

Traditional Islamic Approaches to Public International Law – Historic Concepts, Modern Implications

Tina Roeder*

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|------|---|-----|
| I. | Introduction | 522 |
| II. | Islamic International Law – Classical Rules and Modern Developments | 523 |
| | 1. Islamic Law – Some General Remarks | 523 |
| | 2. The Classical Islamic Approach | 525 |
| | 3. Modern Debate | 529 |
| III. | Islam in International Relations – Risks, Necessities, and Chances | 532 |

Abstract

The traditional Islamic division of the world along religious lines, between *dar al-Islam* as the abode of the *umma*, the Muslim community,¹ and *dar al-harb*, the abode of the unbelievers, has not left many visible traces on the surface of international relations today. Nevertheless, the concept and its more modern variants are still prominent in inner-Muslim discussions at

* Dr. jur. Senior Research Fellow at the Chair for Public Law, European and Public International Law at the Technische Universität Dresden.

¹ As this article was written in the context of the *Arab Spring*, it focuses on the Arab-Muslim states and peoples although much of the broader themes discussed may also apply to the relationships with other Muslim communities. Generally, it should be kept in mind that today, roughly 1 in 3 Muslims is an inhabitant of South Asia, whereas at the most generous account, only 1 in 4 lives in an Arabic country in the broadest sense (figure estimates provided i.a. by B. Krawietz, Introduction, in: B. Krawietz/H. Reifeld (eds.), *Islam and the Rule of Law, Between Sharia and Secularisation*, 2008, 11). At the same time, the notion of a “Muslim people”, country or state presents its own difficulties. It is used here as a simplified denotation of states and/or state populations where Islam is the official religion of the state, and/or the religion of the majority of the population. The third metric presented by B. Krawietz (*ibid.*), 9, with reference to the metrics used by the Organisation of Islamic States (OIC), namely states where Muslims represent at least a considerably large minority, is not adapted here. According to another often used definition, a Muslim individual is one who lives under Islamic Law, see S. Tellenbach, *Muslim Countries between Religious and Secular Law*, in: B. Krawietz/H. Reifeld (eds.), *Islam and the Rule of Law, Between Sharia and Secularisation*, 2008, 115. – It should also be noted that the article frequently uses the term “Islamic Law” rather than “*shari’a*”, because the concept of *shari’a* is much broader than what is usually understood to be law; see for instance A. A. An-Na’im, *Islam and International Law: Toward a Positive Mutual Engagement to Realize Shared Ideals*, in: *Proceedings of the 98th Annual Meeting of the American Society of International Law*, 2004, 163.

various levels. A fresh look at the historical division model and the reasons for its continued, if sub-legal, presence set against the background of the recent events of the Arab Spring points to some of the great discrepancies within the contemporary international community – as well as to possible solutions, relating to the rapport between religion and Public International Law in general.

I. Introduction

Religion has always been a player in the world's affairs; forging bonds, delineating borders. Religion was the key feature of the first international legal community of political systems commonly recognised today, the medieval European *res publica Christiana*. The dogmata of Christendom are distinctly perceivable in the development of many of the most prominent international legal concepts, past and present, such as the occidental *bellum iustum* variant, or *the imago dei* substantiation of human dignity. Religion, Christianity especially, through compliance and through refusal, has played a vital role in shaping today's Public International Law.

While Christianity's respective contributions and influences are matters of common knowledge, there have been other religious players taking part in the development of international legal regimes, for the longest time largely unnoticed by Western, Christianity-based legal cultures and their scholars. For centuries, Islam has served as a mere antipole, a deeply alien religious and cultural system the legal implications of which have, until rather recently, only seldom been explored. But alongside the evolution of the Western international legal order, Islamic legal cultures have, as an integral part of the all-encompassing Islamic Law, developed a sophisticated system of their own; an Islamic international law which determined their legal attitude towards non-Muslim political entities for hundreds of years.

Whereas these Islamic approaches to international law do not seem to have left many visible traces on the surface of international relations today, their fundamental assumptions nevertheless deserve a closer inspection. Their repercussions are still very much palpable in many areas of inner-Muslim as well as Muslim/non-Muslim discourse. Moreover, in view of the events of the *Arab Spring*, the shift from pragmatic autocracies and trans-fixed societies to more versatile situations, these historic concepts and their modern implications can possibly be utilised for the sensible future development of Public International Law in general.

II. Islamic International Law – Classical Rules and Modern Developments

1. Islamic Law – Some General Remarks

When dealing with any part of Islamic Law from a secular European perspective, some general key features have to be kept in mind.² First of all, one should be aware that Islamic Law is not equivalent to Syrian Law, or Egyptian Law, or even the law of decidedly Islamic states, such as Iran or Saudi-Arabia. Rules of Islamic Law have been incorporated into the national legislation of modern Muslim states to various degrees and in various, albeit mostly narrow, legal areas.³ They are surrounded by a majority of norms stemming from other sources. In the course of the development of the nation state, Muslim states have adapted to many legal concepts of essentially European making. This is also generally true for the area of Public International Law.⁴ On the other hand, Islamic Law is not as one could assume a purely religious law which is of little relevance in other matters today; nor has its applicability been reduced on the whole to certain strictly delimited legal spheres, such as the domain of family law where it is often most visibly applied. While Islamic Law contains a large number of very detailed legal rules on all sorts of issues, it also consists of certain general legal principles

² For a general, contemporary introduction to Islamic Law, see for instance *W. B. Hallaq*, *An Introduction to Islamic Law*, 2011; *M. I. Dien*, *Islamic Law, From Historical Foundations to Contemporary Practice*, 2004; *M. Robe*, *Das islamische Recht*, 2011; *R. Loblker*, *Islamisches Recht*, 2012.

³ *J. M. Otto* (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 2010, details the respective situation in Muslim countries such as (pre-revolution) Egypt, Turkey, Saudi-Arabia, Indonesia, and Nigeria. With regard to the twelve countries examined, the conclusion is reached that most areas of national law have not been pervaded by *shari'a* rules – with noteworthy exceptions, such as Saudi-Arabia in general, or the incorporation of Islamic criminal law in states like Pakistan, Sudan, and Iran, see *J. M. Otto*, *Towards Comparative Conclusions on the Role of Sharia in National Law*, in: *J. M. Otto* (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 2010, 627 et seq.

⁴ For a short introduction to Islamic international law from various perspectives, see *M. Fadel*, *International Law, Regional Developments: Islam*, in: *R. Wolfrum* (ed.), *MPEPIL*, online edition, available at <<http://www.mpepil.com>>; and *S. Mahmoudi*, *Islamic Approach to International Law*, in: *R. Wolfrum* (ed.), *MPEPIL*, online edition, available at <<http://www.mpepil.com>>; *M. Khadduri*, *Islam and the Modern Law of Nations*, *AJIL* 50 (1956), 358 et seq.; *W. M. Al-Zuhili* (also transliterated as *Al-Zuhayli*), *Islam and International Law*, *Int'l Rev. of the Red Cross* 858 (2005), 269 et seq.; with special regard to violence in international relations *J. Reisman*, *Islamic State Practices, International Law and the Threat from Terrorism*, 2005, 44 et seq.

with regard to content as well as methodology. Much of the mechanisms and effects of Islamic Law is at work below the surface of the written norms, where it remains hidden, most of the time, from the eyes of non-Muslim observers.

