**Conference reader**

**2nd Conference in The Hague on Islam, politics and law**

**Perspectives on: International Humanitarian Law between Universalism and Cultural legitimacy**

Friday, 27 November 2009, 9.00-18.30, Peace Palace, The Hague



This conference is organized in cooperation with:



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# Programme

**09:00 – 09:45 Participants registration**

**09:45 – 10:00** Opening of the colloquium F**rans Nelissen:** Director T.M.C. Asser Instituut

**10:00 - 11:20 Panel 1 IHL: the Universality versus Cultural Relativity Debate**

**Introductory remarks by the session moderator:** Kathleen Cavanaugh, Irish Centre for Human Rights

 **Jean d’Aspremont:** University of Amsterdam

*Global Values versus Common Interests: the Foundations of International Humanitarian* **Law**

 **Rene Provost**: McGill University, Canada

 *Islam and the Cultural Pluralisation of IHL*

 **Dr. Anver M. Emon**: University of Toronto

 *Islamic law and international law: complementarity or clash?*

**Muhammad Munir:** International Islamic University, Islamabad

 *Jihad in orthodox Sunni doctrines*

**11:20 – 12:00** **Debate**

**12:00 – 13:00  Lunch break**

**13.00 – 14.00  Panel 2 Islamic legal and Political Perspectives on the use of force**

**Introductory remarks by the session moderator:** Jann Kleffner, Swedish National Defence College

 **Hilmi M. Zawati**: International Legal Advocacy Forum

*Jus ad Bellum and the Rules of Engagement in the Islamic Law of Nations―the Shaybānī’s Siyar*

**Mohamed Abdel Aziz Ibrahim:** Rule of Law, Judicial System and Prisons Advisory Section, Khartoum, UNMIS

 *Islamic law and humanitarian intervention*

 **Said Mahmoudi:** Stockholm University

 *Non-State Islamic Actors and International Humanitarian Law*

**14:00 – 14:45** **Debate**

**14:45 – 15:15  Coffee/tea break**

**15.15 – 16.15  Panel 3 Selected Topics: Islam and IHL**

**Introductory remarks of the session moderator: Amna Guellali:** International Criminal Court

**[Maha Azzam:](http://www.amazon.com/exec/obidos/search-handle-url/ref%3Dntt_athr_dp_sr_1?%5Fencoding=UTF8&search-type=ss&index=books&field-author=Mohammad-Mahmoud%20Ould%20Mohamedou)** [Middle East and North Africa Programme Chatham House](http://www.amazon.com/exec/obidos/search-handle-url/ref%3Dntt_athr_dp_sr_1?%5Fencoding=UTF8&search-type=ss&index=books&field-author=Mohammad-Mahmoud%20Ould%20Mohamedou)

*The political theology of Al Qaida*

**Anicee Van Engeland:** McGill University

*Islamic humanitarian approach and international humanitarian law: conflict or complementarity*

**Adel Maged**: Supreme Court of Egypt, Durham University

*Gender violence prohibition in IHL and in Sharia law*

**16.15 – 17.00** **Debate**

**17:00 – 18:00 Reception**

# Panel 1 - IHL: the Universality versus Cultural Relativity Debate

# Kathleen Cavanaugh: Moderator Panel 1

**Irish Centre for Human Rights**

## Biography

Kathleen Cavanaugh is currently a Lecturer of International Law in the Faculty of Law, Irish Centre for Human Rights (ICHR), National University of Ireland, Galway. She holds a LL.M (Distinction) from the Queen’s University of Belfast, Northern Ireland (1998), and PhD in Comparative Politics from the London School of Economics & Political Science (1997). She has held several Visiting Lectureships including: Visiting Research Fellow, Minerva Centre for Human Rights, Hebrew University, Israel (2001), and Visiting Lecturer, Department of International Relations, Boston University, Massachusetts, USA (1998) and was awarded a Fellowship at the Centre for Socio-Legal Studies, University of Oxford (2006-7).

Her publications and current research agenda, academic interests and specialisation includes: the study of nationalism, ethnic conflict, political violence, applicable human rights laws in entrenched/states of emergency and the laws of belligerent occupation (IHL). Her current projects includes a manuscript with Oxford University Press entitled *Minority Rights in the Middle East* as well as an additional monograph entitled *Militant Democracy* which investigates the exclusion radicalisation thesis, focussing on the Muslim community in the UK and in Gujarat India. She is currently Chair of the Executive Committee of Amnesty International (Ireland) and a member of the International Policy Committee of Amnesty International. As a consultant, she has undertaken numerous missions on behalf of Amnesty International including to Northern Ireland, Israel/Palestine and more recently, to Iraq (where she focussed on the conduct of the occupying powers with relation to detention and security). She has conducted trainings for governmental as well as non-governmental organisations throughout the Middle East (Yemen, Jordan, Egypt, Iran, Morocco, Syria, Lebanon, and Sudan), India, and the Republic of Ireland.

# Jean D’Aspremont: Global Values versus Common Interests: the Foundations of International Humanitarian Law

**University of Amsterdam**

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## Biography

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**Profile**

Dr. Jean d’Aspremont is Associate Professor and Senior Research Fellow of the Amsterdam Centre for International Law at the University of Amsterdam. He also is Guest Professor of International Humanitarian Law at the University of Louvain in Belgium. He is a Senior Editor of the Leiden Journal of International Law. He is acting as counsel in proceedings before the International Court of Justice.

He previously was Assistant Professor of International Law at the University of Leiden and Director of the LL.M. in Public International Law. He received his LL.M. from the University of Cambridge and his Ph.D. from the University of Louvain. In 2005-06, he was a Global Research Fellow at New York University (NYU), affiliated with the Institute of International Law and Justice (IILJ).

**Research**

His areas of research include most major subject matters of general Public International Law and, in particular, questions pertaining to Statehood, Sources of International Law, State Responsibility, International Institutional Law, International Dispute Settlement, the Law of Armed Conflicts, and Legal Theory.

He currently carries out a VENI-Research project at the Amsterdam Centre for International Law funded by the Dutch National Fund for Scientific Research (NWO) on Non-State Actors. Other current research projects include a book on Legal Positivism in International Law and a book on International Humanitarian Law.

**Selected Publications**

* “Softness in International Law: A Self-Serving Quest for New Legal Materials”, 19 *European Journal of International Law* (2008) 1075-1093
* “State Responsibility and Rebellion: Wrongdoing by democratically elected insurgents”, 58 *International and Comparative Law Quarterly* 427-442 (2009)
* “Softness in International Law: A Rejoinder to Tony d’Amato”, 20 *European Journal of International Law* 911-917 (2009).
* “Hart et le positivisme postmoderne”, 113 *Revue générale de droit international public* (2009), 635-654.
* “The Foundations of the International Legal Order” 18 *Finnish Yearbook of International Law* (2007) 261-297
* “Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders”, 69 *Heidelberg Journal of International Law* (ZaÖRV) (2009) 939-978 (with Fr. Dopagne)
* *L’Etat non démocratique en droit international. Etude critique du droit positif et de la pratique contemporaine*, Paris, Pedone, 2008 (monograph – 375 p.)
* “Premises of Diplomatic Missions”, “Diplomatic Courier and Bag”, “Persona non grata”in R. Wolfrum (ed.), *Heidelberg Encyclopedia of International Law*, (Oxford University Press, 2008)
* “La doctrine du droit international face à la tentation d’une juridicisation sans limites”, *Revue générale de droit international public* (2008) 849-866
* “Post-Conflict Administrations as Democracy-Building Instruments”, 9 *Chicago Journal of International Law* (2008) 1-16
* “International Law in Asia: the Limits to the Western Constitutionalist and Liberal Doctrines”, 13 *Asian Yearbook of International Law* (2008) 89-111
* “The Doctrinal Illusion of Heterogenity of International Lawmaking Processes”, in R. Wolfrum (ed.), *Proceedings of the ESIL Biennal Conference* (Hart Publishing, 2009)
* “Abuse of the Legal Personality of International Organizations and the Responsibility of Member States”, 4 *International Organizations Law Review* (2007), 91-119
* “The recommendations made by the International Court of Justice”, 56 *International and Comparative Law Quarterly* (2007), 185-198 (see the reaction of H. Thirlway, ICLQ 2009/1)
* “Regulating Statehood: The Kosovo Status Settlement”, 20 *Leiden Journal of International Law* 3 (2007),649-668
* “Legitimacy of Governments in the Age of Democracy”, 38 *N.Y.U.Journal of International Law & Politics*, (2006) 877-918

“Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi’s From Apology to Utopia revisited”, 19 *Revue québecoise de droit international* (2006), 353-360

# René Provost: Islam and the Cultural Pluralisation of IHL

**McGill Centre for Human Rights and Legal Pluralism**

## Biography



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DPhil Oxford University, International Law
LLM University of California at Berkeley
LLB Université de Montréal

**Biography**

Professor Provost teaches and conducts research in public international law, international human rights law, and international humanitarian law. He is particularly interested in human rights, international criminal law, the law of armed conflict,and the intersection of national law and international law.

