Islamic Approach to International Law

Said Mahmoudi

Content type: Encyclopedia entries
Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of Public International Law [MPEPIL]
Article last updated: February 2019

Subject(s):

Freedom of expression — Minorities — Children, rights — Combatants — Prisoners of war — Women, rights — Terrorism — Geneva Conventions 1949 — Sovereignty — Statehood, legitimacy — Legitimacy — Ius ad bellum — Ius in bello — Reparation

Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Professor Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020).

A. Introduction

1 The relationship between Islam and international law has long been studied, primarily in the field of the law of war and international humanitarian law (→ *Humanitarian Law, International*). Particularly in the past two decades, this relationship has been expanded to some other international law areas including → *human rights* and international → *terrorism*. The main reason for this increased attention to the relevance of Islam for international law is States' and non-State actors' repeated references to Islamic legal rules for explaining or justifying a certain position in their relations with other international law actors. The relevance of Islam to international law should be assessed with due regard to substantive legal principles and rules that Islam contains. A prerequisite for an objective assessment is to contextualize them through a glimpse into the Islamic conception of international law, the sources of Islamic international law, and the legal history of this law.

B. Islamic Conception of the International Community

2 Islam, like all other religions, consists of religious norms and practices. In contradistinction to other religions, Islam is also meant to be a political ideology connecting all those who profess the Islamic faith in a political community, the *Ummah*. In Islam's early days the *Ummah* was conceived as one single 'nation'—the brotherhood of Muslims—bound to a superior divine authority. The ultimate goal of Islam at the time of its birth was that the *Ummah* would encompass all mankind. A main objective was also to bring the whole world under Islamic rule and to establish peace and order according to Islamic justice. The Islamic State, encompassing the whole *Ummah* or a part of it, was the means to achieve the ultimate religious objective.

3 Despite the ideal of including all mankind in the *Ummah* in one single State, it was assumed that there would be communities outside the Islamic State with which that State had to deal. Islamic legal and ethical rules were obligatory for all believers both within and outside the territories under Islamic rule. Non-Muslims who lived in an Islamic territory were not bound by all Islamic legal and ethical rules, but disputes between Muslims and non-Muslims were settled according to Islamic rules.

4 Politically and from the perspective of the relation between Muslims and non-Muslims, there was broad support for the proposition that Islam divided the world into two parts: the *dar-al-Islam* (the territory of Islam) and the *dar-al-harb* (the territory of war). *Dar-al-Islam* comprised Islamic and non-Islamic communities that had accepted the sovereignty of Islam, whereas *dar-al-harb* referred to the territories that had declared war against Islam.

5 In theory, there existed a state of war between the two. This state of affairs could continue until the non-Muslim communities either became part of the Islamic community or submitted to its sovereignty as tolerated religious communities or as autonomous communities having treaty relations with it. Acceptance of the state of war did not imply continuous military operations and actual hostilities. It only meant that the *dar-al-harb* was denied legal status under Islamic law; but it was fully possible to negotiate or even conclude treaties with them. In that case, the non-Muslim communities could be entitled *dar-al-ahd*, ie communities that had entered into agreements with Muslims and had economic, cultural, and political relations with them.

6 Given this background, the means for achieving Islam's ultimate objective, ie extending the Faith to all mankind, was the Islamic State with its agenda of expanding the Islamic world through war and conversion of other peoples. It is therefore understandable that the Islamic law of nations originally and essentially focused on the conduct of war and the division of booty. However, the early assumption of a rapid absorption of the whole of mankind did not materialize, and the Islamic State, the first of which was established by the

Prophet Muhammad himself in Medina in 622 AD, had to accommodate its relations with other nations on grounds other than those envisaged in the law of war. The Islamic law of nations thus gradually developed from a set of rules on the conduct of war for the temporary purpose of *Shari'a* —conquering the whole world—to a permanent complex of legal norms regulating the relations between the Islamic State and other communities.

C. Sources of the Islamic Law of Nations

7 The Islamic law of nations is normally referred to as the *siyar* (singular *sirat*), the conduct of the rulers. The *siyar* were assumed to govern the relations of Muslims with non-Muslims, whether outside or inside the world of Islam. The *siyar* originally implied the conduct of the Prophet Muhammad in his wars, but was later extended to include the conduct of his successors in their wars against non-Muslims. The term was initially used in the eighth century by several Islamic jurists including the most prominent one, Abu Hanifah. His lectures inspired one of his disciples, Muhammad bin Hassan Shaybani (749–804), who wrote a specific treatise on Islamic international law, Shaybani's *siyar*. This book is generally considered the standard work on the classical Islamic law of nations.

8 The term *siyar* denotes the sum of the principles, rules, and practices governing Islam's relationships with other nations. The Islamic law of nations was not deemed to be a body of law separate from Muslim law—*Shari'a* —but merely a part and an extension thereof. Consequently, the normal distinction between national and international law as regards their sources and sanctions did not apply to Islamic law and Islamic international law.

9 As regards the sources of Islamic law itself—*Shari'a* —there is a consensus among schools of Islam on the primary sources, the *Qur'an* and the *Sunna* (sayings and tradition of the Prophet). The two major factions of Islam, namely *Sunni* and *Shi'a*, have different views on the secondary sources. For *Sunnis*, *Ijma* (consensus) and *Qiyas* (reasoning by analogy from the *Qur'an* and *Sunna*) constitute the secondary sources of Islamic international law. *Shi'a* jurists, on the other hand, normally replace *Qiyas* with *Aql* (reason). The most learned Islamic jurists interpret the primary sources to adapt them to new situations and to develop the law when these sources do not directly address a specific issue. *Fiqh* is the jurisprudence that is developed in this way.

10 Many verses of the *Qur'an* may have legal relevance, but some 80 verses specifically deal with legal issues. If there is irreconcilable contradiction between the *Qur'an* and the *Sunna*, the *Qur'an* prevails. In addition to the sources named, treaties between Muslims and non-Muslims, the actual practice of the heads of the Islamic State—the caliphs—as regards their orders to commanders in the field, and rules and practices evolved from relations with other nations, have all sometimes been named as sources of Islamic international law.

D. Development of the Islamic State and the Islamic Law of Nations

11 The basic assumptions of the classical theory of Islamic international law are derived from the *Qur'an* and the *Sunna* even though these sources do not themselves spell out such a theory. The theory developed by Shaybani and other lawyers was intended to meet the need to rationalize existing aspirations through the formulation of the concept of a State, the Islamic State. The State as an instrument of a universal religion, according to this theory, was capable of expanding indefinitely.

12 The evolution of the Islamic State started in the mid-seventh century in Medina and continued through the incorporation of the whole of Arabia and the neighbouring countries as well as areas in northern Africa and southern Asia. By the mid-eighth century, the Islamic State, with a central authority in the Caliph of Baghdad, had reached its zenith, and subsequent development of the Islamic law of nations has reflected the political evolution of the Islamic State. This development was particularly influenced by the gradual realization that the Islamic State, despite its formal position of not recognizing any other State besides itself, was not able to accommodate all mankind. It was thus forced to tacitly accept the principle of coexistence. This in itself meant the acceptance of territorial limitations and adjustment of the Islamic law of nations to these limitations.

13 The *dar-al-Islam* and the *dar-al-harb* coexisted for a period, but then the Islamic State tacitly abandoned the fundamental theory of the division of the world, and accepted maintenance of its relations with the rest of the world on the basis of equality and mutual interest. This radical change in the position of the *dar-al-Islam*, acceptance of a state of peace in its relation with the *dar-al-harb*, took place during the 16th century and made possible the gradual incorporation of the Islamic States into the community of nations.

14 A significant internal political evolution in the Islamic State, namely decentralization of power, left an undeniable impact on the development of international Islamic law. The Islamic State was gradually compelled to recognize the independence of various political entities within itself headed by self-appointed provincial rulers, as a part of the process of decentralization. The ultimate goal of this recognition was to preserve the outward unity of the Islamic State. By the beginning of the 16th century this decentralization led to the division of Islam into separate political entities.

15 The transformation of the *dar-al-Islam* into sovereign States led to the relegation of religion to the domestic level and to the gradual separation of inter-State relations from religion. The emergence of independent political entities with secular rulers and the separation of Islamic international law from religion, paved the way for the increased dominance of the Ottoman Empire over the rest of the Muslim world. The separation was due to doctrinal differences between the Ottoman Empire and the Persian Kingdom as two powerful representatives of the *Sunnite* and *Shi'ite* factions of Islam. This separation was a pragmatic move to allow both States to recognize each other as Islamic States and to regulate their external relations separately and regardless of religious considerations. The idea of permanent war between the Islamic world and the non-Muslim was replaced by the principle of equality of States. In this way, the Islamic law of nations—*siyar*—as a law for one single State, the Islamic State with a global agenda, was also replaced by legal recognition of the territorial sovereignty of various States. This development coincided with the formative period of the modern law of nations in Europe governing relations among Christian nations.

