

INTRODUCING AN INTRICATE RELATIONSHIP

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GENESIS AND MOTIVATION

A book project on a subject like “Islam and International Law” is not simply born on a whim. Its genesis can be traced back to 2010 when the two editors of the present volume started a research project at the University of Innsbruck which is dedicated to exploring a special aspect of the intricate relationship of Islam and international law.

From the 15th century on, the *casa de Austria*, i.e. the Habsburg dynasty, established an empire with universal aspirations in a good part of Europe as well as in the so-called “New World”. Its expansion in Eastern and South Eastern Europe brought it into contact, and increasing conflict, with another empire pursuing its aspirations no less ambitiously. Over the course of the 14th and 15th centuries, the Ottoman dynasty turned the territories under its control into the most powerful political entity under Islamic rule at the time. In the wake of the conquest of Constantinople in 1453 and the investiture with the caliphate in the wake of the conquest of Egypt and the fall of the Fatimid caliphate in 1517,¹ the Ottoman Empire represented—and would continue to represent for centuries to come—the Islamic reference point *par excellence* for the European powers, particularly the Habsburg Empire.

In Austria, the two sieges of Vienna by Ottoman forces—in 1529 and 1683, respectively—are still evoked from time to time in the media and by politicians, but also in academic discourse, to document the rivalry of the two powers for territorial aggrandizement and regional hegemony, as well as the irreconcilability of the religious beliefs, i.e. Christendom and Islam, underpinning their claims to power and predominance. At the same time, the many other points of contact between the two empires (on the economic, cultural, diplomatic, etc. levels) have not entered public awareness to a comparable degree. In particular, it is not common knowledge that, beyond and parallel to hostile attitudes and continuing belligerent

¹ See, e.g., Josef Matuz, *Das Osmanische Reich. Grundlinien seiner Geschichte* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2008), 82f.

exchanges, the Habsburg and the Ottoman Empires already began to develop treaty bonds in the early 16th century and subsequently established formal diplomatic relations.

Against this background, the above-mentioned research project aspires to identify the contribution that this special bilateral relationship has made to the formation of international law and, more specifically, to assess whether there has been any “measurable” impact of Islamic (international) law or *siyar*² on the development of this relationship. The three centuries of Austro-Ottoman treaty practice the project focuses on (1500–1800) are not an arbitrary timeframe. They constitute the formative period of modern international law and saw the publication of the *chefs d’œuvre* of Francisco de Vitoria (*De Indis*, 1532), Alberico Gentili (*De iure belli commentationes tres*, 1589) and Hugo Grotius (*De iure belli ac pacis libri tres*, 1625), to name only a few.

In its interest and research questions, the project does not operate in a vacuum, but can draw upon a certain tradition in international law scholarship. It can be safely said that the idea of Grotius as the towering father figure of international law, who created the discipline *ex nihilo*, as it were, has long since given way to a more sophisticated conceptualization of the genesis of modern international law.³ Different attempts have been made to uncover the processes that shaped the formation of the discipline, to transcend the monolithic explanations of its roots and thereby draw a more complex picture of its origins, namely by including Islamic (international) law as a formative factor.⁴ Obviously, one will tend to look first at the earliest interchanges between European powers and their Islamic counterparts from the 13th century on, which can be seen, for instance, in the form of commercial treaties and related arrangements around the Mediterranean Sea between medieval Italian city states as such as Venice,

² Using Arabic words in the English language poses certain difficulties and requires compromise. Bearing this in mind, Arabic terms of art and frequently used names which are included in the Index are transcribed throughout the book, reflecting the original Arabic spelling as accurately as possible. However, diacritics are not used for the remaining names, for original book titles and other bibliographical references.

³ As to this aspect see, for instance, Andreas Th. Müller, “Hugo Grotius”, in *Außenseiter der Philosophie*, eds. Helmut Reinalter and Andreas Oberprantacher (Würzburg: Königshausen & Neumann, 2013), 54.

⁴ See notably Roberto Ago, “Pluralism and the origins of the international community”, *Italian Yearbook of International Law* 3 (1993): 3ff.; Marcel A. Boisard, “On the Probable Influence of Islam on Western Public and International Law”, *International Journal of Middle East Studies* 11 (1980); see more generally Wilhelm W. Grewe, “Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des ‘europazentrischen’ Bildes der Völkerrechtsgeschichte”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 42 (1982).

Genoa, Pisa, Amalfi, but also cities like Montpellier and Barcelona and later on France on the one hand, and Muslim States on the other hand (e.g. Egypt, Muslim potentates in Southern Spain and in North Africa). The treaty relationship between the Ottoman and Habsburg Empires falls into an era which, in terms of commercial activity, can be seen as less vibrant and concerning a more peripheral region. However, the temporal overlap with the formative period of modern international law combined with the fact that Vienna as the former Habsburg residence preserves an impressive share of the pertinent historical documents, including the treaty originals,⁵ motivated the project initiators to tread this path in order to contribute a piece to the delicate mosaic which is the project of establishing a complex genealogy of modern international law.

In framing the research project, it quickly became clear that the relevant questions did not only pertain to international law. The research had to be conducted at the interface of international law, history (of ideas), Ottoman and Arabic studies, etc. Thus, there was an obvious need for the project to endorse an interdisciplinary approach, i.e. a “plurality of perspectives”. It was out of this experience that the idea arose to complement, and enrich, the efforts within the research project and its relatively specific focus with a broader-oriented international conference with the aim of bringing together various views and approaches regarding the wider topic of “Islam and International Law”.

To this effect, a call for papers was launched in October 2011, and from a vast amount of submissions the twenty most promising ones were selected to be presented and discussed at the “Innsbruck Conference” which took place on 14/15 June 2012 at the University of Innsbruck and which brought together 150 participants from more than 20 countries. The former Judge at the International Court of Justice (ICJ) and Former Prime Minister of the Hashemite Kingdom of Jordan, H.E. AWN S. AL-KHASAWNEH, kindly agreed to deliver the Keynote Speech on *Islam and International Law* (→ ch. 2) in his capacity as the Chairman of the “Committee on Islamic Law and International Law” of the International Law Association (ILA). In addition, the presence and active collaboration of other Committee

⁵ See the collections of the *Haus-, Hof- und Staatsarchiv*, i.e. the section of the Austrian State Archives keeping the archival heritage of the Habsburg Empire and dynasty; <www.oesta.gv.at/site/6150/default.aspx> (accessed 14 December 2012). On this occasion, we would like to extend our gratitude to Dr. Ernst Petritsch who is in charge of the Ottoman collections and who was a continuous source of support in view of his profound knowledge of the historical sources and relevant background information.