He is the author of International Human Rights and Humanitarian Law (Cambridge University Press, 2002), the editor of State Responsibility in International Law (Ashgate/Dartmouth, 2002), and a co-editor of International Law Chiefly As Applied and Interpreted in Canada (Emond Mongtgomery, 2006). Professor Provost served as Law Clerk to Justice L'Heureux-Dubé of the Supreme Court of Canada. He was the President of the Société québécoise de droit international from 2002 to 2006. Professor Provost is the founding Director of the Centre for Human Rights and Legal Pluralism, created in the fall of 2005.

**Education**

D.Phil., University of Oxford, St.Antony's College, 1999

LL.M., University of California at Berkerley School of Law (Boalt Hall), 1991

École du Barreau, Centre de Montréal, 1989

LL.B., Université de Montréal, 1988

Baccalauréat général d'enseignement du second degré en économie, Collège Stanislas, 1985

**Employment**

Director, Centre for Human Rights and Legal Pluralism, 2005-

Associate Dean (Academic), Faculty of Law, McGill University, 2001-03

Associate Professor, Faculty of Law, McGill University, 2001-

Assistant Professor, Faculty of Law, McGill University, 1995-2001

Boulton Fellow, Faculty of Law, McGill University, 1994-95

Lawyers' Committee for Human Rights (New York), 1992

Adjunct Lecturer in International Law, Lehigh University, Department of International Relations, Pennsylvania, 1991

Research Attorney, Human Rights Watch, 1991

Law clerk to the Honourable Justice Claire L'Heureux-Dubé, Supreme Court of Canada, 1989-1990

Summer and part-time associate, Stikeman Elliott, 1987-1989

**Areas of Interest**

International public law, international human rights, international humanitarian law, law of armed conflicts, international criminal law, international environmental law

**Selected Publications - René Provost**

1. With Kindred, Hugh, et al. (eds.), International Law Chiefly as Interpreted and Applied in Canada, 7th ed., (Toronto: Emond Montgomery, forth. 2005).

2. “Le juge mondialisé - fonction judiciaire et droit international au Canada”, in Marie Claire Belleau & François Lacasse eds., Mélanges Claire L’Heureux-Dubé (Montreal: Wilson & Lafleur, 2004) 569-603.

3. "Guerre et fait", in Boustany, Katia, Dormoy, Daniel (ed.), Colloque pour le cinquantième anniversaire des Conventions de Genève, (Paris , à paraître).

4. International Human Rights and Humanitarian Law, (Cambridge: Cambridge University Press , 2002).

5. (ed.), State Responsibility in International Law, (Aldershot, UK: Ashgate/Dartmouth, 2002) .

6. "El uso del derecho internacional humanitario por la Comisión interamericana de derechos humanos: ¿hacia un derecho humanitario regional?" (2002) *Jornadas de derecho internacional*, p. 169 - 79.

7. With Kindred, Hugh, et al. (eds.), International Law Chiefly as Interpreted and Applied in Canada, 6th ed., (Toronto: Emond Montgomery, 2000).

8. "International Criminal Environmental Law", in Goodwin-Gill, Guy, Talmon, Stefan (eds) (ed.), The Reality of International Law. Essays in Honour of Ian Brownlie., (Oxford: Oxford University Press, 1999), p. 439 - 453.

9. "Les vingt-cinq prochaines années dans le domaine des droits de l'homme : commentaire sur les Actes du 2e colloque du CCDI, 1973", in Canadian Council for International Law, Compedium - The first Twenty-five years/Les premiers vingt-cinq ans, (Ottawa, CCIL , 1997), p. 143 - 146.

10. "Indeterminacy and Characterisation in the Application of Humanitarian Law", in Sellers, Mortimer (ed.) (ed.), The New World Order - Sovereignty, Human Rights, and Self-Determination of Peoples, (Oxford: Berg Press, 1996), p. 177 - 236.

11. "Reciprocity in Human Rights and Humanitarian Law" (1995) 65 *British Yearbook of International Law*, p. 383 - 454.

12. "Emergency Judicial Relief for Human Rights Violations in Canada and Argentina" (1992) 23 *University of Miami Inter-American Law Review*, p. 693 - 760.

13. "Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait" (1992) 30 *Columbia Journal of Transnational Law*, p. 577 - 639.

## Abstract

IHL seeks to regulate behaviour in the environment which is quite certainly the most unreceptive to normative regulation. We have achieved significant success in devising a thick code of rules, both conventional and customary, to which by and large all states subscribe. I will argue that the compliance pull of any norm must already be written into that norm in order to be effective. Such an approach denies any rigid distinction between the creation of legal norms and their further interpretation and application by a diversity of actors. The writing of rules in the Geneva Conventions and the pronouncement of the ICTY only represent the first step in creating a normative system that stands any chance of altering behaviour. Relying on Lon Fuller’s idea of interactional law, in part as developed in the field of international law by Jutta Brunnée and Stephen Toope, I will argue that any rule must be translated by the very actor whose behaviour we seek to influence so that it becomes both intelligible and legitimate. Fuller insisted that such a penumbra of custom must be present around every type of norms in order for expectations of compliance to mesh and harden into something which can be called law. Legal pluralists later pushed this idea further to insist that the state need not be at the root of this process and that legal normativity can emerge wholly beyond the state. What is missing from this picture is the fact that in any translation, the translator does not act as a mere conduit bringing information from one format to another; rather, translators affirm their own identity in giving new meanings to pre-existing ideas. Relying on James Boyd White and Robert Cover, I will argue that such a necessary act of translation is always embedded in a cultural context, resulting in a plurality of legal narratives which are culturally variable. Focussing on Islam as a prototypical ‘other’, I will sketch the implications of such an approach for actors approaching IHL from within an Islamic perspective.

# Anver M. Emon: Islamic law and international law: complementarity or clash?

**University of Toronto**

Biography

Anver Emon

Assistant Professor
Faculty of Law
University of Toronto
78 Queen's Park
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Tel.: 416-946-0832
Email: anver.emon@utoronto.ca BA, UC Berkeley; JD, UCLA School of Law; MA (History) Univ. of Texas at Austin; LLM, Yale Law School; PhD, UCLA History Department; JSD, Yale Law School.

U of T Departmental Affiliations: [Centre for the Study of Religion](http://www.religion.utoronto.ca/site4.aspx) ; [Faculty of Social Work](http://www.socialwork.utoronto.ca/); [Department of Near and Middle Eastern Civilizations](http://www.utoronto.ca/nmc/)

A native Californian, Anver M. Emon joined the Faculty of Law in 2005. Professor Emon's research focuses on premodern and modern Islamic legal history and theory; premodern modes of governance and adjudication; and the role of Shari'a both inside and outside the Muslim world.  His general academic interests include medieval intellectual and religious history; law and religion; legal history; and legal philosophy. He teaches Tort Law and offers specialized seminars on Islamic legal history, gender and Islamic law, and law and religion. Additionally, he supervises graduate students in advanced research in Islamic law and history. Professor Emon is the founding editor of [*Middle East Law and Governance: An Interdisciplinary Journal*](http://www.brill.nl/default.aspx?partid=210&pid=31352), and sits on the editorial board of [*The Journal of Law and Religion*](http://law.hamline.edu/jlr/journal-law-and-religion.html).