16 The secularization of legal and political systems in Europe during the 18th century was matched by a steady decline in Ottoman power. The increasing weakness of Ottoman rule led to concessions to major European powers, but the European powers were not prepared to regard Muslim countries as being governed by the law of nations, nor would Islam recognize Christian rule when its territory fell into European hands. Islamic international law and the Western law of nations still applied in their separate spheres. It is noteworthy that the Ottoman Empire was intentionally excluded from the → *Vienna Congress (1815)*; not until the middle of the 19th century could European powers agree to invite it to the 1856 → *Concert of Europe*.

17 Views on the doctrine of international law in the second half of the 19th century still diverged with respect to the place of the Muslim world in general and of the Ottoman Empire in particular. This Empire, unlike the majority of other Islamic territories of that time, was a politically independent power and a significant actor representing the Muslim world in the family of nations. Some authors, invoking the religious and other differences between the Ottoman Empire and Europe, refused to recognize the Islamic State embodied in that Empire as a political entity governed by the law of nations. Others argued that since the Ottoman Empire had maintained diplomatic relations with European powers for many centuries and concluded treaties with them, the law of nations was applicable to it. The latter view prevailed in the practice of European States, and the European bar to admitting the Ottoman Empire to the community of nations was finally removed at the end of the 19th century.

18 Political developments in the Ottoman Empire at that time led to a significant change in the character of the State from religious to national. This change entailed the adoption of Western concepts of law and authority. This did not, however, cause the abolition of Islamic laws and institutions. The dissolution of the Ottoman Empire after World War I put a definitive end to the concept of the Islamic State in its classical definition. Some Islamic countries and religious institutions attempted, during the 1920s and 1930s, following the collapse of the Ottoman Empire, to secure the continuance of the office of the Caliph and thereby the concept of the Islamic State. However, Turkey and other successor States of the Ottoman Empire, as well other Islamic nations in Africa and Asia, gradually joined the international community as sovereign States with varying degrees of allegiance to Islam in their internal politics and full recognition of modern international law in their external relations.

19 The classical theory of Islamic international law is today of interest from the perspective of the development of legal history. As members of the UN, all Islamic States have formally agreed to respect international law in their relations with each other and with other States. (Note: some sources make a distinction between the two concepts of ‘Islamic States/countries’ and ‘Muslim States/countries’. The latter, according to these sources, refers to countries whose populations are predominantly Muslims whereas the former signifies the political and legal system of a country. This distinction is not considered in the present text.) They are debarred from invoking Islamic law of nations as a ground for non-compliance with an international law obligation. However, Islam has been referred to, particularly since the early 1990s, to explain certain States’ positions with respect to contemporary international law issues. In the following, the basic concepts of classical Islamic international law will be discussed. After this, those areas of contemporary international law that have particularly been the subject of regular references to Islam will be dealt with.

E. Basic Components of Islamic International Law

20 The *Qur’an*, the *Sunna*, and the writings of prominent Islamic jurists include provisions and statements directly or indirectly relevant to modern international law. Some areas that are more comprehensively treated in Islamic jurisprudence will be touched on below.

1. Law of War

21 One fundamental assumption in the early days of Islam was that a permanent state of war existed between Muslims and non-Muslims. This state would, according to the same assumption, continue until the *dar-al-harb* was transformed into the *dar-al-Islam*. The instrument to achieve this objective was the *jihad*, which literally means struggle and striving, but is usually used as an equivalent of war in the broad sense of the term. Given this point of departure, it is not surprising that a rather comprehensive set of Islamic rules

regarding resort to war (*ius ad bellum*) and the conduct of war (*ius in bello*) was in place long before any similar legal regime had been established elsewhere.

(a) Ius ad bellum Aspects

22 Several verses of the *Qur'an* deal with the question of the use of force. The interpretations of these verses normally revolve around the distinction between legitimate and illegitimate uses of force. The basic requirements for a legitimate war are generally considered to include right authority (a successor to the Prophet as commander), just cause (threat caused by the enemy), right intention (actively aiming to spread the rule of Islamic law), and reasonable hope of success. The *jihad*, according to the earliest interpretations, is a defensive act and constitutes a legitimate use of force by Muslims to defend the Community. To support this view, reference is normally made to verse 9:190 ('And fight in the way of God with those who fight with you, but aggress not') and verse 8:61 ('But if the enemy incline towards peace, do thou also incline towards peace, and trust in Allah') of the *Qur'an*.

23 Parallel to the growth in the political power of Islam in the seventh century, other interpretations of certain verses of the *Qur'an*, eg verse 9:5 ('slay the Pagans wherever ye find them, and seize them, beleaguer them and lie in wait for them in every stratagem of war']) were made to advocate offensive war against non-believers. However, the overwhelming majority of commentators soon agreed that the *jihad* referred to both defensive and offensive wars since the *Qur'an* speaks of both 'killing' the enemy (as an offensive action) and 'defence' against the enemy (as a defensive action). The verse normally referred to in this connection is 3:167 ('Come, fight in the way of Allah, or at least drive the foe from your city … Had we known how to fight, we should certainly have followed you').

24 Notwithstanding the dominant view on the nature of the *jihad*, proponents of the defensive character of war and the peaceful attitude of Islam towards non-believers continued to reinterpret the sources of Islamic law to find more support for their position. The concept of *jihad* as a just and legitimate war survived till the early twentieth 20th century when the codification of the laws of war through international diplomatic negotiations commenced. Codification culminated in the adoption of the → *United Nations Charter* in 1945, which declared international use of force, except in self-defence, illegal.

25 Several contemporary Islamic commentators have claimed consistency between the defensive *jihad* and self-defence according to the UN Charter. There are, however, several differences between these two. Unlike use of force in self-defence, the defensive *jihad* continues until the enemy surrenders or leaves the realm of Islam. To launch the defensive *jihad*, there is no strict requirement of armed attack by the enemy. Besides, the defensive *jihad* is not limited to the defence of a country's freedom, independence, and territorial integrity. It extends, according to some commentators, also to the defence of one's life, property, family, honour, religion, and beliefs. In this sense, the defensive *jihad* is by far a broader concept than the self-defence in the UN Charter.

26 A concept increasingly current is the 'liberating' *jihad*, which, it is argued, seeks to assist oppressed people to free themselves from oppressive political regimes and political, economic, cultural, and social colonialism. This type of *jihad* is based on verse 4:75 of the *Qur'an* ('Why should you not fight in God's cause and for those oppressed men, women, and children who cry out, "Lord, rescue us from this town whose people are oppressors! By your grace, give us a protector and helper"').

the *jihad* is generally defensive, and presumably in harmony with the UN Charter, must be seen in this light.

27 While the distinction in the Islamic sources of law between a war of aggression in contemporary international law terms and legitimate use of force in self-defence is not fully clear, some Islamic commentators claim that such a distinction does indeed exist. What is in any case sufficiently clear is that prominent *Sunni* and *Shi'a* jurists generally define 'legitimate use of war' in broader terms than does a formal and strict interpretation of international law.

28 The re-emergence of the *jihad* in the parlance of international relations since the early 1990s has brought to the fore the question of the relevance of this concept to today's doctrine of international law. In recent discourse, the purpose of the *jihad* is not to bring all humanity under Islamic dominion. At the high political level, the contemporary use of the *jihad* has, it is argued, the limited purpose of mental and moral mobilization for war. When *jihad* is used by religious, resistance, or other groups and individuals, the purpose is claimed to be 'to carry out radical resistance to Western aggression against Muslim peoples'. The Islamic States are all members of the United Nations and as such do not usually justify the use of force by referring to the *jihad*. Even if in normal political rhetoric politicians may refer to 'just war' or the *jihad*, they still try to defend their positions legally by referring to the UN Charter and the norms of international law.

29 As regards State practice, Arab States invoked the *jihad* in the 1948 war against Israel. Similarly, Iran referred to this concept during the → *Iran-Iraq War (1980–88)*. However, the intention in both cases was basically internal mobilization of the forces under a unified banner, rather than justifying the legality of the military operations. Another example is Iraq's leader Saddam Hussein, who tried, but clearly failed, to follow suit by repeatedly inviting the Iraqi people, before the imminent US attack in March 2003, to join the *jihad* against the infidel United States and its allies. A similar call was addressed to the people of Afghanistan by the → *Taliban* leader, Mullah Muhammad Omar, before and during the US attack in October 2001 (→ *Afghanistan, Conflict*).

30 As long as the *jihad* is invoked by one State against another, the current understanding is that it lacks any legal justificatory function. In such cases the dictates of Islamic sources of law will be irrelevant with respect to the establishment of the legality issue.