Members⁶ testified to the links of the research project with the on-going work of the Committee.⁷

SELF-CENTRISM AS A DIAGNOSIS AND CHALLENGE

The relationship of international law and Islamic law in particular, and Islam and the so-called “Western” world in general, direly suffers from ignorance, oversimplification, and prejudice. Attitudes of self-centrism and self-referentialism abound. The situation resembles the mindset of a so-called ἰδιώτης, an “idiot”, who in ancient Athens was a person solely focusing on one’s private matters, on one’s own limited sphere of understanding and interest, but not involving himself in public affairs, and refusing to be engaged in the public space. What applied to the *agora* as a space of political deliberation and decision-making then, still holds true for the *agora* of scholarly exchange and weighing of ideas.

There can be no doubt that the diagnosis of widespread self-centrism affects actors on all sides of the discourse. It applies to various Islamic movements and their real or imputed claims to absolute truth as well as to their Christian counterparts, to certain representations of human rights absolutism as well as to persistent Western complacency and feelings of superiority.

Western Self-Centrism

Self-centrism of people living in Europe and North America vis-à-vis other major world traditions, particularly Islam as a religion, worldview and way of life, has drawn heavy criticism from inside as well as outside of Western countries in the form of postcolonial theories. Edward Said prominently coined Westerners’ essentialist views on the Islamic ‘other’ as “Orientalism”.⁸ In this context, Orientalist perceptions are characterized by attributing to Muslims a collective, ontologically fixed identity that in turn is contrasted with a (superior) ‘Western’ counter-identity.

⁶ Professor Javid Rehman is co-rapporteur of the Committee; Professor Irmgard Marboe is the Austrian member of the Committee; the second co-editor of the present volume is Austria’s alternate member: <www.ila-hq.org/en/committees/index.cfm/cid/1006/member/1> (accessed 14 December 2012).

⁷ See the Committee Description as well as the Conference Reports for the ILA Conferences in The Hague (2010) and Sofia (2012); see <www.ila-hq.org/en/committees/index.cfm/cid/1006> (accessed 14 December 2012); → ch. 10.

⁸ Edward W. Said, *Orientalism* (New York: Vintage Books, 1978).

What Said described and warned against almost a generation ago has become even more significant in the course of the tragedy of 11 September 2001 and its grave consequences in terms of the stabilization of demarcating identities (“us” against “them”) on both the Western *and* Islamic side. To the extent that the subsequently declared ‘war on terror’ has been rapidly interpreted as a war on (certain movements in) Islam by the former US government and perceived accordingly by large parts of the public, Islam has turned into an almost “metaphysical enemy”⁹—an anti-identity to all that is deemed genuinely ‘Western’, i.e. Christian and/or enlightened, rational, and progressive. In fact, it seems as if Islam has successfully replaced the communist world as an identity-establishing adversary, thus dividing the world into a free one and a backward and barbaric one once again.

Whatever reasonable doubt there might be regarding the course of the 9/11 events, it is undisputed that the world before this date and the world after are in fact disjunct as regards the relationship of Western and Islamic civilizations. Of course, already in the late 1970s, incidents such as the Salman-Rushdie-affair or the Iranian Revolution sparked heated discussions about the political nature of Islam, its potential as a counter-ideology and its relationship to human rights in particular. Yet, unease of this sort was still tempered by the vigorous belief that in the *end (of history)*¹⁰ there was no serious alternative to Western democratic and economic liberalism. Over the course of the last decade and the subsequent (military) setbacks of Western hegemony, this aspiration painfully seemed to erode.

The self-centered point of view according to which history is not just a contingent series of events, but has a *telos*, i.e. the completion and global expansion of Western civilization and its (presumed) merits in form of liberty and human rights, is certainly still prevalent in the Western world. From this point of view, Islam, or more aptly, its crude caricatures, appear as serious obstacles in the way of teleological evolution out of providential necessity. Especially many US citizens believe their country to be chosen (by God) and endowed with the mission to once relief whole humanity. Against this background, ideologies of re-modeling the

⁹ Hans Köchler, “The Global War on Terror and the Metaphysical Enemy”, in *The “Global War on Terror” and the Question of World Order*, ed. Hans Köchler (Vienna: International Progress Organization, 2008).

¹⁰ Cf. Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1992).

world—expressly the Middle East—function on the basis of the assumption that the driving force behind certain processes is not man alone or any given administration, but history as such. As a consequence, the responsibility for one's actions—as an individual (politician) or a nation as a whole—is at least partly transferred to the abstract vigor of providence, rendering true justifications and cogent argumentation obsolete and paving the way to (unlimited) violence.

Islamic Self-Centrism

Though not seen as a matter of concern to a comparable degree, the above-mentioned self-centrism is hardly unique to the Western mindset, but can be found in virtually all major traditions to a larger or lesser degree. Where Islam is concerned, thinking in the tradition of Said has the tendency to overlook the considerable potential for self-centered idealization within certain Islamic movements and tendencies. The portrayal of Western people and societies as essentially greedy, exploitive, sexually perverted, godless, and lacking a genuine sense of community and cohesion is a popular tool in the repertoire of Islamic revivalist groups around the globe.¹¹

Just as in the case of many Westerners' steadfast belief in the absolute truth of their worldview and civilization, many Muslims exhibit a similar perspective by constructing the whole long history of mankind around the center of their prophetic revelation(s). Everything that departs from this view risks being deemed *jāhiliyah* (ignorance). Looking at the world from such a self-assuring vantage point, many Muslims—just like many Westerners—are simply shocked that other people do not agree with their philosophical and/or theological premises, or their conception of history. Often, they then ascribe to them vicious motives such as a hate-filled aversion against Islam or even psychological deficits (“Islamophobia”). Furthermore, another frequent response to rejections of Islamic truth claims is immunization against criticism and apologetic treatment of conflicting positions.

Engaging Self-Centrism

Isolationist tendencies are omnipresent and cannot be restricted to one side of the discourse. We are also well, and painfully, aware that such

¹¹ Cf., e.g., Ian Buruma and Avishai Margalit, *Occidentalism. The West in the Eyes of his Enemies* (New York: Penguin Press, 2004).

self-referentialism does not only become manifest on the level of deviating perceptions and opinions, but has momentous practical effects in our daily lives, including death, bloodshed, and suffering affecting myriads of human beings. A critical analysis of one's own position as well as that of "the other(s)" constitutes a crucial element in the efforts to transcend the spiral of violence that we have witnessed in a number of recent incidents, such as the previously mentioned events of 9/11, the invasion of Afghanistan and Iraq, the Danish cartoons of 2005, and the recent YouTube clip "The Innocence of Muslims", and many other examples easily come to mind.

Just like the research project referred to in the beginning is inspired by the idea of making an effort against monolithic explanations and monocausal analysis, the Innsbruck Conference was not neutral or indifferent in its ambition, but sought to engage and challenge attitudes of self-centrism. Quite deliberately, the subtitle of this volume speaks of "engaging", i.e. a process, not a result. The experiences of the last decade and the aforementioned examples in particular contain the bitter truth that we are miles away from intact discourses of engaging each other on the existential questions at stake. Rather, the relevant discourses seem to be inextricably shaped by the respective ideological backgrounds and interests.