**Academic Positions**

Assistant Professor, University of Toronto Faculty of Law (2005-present)

* Acting Director, [Religion in the Public Sphere Initiative](http://www.chass.utoronto.ca/rps/index.html) (2008-2009).
* Co-Chair, Diversity and Accessibility Committee, Faculty of Law (2008-2009)
* Steering Committee Member, [Law In Action Within Schools (LAWS),](http://www.lawinaction.ca/) Faculty of Law (2006-present)
* Advisory Board Member, Religion in the Public Sphere (2007-present).
* Executive Board Member, [Center for Ethics](http://www.ethics.utoronto.ca/) (2006-present)

Adjunct Faculty, Fordham University School of Law (2004)

Teaching Fellow, Yale University (2004)

Lecturer, University of Texas School of Law (1998)

**Academic Degrees**

JSD, Yale Law School (2009)

* Murray Berrie Scholarship, Yale University (2004-5)
* Humane Studies Fellow, Institute for Humane Studies (2004-5)

PhD, UCLA (History, 2005)

* Fishbaugh/Pollack Fellowship (2003-2004), Graduate Division, UCLA
* Edwin W. Pauley Foundation Fellowship (1999-2003), Department of History, UCLA

LLM, Yale Law School (2004)

MA, University of Texas, Austin (1999)

* Jan Carleton Prize for Best M.A. Thesis (Dept. of History, 1999).
* Foreign Language/Area Studies Fellowship, U.S. Dept of Education (1998-99)
* Academy for Education Development Fellowship (1998-99) (declined)
* Teaching Fellowship, Department of History (1998-99) (declined)
* Foreign Language/Area Studies Fellowship, U.S. Dept of Educaton (1997-98)
* Teaching Fellowship, Dept of History (1997-98) (declined)

JD, UCLA School of Law (1996)

BA (with honors), University of California, Berkeley (1993)

* Phi Beta Kappa

**Academic/Professional Associations**

Founder/Editor-in-Chief, *Middle East Law and Governance: An Interdisciplinary Journal*.

Editorial Board Member, *Journal of Law and Religion*

Visiting Scholar (non-residence), Center for Theological Inquiry, Princeton, New Jersey (2009-2010).

Adjunct Faculty, Faculty of Graduate Studies (Programme in Law), York University (2008-2009).

Consultant, International Human Rights Law Institute, DePaul University College of Law (2008-2009).

Faculty Fellow, "Sharia and International Law," Salzburg Global Seminar, Salzburg, Austria (October 2008).

Consultant, The Asia Foundation (June/July 2007)

Consultant, Dept of Foreign Affairs and International Trade (Canada) (July 2007)

Fellow, "Rule of Law, Religion, and the State," Salzburg Global Seminar, Salzburg, Austria (October 2006).

Member, California State Bar of Attorneys

**Awards/Honors**

SSHRC Standard Research Grant (2008-2011) - Reasoning in Islamic and Jewish Law

Faculty Fellow - Religion in the Public Sphere, University of Toronto (2007-2008)

Wright Foundation Grant, Faculty of Law, University of Toronto (2006, 2008)

SIG Program Grant, Faculty of Law, University of Toronto (2006, 2008)

Connaught Start-Up Grant, University of Toronto (2005-2006)

**Lectures (Selected)**

"Islamic Family Law - Comparative State Practices," Canadian International Development Agency (CIDA), Ottawa, May 1, 2009.

"Seminar: Islamic Law and Human Rights," Department of Justice, Government of Canada, Ottawa, April 5, 2009.

"Sharia and Rule of Law Operations," NATO School, Oberammergau, Germany, December 15-19, 2008.

"Seminar: Islamic Family Law," Department of Justice, Government of Canada, Ottawa, December 5, 2008.

Lectures on Sharia,  Institute for Higher Studies of Criminal Law, Siracusa, Italy, May 2008.

Convocation Address, University of Toronto (Mississauga), Commerce and Science, June 2007.

"Understanding Sharia - Canada and the Globe," Muslim Communities Working Group, Department of Foreign Affairs and International Trade, Ottawa, Canada, March 27, 2007.

Understanding Sharia/Islamic Law, Department of Justice, Government of Canada, Ottawa, March 23, 2007.

Inaugural Lecture for the Islamic Studies Programme, University of Texas at Austin, February 27, 2007.

Sharia Jurisprudence, Ministry of Foreign Affairs and International Trade, Government of Canada, January 11, 2007.

Sharia Law in Western Legal Systems, Ministry of Heritage, Government of Canada, January 11, 2007.

Panelist, *Muslims in Western Society,* Trudeau Foundation Conference on Public Policy, Vancouver, November 16-18, 2006.

Panelist, *The Great Debate: 2006: Religion and Family Arbitration.* Ontario Justice Education Network. Osgoode Hall. April 5, 2006.

"Sharia and the Canadian Mosaic," *Shared Citizenship Lecture Series.* Munk Centre, University of Toronto, February 10, 2006.

**BOOKS**

*Law and the Limits of Tolerance: Shari'a, Empire, and Rule of Law*(in progress).

*Islamic Natural Law Theories.* Oxford: Oxford University Press (forthcoming).

**BOOK CHAPTERS**

"Governing Pluralism: From Premodern Shari'a to Constitutional Democracies."In *Whose God Rules a Theolegal Nation?.* Ed. Nathan C. Walker (*forthcoming*).

"Pluralizing Religion: Islamic Law and the Anxiety of Reasoned Deliberation." In *After Pluralism.* Eds. Courtney Bender and Pamela Klassen. New York: Columbia University Press (forthcoming).

"[Islamic Theology and Moral Agency: Beyond the Pre- and Post-Modern](http://www.law.utoronto.ca/../../documents/emon/Islamic_theology.pdf)."  In *Belonging and Banishment: Being Muslim in Canada.* Ed. Natasha Bakht. Toronto: TSAR Publications, 2008. Pp. 51-61.

"[The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law](http://www.law.utoronto.ca/../../documents/emon/limits_constitutionalism.pdf)." In *Constitutional Design for Divided Societies*. Ed. Sujit Choudhry. Oxford: Oxford University Press, 2008. Pp. 258-286.

"[Enhancing Democracy, Respecting Religion: A Dialogue on Islamic Values and Freedom of Speech](http://www.law.utoronto.ca/../../documents/emon/FaithandLaw_Cochran-article.pdf)," in [*Faith and Law: How Religious Traditions from Calvinism to Islam View American Law*](http://www.nyupress.org/books/Faith_and_Law-products_id-5159.html). Ed. Robert F. Cochran. New York: New York University Press, 2007. Pp. 273-290.

“Tasdir [Forward].” In Khaled Abou El Fadl, *al-Sulta wa al-Tasallut fi al-Fatwa*. Cairo: Maktabat al-Shuruq al-Dawliyya, 2004. [Arabic].

"Foreword." In Khaled Abou El Fadl, *The Authoritative and the Authoritarian in Islamic Discourses: A Contemporary Case Study*. 3rd ed. Alexandria, Virginia: al-Saadawi Publications, 2002.

**ARTICLES (REFEREED)**

"Ethics in Shari'a: First Principles, Methodologies, and the Moral Agent." *The Muslim World* (January 2010, Forthcoming).

"*To Most Likely Know the Law*: Objectivity, Authority and Interpretation in Islamic Law." *Hebraic Political Studies*(forthcoming).

"[Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation](http://www.law.utoronto.ca/../../documents/emon/CBR-CanadianMosaic.pdf)." *Canadian Bar Review* 87, no. 2 (February 2009): 391-425.

"[Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence](http://www.law.utoronto.ca/../../documents/emon/Conceiving_SingaporeJLS.pdf)." *Singapore Journal of Legal Studies* (December 2006): 331-355.

"[*Huquq Allah* and *Huquq al-'Ibad*: A Legal Heuristic for a Natural Rights Regime](http://www.law.utoronto.ca/../../documents/emon/HuquqAllah_ILS.pdf)." [*Islamic Law and Society*](http://www.brill.nl/ils) 13, no. 3 (2006): 325-391.

“[Natural Law and Natural Rights in Islamic Law](http://www.law.utoronto.ca/../../documents/emon/JLR_Natural_Law_and_Natural_Rights.pdf).” *Journal of Law and Religion* 20, no. 2 (2004-2005): 351-395.

**ARTICLES**

"[Techniques and Limits of Legal Reasoning in Shari'a Today](http://www.law.utoronto.ca/../../documents/emon/Techniques_of_Rights_Reasoning_in_Sharia.pdf)." *Berkeley Journal of Middle Eastern & Islamic Law* 2, no. 1 (2009): 101-124.

"[On the Pope, Cartoons, and Apostates: Shari'a 2006](http://www.law.utoronto.ca/../../documents/emon/popecartoonsandapostates.pdf)." *Journal of Law and Religion* 22, no. 2 (2006-2007): 303-321.

"Non-Muslims in Islamic Law." In *Encyclopedia of Legal History*. Ed. Stanley N. Katz. 4:233-235. Oxford: Oxford University Press.

“Toward a Natural Law Theory in Islamic Law: Muslim Juristic Debates on Reason as a Source of Obligation.” *UCLA Journal of Islamic and Near Eastern Law* 3, no 1 (2003-2004): 1-51.