(b) Ius in bello Aspects

(i) Introduction

31 Many of the Islamic laws on the conduct of war, including those relating to treatment of prisoners and non-combatants, division of spoil, and use of certain methods of warfare, were elaborated during the lifetime of the Prophet or his immediate successors, the first caliphs.

32 Islam can therefore be considered as a pioneer in this respect. The basic humanitarian principles were expressed in the verses of the *Qur'an*, in the instructions of the Prophet and in the orders of his immediate successors. Many of these principles resemble those enshrined in the core documents of current international humanitarian law such as the → *Geneva Conventions I–IV (1949)* and the related protocols.

(ii) General Principles

33 Most of the Prophet's direct instructions to the military commanders regarding methods of war concern the principles of proportionality and distinction, which allegedly entered from Islamic law into European law of war through Spanish jurists such as Francisco de Vitoria and Francesco Suárez. Examples of the Prophet's instructions in this regard are the prohibition of wanton slaughter, the killing of the injured, the sick, children, women, and aged men, mutilation of human beings, unnecessary destruction of harvest, palm, and fruit-trees, the use of poisonous weapons, killing the enemy through burning or drowning, torturing or harming women, etc.

34 Another important general principle of Islamic humanitarian law is the prohibition of fighting against an enemy who has surrendered. This principle is declared in verse 4:90 of the *Qur'an*:

> Exempted are those who … come to you wishing not to fight you, nor fight their relatives. Had God willed, He could have permitted them to fight against you. Therefore, if they leave you alone, refrain from fighting you, and offer you peace, then God gives you no excuse to fight them.

35 The basic principles promulgated in the *Qur'an* or laid down by the Prophet and his immediate successors were later interpreted by Islamic jurists, and led to various types of modification. For example, the prominent Islamic jurist Abu Hanifah opined that whatever could not be brought under the control of the Islamic army had to be destroyed, including houses, churches, trees, flocks, and herds. This was a clear departure from the early Islamic instructions regarding the conduct of war. A somewhat more moderate view expressed in response to Abu Hanifah was that only lifeless objects had to be destroyed.

(iii) Spoils of War

36 Spoils of war, ie, property acquired by force from non-Muslims, was an important question related to wars waged by Muslims against non-believers. Spoils included not only property, but also persons—prisoners of war, women and children, and slaves. Spoils fell to those who actively participated in the battle. They were divided after completion of the war and the victory of the Muslims. If the persons who were conquered did not accept Islam, one option was to enslave them and distribute them among the Islamic fighters as spoils of war. This was a practice of pre-Islam Arabia, without sanction in the *Qur'an*. Slavery continued as an integral part of Islamic societies until the 19th century although its recognition as an institution was clearly different from slavery elsewhere. In Islam, slavery was a disliked practice that was tolerated and it was viewed as desirable that slaves should be manumitted by individual owners. Moreover, slaves had an established catalogue of rights and their lords did not have the right to violate these rights.

(iv) Prisoners of War

37 There are several injunctions on prisoners of war in the *Qur'an*. The point of departure is that once the enemy has surrendered or been captured, you may set him free or ransom him, until the war ends (verse 47:4). Prisoners of war could be treated in different ways. They could exceptionally be killed. The views of Islamic jurists diverge here. Some deny any grounds in Islam for killing prisoners of war. Others believe that there is no obstacle to this act. A minority takes a middle position and argues that such killing is permitted exceptionally and only when the high interests of the Muslim community so require. Another option was to release them either without compensation or against ransom. This

option was widely practised. A third alternative was to exchange them for Muslim prisoners. Finally, prisoners could be condemned to slavery.

38 Prisoners of war enjoyed certain rights. The number and scope of these rights vary in the writings of prominent Islamic jurists. Nevertheless, several are mentioned by almost all commentators. Prisoners could not be tried and punished for mere belligerency, but for crimes committed beyond the right of belligerency. The capturing State had an obligation to give proper food to prisoners of war according to verse 76:8 of the *Qur'an* (They donate their favourite food to the poor, the orphan, and the captive). Near relatives of the prisoners were not to be separated from them. Prisoners were to be permitted to draw up their wills. In sum, one can find some similarities between the Islamic law of war relating to prisoners and modern concepts of international humanitarian law. Islam has probably influenced the content of the law relating to the protection of prisoners of war.

(v) Non-combatants

39 The distinction between combatants and non-combatants is, according to some commentators, not very clear. The reason is that when the *jihad* is defensive, every Muslim man or woman is believed to have an individual, eternal, and undisputable obligation to participate. For other uses of force, ie, liberating wars, Muslims have a collective obligation: everyone should be ready to join the war when the commanders deem it necessary. Thus, irrespective of the defensive or the offensive character of the war, everybody has an individual or collective obligation to participate. Every able-bodied Muslim can therefore be considered as a combatant irrespective of his/her actual participation in the hostilities.

40 The undetermined borderline between combatants and non-combatants in Islamic law is reflected in the views of commentators. On the one hand, the majority of early Islamic jurists maintained that those who did not actually participate in the fighting—women, children, monks and hermits, the aged, the blind, and the insane—were non-combatants and were therefore excluded from molestation. On the other hand, later commentators argued that the women and the children of polytheists were as guilty as adult men and should be killed. A milder version of this interpretation permitted attack on peasants and merchants even if they had not actively participated in the hostilities. There have of course been variations of these two extremes. It was for instance held that women and children could be killed for taking active part in the fighting or supporting the war against Muslims. The opposite view was that women and children should not be killed even if they took active part as combatants in the hostilities.

41 The legal protection of non-combatants in Islam, unlike other areas of the law of war, was not sufficient. Its possible merits should be assessed by comparing it with the way non-combatants outside of the Islamic world of the seventh and eighth centuries were treated.

(c) Islamic Law of War and International Humanitarian Law

42 The Islamic law of war should be assessed both from the perspective of its historical significance as a pioneer set of rules and its impact on the development of modern law of war. It is undisputed that at a time of complete lack of any rules and legal limitations on methods and means of war and on the rights of prisoners and non-combatants, Islamic laws were a considerable progressive development. However, although they served an important purpose as Islam expanded, not all the rules were of the sort that could affect contemporary international humanitarian law.

43 Views on the relation between Islamic law of war and international humanitarian law diverge, even among Islamic scholars. A minority of these consider the conduct of war in the early stages of Islam as incompatible with modern laws of war. A considerable number of scholars express the opposite view, emphasizing that it was indeed Islam that introduced the concepts of proportionality and distinction through the institution of *jihad*. Mention is made of the Prophet's strict order to the Islamic army not to kill women, children, and the aged, and to destroy houses and other buildings only when military necessity justified it. This positive picture should be balanced by those aspects of the Islamic law of war that are fully incompatible with modern law, eg that relating to the treatment of prisoners of war.

2. Law of Treaties

44 One main chapter of the *siyar* normally dealt with issues relating to treaties. Negotiation of treaties, their conclusion, and their compliance with, and consequences of, breaches of obligations, were described and analyzed in these texts. Treaties between Muslims and others regulated various issues and could be concluded between different entities. Most were somehow linked to hostilities and their prevention. Examples are treaties relating to exchange of territories, exchange of prisoners, non-aggression, and military alliance. There was a requirement of ratification by the head of the State when a treaty was not directly made by him but by one of his representatives.

45 The basic principle of *pacta sunt servanda* and the sanctity of treaties has found expression in several verses of the *Qur'an*, including verse 2:177, which reads: 'It is not righteousness that ye turn your faces towards East or West; but it is righteousness … to fulfil the contracts which ye have made.' Verse 9:4 of the *Qur'an* declares 'The treaties are not dissolved with those idol-worshippers with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you. So fulfil your engagements with them to the end of their term … .' The same principle is mentioned in verse 5.1, 'O ye who believe! Fulfil all obligations.' The principle of compliance with a valid treaty was absolute and no dispensation on religious or other grounds was accepted in the doctrine of Islamic international law.

46 Conclusion of treaties with non-Muslims, despite the presumed state of hostility, is permitted in verse 9:7 of the *Qur'an*:

> How can the idol-worshippers demand any pledge from Allah and from His messenger, except those with whom ye made a treaty near the Sacred Mosque. As long as these stand true to you, stand ye true to them, for Allah doth love the righteous.

The duration of the treaties with non-Muslims was limited, normally to 10 years. The reason was the assumption that the state of hostility did not permit any long-term agreement.

47 Many principles of the modern law of treaties have equivalents in the *siyar*, eg the principles relating to the interpretation, amendment, and renunciation of treaties. The *siyar* also contained rules concerning termination of obligation due to fundamental changes of circumstances governing a treaty, *rebus sic stantibus*.