Secondly, just as there is not one clear-cut notion of “Islam”, but many different Islamic traditions, there is not one “Islamic Law”, but a number of legal-religious schools which are ever so often at odds with each other.⁵ This is mainly due to the historical development of Islamic Law which is quite different from the development process of law in Europe.⁶ Most non-Muslims are familiar with the main Islamic schism between the *Sunni* and the *Shia* schools of thought.⁷ Beyond that, especially within *Sunni* Islam, other sub-schools have survived over the centuries and are still being referred to today. These schools or *madhabib* – named after their respective founders in the 8th and 9th century, most notably the *Hanafi*, *Maliki*, *Shafi’i* and *Hanbali madhhab* – do not only differ in interpretations of specific legal-religious rules, but also in methodology.⁸ Thus, they represent a much more extensive legal plurality than is usually found within the law of Western, non-Muslim states. In this situation, it is often difficult for non-Muslim observers to discern majority views on specific rules or concepts of Islamic Law; and these majorities will also vary regionally.

Thirdly, the common denominator for most of the differing Islamic legal traditions is the conviction that Islamic Law has its roots in divine sources, namely in the Qur’an⁹ and in the body of traditions of the Prophet, the

⁵ B. Krawietz, Justice as a Pervasive Principle in Islamic Law, in: B. Krawietz/H. Reifeld (note 1), 38, characterises Islamic Law as a compilation “of thousands of variations and versions produced by individual scholars belonging to different schools” which was never set in any sort of fixed hierarchy or canon.

⁶ For a concise overview of the key features of the early development of Islamic Law, see for instance W. B. Hallaq (note 2), 7 et seq.; M. Fadel (note 4), for a general overview.

⁷ For the historic background of the schism and its repercussions, see i.a. T. Ansary, *Destiny Disrupted: A History of the World Through Islamic Eyes*, 2009, 53 et seq.

⁸ A very short description of the main *Sunni madhabib* can be found in A. Reidegeld, *Handbuch Islam: Die Glaubens- und Rechtslehre der Muslime*, 2008, 121 et seq., the book also often details the findings of the various schools with regard to specific rules of the Muslim legal and religious system. A. A. B. Philips, *The Evolution of Fiqh (Islamic Law and the Madh-habs)*, 1990, 70 et seq., gives a much more detailed account of the different schools and their methodology, but should be treated with some caution, as it suffers from the at times dissatisfactory translation.

⁹ See i.a. I. Mattson, *The Story of the Qur’an: Its History and Place in Muslim Life*, 2010, for background on the Qur’an and its relevance past and present; A. Jaffer/M. Jaffer, *An Introduction to Qur’anic Sciences*, 2009, provides useful insights into the study of the Qur’an, its structure and the interpretation of its verses.

sunna and *ahadith*.¹⁰ The preoccupation with Islamic Law, regardless of the concrete issue, is essentially unthinkable without referencing its divine sources, whether accepted as such or not. Although there are modern Muslim jurists today who contest a direct link, for various reasons and to various degrees,¹¹ even these jurists are seldom, if ever, to be found in direct contradiction to any clear Qur'anic statement.¹² For many Muslims, Islam penetrates the sphere of law, just as it penetrates any other sphere of life.¹³ This is perhaps the most difficult mental adjustment any observer from a secular background has to make – and also the most vital.¹⁴

2. The Classical Islamic Approach

There are in fact quite a few references in the Qur'an as well as in the *ahadith* to the conduct of Muslims towards non-Muslims in the international realm. From these references, in the formative period of Islamic Law during the 8th and 9th century, a body of law has been developed which is

¹⁰ J. A. C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, 2010, gives a thorough introduction to the study of *hadith*.

¹¹ Such modern jurists claim that while the command to devise a just law is indeed contained in the Qur'an, the precise legal rules are of purely human making, see S. S. Ali/J. Rehman, *The Concept of Jihad in Islamic International Law*, *Journal of Conflict and Security Law* 10/3 (2005), 3 et seq., for a short discussion of this problem with special regard to *al-siyar*.

¹² It should be noted in this respect that the text of the Qur'an contains only a comparatively small number of verses dealing with genuinely legal matters. Commonly, around 500 of more than 6200 verses in the Qur'an are understood to be "legal verses", see W. B. Hallaq (note 2), 16.

¹³ As I. Mattson (note 9), 144, puts it: "(...) Muslim societies are infused with the sound and script of the Qur'an." B. Krawietz (note 1), 9, even states that there is a number of regional Muslim societies "where religion and the laws are as closely interlinked and intertwined today as they were before the onset of the modern age". The author also takes the liberty at this point to reference her own experiences during a prolonged stay in Damascus, Syria, and from her personal relations with Muslims of various affiliations. It should nevertheless be noted that the understanding of Islam as an all-encompassing, totalising system is of course varied, and that certain totalising and universalising tendencies are the hallmark of all three major monotheistic religions, or perhaps even of religion in general, as F. A. Noor, *Where is the 'Islam' in the 'Islamic State'?*, in: B. Krawietz/H. Reifeld (note 1), 66, points out.

¹⁴ In relation to legal reforms in Muslim countries, K. Bälz, *Shariah versus Secular Law?*, in: B. Krawietz/H. Reifeld (note 1), 124, for instance points out that the most important necessary precondition will be to accept the countries' Islamic framework of reference. A. A. Al-Na'im, *A Kinder, Gentler Islam?*, *Transition* 52 (1991), 11 et seq., on the other hand stresses that, in his view, (historic) *shari'a* concepts cannot serve as a basis for legal reform, and that *shari'a* itself needs to be modernised beforehand.

commonly referred to as *al-siyar*,¹⁵ literally meaning “motions” or “travels” before it was taken to denote the conduct of the Muslim community or Muslim rulers in their relationships with other, non-Muslim communities. The term itself appears in six verses of the Qur’an, but not yet in its later, legal-technical sense. It is unclear who originally devised the idea, but it is assumed today that the jurists of the legal school of *Abu Hanifa*, one of the founding fathers of Islamic Law, were the first to popularise the term in its legal meaning.¹⁶ One of *Abu Hanifa*’s star students, *Al-Shaybani*, wrote the first extensive and systematic works on the matter of *al-siyar*, commonly referred to as “*Shaybani’s siyar*”,¹⁷ at the end of the 8th century.

