasion of Muslim territory for political and economic reason.³⁴ Once more a dynamic shift responding to foreign domination becomes noticeable: While *jihad* was conservatively understood to serve the defense of faith, the new conception of defending the domain of Islam for political and economic reasons was included as a wider justification for defending territory.³⁵ This served as an extension that mirrored the colonialism of the 19th and 20th century, effectively allowing the appeal to the doctrine of *jihad* to be applicable for resisting European colonial conquest. At present, most Muslim jurists follow this "defensive-extensive" interpretation of *jihad*.³⁶

But the most important doctrinal development in Islamic international law in the post-Second World War era was the conclusion by prominent Muslim jurists that the domain of war category had no normative significance anymore.³⁷ The rise of international law and institutions such as the United Nations that were to guarantee the independence and sovereignty of all states, secure the self-determination of the colonized, and protect human rights supposedly altered the political scenery in which Muslim states and individuals found themselves.³⁸ With the adoption of the language of legal universalism and the rise of the nation-state, many Muslim jurists espoused a language of nation-states in their quest for independence and distanced themselves from those classical Islamic normative concepts that went beyond the nation-state and addressed the Muslim community as a whole. This change in the international scenery meant that international relations had changed from one in which war and conquest was, for a long time, the

³³ *M. Shaltut*, *The Qur'an and Fighting*, 1948, as translated by *R. Peters*, *Jihad in Classical and Modern Islam: A Reader*, 1996, 97.

³⁴ See *R. Peters* (note 2), 126.

³⁵ See similarly *M. Berger*, *Religion and Islam in Contemporary International Relations*, 2010, 16.

³⁶ See *R. Peters* (note 2), 126. *Y. Al-Qaradawi*, *Fiqh al-Jihad [Jurisprudence of Struggle]*, Vol. II, 2009, 20-35 critically discusses the positions of modern authors who support the idea of an "offensive-extensive" *jihad* that should not be given up.

³⁷ Muslim scholarship on Islamic law, of course, is not homogenous, and thus this paper aims at highlighting only some influential, centered strands of the contemporary debate, in particular as it refers to the Sunni Arab World. When referring to contemporary Muslim scholars, those who are committed to Islamic law and thought are meant in this section.

³⁸ *Y. Al-Qaradawi* calls these "changing factors" (*mutaghayyirat*), *Y. Al-Qaradawi* (note 36), 50; *M. Fadel* (note 6), margin number 47; *S. Jackson* (note 11), 19.

default rule to one in which peace between states was considered the default rule.³⁹ Any state that obliged itself to providing Muslims freedom of religion could not be considered part of the domain of war.⁴⁰ International legal guarantees for the freedom of religion became central in contemporary Islamic law for concluding that the concept of domain of war had become obsolete.⁴¹ Instead, the domain of treaty was to regulate the greater part of international relations. In fact, *Majid Khadduri*, one of the earliest UN commentators on the relationship between contemporary international law and Islamic law and member of the Iraqi delegation to the founding session of the UN in the 1940s as well as *Yusuf Al-Qaradawi*, a prominent contemporary Egyptian *Shari'a* scholar based in Qatar and currently head of the International Union of Muslim Scholars and former head of the European Council of Fatwa and Research, both (irrespective of each other) regard Muslims in view of their being part of the system of United Nations, as being bound by the domain of treaty with other states, unless there is a state of war.⁴²

The rejection of the domain of war had consequences for the Islamic law of warfare: if the domain of war no longer existed due to the guarantees of contemporary international law, then it could no longer be lawful from an Islamic perspective to fight wars except for the purpose of self-defense. The pre-modern Islamic juristic tradition that distinguished between an offensive *jihad* and a defensive *jihad* varying according to the constellations of power was now overwhelmingly given up by Muslim legal scholarship: Modernized *jihad* came to be understood as exclusively defensive *jihad*.

But the doctrinal changes went only that far: As the norms of the post-Second World War international order were considered to be congruent with Islamic moral and political ideals such that the category of the domain of war had become obsolete, one might have expected that the category of the domain of Islam would have also become obsolete: But the realities of modern colonialism and occupation, i.e. the establishment of the state of Israel on the territory of Palestine in 1948 (including the succeeding Israeli occupation or annexation of Egyptian, Lebanese, and Syrian lands), as well as the global Muslim resistance to the Soviet invasion of Afghanistan in

³⁹ S. Jackson (note 11), 19 et seq.

⁴⁰ W. Al-Zuhili, *Al-'Alaqa al-duwaliyya fi al-islam: muqarana bi-l-qanun al-dawli al-hadith* [International Relations in Islam: A Comparison with Contemporary International Law], 1981, 17-21, 26-27.

⁴¹ M. Fadel (note 6), margin number 47.

⁴² M. Khadduri, *Islam and the Modern Law of Nations*, AJIL 50 (1956), 358 (370); Y. Al-Qaradawi (note 36), 55.

1979 substantially coined and precluded the doctrinal development.⁴³ Instead, modern conceptions of the right to self-determination, anti-colonialism, and the territorial integrity of states reinforced older conceptions of Muslim solidarity, particularly as encapsulated in the concept of *jihad* as a means of self-defense.⁴⁴

Contemporary writers such as *Wahbeh Al-Zuhili* (b. 1932), professor and head of the Islamic Law (*fiqh*) and doctrines department of the faculty of Shari'a, University of Damascus and member of the influential Islamic law committee of the Organization of Islamic Cooperation (OIC) stressed in the 1970ies the renaissance of the domain of Islam as a collective, yet as a last resort individual defense mechanism, explaining that Muslims are

“obliged to defend [the domain of Islam] and to liberate such of its parts which have been seized. This obligation is a collective one, but if [liberation] is not achieved, struggle [ie *jihad*] becomes obligatory upon every individual Muslim – [beginning with those] in closest [geographical proximity] to the seized territories, until [the obligation to struggle] encompasses every Muslim. Accordingly, Palestine and like territories which were colonized, form a part of the domain of Islam (*dar al-islam*), and it is obligatory to expel the invaders from such territories when there is sufficient strength to do so”.⁴⁵

Al-Zuhili, in line with many modern jurists, has re-assessed the question of collective versus individual obligation.⁴⁶ Only under special circumstances should *jihad* become an individual obligation (*fard 'ayn*) for everybody who is capable of going to war. The prime condition for *jihad* becoming an individual obligation is that the attack presents a genuine threat to Islam. One such case occurs when the enemy attacks, colonizes or occupies Islamic territory. A further condition was that there is a likely success in opposing the attack. *Al-Zuhili* thus holds up the tradition of Muslim legal writings on defensive *jihad* when faced with an immanent threat: defensive

⁴³ *M. Fadel* (note 6), margin number 50.

⁴⁴ *M. Fadel* (note 6), margin number 50. See *R. Peters* (note 2), 6. Similarly, *Sherman Jackson* states that revitalised conceptions of the domain of Islam and *jihad* as well as Muslim solidarity are effected by the fact that powerful nations violate Art. 1 of the UN Charter. *S. Jackson* (note 11), 20.

⁴⁵ *W. Al-Zuhili* (note 40), 105 as translated and cited by *M. Fadel* (note 6), margin number 51.