“On Democracy as a Shar‘i Moral Presumption.” *Fordham International Law Review* 27, no. 1 (December 2003): 72-80.

"Reflections on the 'Constitution of Medina': An Essay on Methodology and Ideology in Islamic Legal History." *UCLA Journal of Islamic and Near Eastern Law* 1, no. 1 (Fall/Winter 2001-2002): 103-133.

"An Islamic Moral Imperative Against Terrorism." *Middle East Affairs Journal* 6, nos. 1-2 (Win.-Spr. 2000): 65-84.

"Negotiating Between Two Convictional Systems." 66 *Fordham Law Review* 1283 (March 1998).

**REVIEWS**

"Sharia and Its Discontents: Can we find more nuanced ways of examing the Other." *Literary Review of Canada*16, no. 5 (June 2008): 11-12 [review of Sherene Razack's *Casting Out: The Eviction of Muslims from Western Law and Politics* (University of Toronto Press, 2008)].

“[Review] *Origins and Evolution of Islamic Law*, by Wael B. Hallaq." *University of Toronto Quarterly* 76, no. 1 (2007): 343-344.

“[Review] *Islamic Law and the Challenges of Modernity*, ed. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser.” *Journal of Law and Religion* 21, no. 1 (2005-6): 259-263.

“[Review] *Medieval Islamic Pragmatics*, by Mohamed M. Yunis Ali.” *Middle East Studies Association Bulletin* 37, no. 1 (Summer 2003): 141-144.

“[Review] *Taste of Modernity: Sufism, Salafiyya, and Arabism in Late Ottoman Damascus*, by Itzchak Weismann.” *International Journal of Middle East Studies* 34, no. 3 (August 2002).

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The Evolution of International Law:

colonial and postcolonial realities

ANTONY ANGHIE

ABSTRACT The colonial and postcolonial realities of international law have been obscured by the analytical frameworks that governed traditional scholar­ship on the subject. This article sketches out a history of the evolution of international law that focuses in particular on the manner in which imperialism shaped the discipline. It argues that colonialism, rather than being a peripheral concern of the discipline, is central to the formation of international law and, in particular, its founding concept, sovereignty. It argues that international law has always been animated by the civilising mission, the project of governing and transforming non-European peoples, and that the current war on terror is an extension of this project.

The colonial and postcolonial realities of international law have been obscured and misunderstood as a consequence of a persistent and deep seated set of ideas that has structured traditional scholarship on the history and theory of international law. This article seeks to identify these structures, suggesting ways in which they have limited the understanding of the relationship between imperialism and international law. It then sketches a set of alternative perspectives that may offer a better appreciation of the imperial aspects of international law, and their enduring effects on the contemporary international system.1 My purpose, then, is to sketch a history of the relationship between imperialism and international law in the evolution of international law from the 16th century to the present, and to suggest a set of analytic and conceptual tools that are adequate for the purposes of illuminating this history.

The traditional understanding of international law regards colonialism— and, indeed, non-European societies and their practices more generally—as peripheral to the discipline proper because international law was a creation of Europe. The explicitly and unquestionably European character of interna­tional law has been powerfully and characteristically asserted by historians of the discipline such as JHW Verzijl:

Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has drawn its vital

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essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin. 2

International law in this view consists of a series of doctrines and principles that were developed in Europe, that emerged out of European history and experience, and that were extended in time to the non-European world which existed outside the realm of European international law.

Thus, for instance, the classical concept of sovereignty, which stipulated that all sovereigns are equal and that sovereign states have absolute power over their own territory, emerged from the Treaty of Westphalia of 1648. Non-European states lacked this sovereignty, and the development of international law can be seen in part as the ‘Expansion of International Society’, 3 the process by which Westphalian sovereignty was extended to include the societies of the non-European world. This process was tri- umphantly completed through the mechanism of decolonisation that ensured the emergence of sovereign states from what had previously been the colonised societies of Asia, Africa and the Americas. Seen in this way, coloni- sation was an unfortunate—but perhaps necessary—historical episode whose effects have been largely reversed by the role that international law has played, particularly through the United Nations system, of promoting decolonisation by both institutional and doctrinal mechanisms. Whatever the earlier associations between imperialism and international law, then, imperialism is a thing of the past.

A further problematic that has preoccupied international law scholars and that has inevitably shaped traditional understandings of the relationship between colonialism and international law emerged most explicitly in the 19th century, when John Austin, an English jurist whose views had an enormous significance for international law, argued that law and order were only explicable in a system governed by an overarching sovereign that could create and enforce the law. Consequently, international law could not be regarded as law properly so called since the international system lacked such a sovereign. This problematic emerged as a corollary of the Westphalian model of sovereignty which stipulates the equality of sovereign states. Since that time, at least, the question: ‘how is legal order to be established among equal and sovereign states?’ has preoccupied the discipline, and the greatest scholars of international law have developed numerous theories questioning the Austinian paradigm and elaborating on how international law is ‘law’ despite the absence of an overarching sovereign that legislates and then enforces the law.

Finally, the history of international law is structured around the idea that different phases of the history of the discipline were characterised by distinctive styles of jurisprudence. Naturalism, which prevailed from the beginnings of the modern discipline in the 16th century to roughly the end of the 18th century, stipulated that international law was to be found in ‘nature’; it could be ascertained through the employment of reason, and this transcendent ‘natural’ law—which had religious origins—was binding on all states. Positivism, thejurisprudence that has prevailed since the 19th century,

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and which continues to be the dominant mode of thinking, prescribes that a state can only be bound by rules to which it has consented. Pragmatism is associated with the emergence of international institutions that provided the international system with a new set of technologies with which to address international problems. All three strands of jurisprudence continue to play a role in the international system. However, they are seen as embodying quite distinctive ideas of law, society and the international system.

The non-European world plays an insignificant role within each of these schemes. Certainly, the non-European world posed numerous problems to the international system. How were these peoples to be governed? On what legal basis could their lands be occupied? But these were viewed as practical, secondary problems that did not impinge on the great theoretical issues confronting the discipline. Rather, the principal analytic frameworks governing the discipline precluded any real examination of non-European societies and people, and the ways in which they impinged upon and shaped the making of international law. For instance, the Austinian problem of ‘how is order to be created among sovereign states’ prevents an exploration of the status of the non-European societies that were designated as non-sovereign by the jurisprudence of the time. The problem of ‘order among sovereign states’ arises, then, only in the context of sovereign European states, and the transformation of this problem into the central theoretical dilemma of the discipline systematically occludes the study of non-European societies. It avoids the question: how was it decided that non-European states were not sovereign in the first place? Asking this question in turn raises further issues. Rather than adopting the traditional view of sovereignty as an exclusively European product extended into a non-European world that was somehow, naturally, non-sovereign, we might see sovereignty doctrine as consisting in part of mechanisms of exclusion which expel the non-European society from the realm of sovereignty and power. This is then a prelude to the grand redeeming project of bestowing sovereignty on the dark places of the earth. 4 In other words, sovereignty doctrine expels the non-European world from its realm, and then proceeds to legitimise the imperialism that resulted in the incorporation of the non-European world into the system of international law. The process of transforming the non-European world is completed through decolonisation, which enables the non-European state to emerge as a sovereign and equal member of the global community. In short, these mechanisms of exclusion are as essential a part of the sovereignty doctrine as the mechanisms of incorporation and transformation, colonialism and decolonisation that are the subject of the conventional histories of international law. And if, as I argue, the mechanisms of exclusion that deprive the non-European world of ‘Western’ sovereignty persist and endure despite the official end of the colonial period, then it might become necessary to rethink the standard accounts of both colonialism and decolonisation.5

Rather then focusing on the paradigm of ‘order among sovereign states’, then, I would argue that the evolution of international law, and the role of non-European societies within this process, may be better understood in terms of the problem of cultural difference. International law may be seen as

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an attempt to establish a universal system of order among entities characterised as belonging to different cultural systems. This problem gives rise to what might be termed the ‘dynamic of difference’: international law posits a gap, a difference between European and non-European cultures and peoples, the former being characterised, broadly, as civilised and the latter as uncivilised (and all this implies in terms of the related qualities of each of these labels).

