

International Law and Islamic Law

Edited by
Mashood A. Baderin



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Edited by

Mashood A. Baderin

School of Oriental and African Studies, University of London, UK

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Series Preface

Open a newspaper, listen to the radio or watch television any day of the week and you will read or hear of some matter concerning international law. The range of matters include the extent to which issues of trade and human rights should be linked, concerns about refugees and labour conditions, negotiations of treaties and the settlement of disputes, and decisions by the United Nations Security Council concerning actions to ensure compliance with international law. International legal issues have impact on governments, corporations, organisations and people around the world and the process of globalisation has increased this impact. In the global legal environment, knowledge of international law is an indispensable tool for all scholars, legal practitioners, decision-makers and citizens of the 21st century.

The Library of Essays in International Law is designed to provide the essential elements for the development of this knowledge. Each volume contains essays of central importance in the development of international law in a subject area. The proliferation of legal and other specialist journals, the increase in international materials and the use of the internet, has meant that it is increasingly difficult for legal scholars to have access to all the relevant articles on international law and many valuable older articles are now unable to be obtained readily. These problems are addressed by this series, which makes available an extensive range of materials in a manner that is of immeasurable value for both teaching and research at all levels.

Each volume is written by a leading authority in the subject area who selects the articles and provides an informative introduction, which analyses the context of the articles and comments on their significance within the developments in that area. The volumes complement each other to give a clear view of the burgeoning area of international law. It is not an easy task to select, order and place in context essays from the enormous quantity of academic legal writing published in journals – in many languages – throughout the world. This task requires professional scholarly judgment and difficult choices. The editors in this series have done an excellent job, for which I thank and congratulate them. It has been a pleasure working with them.

ROBERT MCCORQUODALE
General Series Editor
School of Law
University of Nottingham



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Introduction

The essays in this volume examine issues concerning the relationship between modern international law and Islamic law. The topicality of this subject, especially after 11 September 2001, is apparent, and its academic and practical importance is very well depicted in the following observation of Professor Christopher Weeramantry, former Judge of the International Court of Justice:

There will be in the future an increasing need for non-Islamic countries all over the world to negotiate with Islamic countries on a multitude of matters ranging from questions of war and peace to mercantile contracts. Such negotiation will require more understanding of Islamic attitudes, history and culture.

An excellent recent example of an opportunity lost through lack of such understanding was the hostage crisis in Iran.¹ The USA, asserting the well-accepted principle of diplomatic immunity and right to protection, kept referring continually to the formulations of this rule in the Western law books. Islamic law is also rich in principles relating to the treatment of foreign embassies and personnel. These were not cited, as far as the author is aware, nor was the slightest understanding shown of the existence of this body of learning. Had such authority been cited by the USA, it would have had a three-fold effect: its persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.

It is not often sufficiently appreciated, especially in the Western world, that many of the current rules of international law are regarded by a large segment of the world's population as being principles from the rule-book of the elite club of world powers which held sway in the nineteenth century. In the midst of this general attitude of mistrust, the worthy rules are tarred with the same brush as the self-serving. World cultural traditions need to be involved, where available, to bolster up and reinforce these rules.

Indeed, at the time of the hostage crisis, the author drew the attention of the US authorities to the need to research the Islamic material on this point and although this suggestion was referred to the Task force in Washington handling the crisis, the author is not aware of any steps taken in this direction. He was never informed of any consequent action following from this proposal and can only presume that it lapsed through lack of understanding or lack of expertise in the US office handling the matter.

The same considerations apply at many other levels. The non-Islamic world neglects them at its own cost. (Weeramantry, 1988, p. 166)

Since the above observation by the learned jurist in 1988, international events generally, and those relating to the Muslim world especially, corroborate the need for a better understanding of the relationship between contemporary international law and Islamic law and how their interaction can be explored and improved to enhance international relations and law. This

¹ This was in reference to the Iran/USA diplomatic hostage crisis of November 1979 to January 1981.

relationship can be perceived from two main angles. The first is in relation to the interaction between contemporary international law and the domestic laws and cultures of relevant Muslim states, while the second is in relation to the existence of a separate traditional concept of an Islamic law of nations or Islamic international law known as the *siyar*² within general Islamic law.

It is a truism that international law must necessarily interact with the domestic laws of respective states. In relation to Muslim states, Islam has often, to varying degrees, been a relevant factor in that interaction. This is due to the evident role that Islam and Islamic law have played and continue to play in the cultural, political and legal affairs of many Muslim states and societies, both prior to and since the establishment of the United Nations (UN) system. Although some commentators do argue that Islam is, essentially, neither the problem nor the solution per se to political and social problems in the Muslim world (Brumberg, 2005–6; Chase, 2006, p. 21), a careful review of the political and legal developments in Muslim states such as Saudi Arabia, Iran, Iraq, Egypt, Morocco, Sudan, Nigeria, Pakistan, Indonesia, Malaysia, Palestine and even secular Turkey (see, for example, Smith, 2005), among others, reveals different degrees of Islamic influence in their politico-legal affairs, which impacts directly or indirectly on the application of international law in those states. For example, Heiner Bielefeldt (Chapter 17) has observed that ‘traditional sha’ria [*sic*] norms continue to mark family structures all over the Islamic world’ and that ‘the sha’ria [*sic*] criminal law is [still] applied ... in a few Islamic countries today’ (p. 358). Buskens has also noted that ‘[i]n most Muslim societies it is impossible to speak about family law except in terms of Islam’ (2003, p. 71), which, on the one hand, signifies the cultural and legal influence of Islam in that regard, but, on the other hand, also has significant impact on the application of international law, especially in relation to women’s rights, in the respective Muslim states. Modirzadeh (2006, p. 192) has thus observed the need to take Islamic law seriously and engage with it one way or another in relation to the promotion and protection of international human rights in the Muslim world. This domestic role of Islam is formally reflected in the constitutions of some modern Muslim states that either declare Islam as the religion of the state and recognize Islamic law as part of state law (Stahnke and Blitt, 2005, pp. 7–12) or provide for the establishment of state courts that apply Islamic law.³

Apart from the domestic influence of Islam in individual Muslim states, Muslim states have also, as members of regional organizations, collectively adopted regional instruments such as the Arab Charter on Human Rights,⁴ the Charter of the Organization of Islamic Conference (OIC),⁵ the OIC Cairo Declaration on Human Rights in Islam⁶ and the OIC Covenant on

2 Also written ‘*al-siyar*’ or ‘*as-siyar*’ in the definite form.

3 See, for example, the Constitution of the Federal Republic of Nigeria (1999) Sections 260–264 and Sections 275–279, and the Constitution of the Islamic Republic of Pakistan (1973 as amended) Article 203.

4 Adopted by the League of Arab States on 15 September 1994, reprinted in *Human Rights Law Journal*, 18 (1997), p. 151. A revised version of the Charter was adopted in May 2004. See <http://www1.umn.edu/humanrts/instree/loas2005.html> [accessed 11 May 2007].

5 914, UNTS, p. 111.

6 Adopted on 5 August 1990. See UN Doc. A/45/5/21797, p. 199.

the Right of the Child in Islam,⁷ all of which make reference to Islam as a relevant factor in relation to international law in the Muslim world. At the UN level, the OIC has made submissions on behalf of Muslim states regarding proposed reforms of the UN Security Council to the effect that 'any reform proposal, which neglects the adequate representation of the Islamic Ummah in any category of members in an expanded Security Council will not be acceptable to the Islamic countries'.⁸ Islam, therefore, also has some theoretical impact on the regional relations and organizations of Muslim states. From an Islamic legal perspective, there is, additionally, the traditional concept of an Islamic international law, the *siyar*, based on Islamic principles but with many principles similar to those of modern international law, which could be employed for a better promotion and accommodation of modern international law in the Muslim world.

While modern international law is generally perceived as a secular international legal system with its foundations lying 'firmly in the development of Western culture and political organisation' (Shaw, 2003 p. 13), it is well acknowledged that its roots generally reach far back into antiquity and can be traced in the history and norms of different religions and civilizations of the world (Brierly, 1963, p. 1; Bederman, 2001; Shaw, 2003, pp. 13–22; Stumpf, 2005). Ironically, in the face of many contemporary international challenges, many international scholars, jurists and statesmen have intermittently suggested recourse to earlier concepts, such as natural law and religious principles, to find ways of expanding the scope of modern international law to meet those challenges. In relation to the Muslim world, Islamic law and the principles of the *siyar* can be very relevant in that regard (see, for example, AbuSulayman, 1994).

Owing to the above influences of Islam in the Muslim world and amongst Muslims generally, the relationship between modern international law and Islamic law has raised many theoretical and practical questions that cannot be ignored in the study and understanding of contemporary international law. The current Iraqi crisis has demonstrated this in at least two ways. First was the earlier controversy as to whether or not the US-led invasion of Iraq in March 2003 (in the wake of the invasion of Afghanistan) was a war by Western superpowers waged against Islam and the Muslim world. Second was the later controversy during the drafting of the Iraqi constitution as to whether Islamic law should serve as 'a source' or 'the source' of legislation in the constitution.⁹ In the first case, both the US President George Bush and the UK Prime Minister Tony Blair had to explain many times that the war on Iraq was not between the West and Islam. After an initial stalemate in the second case, the compromise was to include Islam as 'a source of legislation' in the Iraqi interim constitution adopted in March 2004 (see Brown, 2004) and subsequently as 'a basic source of legislation' in the main constitution adopted in October 2005 (Art. 2, The Constitution of Iraq 2005). Such controversies raise the question of whether or not Islamic norms and the norms of international law are compatible.

7 Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen in June, 2005. See <http://www.oic-oci.org/french/conventions/Rights%20of%20the%20Child%20In%20Islam%20F.pdf> [accessed 11 May 2007].

8 See UN Doc. A/59/425/S/2004/808 (11 October 2004), para. 56.

9 See, for example, International Crisis Group Report, *Iraq's Constitutional Challenge*, 13 November 2003, pp. 17–18, par. D. at: http://www.icg.org/library/documents/middle_east___north_africa/19_iraq_s_constitutional_challenge.pdf [accessed 15 April 2007].

Although debates about the relationship between Islam, Islamic law, modern international relations and international law increased greatly after the terrorist events of 11 September 2001 in the USA, 7 July 2005 in the United Kingdom and similar atrocities in other parts of the world, the debate is not a new one. There had been academic analyses and commentaries regarding the relationship between Islam, Islamic law, Muslim states and international law even before the creation of the United Nations (UN) in 1945. Writing from an Islamic perspective in 1941, Hamidullah noted that ‘There was not *international* law in Europe before 1856’, arguing that ‘[w]hat passed as such was admittedly a mere public law of *Christian nations*. It was in 1856 that for the first time a non-Christian nation, Turkey, was considered fit to benefit from the European Public Law of Nations, and this was the true beginning in internationalising the public law of Christian nations.’ He observed, however, that international law, ‘with its modern connotation’ existed long before then within Islamic law (Hamidullah, 1977, p. vii). This is a reference to the *siyar*, a concept of Islamic law of nations, which existed formally as early as the eighth century as evidenced by the writings of Muslim scholars and jurists such as Muhammad al-Shaybani (see Khadduri, 1966). Shihata, writing in 1962, argued that ‘in order to eliminate a major excuse for the violation of international law, there should be greater participation by the other legal systems in the formation and development of international law’ and that ‘by reflecting to a greater extent on the principles of non-European legal systems in the rules of international law, the validity and fairness of [modern] international law will be more widely recognized and more strongly supported.’ Shihata then argued the need to study the structure of Islamic law and ‘to verify the extent of its past contributions to the development of international law, and to survey the possibilities of its further contributions in the future’ and asserted that ‘[t]hrough this approach, contemporary international law will probably prove to be a more readily accepted system to this vast part of the international community vaguely referred to as the “Muslim world”’ (1962, pp. 101–102). As observations like this still subsist in different connotations within international law debates today, the carefully selected essays in this volume would perhaps go a long way in contributing to relevant comparative reflections between international law and Islamic law.