⁴⁶ On the debate see *R. Peters*, *Jihad in Classical and Modern Islam*, 2005, 164. On further contemporary positions on *jihad* as an individual obligation see, for example, the legal opinion (*fatwa*) of Sheikh *Hassan Ma'mun*, former Grand Sheikh of Al-Azhar, Should Iraqis Take the Occupation A Fait Accompli?, 10.4.2004, available at <<http://www.onislam.net>>; the legal opinion (*fatwa*) of Sheikh *Faysal Mawlawi*, deputy chairman of the European Council for Fatwa and Research, Is it an Obligation to Join Jihad in Palestine?, 17.4.2004, available at <<http://www.onislam.net>>.

jihad shifts from a collective to an individual obligation, encompasses not only those Muslims immediately affected by foreign domination but also those in close geographical proximity, potentially extending to all Muslims, and the actions of defensive *jihad* are to be measured against a likely success in opposing the attack.⁴⁷ In fact, the variety of forms of *jihad* depends on geographic proximity and personal capacity and is left wide open, spanning from, amongst others, concrete fighting, to advocating the cause of the oppressed, giving charity for those under foreign domination, to pray for them so that God eases their difficulty.⁴⁸ But significantly, the infringement of the integrity of the domain of Islam makes *jihad* an individual obligation. When *jihad* is understood as self-defense of the domain of Islam, it is only a logical consequence that all those people who belong to the domain of Islam and have come under attack to have the individual obligation – as much as a right – to defend themselves.

The writings of *Al-Zuhili* are particularly significant in that they theorize and highlight the concept of wars of liberation for a systematic re-evaluation of Islamic international law:⁴⁹ Because it was always lawful to wage war against a non-Muslim power before the nation-state era when no treaty of peace was in place, and because states did not have a lawful entitlement to the territory they occupied, the pre-modern Islamic understanding of war had no concept of a war of liberation as distinct from a war of conquest.⁵⁰ With the contemporary elaboration of *jihad* restrained to fight off foreign invaders, wars of liberation (“liberating *jihad*”⁵¹) become central to modern Islamic international law. Put differently, wars of liberation, previously conceptionally unknown in Islamic international law, become the modern template for thinking about the use of force in Islamic international law.

In this vein, other modern Muslim jurists, too, interpret the doctrine of *jihad* as a result of a revised notion of the domain of Islam to require that all Muslims living under a regime of foreign domination (like in Palestine, Iraq, and Afghanistan) must resist that domination using all means available – and Islamically justifiable – to them.⁵² For example, prior to the United Sta-

⁴⁷ For a similar discussion on collective and individual obligation of *jihad* in *Shi'a* legal literature, see *S. Mahmoudi* (note 19), 107 et seq.

⁴⁸ See also the legal opinion (*fatwa*) Backing the Wronged Afghans, 10.4.2004, available at <<http://www.onislam.net>>.

⁴⁹ *W. Al-Zuhili* (note 40), 110; *Y. Al-Qaradawi* (note 36), 380.

⁵⁰ *M. Fadel* (note 6), margin number 52.

⁵¹ See also *S. Mahmoudi* (note 19), 106, with reference to Islamic *Shi'a* legal literature in Persian language.

⁵² Legal opinion of Sheikh *Hassan Ma'mun* (note 46).

tes invasion of Iraq in March of 2003, a group of leading Islamic jurists of the Islamic Research Academy at Al-Azhar University Cairo announced that if the United States invaded Iraq, *jihad* against the U.S. forces would become obligatory for every Muslim, stating that “according to Islamic law, if the enemy steps on Muslims’ land, *jihad* becomes a duty on every male and female Muslim”.⁵³ It was made clear that any attack on the territory of the domain of Islam, like in the case of Iraq, would be considered an attack on Islam. It was left unspecified by the Islamic Research Academy, however, in which form *jihad* was to be performed.

So while the modernized, redefined religio-legal doctrine of the domain of Islam clearly supports the modern system of peaceful relations between nation-states insofar as it represents a refusal of aggressive war, it also provides a justification for transnational armed resistance movements fighting a war of resistance or liberation against non-Muslim invaders.⁵⁴ Given the fact that the colonial rulers were non-Muslims, the doctrine of *jihad* has been suited for this purpose.⁵⁵ The modernization of religio-legal doctrines of warfare is reflected in the language of Islamist resistance groups in Palestine, Lebanon, Afghanistan, Iraq, and beyond. Interestingly, the Islamist groups *Hamas* and *Hizbullah*, both founded in reaction to the Israeli occupation of Palestinian and Lebanese lands, refer to the Arabic word of resistance (*muqawamah*) and not *jihad* in their party names.⁵⁶ *Hizbullah*, for instance, defines *jihad* by arms (in contrast to spiritual or moral *jihad*) as a defensive war against aggression and occupation and an obligation of every Muslim.⁵⁷ *Said Mahmoudi’s* statement that “[w]hen *jihad* is invoked by resistance or militant groups to justify attacks, there is reason to be hesitant about accepting this as sanctioned by Islam”⁵⁸ needs to be qualified. In many cases *jihad* doctrine can be considered to Islamically justify the resort to force in defense of the domain of Islam (“*jihad ad bellum*”, if you will),

⁵³ A. Shadid, Scholars Urge Jihad in Event of Iraq War, Washington Post, 11.3.2003.

⁵⁴ M. Fadel (note 6), margin number 53.

⁵⁵ R. Peters (note 2), 2.

⁵⁶ *Hamas*, Arabic for “enthusiasm” is an acronym of *Harakat al-Muqawamah al-Islamiyyah*, “Islamic Resistance Movement”. *Hizbullah* calls itself the Islamic Lebanese Resistance (*Al-Muqawamah Islamiyyah Lubnaniyyah*), and similarly its military wing is named “The Islamic Resistance” (*Al-Muqawamah al-Islamiyyah*). One reason for *Hamas* using the word resistance in their party/movement’s name instead of *jihad* is because of the part Christian Palestinians have been playing in the national resistance movement. See the history of Palestinian resistance against British Mandate and settlercolonialism, R. Peters (note 2), 95, 103. Both *Hamas* and *Hizbullah* make use of the term *jihad* in their political parlance, though. Other armed resistance groups carry the notion *jihad* in their name.

⁵⁷ N. Qassem, *Hezbollah: A Story from Within*, 2005, 39 et seq.

⁵⁸ S. Mahmoudi (note 19), 115.

the lives and territory, property and religion of people living in the domain of Islam, but the *jihad* doctrine does not always justify the means that are proposed to be used in that fight (“*jihad in bello*”).⁵⁹ Indeed, there exists a rich body of *jihad in bellum* that needs to be highlighted separately. But as *Nimer Sultany* has rightly said, characterizing contemporary debates: “[T]he exclusive focus on *jus in bello* (conduct during war) rather than *jus ad bellum* (the justifications for launching a war) is disturbing. By focusing on questions of excessive use of force and indiscriminate attacks, i.e. proportionality and distinction between civilians and combatants, human rights discourse seeks to shy away from political controversy surrounding justifications for wars.”⁶⁰

The modernized definitions of the domain of Islam and *jihad* point to the major tensions regarding understandings of resistance against foreign domination in international law: According to a prevailing understanding of Muslim jurists, Muslims, as a religious community, have obligations of self-defense that go beyond any conception of self-defense in contemporary international law as laid down in Art. 51 UN Charter. The function of *jihad* as a tool for the self-defense of every single individual of the Muslim community rather than that of a particular nation-state or even that nation-state and its allies as authorized by Art. 42 of the UN Charter, see e.g. NATO, is particularly important in understanding how what would otherwise appear to be local conflicts, e.g. Israel in Palestine, the United States in Iraq, as well as the former Soviet Union and respectively the United States in Afghanistan, are transformed into trans-national conflicts.⁶¹ In these and other conflicts, *jihad* – despite necessary and valid qualifications – is referred to as an anti-colonial struggle, as an appeal to Muslim solidarity for defense from abroad and as a key word for an emancipatory narrative. The internationally unabated scholarly concern for *jihad* reveals a need for a broader understanding of territorial and communal integrity and the needs to uphold or defend it – at least broader than the arena of current international legal scholarship offers.

⁵⁹ This distinction of *jus ad bellum* and *jus in bello* was revived in international law only in the 20th century, and directed each at a different audience, *D. Kennedy*, *The Dark Side of Virtue: Reassessing International Humanitarianism*, 2004, 242. Islamic law does not know this formal distinction, the concept of *jihad* includes both.