This gap having been established, what follows is the formulation of doctrines that are designed to efface this gap: to bring the uncivilized/ aberrant/violent/backward/oppressed into the realm of civilisation, the universal order governed by (European) international law. This distinction between the civilised and the uncivilised, the animating distinction of imperialism, is crucial to the formation of sovereignty doctrine, which can be understood as providing certain cultures with all the powers of sovereignty, while excluding others. In short, cultural difference precedes and profoundly shapes sovereignty doctrine—whereas the traditional approach asserts that an established sovereignty manages the problem of cultural difference. This basic dynamic is played out, in different vocabularies and doctrines, throughout the history of international law. And, further, its replication in all the distinctive styles of jurisprudence—naturalism, positivism and pragmatism—suggests its profoundly enduring character. Colonialism, then, far from being peripheral to the discipline of international law, is central to its formation. It was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present.

The colonial origins of international law

Contact between European and non-European peoples, of course, has taken place for many centuries. As the European presence in non-European areas intensified, however, beginning in the 15th and 16th centuries, legal doctrines were developed to manage more complex forms of interaction between European and non-European states, and these extended, inevi­tably, to doctrines that purported to account for the acquisition of sovereignty over non-European peoples. These doctrines, invariably, were created by Europeans, or adapted by Europeans, for their own purposes, although scholarship has shown that many important international legal principles relating, for example, to the law of treaties and the law of war, were also developed, understood and practised by non-European states.6

Many of these themes may be illustrated by an examination of a work commonly regarded as one of the first texts of modern international law, Francisco de Vitoria’s On the Indians Lately Discovered.7 Vitoria here addresses the complex legal problems that arose from Spanish claims to sovereignty over the Americas following Columbus’ voyage. Drawing upon the naturalist and theological jurisprudence of the period, Vitoria argued that all peoples, including the Indians, were governed by a basic ‘natural law’.

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While others characterised the Indians as heathens, and animals, lacking any cognisable rights, Vitoria instead humanely asserts of the Indians that:

the true state of the case is that they are not of unsound mind, but have according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason: they also have a kind of religion. Further, they make no errors in matters which are self-evident to others: this is witness to their use of reason. 8

It is because of his acknowledgement of the humanity of the Indians of the New World that Vitoria is remembered as a champion of the rights of indigenous and non-European peoples. Equally, it is precisely because they possess reason that the Indians are bound by a universal natural law. And yet Vitoria also considers the possibility that, while there is an order apparent in Indian affairs, it is a deficient order because it fails to meet the universal criteria established by natural law:

Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are a little short of that condition, and so are unfit to found or administer a lawful State upto the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs. 9

As a consequence, Vitoria suggests that proper government must be established over the Indians by the Spanish, who, he argues, must govern as trustees over the uncivilised Indians. The Indians now are children in need of a guardian. There is a gap, then, between the ontologically ‘universal’ Indian and the historically, socially ‘particular’ Indian that can only be remedied, it transpires, by the intervention of the Spanish, who are characterised as the agents of natural law. Seen in this way, the recognition of the humanity of the Indians has ambiguous consequences because it serves in effect to bind them to a natural law which, despite its claims to universality, appears derived from an idealised European view of the world, based on a European identity. Consequently, it is almost inevitable that the Indians, by their very existence and their own unique identity and cultural practices, violate this law, which appears to deal equally with both the Spanish and the Indians, but which produces very different effects because of the asymmetries between the Spanish and the Indians.

The ramifications of these asymmetries become clearer when Vitoria proceeds to enunciate the principles of natural law: ‘The Spaniards have a right to travel to the lands of the Indians and to sojourn there, so long as they do no harm, and they can not be prevented by the Indians’.10 These apparently innocuous rights to trade and travel have profound consequences for the Indians, for, as Vitoria further argues, “to keep certain people out of the city or province as being enemies, or to expel them when already there,

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are acts of war’.11 Thus, any Indian resistance to Spanish incursions would amount to an act of aggression by the Indians that justified the Spanish in using force in self-defence—and, in so doing, in endlessly expanding their territory, conquering the native rulers in the process. Violence arises, in Vitoria’s system, through the inevitable violation by the Indian of the natural law by which he is bound.

Once commenced, war, in Vitoria’s scheme, has an overwhelming and transformative character. It is through war that the aberrant Indian identity might be effaced. It is clear, furthermore, that war against the barbaric Indians has a different character from war waged against a civilised, Christian adversary. In describing this war, Vitoria reverts to principles and arguments developed earlier, in the times of the Crusades. The Indian is like the Saracen, a pagan:

And so when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery.12

The barbaric Indian exists beyond the existing rules of law; war against the Indians is ‘perpetual’, their guilt or innocence is irrelevant. Thus, both bound by the law and yet outside its protections, the Indian is the object of the most extreme aspects of sovereignty, which can expand and innovate its practices and manifestations precisely because of this peculiar, in-between status.

I have dwelt on Vitoria’s work because it illustrates several crucial and enduring aspects of the relationship between colonialism and international law, and this in a text regarded as the first modern work of the discipline. Vitoria’s work demonstrates, for instance, the centrality of commerce to international law, and how commercial exploitation necessitates war. It shows, furthermore, how an apparently benevolent approach of including the aberrant Indian within a universal order is then a basis for sanctioning and transforming the Indian. The Indian is characterised in a number of different and sometimes contrasting ways: as economic man anxious to trade with the Spanish; as oppressed by his own rulers and looking to the Spanish to liberate him; as backward and in need of guidance; as irredeemably and hopelessly savage and violent. In each of these cases Spanish intervention appears the appropriate response. And Spanish violence is characterised as, simultaneously, overwhelming, liberating, transforming, humanitarian. My argument, furthermore, is that Vitoria’s attempt to address the problem of difference demonstrates the complex relationship between culture and sovereignty, for Vitoria’s jurisprudence decrees that certain cultures—such as that of the Spanish—are universal and enjoy the full rights of sovereignty, whereas other cultural practices—like those of the Indians—are condemned as uncivilised and non-sovereign.

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The same structure of ideas is evident in the 19th century, the apogee of imperial expansion, and the period when positivism was established as the major jurisprudence of international law. Unlike naturalism, which argues that all states are subject to a higher universal law, positivism, in basic terms, asserts that the state is the exclusive creator of law, and cannot be bound by any law unless it has consented to it. There is no higher authority than the sovereign, according to this system of jurisprudence. Nominally, at least, under the system of naturalism both European and non-European societies were bound by the universal natural law which was the foundation of international law. 13 Positivist jurists, however, devised a series of formal doctrines that used explicitly racial and cultural criteria to decree certain states civilised, and therefore sovereign, and other states uncivilised and non- sovereign. Thus non-European societies were expelled from the realm of international law. Lacking legal personality, these societies were incapable of advancing any legally cognisable objection to their dispossession, and were thus reduced to objects of conquest and exploitation.

This law legitimised conquest as legal, and decreed that lands inhabited by people regarded as inferior and backward were terra nullius. In other cases imperial powers claimed that native chiefs had entered into treaties which gave those powers sovereignty over non-European territories and peoples. The ability of natives to enter into such treaties was paradoxical, given that they were characterised as entirely lacking in legal status. What is clear from an examination of the treaties, however, is that international lawyers granted the natives such status, quasi-sovereignty, for the purposes of enabling them to transfer rights, property and sovereignty. The right of the native to dispose of himself or his resources was in effect upheld by these treaties, just as in Vitoria native personality is established so that it may be bound by international law.

Once again, Western standards were declared universal, and the failure of non-Western states to adhere to these standards denoted a lack of civilisation that justified intervention and conquest. Thus John Westlake, the Whewell Professor of International Law at Cambridge, declared in 1894, that ‘Government is the Test of Civilization’ and elaborated:

When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well being at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it. 14

Westphalian sovereignty denoted the right of a state to establish its own system of government within its territory. In the case of the non-European

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state, however, its internal system had to comply with standards that in effect presupposed a European presence within that polity. Thus countries such as Siam, which were never formally colonised, were compelled to enter into a humiliating system of unequal treaties, capitulations according to which foreigners were governed by their own law rather than that of the non­European state. Non-European societies that failed to establish the conditions in which Europeans could live and trade could then be justifiably replaced by European governance, which proclaimed itself as bringing with it civilisation and stability, and, indeed, better protection for the natives themselves. Such government was essential and inevitable, as ‘The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied’.15

Many of the legal doctrines used at this time dealt not only with relations between European and non-European states but between European states who were intent on acquiring title over the non-European territories. These doctrines were developed for preventing conflict between European states over who had proper title to a non-European land. Thus, at the Berlin Conference of 1884–85 the great European powers of the period met in Berlin to decide on how Africa was to be divided among them. The resulting division of the continent, which occurred with no regard to the complex system of political organisation that operated within that territory, has created enduring problems.16

By the end of the 19th century European expansion had ensured that European international law had been established globally as the one single system that applied to all societies. It was in this way that European international law became universal.