Generally, the academic literature on this subject reflects two main points of view. While some commentators project a synthesis between modern international law and the principles of Islamic law (see, for example, Mahmassani, 1968; Abou-el-Wafa, 2005), others project a divergence between the two (see, for example, Westbrook, 1993). Nevertheless, modern international law does encourage the development of common ground between the different legal systems of the world to ensure global peaceful and harmonious international relations. This is manifested in the provisions of a number of international instruments. Article 38(1) of the Statute of the International Court of Justice (ICJ) recognizes ‘the general principles of law recognized by civilized nations’ as part of the sources of international law, while Article 9 of the Statute provides that in electing the judges of the ICJ ‘the election shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilizations and of the principal legal systems of the world should be assured’. In a memorandum presented by delegates of Muslim states to the League of Nations in September 1939 and to the UN Conference in San Francisco in April 1945, it was submitted that Islam constituted one of the main forms of civilization and Islamic law one of the principal legal systems of the world referred to in Article 38 of the Statute of the Permanent Court of International Justice

(PCIJ) under the League of Nations, which was subsequently adopted as Article 38 of the ICJ Statute (see Mahmassani, 1968, p. 222). Similar provisions are found in Article 31(2) of the International Covenant on Civil and Political Rights and in Article 8(1) of the International Convention on the Elimination of Racial Discrimination. The UN General Assembly has also expressed a firm determination to promote dialogue among civilizations as a means of achieving the universal purposes and principles contained in the UN Charter, and has emphasized the importance of dialogue ‘as a means of understanding, remove threats to peace and strengthen interaction and exchange among civilizations’ (see GA Res. A/RES/53/22 of 16 November 1998).

The possibility of cooperative interaction between principles of international law and Islamic law has also been acknowledged by international tribunals in some cases. For example, in *Eritrea v. Yemen* (Phase Two: Maritime Delimitation) (1999), the arbitration tribunal acknowledged relevant aspects of Islamic law in its findings and concurred, *inter alia*, to the view that ‘in today’s world, it remains true that the fundamental moralistic general principles of the Quran and the Sunna may validly be invoked for the consolidation and support of positive international law rules in their progressive development towards the goal of achieving justice and promoting the human dignity of all mankind’.¹⁰

To regulate the coexistence between states in their bilateral and multilateral relations, modern international law covers a wide range of issues in international relations both in times of peace and in times of war. Research by prominent scholars and jurists of Islamic law and international law has shown that there are principles within general Islamic law and within the rules of the *siyar* that are relevant to most of the issues covered by modern international law (see Shihata, 1962; Hamidullah, 1977; AbuSulayman, 1994; Mahmsanni, 1968; Abou-el-Wafa, 2005). As it is obviously impossible to cover every aspect of international law in this volume, the scope of the essays contained herein is limited to the 11 main areas listed below. The essays have been carefully selected to reflect, as much as possible, the different perspectives on each of the aspects covered. A brief summary is provided of each essay included in the volume, giving a general insight into the issues covered.

General Principles of International Law

To achieve its purpose, international law is based on some important general principles, to which all states are expected to adhere. Some of the most important of these principles, as established under the UN Charter, are the principle of peaceful coexistence between states (Preamble Paragraph 4 and Art. 1(2), UN Charter), the principle of sovereign equality of states (Art. 2(1), UN Charter), the principle of peaceful settlement of disputes amongst states (Art. 2(3), UN Charter) and the principle of refraining from the threat or aggressive use of force by states against the territorial integrity or political independence of one another (Art. 2(4), UN Charter). Of importance also is the principle of the sanctity of treaties under international law, which requires that parties to a treaty must fulfil their obligations under the treaty in good faith (*pacta sunt servanda*) (Art. 26, Vienna Convention on the Law of

¹⁰ *Eritrea v. Yemen* (Phase Two: Maritime Delimitation) (1999) Judgement, par. 94. Professor Michael Reisman has, however, submitted that the reference to Islamic law in this case was unnecessary and ‘unwise in context’ (2000, p. 730).

Treaties 1969). Most questions regarding the relationship between modern international law and Islamic law tend to centre on whether or not the principles of general Islamic law and that of the *siyar* are reconcilable with the general principles of modern international law.

In the interaction between international law and Islamic law, the relevance of these principles of international law revolves particularly around the division of world order under traditional Islamic political theory into two realms, namely the realm of Islam (*dār al-Islam*) and the realm of war (*dār al-harb*). The traditional theoretical division of world order under the Islamic law of nations was perceived principally as realizing a single universal Islamic realm under one political authority, which was in a permanent state of hostility with the non-Islamic realm until the non-Islamic realm was converted into the Islamic realm (Ibn Khaldun, 1958, p. 473). That perception of world order under the traditional Islamic law of nations has been identified by commentators as irreconcilable with the main principles of modern international law identified above, particularly the principle of peaceful coexistence between states. However, there are contemporary arguments that there is no unanimity on this perception of world order under Islamic law and that ‘it was not, and is still not, a rigid or unanimous doctrine of Islamic legal theory and political practice that Muslim nations shall maintain permanent or persistent hostile relations with non-Muslim nations’ but that the Muslim world ‘has an important role to play in the modern international order through an evolutionary interpretation and injection of the paradigmatic ideals of Islam into the pragmatic policies of the modern international order’ (Baderin, 2000, p. 59). The five essays in Part I of the volume examine, from different perspectives, issues relating to the general principles of modern international law in relation to Islamic law.

In the first essay, ‘Islam and the Modern Law of Nations’ (Chapter 1), Majid Khadduri, one of the earliest post-UN commentators on the relationship between Islamic law and modern international law,¹¹ begins with the argument that the ‘traditional [Islamic] law of nations is ... radically different from the modern law of nations and the principles implied in the United Nations Charter’ (p. 3). He then proceeds to analyse the traditional concept of the Islamic law of nations and its evolved practices, particularly under the Ottoman Empire, in relation to the development of modern international law and its European and Christian foundations before its secular transformation, particularly after the creation of the UN. In the end, he observes, that ‘[t]he secular approach to the conduct of foreign relations has been accepted by almost all Muslim states, whether completely secularized in their internal legal structure, as in the case of Turkey, or still recognizing the *shari’a* as their basic law, as in Saudi Arabia and the Yaman [Yemen]’ (p. 15), leading to his conclusion that ‘[t]he active participation of Muslim states in international conferences, in the League of Nations, and the United Nations and its agencies, demonstrates that the *dar al-Islam* has at least reconciled itself to a peaceful co-existence with *dar al-harb*’ (pp. 15–16). Similar views are expressed on this point by Khadduri in his other publications (1955, 1959, 1966 and 1972), as his general position tended to be that the

11 Professor Majid Khadduri was a leading pioneer and a world renowned scholar in the study of the relationship between international law and Islamic law. He was a member of the Iraqi delegation to the founding session of the UN in the 1940s, and a leading expert in Islamic law, Middle East studies and international law. He was Director of Middle East Studies at the School of Advanced International Studies of Johns Hopkins University, Washington DC until his retirement in 1980. He died in January 2007 at the age of 98.

membership of Muslim states in the UN should be seen as a departure from the religious ideology of international relations under classical Islamic law.

Christopher Ford, in his essay 'Siyari-zation and Its Discontents: International law and Islam's Constitutional Crisis' (Chapter 2), also begins by examining the classical traditions of the Islamic law of nations in theory and practice but then moves on to challenge 'attempts to depict the *siyar* as being congruent with the sources-doctrine of modern international jurisprudence' (p. 20). He argues that such attempts 'merely whitewash genuine discrepancies between international norms and the principles grounding the *siyar*' (p. 20). In that regard, Ford challenges one of Khadduri's arguments that 'the sources of the Islamic law of nations conform generally to the same categories defined by modern jurists and specified in [Article 38(1) of] the Statute of the International Court of Justice' (Khadduri, 1966, p. 9). According to Ford, that represented a 'loose analogizing of Article 38(1) [of the ICJ Statute] and Islamic sources-doctrine ... [which] may overstate the degree to which Islamic law can genuinely be reconciled with modern international jurisprudence' (p. 38). He concludes that the Islamic law of nations faces a 'constitutional crisis' and that 'a Muslim law of nations that genuinely does conform generally to the structure of modern international law requires Islam's abandonment of much of the bedrock of theocratic principle that makes the *shari'a* the *shari'a*' (p. 51) (see also Westbrook, 1993, the text of which could not be included in this volume due to its length).

The perspectives of the other three essays in Part I differ from that of the two essays above. In 'The Role of Islamic Law in the Contemporary World Order' (Chapter 3), Ali Ahmad begins by identifying the existence of the principle of the validity of treaties under Islamic law and that Muslim states are thus bound by their treaty obligations and membership of the UN even under Islamic law principles. In the case of *Saudi Arabia v. Aramco* the Arbitrator had also observed that 'Muslim law does not distinguish between a treaty, a contract of civil or commercial law' and that '[a]ll these types are viewed by Muslim jurists as agreements or pacts, which must be observed ... as expressed in the Koran: "Be faithful to your pledge, when you enter into a pact"'.¹² Ahmad further notes that despite their membership of the UN and participation in modern international law, 'Islamic law [still] plays a role in regulating the internal and external affairs of a number of Muslim societies' (p. 55). He thus seeks to examine the potential of Islamic law 'in mediating international tensions involving Muslim countries and its role in international consensus building and lawmaking forums' (p. 55). Ahmad observes that there is little irreconcilable difference between modern international law and Islamic law per se, but laments the lack of engagement of Islamic law in resolving international issues in circumstances in which it would have been appropriate and helpful. He notes, *inter alia*, the potential relevance of Islamic law and legal principles in the fight against international terrorism, corroborating his argument with reference to Yasin El-Ayouty's observation that '[t]he invocation of Islamic law would constitute a powerful tool in the delegitimization of the Islamic framework within which Muslim terrorists operate and raise funds' and that the 'invocation of Islamic law would be of considerable help in the areas of extradition, prosecution and punishment of Muslim terrorists' (El-Ayouty, 1999, p. 491) due to the fact that, similar to modern international law principles, Islamic principles prohibit such acts of terrorism. Ahmad's essay concludes that 'involving Islamic law in addressing

12 (1963) 27 ILR 117.

international terrorism and management of the global environment is an indication of how it may assist in addressing, on a long-term basis, wider issues of international concern' (p. 69).

Abdullahi An-Na'im's essay 'Islam and International Law: Toward a Positive Mutual Engagement to Realize Shared Ideals' (Chapter 4) begins by identifying the basis of the linkages between Islam and international law but then argues for the need to contextualize the relationship between Islam and international law in terms of Muslims' understanding and practice of their religion in relation to international law and not about Islam in the abstract. He also observes the necessity to speak of Islamic traditions in the plural to indicate the diversity of Islamic perspectives in that regard. On the other hand, he notes the need for international law to be truly *international* for it 'to play its role in realizing shared ideals of justice and equality under the rule of law for all human beings' and that 'it cannot simply be the same as the European system of interstate relations that had evolved since the eighteenth century' (p. 72). In essence, modern international law needs to accommodate relevant principles, institutions and processes within all civilizations that can enhance the promotion and realization of the noble ideals of modern international law under the UN system.

Regarding the question of how a system based on religious and theological concepts can positively interact with an inherently secular international law, An-Na'im notes that '[s]ince the Islamic dimension of traditions and law are the product of the *human agency* of Muslims in the specific historical context of their societies, they can fully engage international law as an integral aspect of the context and experience of those societies' (p. 76). However, he laments that 'the realities of power relations, as well as the possibilities of legal imagination, are missed by western scholars when they examine the relationship between Islam and international law' (p. 76), citing two examples – David Westbrook's essay (Westbrook, 1993) and aspects of James Cockayne's essay (Chapter 10 – discussed below) – both of which, he observes, present international law as inherently 'Western' without an attempt to include the Islamic perspective on equal terms.

Finally, Wahbeh al-Zuhili's essay on 'Islam and International law' (Chapter 5) analyses the Islamic principles on international relations and international law, wherein he observes that the Islamic system provides for many rules of international relations similar to those under modern international law such as principles relating to human brotherhood, honouring of the human being and preserving human rights, commitment to rules of ethics and morality, justice and equality, humanitarianism, *pacta sunt servanda*, reciprocity, state sovereignty and legal restrictions on and in warfare. Although quite introductory and relying mostly on references from the main sources of Islamic law, such an analysis from a leading Islamic scholar and jurist provides a good Islamic basis for areas of common ground between Islamic law and modern international law principles (see also Abou-el-Wafa, 2005 and Mahmassani, 1968, the text of which could not be included in this volume due to its length).

International Use of Force

The regulation of the use of force is one of the most problematic aspects of international law. In fact, the effectiveness (or ineffectiveness) of international law as a whole is often assessed based solely on this single aspect. Use of force in this sense relates to the legality of warfare, *jus ad bellum*. International law prohibits the aggressive use of force by states against each other (Art. 2(4) UN Charter), except in cases of self-defence (Art. 51 UN Charter) and for collective

security authorized by the UN Security Council under Article 42 of the UN Charter. Between these two exceptions are some grey areas that have given rise to diverse interpretations and positions by different international law scholars and states. Many of the challenges confronting modern international law, especially in relation to Islamic law and the Muslim world, concern issues relating to the use of force. The Islamic concept of *jihād* has been very controversial in that regard. Where *jihād*, as interpreted by some, is perceived strictly as aggressive use of force against non-Muslims or non-Muslim states, such use of force would be contrary to the principle of non-aggressive use of force under modern international law. The need has thus been stressed for a historical and contextual understanding of the concept of *jihād* in relation to the relevant principles of modern international law (see Ali and Rehman, 2005).