⁶⁰ *N. Sultany*, Roundtable on Occupation Law: Part of the Conflict or the Solution?, Part V, available at <<http://www.jadaliyya.com>>.

⁶¹ *M. Fadel* (note 6), margin number 59.

III. Modernized Concepts of Islamic International Law within the Tradition of Third World Approach to International Law (TWAIL)

Modernized Islamic international legal concepts are a particular response to the universal problem of foreign domination. Similarly, contemporary scholars loosely united under the banner of “Third World Approaches to International Law” have emerged to present how legal regimes, norms, concepts, and doctrines incorporated in international law cause subjugation and foreign domination, of a political or economic nature.⁶²

Although scholars within the TWAIL school of thought are not uniform in their methodology or approach, they are united in their common “opposition to the unjust global order” currently prevailing.⁶³ *Antony Anghie* and *Bhupinder Chimni*, both doyens of TWAIL, have distinguished between what they call the first generation of TWAIL scholarship (TWAIL I) and the second generation, TWAIL II scholarship.⁶⁴ TWAIL I scholars of the decolonization-era of the 1940-70ies placed a particular emphasis on critiquing the genealogy of modern international law and the Euro-centric assumptions at its core, while at the same time accepting and accommodating key doctrines of contemporary international law to benefit the positions of newly decolonized states, such as the actual application of the principle of sovereign equality of states and the principle of non-intervention in the internal affairs of states.⁶⁵ TWAIL II scholars, on the other hand, have es-

⁶² See, for example, *A. Anghie/B. S. Chimni/K. Mickelson/O. Okafor* (eds.), *The Third World and International Legal Order: Law, Politics and Globalization*, 2003; *R. Falk/J. Stevens/B. Rajagopal* (eds.), *International Law and the Third World: Reshaping Justice*, 2008; *K. Mickelson/I. Odumosu/P. Parmar* (eds.), *Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities*, *International Community Law Review* 10 (2008), 351.

⁶³ *M. Mutua*, *What is TWAIL?*, *American Society of International Law Proceedings* 94 (2000), 31 (32).

⁶⁴ *A. Anghie/B. S. Chimni*, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, *Chinese Journal of International Law* 2 (2003), 77 (79).

⁶⁵ *A. Anghie* and *B. S. Chimni* identify five arguments central to the TWAIL I scholarship, as follows: (1) an indictment of “colonial international law for legitimizing the subjugation and oppression of Third World peoples”; (2) underline that “Third World states were not strangers to the idea of international law”; (3) envision “that the contents of international law could be transformed to take into account the needs and aspirations of the peoples of newly independent states”; (4) stress the “sovereign equality of states” and the principle of “non intervention” as protection from renewed imperial interference; and (5) support the inauguration of “a New International Economic Order”, aimed at “regaining control” over Third World resources to maximize the benefit to indigenous, newly independent societies. *A. Anghie/B. S. Chimni* (note 64), 80 et seq.

poused a framework critical of the newly independent post-colonial state and its right to “non-intervention”. They were concerned with how the new nation-states were perpetuating the patterns of domination. TWAIL II gave space to thus far marginalized voices critical of “the Third World nation-state, of the process of its formation and its resort to violence and authoritarianism” against the very populations such states were principally created to emancipate from foreign domination.⁶⁶ Thereby TWAIL II scholars have highlighted “more closely” than the preceding TWAIL I scholars “the extent to which colonial relations had shaped the fundamentals of the [international law] discipline” to the extent that “[r]ather than seeing colonialism as external and incidental to international law, an aberration that could be quickly remedied once recognized”, colonialism must be understood more principally as “central to the formation of international law”.⁶⁷

Though the difference between the work of the first and the second generation TWAIL can be explained by their respective era in which they were formulated (with decolonialization and the drive of Third World independence paramount to TWAIL I, and neo-imperialism, globalization and Third World despotism principal to TWAIL II), *Ardi Imseis* critically recalls that these two historical paradigms should not be seen as one (TWAIL II) historically overriding the other (TWAIL I).⁶⁸ In fact, the above mentioned writings of *Al-Zubili* and *Qaradarwi* underline that foreign domination is not considered a chapter that ended with the decolonization processes of the 1940-70 but a reality in the lives of many in the Muslim World. It will be highlighted in the following how, within the Muslim legal scholarship, both TWAIL I and TWAIL II critiques are indeed concurrently relevant.

TWAIL I scholarship has a tradition emphasizing that societies and their legal cultures before they became colonized were “no strangers to the idea of international law in the first place”.⁶⁹ Non-European societies and legal cultures had developed sophisticated rules relating to international law, such as to the laws of peace and war and the law of treaty. This also applies to Muslim societies and their legal cultures: Both injunctions from the Qur’an

⁶⁶ A. Anghe/B.S. Chimni (note 64), 83. TWAIL II scholars have relied on their theoretical frame on the works of *F. Fanon* on the one hand, and the deconstructionist works of *E. Said*, *H. Bhabha* and *G. C. Spivak* on the other. *F. Fanon*, *The Wretched of the Earth*, 1963; *E. W. Said*, *Orientalism*, 1978; and *E. W. Said*, *Culture and Imperialism*, 1993; *H. Bhabha*, *The Location of Culture*, 1994; *G. C. Spivak*, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, 1999.

⁶⁷ A. Anghe/B. S. Chimni (note 64), 84.

⁶⁸ *Imseis* refers to the almost simultaneous existence of both paradigms in the case of Palestine. *A. Imseis*, Introduction, *Third World Approaches to International Law and the Persistence of the Question of Palestine*, *Palestine Yearbook of International Law* 15 (2009), 1 (3).

⁶⁹ A. Anghe/B. S. Chimni (note 64), 80.

and from the enormous corpus of the Prophetic tradition (*Sunna*) as well as Islamic legal scholarship provide for many rules of international relations comparable to those under modern international law such as the principles honoring the human being, commitment to rules of ethics, morality, justice and equality, *pacta sunt servanda*, reciprocity, sovereignty and legal restrictions on and in warfare.⁷⁰ In this sense, TWAIL I recognizes the rich body of doctrines and principles which have found no or little acknowledgement in international law. Collective and individual resistance to foreign domination is one principle that has not generated as much scholarship and practical attention as it deserves to serve the sense of justice of those living under foreign domination. Instead, *jihad*, as a self-defense mechanism, has often been bracketed out of the discussions of international law.

It is a core concern of TWAIL I that colonial international law is employed to legitimize the subjugation and oppression of Third World peoples.⁷¹ Resistance and liberation are the key words that are used by TWAIL scholars (both first and second generation) to explain how TWAIL is a response to the discourse of domination and subordination in international law.⁷² Similarly, Muslim jurists have underlined that the international legal order has failed to aid them in their quest for resistance and liberation, and instead used the law for domination and subordination. Frustration with international law has made many Muslims refer to Islamic international law concepts rather than those (few) contemporary international law ones which provide for resisting foreign domination.⁷³

A substantial part of TWAIL II research is understood as reconstructive projects,⁷⁴ critically examining the legal history of international law and the often hierarchized, and sometimes racialized, approaches and binaries, and their dire consequences for the Third World (e.g. civilized/uncivilized, developed/developing, sovereign/occupied).⁷⁵ As much as TWAIL is a response to the unfinished business of decolonization at the end of direct European colonial rule over non-Europeans and its grim legacy,⁷⁶ modern-

⁷⁰ W. Al-Zuhili (note 8).

⁷¹ A. Anghie/B. S. Chimni (note 64), 80.

⁷² M. Mutua (note 63), 31.

⁷³ Surely, frustration with international law is not only a religious affair. That is, even those who do not use religious arguments, know and understand the pitfalls of international law. It is not meant to reduce resistance in that part of the world to Islamic resistance only.