48 Although basic principles of the law of treaties are also parts of Islamic law, the practice of Islamic States as regards reservations to treaties in accordance with the provisions of the → *Vienna Convention on the Law of Treaties (1969)* can give rise to the issue of the compatibility of international law and Islamic law in this area. Reservations to treaties are not a principle of Islamic law, and Islamic States exercise the right of appending a reservation to a treaty according to the relevant provisions of the Vienna Convention on the Law of Treaties. The majority of these States have made reservations, particularly to human

rights conventions. Although the contents of these reservations very often vary, their function is usually to exclude those provisions of human rights conventions that are deemed not to be in harmony with Islamic law. As such, the relevant question is whether such reservations are compatible with the impermissibility principle as enshrined in Art. 19 Vienna Convention.

49 Reservations on the basis of possible incompatibility of certain provisions of a human rights treaty with Islamic law can in fact defeat the object and purpose of that treaty. In such cases, reservations can be objected to by other parties. Western countries have regularly objected to reservations that make fulfilment of the legal obligations of the Islamic States conditional on the compatibility of these obligations with *Shari'a*. An example is objections that Western countries have made to reservations by the majority of the Islamic States to Arts 2 and 16 Convention on the Elimination of All Forms of Discrimination against Women ([adopted 18 December 1979, entered into force 3 September 1981] 1249 UNTS 13).

3. Diplomatic Immunity

50 Rules concerning diplomatic relations and immunity of envoys predate the emergence of Islam. During the last 10 years of the Prophet's life when he acted as the political leader of the Islamic State, these rules were accepted and incorporated into the practice of that State. This was due to the intensive relations the Islamic State established with other countries. These relations, initially of a religious character, gradually developed a more and more political nature. The development of peaceful relations between Islam and other nations in later centuries, and the entrance of *jihad* into a state of passivity, gave diplomacy more significance, particularly in matters such as international trade, that fell outside the realm of war.

51 Like other areas of Islamic law, the relevant principles are to be found in the *Qur'an* and the *Sunna*. The *Sunna*, particularly the sayings of the Prophet (*hadith*), is the richest source of law in this area. The core principle with respect to foreign envoys was *Aman* or safe conduct. This principle had broad application and was not limited to foreign emissaries: any infidel could be granted *Aman*. The beneficiary of *Aman* was legally protected, normally for a limited time, against assault. However, there were limits to what a person who had been granted *Aman* might or might not do. The Islamic State could revoke *Aman* and punish the protected person if he committed a crime. This possibility did not exist with respect to foreign envoys, who enjoyed absolute immunity.

52 Although the principle of the immunity of an envoy in the sense of protection of his life is not disputed in Islam, some commentators express the view that immunity of diplomats was not absolute, and could be forfeited if they committed the most serious Islamic crimes, *hudud*. However, there is no explicit limitation to the immunity of emissaries in the primary sources of Islamic law.

53 Despite the generally accepted immunity for foreign emissaries in Islam, Muslim rulers did not always carefully respect this immunity in all respects. There are many examples of the detention of foreign messengers as a guarantee for the safe conduct of a State's own messengers in other countries. Other types of breach of the law of diplomatic immunity in Islamic countries have also been recorded. A case that attracted great international attention was the hostage-taking of American diplomats in Tehran in 1979. This act, which was initiated by private persons but supported by the Government of the Islamic Republic of Iran, was declared by the International Court of Justice ('ICJ') to be in violation of Iran's international law obligations (→ *United States Diplomatic and Consular Staff in Tehran Case*

[United States of America v Iran] [1980] ICJ Rep 3). Even some Muslim international lawyers considered this act to be a violation of Islamic law of diplomatic immunity.

4. Settlement of Disputes

54 The *Qur'an* contains several injunctions on the peaceful settlement of disputes. These normally relate to disputes between Muslims (see, eg, verses 4:135 and 49:9 Qur'an). Settlement of disputes by peaceful means was an established practice in pre-Islam Arabia and arbitration was the method normally applied. Arbitration had then the nature of mediation and conciliation.

55 Arbitration as a means of dispute settlement was used even in cases of dispute between Muslims and non-Muslims. One example is the arbitration between the Prophet and the Jewish tribe of Banu Qurayza, which was decided by a person chosen and approved by both parties. This became the basis for the permissibility of, and the conditions for, arbitration. Among other things, Islamic jurists later spelt out that an arbiter should bring the disputing parties to agreement on a settlement through compromise. He must be a sane and just believer with a reputation of fairness beyond any doubt. He must be chosen freely by both parties. His awards must be unconditionally accepted by both parties.

56 Despite the explicit reference to the peaceful settlement of disputes in the *Qur'an*, and the supporting practice of the Prophet in this respect, resort to arbitration or other means of peaceful dispute settlement in Islam has been rather limited. The preference of the Islamic caliphs, like political leaders of other nations, was war and diplomacy rather than arbitration.

F. Contemporary International Law and Islam

57 The development of international relations and politics since the mid-1960s, and particularly in the past two decades, has paid more attention to the possible relevance of the Islamic law of nations to today's international law. This increased attention is not due only to the practice of Islamic States, but also to the acts of private persons and other entities. Islamic laws, norms, and principles have been invoked particularly in certain areas of international law.

1. Human Rights

(a) Relation of Human Rights and Islamic Law in General

58 The relation between human rights and Islamic law has been the subject of many studies and debates in recent years. Although human rights specialists generally share a common view of the legal regime of human rights and the status of these rights, the views of Islamic law experts on the relation of that law to human rights law are very divergent. The variety of views among Islamic scholars depends greatly on how they define and interpret Islamic laws. A fundamental or traditional interpretation normally sees no compatibility or even need for compatibility between Islamic laws and human rights. A modern interpretation normally tries to see common points and show that there is or can be harmony.

59 Some human rights specialists opine that Islam and human rights are and remain incompatible. They advocate the universality of human rights and reject any exemption on the basis of culture or religion. Others, particularly some scholars with deep knowledge of *Shari'a*, believe in the relevance of religion in this context. They either argue that the assumed discord is a myth and that correct interpretation of the law rejects the presumed discrepancy, or acknowledge the discord but believe that new interpretations of Islamic imperatives can harmonize them with contemporary requirements. The schism between the

two points of view constitutes the core of the discourse on universalism versus cultural relativism in international human rights law.

60 The differing views on the compatibility of human rights and Islamic law can be traced back to the early days of the codification of modern human rights after World War II. During the discussions in the Third Committee of the UN General Assembly in 1946 of a draft of the → *Universal Declaration of Human Rights (1948)* ('UDHR'), the representative of Saudi Arabia, supported by Syria and Iraq, criticized the Draft for reflecting mainly Western values. Given the requirement for Muslim women to marry only Muslim men, he requested amendment of the phrase 'without any limitation due to religion' in Art. 16 in connection to with the right to marry. He further requested the deletion of the reference to 'freedom to change religion' in Art. 18. Similar views were expressed later by the representative of Egypt when the UDHR was adopted. Despite these objections, the Declaration was adopted with the original wording as regards freedom to marry and freedom to change one's religion. Eight Islamic States—Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Syria, and Turkey—voted for the Declaration. Saudi Arabia was the only Islamic State that abstained.

61 At the time of the negotiations within the Commission on Human Rights and the Third Committee of the General Assembly for the → *International Covenant on Civil and Political Rights (1966)* ('ICCPR'), the representatives of some Islamic States raised the issue of the unsatisfactory wording of Arts 16 and 18 UDHR. They argued again that apostasy was a grave crime in Islam incurring capital punishment. The view of these States was taken into consideration and in Art. 18 ICCPR 'freedom of changing religion' was replaced by 'freedom to have or to adopt a religion'. The same wording was used in UNGA Res 36/55 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' ([25 November 1981] GAOR 36th Session Supp 51, 171). As regards the right to marry and build a family, Art. 23 ICCPR, unlike Art. 16 UDHR, contains no reference to religion and has thus accommodated the demand of some Islamic countries.

62 Despite the adherence of the majority of Islamic States to many international human rights documents, they continued to consider the existing human rights system as Western. They sought a specific declaration on human rights from the perspective of Islam. The matter was discussed in various meetings of the foreign ministers of the Organization of the Islamic Conference (OIC), now known as the Organisation of Islamic Cooperation (→ *Organisation of Islamic Cooperation (OIC) [previously known as the Organization of the Islamic Conference]*) during the 1980s and resulted in the adoption of the Cairo Declaration on Human Rights in Islam. Those provisions of UDHR and ICCPR that have been criticized by some Islamic countries have different contents in the Cairo Declaration on Human Rights in Islam ([adopted and issued 5 August 1990] OIC Cairo 1990). Its Art. 5 recognizes the right of men and women to marriage without any restrictions stemming from race, colour, or nationality. However, no mention is made of religion. Art. 6 Cairo Declaration states that woman is equal to man in human dignity; it does not recognize equal rights in general. This should be compared with verse 23:35 of the *Qur'an*, which according to some Islamic scholars is evidence of complete equality of men and women in Islam. The verse reads: 'For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much in Allah's praise, for them has Allah prepared forgiveness and great reward.' As regards apostasy, the Declaration does not address the right of a person to change religion, but in Art. 10 prohibits others, presumably

missionaries, ‘to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism’.