In her short essay 'Views of *Jihad* Throughout History' (Chapter 6) Asma Afsaruddin provides a concise analysis that 'traces the transformation in the meanings of *jihad* ... from the earliest period of Islam through the late medieval period and down to our present time' (p. 97). The essay begins by contextualizing the Qur'anic concept of *jihād* as depicted by the lifetime practices of the Prophet Muhammad, followed by an analysis of the different views of *jihād* from Islamic jurists after the Prophet through different periods of Islamic history up to the present time. Paul Heck has presented a similar but more comprehensive overview of the formulations of *jihād* during the first six centuries of Islam showing that the concept was 'embedded in particular socio-historical contexts' and arguing that discussions of *jihād* 'should take care to distinguish the historically incidental features of the tradition from those with an enduring relevancy' in order for the concept to contribute positively to modern public order and political organization (2004, p. 95).

Against that contextual background of *jihād*, Said Mahmoudi's essay (Chapter 7) examines the Islamic perception of the use of force in the contemporary world. He begins by identifying that although Muslim states must, as must other members of the UN, remain within the framework of the UN Charter on international use of force, nevertheless, 'Islam-inspired interpretations may have a role in justifying the use of force within the Charter's limits' (p. 103) in relation to the Muslim world. He thereafter discusses the regulations of the use of force in Islam through an analysis of the concept of *jihād* in its defensive, offensive and humanitarian contexts. Regarding the compatibility of the concept of *jihād* with modern laws of war, he observes that while 'a minority of Islamic scholars consider conduct of wars in the early stages of Islam as incompatible with modern laws of war' (p. 107), most other scholars have expressed a contrary view emphasizing that principles of modern warfare such as the principle of proportionality and the principle of discrimination between military and non-military objects, were Islamic concepts that 'entered international humanitarian law through Spanish jurists such as Francisco de Victoria and Francesco Suárez' (p. 107). The essay also discusses the re-emergence of the concept of *jihād* in modern international law debates and examines the current state practices of Muslim states through an analysis of three cases of international use of force involving Muslim states or groups, namely 'the NATO bombing of former Yugoslavia, the US war in Afghanistan and the US-UK war in Iraq' (p. 112). In the end, he notes that Muslim states have generally 'shown a rational reaction to recent cases of the international use of force' (p. 115) and that '[w]hen *jihād* is invoked by resistance or militant groups to justify attacks, there is reason to be hesitant about accepting this as sanctioned by Islam' (p. 115).

The question of international humanitarian intervention is one of the grey areas in the regulation of the international use of force. There is ongoing debate regarding the scope of, and whether or not there is a right of, forceful humanitarian intervention under international law. Sohail Hashmi's essay (Chapter 8) examines the question of whether there is an Islamic ethic of humanitarian intervention and whether Islamic law can contribute to resolving the debate on humanitarian intervention under modern international law. The importance of Islamic principles in that regard is reflected in the fact, as identified by Hashmi, that 'most important "test cases" of humanitarian intervention have involved Muslims, as victims (as in Bosnia and Kosovo), as perpetrators (as in East Timor), or as both victims and perpetrators (as in Iraq and Somalia)' (p. 118). The Darfur humanitarian crisis in the Sudan is a recent example of such crises. Hashmi observes that '[i]f humanitarian intervention is to become a viable instrument for the alleviation of severe human suffering, appropriate institutions must be created in the regions of the crises themselves for speedy relief and eventually for prevention' (p. 118). He argues that Islamic law can provide valuable contributions in that regard generally and particularly in situations involving Muslim states. He notes that 'the ethics of humanitarian intervention in Islam must be seen as a subset of the general theory of *jihad*' (p. 124) and cites the Qur'anic verse that says 'And why should you not fight in the cause of God and of those who being weak are ill-treated and oppressed: Men, women and children whose cry is: "Our Lord!, rescue us from this land whose people are oppressors. And raise for us by Your grace one who will protect; and raise for us by Your grace one who will help"' (Q4:75), as a launching pad for his analysis of the concept of humanitarian intervention under Islamic law in relation to the principles of modern international law.

International Humanitarian Law

International humanitarian law aims to ensure that when war occurs (whether legally or illegally) the parties involved in hostilities conduct it according to defined humanitarian principles. It regulates conduct in warfare, *jus in bello*, rather than the legality of warfare, *jus ad bellum*, which was the subject of Part II above. Humanitarian principles are equally an important component of the law of war under the traditional rules of Islamic law of nations (*al-siyar*). In fact, as in modern international law, there are more rules relating to *jus in bello* than to *jus ad bellum* under the traditional Islamic law of war.

Karima Bennoune's essay (Chapter 9) provides a comprehensive comparative analysis of humanitarian law in Islamic jurisprudence in relation to modern international law. She begins by noting that 'scholars of modern international humanitarian law have often ignored its historical roots in Islamic law' (p. 141) and that modern international humanitarian law 'is often viewed as a product only of the Christian tradition (sometimes expanded to the Judeo-Christian tradition) and of European experience' (p. 142). Against the background of a very good analysis of both modern international humanitarian law and Islamic humanitarian principles of warfare, the essay provides a comparative examination of Islamic humanitarian law and modern international humanitarian law, identifying the areas of similarities, differences and the contributions of Islamic legal traditions to modern international humanitarian law. Arguing that international cooperation is entirely possible in this area of modern international law and Islamic law, the essay concludes that '[i]f the vitally important body of contemporary international humanitarian law is to find further acceptance and compliance, the contributions

to its development made by multiple cultural traditions and the great debt it owes to the Islamic legal tradition, among others, must be recognized' and that 'the perceived legitimacy of the law is hurt among peoples whose traditions and historical contributions are excluded from official genealogies of contemporary humanitarian law' (p. 178).

James Cockayne's essay 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations' (Chapter 10) provides a historical analysis of how 'the modern interaction between Islamic and Western civilizations has played an important part in shaping humanitarian law as we now know it' (p. 181). It presents a historical analysis of the role of Islam in the development of international humanitarian law starting from 1856, when the Ottoman Empire entered into the European States' legal system, up to the negotiation of the Statute of the International Criminal Court at the 1998 Rome Diplomatic Conference. Cockayne's analysis in this essay reflects more of the negative impacts of the Muslim or Islamic 'other' that eventually contributed to the universalization of humanitarian law from its Christian origins (see criticism by An-Na'im in Chapter 4). Cockayne, however, concludes positively by proposing that international humanitarian law should be understood as a '*conversation between civilizations*' and that 'Islam is just one of the civilizations ... engaged in this conversation' (p. 207). Some Islamic principles of *jus in bello* applicable during warfare which can positively contribute to such a conversation are discussed in the previous essay and in the following one.

International Terrorism

Since the 11 September terrorist act in the USA, some commentators on international terrorism have argued, often with reference to the statements of Osama bin Laden in that regard, that Islamic law encourages terrorism. That view has been challenged by other commentators. Major Copinger-Symes' essay (Chapter 11) examines whether the '*fatwa*' issued by Osama bin Laden on 23 February 1998 urging '*jihād*' against Americans could be justified under Islamic law. The essay begins by identifying that '[t]here has been an academic and media focus on the potential for prolonged conflict between the liberal democratic "West" and the Islamic (Middle) "East" for some time', much of which, Copinger-Symes observes, has 'relied heavily on cliché and stereotype' but which has 'proved seductive to a great many readers in both the West and the East' (p. 213). He notes that 'there has been little willingness to examine whether or not there is any valid [Islamic] theological basis to bin Laden's activities' (p. 214). The essay provides an extensive analysis of the doctrine of *jihād* under Islamic law before proceeding to evaluate bin Laden's '*fatwa*' of 23 February 2008 in the light of that analysis. Copinger-Symes concludes that '[w]hile *jihad* doctrine can be considered to justify bin Laden's resort to war in defence of Islam, it cannot justify the means that bin Laden proposes to use in that war. The means – the murder of non-combatants wherever they may be found – are against even the most extreme interpretations of Islamic Law' (p. 229). He notes, in conclusion, that 'We must ... continue to stress that bin Laden's actions run entirely counter to the *jus in bello* of *jihad* doctrine, as well as International Law. This must be used to undercut his credibility by calling into question his understanding of Islamic Law' (p. 229). On the other hand, the essay identifies the need also for the West to ensure that 'it is above reproach with regard to rules that it has developed for its own guidance – Public International Law including the Laws of Armed Conflict' (p. 230).

Katerina Dalacoura's essay (Chapter 12) examines, against the backdrop of 11 September, the relationship between Islam, violence and just war principles. The essay argues generally that Islamic principles could be used to both support and oppose international norms on going to war and the correct conduct of warfare. Dalacoura observes that the interpretations of Islamic norms in that regard are determined by both domestic and international political factors, and cites two Muslim states, Afghanistan and Iran, as examples to demonstrate the possibility of two opposing interpretations of Islam under different 'Islamic' regimes. She concludes that Western foreign policies towards the Middle East are an important factor in how Islam is interpreted in the Muslim world in relation to international violence and war.

International Protection of Diplomats

Peaceful bilateral relations amongst states are normally established based on mutual exchanges of diplomats. The international protection of diplomats can therefore be considered as the 'live-wire' of peaceful international relations. Thus, the identification of common ground in this area between modern international law and Islamic law can go a long way to enhance peaceful interstate relations especially with Muslim states. Interestingly, this is an area in which there is significant common ground between international law and Islamic law but it has been underutilized in modern international law practices, as reflected in the statement by Weeramantry quoted at the beginning of this Introduction.

M. Cherif Bassiouni's essay (Chapter 13) provides an informative contribution on this topic. It examines the protection of diplomats under Islamic law in the light of the 1979–1981 seizure and detention of United States diplomats by a group of militant students in Tehran, Iran. Bassiouni argues that even though the ICJ had examined the incident from the point of view of modern international law, it was also of interest to inquire about the legal position of the incident under Islamic law as recognized law under the constitution of the Islamic Republic of Iran then and now. In fact, the ICJ did acknowledge in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*¹³ that 'the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution'.¹⁴ Through an analysis of the sources of Islamic law, the principles of Islamic law of nations and the 'consistent practice of Muslim heads of state (*Khalifas*)' (p. 243), Bassiouni establishes that diplomats have privileges and immunities under Islamic law similar to that under modern international law. He argues that based on the recognition of the principle of the sanctity of treaties under Islamic law, Iran was bound under Islamic law to respect its obligations as a State Party to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. He concludes, *inter alia*, that the seizure and detention of the US Diplomats was 'in violation of Islamic law, Islamic international law, and conventional international law' (p. 265) (see also Hamidullah, 1977, pp. 151–52). The potential, but untapped, relevance of Islamic law to that Iran hostage crisis is very well depicted by Weeramantry in the quotation at the beginning of this Introduction.

13 ICJ Reports 1980, p. 41.

14 Judgment of 24 May 1980, par. 86.

International Environmental and Water Law

Although International Environmental Law (IEL) is a relatively young branch of general international law, it has emerged as one of the most important international law issues in recent times. The reality of the many environmental problems confronting humanity as a whole in the form of air pollution, marine pollution, soil pollution, water pollution, water shortage, deforestation, global warming and depletion of the ozone layer has brought IEL to the forefront of modern international law. Owing to the fact that the environment does not respect the artificial boundaries of states, an unbreakable chain of ecological interaction is naturally created between states, leading to calls for legislative and cultural cooperation between all states and civilizations in protecting the environment. The importance of water law in that regard can also not be overemphasized, as many states share ground water resources in the form of transboundary watercourses requiring international legislative cooperation. An International Environment Forum from an Islamic Perspective was held in Saudi Arabia in 2000 where it was observed that ‘according to the principles of Islamic law, it is the responsibility of mankind to ensure a healthy environment and to take special care in order to avoid all forms of man-made waste, such as hazardous chemicals’.¹⁵ An identification of relevant areas of common ground between modern international law and Islamic law can enhance international legislative and cultural cooperation in that regard, particularly for the Muslim world.