In this sense, engaging self-centrism means identifying and developing a critical distance to supposedly self-evident attitudes and assumptions, to ideologies, platitudes, and stereotypes, whatever their provenience, and being willing to enter into discussions and to exchange arguments—thoroughly, but respectfully, and with intellectual honesty. This process should also extend to the delicate or "hot" topics, the ideas held most dear by different persons or groups, and even those deemed to be "inviolable", "non-negotiable", or "sacred".

PLURALITY OF PERSPECTIVES AS THE REMEDY?

The correct diagnosis, it is said, is the key to finding the proper remedy. In that sense, this book seeks to assemble a *plurality of perspectives* on Islam and international law, with a view of furthering awareness of and a sensitivity for various kinds of self-referentialism and with the hope to be able, on that basis, to challenge and, at times, to overcome self-centrism.

Hence, plurality refers not only to the interdisciplinary approach of the volume, which brings together contributions of international lawyers

and scholars of Islamic law, historians, scholars of Ottoman and Arabic studies, political scientists as well as philosophers. The plurality of perspectives also arises from the various backgrounds of the contributors: in terms of regional, religious, cultural, and linguistic backgrounds. Deliberately, the volume contains both views from within and outside of the so-called “Islamic” world. Likewise, it was a conscious decision by the editors to invite both well-renowned and seasoned academics and aspiring young scholars to come to Innsbruck and to join this book.

Alas, plurality is not only a chance, but at times also a burden. In particular, it involves a certain heterogeneity—something a more “streamlined” book focusing on the positive law and some well-known doctrinal problems might have avoided. Nonetheless, we take pride in having been instrumental in bringing these many perspectives and people together.

The result is far from being a harmonious choir. It rather reflects a multi-colored and often chaotic world, exposed to power struggles and structures of suppression and injustice, but also with the efforts of many human beings to approach the difficult questions of our time in a sober and constructive manner. The following contributions are in disagreement on various questions, even very important ones. They differ in methodology and epistemological interest. The terminology used and the ways or arguing may, in several ways, not be easily “digestable” for some readers, but allowing this to happen is, in our mind, the very point of engaging self-centrism. Having said that, our declared option for and benevolence vis-à-vis a plurality of opinions does obviously not signify that we would agree or identify ourselves with every position taken and every argument made subsequently.

Plurality and Truth Claims

Naturally, a plurality of voices and viewpoints begs an important question: How can one amidst these heterogeneous and rivaling perspectives achieve trans-subjective points of view as is—and with good reason—the traditional aspiration of scientific encounters? Scholars, just like everyone else, cannot easily detach their reasoning and way of looking at the world from the general framework of increasing inter-civilizational animosities and essentialist simplifications. What they can do, however, is to reflect upon their own positions and attitudes. Given this, two different methodological approaches lend themselves to resolving this predicament: The technique in the tradition of Edmund Husserl’s “eidetic reduction” aims at identifying and setting aside all previous opinions and presumptions one

has regarding a specific object (of research), i.e. to put them in brackets,¹² and thus corresponds perfectly to Max Weber's ideal, according to which the sciences, and the humanities in particular, should strictly avoid all kinds of private (value) judgments. The very opposite is suggested by Hans Gadamer's philosophy of hermeneutics: Instead of partitioning off our pre-understanding, we should rather make use of our pre-judices since they are, according to Gadamer, essential conditions of understanding.¹³ Prejudice in this sense pertains to any judgment one has before a question is settled or before the clarification of a certain issue is achieved. Hence, this approach amounts to transparency of one's own assumptions in contrast to their pure avoidance.

The first method implies that once all subjective coloring of a phenomenon is overcome, an objective position becomes possible; that among the plurality of views we hold and the positions we take, there is one that is more correct than the others—whereas in terms of hermeneutics, i.e. making sense of the world (in the widest sense), Gadamer's position indicates that more than one form of understanding can be (provisionally) appropriate. In many current lines of thinking, especially those in the post-colonial tradition, this is exactly the initial point of reasoning: The picture of a plurality of perspectives thus eschews the question of defining explicit truth standards, ascribing to all of them their peculiar validity. One could view this as a quite open-minded, humane approach in the spirit of tolerance or even respect. One might, however, also pose the critical question of whether such *perspectivism* simply takes the easy way out since it not only excludes the decision of truth claims, but avoids touching upon the very question of truth in the first place.

Today, every one of us is constantly confronted with antagonistic, rivaling judgments about the meaning of human life, the ways we should organize community in terms of (religious) ideologies, improve ourselves in terms of spirituality, and treat one another in terms of morals and rights. In the current era of globalization, the pressure to take one's stance and to make decisions further increases in view of previously unknown answers to the above-mentioned questions plowing their way into our realm of experience—via modern media technologies, migration, or traveling. That this type of cultural globalization can result in anxiety is strikingly shown by the ambivalent tendencies it provokes—assimilation

¹² Edmund Husserl, *Ideas Pertaining to a Pure Phenomenology and to Phenomenological Philosophy* (Dordrecht: Kluwer, 1989).

¹³ Hans Gadamer, *Truth and Method* (London: Continuum, 2004).

(e.g. fashion, technology) *and* rejection (e.g. religious values). Against this background, it becomes understandable why so many content themselves with the mere observation that there is a *factual* plurality of perspectives. But do they exist with good reason?

Let us have a closer look at the tensions between a secular and a religious worldview. They stem from *truly conflicting* perspectives, that is to say, the conflict between them would not just vanish if only both sides kept engaged in dialogue long enough. When it comes to such fundamental philosophical problems, it will prove hard to settle them in a conclusive manner: Whether one rightly believes that God exists, that he communicates with us in one way or another, and is actually interested in our fate instead of a mere “watchmaker”, goes beyond sheer empirical knowledge and therefore cannot be decided by ‘scientific’ proofs of God—no matter what religions may claim in a given context. In this regard, one cannot but merely state that there is a plurality of (provisionally) equally valid perspectives from an *epistemological* point of view. Knowing that one cannot know certain things with certainty for methodological reasons has often evinced superior since it can help us in developing fairness and a certain humbleness with regard to our own prejudices, as well as those of others.

Plurality and the Universality of International Law

Some may well be prepared to accept that there can be disagreement and even dissent on the *theoretical* level, as long as it does not affect humanity’s ability, on the *practical* plane, to agree on certain standards. And indeed, is it not the very essence of the project of international law to transcend the particularities of States, societies, ethnicities, religions, ideologies, and cultures with the aim of establishing overarching principles on the basis of which to conduct international relations? Some would argue that principles such as the prohibition of the use of force, non-intervention, or the recognition of the equal dignity and worth of all human beings represent such truly universal principles.¹⁴

At the same time, there is the well-known criticism of international law as being a “Western” or “occidental” project, inextricably mired in its history of imperialism and colonialism. From this perspective, which is

¹⁴ As enshrined, for instance, in the Charter of the United Nations of 24 October 1945 and the UN General Assembly’s so-called “Friendly Relations Declaration”; see Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA Res. 2625 (XXV) of 24 October 1970.

notably taken by thinkers associating themselves with what they deem to be required by the “Islamic” tradition, international law is not much more than a device consolidating and stabilizing, and perhaps at times timidly taming, existing power structures and inequalities. When taken to the extreme, such a “realist” view would only accept the alternative of having several incompatible ideological systems competing for hegemony, with at most temporary truces or deals negotiated among them, or one of the systems actually obtaining hegemony. According to this view, to end Western predominance would not mean reforming or changing, but rather ex-changing the existing regime of international law for a very different international legal order, namely one based on the precepts of Islam.