⁷⁴ M. Mutua (note 63), 38; A. Anghie, What is TWAIL: Comment, American Society of International Law Proceedings 94 (2000), 39.

⁷⁵ A. Anghie refers to the importance and effect Critical Race Theory and Lat-Crit Theory had on TWAIL, with their work focusing on normatively deconstructing white privilege and supremacy. A. Anghie (note 74), 39.

⁷⁶ See M. Mutua (note 63), 31.

ized Islamic international law concepts have been a response to real or feared re-colonization and occupation. Just as modernized concepts of Islamic international law cannot be understood without reference to the development of international law in European and later Northern-American states, TWAIL II grounds its understanding on an intimate connection between the development of legal concepts and the colonial project.⁷⁷ Therefore, TWAIL, the first and second generation scholarship and modernized Islamic international law concepts seem to have a lot in common: an alternative review of history, hegemony and resistance.

Modern historical experiences of the Muslim World make it also categorically fit the Third World. Broadly speaking, the Third World is used to describe countries that suffer(ed) under colonialism and imperialism with all its convoluted consequences.⁷⁸ With the rise and expansion of European industrialism in the 19th and the beginning of the 20th century, most of the peoples of the Muslim World, i.e. where Islam is the religion of the majority of the respective society, were subjugated by European colonial rule. In the vast majority of the regions brought under European domination, resistance amongst the local population against colonization at one point organized itself in politico-religious movements that fought the foreign rulers under the banner of *jihad*.⁷⁹ Muslim cases of anti-colonial resistance have a long history, exemplified by the examples of Muslim resistance against British colonialism in India, Algerian resistance against French colonialism, the Mahdist resistance movement in Sudan, Egyptian resistance against British occupation, resistance against Italian colonialism in Libya, the Ottoman *jihad* declaration of 1914 and Palestinian-Arab resistance against British and Israeli colonialism in Palestine.⁸⁰ Until today, the consequences of the reality of European colonialism have drastically transformed the basis and nature of political and social organization within and among territorial states where the majority of Muslims live.⁸¹ It is in this sense that, for the purpose

⁷⁷ A. Anghie, Finding the Peripheries, Sovereignty and Colonialism in Nineteenth-Century International Law, Harv. Int'l L. J. 40 (1999), 1 (5).

⁷⁸ For a critical discussion of the term "Third World" in international law, and the critique of essentialising the Third World see B. Rajagopal, Locating the Third World in Cultural Geography, Third World Legal Studies (1998-99) (Special Issue on Postcolonialism, Globalization and Law), 1. For B. Rajagopal there is ultimately no alternative to the term "Third World", see *ibid.*, 3.

⁷⁹ R. Peters (note 2), 39. A significant impetus for resistance was also nationalist-secular, arising with the aspirations of the emerging nation-state.

⁸⁰ For an analysis of these (Sunni) anti-colonial resistance movements see R. Peters (note 2), 39-104.

⁸¹ A. A. An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a, 2008, 125.

of this theoretical approach, the Third World lends itself to the Muslim World.

To the best of my knowledge, modernized Islamic international law concepts and TWAIL were previously not explicitly brought together. More to the point, modernized Islamic international law concepts were not read as, I would argue, a possible autochthonic rendition of TWAIL. One possible reason might be the lack of knowledge about the Islamic legal system or about TWAIL. Others might feel unease about making way for religion in international law. Yet for others, Islamic law is not even considered an “ideological *terra nullius*”⁸², a legal system that needs to be discovered, but rather one that needs to be rejected as one intrinsically conflicting with international law.⁸³

Yet to read an Islamic international law concept as one strand of TWAIL, one must translate the ideas of *Shari‘a* law trained scholars not only from the Arabic to English. Moreover, *Shari‘a* legal terminology must be translated to post-Second World War international legal norms. Whether or not these jurists see themselves as arguing within the tradition of TWAIL is not my question, it is rather the arguments they make, I would argue, that fall within this line of legal thought.

So far, integrating an Islamic legal critique of international law into the international legal discourse in general has proven difficult for a variety of reasons: Some Muslim legal critics of international law have not had a secular but instead a *Shari‘a* law education, with *siyar* the branch of international law. *Siyar* understanding and terminology does not permeate the dominant contemporary international law debate easily, in part because Muslim scholars of Islamic law often do not equally master the terminology and technicalities of post-Second World War international law, and in part because little substantial attempt is made on the other side to understand the Islamic legal framework and general principles of Islamic law in order to fully comprehend the rules governing international relations.⁸⁴ A case in point is the scholarly (non-)exchange on occupation as a form of foreign domination. While international law considers occupations legal, i.e. has set up a normative regime for it, *siyar* does not know the concept of occupation at all and neither accepts its legality nor legitimacy (*siyar* understands conquest as incorporating territory and people, extending the same rights to

⁸² B. Rajagopal (note 78), 17.

⁸³ See, for example, D. Westbrook, Islamic International Law and Public International Law: Separate Expressions of World Order, Va. J. Int’l L. 33 (1993), 819.

⁸⁴ M. Berger argues that “the West lacks a discourse on religion in international relations”, M. Berger (note 35), 32.

them as to domestic subjects). Here, a plethora of questions on communicating the respective doctrines and principles arise. Yet, *Antony Anghie* and *Bhupinder Chimni* critically recall that “what counts as acceptable scholarship in the field of international law” remains set by the “standards” of “Northern scholars and Northern institutions”, casting aside with little to no consideration the scholarship emanating from outside the Northern spheres.⁸⁵ Also, some Muslim scholars of Islamic law have challenged Western hegemony so that they and their scholarship are stigmatized, branded as extreme and thus kept away from the international arena.⁸⁶ Reference to terrorism is also quickly made wherever the concept of *jihad* appears,⁸⁷ despite many modern Muslim legal authors stressing the fact that Islamic legal principles prohibit acts of terrorism.⁸⁸

Acknowledging Muslim scholars’ work and underlining the modernized conceptions of resisting foreign domination, however, is an important reminder that the views of those suffering from foreign domination are part and parcel of the empirical world that must be properly understood and debated, and not dismissed as “deviant scholarship unworthy of engagement”.⁸⁹ Consequently, while the present approach absorbs the critique of contemporary international law as expressed by TWAIL I and TWAIL II, it fits into a new, possibly third generation of TWAIL scholarship (TWAIL III) seeking to de- and reconstruct international law from within their respective own legal tradition, researching and incorporating indigenous un-

⁸⁵ *A. Anghie/B. S. Chimni* (note 64), 87.

⁸⁶ For example, since jurist *Yusuf Al-Qaradawi* has condoned suicide attacks against Israelis as a justified form of resistance to Israeli occupation of Palestinian territory, his visa to the USA has been revoked (1999). The UK (2008), Ireland (2011), and France (2012) also denied him access to their territory, see French Visa Ban Blow to Al-Qaradawi, 27.3.2012, available at <<http://www.gulfnews.com>>.

⁸⁷ The dismissive connotations attached to the term “uncivilized” in 19th and 20th century international legal parlance, see the work of *A. Anghie* (note 77), are arguably similar to those attached to the term “terrorist” in the second half of the 20th and 21st century, both aiming at exclusion, essentially stating that the two have nothing worthwhile, if not dangerous, to bring to the table.

⁸⁸ In fact, it is in particular the concept of *jihad* that is often erroneously identified by many as being synonymous with a total disregard for humanitarian principles in the conduct of war by the launching of indiscriminate attacks aimed at terrorizing the civilian population. It is all too often forgotten that this type of conduct is prohibited by Islamic principles. Islamic legal tradition has developed a whole set of principles and rules aiming at regulating conduct during armed conflicts and imposes on combatants certain limits in the use of violence and during the conduct of hostilities. See, for example, *Y. El-Ayouty*, International Terrorism Under the Law, ILSA Journal of International and Comparative Law 5 (1999), 485 et seq., *Y. Al-Qaradawi* (note 36), 120.