Decolonisation and the postcolonial state

The trauma of the First World War generated many changes in international law and relations. Most significantly, the imperial character of the discipline was recognised and criticised by scholars and statesmen in the inter-war period who denounced the international law of the 19th century that had legitimised colonial exploitation. The League of Nations attempted to formulate a new approach towards colonies, which were now labelled ‘backward territories’. Whereas in the 19th century the division between Europe and uncivilised non-Europe had been formulated principally through an elaboration of racial and cultural categories, the League of Nations characterised the differences between the civilised and uncivilised in economic terms, the ‘advanced’ and the ‘backward’.

As a consequence of these shifts, the territories of the defeated powers (the Ottoman Empire and Germany), rather than being acquired as colonies by the victors, were placed under the authority of the Mandate System of the League of Nations.17

The purpose of this system was, through international supervision, to ensure the ‘well being and development’ of the mandate territories;18 it was

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even contemplated that the most advanced territories, such as Iraq, would become sovereign states. These territories were placed under the control of Mandate Powers—Britain and France, most often—who acted as trustees on behalf of the League towards the backwards peoples, and were ultimately accountable to the League.

The League of Nations is studied most often in terms of its failed attempts to prevent international aggression. For the Third World, however, what is perhaps most important about the League was its attempt to create a set of techniques that were uniquely devised for the specific purpose of transform- ing backward, non-European societies into modern societies. Once more, whereas the interior realm of Western states (and of course of their colonies) was immune from international scrutiny by the League, the non-European mandate territories were completely accessible to the technologies of this, the first major international institution. The League’s ambitions to establish international peace were thwarted by the obdurate sovereignty of Western states—and of Japan, which was in effect treated as a Western state. In the case of the Mandate System, by contrast, the League was confronted by a novel and contrasting task, that of creating sovereignty and promoting self- government. As a consequence, once more, it was in the non-European world that the League could devise legal, administrative and institutional mechanisms to address this great challenge, and in so doing develop the technologies of management and control that have become entrenched in the repertoire of techniques subsequently used by international institutions.

While this project suggested the first attempts to achieve something like decolonisation and to create an international law that would further rather than suppress the aspirations of Third World peoples, the character of the sovereignty to be enjoyed by the non-European peoples was problematic. As Sir Arthur Hirtzel of the Indian Foreign Office recommended, regarding the sovereign Iraq that Britain—the mandatory power—should bring into existence:

What we want to have in existence, what we ought to have been creating in this time, is some administration with Arab institutions which we can safely leave while pulling the strings ourselves; something that won’t cost very much, which Labor can swallow consistent with its ginciples, but under which our economic and political interests will be secure. 9

In essence, while the Mandate System worked towards the creation of sovereign states, or at least politically developed, ‘self-governing’ societies, both the ‘sovereignty’ and ‘government’ of the non-European society were created with a view to furthering Western interests. Third world sovereignty, then, at least to the extent that it was shaped by international institutions, and by Western states acting through international institutions, was created in a way that could continue to serve Western interests. Crudely put, an examination of the Mandate System illuminates the ways in which political sovereignty could be created to be completely consistent with economic subordination.

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The Mandate System, of course, did not apply to the victorious colonial powers, such as Britain and France. Sustained nationalist protest by Third World peoples, however, ensured that decolonisation had become a central preoccupation of the international system. The United Nations responded by creating a number of institutional mechanisms for the furtherance of decolonisation, and by extending and adapting the doctrine of self­determination to colonial territories. The newly independent states signifi­cantly changed the composition of the international community, as they became a majority in the UN system. Most significantly, this enabled the sovereign Third World states to use international law and sovereignty doctrines to further their own interests and to articulate their own views of international law. The new states were especially intent on protecting their recently won sovereignty and negating the enduring effects of colonialism. Thus they sought to establish a set of principles that outlawed conquest and aggression, and prevented intervention in Third World affairs. Further, the new states used their numbers in the General Assembly to pass a number of resolutions directed at creating a ‘New International Economic Order’.20 This initiative was especially important, as the new states realised that political sovereignty would be meaningless without corresponding economic indepen­dence. Thus the new states sought to regain control over their natural resources through the nationalisation of foreign entities that had acquired rights over these resources during the colonial period.

Issues such as the terms on which a state could nationalise a foreign entity became particularly controversial. International economic law, which determined these issues, became a central arena of struggle between the West and the new states. The new states argued that this body of law had been created by the West to further its own interests and that they had played no role themselves in its formation. While several Western scholars acknowledged the legitimacy of the claims made by the new states, Western states argued that they were not bound by the principles authored by the Third World because of the basic rule that a state could not be bound by international rules unless it agreed to be so bound.21 Nevertheless, the West proceeded to argue, the Third World was bound by the older rules of inter­national economic law that the West had authored. Indeed, the West argued, acceptance of these and the other established rules of the international system was a condition of becoming an independent, sovereign state. In this context, Third World sovereignty was again articulated principally as a basis for being bound by international norms. The Third World initiatives, undertaken in the belief that colonialism was embodied in certain specific doctrines relating, for instance, to conquest or the rate of compensation payable upon nationalisation, confronted the problem that the colonial past could not be so easily excised from the discipline.

My argument is that colonialism had shaped not only those doctrines of international law explicitly devised for the very purpose of suppressing the Third World, but also had also profoundly shaped the very foundations of international law, including the ostensibly neutral doctrine of sovereignty. The end of formal colonialism, while extremely significant, did not result in

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the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism; Third world states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case.

The acquisition of sovereignty by the Third World state had numerous other repercussions. The postcolonial state, in many ways, adopted the models of development, progress and the nation-state that had first been articulated in the Mandate System and that had been further refined and elaborated by development theories such as modernisation theory. The leaders of these states sometimes consisted of elites with close ties with the West; in other cases they derived their power from affiliations with superpowers in the context of the ongoing Cold War. Further, Third World states divided along ethnic lines experienced civil wars as different ethnic groups fought for control of the state.

The postcolonial state, then, engaged in its own brutalities: women, minorities, peasants, indigenous peoples and the poorest were the victims. The international human rights law that emerged as a central and revolutionary part of the United Nations period offered one mechanism by which Third World peoples could seek protection, through international law, from the depredations of the sometimes pathological Third World state. It was for this reason that international human rights law held a special interest and appeal for Third World scholars.

Human rights law was controversial, however, precisely because it legitimised the intrusion of international law in the internal affairs of a state: it could be used to justify further intervention by the West in the Third World. Aspects of this intervention became evident after the collapse of the USSR and the intensification of globalisation. The ascendancy of neoliberal economic policy and the creation of the World Trade Organization (WTO), presented new challenges to Third World states. International financial institutions such as the IMF and the World Bank played an increasingly intrusive role in the economies of Third World states, and attempted to use their considerable powers to reform the political and social structures of these states, this in the name of promoting ‘good governance’, a project that entailed drawing in various strategic ways on international human rights law. The virtues of good governance are apparently self-evident. But the meaning of the terms remains open and contestable and these institutions attempted to use an amended version of human rights law to further their neoliberal policies in the guise of ‘good governance’, rather than enabling real empowerment of Third World citizens. In this way these international institutions, which proclaimed that the project of ‘good governance’ was entirely novel and necessary, were in many ways replicating the earlier efforts of their predecessor, the Mandate System and its efforts to promote ‘self- government’. The demand made by the international financial institutions (IFIs) that these states reform their internal arrangements was compared by some scholars with the system of capitulations that had previously been used by European states to demand the reform of non-European states. 22

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Towards the present: the ‘war on terror’

Following the 9/11 attacks many international law and international relations scholars argued that a new and unique threat confronted the international community, and that established international law was inadequate for the challenges it presented. As a consequence, scholars proposed a range of theories that purported to reform the laws of war, international humanitarian law and the law of human rights to address these new realities. What these arguments generally overlooked is that Third World countries themselves have suffered the worst consequences of terrorism for many years without attempting, as the USA is now doing, to dismantle the fundamental norms of international law relating to human rights and the use of force established by the system of the UN Charter, all in the name of effecting this supposedly essential adaptation.

What is clear, however, is that the ‘war on terror’—articulated in the National Security Strategy of the USA and now launched by that country— with its willingness to use pre-emptive force against ‘rogue states’ and its ambitions to transform Middle Eastern countries into peace-loving democ­racies, resembles in many ways a much earlier imperial venture. The rhetoric employed by President Bush to justify the invasion of Iraq disconcertingly resembles the rhetoric used by Vitoria to justify the Spanish conquest of the Indians. Once again, then, it is the barbaric, the uncivilised, that has prompted a concerted attempt to reconstruct international law. Ironically, however, these efforts to create a new international law appropriate for the allegedly unprecedented times in which we live have involved returning to a primordial and formative structure of international law, the civilising mission. This has resulted in the formulation of a new form of imperialism that asserts itself in the name of ‘national security’, as self-defence.