63 Following the end of the → *Cold War (1947–91)* and the increased attention to universal human rights, which was manifested in the 1993 United Nations World Conference on Human Rights in Vienna, the Member States of the Arab League embarked on the adoption of an Arab Charter on Human Rights ([adopted 15 September 1994] [1997] 18 HRLJ 151). This aimed to harmonize with other international human rights instruments, but was not ratified by any Arab country. The Arab League eventually adopted the revised → *Arab Charter on Human Rights (2004)* ([adopted 22 May 2004, entered into force 15 March 2008] [2005] 12 IHRR 893). It avoids some of the controversies such as freedom to change religion (Art. 30 Arab Charter) or freedom to marry subject to restrictions due to religion (Art. 33 Arab Charter) by simply being silent on these issues or leaving them to national laws of State Parties. The Arab Charter provides for the establishment of a seven-member Committee of Experts on Human Rights, which will consider reports submitted by Member States every three years, and send its comments on these reports to the Standing Committee on Human Rights of the Arab League.

64 Differences of views on the relation between Islamic law and human rights have been present in both political statements and judicial decisions. As regards the latter, the judgments of the → *European Court of Human Rights (ECtHR)* in the past two decades have been particularly important. Perhaps the most discussed case here is *Refah Partisi (The Welfare Party and others v Turkey)* ([2001] App 41340/98, 41342/98, 41343/98, and 41344/98). The case concerned the compatibility of the decision of the Turkish Constitutional Court with Arts 9–11, 14, 17, and 18 → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* (‘ECHR’) to disband the largest political party of the State on the ground that some of its leaders were accused of advocating the introduction of Islamic law in Turkey. The chamber of the ECtHR in its judgment in 2001 decided:

> It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on *shari’a*, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts …. In the Court’s view, a political party whose actions seem to be aimed at introducing *shari’a* in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.

This judgment was upheld in 2003 by the Grand Chamber of the ECtHR. The judgment of the Court and its general statement on the compatibility or not of Islamic law with democracy and human rights have been criticized by many commentators, both renowned international experts on Islamic law and human rights specialists.

65 The Court has delivered several judgments relating to the permissibility or otherwise of wearing special cloths associated with Islam. The case *Dahlab v Switzerland* (App 42393/98 [2001]) was about a primary-school teacher in Switzerland, Lucia Dahlab. After several years during which she had worn a headscarf without any difficulty, the school authorities adopted a formal decision to prohibit her to wear a headscarf while teaching. Ms Dahlab contested the decision, but the Federal Court upheld it in 1997. She then turned to the ECtHR, which declared the application inadmissible. According to the ECtHR, the measure had not been unreasonable, having regard in particular to the fact that the children for

whom Ms Dahlab was responsible as a representative of the State were aged between four and eight, an age at which children were more easily influenced than older pupils.

66 Another case that attracted much attention was *Sahin v Turkey* (App 44774/98 [2005]), in which the ECtHR once again interpreted freedom of religion as enshrined in Art. 9 ECHR with respect to a Muslim woman. The case concerned a young Turkish university student from a traditional family of practising Muslims, who usually wore headscarves. Following a ban imposed by Istanbul University on wearing headscarves, through a circular dated 23 February 1998, she was several times refused entry to examinations and lectures. She lodged an application with the Istanbul Administrative Court, submitting that the circular infringed her rights guaranteed by, inter alia, Art. 9 ECHR. The Court dismissed the application holding that the University, under existing laws, had the power to regulate students' dress for the purpose of maintaining order. The Supreme Administrative Court dismissed the student's appeal. In its judgment of 29 June 2004, the Chamber of the European Court held unanimously that there had been no violation of Art. 9 Convention on account of the ban on wearing the headscarf. Leyla Sahin appealed against this judgment.

67 The Grand Chamber of the ECtHR delivered its judgment on 10 November 2005, referring to one of its previous cases, namely *Kalaç v Turkey* (Reports 1997-IV 1209) and reiterated its finding there that 'Art. 9 does not protect every act motivated or inspired by a religion or belief'. It continued, 'In democratic societies … it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'. The Court concluded that

> it is the principle of secularism … which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

A more or less similar conclusion was reached by the European Commission of Human Rights in *Karaduman v Turkey* ([1993] European Commission on Human Rights Decisions and Reports 93). The case concerned a Turkish woman who had been denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The Commission found no interference with her Art. 9 right because:

> by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.

68 In a more recent case, the ECtHR has developed its approach to the relation of Islam and human rights as enshrined in the Convention. The case *SAS v France* (App 43835/11 [2014]) is about a French law that prohibits wearing face coverings—burqa—in public spaces. The applicant, a Muslim French national, challenged the blanket ban on the basis that it infringed, among other things, her rights under Arts 8 and 9 ECHR. The Court acknowledged that the evidence indicated that the French legislature had intended the law to address issues of public safety that might arise from the concealment of faces in public. However, it rejected the French Government's reasoning that the law was intended to promote respect for gender equality and respect for human dignity. The Court found that

the impugned ban could be justified in so far as it seeks to guarantee the conditions of 'living together' or 'respect for the minimum requirements of life in society'. According to the Court this concept is one facet of the 'rights and freedoms of others' within the meaning of Arts 8 and 9.

69 Introduction of the concept of 'living together' as a basis for justification of the ban was unprecedented in the practice of the Court. In a dissenting opinion, two judges expressed strong reservations about this concept, and argued that 'living together' is a far-fetched and vague concept that does not fall directly under any of the rights and freedoms guaranteed within the Convention. This view is shared by some commentators who consider it a worrying development. Despite the criticism, the Court has repeated its 'living together' argument in two later cases decided in 2017 about Belgium's ban on full-face Islamic veils (*Dakir v Belgium* [ECtHR] App 4619/12 [2017] and *Belcacemi and Oussar v Belgium* [ECtHR] App 37798/13 [2017]).

70 The rulings of the ECHR have been extensively commented on, and in some cases criticized, primarily by scholars in Islamic countries, for being simplistic and unsupported. The Court has been further criticized by some commentators for having a tendency to mistake Islam for Islamic fundamentalism. The critics refer eg to *Lautsi and others v Italy* (App 30814/06 [2011]), which was about the permissibility of using Christian religious symbols, as an indication of the Court's possible bias against Islam.

71 The rulings of the Court in these cases should be compared with some decisions of the → *Human Rights Committee* ('UN HRC', 'HRC', or 'Committee') on petitions related to Art. 18 ICCPR. One such petition, with a factual content similar to the above-mentioned *Sahin v Turkey* case, was *Raihon Hudoyberganova v Uzbekistan* (UN HRC 'Communication No 931/2000 *Raihon Hudoyberganova v Uzbekistan*' [5 November 2004] UN Doc CCPR/C/82/D/931/2000). The petition concerned a female university student who had been excluded from the university for refusing to remove her headscarves (*hijab*). In this case also, the exclusion was based on the provisions of the university's new regulations. The Committee found Uzbekistan in violation of Art. 18 Covenant. In two more recent decisions regarding the so-called French 'burqa ban' (UN HRC 'Communication No 2747/2016 *Yaker v France*' [17 July 2018] UN Doc CCPR/C/123/D/2747/2016 and UN HRC 'Communication No 2807/2016 *Hebbadj v France*' [17 July 2018] UN Doc CCPR/C/123/D/2807/2016), the HRC reached a conclusion quite opposite to the finding of the ECtHR in *SAS v France* (see para 68 above). The HRC found in *Yaker* and *Hebaddj* that the French law on the 'burqa ban' violated not only Art. 18 ICCPR on the right to freedom of thought, conscience and religion, but also Art. 26 on the right to equality before the law.

72 Mention can also be made of some judgments of the Court of Justice of the European Union ('CJEU') about dismissal of Muslim women workers because of their refusal to remove their Islamic headscarves during working hours. In these cases, the Court found such dismissal incompatible with the requirements of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; see eg Case C/188/15, decided on 14 March 2017.

73 Concerning Islam and human rights, in addition to the relation between the two in general, certain areas of human rights should be specifically commented on.

(b) Freedom of Expression

74 Freedom of expression, freedom of speech, and freedom of thought are often addressed at the same time when discussing such freedoms from the perspective of Islamic law. Irrespective of how such freedoms and possible limitations to them are defined, Islamic scholars generally underline the fundamental character of these freedoms in Islam and their status as a precondition for the enjoyment of other rights and freedoms. However, what is common in analyses is the distinction made between apposite and evil speech. The purpose of this distinction is to justify limitations regarding certain sorts of statement that have legal sanctions in Islamic law, such as slanderous accusations, seditious speech, and blasphemy. Freedom of speech applies to praiseworthy and apposite expression. This distinction, and its ensuing legal and moral constraints on certain speech and expressions, have been compared by some Islamic commentators with those limitations on freedom of expression recognized under Art. 19 ICCPR.