⁸⁹ *B. S. Chimni*, An Outline of a Marxist Course on Public International Law, LJIL 17 (2004), 1 (2).

derstandings of law into international law both to highlight contemporary international law's hegemonial claim as well as overcome it.⁹⁰ To do so, the native discourse needs to encroach upon the dominant sphere of mainstream international law and change its vocabulary, becoming a player in "the politics of knowledge creation".⁹¹ Analyzing the contemporary international legal order through modernized Islamic international law concepts, I would argue, is part of this recently emerging third generation of TWAIL scholarship. The relevance of Islamic international law concepts remain globally relevant in that there is more to them than a religious take on international law. They can be read as an Islamic response to the universal problem of foreign domination. As such, I would argue that modernized Islamic concepts of international law today take a Third World Approach to International Law.

IV. An Islamic and Third World Approach to the Problem of Occupation in International Law

The disenchantment with international law's living up to its both *de lege lata* and in spirit promise of equality and peace led to the very existence of modernized Islamic international law concepts and TWAIL. Each strand of critique presents its specific way to develop a "systematic process of resistance to the negative aspects of international law".⁹² Modernized Islamic approaches to international law and TWAIL do not claim to formulate a comprehensive alternative international normative order, yet their scholarship offer various frameworks for describing and analyzing questions of justice within international law.⁹³ Instead, the explicit aim of both is to evaluate key international legal concepts and principles as they most direly affect the Muslim and Third World.

⁹⁰ See, for example, *P. Singh*, Indian International Law: From a Colonized Apologist to a Subaltern Protagonist, *LJIL* 23 (2010), 79; *A. Kemmerer*, TWAIL 3.0: Indien, die Juristerei als Wissenschaft und das internationale Recht, 5.5.2012, available at <<http://www.verfassungsblog.de>>.

⁹¹ *P. Singh* (note 90), 83 et seq.

⁹² See also *L. Eslava/S. Pahuja*, Between Resistance and Reform: TWAIL and the Universality of International Law, *Trade Law and Development* 3 (2011), 103 (116).

⁹³ For Islamic legal approaches see *M. Fadel* (note 6), margin number 58. For TWAIL see *O. C. Okafor*, Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both?, *International Community Law Review* 10 (2008), 371 (374); or *J. Gathii*, TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography, *Trade Law and Development* 3 (2011), 26.

In the Muslim and Third World, there is a heightened sensitivity to the role of international law in regulating or, more to the point (and to the experience), deepening unequal global power relations.⁹⁴ One joint focal critique is that international law (contrary to its rhetoric) legalizes and legitimizes foreign domination, a contemporary reality in parts of the Muslim World. While foreign domination can come in military, political, and economic ways, this paper focuses on military authority over Muslim Third World peoples and resistance against it. In this sense, the following critique of occupation law builds on *Antony Anghie's* seminal work highlighting colonial encounters as being central for international law⁹⁵ as well as contemporary Islamic legal scholars' main concern for resistance to foreign rule.⁹⁶ TWAIL scholarship, and arguably modernized Islamic international law scholarship, has not only re-centered international law's relationship to the colonial normative legacy, but is also challenging "the complacency in international law to treat the colonial legacy as dead letter, overcome by the process of decolonization".⁹⁷

The choice for occupation law is made by contemporary (Arab) Muslim legal scholarship prominently discussing Palestine, Afghanistan and Iraq as a question of foreign invasion (Arabic: *ghazu*) and occupation (Arabic: *ihtilal*). The notion of occupation (*ihtilal*) is noteworthy given the fact that it is a term much in circulation amongst Muslim scholars of Islamic law but unknown to the tradition of *siyar*. In fact, Muslim legal scholars use the term occupation but do not do so with reference to the normative regime as known in contemporary international law. So the ambivalence to use the term occupation to denote the domination of parts of the domain of Islam while rejecting the normative regime of international law will be reflected throughout this section. The term occupation is used, notwithstanding the official invitations of the Afghan and Iraqi governments, for foreign troops being stationed in their countries. Some Muslim legal scholars dismiss these invitations as formal, serving the needs of powerful foreign nations and not the respective people.⁹⁸ However, for reasons of scope, no case by case analysis of the respective country will be offered.

Most cases of occupation are met with violent or non-violent resistance, or defensive *jihad* to use the term of modernized Islamic law. Despite the

⁹⁴ *M. Al Attar/V. Tava*, TWAIL Pedagogy – Legal Education for Emancipation, Palestine Yearbook for International Law 15 (2009), 7 (8).

⁹⁵ *A. Anghie*, Imperialism, Sovereignty and the Making of International Law, 2004.

⁹⁶ See, for example, *Y. Al-Qaradawi* (note 36), 389; *W. Al-Zuhili* (note 40), 105-115.

⁹⁷ *J. Gathii* (note 93), 30.

⁹⁸ See, for instance, statements made by the Association of Muslim Scholars in Iraq, *R. Meijer*, "Association of Muslim Scholars in Iraq", 2005, Vol. 35, <<http://www.merip.org>>.

(historic and present) importance resistance has to many in the Muslim/Third World, the main international conventions on occupations say little about the legality and legitimacy of resistance, or those involved in it.⁹⁹

Certainly, international law, emerging out of the century-long experiences of warfare, knows that uprisings and revolts against occupying forces are commonplace throughout the history of occupations.¹⁰⁰ An examination of the normative regime of occupation law shall explore the legal space made for resistance against occupation. An analysis will show that occupation law is to be criticized as using a “language of oppression”¹⁰¹ centering on order, obedience and control, while disguising the authorization of force, fear and coercion vis-à-vis the whole occupied population. Fundamentally, occupation law delegitimizes resistance by authorizing severe measures to deter partisan and irregular combatants,¹⁰² or, put in modernized Islamic legal terms, those effecting their individual *jihad* obligation. A critical legal review will show that the normative regime of occupation does not address the conflict it creates: legalized foreign domination. Even if occupation law was fully applied it would not address the main problem of a legalized hierarchy,¹⁰³ severely constraining the rights of an entire population for an unspecified time. Even under an occupation that fully complies with international humanitarian law, the occupied population nevertheless has to experience a loss of freedom, autonomy, and national sovereignty – for a period as long as the Occupying Power determines. The occupied are not only forced to accept foreign rule but are also legally constrained in resisting it.¹⁰⁴ These constraints lead many in the Muslim World to refer to Islamic rather than international legal concepts, and have heightened, if not caused, the tensions that exist between the two legal systems. In fact, I am not aware of any detailed normative critique of the regime of occupation law from an Islamic legal perspective, partly because occupation as a legal regime is not only unknown in classical Islamic law (and thus *Shari‘a* law terminology alone would not be an appropriate or sufficient tool to deconstruct occupation law) but is also likely to lack legitimacy in the eyes of contemporary Muslim legal scholarship. The TWAIL II tradition recognizes, and simultane-

⁹⁹ A. Roberts, A Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, *AJIL* 84 (1990), 44.

¹⁰⁰ For 19th century Europe, see K. Nabulsi, *Traditions of War: Occupation, Resistance, and the Law*, 1999, 52.

¹⁰¹ A. Angbie (note 77), 67; A. Angbie/B. S. Chimni (note 64), 79.

¹⁰² N. Bhuta, The Antinomies of Transformative Occupation, *EJIL* 16 (2005), 721 (722, 733). See K. Nabulsi (note 100), 21-36.

¹⁰³ See N. Sultany (note 60).