At the heart of these early works on *al-siyar* were two concepts which are closely related to each other and which served as the first basis of Islamic international law. The first one is *jihad*, a term with different – and today notoriously disputed – connotations that in this context means the military spreading of Islam.¹⁸ At this time, Islam was in a phase of great expansion;¹⁹ necessarily, the first basic *siyar*-rules dealt mostly with war-related issues, such as legitimate reasons for waging a war, rules on the taking of booty, or the conduct of Muslim soldiers in battle. It is noteworthy in this respect that Islamic Law at this time already knew some important rules of “modern” humanitarian law, especially the concept of distinguishing between combatants and non-combatants.²⁰ The fundament of all such legal rules in relation to non-Muslims outside of Islamic territory, whether in actual times of war or within other political relations, was the second, overarching concept of dividing the world, politically and legally, along the line between

¹⁵ The term *al-siyar* denotes the same concept as *siyar*, in which form it is often also used – the prefix being merely the Arabic definite article.

¹⁶ See *M. Khadduri*, *The Islamic Law of Nations – Shaybani’s Siyar*, 1966, 38 et seq., on the development of the notion of *siyar*.

¹⁷ Translated and annotated by *M. Khadduri* (note 16). Some information on the book itself which actually consists of portions of different works by *Shaybani*, and on the author can also be found here (22 et seq.), and in *C. Stumpf*, *Völkerrecht unter Kreuz und Halbmond: Muhammad al-Shaybani und Hugo Grotius als Exponenten religiöser Völkerrechtstraditionen*, AVR 41 (2003), 83 (88 et seq.).

¹⁸ *S. S. Ali/J. Rehman* (note 11), present a concise overview of the concept of *jihad*. See also *W. M. Al-Zuhili* (note 4), 278 et seq.

¹⁹ The historical development of Islam and Islamic International Law alongside is generally categorised in three main stages, expansion, interaction, and coexistence, see *G. M. Badr*, *A Survey of Islamic International Law*, in: *M. W. Janis/C. Evans* (eds.), *Religion and International Law*, 1999, 95.

²⁰ *K. Bennoune*, ‘As-Salamu Alaykum?’ Humanitarian Law in Islamic Jurisprudence, *Mich. J. Int’l L.* 15 (1994), 607 et seq., details such traditional Islamic rules on warfare and also points out the difficulties in establishing a truly clear-cut concept of “non-combatant” in classical Islamic Law.

Muslim and non-Muslim communities, that is, between the *dar al-Islam*, the domain or abode of Islam, and the *dar al-harb*, the abode of war, where the unbelievers dwell.²¹

The classical concept of division is, old though it may be, not laid down explicitly anywhere in the Qur'an.²² Instead, it is understood to be a legal and political structure developed by means of *ijtihad*, i.e. individual logical deduction and conclusion by the *Hanafi* jurists based on certain indications in the religious sources, most notably two verses in the *sura al-Mumtahana* of which the shorter one shall be quoted here for illustration:

“God only forbids you, with regard to those who fight you for (your) Faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances), that do wrong.” (60:9)²³

Harsh though this may seem at first, it should be immediately contrasted with another group of verses which also refer to the relationships between Muslims and non-Muslims and which sound a different note altogether:

“(…) if they withdraw from you but fight you not, and (instead) send you (guarantees of) peace, then God has opened no way for you (to war against them)” (4:90); and

“(…) if they incline towards peace, do you (also) incline towards peace, and trust in God (…)” (8:61).

One could perhaps say that in between these two flare signals, of which only short examples are presented here, the general concept of division has been developed.²⁴

²¹ S. S. Ali/J. Rehman (note 11), 9, rightfully note that “virtually every writer on Islamic Law has considered these divisions”. Generally on the concept of division see i.a. C. Stumpf (note 17), 86 et seq.; M. Fadel (note 4), margin number 7 et seq.

²² Its occurrence in the body of *hadith* is in dispute, as this relates to a very small number of *ahadith* the authenticity of which is debatable and refused by the majority.

²³ The translation used here and for the following verses is the one by *Abdullah Yussuf Ali*, according to A. Y. Ali, *The Holy Qur'an: Text, Translation and Commentary*, 1934, which is one of the most widely known English translations today. It can also be accessed via <<http://www.searchtruth.com>>. A perhaps slightly less accurate, but rather more flowing rendering of the original text is given by *Muhammad Habib Shakir*, also accessible via <<http://www.searchtruth.com>>: “Allah only forbids you respecting those who made war upon you on account of (your) religion, and drove you forth from your homes and backed up (others) in your expulsion, that you make friends with them, and whoever makes friends with them, these are the unjust.”

²⁴ It should be noted in this regard that the citation of Qur'anic verses outside of their proper historic and textual context is always of a somewhat problematic nature. This is especially the case with those frequently debated verses relating to the general conduct of Muslims

With this background in mind, it is easily understandable that the notion of *dar al-Islam* – as the one side of the coin which also inevitably defines the meaning of the other side, *dar al-harb* – is a rather complex one. Generally, its interpretation appears to have developed in two different ways.²⁵ On the one hand, *dar al-Islam* is defined as a country or an area where Muslims live and are able to exercise their religious duties freely and in security; possibly with the additional condition that in order to guarantee security, the country must have common borders with other countries which are part of *dar al-Islam*.²⁶ This does not necessarily mean that the country in question is predominantly Muslim, although this will often be the case. On the other hand, a different and rather more common perception of *dar al-Islam* defines this area as one which is under Islamic rule, including non-Muslim communities which accept this rule and are tributaries.²⁷ The main difference between the two perceptions of *dar al-Islam* thus lies in the fact that, according to the latter, Islamic sovereignty is the *conditio sine qua non* for designating a specific area “*dar al-Islam*”, while according to the former, this is not a necessary condition.

In both views, one of the main legal distinctions between *dar al-Islam* and *dar al-harb* relates to the applicability of Islamic Law: within *dar al-Islam*, everyone regardless of his or her religion is, from an Islamic point of view at least, subject to the rules of Islamic Law; these rules apply to the Muslims in *dar al-Islam* themselves as well as to their dealings with non-Muslims. By contrast, within *dar al-harb*, Islamic Law is usually not applicable, except for legal relations solely between Muslims. The *harbi*, the non-Muslim inhabitant of *dar al-harb*, is of no general interest to Islamic Law, even in dealings with Muslims, unless he has been awarded a special protective status by a Muslim, or unless he is protected by the *siyar* humanitarian rules.²⁸

towards non-Muslims, of which the so-called “sword verse” (sura 9, verse 5, not quoted above) is the most prominent and most controversial. The relationship between seemingly contradictory verses, such as the above, and the question of the possibility of *naskh*, of abrogation of one verse by another, is a particularly difficult field of Qur’anic study. Therefore, the citations above should be taken as mere examples of the most extreme positions on the subject of international relations found in the Qur’an.

²⁵ I. K. Salem, *Islam und Völkerrecht: das Völkerrecht in der islamischen Weltanschauung*, 1984, 159, sums up both positions.

²⁶ Compare for instance the *fatwa* by A. Saqr, former head of the *Al-Azhar fatwa* committee, on the concept of *dar al-Islam* and *dar al-harb*, of 11.10.2001, on file with the author. See also S. S. Ali/J. Rehman (note 11), 17, with further references.

²⁷ S. S. Ali/J. Rehman (note 11), 9, with further references. T. Ramadan, *Western Muslims and the Future of Islam*, 2004, 65, concludes that this position is “the current legal opinion”.