The essay by Lisa Wersal on ‘Islam and Environmental Ethics’ (Chapter 14) explores the insights of Islamic scholars on how Islamic ethics can respond to contemporary environmental challenges. The essay begins by identifying the challenge posed to every world religion to ‘reclaim and emphasize those aspects of their beliefs which promote ecological integrity and environmental quality’ and ‘to contribute to international and interfaith forums for the discussion of environmental ethics’ (p. 271). Many scholars have endeavoured to respond to this challenge by researching and analysing provisions of the Qur’an and other aspects of Islamic law relevant to environmental conduct (see Izzi Dien, 2000; Kula, 2001; Schwarte, 2003; Rice, 2006). Wersal raises the important question of ‘What unique insights does Islam offer the global community in addressing environmental challenges?’ (pp. 271–72). To answer that question the essay proceeds to examine different interpretations of Islamic law regarding environmental ethics and the suggestions of different scholars on the application of Islamic principles to contemporary environmental challenges.

In the essay ‘Can there be Confluence? A Comparative Consideration of Western and Islamic Fresh Water Law’ (Chapter 15) Thomas Naff and Joseph Dellapenna provide a comparative analysis of the regulation of fresh water under modern international law and Islamic law. They examine important questions such as whether the two legal regimes ‘can be sufficiently harmonized or integrated to enable effective, basin-wide management of such waterways as the Indus and the Nile Rivers where the two systems of law co-exist’ (p. 281) and whether Islamic law has ‘a direct practical role to play in the management of international water basins in today’s world’ (p. 282). The essay also explores ‘the implications of the fact that Muslim nations where Islamic law prevails are members of the UN and have signed [relevant]

¹⁵ ‘The Environment from an Islamic Perspective’, *Environmental Policy and Law*, **31**, 3 (2001), p. 162.

UN conventions and treaties' (p. 281) on the rules of international water law. They identify areas of similarities and differences between the two systems and in the end conclude that despite the differences between the two legal systems, Islamic law and international water law 'might be successfully combined in the management of some international basins that involve Islamic riparian states' (p. 302), for example, in the form of regional framework accords or codes that can be supported under modern international law. Indeed, other researchers have also observed that the 'Islamic legal tradition may have one of the richest traditions of law applicable to ground water resources' (Eckstein and Eckstein, 2005, p. 680), which could be explored for the possible enhancement of the principles of modern international law in that regard, especially in relation to their application in Muslim states that apply Islamic law.

Universality of Human Rights

While general international law primarily regulates the relationship between states, human rights is a specific aspect of international law that aims to protect the rights of individuals within states and thus directly impacts on the life of individuals globally. International human rights norms are more likely to be affected by the cultural norms and domestic laws of states. The issue of the relationship between international human rights and Islamic law in Muslim states is therefore very topical, with the question being raised as to whether international human rights is Islam's friend or foe (Entelis, 1997). One of the main controversial theoretical debates concerns the concept of the universality of human rights in relation to Islamic law, which the four essays in Part VII endeavour to address from different theoretical perspectives.

The essay by Bassam Tibi on 'Islamic Law/*Shari'a*, Human Rights, Universal Morality and International Relations' (Chapter 16) 'focuses on the global dimension of human rights law, and in particular its incompatibility with the Islamic *shari'a* in our current historical period' (p. 317). It emphasizes that 'human rights are a cultural concept that originated in Europe' (p. 312) but which through the adoption of the Universal Declaration of Human Rights (UDHR) and other international human rights instruments have now become international law. Tibi identifies human rights as the basic underpinning for international morality and a uniting force for humanity but notes the problem of the contestation of the universality of this morality by non-Western politicians, as was demonstrated by delegations from Muslim states, among others, during the UN Human Rights Conference in Vienna in 1993. He observes that '[w]hile there is a need for unity on human rights standards on an international level, the implementation of these rights takes place in multicultural contexts that have to be taken into account' (p. 316), which raises the question of 'whether this concept can be established legally on cross-cultural foundations and thus accepted by Muslims' (p. 318). This is where Islamic law and culture becomes relevant for the international human rights debate in relation to Muslim states and societies. While Tibi notes at the end of the essay that '[t]he increasing role of Islam in world politics and the increased presence of Muslims in Europe and North America – a presence that makes for a more intense interaction between civilizations than ever before – underlie the need for a "common discourse about ethics"' (p. 330), he, however, concurs 'fully with Max Weber's view that modern Western science is the only universally valid standard humanity has ever known' (p. 324) and thus could be inferred as a source of modern universal knowledge for judging Islamic norms in terms of cultural modernity in relation to human rights.

A question that has often been raised in relation to the proposition for a cross-cultural approach to universalism is whether there is a single Islamic or Muslim position on human rights or other issues of international law generally. The essay by Heiner Bielefeldt (Chapter 17) examines Muslim voices in the human rights debate, the purpose of which is to demonstrate that there is ‘a plurality of Muslim positions in the area of human rights’ (p. 333). In relation to the universality debate, Bielefeldt states that the essay is also ‘an exploration of the relationship between the universal claims of human rights on the one hand and the traditional values rooted in a particular culture [Islam] on the other’ (p. 333). The essay argues that while ‘one can hardly deny that the concept of human rights is of Western origin, insofar as it first emerged in Europe and North America’ (p. 339), it does not, however, follow from this historical fact ‘that the very idea of human rights is essentially and exclusively connected with Western culture and philosophy’ (p. 339) and thus Bielefeldt identifies the need to accomplish ‘an “overlapping consensus” across different peoples, religions, and cultures’ (p. 340) in the international debate on human rights. Regarding Muslim voices on the subject, he observes that ‘a great variety of Islamic positions in the area of human rights exist’ (p. 360), ranging from conservative positions to liberal positions with other intermediate positions based on the pragmatic humanitarianism that has largely shaped the development of Islamic law. The essay concludes that although ‘there are fundamental obstacles to an unconstrained and unambiguous recognition of human rights in the Islamic tradition – and in other traditions, too’, ‘because traditions evolve, in light of new experiences and needs, such obstacles might be overturned both by deliberate efforts on the part of intellectual reformers as well as through the pragmatic wisdom and humanitarianism of the people’ (p. 361).

In his essay ‘A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context’ (Chapter 18) Jason Morgan-Foster introduces what he calls ‘Reverse Moderate Relativism’ (RMR) to what he considers the ‘stalled universality debate’ (p. 397) on human rights. The essay begins by observing that the debate about the relationship between Islam and human rights ‘provides a particularly rich and controversial window’ (p. 366) to the general universality/cultural relativist debate on human rights. The RMR theory, Morgan-Foster argues, ‘offers a superior way to conceptualize the universality question by focusing on local (in this case, Islamic) norms instead of maintaining an international bias’ (p. 366), which he considers to be ‘Western-centered’ (p. 377). The essay engages, very comprehensively, with the different aspects of universalism and cultural relativism before moving on to analyse the proposed RMR theory in four areas of Islamic law in relation to international human rights law. Highlighting the ‘profound importance of restructuring the universality debate from Western neutrals to local neutrals’ (p. 397), Morgan-Foster concludes that ‘[t]he three most popular theories – universalism, strict cultural relativism, and moderate cultural relativism – are each conceptually flawed’ (p. 396) for different reasons discussed therein. He asserts that a ‘reverse moderate relativism, which accepts the virtues of moderate cultural relativism while avoiding the western-centric detrimental focus on international norms as neutral benchmark standards ... offers a superior outlook on relativism which avoids the neo-colonial and western-centric undertones of moderate cultural relativism’ (pp. 396–97) and thus ‘provides a necessary change in momentum, a change of focus and perspective’ (p. 397) in the universality debate.

Abdullahi An-Na’im’s essay on ‘Islam and Human Rights: Beyond the Universality Debate’ (Chapter 19) concludes Part VII. It begins by acknowledging that the ‘implementation of

international human rights norms in any society requires thoughtful and well-informed engagement of religion (broadly defined) because of its strong influence on human belief systems and behavior, regardless of the formal characterization of the relationship between religion and the state in any society' (p. 399) and that 'religious considerations are too important for the majority of people for human rights scholars and advocates to continue to dismiss them simply as irrelevant, insignificant, or problematic' (p. 399). In relation to the universality debate, An-Na'im then raises the question of 'whether the secular Western origins of human rights, as defined by the UDHR, necessarily mean that these rights are not (or cannot be) truly universal' (p. 400). The essay endeavours to answer that 'key question' in relation to Islam and Islamic societies. An-Na'im identifies the need to understand the synergy between internal discourse and cross-cultural dialogue in the universality debate and concludes that 'universality of human rights must be realized through the implementation of deliberate strategies that are likely to attract popular support, instead of on the basis of assumptions that such universality already exists, or can be achieved by proclamation in international documents' (pp. 404–405) alone.

Women's Rights

Owing to continued widespread discrimination against women in many aspects of life universally, the protection of women's rights has become one of the foremost items on the international human rights law agenda today. International law prohibits all forms of discrimination against women and provides for equality of gender in both private and public spheres of life. This has impacted upon many cultural and traditional practices, in many states, which are considered discriminatory against women under international human rights law. Many Muslim states have incorporated elements of Islamic family law into their domestic laws, creating a big debate on the scope of women's rights under Islamic law in Muslim states and whether women can enjoy equal rights and non-discrimination under Islamic law. An overwhelming literature has been produced, offering different points of view on the subject. According to al-Hibri, while 'many secular feminists have criticized patriarchal religiously-justified laws in Muslim countries, many Muslim women have defended Islam as the guarantor *par excellence* of women's rights'. She observes, however, that while most Muslim women want to remain good Muslims and enjoy their human rights as well, the conflict created by traditional patriarchal interpretations of Islamic law for Muslim women is 'frightening' (al-Hibri, 1997, p. 3).

The three essays in Part VIII analyse the different perspectives and approaches that have emerged within this debate. The essay by Rebecca Barlow and Shahram Akbarzadeh on 'Women's Rights in the Muslim World: Reform or Reconstruction' (Chapter 20) examines the Muslim feminine paradigms that have emerged in response to the malaise of gender inequality in the Muslim world. The essay begins by noting that the 'question of women's human rights is arguably one of the most complex and controversial social problems for Muslim societies' (p. 411), which the authors argue 'has led many observers to point to a profound intellectual gap that allegedly separates Muslim and Western thinkers on the question of universal human rights' (p. 411). In analysing the different approaches to the promotion of women's rights in Muslim societies, they focus principally on the writings of Fatima Mernissi, a leading Moroccan feminist and advocate of women's rights. The essay traces Mernissi's evolution

from an advocate of 'secular reconstruction of Muslim societies to a position that resembles Islamic reformism' (p. 411) and analyses the reasons underlying the shift in her approach with relevant criticisms in that regard. Barlow and Akbarzadeh conclude that Mernissi's brand of Islamic feminism, which subjects 'the sacred texts of Islam to a feminist re-reading, to locate and emphasise Islam's egalitarian precepts ... [is] important to reformism' (p. 423) and note that '[i]f Muslim feminist theory is separated from its subjects and not able to inspire and motivate Muslim women, then that theory is diminished in relevance and effectiveness' (p. 423).

Shaheen Sardar Ali's essay 'Women's Human Rights in Islam: Towards a Theoretical Framework' (Chapter 21) aims to highlight 'the gap between what may be described as the Islamic "ideal" of women's human rights as opposed to the contextual realities of the status of women in various Muslim jurisdictions today' (p. 425). It provides a comprehensive analysis of the controversial issues in the debate on women's rights under Islamic law. Ali begins by stating the view that the general 'ethical voice of the Qur'an is egalitarian and non-discriminatory' (pp. 425–26) but also contains up to six verses that could validate gender hierarchies. She then notes that 'it is difficult to understand why and how these six verses outweigh the remaining 6,660 [verses], and the position of women in Islam appears to be determined solely on rules derived from a literal and restrictive reading of these verses' (p. 426). The essay identifies and critiques some of the theoretical frameworks that have been advanced by different scholars on the subject, arguing in the end that a common feature of the various frameworks identified is that 'they highlight the fact that no matter what methodology one attempts to employ, there appears no escape from certain clear Qur'anic verses creating gender hierarchies' (p. 460).