¹⁰⁴ K. Nabulsi (note 100), 65.

ously questions the established principles and regimes of international law. Its perspective will be used in the following to read and question the normative regime of occupation law. I would argue that TWAIL has the potential to analyze the tensions that exist between international law and Islamic international legal concepts on the acute question of occupation law – and for understandings of resistance/*jihad* against it.

It is not to say that contemporary international law is not aware of the problems mentioned. According to international law, occupation is quintessentially a temporary state arising when an invader achieves military control of a territory and administers it on a provisional basis, but has no legal entitlement to exercise the rights of the absent sovereign.¹⁰⁵ The normative regime of occupation comprises a host of humanitarian rules. Primarily applicable are the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land (henceforth “the Hague Regulations”) and the 1949 Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War (henceforth “the Fourth Geneva Convention”). These laws underline that *Occupatio bellica* is a transitional status between invasion and conquest, during which the continuity of the political and economic order is to be maintained. The authority of the Occupying Power stems from its factual power, its military capacity to exercise functions of administration and issue enforceable commands, not from any sovereign right.¹⁰⁶ Parallel to the international law’s recognition of this factual power, however, is the imposition of an obligation to respect the property rights of the occupied and to refrain from interfering with the private economic relations as well as restore and ensure public order.

But in authorizing the Occupying Power to restore order, international law makes a powerful recourse to the theme of disorder in the occupied territory. The reference to disorder necessitates the imposition of order that could only take place through the Occupying Power.¹⁰⁷ *Annelise Riles* has already noted what the recourse to order meant in the legal history of international law: It diverts attention “from the positivist vision of law as force, and reorganised international law around the theme of order”.¹⁰⁸ Centering the regime of occupation law on the conception of order disguises the force needed to uphold the legal hierarchy between the Occupying Power and the

¹⁰⁵ *N. Bhuta* (note 102), 725.

¹⁰⁶ *N. Bhuta* (note 102), 726.

¹⁰⁷ Similarly, *A. Anghie* on protectorates as the flexible instruments of control, *A. Anghie* (note 77), 57.

¹⁰⁸ *A. Riles*, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, *Harv. L. Rev.* 106 (1993), 723 (726).

occupied population.¹⁰⁹ It is this force that allows for the exercise of control over both the (political and economic) internal and external affairs of the occupied population.

Besides, international law prescribed that the law of the occupied territory was to be respected by the Occupying Power unless it is “absolutely prevented” from doing so.¹¹⁰ As a consequence of this exception granted, occupation law allows the ordinary laws of the territory to be temporarily supplemented in order to meet the exigencies of preserving order under circumstances of war or to be partially suspended in the name of military necessity (such as to protect the occupying military forces).

Still, military necessity allows for a set of instruments designed to maintain control over land and people,¹¹¹ its theoretical temporary character notwithstanding. Forceful military measures of the Occupying Power against the occupied population were usually considered justified on the grounds of self-defense and deterrence. In most cases, reprisals of the Occupying Power could fall under the concept of “military necessity”.¹¹²

Subjugation is further consolidated in the sense that the population was deemed to owe a duty of obedience to the occupant, though not loyalty,¹¹³ arising out of an acceptance of the Occupying Power to enforce its commands and in return for the preservation of public order. As occupation law envisages a duty of obedience and characterizes certain acts as hostile to the occupant,¹¹⁴ occupation law is reminiscent of the law of conquest.¹¹⁵ The relationship between the Occupying Power and the occupied population, while encompassing protection and obedience, fundamentally arises from the occupant’s force which is internationally legitimated and constrained by international law’s precarious (im)balance of “military necessity” and main-

¹⁰⁹ Similarly order was employed as a pretext for the colonial context permitting European states to claim colonial territory, *A. Riles* (note 108), 727.

¹¹⁰ Art. 43 of the Hague Conventions of 1899 and 1907.

¹¹¹ For example, Arts. 27, 49, 51, 53 Fourth Geneva Convention.

¹¹² See *K. Nabulsi* (note 100), 65.

¹¹³ See Art. 44 of the Hague Regulations: “A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence.”; Art. 45: “It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the Hostile Power.” See also Art. 51 of the Fourth Geneva Convention, prohibiting conscription of civilians in occupied territory.

¹¹⁴ Art. 5 para. 1 of the Fourth Geneva Convention: “Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.”

¹¹⁵ See, for instance, *R. Baxter*, *The Duty of Obedience to the Belligerent Occupant*, *BYIL* 27 (1950), 235 (258).

taining order. Obedience, though not literally mentioned in the laws of occupation, is the quintessential foundation that the legal regime of occupation needs to lay. The ability to instill fear (or, according to *Karma Nabulsi*, better known as “terror”), and thus to generate obedience, has been the primary method used by occupation forces to exert control over an occupied people and their territory.¹¹⁶ Rules governing the treatment of those resisting, rather than obeying, are rather thin. Arts. 5, 49, and 68 of the Fourth Geneva Convention all require fair treatment when detained or tried by the Occupying Power.¹¹⁷

Though occupation law does not extend to all means and methods used in the name of “military necessity”, the extent of this constraint remains as widely open as the vague concept of “military necessity” steers it. The substantive law of occupation grants the security concerns of the Occupying Power much room. And so the notion of “military necessity” as a regulative principle in international law expands and contracts, depending on the perceived actuality of the threat to be contained and of the enemy to be defeated.¹¹⁸ With the interests of the occupying force being paramount,¹¹⁹ the hierarchy between the occupier and the occupied merges the military and the legal-humanitarian realm,¹²⁰ at the expense of the occupied. In fact, the legal concept of occupation comes with its own history that reveals, following *Antony Anghie’s* TWAIL theory that the “modern discipline [of international law] operates very much within the framework it has inherited from the nineteenth century”.¹²¹ *Nehal Bhutha* similarly departs from the common historical account which narrates the emergence of belligerent occupation as part of the progressive “humanization of warfare” by European civilization. Instead he sees the development of *occupatio bellica* as a response to the twofold perils of revolutionary war and wars of liberation.¹²² Similarly, *Karma Nabulsi* reminds us that the notion of military necessity was invoked by all 19th century military occupiers to justify a variety of pu-

¹¹⁶ *K. Nabulsi* (note 100), 41.

¹¹⁷ Accommodating though confining resistance, the Geneva Protocol I makes legal restraints applicable to liberation struggles, which in Art. 1 para. 4 includes within its scope of application “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”. If implemented, Protocol I would require any liberation movement to observe extensive restrictions as regards methods of operation, weaponry and targets.

¹¹⁸ *N. Bhuta* (note 102), 728.

¹¹⁹ *G. von Glahn*, *The Occupation of Enemy Territory*, 1957, 265.

¹²⁰ See *D. Kennedy* (note 59), 271.

¹²¹ *A. Anghie* (note 77), 74. See also *N. Bhuta* (note 102), 721.

¹²² *N. Bhuta* (note 102), 723.

nitive measures against inhabitants.¹²³ *Nehal Bhuta* recalls that 19th and early 20th century commentators of international law allowed the occupier to extend his control “over practically all fields of life” to serve military necessity and order-preservation,¹²⁴ particularly if faced with local resistance to his military control.¹²⁵ The “disciplining” of the occupied was seen as the “secret success of the occupation”.¹²⁶ Eventually, occupation forces were expected and entitled to be “severe”¹²⁷ in as much as pacification was necessary to the carrying out of military operations and the administration of the territory.¹²⁸

Denying sovereignty to some people is central to the laws of occupation, and key to the TWAIL critique:¹²⁹ The assumption underlying this law is that no other authority exists in the occupied area.¹³⁰ The territory under occupation, and by extension its population, is the object of the occupier’s sovereignty.¹³¹ The law of occupation does not pretend that the local population has much say in the matters of occupation.¹³² Local municipal courts of the occupied countries were precluded from inquiring into the behavior of the Occupying Power. Instead, occupation law first relies on self-regulation, placing the occupying forces under the jurisdiction of their own states. Moreover, the responsibilities of Occupying Powers are conceptualized as existing towards the entire community of states, emerging from the obligation of all states to “ensure respect” for the Geneva Conventions “in all circumstances”.¹³³ Attempts made by the occupied population to ques-

¹²³ *K. Nabulsi* (note 100), 29-30.