²⁸ M. Fadel (note 4), margin number 8 et seq.

While the concept of division is thus related to the applicability of Islamic Law, it is equally and naturally related to the classical concept of military *jihad*, as stated before. The basic assumption underlying the concept of division is that there are countries or areas which are not subject to Islamic rule. Against this background, the question inevitably arose, from the Muslim point of view, of how to deal with these countries adequately; specifically, whether such countries should be ultimately brought under Islamic rule by military *jihad*. To clarify: this does not necessarily mean military coercion into accepting Islam religiously. But to classical Islam, the existence of separate *political* communities is transitory; a condition which will eventually be dissolved by the establishment of one world-wide Islamic state in which Muslims and non-Muslims will both live. This establishment can be brought about by either willing acceptance of Islamic dominance by non-Muslims – or by military means, as was rather often the case in the expansive period of Islam. The contemporary scholar *Al-Zuhili*, who was asked by the International Committee of the Red Cross (ICRC) to elaborate on Islamic international law today, actually deems this connection between the classical concept of division and military conflict to be so strong that he considers the whole concept as a mere factual description of wartime relations between Muslim and (belligerent) non-Muslim states.²⁹

3. Modern Debate

But there are many differing opinions on this issue today. This may be surprising as it is hard to see what relevance the traditional Islamic concept of division could have in the world of modern Public International Law and modern international relations, and why it should still be discussed. Already centuries ago, Muslims had accepted the fact that the one Islamic state was not going to be realised in the near future.³⁰ Therefore, the *siyar*-rules have eventually evolved to allow for permanent non-violent legal contact with non-Muslim political entities – and with Muslim communities of a different persuasion – in the form of treaty-making and diplomacy, out of sheer political and economical necessity. While such treaties with non-Muslim communities were initially understood to have a maximum duration of ten

²⁹ W. M. Al-Zuhili (note 4), 278.

³⁰ For the development of Muslim constitutional and legal systems against the background of the surrender of the *khilafa*, the Islamic caliphate-state, see for instance M. Abdilab, Ways of Constitution Building in Muslim Countries – the Case of Indonesia, in: B. Krawitz/H. Reifeld (note 1), 52 et seq.

years,³¹ over the course of time this limit was expanded; the Ottoman Empire finally took to concluding treaties with an unspecified duration with European powers.³² Today, all Muslim states are members of the United Nations and as such part of the international legal community which knows no legal differentiation between states, as expressed in Article 2(1) of the Charter of the United Nations (UNC).

And yet, the classical division model has not disappeared from legal, religious, political, or social discourse in the Muslim world. In 2004, for example, at the meeting of the *Conference on Recent Topics of Islamic Thought* in Kuwait, the notions of *dar al-Islam* and *dar al-harb* were debated intensively and controversially by state representatives from various Muslim states.³³ *Al-Djazeera* broadcasts opinions of legal-religious authorities on their interpretation,³⁴ and the internet is rife with inner-Muslim discussions on their meanings, especially with a view to the question whether a Muslim is allowed to reside in *dar al-harb* permanently.³⁵ In this rather lively debate among Muslims and sometimes non-Muslims as well,³⁶ a whole range of views is being professed, the most contrarian of which (leaving aside obviously extremist positions) can probably be characterised as follows:³⁷

On the one hand, it is claimed that the notion of a general division on religious grounds is not part of the contemporary Muslim approach to inter-

³¹ C. Stumpf (note 17), 90.

³² M. Fadel (note 4), margin number 36. Although some earlier precedents have been mentioned, the most widely known example of an indefinite treaty between Muslim and non-Muslim political entities is the so-called Franco-Ottoman treaty of 1535, see C. A. Ford, *Siyarization and Its Discontents: International Law and Islam's Constitutional Crisis*, Tex. Int'l L. J. 30 (1995), 514.

³³ See the English report on this controversy, entitled A "War on Terms" at the Conference on Recent Topics in Islamic Thought in Kuwait of 26.7.2008, available at <<http://www.arabwestreport.info>>.

³⁴ See A. Khalil, *Dar al-Islam and Dar al-Harb: Its Definition and Significance*, available at <<http://www.islamway.com>>, for references to the TV programmes and further discussions. A relevant *fatwa* is also referenced in this article in note 24. See also the intensive discussions with references to various scholars recorded in the blog of the World Muslim Congress titled *Dar al-Islam, Dar al-Harb, Dar al-Kufr, and Dar al-Sulh*, of 2007/2008, available at <<http://worldmuslimcongress.blogspot.com>>.

³⁵ See for example the broad range of discussions at <<http://www.sunniforum.com>>. See also K. A. Al-Fadl, *Islamic Law and Muslim Minorities*, Muis Occasional Paper Series 3 (2006), 4 et seq. on the residence problem.

³⁶ T. Ramadan (note 27), 63 et seq., gives an account of the various contemporary positions today and elaborates on possible new concepts.

³⁷ See also W. S. D. Cravens, *The Future of Islamic Legal Arguments in International Boundary Disputes Between States*, Wash. & Lee L. Rev. 55 (1998), 539 et seq.

national relations.³⁸ This view is mainly based on the assumption that Islamic Law in general is of no palpable relevance to contemporary Public International Law, either because Muslim states have completely adapted to the legal structures and fundamental rules of the “Western model”, or because the rules of this “Western model” essentially coincide with the basic rules of Islamic international law.³⁹ On the other hand, apparently a rather larger number of scholars uphold a partitionist world model, mostly tripartite, consisting of *dar al-Islam*, *dar al-harb* and a third abode with varying names that usually denotes countries that have contractual agreements with *dar al-Islam*, thereby putting both parties to such contracts under binding legal obligations.⁴⁰ This third abode is commonly termed the “abode of agreement” or the “abode of treaty” in order to illustrate the contractual nature of the relations with *dar al-Islam*, although the actual content of the term varies. Generally, it seems to have evolved mainly within the *Shafi’i madhhab*, one of the four main *Sunni* legal schools;⁴¹ it also has strong connections to the international practice of the Ottoman Empire as mentioned before. It is important to note in this respect that the adherence to contractual obligations, the rule of *pacta sunt servanda* in the European legal tradition, also is of the greatest importance in Islamic Law,⁴² serving as a broad common denominator of Muslim and non-Muslim concepts of law.⁴³

While the tripartite model is today, in view of the universal legal obligations imposed especially by the UNC, quite capable of embracing all Mus-

³⁸ M. Fadel (note 4), margin number 46 et seq., with further references, claims that the divisional model is being rejected by the majority of contemporary Muslim scholars. Nevertheless, he also discusses the persistence of at least the notion of *dar al-Islam* in contemporary Islamic doctrine, *ibid.*, margin number 50 et seq. M. Parvin/M. Sommer, *Dar al-Islam: the Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East*, *International Journal of Middle East Studies* 11 (1980), 14, conclude by contrast that the idea of *dar al-Islam* was “effectively abrogated” by the adoption of the Western principles of territorial sovereignty and territorial law.