To be sure, in international law, there has always been tension between universality on the one hand and particularity and relativism on the other. Regardless of the validity of criticism of international law as a Western, still “hegemonic” project, the universalist aspirations and potential of international law, if appropriately articulated and operationalized, should not be easily dismissed.

For one, the distinction between the *context of emergence* (“Entstehungszusammenhang”) and the *context of validity* (“Geltungszusammenhang”) of normative orders should be borne in mind. The fact that a certain legal regime has arisen in a certain geographical and temporal context does not necessarily affect its claim of validity. This is an important aspect, in particular in regard to the debate on the justifiability of universalist claims in the human rights discourse. While the history of modern international law will have to be reassessed and partly revised,¹⁵ even a more sophisticated analysis of the dynamics at work in the formation of international law still has to acknowledge that there was no equality in the impact of “Western” political, cultural, and religious traditions as compared to other traditions in terms of shaping the development of the discipline. Accordingly, it becomes all the more important to examine whether the particular circumstances of the *genesis* of international law fatally affect the claim of *validity* of the contemporary international legal system or whether there is not a relative independence of the two modes of analysis, exonerating the universalist aspirations of international law from its partly dubious origins.

Related to this aspect, the *consensual* nature of international law deserves to be emphasized. Indeed, it is a remarkable fact—and one that is often neglected or simply ignored in the “clash of civilizations” or

¹⁵ See above fn. 4.

analogous discourses—that there are a great number of international treaties with universal or quasi-universal membership, including in the area of human rights (e.g. the UN Charter, the 1961 Vienna Conventions on Diplomatic and Consular Relations, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights), not counting the fact that many of the principles laid down in international treaties are commonly recognized as representing general international law (e.g. the Vienna Convention on the Law of Treaties and the UN Convention on the Law of the Sea). In other words, in spite of some lonely bystanders and a number of reservations and interpretative declarations, there is still merit in the claim that there exists a real and not so insignificant *corpus* of virtually universally accepted norms of international law. Even in areas where there is dispute regarding the existence and/or interpretation of international rules, the lines of conflict do not necessarily, or even generally, coincide with the purported ideological and cultural rift between “Islam” and “the West”.

Moreover, when criticizing international law as an “occidental” project, it should not be forgotten that it contains various institutions and devices which guarantee States and groups the right to maintain their specific approaches to certain issues. This starts with the very principle of sovereign equality, and non-intervention as its corollary principle, in regard to which, for example, the ICJ states that

adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.¹⁶

Even in the highly controversial area of international human rights, universal aspirations and potentials of contextualization coexist, as famously expressed in the 1993 Vienna Declaration:

All human rights are universal, indivisible and interdependent and interrelated. [...] While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁷

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment, ICJ Reports 1986, 14, para. 263.

¹⁷ World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, UN Doc. A/CONF.157/23, para. 5; <www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en> (accessed 14 December 2012).

In this regard, legal doctrines such as *margin of appreciation* and *proportionality* allow to some extent to embed human rights guarantees in specific regional, cultural, and religious contexts and thus to accommodate for the needs of particular normative systems. Arguably more controversially, the instrument of making reservations to international treaties, may—if reasonably and responsibly used—permit a middle way between international commitment and taking various special features seriously.

Such a perspective of international law will most likely not satisfy those who favor a more radical approach. Others may fear that admitting such “accommodating” or “appeasing” devices too willingly could lead to merely lip service being paid to the universal aspirations of international law, which would run the risk of eventually abandoning those very aspirations as an empty shell, devoid of meaning. Yet, in our opinion, one should not be overly pessimistic in this regard. Especially the concept of *jus cogens*,¹⁸ in spite of all problems and controversy it gives rise to, appears to constitute a promising reference point from which to develop a discourse on shared universal values and principles in international law. Is it really that far-fetched to work on the assumption that there is indeed a trans-civilizational consensus on the prohibition of wars of aggression, genocide, or torture?¹⁹ Quite obviously, the exact scope of these prohibitions is subject to not seldom fervent dispute—recent controversies easily come to mind in the form of buzzwords like Iraq, Sarajevo, Guantánamo, and so on. At the same time, it is hardly imaginable that a State or a political regime could plausibly claim today that, as a matter of principle, human beings have no right to life, freedom of expression or that such State would

¹⁸ Art. 53 Vienna Convention on the Law of Treaties of 23 May 1969 defines “a peremptory norm of general international law (‘jus cogens’)” as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

¹⁹ According to the famous dictum of the International Court of Justice in the *Barcelona Traction* case, so-called *erga omnes* obligations, i.e. obligations which “[b]y their very nature [...] are the concern of all States [...] derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination; *Barcelona Traction, Light and Power Company, Limited (new application 1962) (second phase) (Belgium v. Spain)*”, Judgment 5 February 1970, ICJ Reports 1970, 3, paras. 33f.; as to the recent express confirmation of the *jus cogens* nature of the prohibition of torture see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, para. 99; see in general Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 5off.

be authorized to torture them.²⁰ Especially the acts ostracized by international criminal law could be deemed to represent the nucleus of universally accepted prohibitions, irrespective of the religion, culture, and political or ideological system involved.²¹

Against this background, one should not give up on the universalist aspirations of international law, acknowledging all the problems and pitfalls the concept involves. At the same time, if and to the extent that *jus cogens* and international criminal law may provide a platform and starting point for a discourse on universally shared principles, one should be careful not to overburden these concepts. It might be advisable to work with modest and sometimes even minimalist conceptions to establish the core guarantees which are actually accepted by (virtually) all and thus can be distilled as an element of “overlapping consensus”.²² However, the credibility of such an approach strongly depends on identifying and articulating the respective tensions and points of conflict, since the harmony-addicted concealment of one’s position may be as harmful for the development of international law and of international relations as the adamant insistence on self-fabricated dogmas.

TENSIONS AND LINES OF CONFLICT

The encounter of Islamic law and classical Western international law provides an intriguing example for seeking a balance between both particularist and universalist inclinations. Islam as an axiomatic complex of fundamental claims about (wo)man in her or his condition in life and humanity’s (prophetic-mediated) position vis-à-vis an all-powerful creator has a distinct perception of what law is and should be, namely the (approximately perfect) realization of God’s (inherently perfect) orders. The Western notion of (international) law, by contrast, points out other references when it comes to deciding public affairs. Historically developed

²⁰ Juliane Kokott, “Der Schutz der Menschenrechte im Völkerrecht”, in *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik*, eds. Hauke Brunkhorst et al. (Frankfurt a.M.: Suhrkamp, 1999), 179.