The essay by Niaz Shah on 'Women's Human Rights in the Koran: An Interpretive Approach' (Chapter 22) identifies and discusses 'three different Islamic approaches towards human rights, secular, non-compatible, and reconciliatory' (p. 461). Shah critiques these three approaches in relation to the guarantee of women's rights under Islamic laws of Muslim states and proposes an 'interpretive approach' in which he advocates a contextual interpretation of the Koran. He notes that it was the 'decontextualized and narrow interpretations of the Koranic verses dealing with women's rights that ultimately lead to the unequal treatment of women in Muslim jurisdictions' (p. 462). The essay thus 'looks at the relevant verses in their proper Koranic context and argues that the Koran protects the rights of women fully, if these verses are interpreted in their proper Koranic context and according to the holistic spirit of the Koran' (p. 462). The proposed interpretive approach does 'not necessarily seek compatibility between Islamic and international human rights standards, but rather argue[s] that the Koran is a living text and can be reinterpreted to meet contemporary needs of given Muslim societies' (p. 474). Shah discusses the possible advantages that the interpretive approach has over the previous three approaches identified in the essay and concludes, *inter alia*, that where the relevant verses of the Qur'an are interpreted in their proper contexts it guarantees the equal rights of women in all spheres of life and that in relation to the discrimination against women in the Muslim world, 'the fault lies not in the Koran, but in the out of context interpretation of the Koran' (p. 496).

Rights of the Child

Due to the vulnerability of children, international human rights provide for the protection of children's human rights by states. According to Van Bueren, 'the very concept that children possess rights has a far older tradition in Islamic law than in international law, where the notion did not emerge until the twentieth century' (1993, p. 51). It is no surprise therefore that all Muslim states have ratified the UN Convention on the Rights of the Child (CRC). Also, the CRC is the only international treaty that makes specific reference to Islamic law in its provisions (Article 20(3), CRC). Nevertheless, the issue of protecting children's rights in Muslim states is not free of controversy in relation to Islamic law, particularly regarding the status of children conceived out of wedlock. Such children are often discriminated against and suffer stigmatization in Muslim states and societies, which has been considered a violation of children's rights under international human rights law by the UN Committee on the Rights of the Child.¹⁶

Safir Syed's essay (Chapter 23) examines the impact of Islamic law on the implementation of the CRC with particular reference to the plight of non-marital children conceived out of wedlock under Islamic law. The essay begins by identifying that all the member states of the OIC are states parties to the CRC, which places an international obligation on each of them to ensure the rights guaranteed under the convention without discrimination. After noting that international human rights law prohibits discrimination against non-marital children, the essay proceeds to analyse the status of non-marital children under traditional Islamic law and the reservations of Muslim states to the Convention. The essay concludes that 'the Islamic law currently in force in Islamic States parties in relation to non-marital children is in violation of the non-discrimination provision of the Children's Convention' (p. 520) and goes on to identify some possible ways of resolving and remedying the problem.

In his essay 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation' (Chapter 24) Kamran Hashemi provides a comprehensive comparative study of the provisions of the CRC in relation to Islamic law and the state practice of Muslim states in that regard. He begins by noting the important need to develop 'an approach to religious interpretation that can integrate legal traditions with modern universal values, as expressed in international human rights norms' (p. 535). The essay observes that while, on the one hand, the CRC is the only international treaty that makes reference to Islamic law, it is, on the other hand, also one of two treaties that have received the most religious based reservations by the Muslim state parties. In the end, Hashemi observes that '[i]t seems that even according to today's standards, most of MLT [Muslim Legal Tradition] are either consistent with or contribute to children's rights' (p. 566) and that 'Muslim States are making progress withdrawing from problematic MLT' (p. 567) that are in conflict with the CRC.

16 See, for example, the CRC Committee's Concluding Observation on Kuwait, UN Doc. CRC/C15/Add.96 (1998) at par. 23.

Rights of Religious Minorities

Discrimination against religious minorities is another problematic area of the human rights debate in relation to Islamic law in Muslim states, and it has attracted much criticism from human rights commentators (see Michel, 1986; Furman, 2000; Pink, 2005). The essay by Javaid Rehman on 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' (Chapter 25) argues that 'it is possible for Islamic states to find a great measure of compatibility with practices advocated by Western states on issues concerning the rights of religious minorities and religious freedom' (p. 571) and that the current problems of discrimination against religious minorities in many Muslim states 'are embedded not in the Islamic system of governance which the states are claiming to follow, but in domestic politics and constitutional inadequacies' (p. 572). The essay critically examines the international framework on freedom of religion and rights of religious minorities as well as the relevant rights under Islamic law and analyses the state practices of three Muslim states – Pakistan, Iran and Sudan – pointing out 'the difficulties, dilemmas, and inherent contradictions that have existed within their practices and policies in relation to the issue of religious freedom' (p. 572). The essay concludes that while differences may exist, 'the Western paradigm of freedom of religion and rights of religious minorities and the *Sharia* are not inherently antithetical to each other' (p. 594).

In his essay 'Non-Muslims in the Islamic State: Majority Rule and Minority Rights' (Chapter 26) Mohamed Between examines the principles of majority rule and minority rights and argues that in that regard 'an Islamic model is ideal for governing multi-religious, multi-cultural, and multi-ideological societies' (p. 599). Between argues that the best way to deal with the tensions between minorities and majorities in modern societies is the implementation of the principle of 'majority rule and minority rights', claiming that this is 'one of the main processes that hold society together, and ... a political system cannot work effectively and fairly without this principle' (p. 599). He then analyses the conditions for an effective majority rule that would ensure minority rights, before discussing the Islamic provisions on the right of non-Muslims under Islamic law and citing some historical practices of Islamic states in that regard. The essay concludes that '[i]n an Islamic state, although the Muslim majority rules, it does not have the power to deprive the minorities of their basic rights or to stop them from serving their society like any other citizen' (p. 609) under Islamic law and that the 'Muslim majority must obey all Islamic laws' (p. 609) without violating the rights and liberties of any citizen.

State Practice

Since states are the main direct obligation bearers in international law generally, and in human rights law specifically, the practice of states is very relevant in the realization of human rights in respective states. Often what makes the difference in the relationship between international human rights and Islamic law is the political will on the part of Muslim states to be committed to the fulfilment of their international human rights obligations within their Islamic cultural and legal dispensations. The last two essays in this volume thus examine general human rights practices of relevant Muslim states in relation to the interaction between international human rights law and Islamic law in the respective states.

The first essay in Part XI, by Shadi Mokhtari, presents a general analysis of the debate on human rights in the Islamic Republic of Iran in relation to Islamic law. Mokhtari begins by observing that '[s]ince the Islamic Revolution in 1979, Iran has been the source of extensive criticism by international human rights NGOs and U.N. human rights bodies' (p. 613). She then identifies that 'Iran's internationally cited human rights violations can be divided into two categories' (p. 613). The first one she categorizes as akin to 'violations traditionally associated with repressive regimes' (p. 613) for which justification based on Islamic law is weak. The second category, she argues, is related to 'Iran's codification and implementation of various provisions found in traditional Shi'a jurisprudence' (pp. 613–14), and thus relates to Islamic law. According to Mokhtari, '[i]t is with respect to this class of human rights violations that Iran's reformist jurists and intellectuals have made the greatest contribution; their theorizing and exegesis serves as a model for other parts of the Muslim world where civil or criminal laws are also derived from traditional Islamic jurisprudence' (p. 614). She argues that while Iran used to dismiss criticisms of its human rights practices as a form of Western imperialism, this changed with the election of President Khatami in 1997. She concludes that '[w]hile Iran is frequently cited as a classic case of non-compliance with international law, it is apparent that international human rights norms and consciousness have entered the fabric of Iran's religious and political culture and institutions' and that, 'since the election of President Khatami, Iranian society has been actively involved in defining and redefining the notion of rights both within Islam and in an Islamic society existing within a global context with an ingrained human rights normative order' (p. 621). She, however, acknowledges that '[c]onservatives have [still] retained control of several key sources of power', which has 'repeatedly been used to impede progress of the reformist agenda' but argues, nevertheless, that '[e]ven so, this situation does not detract from the significance of the transformations described above' and that the 'theoretical debates that have enthralled Iranian society since the election of Khatami constitute an historic conceptual turning point in the search for human rights within an Islamic framework, not only for Iran, but for the Muslim world" (pp. 621–22) (see also Mayer, 2000).

In his essay titled 'A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?' (Chapter 28), Mashood A. Baderin examines the general practices of Muslim state parties to international human rights treaties, to determine whether the trend is that of conflict or congruence. The essay begins by identifying the current strong cultural awareness and identity assertion of Muslim states within modern internationalism, especially with respect to international human rights law. Baderin raises the question of whether Muslim states thus create a stalemate for universalism in human rights by their practices or whether there is some prospect for congruence in that regard. Answers to this and other relevant questions are sought through a thematic analysis of the practice of relevant Muslim state parties and the responses of relevant human rights treaty bodies on the contentious issues. Baderin argues that 'an objective consideration of the arguments made by Muslim State Parties to the different international human rights treaties in the course of their implementation can be an important element in achieving universalism in human rights and aid international human rights protection in Muslim States' (p. 627). He concludes that although there are areas of fundamental differences on some issues, the practices of the Muslim states do not reveal a case of total conflict and incompatibility and that there is 'a general acknowledgement of the importance of international human rights law

by Muslim States, which suggests an emerging congruence instead of stalemate between the practice of Muslim State Parties and international human rights law' (p. 661) that must be encouraged and further enhanced.

Conclusions

Despite the diversity of views on some of the issues addressed by the essays in this volume, they collectively demonstrate that Islamic law is very relevant, in many ways, to the development of modern international law generally and particularly in the Muslim world. An objective comparative approach to debates on this subject as demonstrated by the essays in this volume can certainly enhance a better understanding of the interaction between modern international law and Islamic law. For example, there is, today, a general consensus among international lawyers that a Security Council collective security mandate under Chapter VII of the UN Charter, pursued multilaterally, would have stood a better chance of success in Iraq than the US-led invasion that has resulted in the present disorder in Iraq. It is interesting to observe, as noted in Sohail Hashmi's essay (Chapter 8), that the Qur'an, which is the principal source of Islamic law, specifically established a relative rule of collective measures as early as the seventh century for dealing with apparent threats to peace and security by providing that:

If two parties among the Believers fall into a dispute, then *you all* should make peaceful settlement between the two of them; but if one of them transgresses beyond bounds against the other, then *you all* should fight *against* the transgressing party until it complies with the command of God. If it complies, then *you all* should make peaceful settlement between the two of them with justice and *you all* should act equitably. Indeed God loves those who are equitable. The Believers are but a single Brotherhood, so *you all* should make peaceful settlement between your two (contending) brothers and be God-fearing so that you may receive mercy. (Q 49:10; emphasis added)

This provision reflects the recognition of collective measures, similar to collective security under modern international law, as a means for maintaining peace and security in human and state relations under Islamic law. This demonstrates one of the many areas of common ground that exist between Islamic law and modern international law, which need to be positively explored to achieve a less controversial application of international law generally, and collective security law especially, within the Muslim world. Looking back at debates on Iraq before the US-led invasion in 2003, the important lesson is that the introduction and accommodation of this Islamic legal perspective of collective measures into the discourse on the enforcement of international collective security law could have enriched the debates on the subject. Perhaps such an informed dialogue could have promoted a more in-depth reflection on the necessary elements of collective security under the UN Charter and the role of Muslim states in that regard, which could also have eliminated charges of an imposition of a Western concept upon Muslim states during the early days of the Iraqi crisis.

The relevance of Islamic law to modern international law debates is evidenced by the volume of increasing literature on the subject. Selecting which aspects of international law and which essays to include in this volume was therefore a painstaking exercise. Relevant academic literature on other aspects of the subject, which could not be covered in this volume, such as International Sale of Goods, International Arbitration, the International Criminal Court,

Nuclear Weapons, Migration and Refugee Law, and International Institutions and Tribunals, among others, is provided in the list of further reading at the end of this Introduction.

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Part I
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[1]

ISLAM AND THE MODERN LAW OF NATIONS

BY MAJID KHADDURI

*School of Advanced International Studies,
The Johns Hopkins University*

Muslim states have shown in recent years eagerness to participate in international organizations and co-operate with other Powers to promote international peace and security. This is a significant phenomenon in the behavior of states whose traditional law of nations is so radically different from the modern law of nations and the principles implied in the United Nations Charter.

Islam, emerging in the seventh century of the Christian era as a conquering Power with world domination as its ultimate objective, refused to recognize legal systems other than its own. It was willing to enter into temporary peaceful relations with other states pending consummation of its world mission. The "temporary" period endured for centuries, and it proved itself more permanent than originally contemplated. During this period Islam gradually tried to accommodate itself to the new conditions of life, and its changing attitude helped to integrate the Muslim nations into the larger community of nations. Thus Islam provides a precedent for a prolonged period of hostile co-existence until accommodation has been achieved. It is proposed to discuss in this paper the fundamental concepts of the Muslim law of nations and the changes that have taken place which made possible the integration of Muslim states into the modern community of nations.