³⁹ M. Berger, *Islamic Views on International Law*, in: P. Meerts (ed.), *Culture and International Law*, 2008, 107 (110 et seq.), with references to the growing use of classical Islamic concepts by non-state actors, *ibid.*, 114 et seq.; A. Ahmad, *The Role of Islamic Law in the Contemporary World Order*, *The Journal of Islamic Law & Culture* 6 (2001), 56.

⁴⁰ Summing up various positions in this regard, S. S. Ali/J. Rehman (note 11), 14 et seq. W. M. Al-Zuhili (note 4), 275, states that the tripartite model is today the view of the majority. M. Robe (note 2), 159 et seq., believes that mostly traditionalist scholars with sometimes extreme “anti-Western” and “anti-Christian” tendencies uphold the partition model in its strict classical form today.

⁴¹ C. Stumpf (note 17), 86. *Al-Shafi’i* is generally understood to be the founder of the study of Islamic Law as a scientific discipline, see I. K. Salem (note 25), 48.

⁴² W. M. Al-Zuhili (note 4), 275; critically C. A. Ford (note 32), 518 et seq.

⁴³ S. Mahmoudi (note 4) points to sura 9, verse 4, and sura 5, verse 1 as the basis for this principle.

lim and non-Muslim states alike, the model does not abandon the general idea of division. This is instead done by a more recent theory under the name of *dar wahida*, the “one abode”, denoting a true common legal/political dwelling of all, Muslims and non-Muslims alike. In this theory, the tripartite or any other divisional model is understood to be generally unfitting for the contemporary state of international relations – a state in which the default mode is one of peace, security, and cooperation under the umbrella of mutually and equally binding legal obligations for all.⁴⁴

Which approach is the most representative today? It is impossible to say. In view of the traditional plurality of Islamic Law, this is hardly surprising. But if one conclusion can be drawn from the frequent legal, religious, political, and social discussions, it is the assumption that although the divisional model is usually not related to by Muslim state representatives on the international plane, and although its validity today is at least very much contested in the legal and political realm, it is nevertheless still very present in the minds of many Muslims.⁴⁵

III. Islam in International Relations – Risks, Necessities, and Chances

It is this mental presence that calls for a closer contemporary engagement, despite the commitment and adherence of Muslim states to the rules of modern Public International Law. The frequent reference to divisional concepts and their implications in the Muslim world is not so much relevant because it is to be expected that the historical distinctions between *dar al-Islam* and *dar al-harb* will be utilised again some time in the nearer future on the international plane; this is not the case, at least in all probability not

⁴⁴ W. M. Al-Zubili (note 4), especially on 278 et seq., with reference to *Al-Shafi'i. T. Ramadan* (note 27), 63 et seq., also explains the inadequacy of the traditional binary as well as any of the tripartite models. It is interesting to note that he arrives at another binary model nevertheless, consisting of the “Center – the West and those upon whom it exerts influence” and “Periphery – rest of the world” (*ibid.*, 77), and that he also seems to endorse an understanding of the “one world concept” as *dar al-dawa*, an abode of invitation, that is: invitation by the Muslims towards non-Muslims to embrace Islam. Compare also C. Fourest, Brother Tariq – the Doublespeak of Tariq Ramadan, 2008, especially 196 et seq.

⁴⁵ A. A. Al-Na'im (note 14), 9, believes that the dichotomy of *dar al-Islam* vs. *dar al-harb*, although not necessarily reflective of actual Muslim behaviour throughout history, is still “the basis of *shari'a*'s view of international law and intercommunal relations (*siyar*) and continues to colour Muslims' relations with non-Muslims”.

concerning state actors.⁴⁶ Rather, these discussions are illustrative of the distinctive subsurface rifts running through the international community which so decidedly aspires to the universality of its fundamental rules. The question that arises out of the context of these discussions is: If the events of the *Arab Spring* will indeed facilitate the arrival of a new type of (Arab-) Muslim state, a state which is more representative, more strongly legitimised by the consent of the people it governs than the preceding autocratic regimes – and if thus the voices of Muslim peoples themselves will be heard one day in the international realm, truly represented by their governments, in whichever concrete form – what are these voices going to say?

From the non-Muslim, “Western” perspective, it is quite impossible to predict. On various levels, the dialogue between (Arab-)Muslim and non-Muslim peoples has been distorted and hampered for so long, in so many respects, that one can be led to doubt whether any substantial mutual exchange of ideas, of convictions and interests has indeed yet taken place at all. This is also the case concerning certain international legal matters, especially human rights law. On the one hand, the dialogue has been severely impeded by the restrictions imposed upon Muslim scientific and social societies by their own governments, and by the difficulty for Western observers to filter genuine Islamic concerns and motifs from the purely pragmatic political moves of autocratic and power-obsessed regimes. On the other hand, Western jurisprudence has long been so preoccupied with presenting Western concepts to the world that the impetus other legal cultures might have wanted to give often remained unappreciated – by now one of the standard laments in the human rights law debate revolving around the antipodes of universality and cultural relativity of basic human rights.⁴⁷ But political and historical realities aside, the main stumbling block in many areas of the discourse between Muslims and Westerners seems to be the presence – or absence – of religion in legal matters. Neither has the West yet found a solid working attitude towards Islamic demands, nor has the Muslim world developed a consistent practice in dealing with the Western insis-

⁴⁶ Among others, *U. Fastenrath*, *Lücken im Völkerrecht*, 1991, 132 et seq., points out that a particular Islamic branch has so far not emerged in modern Public International Law.

⁴⁷ Representative of the abundant legal and legal-political literature on the subject, see for instance *L. Kühnhardt*, *Die Universalität der Menschenrechte*, 1991, 133 et seq. On the ethical problems of universalisation, see the articles in *K.-J. Kuschel/A. Pinzani/M. Zillinger* (eds.), *Ein Ethos für eine Welt? Globalisierung als ethische Herausforderung*, 1999, pt. 1, 36 et seq. In relation to the difficulties met by the efforts of spreading the idea of the rule of law or the German “Rechtsstatlichkeit” and its oftentimes negative reception as “Westernisation” or a “colonisation of values”, see *U. Meyer*, *Idealität, Interessen, Ignoranz: Zur schwierigen Gemengelage der internationalen Rechtsstaatsförderung*, *Der Staat* 51 (2012), 36 et seq., with further references.

tence on secularity of the law.⁴⁸ While the international daily routine seems to run quite smoothly without any express agreement on this subject, again, the development of human rights law does not. It is here that the risks of the continued lack of substantial discussion have become visible – and virulent.