²¹ See the section on “Punishment and International Criminal Law” below.

²² Cf. John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 133ff.; with a special view on the international context see *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 150f. and 172ff. Rawls explicitly raises the issue of religions in this regard and refers (interestingly for our contest) in *ibid.*, 151, fn. 46 to Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990), 52ff. and notably 100 as “a perfect example of overlapping consensus”.

against the backdrop of (inner-)religious conflicts that plunged Europe into chaos and devastation, the notion of normativity based on rationality commonly appealing to all regardless of personal religious beliefs contributed to the evolution of a rather secular conception of law.

Human Rights

Currently, these points of conflict may be best observed in the global discourse on human rights that can more or less be seen as a battleground between secular and religious rights conceptions. Are human rights really *universal* or merely a peculiar obsession of the ‘West’?

In this regard, two different issues have to be distinguished: first, the question of whether or not the concept of human rights as such (which has historically evolved in Western thinking²³ within the framework of a very specific political philosophy) can be considered truly universal, i.e. absorbable by non-Western (religious) traditions; and second, the question whether single contemporary human rights can find a basis or have an equivalent within non-Western (religious) traditions.

Before expanding upon the second, more specific issue, let us first turn to the universality of the *human rights concept* as such by examining the case of Islam. The notion according to which all human beings have certain basic rights consists of two pillars, i.e. universalism (*all* human beings) and individualism (*individual* rights). With regard to Islam, the question of whether the notion of human rights as such is familiar or alien to its normative structure cannot be answered conclusively, since individual Muslim believers could endorse different ways of ranking religious norms and values, as will be shown below.

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, affirms the universal outlook of the human rights project in its Art. 1, according to which “[a]ll human beings are born free and equal in dignity and rights”.²⁴ Such a statement may be taken for granted as a commonsense proposition, yet the universalist claim

²³ In this discussion, one often encounters the claim that human rights are in fact not a genuine Western “invention”. In its preamble, the Universal Declaration of Human Rights (UDHR) also pays tribute to non-Western traditions by describing human rights as “a common standard of achievement for all peoples and all nations” (*ibid.*). It is, however, necessary to distinguish between (abstract) principles of justice, human dignity, peace etc. on the one hand and the notion of universal concrete human *rights* on the other; cf. also Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2010).

²⁴ Universal Declaration of Human Rights of 10 December 1948, GA Res. 217A (III).

comprised therein in fact asks for great concessions. As far as religions and their claim to ultimate truth are concerned, the litmus test for accepting this claim would be the acceptance that not only are differences in terms of race, color, sex or wealth irrelevant to the question of whether one is entitled to equal rights, but that even religious differences cannot justify treating believers and non-believers differently.

For example, taking a closer look at the preamble of the OIC's Cairo Declaration on Human Rights in Islam (CDHRI), it is dubious whether such a concession is really bearable for pious Muslims: Even though the Declaration affirms the abstract equality of human beings and their common origin in God ("All human beings form one family whose members are united by submission to God and descent from Adam"), it nevertheless declares that "[t]rue faith is the guarantee for enhancing such dignity along the path to human perfection".²⁵ A similar argument is put forward by Mawdūdī, who states that from a human rights perspective, there are no crucial differences between people save one: whether their deeds are good or bad (to be judged by an Islamic standard). Hence, Muslims are placed in contrast to non-Muslims in categorical terms:

Muslims and Kafirs are both human beings; both are slaves of God. But one becomes exalted and meritorious by reason of recognizing his Master, obeying His orders and fearing the consequences of disobeying Him, while the other disgraces himself [...].²⁶

A universalist understanding of human rights would therefore, in the extreme, be confronted with an approach that operates with the alternative of "ummah's rights or human rights".²⁷ Of course, an individual believer could very well counter such religious chauvinism as present in the Cairo Declaration with leaving it to God to decide whose deeds or thoughts are good/obedient and whose are not. This hypothetical believer could refer the question to the "Day of Judgment" and hence without principal difficulty approve of universal human rights here and now. Another frequent approach endorses Islam's inherent potential of pluralism regarding certain Qur'ānic verses according to which God himself created mankind in cultural *and religious* diversity (→ ch. 20).

²⁵ Organization of Islamic Cooperation (formerly Organization of the Islamic Conference), *Cairo Declaration on Human Rights in Islam*; <www.oic-oci.org/english/article/human.htm> (accessed 10 December 2012).

²⁶ Sayyid Abul A'la Mawdūdī, *Let Us Be Muslims* (London: The Islamic Foundation, 1985), 54.

²⁷ Marie-Luisa Frick, "Ummah's Rights or Human Rights? Universalism, Individualism and Islamic Ethics in the 21st Century", *American Journal of Islamic Social Sciences* 27 (2010).

Another potential obstacle is the *individualistic* nature of the human rights concept. Framed as rights of the individual vis-à-vis the community or the State, respectively, human rights will often, “naturally”, as it were, conflict with interests of a group or collective. A telling example thereof would be the interest of a religious body in terms of integrity and cohesion, which is threatened by the individual’s right to choose and change his or her religious affiliation (→ ch. 4, 5 and 12). Can Islam principally allow for individual rights to override collective concerns (often phrased as “group rights”)? Again, it is the individual believer who has to choose between such antagonistic options. Even though a majority currently still seems to be ill at ease with unrestricted individual liberties regarding the example above, one could very well hold the opinion that the choice of one’s religious belief should not be restricted, since in the end, everyone is personally responsible for their action in the “hereafter”.

Given this, it should be clear that the relationship of Islam and the concept of human rights is open to (individual) configuration. Thus, a principal antagonism between the two—as claimed with increasing regularity today—must be denied. The current inner-Islamic discourse on human rights confirms this assumption. As ABDULMUMINI A. OBA points out in his contribution on *New Muslim Perspectives in the Human Rights Debate* (→ ch. 11), there are different possible reactions of Muslim thinkers to the accentuation of universal human rights (standards), ranging from total rejection to attempts of accommodation. It is, however, important to bear in mind that due to its Western origins, the concept of human rights cannot be easily disconnected from Western global hegemony (even though the latter is obviously declining and will most probably diminish even further given the demographic, economic, and geopolitical shifts expected in the future). According to OBA, not only does this contribute to the hegemonic character of the international human rights discourse, converting human rights into “trumps”,²⁸ working to the advantage of those who know how to play the “language game” of rights;²⁹ it also spreads the subliminal accusation that people from the global South are and remain backward as long as they do not conform to the new secular ‘religion’ of human

²⁸ Roland Dworkin, “Rights as Trumps”, in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984).