I

In contrast with the modern law of nations, which presupposes the existence of a family of nations composed of states enjoying sovereign rights and equality of status, the law of Islam recognizes no other nation than its own. Similar to the law of ancient Rome and the law of medieval Christendom, the law of Islam was based on the theory of a universal state. It assumed that mankind constituted one community, bound by one law and governed ultimately by one ruler. The aim of Islam was the proselytization of the whole of mankind. Islam's law for the conduct of the state, accordingly, was the law of an imperial state which would recognize no equal status for the party (or parties) with whom it happened to fight or negotiate. It follows therefore that the binding force of such a law was not based on mutual consent or reciprocity, but on the state's own interpretation of its political and religious interests, since Islam regarded its principles of morality and religion as superior to others.¹

Islam, probably more than any other religion, has the character of a jurial system which regulates the life and thoughts of the believer accord-

¹ See M. Khadduri, *War and Peace in the Law of Islam* 45 (Baltimore, 1955). Cf. M. Hamidullah, *Muslim Conduct of State* 71 (3rd ed., Lahore, 1953).

ing to an ideal set of rules regarded as the only correct and valid one. This system, unlike positive law, proceeded from a high divine source embodying God's will and justice. As the expression of the will of God, the law of Islam (known as the *Shari'a*) is regarded as the most perfect, eternal and just, designed for all time and characterized by universal application to all men.² The law that regulates the conduct of the Islamic state is called the *siyar*, based on the same sources and having the same character as the *shari'a*. In theory the *siyar* was designed to be only a temporary institution, on the assumption that Islam was ultimately to correspond to the then known world, but failure to achieve this rendered the *siyar* a permanent and an integral part of the sacred law. This law was based on the *Qur'anic* revelations, Muhammadan tradition, analogy and consensus. These sources are not unlike the sources of the modern law of nations. The *Qur'an* represents the authoritative source of law; traditions are equivalent to custom; rules and principles expressed in treaties with non-Muslims fall in the category of agreement; and the opinions of the caliphs and jurists, based on legal deduction and analogy, may be regarded as reason.³

On the assumption that the aim of Islam was the whole of mankind, the world was sharply divided, under the law of Islam, into the *dar al-Islam* (abode or territory of Islam) and the *dar al-harb* (abode of war or enemy territory). The first corresponded to the territory under Islamic sovereignty. Its inhabitants were Muslims, by birth or conversion, and the people of the tolerated religions (Jews, Christians and Zoroastrians) who preferred to remain non-Muslims at the sacrifice of paying a poll tax.⁴ The *dar al-harb* consisted of all the states and communities outside the territory of Islam. Its inhabitants were called *harbis* or people of the territory of war.

In theory the *dar al-Islam* was always at war with the *dar-al-harb*. The Muslims were under legal obligation to reduce the latter to Muslim rule in order to achieve Islam's ultimate objective, namely, the enforcement of God's law (the *Shari'a*) over the entire world. The instrument by which the Islamic state was to carry out that objective was called the *jihad* (popularly known as holy war), which was always just if waged against the infidels and the enemies of the faith. Thus the *jihad* was the Islamic *bellum justum*.⁵ But the *jihad* did not always mean war, since Islam's objective might be achieved by peaceful as well as violent means. Thus the *jihad* may be regarded as an intensive religious propaganda which took the form of a continuous process of warfare, psychological and political, no less than strictly military. From a legal viewpoint it meant a permanent state of war between Islam and enemy territory. But this state of war should not be construed as actual hostilities; it was rather equivalent, in Western legal

² See Abdur Rahim, *Principles of Muhammadan Jurisprudence* 52-53, 56-58 (Madras, 1911); Khadduri, *op. cit.* 22-27.

³ See Hamidullah, *op. cit.* 17-38.

⁴ For a discussion of the status of non-Muslims under Muslim rule, see A. S. Tritton, *The Caliphs and Their Non-Muslim Subjects* (London, 1930); and Khadduri, *op. cit.* Ch. 17.

⁵ See *ibid.* Ch. 5.

terminology, to non-recognition. This, however, did not imply, as in the modern law of nations, the impossibility of initiating negotiations and concluding treaties, for such actions were considered neither to imply equality between the two contracting parties nor necessarily to possess a permanent character. The nearest equivalent, perhaps, to this situation is the recognition of insurgency which neither precludes an intention of later *de facto* or *de jure* recognition nor approval of the regime under insurgency; it merely means that an authority to enforce the law in a certain territory is needed under certain circumstances.⁶ The Islamic state, in like manner, in entering into diplomatic negotiations with a non-Muslim state, did not intend to recognize that state, but merely to admit that a certain authority or authorities were needed in the *dar al-harb* so long as it remained beyond Muslim sovereignty.

Peace was the short interval when the *jihad* was in suspense. This period, according to the most liberal estimate, was not to last more than ten years. Permanent peace was to be achieved only when the *dar al-harb* would have been reduced to non-existence and thus the *raison d'être* of the *jihad*, except perhaps for combatting Islam's internal enemies, would eventually have disappeared. The Islamic law of peace, which was originally designed to regulate the relations of Muslims with enemy territories during non-hostile periods, was in theory only a temporary institution until *dar al-Islam* should comprise the whole world. In practice, however, the *jihad* underwent certain changes in its meaning to suit the changing circumstances of life. Islam often made peace with the enemy, not always on its own terms. The jurists began to interpret the law with a view to justifying suspension of the *jihad*. The new conception of the *jihad* did not necessarily imply the abandonment of the *jihad* duty; it merely meant the entry of the obligation into a period of suspension. It assumed a dormant status, from which the head of state may revive it at any moment he deems necessary. In practice, however, the more habituated the Muslims became to a dormant *jihad*, the more reconciled they tended to be to the permanency of a law of peace.⁷

II

The rise of the Ottoman Empire (A.D. 1300) revived Muslim power and gave fresh impetus to the development of the Muslim law of nations. The Ottoman sultans followed the practice of issuing decrees, having the force of law, which supplied valuable additions to Islamic law and helped to accommodate it to the new circumstances of the Muslim world. This method of legislation enabled the sultans to regulate their relations with the Christian Powers with whom they had become closely connected after Islam's expansion into Eastern Europe. When the Portuguese and Spanish explorers diverted European commerce from the Eastern Mediterranean by their new discoveries, the Ottoman sultans offered liberal terms in their commercial treaties with European states in order to revive commercial relations

⁶ H. Lauterpacht, *Recognition in International Law*, Ch. 16 (Cambridge, 1947).

⁷ See M. Khadduri, *op. cit.* 65.

with Europe.⁸ The Treaty of Alliance between Sultan Sulayman the Magnificent and Francis I, King of France, signed in 1535, although not the first treaty that helped to attract Western merchants, was by far the most important.

The treaty of 1535 provided innovations in the relations between Christian Powers and Islam in early modern times.⁹ The preamble treated the King of France and his representatives as equals with Sultan Sulayman and his representatives. Article 1 provided for the establishment of a "valid and sure peace" (*bonne et sure paix*) between the Sultan and the King "during their lives," and granted reciprocal rights to the subjects of each monarch in the territory of the other. The French were to enjoy exemption rights from the poll tax, the right to practice their religion, and the right of trial in their own consulates by their own law. The King of France was also given the right to

send to Constantinople or Pera or other places of this Empire a bailiff —just as at present he has a consul at Alexandria. The said bailiff and consul shall be received and maintained in proper authority so that each one of them may in his locality, and without being hindered by any judge, qadi, soubashi, or other according to his faith and law, hear, judge, and determine all causes, suits and differences, both civil and criminal, which might arise between merchants and other subjects of the King (of France). . . . The qadi or other officers of the Grand Signior may not try any difference between the merchants and subjects of the King, even if the said merchants should request it, and if perchance the said qadis should hear a case their judgment shall be null and void. [Article 2.]

The traditional rule of the law of Islam, it will be recalled, permitted years. The Ottoman sultans modified this rule by extending this period to the lifetime of the sultan who made the treaty. Further, the treaty of 1535 established the precedent of making treaties on the basis of equality and mutuality of interests. This might be regarded, as many publicists peace to be established with the enemy for a period not exceeding ten have maintained, as a specific privilege given to the King of France before other Christian princes were accorded similar status. Article 15, however, stated that such a privilege would be granted to other monarchs, which indicated that the Sultan sought to establish a principle which would apply to other Christian princes as well. The text of Article 15 follows:

The King of France has proposed that His Holiness the Pope, the King of England, his brother and perpetual ally, and the King of Scotland

⁸ It has been maintained that, because the Ottoman sultans discouraged trade with Europe after they controlled the Eastern Mediterranean, the Portuguese and Spanish explorers sought new routes to the Orient which led them to new discoveries. For a critical discussion of this point, see A. H. Lybyer, "The Ottoman Turks and the Routes of Oriental Trade," 30 *English Historical Review* 577-588 (1915).

⁹ For the text of the treaty, see Baron I. de Testa, *Recueil des Traités de la Porte Ottomane*, Vol. I, pp. 15-21 (Paris, 1864); and G. Noradounghian, *Recueil d'Actes Internationaux de l'Empire Ottoman*, Vol. I, pp. 83-87 (Paris, 1897). For an English translation, see Nasim Sousa, *The Capitulatory Regime in Turkey* 314-320 (Baltimore, 1933).

should be entitled to adhere to this treaty of peace if they please, on condition that when desirous of doing so they shall within eight months from date send their ratifications to the Grand Signior and obtain his.¹⁰

The treaty of 1535 modified another principle of the law of Islam by granting Christians exemption from the poll tax. The traditional rule was that non-Muslims, if residing in Muslim territory more than one year (in this case they would be treated on the same footing as permanent non-Muslim residents), had to pay the poll tax.¹¹ With respect to the right granted to Frenchmen (later extended to other Europeans) of being tried by their own consulates, the treaty at first gave expression to the classical principle of the personality of the law; but the modification of this principle in subsequent treaties (especially that of 1740), by which all lawsuits involving foreigners and Muslims were to be handled by foreign consulates,¹² greatly changed the fundamental rule that Islamic law must be applied in such cases.

The treaty of 1535, concluded at a time when the modern law of nations was at the beginning of its development, might have provided an excellent opportunity to reconcile Christian and Muslim law. However, the political motives which brought the treaty to life were not conducive to accommodate the one to the other. Francis I was in dire need of support against his Christian rival, Charles V, and Sulayman, after his unsuccessful attack on Vienna (1529), sought to divide the combination against him by creating dissension among Christian princes. This alliance, which helped indirectly to foster the Reformation, created resentment for the schism within Christianity as well as for the co-operation of a Christian prince with the infidel.¹³

Nor were the European jurists and publicists, who advocated a new law of nations based on the principles of territorial sovereignty and equality among nations, prepared to regard the Ottoman Empire as part of the European community. The traditional viewpoint of Christendom seemed to take it for granted that Islam lay outside the pale of the newly developing law of nations. Albericus Gentilis (1552-1608), who was not in favor of religious wars and criticized Spain for making war on the Indians, attacked Francis I for making an alliance with the Turks.¹⁴ Even Grotius, who emphasized the law of nature as the basis of the modern law of nations, advocated discriminatory treatment against non-Christian states. He argued that it was permissible by the law of nature to make treaties with the enemies of the Christian religion, but advocated that all Christian princes

¹⁰ The King of England preferred to sign a separate treaty with the Sultan in 1580, while the others failed to adhere to the treaty.

¹¹ For the law governing the status of non-Muslims in Muslim territory (usually called *dhimmis*), see M. Khadduri, *op. cit.* Ch. 17.

¹² See Sousa, *op. cit.* 78-86.

¹³ See D. J. Hill, *A History of Diplomacy in the International Development of Europe*, Vol. II, pp. 435, 439-440 (New York, 1906); and D. M. Vaughan, *Europe and the Turk* 134-146 (Liverpool, 1954).