Universality, one of the key terms of present international law debate, cannot be equated with mere formal universal applicability. Universality relates to the interpretation of content as well as to the process of creation and development of whatever it is that is assumed to be universal.⁴⁹ To reduce universality to its mere formal component holds the risk of virtually leaving behind those not included in the creative or interpretive processes. Successively, rejections or massively diverging interpretations of those norms deemed to be universal may ensue – in fact, they have already ensued. These divergences cannot be reconciled, only obscured by a strategy of the broadest possible inclusion on the basis of the least common denominator, a main feature of Public International Law as a law of consensus, and one that is especially pronounced in the contemporary creation of new human rights instruments.⁵⁰ While the universality of human rights is being frequently, almost desperately emphasised in the legal and political sphere, reality equally frequently – and bitterly – appears to reflect quite the con-

⁴⁸ The positions described represent simplifications for the sake of pointed emphasis. In both Muslim and non-Muslim societies, there exists a great variety on contemporary views concerning the relation between law and religion. It is interesting to note in this respect that the so-called “renaissance of religion” in Europe which has been proclaimed by some and deemed a mere “feuilleton phenomenon” by others – see for instance *R. Uertz*, *Christentum und säkulares Gemeinwesen*, in: G. Buchstab/R. Uertz (eds.), *Was eint Europa? Christentum und kulturelle Identität*, 2008, 395 et seq., with further references – is at least partly caused by the increased contact with Islamic views within European countries. Concerning the religious renaissance phenomenon, its possible relevance for international relations and its understanding either in terms of a true “re-emergence” or a “new visibility”, see i.a. *V. Kubáľková*, *Towards an International Political Theology*, in: F. Petitto/P. Hatzopoulos (eds.), *Religion in International Relations – the Return from Exile*, 2006, 79 et seq.; *G. Ward/M. Hoelzl*, *Introduction*, in: G. Ward/M. Hoelzl, (eds.), *The New Visibility of Religion: Studies in Religion and Cultural Hermeneutics*, 2008; *S. Thomas*, *The Global Resurgence of Religion*, *International Law and International Society*, in: M. W. Janis/C. Evans (note 19), 321 et seq.

⁴⁹ As *A. A. An-Na'im* (note 1), 160, puts it: “The fact that European powers managed to extend the domain of their regional system further and more completely than any of the earlier imperial powers does not make it truly international.”

⁵⁰ It has already been noted – and criticised – by many that relevant differences of opinion concerning human rights treaties are oftentimes relegated to the realm of reservations, see for instance *L. Lijnzaad*, *Reservations to UN Human Rights Treaties – Ratify and Ruin?*, 1995, 3 et seq.

trary.⁵¹ The failure to find creative and interpretive mechanisms to genuinely discuss possible Islamic implications, and the prolonged willingness to “compromise the integrity of a convention in the hope of achieving universality”⁵² have permitted essential human rights treaties to be subjected to general reservations relative to the rules of the *shari’a*, the Islamic Law, the scope of which is oftentimes unpredictable for most non-Muslim state parties.⁵³ They have also permitted interpretations of human rights to exist alongside each other which are utterly incompatible. While many Muslim states have for example signed the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) without reservations, Islamic interpretations exist that exclude degrading or inhumane punishments from the definition of torture if these are prescribed by divine sources – such as the amputation of limbs in certain cases of theft, or flogging, as being applied in Iran or Saudi-Arabia, in accordance with the

⁵¹ C. Tomuschat, *An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?*, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje, *Weltinnenrecht – Liber amicorum Jost Delbrück*, 2005, 818, thus cautions against expanding the legal human rights framework out of pure legal-technical considerations: “In devising new mechanisms, one should primarily ask, on the basis of a realistic assessment, whether such mechanisms are indeed suitable to effectuate enjoyment of human rights by individuals. (...) It makes no sense to elevate the institutional framework to idealistic heights where its failure may be almost guaranteed beforehand.” – See also for instance H. Bielefeldt, *Muslim Voices in the Human Rights Debate*, *Hum. Rts. Q.* 17 (1995), 333 et seq. on some of the main areas of friction between Islamic Law and international Human Rights and Muslim efforts of reconciliation.

⁵² L. J. LeBlanc, *The United States and the Genocide Convention*, 1991, 218, concerning the discussion of the ratification of the Genocide Convention in the U.S., slightly rephrased quotation cited after L. Lijnzaad (note 50), 5.

⁵³ Such as the notorious *shari’a* reservations made by a number of predominantly Muslim states to the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979 (as well as to Art. 3 of the International Covenant on Civil and Political Rights (ICCPR) of 1966), although it should be noted in this respect that the Egyptian reservation, for instance, undertakes to detail clearly which parts of the CEDAW rules are found to be in contradiction with the parts of the *shari’a* as practiced in Egypt. On the other hand, the fact that there exists not one version of *shari’a* but many, and that these are also subject to change makes *shari’a* reservations all the more problematic for non-Muslim state parties. It should also be noted, for good measure, that not only Muslim states have entered reservations on religious grounds. See also A. E. Meyer, *Islamic Reservations to Human Rights Conventions – a Critical Assessment*, *Recht van de Islam* 15 (1998), 25 et seq., for further analysis of Islamic human rights reservations. *Shari’a* reservations are especially problematic because they may amount to reservations contrary to the object and purpose of a human rights treaty and may therefore possibly be invalid – concerning the ensuing doctrinal problems and proposals for solutions, see i.a. R. Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, *AJIL* 96 (2002), 531 et seq.

countries' penal code.⁵⁴ Interpretation of the right to life and death penalty is another example, since the "most serious crimes" which justify the death sentence according to the International Covenant on Civil and Political Rights (ICCPR) are in some states interpreted as including apostasy – *ridda* – which is one of the gravest breaches of Islamic Law.⁵⁵ The revised Arab Charter on Human Rights of 2004 (ACHR) *inter alia* grants women legal equality with men only "within the framework of the positive discrimination established in favour of women by the Islamic *shari'a*" and other divine and national rules (Art. 3 III), and thus allows, for instance, restrictions on the freedom of movement in accordance with national law. It also relates to Islam specifically and exclusively in its preamble, despite the considerable Christian and other minorities within the territory of state parties.⁵⁶

On the other hand, the Arab Charter's preamble explicitly states the universality and indivisibility of all human rights. Universality, in the end, seems to be the one thing everyone strives for; needs to strive for, in the globalised world. But with regard to human rights and Islam, the strategies employed so far appear to be failing. Apart from the few (of many) concrete examples given above, it is exactly the lingering presence of the centuries-old Islamic model of dividing people along religious lines as described above that testifies to this.⁵⁷

⁵⁴ E. von Eijk, Sharia and National Law in Saudi-Arabia, in: J. M. Otto (ed.), Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, 2010, 166; Z. Mir-Hosseini, Sharia and National Law in Iran, in: J. M. Otto (ed.), Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, 2010, 358-360. In this respect, it should also be noted that Saudi-Arabian constitutional law stipulates that the protection of human rights in general is only being provided in accordance with *shari'a* (E. von Eijk, *ibid.*, 168), and that the Iranian constitution sets forth that *shari'a* prevails over every form of customary and international law, including human rights (Z. Mir-Hosseini, *ibid.*, 361).

⁵⁵ In Sudan, apostasy is indeed incorporated into the criminal law as one of the *hudud* and punishable by death, O. Köndgen, Shari'a and National Law in the Sudan, in: J. M. Otto (note 54). Compare also the Cairo Declaration of Human Rights in Islam which makes a caveat on behalf of the *shari'a* concerning both death penalty and physical punishment (see for instance Art. 2). See also the discussion of the apostasy and, more general, the *hudud* punishment problem in M. Rohe (note 2), 266 et seq.