75 To support the premise of recognition of freedom of expression in Islam, reference is made to verse 55:1–4 of the *Qur'an* ('Allah Most Gracious, it is He Who has taught the Qur'an; He has created man; He has taught him). Islamic law specialists underline that although God has given humankind the power and freedom of expression, He has at the same time forbidden evil speech. This assertion is based on, among others, verse 24:19 of the *Qur'an* ('Those who love to see scandal published among the Believers, will have a grievous Penalty in this life and in the Hereafter'). However, the prohibition of evil speech does not seem to be absolute, since according to verse 4:148 of the *Qur'an*, 'Allah does not love the public utterance of hurtful speech unless (it be) by one to whom injustice has been done'.

76 The relation between freedom of expression and Islam has been much debated in the past two decades. The main issue has almost always been whether a certain statement or act should be considered as an exercise of freedom of expression or as an act falling under the limitations to such freedom. The core issue has always been how to decide the scope of the limitations and whether the abuse or insult of a religion is comparable to other limitations, such as libel in UK law or denial of the Holocaust in the law of certain European countries.

77 Probably the most famous case is the death-sentence, *fatwa*, issued by the Iranian Revolution's leader Ayatollah Khomeini in 1989 against the British writer Salman Rushdie. The controversy concerned Rushdie's book *Satanic Verses*, which was considered by many Muslims to be blasphemy. Some went even further and considered it apostasy since the book was written by a Muslim. The death sentence was generally condemned by non-Muslim countries, and human rights specialists stressed Rushdie's right to freedom of expression.

78 The strong reaction of people in some Islamic countries to the publication of *Satanic Verses* was repeated in September 2005 after the publication of Prophet Muhammad cartoons in the Danish newspaper *Jyllands-Posten*. The publication of a cartoon depicting the Prophet Muhammad as a dog in a Swedish local daily, *Nerikes Allehanda*, in August 2007, the release by the Dutch lawmaker Geert Wilders in 2008 of a documentary film considered by many Muslims as defaming Islam, and the release of the anti-Islam short film 'Innocence of Muslims' in 2012 by the Egyptian filmmaker Nakoula Basseley Nakoula, aroused similarly strong protests from the people and the governments of Islamic countries. In all these cases, European and other Western countries have both individually and in various international organizations invoked freedom of expression and speech to justify

these publications, whereas the Islamic States and the OIC have qualified the publications as blasphemous and thereby not permissible as an exercise of the freedom of expression.

79 The question of defamation of Islam became a main reason for introducing the subject of 'defamation of religions' to the agenda of the UN Human Rights Commission in the late 1990s. This Commission and its successor the UN Human Rights Council adopted annual resolutions on this subject between 1999 and 2010. The last Human Rights Council resolution on 'Combating Defamation of Religions' was Resolution 13/16 of 25 March 2010 (UN Doc A/HRC/RES/13/16). Even the UN General Assembly became involved in the subject in 2005 after the publication of the cartoons in the Danish newspaper and annually adopted resolutions on defamation of religions until 2010. The last General Assembly resolution was Resolution 65/224 'Combating Defamation of Religions' of 21 December 2010 (UN Doc A/RES/65/224). The driving force behind all these resolutions was the Organisation of Islamic Cooperation, which has regularly condemned all publications and statements that are assumed to affront Islam. The resolutions of UN bodies on combating defamation of religions were usually adopted by the positive votes of China, Russia, and many developing countries, including Islamic countries, while the majority of European and other Western countries normally vote against the resolutions.

80 Given the declining support for the adoption of further resolutions with the same content, the OIC changed its approach in 2011. The purpose was to gain more support from the Western countries. This shift in strategy was reflected in the Human Rights Council Resolution 16/18 of 24 March 2011 on 'Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons Based on Religion or Belief' (UN Doc A/HRC/RES/16/18). In this way, the emphasis was shifted from protection of religions to protection of believers. The General Assembly endorsed this shift by adopting the similarly titled Resolution 66/167 (UN Doc A/RES/66/167) on 19 December 2011.

(c) The Rights of the Child

81 Some commentators assume that the rights of the child under Islamic law are insufficient compared to those rights under the international human rights system. Those Islamic law specialists known for their modern interpretations emphasize that there are numerous areas of compatibility between the two legal systems.

82 All 57 Member States of the OIC, except for Somalia, have ratified the Convention on the Rights of the Child ('CROC') ([adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3). 22 of these ratifying States have appended reservations or declarations on the relation between Islam and the CROC. These reservations are generally of two kinds; they are either general and apply to the whole CROC and any unspecified provision or part therein that may be in conflict with *Shari'a* (Iran, Qatar, and Saudi Arabia), or are limited to specific provisions of the CROC (the other Islamic countries that have entered reservations).

83 Several provisions of the CROC may, prima facie, come into conflict with Islamic laws. The definition of 'child' is one example. Art. 1 CROC considers everybody under the age of 18 as a child 'unless under the law applicable to the child, majority is attained earlier'. Many Islamic States have formally adopted this age as the age of maturity. However, as regards rights and obligations, in many cases the dictates of *Shari'a* are in fact decisive for the determination of maturity, which may normally be reached earlier or much earlier than the age of 18. This difference in defining the legal borderline between childhood and adulthood has consequences for the rights and obligations of the child. As regards responsibilities, the most important issue is the criminal responsibility and conviction of persons under the age of 18 to capital punishment or life imprisonment, which has occurred

in recent years in several Islamic countries, eg Iran, and is in contradiction to Art. 37 CROC.

84 As regards rights, a clear case of discrepancy between Islamic law and human rights law is the status of children born out of wedlock. According to Islamic law, such a child is illegitimate and his/her paternity cannot be established. He or she has no right to custody, guardianship, or inheritance from the father. Accordingly, these children are obviously discriminated against under Islamic law, in contravention of Art. 2 (1) CROC, which prohibits all forms of discrimination. While some Islamic States have, through national legislation, tried to mitigate the effects of this discrimination, the provisions of Islamic law about unmarried mothers and children born out of wedlock have been effectively implemented, occasioning criticism by international supervisory organs such as the Committee on the Rights of the Child and the Human Rights Committee, eg in Oman.

85 Other problematic questions with respect to the relation between Islamic law and the rights of the child under international law are child marriage, different ages of marriage for boys and girls, different rights and obligations of the mother and the father with respect to custody and guardianship, discrimination on the basis of religion, and adoption. The latter, as is normally understood in legal systems, is not recognized in Islamic law. Instead the Islamic institution of *Kafalah* is used for the same purpose. The difference lies in the types of right that the child of unmarried parents can enjoy under these two institutions. The Convention refers in Art. 20 to both institutions.

86 As a complement to the Convention on the Rights of the Child, the OIC adopted the Covenant on the Rights of the Child in Islam in June 2005 (OIC/9-IGGE/HRI/2004/Rep. Final). Certain provisions in this Covenant have the ambition of doing away with parts of the criticism that have been addressed to the Islamic States in this regard. The Covenant has not entered into force.

(d) The Rights of Women

87 The rights of women and religious minorities under Islamic law are usually two areas that are singled out as prime examples of discrimination. As regards women's rights, the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') is the most important, and at the same time the most controversial, international document from the perspective of Islamic law.

88 The point of departure for the CEDAW is the enjoyment by women, on an equal footing with men, of their human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. Views on the content of the CEDAW and the nature of its demand for equality between men and women are diverse. As regards its relation with Islamic law, a considerable number of commentators argue that the CEDAW is not compatible with the *Shari'a*. The reason is the existence of several verses in the *Qur'an* which are evidence of gender inequality and discrimination against women. Given this possible discrepancy, three Islamic States, namely Iran, Somalia, and → *Sudan*, have not signed or ratified the CEDAW and 19 Islamic countries have ratified it with reservations directly referring to the *Shari'a*.

89 An opposite view is that equality of men and women is clearly spelled out in the *Qur'an*. Reference is made to verse 33:35 in support of this proposition. This verse reads:

> For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much in Allah's praise, for them has Allah prepared forgiveness and great reward.

90 Some verses of the *Qur'an* are referred to as bases of discrimination against women. Probably the most relevant in this respect is verse 2:228, which in a general and plain manner declares the advantage of men over women ('And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them'). This verse deals in fact with the question of divorce, and underlines in various ways the supremacy of the rights of men over women. For instance, it acknowledges that, in case of pregnancy, the husband's wishes shall supersede the wife's wishes, if he wants to remarry her.