¹⁴ Gentilis, *De Jure Belli*, Lib. I, C. 12 (1588). See also T. A. Walker, *A History of the Law of Nations*, Vol. I, pp. 254, 271-272 (Cambridge, 1899).

should combine against the advances of the enemies of the faith.¹⁵ In its formative period, the modern law of nations developed principles that governed the relations of Christian nations alone, that is, nations that enjoyed the benefits of Christian civilization. Thus it was taken for granted that the rights which that law would protect were only the rights of "civilized" Powers.¹⁶

The utopians were no less concerned with the problem of a non-Christian Power in Europe than other publicists. They sought to establish European peace by forming a combination of Christian princes against the Turks. Several schemes were laid down during the seventeenth and eighteenth centuries, like that of Dubois in medieval times, which had the common appeal to Christian princes to compose their differences and unite against the Turks. Thus William Penn considered the subjection of the Turks as a prerequisite for the general pacification of Europe.¹⁷ Emeric Crucé and Abbé de Saint-Pierre, however, in their schemes for a general union of states, thought that the Turks might be included. Saint-Pierre contended that such a union would not necessarily lead to conciliation of the various religions, but it would help to establish peace between states with different religions.¹⁸ Perhaps the most elaborate of such schemes for establishing peace in Christendom at the expense of the Turks was that of Cardinal Alberoni, Prime Minister of Spain, in a book entitled *Testament Politique du Cardinal Jules Alberoni* (Lausanne, 1753), in which he sought to organize a general diet, composed of representatives of European princes, for discussing all matters of common concern to Christendom. Cardinal Alberoni maintained that before such a plan could ever become a reality the Turks must first be expelled from Europe by a combination of Christian forces. For this purpose he published a pamphlet in German and English entitled *Cardinal Alberoni's Scheme for Reducing the Turkish Empire to the Obedience of Christian Princes* (London, 1736).¹⁹ For achieving the general scheme of peace Alberoni stated:

. . . It would seem to be for the absolute interest of whole Christian Europe that the attention of the emperors of Germany should be directed solely to the defense of their territory against the power of the Ottoman Empire, and to seek to extend their dominions in that direction only. . . . They would have the means to induce the Princes of the Empire to combine all their forces for the purpose of conquering Turkish territory by rewarding these Princes with some of the domains

¹⁵ Grotius, *De Jure Belli ac Pacis*, Lib. II, C. 20 (1625). See also Walker, *op. cit.*, Vol. I, pp. 300, 306-307.

¹⁶ See E. P. Cheyney "International Law under Queen Elizabeth," 20 *English Historical Review* 660 (1905).

¹⁷ W. Penn, *Essay on the Present and Future Peace of Europe* (London, 1693).

¹⁸ Abbé de Saint-Pierre, *Project pour rendre la paix perpétuelle en Europe* (Utrecht, 1713). For a survey of the utopian plans of peace, see S. J. Hemleben, *Plans for World Peace Through Six Centuries* (Chicago, 1943).

¹⁹ The original, apparently lost, has been preserved in an Italian translation. For an English rendering of the Italian manuscript, see Theodore Henckels, "Cardinal Alberoni's Scheme for Reducing the Turkish Empire to the Obedience of Christian Princes," 7 *A.J.I.L.* 83-107 (1913).

belonging to the House of Austria, in Germany, as they were making progress toward the Orient. . . .

It would seem that, through the execution of this system, all the old sources of quarrels between the Houses of Austria and Bourbon might be entirely removed. Nothing would prevent them from acting concertedly in order to drive the infidels out of Christendom, to settle all differences pending between their neighbors, to render justice to whom it is due and to establish commerce on a footing of equality which encourages industry and honesty among all nations. Thus, enjoying peaceful possession of their legitimate states the Christians will then think of relieving their subjects, harassed by wars or by apprehensions of wars which follow conditions of uncertainty and jealousy. . . . They will have a beautiful open field, within which to exercise their power and their prowess against the infidels, and to set their conscience at peace for the shedding of Christian blood of which the indecision of their pretensions has been responsible in the course of the latter centuries.²⁰

It is a tempting conclusion to make that at this period neither Islam nor Christendom had yet been prepared to meet on a common ground and modify their religious principles for the purpose of developing a law of nations based on equality and reciprocity. The distrust and lack of mutual respect were not conducive to an understanding between Islam and Christendom. Their conduct of foreign relations tended to be Machiavelian and coercive. European diplomats at the Ottoman Porte often resorted to bribery and intrigue in order to achieve their ends, while the Ottoman viziers frightened and misused European envoys to extract disclosure of their instructions.²¹ Thus the relations between Islam and Christendom showed no appreciable improvement over the precedent established by Sulayman the Magnificent and Francis I. The factors governing their relations depended less on law than on the relative strength and weakness of either side.

III

Had the Ottoman Empire been integrated into the European system during the formative period of the law of nations, this law might have become universal in shape at an earlier period. When, however, the modern law of nations, after the Treaty of Westphalia (1648), began to develop along secular lines, based on the principle *cuius regio, eius religio*, the encounters between Christendom and Islam were no longer at par. The growing strength of Europe and the secularization of its legal and political systems were matched by a steady decline in Muslim power. The readiness of Islam at the height of Ottoman power to reconcile its interests with those of Christendom was superseded by the fear of a nation in decline lest its

²⁰ For a full statement of this system, see *ibid.* 62-66.

²¹ For an account of the experiences of European envoys in Turkey, see the memoirs of the Ambassador of Austria, de Busbecq, in Constantinople, in C. T. Forster and F. H. B. Daniell, *The Life and Letters of Ogier Ghiselin de Busbecq*, Vol. I, pp. 176-177 (London, 1881); and Queen Elizabeth's Ambassador to Turkey, Sir John Finch, in G. F. Abbott, *Under the Turk in Constantinople* (London, 1920).

contact with non-Muslim nations should lead to its destruction. The sultans, it is true, were quick to adopt Western weapons and military skills—which were not only permitted but encouraged by the law of Islam—but they were not prepared to adopt the new political and legal concepts which would materially change the juridical structure of Islam.

During the latter part of the eighteenth century the encounters between Christendom and Islam proved to be a disaster for Islam. Its defeats came as a surprise to the European Powers who had attained their military and diplomatic victories with relative ease. This resulted in the unfavorable revision of the treaty of 1535 in 1740, granting France the right of protection over the Christian nationals of the Sultan and the similar rights granted to Russia in the Treaty of Küchük Kaynarja in 1774. The European Powers, on their part, when they dealt with the Muslim world, were not a little surprised to find that Islamic civilization was so “inferior” and so different from their own, without appreciating the differences in the cultural values and the relative state of decadence. Taking a short-range view of their interests, they preferred to attain immediate advantages rather than to deal with Islam on a basis of equality and reciprocity. The European Powers found it more expedient to leave behind them the rules and practices of the modern law of nations and to resort to force whenever diplomacy failed them. Thus neither were the European Powers prepared to regard Muslim countries as falling under the operation of their law of nations nor would Islam recognize Christian rule whenever its territory fell into European hands. Islamic law regarded non-Muslim rule over Muslim lands as an anomaly permitted only under *force majeure*, but the caliph was under legal obligation to restore these lands whenever Islam could regain its strength. The European Powers, in their contacts with Muslim countries, treated them as backward areas and savage communities to whom the principles of the law of war did not apply. Conquest of Muslim territory, like conversion to Christianity, was considered meritorious.²²

After the Napoleonic wars, when Ottoman territories became a bone of contention among rival Powers, the Western Powers deemed it necessary to invite the Sultan to join the community of European nations for the purpose of maintaining the integrity of his empire by affording him the benefits of the law of nations. When such an invitation was proposed at the Congress of Vienna, Russia objected on the grounds that Turkey was barbarous. “Barbarous as it is,” retorted Castlereagh to Tsar Alexander, “Turkey forms in the system of Europe a necessary evil.” Seeking a free hand in the Sultan’s dominions, Russia insisted that Turkey be kept out of the community of European nations.

Nor were the Western jurists agreed as to whether Turkey had become a subject under the law of nations despite the fact that she had established for a long time diplomatic intercourse with Europe. The jurists were doubtful as to Turkey’s ability to meet her obligations in accordance with European standards. In *The Hurtige Hane*, Sir William Scott argued

²² See Q. Wright, “The Bombardment of Damascus,” 20 A.J.I.L. 266 (1926); Mandates under the League of Nations 7-8 (1930).

that the law of nations should not be applied to nations outside Europe "in its full rigour"; for, as he went on to say,

. . . it would be extremely hard on persons residing in the kingdom of Morocco, if they should be held bound by all the rules of the law of nations, as it is practised among European states. On many accounts undoubtedly they are not to be strictly considered on the same footing as European merchants; they may, on some points of the law of nations, be entitled to a very relaxed application of the principles, established by long usage, between the states of Europe, holding an intimate and constant intercourse with each other.²³

In *The Madonna del Burso*, Sir William Scott reiterated a similar opinion in more general terms:

The inhabitants of those countries (Ottoman Empire) are not professors of exactly the same law of nations with ourselves: in consideration of the peculiarities of their situation and character, the Court has repeatedly expressed a disposition not to hold them bound to the utmost rigour of that system of public law, on which European states have so long acted, in their intercourse with one another.²⁴

Even after the Ottoman Empire had been admitted to the Concert of Europe in 1856, some jurists, such as Lorimer, continued to regard her beyond the operation of the law of nations.²⁵ Other jurists, like T. E. Holland and W. E. Hall, emphasized differences in the degree of civilization, not religion, as a bar to full recognition, and this, they held, would be merely a transitional stage until non-European states would become members of the family of nations.²⁶ On the other hand, there were jurists who held that since the Ottoman Empire had maintained diplomatic intercourse with European Powers for many centuries and concluded treaties with them, the general body of the law of nations was accordingly applicable.²⁷ There is, however, no clear evidence to indicate that during the first half of the nineteenth century Turkey and other Muslim countries had enjoyed the full advantage of the law of nations. Writing in 1845, Wheaton was perhaps reflecting this state of affairs when he said:

²³ *The Hurtige Hane*, High Court of Admiralty, 1801, 3 C. Rob. 324. See J. B. Scott and W. H. E. Jaeger, *Cases on International Law* 62-64 (1937).

²⁴ *The Madonna del Burso*, High Court of the Admiralty, 1802, 4 C. Rob. 169. See Scott and Jaeger, *op. cit.* 65-66. In *The Fortuna*, 2 C. Rob. 92 (1803), Sir William Scott said: "Considering this case as merely between the British and Algerian claimants, I do not, at the same time, mean to apply to such claimants the exact rigour of the law of nations as understood and practised among the civilized states of Europe; it would be to try them by a law not familiar to any law or practice of theirs. . . ." See also *The Kinders Kinder*, High Court of Admiralty, 1799, 2 C. Rob. 88; and *The Helena*, High Court of Admiralty, 1801, 4 C. Rob. 3.

²⁵ James Lorimer, *Institutes of the Law of Nations*, Vol. I, pp. 101-102, 123-124 (Edinburgh, 1883). In another work Lorimer rejects the ethical basis of Islam as suitable for a political system (J. Lorimer, *Studies National and International* 132-147 [Edinburgh, 1890]).

²⁶ See T. E. Holland, *Lectures on International Law* 38 (ed. Walker, London, 1933); and W. E. Hall, *International Law* 48-49 (8th ed., Higgins, Oxford, 1924).

²⁷ See H. A. Smith, *Great Britain and the Law of Nations*, Vol. I, pp. 16-17 (London, 1932).

In respect to the mutual intercourse between the Christian and Mahommedan Powers, the former have sometimes been content to take the law from the Mahommedans, and in others to modify the International Law of Christianity in its relation to them. Instances of the first may be found in the ransom of prisoners, the rights of ambassadors, and many others where the milder usages established among Christian nations have not yet been adopted by the Mahommedan Powers. On some others they are considered as entitled to a very relaxed application of the peculiar principles established by long usage among the states of Europe in constant intercourse with one another.²⁸

During the Crimean War (1854-56) the Western Powers had realized that Turkey's continued exclusion from the European community had accentuated the rivalry over the "Sick Man's" territories; it had also become inconsistent with the trend of an expanding family of nations which had comprised countries outside Europe. Thus, on the invitation of the six Powers signatory to the Treaty of Paris (March 30, 1856), the Sultan was formally admitted to "participate in the public law and concert of Europe" (Article 7). Western jurists have been confused as to the meaning of this article. Most of them have construed the clause "to participate in the public law and concert of Europe," as one admitting Turkey to the advantages of the law of nations.²⁹ Few have argued that it merely meant her admission to the European community of nations and that it had no bearing on the subject of her participation in the operation of the law of nations.³⁰ Turkey's exclusion from the Concert of Europe in 1815 had perhaps postponed her participation in the operation of the law of nations; but her admission to the Concert in 1856 must have fully entitled her (subject to foreign capitulatory rights which were not abolished until 1924) to the full advantages of that law.³¹ The Ottoman Empire and other Muslim nations had been recognized only by slow stages as subjects of the law of nations, and the European Powers, perhaps not conscious at first of this process, had slowly come to this conclusion.