²⁹ Cf., e.g., Martti Koskenniemi, “The Effect of Rights on Political Culture”, in *The European Union and Human Rights*, ed. Philip Aston Waldron (Oxford: Oxford University Press, 1984).

rights. Thus, Western emphasis on human rights standards often risks ending up in exactly those pitfalls and traps against which post-colonial theories and policies caution.

What is thus necessary, at least from the perspective of a human rights agenda conscious of the precarious nature of discursive power hierarchies and mechanisms of exclusion, is the reflection upon one's own cultural conditions and pre-judices, as referred to above. If the international human rights regime is to be truly universal—and additional or even rivaling human rights declarations indicate that up to now it is, in fact, *not*—a global debate on the precise meaning, shape and implementation of human rights standards has yet to be started. However, apart from the well-known controversies between Western and Islamic perspectives, there also exists an “overlapping consensus” regarding certain fundamental values, as referred to above. This fact is also confirmed by the contribution of ABDUL GHAFUR HAMID @ KHIN MAUNG SEIN, who addresses *Muslim States and the Implementation of the Convention on the Rights of the Child: With Special Reference to Malaysia* (→ ch. 14). He shows that Muslim States' reservations to the said Convention are in fact not primarily based on the Shari'ah, and argues that most provisions of Islamic law are either consistent with or even contribute to (the idea of) children's rights. Yet, tensions remain, e.g. in the case of adoption or corporal punishment like caning in his home country Malaysia.

In a similar vein, MASHOOD A. BADERIN'S contribution on *Islamic Law and International Protection of Minority Rights in Context* (→ ch. 15) takes a closer look at the international protection of minority rights and relates the pertinent standards to the regime of minority treatment according to Islamic law. By focusing on ethnic, linguistic and especially religious minorities, he shows that the Islamic legal system offers substantial resources, but also stresses the need to put classical Islamic doctrine “in context” and thus to work for its transformation.

Regarding efforts to reconcile Islam and the notion of human rights, the second question raised above comes to the fore: What content do or should (universal) human rights have? Is it enough to grant civil and political rights (so-called “first generation” rights) without duly considering the relevance of economic, social, and cultural rights (“second generation” rights) or even collective rights (“third generation” rights)? Should the right to free expression of one's opinion have no (religious) boundaries at all? Should women really have the same rights as men—given the (“evident”) dissimilarities among the two sexes?

Women's Rights

Regarding the matter of women's rights, which features most prominently in the contemporary debates on Islam and human rights, the pertinent questions involve, *inter alia*, women's reproductive rights, their right to education and to choose their profession, to equal custody of their children and the right to a fair trial (with regard to the provisions of Islamic law on criminal procedure concerning the status of the female accused and/or witness). Often, these abstract issues are put into perspective by vivid and tragic incidents which receive widespread media coverage, such as the case of Nojoud Nasser, the famous Yemenite child bride who successfully enforced her divorce, or the Pakistan teenage rights activist Malala Yousafzai, who survived a murder attempt by the Taliban. The questions raised by the increasingly concerned world public regarding such cases go to the very heart of the problem of Islam's compatibility with women's human rights.

Indeed, many Islamic countries have articulated Shari'ah-based reservations to the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), in particular in regard to the non-discrimination provisions of its Arts. 2 and 16—even though those are considered “core provisions” by the UN Committee on the Elimination of all Forms of Discrimination against Women, thus entailing the qualification of such reservations as impermissible since said provisions are deemed central to the very objective and purpose of the Convention.³⁰ Art. 2 CEDAW demands that State Parties take effective policy measures and, *inter alia*, “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”³¹ One might tend to think that States agreeing on the aim of the elimination of discrimination against women would not object to this wording. Yet, Islamic States, including Algeria, Bahrain, Egypt, Iraq, Libya, Malaysia, Morocco, Nigeria, Syria, the United Arab Emirates, but also Singapore with regard to its minorities and their religious and personal laws, have made reservations to Art. 2 CEDAW.³² Many, e.g. Bangladesh, explicitly refer to the two

³⁰ Committee on the Elimination of the Discrimination against Women: *Report*, 18th and 19th sessions, 1998. UN Doc. A/53/28/Rev.1, 47.

³¹ Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 18 December 1979.

³² Cf. <www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (accessed 18 December 2012).

pillars of Islamic law: “The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of article 2, [...] as they conflict with *Sharia* law based on Holy Quran and Sunna”. Also Art. 16, calling for States to take “all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” obviously poses great difficulties to Islamic (family) law, resulting again in numerous reservations.

The grave tensions between (certain interpretations) of Sharī‘ah law and women’s rights have to be taken seriously since they are rooted in antagonistic worldviews regarding the role of women and the natural and/or religious order they are derived from. In the face of such conflict as well as of the serious consequences it involves, it is crucial to avoid two prominent discursive flaws: *arrogance* on the one, and *apologetics* on the other hand. Regarding ‘Western arrogance’, one should not try to minimize the fact that until recently, women in Western countries faced direct legal discrimination. In many European countries, the entitlement of women to higher education and to vote has existed for less than one hundred years. And even today, women’s rights remain a global issue and are by no means an exclusive and peculiar problem of Islamic societies. Pointing fingers requires that one is likewise prepared to take a close look at one’s own society in that regard. Taking women’s rights seriously would also mean the re-evaluation of certain practices common in Western societies, as many Muslim scholars stress (→ ch. 11). On the other hand, Islamic apologetic strategies are inadequate as well. To argue that, in Islamic law, women in fact have rights superior to classical human rights all too often stems from an exclusively male perspective primarily interested in upholding a convenient *status quo*. Apologetics also reach the limits of plausible argumentation when they turn to mistaken comparisons: One simply cannot relativize female genital mutilation (FGM) by pointing to Western beauty ideals pushing women to aesthetic surgeries, since this confuses diffuse psychological pressure with veritable violence.

Freedom of Expression and Freedom of Religion

Another topical question that has already been raised is the intricate relationship of freedom of expression and freedom of religion. While freedom of expression can come into conflict with other human rights guarantees in different constellations (e.g. the right to privacy, right to name and reputation), its relation to freedom of religion is arguably the most delicate, and controversial, problem in the field: To what extent does an individual’s

right to freely express and live his or her religious belief justify a restriction of another individual's ability to express him-/herself on religious topics, namely in the sense of criticizing or even ridiculing religious convictions, practices, or rituals under the protection of the law?