⁵⁶ An English translation of the Charter with an initial introduction can for example be found in M. A. Al-Midani/M. Cabanettes, Arab Charter on Human Rights 2004, Boston University International Law Review 24 (2006), 147 et seq. For a discussion and assessment of the changes included in the 2004 version of the Arab Human Rights Charter, see M. Rishmawi, The Revised Arab Charter on Human Rights: A Step Forward?, HRLR 5 (2005), 361 et seq.

⁵⁷ Naturally, this is not to say that other religions do not set up such divisions in the religious area, which they do. But as explained above, Islam does not limit itself to the religious area, and is still understood by many as an all-encompassing scheme.

The reception of the events of the *Arab Spring* by the West has pointed to yet another important cause for the failure of substantial dialogue. Much of Western media and Western scholarly discourse concerning the uprisings has been focused on the demands for democratisation voiced by the peoples in Egypt, Libya, et al.⁵⁸ These, along with the calls for liberalisation and secularisation, were the demands Western states were expecting to hear, and have therefore been received sympathetically, because they fitted Western preconceptions.⁵⁹ But to focus necessarily means to constrict one's field of vision, and thus, many other important aspects of the uprisings went largely unnoticed. It is oftentimes disregarded, for example, that the term "democracy" might have rather different connotations for a Muslim people than for a secularised one.⁶⁰ The constant, very distinct references to Islam as a means of underpinning the legitimacy of the uprisings could be heard clearly throughout the *Arab Spring*. Nevertheless, Western states and media seem to have been taken by surprise, *inter alia*, by the outcome of the first

⁵⁸ Striking recent examples of this narrowly focused scholarly discourse are i.a. *N. Petersen*, *Der Arabische Frühling und das Recht auf Demokratie*, *Die Friedens-Warte* 87 (2012), 43 et seq., in which the foundations and repercussions of a right to democracy in Public International Law are being discussed virtually without any substantial reference to the Muslim countries in question; as well as *J. Paust*, *International Law, Dignity, Democracy, and the Arab Spring*, *Cornell Int'l L. J.* 46 (2012), available at <<http://www.ssrn.com>>, who does list a number of key elements of the *Arab Spring* events besides demands for democracy, such as human dignity, but elaborates upon the meaning of these concepts again without any substantial reference to possible non-Western interpretations. By contrast, *A. A. An-Na'im*, *Islam, Sharia and Democratic Transformation in the Arab World*, *Die Friedens-Warte* 87 (2012), 40, puts the greatest emphasis on the need for democratic reforms in the Muslim countries, but specifies democratic elements and methods with regard to specific problems of the Muslim states in question on the one hand, and on the other reduces the notion of democracy from an end in itself and a virtual "cure-all" by pointing out that "the exercise of human rights is both the end and means of democratic transformation".

⁵⁹ In the case of Libya, Western states have not reduced themselves to receiving, see *M. Payandeh*, *Die Militärintervention in Libyen zwischen Legalität und Legitimität*, *Die Friedens-Warte* 87 (2012), 69 et seq., for the ensuing legal problems. The attitude of European Union (EU) countries towards democratic developments in the Mediterranean is actually ambivalent: While the furthering of democracy in the surrounding countries has long been a guiding principle of European foreign and security policy, the events of 11 September 2001 have led to a remarkable shift in policies, see *A. Jünemann*, *Europa und der Arabische Frühling: Kritische Anmerkungen zur Lernfähigkeit der Europäischen Union*, *Die Friedens-Warte* 87 (2012), 102 et seq.

⁶⁰ See recently *G. Krämer*, *Demokratie im Islam: Der Kampf für Toleranz und Freiheit in der arabischen Welt*, 2011, 117 et seq., on some aspects of compatibility and divergence in this regard. Some hold that Islam indeed presents its own version of democracy, generally called *shura*, which is a sort of consultative system. On the utilisation of *shura* for modern reforms, see i.a. *W. Ende*, *Justice as a Political Principle in Islam*, in: *B. Krawietz/H. Reifeld* (note 1), 28 et seq.; on the questions arising with relation to *shura* in a modern context see *B. Krawietz* (note 5), 42 et seq.

free election in Egypt in favour of the representatives of the *Muslim Brotherhood*.⁶¹ It is also interesting that, according to the first unbiased poll conducted in Libya in February 2012, only a negligible number of Libyans wished for a “Western style” democracy to be installed.⁶² Possibly, even probably, considerable divergences exist between Western and Arab/Arab-Muslim⁶³ perceptions of the revolutions, their causes and their goals. At the very least, Muslim perceptions and motifs are much more varied and manifold than is usually noticed by the West, and they are not mere mirror images of Western aspirations.⁶⁴ The events of the *Arab Spring* show that the Muslim/non-Muslim or Arab/West dialogue is not only impeded by certain external circumstances, but also by internal preconditions – and presumably not exclusively so on the Western side.

Islam will have to be a part of any substantial dialogue. Regardless of Western desires and of secular movements within the Muslim world itself, it is an unquestionable presence within national borders as well as in the international realm, and will in all likelihood continue to be one in the nearer future. Wishful thinking for a secularised global community will not make it disappear; it will only serve to deepen the rifts, on the political, social, and legal level. As the Muslim scholar *An-Na'im* once stated in utmost frustration after the events related to the US invasion of Iraq: “If the (international

⁶¹ See for instance *G. Nonnenmacher*, Nach den Wahlen in Ägypten: Ägyptischer Herbst, *Frankfurter Allgemeine Zeitung*, 4.12.2011, available at <<http://www.faz.net>>. On the background of the Muslim Brotherhood and its development as a political actor in Egypt, see recently *T. Kraitt*, Von der Illegalität zur politischen Partizipation: die Muslimbruderschaft als neue Reformkraft in Ägypten, in: *Österreichisches Zentrum für Frieden und Konfliktlösung* (ed.), *Zeitenwende im arabischen Raum – welche Antwort findet Europa?*, 2012, 101 et seq. – In the early summer of 2012, the situation in Egypt was further complicated by inner-Egyptian disputes about the results of the election, and by continued involvement of the Military in the political processes.

⁶² *Oxford Research International*, First National Survey of Libya 2011-2012 – Executive Summary, available on request via <<http://www.oxfordresearch.com/1.html>>, and on file with the author. The study also shows that the majority of Libyans does not wish for a religious government either.

⁶³ Naturally, not all inhabitants of the countries in question are Muslims, and again of these, not all hold a distinctly Muslim perspective.