¹²⁴ *N. Bhuta* (note 102), 728, further references omitted.

¹²⁵ *N. Bhuta* (note 102), 728.

¹²⁶ *J. Spaight*, *War Rights on Land*, 1911, 323 as cited by *N. Bhuta* (note 102), 728.

¹²⁷ *N. Bhuta* (note 102), 728, at note 47.

¹²⁸ *N. Bhuta* (note 102), 729.

¹²⁹ *A. Anghie* (note 77), 56.

¹³⁰ See Art. 43 of the Hague Regulations of 1907.

¹³¹ *A. Anghie* (note 77), 68.

¹³² *D. Li*, *A Universal Enemy? Legal Regimes of Exclusion and Exemption Under the “Global War on Terror”*, Student Scholarship Papers, Paper 92 (2009), 62, available at <http://digitalcommons.law.yale.edu/student_papers/92>.

¹³³ Art. 1 of the Fourth Geneva Convention. Obligations under international humanitarian law, pertaining to occupation are arguably of an *erga omnes* nature – opposable to all states – as well. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9.7.2004, Advisory Opinion, ICJ Reports 2004, 136 (199) describing certain rules of international humanitarian law relevant for occupation as existing *erga omnes*; but see the separate opinion of *J. Higgins* considering *erga omnes* an “uncertain concept”, ICJ Reports 2004, 136 (216).

tion the legality of actions taken by the occupying Power are bound to fail.¹³⁴

Occupation law is not the clinical and protective regime necessarily projected by the law, nor always the total chaos and barbarity, but surely one pertinent form of foreign domination and subjugation.¹³⁵ The provisional character of occupation law mitigates the inequalities between occupier and occupied, and putting the possibility of ending this legal hierarchy solely into the hands of the Occupying Power. It is granted that humanitarian law in general is meant to be temporary in nature and is meant to balance an occupier's military needs and an occupied population's humanitarian ones. But the vocabulary in which the charges of military necessity and proportionality of inflicting damage on the occupied population is repeatedly made, and defended, is the vocabulary of humanitarian law.¹³⁶ By emphasizing the primacy of military necessity, measures are being inherently taken at the expense of the occupied population. With the very arrival of an invading and occupying force, all the rules of normal social and political interaction are suspended.¹³⁷ Collective and individual rights are violated as an inherent consequence of occupation, both with the force used to establish occupation and with the force used to reinstate order. Though some elements of occupation law limit the force of the Occupying Power, they are far from empowering the occupied to resist foreign domination.

It is rather outside of the Hague Regulations and the Fourth Geneva Convention that case law on the legality of resistance can be found.¹³⁸ Support for resistance to end foreign domination lead to relevant statements such as incorporated in the 1974 UN Definition of Aggression: "Nothing in this Definition (...) could in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right (...), particularly peoples under colonial and racist regimes or other forms of alien domination, nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter (...)." ¹³⁹ *Adam Roberts* also re-

¹³⁴ This observation follows *A. Anghie* (note 77), 51, who refers to colonised people and the colonising state.

¹³⁵ See *K. Nabulsi* (note 100), 63 et seq.

¹³⁶ *D. Kennedy* (note 59), 271.

¹³⁷ See *K. Nabulsi* (note 100), 63 et seq.

¹³⁸ See *R. Baxter* (note 115), 256 et seq. with examples of Norwegian and Dutch national case law being sympathetic to resisters to German occupation. *A. Roberts* (note 99), 80.

¹³⁹ Art. 7 of the Definition of Aggression, Annex to GA Res. 3314 (XXIX), 14.12.1974. See similarly also in Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Annex to GA Res. 2625 (XXV), 24.10.1970.

fers to a degree of recognition that has been granted to some liberation movements that were granted observer status in the General Assembly and UN-sponsored conferences.¹⁴⁰ Countless statements were made by UN bodies criticizing the actions by Occupying Powers in response to resistance.¹⁴¹ Some mainstream international law scholarship sheds light on the unease of occupation law. *Antonio Cassese*, for instance, though through the lens of self-determination and not resistance, is troubled by the intrinsic tension between self-determination and occupation.¹⁴²

But these articulations, as significant as they are (or should be), cannot distract from the fact that the legitimacy and legality of resistance in occupied areas, and of support from abroad for such resistance, seems to have always been a question experts of international law – unlike Islamic international law scholars – had wanted to avoid.¹⁴³ *Adam Roberts* lists but four questions that international law has so far failed to properly address: “What is the status of combatants other than the members of the regular armed forces of a country? Is popular resistance (whether violent or non-violent) a breach of a notional contract between occupier and occupied? Is active outside support of resistance in occupied areas justified? Is the recovery of lost territories, including those under prolonged occupation, a justification for war?”¹⁴⁴ While international law finds it difficult to take a clear stance on supporting resisters, it is these questions that are of paramount interest for a Muslim and Third World critique of international law.¹⁴⁵ With modernized Islamic law offering a legal and religious justification for resisting occupation, it lends itself as a reference for resistance.

This TWAIL or TWAIL-friendly analysis of the core texts of occupation law reveals that subordination is essential to occupation law, but one not addressed. This critique resonates with Muslim legal scholars. As already mentioned, while international law considers occupations legal, i.e. has set up a normative regime for it, *siyar* does not know the concept of occupation

¹⁴⁰ GA Res. 3237 (XXIX), 22.11.1974. *A. Roberts* (note 99), 80.

¹⁴¹ See *A. Roberts* (note 99), 80.

¹⁴² *A. Cassese*, *Self-Determinations of Peoples: A Legal Reprisal*, 1995, 99.

¹⁴³ See *A. Roberts* (note 99), 80.

¹⁴⁴ See *A. Roberts* (note 99), 80.

¹⁴⁵ The legality of resistance against foreign domination came up recently in the Egyptian State Security Criminal Court case No. 66, 2009, known as the *Hizbullah cell case*, on the legality of Hizbullah resistance to foreign occupation from Egyptian lands. *Mohamed Selim El-Awwa*, lawyer and Secretary-General of the Union of Islamic Scholars as well as head of the defence team referred to contemporary international law conventions to argue that resistance against occupation is enshrined in international law, the UN Charter and the Arab Defence Agreement, *A. Howeidy*, *In Defence of Politics*, *Al Ahram Weekly* No. 987 (2010), available at <<http://weekly.ahram.org.eg>>.

at all and neither accepts its legality nor legitimacy. Islamic legal scholars recall that occupation of Muslim land is an attack on the overall integrity of the domain of Islam. This fundamental opposition notwithstanding, an analysis of occupation law from the perspective of Islamic international law would emphasize the fact that occupation law runs counter to any acknowledgement of the occupied people's wish for emancipation: For instance, while order, central to occupation law, is also a prominent theme in Islamic legal literature,¹⁴⁶ Muslim jurists expect that *jihad* is necessary to re-install the social and political order as it was prior to the invasion.¹⁴⁷ Because preserving order is one of the basic functions of law *per se*, Muslim legal scholarship sees it as a prerogative of legitimate rule.¹⁴⁸ To refuse international law's right of the occupier to uphold order is thus to deny legitimacy to the regime of the foreign occupier. Also, obedience to the occupying forces, another pillar of occupation law, runs counter to the modernized definition of *jihad*, which demands a collective, if not individual obligation to resist. Moreover, even with provisions on protecting the occupied population in place, the protection is relatively slim. What the modernized concept of *jihad* seeks goes beyond obliging the Occupying Power to protect the occupied. This is why contemporary attempts to complement occupation law with international human rights law indeed underline that there is unease about the sufficiency of the zone of protection for the occupied population. But as much as international human rights law normatively ameliorates the position of the occupied, it does not address the key concern of legalized and sustained foreign domination. By limiting the illegality of occupation to specific violations such as the requirement to keep it temporary,¹⁴⁹ international law leaves the problem of foreign domination as such unaddressed. Modernized Islamic international and TWAAIL instead reject subordination, and as such the concept of occupation, as a whole.