It is well recognized that protection of the rights of others (including freedom of religion) can be a legitimate reason to justify the limitation of freedom of expression, as long as such a limitation is prescribed by law and satisfies the requirements of the principle of proportionality.³³ While it is clear therefore that freedom of expression is not an unlimited right but subject to a balancing of interests with respect to other legally protected rights, the case-law of the human rights decision-making bodies such as the European Court of Human Rights (ECtHR) indicate that freedom of expression must not be restricted without good reasons. This notably holds true in light of the fact that this right is considered of paramount importance in facilitating public discourse, which, for its part, is conceived of as a guarantee for maintaining a liberal order and a system of human rights. Hence, the ECtHR, for instance, is extremely sensitive vis-à-vis the “chilling effect”³⁴ certain acts may have on the freedom of expression, notably when it comes to restricting the scope of manoeuvre of the media, namely “its vital role of ‘public watchdog’”.³⁵ Most importantly, from the point of view of the Strasbourg Court, not only is objective criticism of religions protected, but also and in particular statements which, to cite the famous and oft-repeated formula, “offend, shock or disturb”.³⁶

A related question is whether, parallel and in addition to the religious feelings of affected individuals, the right of a religious group “as such”, i.e. of a collective, may or should enter the process of balancing of interests in its own right. In that regard, the concept of “defamation of religions” has been marshalled since 1999, notably by the OIC. In his contribution *Religious Considerations in International Legal Discourse—The Example of Religious Defamation* (→ ch. 13), LORENZ LANGER delves into the history

³³ See, for instance, Art. 19(2) International Covenant on Civil and Political Rights of 16 December 1966; Art. 10(2) European Convention on Human Rights of 4 November 1950.

³⁴ See US Supreme Court, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), at 557; from the European context see ECtHR, *Goodwin v. UK*, Appl. No. 17.488/90, Judgment, 27 March 1996, para. 39.

³⁵ See, e.g., ECtHR, *Observer and Guardian v. UK*, Appl. No. 13.585/88, Judgment, 26 November 1991, para. 59.

³⁶ See, e.g., ECtHR, *Handyside v. UK*, Appl. No. 5493/72, Judgment, 7 December 1976, para. 49.

and significance of the concept and places the phenomenon in the broader context of “the potential renaissance of a religious norm rationale in international law”. While not coming to a definite conclusion in that regard, he acknowledges that the appearance of a video clip entitled “Innocence of Muslims” in 2012, which depicts Prophet Muḥammad as a sadist and pervert, has certainly contributed to the increase in momentum for the campaign against “defamation of religion” in the pertinent international fora.

The publication of the aforementioned video clip is also the point of departure of JAVAID REHMAN’s article on *The Sharī’ah, International Human Rights Law and the Right to Hold Opinions and Free Expression: After Bilour’s Fatwā* (→ ch. 12). He analyzes the protection and limitation of freedom of expression in the framework of international human rights law, as well as according to Islamic criminal law and certain national blasphemy laws. He draws a differentiated picture of Sharī’ah’s attitude toward criticizing and insulting religions. Thus, he argues that domestic blasphemy legislation, which in many cases goes well beyond what would be required by the Sharī’ah, and the criminalization of blasphemy often serve a political agenda.

As the issues of blasphemy and apostasy are often treated together (→ ch. 12), it is worth referring to the contribution of NECMETTIN KIZILKAYA on *Apostasy as a Matter of Islamic International Law* (→ ch. 5). He cautions against conceiving of apostasy first and foremost as a problem of religious freedom and human rights or, for that matter, criminal law. In contrast, he argues that apostasy in classical Islamic law, notably the Ḥanafī school, was considered a matter of international law, as the most important concern was the fact that the “apostate” would turn into an enemy in war. A different point of view is taken by MOHD HISHAM MOHD KAMAL (→ ch. 4) who argues that apostasy in light of a harmonious interpretation of the sources of Islamic law is not so much an issue of war but remains a crime subject to severe penalties.

Punishment and International Criminal Law

International criminal law has already been identified as one of the most promising areas for identifying a *nucleus* of values and principles that could claim universal recognition.³⁷ It is telling that the Rome Statute of the International Criminal Court (ICC) defines the crimes within its

³⁷ See the section on “Plurality and the Universality of International Law” above.

jurisdiction as “the most serious crimes of concern to the international community as a whole”.³⁸ Only in a second step are these crimes identified as comprising, in the current state of development of international criminal law, the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.³⁹

However, is the “check” of universalism actually covered with regard to current international criminal law? Are there not a lot of open questions in relation to the very definition of the elements of crime, for instance whether certain Islamic penal practices⁴⁰ or various forms of FGM applied in Muslim-majority States⁴¹ may or may not fall within the purview of war crimes or crimes against humanity? This might be one of the reasons accounting for the marked reluctance on the part of Muslim-majority States to join the ICC. In his contribution on *Islamic Law and International Criminal Law* (→ ch. 16), MARKUS BEHAM elaborates precisely on such questions. He makes note of the reluctance mentioned above, but also of the fact that all defendants before the ICC currently come from African countries and are often Muslims (e.g. the situations of Sudan and Libya), which raises criticism of the ICC as being an “Africa-only” court. While he does not see any fundamental contradictions or incompatibilities between Islamic law and international criminal law, he points out and examines areas where there are tensions and even limits for a harmonious reading of Islamic criminal law and international criminal law.

MATTHIAS CERNUSCA addresses a related topic in his *Islamic Criminal Procedure and the Principle of Complementarity of the International Criminal Court* (→ ch. 17). The principle of complementarity allows the ICC to only take up cases where the State called to exercise criminal jurisdiction in the first place has proven “unwilling” or “unable” to conduct a genuine criminal trial. While this provision is primarily designed to prevent presumed criminals from eluding prosecution, one may also ask whether the principle can operate in the opposite direction. Is there a right of the alleged perpetrator to take his or her case to The Hague if it is doubtful that the primarily competent State conducts a “genuine”

³⁸ Art. 5(1) Rome Statute of the International Criminal Court of 17 July 1998 (emphasis added); see also the fourth preambular paragraph as well as Art. 1.

³⁹ Art. 5(2) Rome Statute.

⁴⁰ See Mahnoush H. Arsanjani, “The Rome Statute of the International Criminal Court”, *American Journal of International Law* 93 (1999): 31.

⁴¹ Cf. notably the critical assessment of Elisabetta Grande, “Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Perspective”, *Global Jurist Frontiers* 4 (2004).

criminal trial satisfying international human rights standards? In this controversial and highly topical issue (one only has to think of the case of Saif Al-Islam Gaddafi), CERNUSCA sides with the latter, “human rights friendly” view. One must be aware, however, that such a move endowing the ICC with functions of a human rights court might contribute to alienate sympathizers of international criminal justice, given the risk that such a move may be understood as just another proof of the hubris and imperialist nature of the Western “human rights agenda”, as well as its contempt for the judicial systems and legal traditions of non-Western States.

War and Peace

Western hubris is also often contained in the assumption that the Islamic civilization has been spread “by the sword”. To be sure, the historical claims underpinning such a position could be easily put into perspective by comparing, for example, the spread of Western civilization that by no means occurred without bloodshed, either. But the sources of Islam themselves, the Qur’ān and the prophetic tradition, also pose serious questions regarding the oft-claimed peaceful nature (“Islam means peace”) of that very religion. So called “sword verses” in the Qur’ān calling the pious to fight non-believers (“polytheists”) and promising eternal reward to martyrs engaging in *jihād* stand in striking contrast to other passages of the Muslims’ holy book that emphasize the unity and dignity of humankind and call for non-violent relations among (at least Abrahamic) peoples based on truthfulness, mercy, and reciprocity.