91 Another area of discrimination is polygamy. According to verse 4:3, 'If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly with them, then only one, or a captive that your right hands possess.' No similar right is recognized for women. Some Islamic law scholars have interpreted this verse as having the main purpose of doing justice to orphans, widows, and war captives. In their view, the verse expresses a right for women when they outnumber men and it becomes an obligation for society and men to discharge this right.

92 The status of women in at least one more area seems to be inferior to that of men, namely the right to inheritance. According to verses 4:11 and 4:12 of the *Qur'an*, a woman inherits half what a man inherits. The *Qur'an* rule on this matter is unequivocal. Some commentators justify this discrimination by referring to the obligation that a man, in contradistinction to a woman, has, in Islam, to economically take care of the whole family. According to them, the discrimination is thus not gender-related but is based on different economic responsibilities. A number of modern readings of this verse suggest that men do not automatically receive double shares and that the principle of proportional distribution should be applied.

93 One verse of the *Qur'an* that has often been criticized by supporters of gender equality is verse 4:34:

> Men are the protectors and maintainers of women, because Allah has given the one more strength than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in the husband's absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them first, next refuse to share their beds, and last beat them.

However, modern interpretations suggest that the injunction should not be taken literally. The sanctions prescribed in the verse are, according to these interpretations, symbolic and shall not necessarily be construed as physical punishments.

94 In sum, as regards gender equality Islamic law scholars can be roughly categorized into two groups. Adherents of the conservative school of interpretation argue that the principle of equality is in contrast to Islamic law since it tries to make equal those who under the *Shari'a* must be treated differently. The other group has a modern approach, insisting on the compatibility of the *Qur'an*' discriminatory injunctions with the principle of equality. The latter are aware that a fundamentalist interpretation of the verses of the *Qur'an* relating to

women’s rights creates a tension between these rights and international human rights standards. They contend that an interpretation based on the context and with due regard to the purpose of the *Qur’an* can ensure conformity with these standards. This proposition has been challenged by many international human rights experts.

(e) The Rights of Religious Minorities

95 As regards the rights (and obligations) of religious minorities in the *dar-al-Islam* or in other areas under the control of the Islamic State, there are detailed rules in Islamic law, which date back to the time of Islam’s inception. Non-Muslims (*dhimmis*), who were *ahl-al-Kitab*, ie people of the Book or Scriptures (consisting primarily of Christians and Jews), were tolerated communities in the Islamic State. They had the right to security of life and property, but did not enjoy full citizenship. The protection of other religious minorities and their rights were governed by the agreements that they concluded with the Muslim ruler.

96 The rights and obligations of the *dhimmis* gradually developed in the doctrine of Islamic law, and were limited to a few well-defined duties that they had to fulfil in order to enjoy the protection that the Islamic State was to offer them. The obligations included the duty of every *dhimmi* to pay a sum of money, the *jizya*, as a tax for disbelief and the duty to abstain from marrying a Muslim woman. These legal duties were not strictly implemented all the time, and in reality non-Muslims were treated differently at different places and different times. Various degrees of discrimination against non-Muslims were, however, at all times patent and in force.

97 Some Islamic scholars are of the view that despite certain differences between the status of Muslims and that of non-Muslims in the law and practice of Islam, their equality is well established in some verses of the *Qur’an* and in the *Sunna*. Mention is made in this context of verse 49:13 (‘O mankind! We created you from a single pair of a male and a female, and made you into nations and tribes, that ye may know each other. The most honoured of you in the sight of Allah is he who is the most righteous of you.’). There are also a number of *hadith* (sayings) attributed to the Prophet Muhammad as evidence of the protection of non-Muslims in Islam (‘Whoever persecuted a non-Muslim or usurped rights or took work from him beyond his or her capacity, or took something from him or her with ill intentions, I shall be a complainant against him or her on the Day of Resurrection’).

98 The contemporary practice of Islamic States with respect to religious minorities is divergent. In the countries where Islamic law is State law, discrimination is more manifest and multifaceted. Normally Christians and Jews, as people of the Book, have certain guaranteed rights whereas other faiths seldom enjoy any specific rights enshrined in laws. In some Islamic countries, discrimination is implemented informally by imposing different sorts of limitation on the activities of religious minorities. These limitations normally relate to the right to assemble for religious purposes, to establish charitable institutions, to write and circulate religious publications, to celebrate religious holidays, and to participate in similar activities.

99 Another area of discrimination with important practical consequences is access to public office. Religious minorities are often denied such access in most Islamic countries. This discrimination is not always explicitly spelled out in laws, but is exercised in practice. The degree of limitation to the right of access to public office varies in various countries. In some, the limitation applies only to high-ranking positions such as cabinet ministers, high military commanders, and high judicial authorities. In others, particularly those with

Islamic law as State law, the limitations are in principle all-embracing, and a non-Muslim's access to public office is a rare exception subject to specific authorization.

100 Religious discrimination takes place even though all relevant international human rights documents which address the question of religious discrimination are formulated with due regard to certain demands of Islamic countries. The language of these documents, eg the 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, was several times amended before its adoption, just to accommodate the demands of Islamic States and to encourage them to work for the equality of religions.

101 Most recent commentators who propagate modern interpretations of Islamic law believe that it is possible to find compatibility with practices advocated by Western States on issues concerning the rights of women and religious minorities. They stress that the poor human rights record of many Islamic States is not due to the dictates of Islamic law, but rather to domestic politics and constitutional inadequacies of these States.

(f) Criminal Law

102 One other area of possible conflict between international human rights law and Islamic law is criminal law. What is generally referred to as Islamic criminal law consists of a number of rules relating to the punishment of certain categories of crime, together with aspects of criminal procedure relating to these crimes. Like all other criminal law systems, the categorization of crimes in Islam is based on their seriousness.

103 The most serious crimes are *Hudud* (an Arabic word for limits), which are considered to be crimes against God. There is no general consensus among all schools of Islamic law on all crimes that are included in *Hudud*. Apostasy, revolt against the ruler, drinking alcohol, highway robbery, adultery, and slander are examples of crimes that may be placed in this category. The second group of crimes is called *Qesas* (an Arabic word for retaliation) which is the Islamic perception of the principle of an eye for an eye. *Qesas* includes crimes such as murder and the intentional or unintentional infliction of physical injury. There are mandatory penalties in *Shari'a* for *Hudud*. They include amputation of hands, flogging, and death, sometimes through stoning. The sanctions for *Qesas* are either retaliation or compensation for the victim or his/her family. The third category of crimes is called *tazir*. Islamic law prescribes no specific penalty for these crimes and the punishment can be decided at the discretion of the judge or by a parliamentary act.

104 *Hudud* and *Qesas* punishments, such as amputation of hands and feet or stoning, reasonably fall within the definition of torture as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ([adopted 10 December 1984, entered into force 26 June 1987] 1465 UNTS 112). Nevertheless, of those Islamic countries that have so far ratified the Convention only Qatar, upon its accession to the Convention, made reservation for any 'interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion'. Several Western countries objected to this reservation, which was withdrawn on 14 March 2012. Pakistan has appended a declaration to its ratification to the effect that provisions of the Convention 'shall be applied to the extent that they are not repugnant to the provisions of … the Shari'a law'.

105 The fact is that Islamic criminal law is not applied in the majority of the member States of the Organisation of Islamic Cooperation. There is thus no need for reservation to the Convention in this respect. There are nevertheless countries that have ratified the Convention but exercise Islamic criminal penalties. One example is Saudi Arabia. For these countries and also those Islamic States that fully apply Islamic law but are not parties to the

Convention, eg Sudan and Iran, Islamic punishments are not equal to torture since they are predetermined in *Shari'a* as the will of God. Torture and cruel treatment in the sense of the Convention is a human-made concept. Art. 38 Constitution of Iran specifically prohibits all forms of torture for the purpose of extracting confessions or acquiring information. This arguably means that all Islamic criminal punishments that are enforced in Iran are not considered by that country as torture or as cruel, inhuman, or degrading treatment.

2. International Terrorism

106 The association of international terrorism as a matter of international law with Islam has its origin in the fact that a number of allegedly terrorist operations in the past half a century are attributed to Muslims. Such attacks have often been against Western interests in general. The killings or other criminal acts that have taken place in the context of the Middle East conflict have particularly contributed to the linkage of Islam to international terrorism. This linkage became even stronger after the Al Qaeda attacks on the World Trade Center in 2001.

107 The differences of opinion regarding the definition of terrorism and the legitimacy or otherwise of an act of violence that can arguably be qualified as an act of terrorism, are also reflected in the views of Islamic scholars who opine on the question of international terrorism. A number of Muslim commentators emphatically reject terrorism due to its contradiction with the very nature and purpose of Islam. Others try to justify certain acts of violence by referring to the problems that have instigated such acts as a reaction to an allegedly illegal situation. The acts of Palestinians against Israelis (→ *Arab-Israeli Conflict*) and those of Muslims in → *Kashmir* against Hindus are two examples.