Both a modernized Islamic international law and the TWAAIL critique of occupation law bring to the forefront that occupation law reckons with but delegitimizes resistance: The Occupying Power is legally entitled to use force quelling resistance. Occupying forces are authorized to use severe measures to deter partisan and irregular combatants.¹⁵⁰ Though the normative regime of occupation inscribes the protection of the occupied population, it prevents them from seeking empowerment to end their fate of sub-

¹⁴⁶ See *K. Abou El Fadl* (note 17), 27.

¹⁴⁷ See *S. Mahmoudi* (note 19), 104.

¹⁴⁸ See *K. Abou El Fadl* (note 17), 30.

¹⁴⁹ *O. Ben Naftali/A. Gross/K. Michaeli*, *Illegal Occupation: Framing the Occupied Palestinian Territory*, *Berkeley J. Int'l L.* 23 (2005), 551 (555).

¹⁵⁰ *N. Bhuta* (note 102), 733. *K. Nabulsi* (note 100), 21-36.

jugation: Ultimately, occupation law brackets questions of equality.¹⁵¹ The temporality of the law only masks its inequality. The argument of temporality, being central to occupation law, needs to be understood as lacking substance, diverting from the systemic violations it permits. This fundamental gap in perception is one key reason for many Muslims to be receptive to modernized Islamic law. It is also because of this gap in perception that TWAIL came into existence. *Any* refusal of autonomy and freedom to an entire people should be normatively rejected. I would argue that this is in keeping with both a modernized Islamic legal as well as TWAIL perspective. Rather than reading violence of Occupying Powers as illegal or exceptional, a modernized Islamic and TWAIL inspired reading of general international humanitarian law tenets can highlight how international legal principles have been used normatively to limit and restrict the resistance of Muslim and Third World through force.¹⁵² Both perspectives are clear in that occupations and their legal regime must not be expected as something to be endured – not even in the Agamben sense of a “state of exception”: “They are an affront to both individual and collective freedom, and a pervasive and invasive phenomenon that makes any retrenchment impossible”.¹⁵³

It is generally known that law legitimizes certain types of violence and stigmatizes others. In light of the Islamic international legal position on the illegitimacy of occupation, a TWAIL perspective also demands a critical review of the normative regime of occupation law, underlining how it consolidates domination in the Muslim and Third World. Instead of promulgating “clear time limitations for the duration of occupation”¹⁵⁴ or complement international humanitarian law with international human rights law to fill the lacunae of occupation law, a clear stance against legalized foreign domination and its systemic bias in favor of the Occupying Power would be an answer to a modernized Islamic and TWAIL critique.

As long as the normative regime of occupation law is not critically reviewed, modernized concepts of Islamic international law will remain not only relevant but will also trump international law in the eyes of many Muslims. This is because modernized Islamic legal concepts address the grievances that come with foreign domination, such as loss of freedom, autonomy and integrity, whereas occupation law only manages life under domination. While prevailing understandings of international law focus on the

¹⁵¹ D. Li, Roundtable on Occupation Law: Part of the Conflict or the Solution?, Part VI, available at <<http://www.jadaliyya.com/pages/index/2704/roundtable-on-occupation>>.

¹⁵² See M. Burgis, A Discourse of Distinction? Palestinians, International Law, and the Promise of Humanitarianism, *Palestine Yearbook of International Law* 15 (2009), 39 (44).

¹⁵³ K. Nabulsi (note 100), 240.

¹⁵⁴ O. Ben-Naftali/A. Gross/K. Michaeli (note 149), 613.

law of occupation as preventing the alternative ills of anarchy, lawlessness and arbitrariness, thus claiming to foster the status quo and stability following a situation of war, modernized Islamic legal perspectives and TWAIL underline the forceful and violent legal hierarchy as incorporated in occupation law. Though both Islamic and Third World Approaches to International Law equally recognize order as an overall aim of law *per se*, forceful foreign domination is emphasized as fundamentally different from order. For the international community to bridge the gap between mainstream international law scholarship and modernized Islamic international law and TWAIL, it has to recognize that international law still allows for persistent forms of foreign domination. With Muslim regions such as Palestine, Iraq and Afghanistan dominated by foreign military forces, their integrity and sovereignty is violated in the name of the international law.

V. Concluding Statements

Foreign domination poses a universal problem to which diverse responses have historically and presently been given. Religiously legitimated forms of resistance are neither a global exception nor the only response within the region. The Muslim World has seen many forms of resistance such as left, nationalist, socialist, liberal, etc. Also, other regions have developed a liberation theology such as in Latin America, while *Gandhi's* liberation movement was grounded in Hindu belief. Thus, religiously inspired resistance is not an exception to the world. They seem to be responding to grievances international law is not addressing, forming a manifest critique of international law.

Such a critique is brought forward by Islamic legal scholarship on *jihad* as a self-defense mechanism of a community, in response to foreign domination. Modernized Islamic legal approaches and TWAIL address the problem of how international law does not or not sufficiently address foreign domination and how the instruments of international law such as occupation law, contain notions that consolidate subjugation. TWAIL serves as a fruitful approach for analyzing the tensions that exist between contemporary international law and Islamic international concepts: It unwraps the "Islamic" message, i.e. it offers the critical terminology to see beyond a religious discourse. TWAIL offers a way to look at the critique of subordination as in-

corporated in international law without being sidetracked by the religious rhetoric that accompanies it.¹⁵⁵

A final note: Colonial history and present examples show that resistance and liberation should, but do not necessarily, equate emancipation. The aim remains to transform international law from being a “language of oppression” to a “language of emancipation”.¹⁵⁶ TWAIL II scholars have extended their critique to the despotism and oppressiveness of Third World nation-states.¹⁵⁷ This critique remains no less timely, with the Arab Revolutions still awaiting their long-term goals of emancipation. It is obviously of equal importance to adopt the critique also for public non-state actors in their quest for freedom from foreign domination insofar as some neglect, if not outright oppose, the overall aim of individual and collective emancipation. TWAIL III scholarship is discussing productive ways to keep the historical roots and the contemporary force of foreign domination alive in their own terms, while at the same time addressing the acute problems of internal domination that can come with the totalizing tendencies of resistance, suppressing voices of the marginalized from within. This, of course, is a critique that requires the equivalent and continuous application to the Islamic (international) law tradition.¹⁵⁸

¹⁵⁵ See also the general advice of *M. Berger* to “unwrap the ‘Islamic’ message”, *M. Berger* (note 35), 32.

¹⁵⁶ *A. Anghie* (note 95), 79.

¹⁵⁷ Interestingly, the Muslim Third World nation-state has found its harshest critics in Islamic non-state actors who have continuously addressed repression, corruption and injustice within the modern nation-state. See also *R. Peters* (note 2), 160 et seq. on Islamic non-state actors and the development of the concept of “internal *jihad*” vis-à-vis the modern nation-state in the Middle and Near East.

¹⁵⁸ *B. Rajagopal* productively proposes to rethink the relationship between global and local: “If Third World is not defined by political geography but by the actual contestation of power formations such as gender oppression, it is possible to think of transnational linkages among the oppressed. One would then have to map the world by a cultural geography which denies the category of the civilisational ‘other’”, *B. Rajagopal* (note 78), 20.