⁶⁴ Among others, the works of popular writer and poet *T. Ben Jelloun* are especially enlightening in this respect. On the one hand, *Ben Jelloun* puts great emphasis on those components of the uprisings aiming for individual liberties, and views the uprisings themselves as a marker for the failure of Islamists. On the other, he details much of the elements that often go unnoticed by the West: among those, the regaining of the dignity of the Arab peoples is prominent. Along this line, he also deems the Arab revolution to be first and foremost of an “ethical and moral” character. See for instance *T. Ben Jelloun*, *L'étincelle. Revoltes dans les pays arabes*, 2011, as well as *T. Ben Jelloun*, *Dignité*, available at <<http://www.taharbenjelloun.org>>. The quotation has been adapted from a German compilation of his works, *T. Ben Jelloun*, *Arabischer Frühling: Vom Wiedererlangen der arabischen Würde*, 2011, 12.

legal) system fails to address my fundamental concerns as a Muslim advocate of international legality, then it is not international law at all for me.”⁶⁵

The international community urgently needs to devise effective, deliberative mechanisms to deal with this presence of Islam. Religion generally is a difficult international player, as European scholars know only too well from Europe’s own past. General divisions between individuals on religious grounds reaching out of a purely religious context are not reconcilable with the basic idea of human rights, nor are they reconcilable with the idea of a global legal community, *one* global community.⁶⁶ The continued societal and political relevance of the Islamic concept of division illustrates the feeling of alienation of many Muslims in international relations as they stand today. In a common effort with the new Muslim states, ways need to be found for the Muslim collective selves to integrate into the international political and legal regime without feeling coerced and robbed of vital characteristics. The quest is made all the more difficult by the fact that most Muslim communities are still struggling with the identification of their modern self. But it is nevertheless an essential one. In dialogue, distinctive stances need to be found on the questions of universality and the cultural relativity of the content of fundamental international norms.⁶⁷ And in this endeavour, religion might prove as destructive as it might prove helpful.

Religion is indeed a difficult international player. But it does have properties which could be utilised for the future development of Public International Law and of the international community as a whole, in all of its facets.⁶⁸ Theories have already been advanced on how to not only reconcile religion and international law, but how to make religion a positive factor in the future development of legal international relations.⁶⁹ This is not as far-fetched as it might seem to those of a strictly secular background, for religion and law have rather much in common. Religious and legal rules both

⁶⁵ A. A. *An-Na'im* (note 1), 166.

⁶⁶ See also W. Graf *Vitzthum*, *Begriff, Geschichte und Rechtsquellen des Völkerrechts*, in: W. Graf *Vitzthum* (ed.), *Völkerrecht*, 2010, margin number 83 et seq., voicing respective concerns.

⁶⁷ Especially in relation to Islam, J. *Morgan-Foster*, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context*, *ILSA J. Int'l & Comp. L.* 10 (2003), 35 et seq., points out that international norms cannot serve as a “neutral”, unmoveable benchmark, but must be viewed as items of discussion just like regional legal concepts.

⁶⁸ J. A. E. *Nafziger*, *The Functions of Religion in the International Legal System*, in: M. W. Janis/C. Evans (note 19), 155 et seq., identifies five main functions of religion and religious institutions which may be utilised in international legal development.

⁶⁹ M. A. *Baderin*, *Religion and International Law: Friends or Foes?*, *EHRLR* 5 (2009), 643 et seq., provides an overview of the theoretical perspectives on the relationship between religion and international law.

connect to certain ethical needs, and both build upon the same basic structures.⁷⁰ Religious rules may even be seen as the ancestors of law in general.⁷¹ Religion has facilitated legal developments on the international level – for example, religious differences between Christians and Muslims have in the past initiated the inclusion of rules of religious non-discrimination in modern humanitarian law.⁷² Moreover, it has been argued that “the morality of religion has provided some of the glue that has made international law stick”.⁷³ In this sense, religion can provide impetus for concepts of universality and tolerance, despite its other, contrasting tendencies to exclude.⁷⁴ The Islamic *siyar*-rules mentioned above provide one of the best examples, having included humane restrictions on the conduct of war even at times of fierce military religious expansion. Religion can also provide legitimisation and thus foster acceptance of international legal rules which are still too often and by too many seen as rules devised by a foreign secular elite.⁷⁵ As such, religion can serve as the connecting link between the individual and international law.⁷⁶

Moreover, since the *siyar*-rules were devised at a time during which the concept of the state was not yet existent, and since it is generally not the custom of religion or religion-based law to address states, naturally, these rules relate to individuals and groups of individuals. Thus, for centuries,

⁷⁰ G. M. Badr (note 19), 100; J. A. E. Nafziger (note 68), 159. Concerning the relation between Islam and human rights especially, A. A. An-Na'im (note 55), 35, argues that although *shari'a* and state law should be understood as two separate normative systems, the possibilities of compatibility lie in their similarities in methodology and normative content.

⁷¹ D. M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena*, 2008, 157.

⁷² J. Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation between Civilisations*, *Int'l Rev. of the Red Cross* 84 (2002), 608.

⁷³ M. W. Janis, *Religion and International Law*, *Proceedings of the 87th Annual Meeting of the American Society of International Law* (1993), 321.

⁷⁴ Advocates of this so-called “double-edge theory” on the relation between international law and religion assume that generally all major religions have universalist as well as exclusivist tendencies which both need to be taken into account when giving religion a role on the international plane, see R. Falk, *Religion and Global Governance*, *International Journal of World Peace* 19 (2002), 7.

⁷⁵ For example, A. A. An-Na'im, *Human Rights in the Arab World: a Regional Perspective*, *Hum. Rts. Q.* 23 (2001), 725, senses a “deep sense of insecurity and profound distrust of the international community among Arab societies”, and H. Bielefeldt (note 51), 616, relates to numerous experiences with Muslims who perceived especially efforts to implement human rights as “a new Western crusade”.

⁷⁶ As A. A. Na'im, *Islam and Human Rights: Beyond the Universality Debate*, *Proceedings of the American Society of International Law*, 2000, 96, puts it in relation to international human rights: “Popular perceptions of human rights as consistent with the religious beliefs of the population are essential for these rights’ legitimation in each country.”

Islamic international law has, apparently without any structural problems, understood individuals and groups as its legal subjects. This individual- and group-related structure of Islamic international law which is based on its religious foundation could be taken as a valuable addition to the current discussions on how to give individuals and groups their proper place in Public International Law, and how to deal in the future with the concept of state sovereignty⁷⁷ – the main foundation and one of the main problems of Public International Law. From this perspective, the figure of the *umma*, the transnational community of Muslims, does not necessarily pose a threatening alternative draft to the idea of the international community, but could be understood as an interesting model of civil society's involvement in international affairs.

Religion, therefore, has much to give to international law; it *has* already given much to it. But the relationship between both is always reciprocal. The Muslim jurist *Baderin* has once described it as a centuries-old, on-going romance.⁷⁸ To stick with his picture: like true lovers, neither religion nor international law will ultimately suffer to be ignored by the other.

⁷⁷ Concerning state sovereignty, Islamic Law is particularly interesting because at first, the *siyar* concept of sovereignty does not rely on territorial, but, in connection with the *umma*, personal notions; and secondly, because of the religious foundation, Islamic international law does not allow for absolute state sovereignty. See *G. M. Badr* (note 19), 98 et seq.; *W. S. D. Cravens* (note 37), 531 et seq.

⁷⁸ *M. A. Baderin* (note 69), 657.