IV

Although Europe had at last accepted the Ottoman Empire as a member of the European community of nations, the internal structure of the Empire had not yet been sufficiently changed to adapt itself to Western practices in the conduct of foreign relations. In his diplomatic relations with the West, the Sultan permitted only friendly Powers to maintain diplomatic missions in his capital, although the practice of maintaining permanent diplomatic missions had been in vogue in Europe since early

²⁸ Henry Wheaton, *History of the Modern Law of Nations* 555 (1845).

²⁹ See W. E. Hall, *Treatise on International Law* 48 (ed. Pearce Higgins, Oxford, 1924).

³⁰ Hugh M. Wood, "The Treaty of Paris and Turkey's Status in International Law," 37 *A.J.I.L.* 262-274 (1943).

³¹ In *The S. S. Lotus* (P.C.I.J., 1927), in a dissenting opinion by Judge Weiss, Turkey was not considered as a subject of the law of nations until the Treaty of Lausanne (July 24, 1923).

modern times. In the eighteenth century the Sultan approved of this practice on a reciprocal basis. After 1792 the Sultan himself established permanent missions in Paris, London, Vienna and Berlin.

For a long while the Sultan had been advised by Western sympathizers, as well as by Muslim liberals, to introduce reforms along Western lines in order to enhance the prestige of his Empire among the Powers and to discharge his duties as the head of a modern state. But the Sultan, who was willing to adopt the new weapons and military skills of the West, was not prepared to adopt Western concepts and practices which would compromise or materially change the law of Islam. Faced with a threat from within—provincial uprisings, local claims for independence, and the insistence of liberals on reform—the Sultan could afford as little to please the conservatives as to reject the pleadings of Western sympathizers to strengthen his Empire against the Russian threat. This constructive approach to strengthening the Empire along Western lines is collectively known as the *Tanzimat*, or Reform Movement. For it became quite obvious that the Empire had either to change or to collapse.

Under pressure from the Powers, the Sultan permitted freedom of navigation through the Straits, first to Russia (in the Treaty of Küçük Kaynarja, 1774),³² and then to other Powers. This right of passage was at first limited to certain merchant vessels but was later extended as a rule to all other Powers.³³ The so-called Ancient Rule of the Ottoman House, which closed the Straits to all warships of foreign Powers, remained effective until it was modified by several international instruments during the nineteenth century.³⁴ A far more radical change, also carried out under Western pressure, was in improving the position of the Christian subjects of the Sultan by granting France (1740), Russia (1774), and other Powers the right to "protect" these subjects by making representations to the Sultan regarding their conditions. The implementation of these commitments was embodied in the *Tanzimat* decrees, beginning with the promulgation of the *Khatti Sharif Gulkhané* of November 3, 1839, and followed by other enactments until they were finally incorporated in an elaborate constitutional document issued by the Sultan on December 23, 1876. These instruments covered a variety of legal reforms, but neither the *Tanzimat* decrees nor the Constitution of 1876 were destined to materialize, owing to the strong resistance of traditional Islam to Western concepts of law and justice.³⁵

The process of social change, however, pays no attention to stereotyped practices or abstract doctrines. The Ottoman Empire had either to change

³² Article 2.

³³ See Erik Brüel, *International Straits*, Vol. II, pp. 272-276 (London and Copenhagen, 1947).

³⁴ For a comprehensive treatment of the various treaties governing the status of the Straits, see J. T. Shotwell and F. Deák, *Turkey at the Straits* (New York, 1940). See also Serge Gorainov, *La Question d'Orient à la Veille du Traité de Berlin* (ed. B. Nolde, Paris, 1948).

³⁵ See E. Engelhardt, *La Turquie et le Tanzimat* (2 vols., Paris, 1882-84); F. E. Bailey, *British Policy and the Turkish Reform Movement* (Cambridge, Mass., 1942).

or fall to pieces. A few Muslim thinkers who became impatient with the Sultan's despotism, enforced in the name of Islam, sought change in the character of the Islamic state. Western constitutionalism and nationalism found their way into Muslim society and the new generation advocated the principle that religion was no longer adequate as the basis of the state. A constitutional movement, which had been long in the making, succeeded at last in overthrowing the traditional Ottoman regime in 1908 and laid the basis of a modern Muslim state. This change introduced the secular conception of authority and the doctrine that the nation is the source of authority. Consequently, the sacred law of Islam ceased to be the sole authoritative source of the conduct of the state. But no attempt was made at this stage to separate the religious from the secular powers, nor was serious thought ever given to reconciling Islam with the new concepts of law and authority.

The triumph of nationalism as the basis of Muslim polity resulted in the destruction of the Ottoman Empire following World War I and the abolition of the Caliphate (1924), thus permitting several Muslim states to emerge as new sovereign entities. Kemalist Turkey took the lead in this matter and an Egyptian publicist, Shaykh Ali Abd al-Raziq (although his doctrine was officially rejected by the Egyptian Government), supplied the legal and doctrinal justification of it.³⁶ He argued that Islam was not originally designed by the Prophet Muhammad as a political system (although circumstances necessitated that he should exercise political and military functions which were distinct from his primary religious functions as a prophet), but, like Christianity, as a system of religion for the regulation of the spiritual life of the Muslims. The significance of Raziq's theory lies in permitting the heads of Muslim states to conduct foreign relations in accordance with rules and practices not necessarily derived from the sacred law, since this matter lay outside the domain of religion. His interpretation gave validity not only to the action of the Kemalist regime in Turkey, but also justified the conduct of foreign relations of the very state which enforced the act of the disciplinary council that rejected his theory.

Raziq's theory was challenged by another Egyptian who was still studying law in Paris at the time it was rejected in Cairo. Sanhuri chose as the subject of his dissertation, the theme of which is indicated in its title, "The Caliphate: Its Development Toward an Oriental League of Nations."³⁷ He rejected Raziq's theory that political authority was not an integral part of Islam, but he saw no reason why Muslim public law could not develop to fit modern conditions of life. He therefore suggested that the Caliphate, which had undergone many changes in the past, was still capable of further change and might develop into an Oriental league of

³⁶ See Ali Abd al-Raziq, *al-Islam wa Usul al-Hukm* (Cairo, 1925). For a discussion of Raziq's theory, see C. C. Adams, *Islam and Modernism in Egypt* 259-267 (London, 1933).

³⁷ A. Sanhoury, *Le Califat: Son Évolution vers une Société des Nations Orientale* (Paris, 1926).

nations. Although Sanhuri disagreed with Raziq on the internal legal superstructure, he seemed to support, at least in the external relations of Islam, the secular viewpoint, namely, the full participation of the Muslim states in the international community in accordance with the modern law of nations.³⁸

Raziq's theory of government has been tacitly accepted as the basis of the modern Muslim state. Although several Muslim entities had already seceded from Muslim unity, it was not until the dissolution of the Ottoman Empire and the abolition of the Caliphate that Muslim national states emerged as modern states. Kemalist Turkey formally recognized this fact in its National Pact as well as in the Treaty of Lausanne (June 24, 1923), by virtue of which she voluntarily gave up territories in which the majority of the population were not Turks. This process of complete break-up, whether regretted as the dissolution of Islamic unity or hailed as the progressive evolution toward a new community of states, is probably the most significant landmark in the development of Islamic polity since its formative period. Its accomplishment was significantly noted by none other than Rüstü Aras, representative of the mother country, who presided over the special meeting of the League Assembly on May 26, 1937, and welcomed the admission of Egypt as having "completed the successive stages of a progress of evolution as peaceful as it is glorious."³⁹

V

The secular approach to the conduct of foreign relations has been accepted by almost all Muslim states, whether completely secularized in their internal legal structure, as in the case of Turkey, or still recognizing the *shari'a* as their basic law, as in Saudi Arabia and the Yaman. Even those publicists who objected to the secularization of the internal law of Islam have accepted marked departures from the traditional Muslim law governing Islam's foreign relations. Almost all of them, who often invoked the *jihad* against Western encroachment on Islam, repudiated the idea that the *jihad* is offensive in character.⁴⁰ Some of them have gone so far as to argue that the law governing Islam's relations with other nations, as originally expounded by Muhammad, was based on the principle of the peaceful—not the hostile—relations among nations and that its humane rules and practices have anticipated (in certain instances surpassed) the rules and practices of the modern law of nations.⁴¹

The active participation of Muslim states in international conferences, in the League of Nations, and the United Nations and its agencies, demonstrates that the *dar al-Islam* has at least reconciled itself to a peaceful co-

³⁸ *Ibid.* 577 ff.

³⁹ Monthly Summary of the League of Nations, Vol. 17, p. 91 (May, 1937).

⁴⁰ See Shaykh Rashid Rida, *al-Khilafa* (Cairo, 1922); French translation by H. Laoust, *Le Califat* (Beyrouth, 1938).

⁴¹ See Abd al-Wahhab Khallaf, *al-Siyasa al Shar'iyya* 61-100 (Cairo, 1931); Sayyid Quthb, *al-Adala al Ijtima'iyya* 92, 94-95 (Cairo, 1945); English translation by J. B. Hardie, entitled *Social Justice in Islam* 91, 93-94 (Washington, 1953).

existence with *dar al-harb*. The various declarations of Muslim statesmen and representatives in international conferences as well as in international organizations, although frequently directed against Western interference in handling Muslim affairs against Islam's interests, indicate on the whole Islam's willingness to take active part in the promotion of international peace and security and its support for existing international organizations.⁴² Great satisfaction was shown throughout the Muslim world when two Muslim jurists were elected to the bench of the International Court of Justice. Muslim representatives have shown great eagerness to serve in the various agencies of the United Nations and several international commissions—evidence which bears witness to the fact that Islam has at last accepted integration into the larger international community.

A few Muslim thinkers have recently argued that Islam can go a step further in making a contribution toward world peace and stability by reviving certain Muslim concepts of law and justice. This trend has been called neo-Panislamism, and, since the creation of Pakistan in 1947, has become a notable movement. In domestic affairs it is reflected in the recognition of the sacred law as a primary source of legislation in the new Syrian Constitution (1950, 1953) and in the new civil codes of Syria, Egypt and Iraq. On November 2, 1953, the Constituent Assembly of Pakistan declared that country to be an Islamic Republic. Even Turkey has relaxed certain measures against religious activities, thus giving impetus to Islamic revival. In the international sphere, there has been a revival in holding Islamic conferences (such as those in Pakistan and Arabia), the exchange of visits among Muslim statesmen, and the formation of certain regional pacts and alliances—all of these are signs indicative of a desire to co-operate as a Muslim bloc for the promotion of international stability within the international community.

Muslims, however, are quite aware that in the present state of international relations it is not possible to revive the traditional religious approach to the conduct of foreign relations, nor is it in their interest to do so, as the circumstances permitting the association of religion in the relations among nations have radically changed. Not only has the *jihad* become an obsolete weapon, but also since Islam has in the past exhausted its power, and its initiative has passed to other great Powers, it has become permissible—even necessary, according to the principles of Islamic law—that Islam look after its interests in accordance with the changed circumstances of life.⁴³ If certain publicists have insisted on a more active rôle for the *shari'a* in the domestic affairs of Islam, their interest on the international plane has been primarily to demonstrate that the *shari'a* can contribute to the development of the modern law of nations for the mutual benefit of Islamic and Christian nations.

⁴² For a discussion by a Muslim writer advocating the competence of the U. N. General Assembly to deal with a Muslim country, see A. W. DeJany, "Competence of the General Assembly in the Tunisian-Moroccan Questions," Proceedings of the American Society of International Law, 1953, pp. 53-59.

⁴³ See *The Majalla*, Article 39.

The historical experiences of Islam and Christendom in introducing a religious element in politics, on the international no less than on the domestic plane, can be very dangerous indeed. For religion—perhaps any form of ideology—would gravely disturb the operation of a system of law which is in the main the product of custom and convention rather than the crystallization of abstract doctrines. If the modern law of nations has become worldwide, in contrast to the medieval Christian and Islamic law of nations, it is because the European Powers have relegated religion from the international to the national plane since the Peace of Westphalia, and have accepted secular sources for its development in accordance with the growing needs of an expanding family of nations. Thus Islam and Christendom have demonstrated, after a long period of hostilities, that they can reconcile their rival ideological principles for purposes of peaceful co-existence. Both have at last accepted their integration into a world order which, though originating in Western Europe, now tends to encompass the entire world.⁴⁴

⁴⁴ The present writer has drawn freely from his book, *War and Peace in the Law of Islam* (Baltimore, 1955), and from his paper, "From Religious to National Law," in R. H. Anshen (ed.), *World-Center: Mid-East* (New York, 1956). See also Q. Wright, "International Law and Ideologies," 48 *A.J.I.L.* 616-626 (1954); and Kurt Wilk, "International Law and Ideological Conflict," 45 *ibid.* 648-670 (1951).

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