The imperial dimension of these initiatives is so explicit and unmistakable that even scholars and institutions who were largely indifferent, if not impervious, to the phenomenon of imperialism have begun to focus on the relationship between imperialism and the international system. A large and sometimes dishevelled literature has resulted, and prominent Western scholars such as Niall Ferguson have argued for the return of an imperial system of management headed by the USA.23 There is a happy assumption made in much of these supposedly expert writings—the validity of which has only been questioned by the violence in Iraq—that imperial rule would be welcomed and acquiesced to by those who are subjected to it.

There are certain dangers associated with this sudden focus on imperial­ism, and not only because of the calls for its return. I would argue that the Iraq episode and the war on terror more generally are simply very explicit and obvious examples of imperial practices. Imperialism is experienced in the Third World, I would suggest, in a much more everyday way through, for example, international economic regimes, supported and promoted by international law and institutions that systematically disempower and sub­ordinate the people of the Third World.24 This is the ‘everyday’ imperialism, the quotidian and mundane imperialism, that is accepted as somehow normal

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and that is furthered and promoted not only by the USA, but by European states that otherwi se have opposed US policy in Iraq. Much has been made on both sides of the Atlantic about the differences between Europe and the USA .25 But, I would argue, whatever separates Europe and USA, they are in many ways arguing for different versions of an imperial international system, one more explicit than the other. For the Third World, I suspect, imperialism is not an aberration that has emerged with the US actions in Iraq. Rather, imperialism is an integral aspect of day-to-day international relations. What is required, then, is an understanding of how imperial relations and structures of thought continue to operate in an ostensibly neutral setting. This would reveal how imperialism has always been a part of the international system, as opposed to a phenomenon that has suddenly emerged with the US war on terror and against Iraq.

The current war on terror involves the return of a much older form of imperialism. Equally, however, there is a certain novelty about the present that requires closer analysis, as the USA’s policy appears to be premised on the belief that only the use of force and the transformation of alien and threatening societies into ‘democratic’ states will ensure its security.

I have argued that the transformation of the peoples and polities of the non-European world is a continuing preoccupation of international law from its Vitorian beginnings. That transformation was seen principally in terms of enabling economic exploitation; now, however, the transformation of the non-European world is seen as essential for physical security.

Yet what events in Iraq and elsewhere have suggested is that US policies have only exacerbated the situation, and are more likely to generate resentment and retaliation. The paradoxes emerge: while proclaiming to further human rights, the USA has persistently violated them, while seeking to prevent terrorism, it has generated further violence. There is a cycle of violence here that could make the attempts to create a Kantian world of peace-loving democratic states into a guarantee of endless war rather than perpetual peace.

Conclusions

The use of international law to further imperial policies is, I have argued, a persistent feature of the discipline. The civilising mission, the dynamic of difference, continues now in this globalised, terror-ridden world, as international law seeks to transform the internal characteristics of societies, a task which is endless, for each act of bridging generates resistance, reveals further differences that must in turn be addressed by new doctrines and institutions. This is not to say, however, that these imperial ambitions and structures have always prevailed; rather, they have been continuously contested at every level by Third World peoples. Equally, of course, Third World states have often engaged in what might be regarded as colonial practices, in relation both to other, smaller states and to minorities and indigenous peoples within their own boundaries. Colonial practices, further, suffer from their own contradictions and incoherence. But they certainly

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pervade every aspect of the discipline. The questions that then arise are whether, how and to what extent international law can be used for the purposes of furthering the interests of Third World peoples—protecting them against the excesses of the authoritarian and sometimes genocidal state, on the one hand, and advancing their interests in the international sphere on the other. Third World international lawyers, immediately following the period of decolonisation, placed a special faith in international law, believing that it could achieve these results. However, this faith proved unfounded, and many international initiatives that were explicitly humanitarian and anti-colonial— such as the Mandate System—became a vehicle for imperialism. As a result, some scholars have eloquently argued that the Third World should dispense with international law altogether. But this not a feasible option, simply because that would leave open the field of international law to the imperial processes I have sketched, and this in a context where international law plays an increasingly vital role in the public sphere, where questions of violation, injury, legitimacy are all discussed in terms of international law. Interna­tional law operates, I have tried to suggest, at every level: international and national; economic, political and social; private and public. And it is in all these arenas that it is now imperative to understand the operations of imperialism and how they might be opposed and overcome. This is an issue that must surely concern all international lawyers, North and South, who intend international law to make good on its promise of furthering the cause of global justice.

Notes

1 This article presents arguments that are developed at greater length in Antony Anghie, Imperialism, Sovereignty and the Making of International Law, Cambridge: Cambridge University Press, 2005.

2 JHW Verzijl, International Law in Historical Perspective, 10 vols, Leiden: AW Sijthoff, 1968, Vol I, pp 435–436.

3 See Hedley Bull & Adam Watson (eds), The Expansion of International Society, New York: Oxford University Press, 1984. For an important critical treatment of the same theme, see Onuma Yasuaki, ‘When was the law of international society born? An inquiry of the history of international law from an intercivilizational perspective’, Journal of the History of International Law, 2, 2000, pp 1–66.

4 On this theme, see Martti Kosekenniemi, The Gentle Civilizer of Nations, Cambridge: Cambridge University Press, 2003, pp 98178.

5 This approach draws heavily on the work of pioneering postcolonial scholars, eg Edward Said, Orientalism, New York: Pantheon Books, 1978; Said, Culture and Imperialism, New York: Knopf, 1993; and Gayatri Chakravorty Spivak, A Critique of Post-Colonial Reason, Cambridge, MA: Harvard University Press, 1999.

6 Important works that deal with these themes include TO Elias, Africa and the Development of International Law, Leiden: AW Sijthoff, 1972; RP Anand, New States and International Law, New Delhi: Vikas Publishing House, 1972; and CH Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies, Oxford: Clarendon Press, 1967. For a more recent work that offers an important Third World perspective, see Siba N’Zatioula Grovogui, Sovereigns, Quasi Sovereigns and Africans, Minneapolis, MN: University of Minnesota Press, 1996.

7 See Francisco de Victoria (1557/1917) De Indis et de Ivre Belli Relectiones, ed Ernest Nys, trans John Pawley Bate, Washington, DC: Carnegie Institute of Washington. This work consists of lectures that Vitoria gave with the titles that might be broadly translated as ‘On the Indians lately’ and ‘On the law of war made by the Spaniards on the barbarians’. Significantly, this is the first work in the series ‘The Classics of International Law’ published by the Carnegie Institute of Washington. Victoria is more usually referred to as ‘Vitoria’ and I have used the latter name.

8 Vitoria, De Indis, p 127.

9 Ibid, p 161.

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10 Ibid, p 150.

11 Ibid, p 15 1.

12 Ibid, p 181.

13 See Alexandrowicz, An Introduction to the History ofInternational Law in the East Indies.

14 John Westlake, Chapters on the Principles of International Law, Cambridge: Cambridge University Press, 1894, p 141.

15 Ibid, p 142.

16 Makau wa Mutua, ‘Why redraw the map of Africa? A moral and legal inquiry’, Michigan Journal of International Law, 16, 1995, pp 1113 – 1176.

17 For an early and masterly account of the system, see Quincy Wright, Mandates Under the League of Nations, Chicago, IL: University of Chicago Press, 1930.

18 This was stipulated by Article 22 of the Covenant of the League of Nations, which created the Mandate System. Ibid, p 591.

19 Peter Sluglett, Britain in Iraq, 1914–32, London: Ithaca Press, 1976, p 37.

20 The classic work on this subject is Mohammed Bedjaoui, Towards a New International Economic Order, New York: Holmes and Meir, 1979.

21 Fundamental norms, jus cogens norms, are an exception to this broad principle.

22 David Fidler, ‘A kinder, gentler system of capitulations? International law, structural adjustment policies, and the standard of liberal, globalized, civilization’, Texas International Law Journal, 35, 2000, p 387.

23 Niall Ferguson, Empire: The Rise and Demise of the British World Order and the Lessons for Global Power, New York: Basic Books, 2003.

24 See, for example, BS Chimni, ‘International institutions today: an imperial global state in the making’, European Journal of International Law, 15 (1), 2004, pp 1 – 37.