108 Yet a third group of Islamic law specialists has a fundamental approach to the question of terrorism. They justify any act of violence against Western interests, particularly against American interests, as a *jihad* and thereby a duty for Muslims. This fundamentalist approach is adhered to by the jihadist movement that has been considered responsible for the majority of terrorist acts since early 1980s. The spiritual father of this movement is the Egyptian Islamist Sayid Qutb (1906–1966), who also is regarded as the inspiring source of Al Qaeda.

109 The individual practice of the Islamic States with respect to international terrorism is very divergent. Although they generally condemn acts of terrorism that are specifically regulated at the international level, such as the unlawful seizure of aircraft or crimes against internationally protected persons, their reaction against other types of terrorist act, such as suicide bombings, can vary considerably. From the perspective of international law, the attitude of the OIC as the overarching assembly of all Islamic countries is important.

110 Given the *raison d´être* of the OIC and the fact that the Palestinian issue has always headed the agenda of this organization, it has repeatedly underlined the need for a generally accepted definition of terrorism and a distinction between terrorism and → *national liberation movements*. A major event in the work of the OIC with respect to international terrorism is the adoption of the Convention of the OIC on Combating International Terrorism on 1 July 1999. The Arab members of the OIC had, in April 1998, adopted a similar document within the framework of the Arab League, namely the Arab Convention on the Suppression of Terrorism (signed 22 April 1988, entered into force 7 May 1999).

111 The OIC Convention condemns terrorism as a breach of Islamic law principles and fundamental human rights. It also provides a rather comprehensive definition of terrorism at the same time as it refers to other treaties related to various types of terrorist acts. It is noteworthy that the Convention underscores that peoples' struggle against foreign aggression and colonial or racist regimes is not to be considered a terrorist crime.

112 After the terrorist attacks against the United States on 11 September 2001, the extra session of the foreign ministers of the OIC issued a communiqué on 10 October 2001 strongly condemning the 'shameful terrorist acts' as being 'opposed to the tolerant message of Islam which spurns aggression, calls for peace, co-existence, tolerance and respect among people'. The communiqué 'further rejected any attempts alleging the existence of any connection or relation between the Islamic faith and the terrorist acts'. Another extraordinary session of the foreign ministers of Islamic countries in April 2002 specifically addressed the question of international terrorism and adopted the Kuala Lumpur Declaration on International Terrorism. The Declaration once again rejects any attempt to link Islam and Muslims to terrorism. The Declaration also provides for the establishment of a 13-member committee of ministers against international terrorism.

113 In sum, the role of the OIC in combating international terrorism should not be overestimated. There are at least two important obstacles to effective OIC action. Most terrorist activities in recent years have been carried out by organizations that are not fully under the control of the OIC Member States. Moreover, some Islamic countries have been regularly criticized as supporters of international terrorism.

Select Bibliography

M Hamidullah *Muslim Conduct of State* (Sh Muhammad Ashraf Lahore 1945).

M Khadduri *War and Peace in the Law of Islam* (The Johns Hopkins Press Baltimore 1955).

H Kruse 'The Foundation of Islamic International Jurisprudence' (1955) 3 Journal of Pakistan Historical Society 231–67.

J Schacht *An Introduction to Islamic Law* (Clarendon Press Oxford 1964).

S Mahmassani 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117 RdC 201–328.

MT Al-Gunaymī *The Muslim Conception of International Law and the Western Approach* (Nijhoff The Hague 1968).

A Yusuf Ali *An Interpretation of the Holy Qur-an with Full Arabic Text* (Sh Muhammad Ashraf Lahore 1975).

M Hamidullah *Muslim Conduct of State: Being A Treatise of Muslim Public International Law, Consisting of Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction* (7th edn Ashraf Lahore 1977).

J Farsi *Hoquqe beinolmelale eslami* (in Persian, Islamic International Law) (Jahan Ara Publications Qom 1979).

H Kruse *Islamische Völkerrechtslehre* (2nd edn Brockmeyer Bochum 1979).

MC Bassiouni 'Protection of Diplomats under Islamic Law' (1980) 74 AJIL 609–33.

M A Boisard 'On the Probable Influence of Islam on Western Public and International Law' (1980) 11 *International Journal of Middle East Studies* 429–50.

F Hassan *The Concept of State and Law in Islam* (University Press of America Washington DC 1981).

MJM Bossuyt *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (Nijhoff Dordrecht 1987).

H Moinuddin *The Charter of The Islamic Conference and Legal Framework of Economic Co-operation among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC* (Clarendon Press Oxford 1987).
AA al-Na'īm *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives—A Preliminary Inquiry* (1990) 3 HarvHumRtsJ 13–52.
AA al-Na'īm *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press Syracuse 1990).
DE Arzt 'The Application of International Human Rights Law in Islamic States' (1990) 12 HumRtsQ 202–30.
DA Westbrook 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 VaJIntlL 819–96.
MR Ziayee Bigdeli *Eslâm va hoqûqe beinolmelal* (in Persian, Islam and Human Rights) (2nd edn Ganje Dânesh Publications Tehran 1996).
MH Kamali *Freedom of Expression in Islam* (Islamic Texts Society Cambridge 1997).
FH Syed 'Structural Reforms in the OIC' (1997) 9 Iranian Journal of International Affairs 382–99.
A Zemmali *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire* (Pédone Paris 1997).
SA Aldeeb Abu-Sahlieh 'Les mouvements islamistes et les droits de l'Homme' (1998) 34 RTDH 251–90.
M Charfi *Islam et liberté: Le malentendu historique* (Michel Paris 1998).
CG Weeramantry *Islamic Jurisprudence: An International Perspective* (Macmillan Press Houndmills 1988).
MI Al-Shaybānī *The Islamic Law of Nations, Shaybānī's Siyar* (M Khaduri [ed] The Johns Hopkins Press Baltimore 2002).
J Cockayne 'Islam et Droit international humanitaire: du "choc de civilisations" au "dialogue entre civilisations"' (2002) RevICR 597–626.
HM Zawati *Is Jihād a Just War?: War, Peace, and Human Rights under Islamic and Public International Law* (Edwin Mellen Press Lewiston 2002).
MA Haleem AO Sherif and K Daniels (eds) *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (Tauris New York 2003).
MA Baderin *International Human Rights and Islamic Law* (OUP Oxford 2003).
CN Brower and JK Sharpe 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 AJIL 643–56.
MA al-Midani (ed) *Les droits de l'Homme et l'Islam: Textes des organisations arabes et islamiques* (Université Marc Bloch Strasbourg 2003).
M Munir 'Public International Law and Islamic International Law: Identical Expressions of World Order' (2003) 1 Islamabad Law Review 369–430.
J Rehman *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilisations' in the New World Order* (Hart Oxford 2005).
S W al-Zuhili 'Islam and International Law' (2005) 87 IRRC 269–83.
N Lerner *Religion, Secular Beliefs and Human Rights: 25 Years after 1981 Declaration* (Nijhoff Leiden 2006).
SVR Nasr *The Shia Revival: How Conflicts within Islam Will Shape the Future* (Norton New York 2006).
N Ghanea A Stephens and R Walden (eds) *Does God Believe in Human Rights?: Essays on Religion and Human Rights* (Nijhoff Leiden 2007).
AE Mayer *Islam and Human Rights: Tradition and Politics* (4th edn Westview Press Boulder 2007).

N Abiad *Sharia, Muslim States and International Human Rights Obligations: A Comparative Study* (British Institute of International and Comparative Law London 2008).
AA al-Na'ĭm *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press Cambridge 2008).
MA Baderin (ed) *International Law and Islamic Law* (Ashgate Aldershot 2008).
M Kadivar *Haqolnas: Eslâm va hoqûqe bashar* (in Persian, *Haqonâs: Islam and Human Rights*) (Kavir Publications Tehran 2008).
A al-Ahsan 'Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC's Cairo Declaration of Human Rights' (2008–2009) 24 Journal of Law & Religion 569–97.
A Sachedina *Islam and the Challenge of Human Rights* (OUP New York 2009).
AM Emon M Ellis and B Glahn *Islamic Law and International Human Rights Law* (OUP Oxford 2012).
AA al-Na'ĭm 'Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective' (2013) 39 Pepperdine Law Review 1231–55.
ML Frick and AT Müller (eds) *Islamic and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Nijhoff Leiden 2013).
T Kayaoğlu *A Rights Agenda for the Muslim World? The Organization of Islamic Cooperation's Evolving Human Rights Framework* Brookings Doha Center Analysis Paper No 6 (2013).
Z Mir-Hosseini K Vogt L Larsen and C Moe (eds) *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (Tauris London 2013).
KLH Samuel *The OIC, the UN, and Counter-Terrorism Law-Making: Conflicting or Cooperative Legal Orders?* (Hart Publishing Oxford 2013).