In view of those contradicting directives, it is not surprising that a great variety of hermeneutic strategies exist alongside rivaling interpretations. They have a long tradition in Islam, as ASMA AFSARUDDIN explains in her contribution on *The Siyar Laws: Juridical Re-interpretations of Qur’ānic Jihād and Their Contemporary Implications for International Law* (→ ch. 3). According to her, the early understanding of *jihād* was of a merely defensive war that was also concerned with the immunity of non-combatants. This view, however, was replaced by other notions of *jihād* as a requisite war of conquest due to Islam’s imperialist striving for power.

Against this historical backdrop, many Muslims place the conception of *jihād* as a mere matter of defending Islam in contrast to the terrorist *jihād*ist ideology. What is important to note, however, is that the question of when the conditions of legitimate defense are met is similarly subject to heated discussions: When an Islamic country is actually attacked? When

non-Muslim States deploy troops on Islamic soil? When non-Muslim States fight “extremist groups” within a Muslim country with(out) the permission of its authorities or when Muslim populations are denied legal self-determination? That the question of *jihād*, its conduct, and the satisfaction of the precise conditions of the military struggle for the cause of God are debated controversially today among the Islamic *‘ulamā*, is also demonstrated by the contribution of MUHAMMAD MUNIR on *Suicide Attacks: Martyrdom Operations or Acts of Perfidy?* (→ ch. 6). Suicide attacks, he argues, can under no circumstances be justified with reference to the Islamic religion, since they constitute acts of perfidy and can therefore by no means be equated with war heroism.

The issue of *jihād* is not only addressed in the Qu’rān, but also by various sayings of Muḥammad. In his contribution on *Meaning and Method of the Interpretation of Sunnah in the Field of Siyar: A Reappraisal*, MOHD HISHAM MOHD KAMAL (→ ch. 4) points out the importance of a historical contextual interpretation of the Sunnah. In particular, he argues that certain *aḥādīth* which presumably suggest an offensive nature of *jihād* have to be interpreted in light of the higher-ranking source of Islamic law, the Qur’ān, with the consequence that no duty of Muslims can be identified to violently fight non-Muslims *qua* non-Muslims.

That Islam not only has an oscillatory notion of just war, but also possesses a rich tradition of fostering peace in international relations, is emphasized by our contributors in the second section of this book. LABEEB AHMED BSOUF begins with an examination of the early history of Islam and of *Islamic Diplomacy: Views of the Classical Jurists* (→ ch. 7). In his opinion, Islam has contributed significantly to international law in terms of legal norms governing diplomatic relations that regulate peaceful encounters between the peoples—both then and now. The same argument is made by KHALED RAMADAN BASHIR in *Treatment of Foreigners in the Classical Islamic State with Special Focus on Diplomatic Envoys: Al-Shaybānī and Amān* (→ ch. 8), where he analyzes the contributions the “father” of *siyar* has made to the Islamic law of diplomacy. From the perspective of a historian, HARRIET RUDOLPH’S contribution focuses on *The Ottoman Empire and the Institutionalization of Diplomacy in Early Modern Europe* (→ ch. 9). She demonstrates that despite traditional (European) assumptions suggesting otherwise, the Ottoman Empire has actually been regarded as on par with other European powers, not least since Constantinople functioned as a European center of diplomacy playing an important role in the establishment of permanent representations across Europe.

In her contribution on *Promoting the Rule of Law: UN, OIC and ILA Initiatives Approaching Islamic Law* (→ ch. 10), IRMGARD MARBOE establishes ties to contemporary Islamic peace-building initiatives and contributions. In doing so, she points out the great potential that the notion of *rule of law*—which, according to her, is by no means exclusively “Western”—has in Islamic legal thinking, as well as its relevance in the context of the globalization of international law. In addition, she discusses differences and obstacles pertaining to the conception of divine versus secular law.

... AND THE FUTURE?

A lot has been said in the chapters above on tensions and conflicts pertaining to the relationship of Islam and international law. The lesson to be drawn, however, is definitely not to be paralyzed in front of the challenges ahead. The insight that people do take very different perspectives on how to lead one’s life on this small planet can work out both ways: It can increase the potential for conflict, but it can also promote attitudes of finding arrangements to live with another side by side. The expectation to be able to “assimilate” the others to one’s own conviction, from whatever side it may be cultivated, is as vain as it is dangerous. It has quite correctly been said in that regard that “[a] global composite culture cannot evolve on the basis of assimilation. It can only emerge through a dialogue between equals”.⁴²

This cannot mean, however, to ignore or trivialize conflict, but to collaborate on creating a public sphere of international law and politics where differences, disagreements and dissent can be addressed and negotiated. To that effect, it becomes of crucial importance to seek to acknowledge and to take seriously each other’s perspectives, to understand better where they come from, what they rest upon and what their implications are. Islam as one of the world’s major traditions has certainly to make a major contribution in this regard. Taking its well-deserved place in the dialogue of nations, cultures, religions—and human beings does not only mean a prerogative, but also a responsibility and commitment.

Against this background, the three contributions assembled in the final section of this volume try to respond to the question what contributions

⁴² B.S. Chimni, “Legitimizing the international rule of law”, in: *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 306.

Islam and Islamic international law can and should make in view of the realities of our globalizing world. MAURITS S. BERGER explores the relationship of *Islam and International Law in Contemporary International Relations* (→ ch. 18) by distinguishing two approaches which are relevant when discussing the role of Islam in modern international relations: “Islamic discourse” and “Islamic activism”. Whereas, according to him, the former is strongly impregnated by classical Islamic doctrine, the latter, in which his contribution is primarily interested and which focuses on what role Islam actually plays in the international relations of Muslim States, is relatively uncharted territory. Subsequently, GREGOR NOVAK undertakes a detailed exploration of *Islamic Views on Global Order and their Impact on International Law* (→ ch. 19). He identifies three “lenses” through which the impact of Islam on international law can be examined. On that basis, he analyzes how what he calls “Islamic views of global order” can be conceptualized and understood in terms of shaping the conduct of international relations and the development of international law. Finally, the contribution of MUDDATHIR ‘ABD AL-RAḤĪM which is concerned with *Islam and the Future of the International Community* (→ ch. 20) takes a generally optimistic view on Islam’s potential contribution to the world order and especially stresses Islam’s remarkable resources concerning the consciousness of the unity and oneness of humankind.

Inasmuch as the world is the *locus* of our acting, the future is our common responsibility. However, humankind does not exist in the abstract, but consists in individual human beings, women and men, of different ages, talents and worldviews and living in manifold social contexts. In that regard, plurality is a cardinal aspect of the human condition.⁴³ Disregarding this reality is tantamount to denying humanity.

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