25 See, for example, Robert Kagan, Of Paradise and Power, New York: Alfred Knopf, 2004.

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## Article of Interest 2

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Book Reviews

Elizabeth Heger Boyle, Editor

Imperialism, Sovereignty and the Making of International Law. By Antony Anghie. Cambridge, UK: Cambridge University Press, 2005. Pp. 378. $110.00 cloth.

Reviewed by Leslye Obiora, University of Arizona

Anghie posits imperial interests as the crucible for the improvisa­tion of the norms, structures, and processes that constitute the international rule of law. Identifying the seminal works of Francisco de Vitoria as a watershed that engendered juridical techniques and institutions manifestly appropriated as license to live by plunder, he copiously depicts the chameleonic persist­ence of Vitorian epochs belied by rituals of innovation in the international legal framework. Exploring the politics that inform the complex of rules refereeing what entities are sovereign and ascribing relevant powers (p. 16), Anghie analyzes the doctrine of sovereignty not merely as a fetish albeit impotent to fetter imperialism, but precisely as a simple expedient contrived to entrench colonial exploitations. Addressing the intimate con­nection between the doctrine and the question of culture, the author critiques the construction of sovereignty as the intrinsic preserve of a racialized elite simultaneously vested with the pre­rogative to arbitrate the ripeness (or lack thereof) of competing entities for induction.

In a similar vein, Anghie invokes an array of vivid arguments to demonstrate the contemporary significance of the self-sustaining exclusions that inaugurated the jurisprudential resources of inter­national law as a strategy of European imperialism. Illuminating the ideological and material constraints that predetermine dominations and the dependencies that thwart the substantive self-determination of third world states, he illustrates the incoherence of the axiom of sovereign equality and its corollaries as models of universal appli­cability. Underscoring a constellation of fictions that reinforce the disparate integration of the third world into the global order, the author chronicles a genius of creativity that legitimizes and perpetuates imperialism as a pervasive constant. Dissecting itera­tions of the colonial encounter as fossils with discernible imprints of historical shifts in the global political economy that incubate peren‑

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nial inequities, Anghie draws on the Mandate System to exemplify the genesis of egregious extremities that precipitated the Rwandan carnage (p. 191). The instructiveness of Anghie’s insight into the profound influence of the global political economy on localized vi­olence falters in light of the explanatory force he imputes to eth­nicity and racial determinism in lieu of rigorous attention to the objective conditions underlying conflict over resources (p. 206).

The work would have been further enriched had the author turned his piercing gaze to explore, animate, and engage the third world’s agency in its own predicament. An undertone of the work suggests an unquestioning embrace of the passivity of the third world that is rather curious. Perhaps it is naïve to presume the viability of resistance in the face of uncompromising ambition or against imperialistic finesse fine-tuned through years of practice. Arguably, there is no shortage of substantive historical evidence to vindicate counterhegemonic acts that Anghie seems inclined to relegate to a passing note. Conceivably, robust attention to third

world agency by way of resistance—or complicity for that mat­ter—is not exactly consistent with a core thesis that foregrounds

the arrogant certainty of hegemons whose machinations abound with impunity. However, the occlusion of or reticence about third world agency is not readily reconcilable with the author’s assertion of the centrality of the colonial encounter to the ascendancy of sovereignty. By the same token, closer interrogation may well have demystified the self-diminution signified by the third world’s apparent ratification of a regime Anghie painstakingly elucidates as a proxy for imperialism.

The enthusiasm that marked the inception of this review was especially tempered with disappointment about the author’s teas­ing rhetorical maneuvers, spurious disclaimers, and incongruous symbolic gestures. In material respects, the work does not quite live up to its aspiration to showcase “alternative histories—histories of resistance to colonial powers, history from the vantage point of the peoples who were subjected to international law” (p. 8). For a body of work preoccupied with nuance in distinguishing its undertaking and potential contribution, the considered evisceration of interna­tional ethics atrophies into a tunnel vision that replicates a familiar pattern of ascribing omnipotence to the West. Anghie extensively suggests that the stakes that dictated and are safeguarded by the predication of international order on asymmetric binaries or “a dynamic of difference” inoculate against the evolution of an inclusive paradigm from the status quo. However, insofar as he highlights the transformative potential of historicizing particular formulations and privileges a space to reclaim and invigorate international law in the postcolonial world (p. 317), to construe his intervention solely as a critique of the bankruptcy of technol‑

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ogies of control and management that masquerade as international law is to deflate the incisiveness of his criticism and to decline his invitation to render the regime accountable. All things considered, Anghie’s book is a thoroughgoing account that gives voice to sentiments that seldom see the light of day, let alone are adjudged worthy of dissemination by a prestigious press. The rereading of international law is a useful corrective to conventional perspectives that normalize subjugation and its rationalization by any means necessary.

\* \* \*

Overcoming Apartheid: Can Truth Reconcile a Divided Nation? By James L. Gibson. New York: Russell Sage Foundation, 2004. Pp. 488. $47.50 cloth.

Reviewed by John Hagan, Northwestern University and American Bar Foundation, and Sanja Kutnjak Ivkovié, Florida State University

Gibson’s ambitious goal is to assess the success of the South African Truth and Reconciliation Commission (TRC) not only in reducing this nation’s racial divide, but also in increasing South Africa’s po­litical tolerance, its support for human rights, and the legitimacy of its governing political institutions. He rises to this challenge by analyzing the results of a landmark 2000–2001 survey of nearly 4,000 South Africans. Gibson is cautious but not shy in delivering a bottom-line assessment. He finds that nearly one-half of the South African population entered the new millennium expressing some degree of reconciliation. Given the challenges of overcoming apartheid, the TRC, according to Gibson, has likely delivered as much as could be expected.

The reader learns much across the chapters of this book: that reconciliation is a measurable construct, that interpretive truth is critical in creating a collective memory, that intense contact among members of conflicting subgroups can help achieve reconciliation,

that the creation of a human rights culture—among the populace and the government—is both a backward- and forward-looking

process, that intolerance is a social and not an individual-level characteristic, that amnesty can be a powerful source of perceived injustice, and that public institutions that serve as the backbone of a democracy must develop a substantial degree of legitimacy.

Among the strengths of Gibson’s accomplishment are the pre­cision of his measurement approach and the cautiousness of his analytic judgments. For example, subdimensions of reconciliation

# Muhammad Munir: Jihad in Orthodox Sunni Islam

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## Abstract

This work attempts to answer some of the very basic questions raised about the just or legitimate causes of war in Islam as laid down by orthodox Sunni fuqha. Such questions include: what is the permanent basis of relation between Islamic and non-Islamic territories? Is the world split into only two domains − *Dar al-Harb* and *Dar al-Islam*? Is jihad waged to impose Islamic faith on non-Muslims? What are the purposes and objectives of jihad? Is Islamic history in reality the history of violence? Can there be peaceful co-existence between Islam and other beliefs?

This work thoroughly analyzes, from an academic and legal point of view the tenability of the first three premises stated above as well as rules about the conduct of war as laid down by classical Muslim jurists. The findings are: that the cause(s) of war in Islam is never the elimination or subjugation of infidelity or the bringing of the whole world under the supremacy of Islam rather it is to defend Islam and Muslims from external attacks; that evolutionary theory of warfare in Islam which culminated in the perpetual war theory cannot be sustained and must be rejected; that the Qur’anic verses on *qital*(fighting) have mostly been read out of context, misunderstood and misinterpreted; that the perpetual war theory must be rejected and that the theory of interstate relation in Islam is “so long as they remain true to you, be true to them”; that the theory of the division of the world into two domains – *Dar al-Harb* and *Dar al-Islam* must be understood in the context for which it was devised by the fuqaha. There are many inconsistencies and self-contradictions in the jihad theory explained in some classical treatises of Islamic law.

Islamic law makes a distinction between combatants (those who fight) and non-combatants (those who do not fight) and allows fighting with the former and protection to the latter. Some classical Imams or followers of one school of thought were careless in transmitting the opinions of another school of thought; that the Qur’an has mentioned only two ways to terminate captivity of POWs, that is, ‘*mann*’ (freedom gratis) and ‘*fida*’ (ransom) in verse 47: 4; that ransom was taken by the Prophet only from the POWs of Badr and the general practice of the Prophet (PBUH) and his successors was to set POWs free without any condition, ransom or anything else; that Non-Muslim states used to ask for ransom to release Muslim or non-Muslim POWs. In addition, enslavement of POWs as well as their execution had never been the general rules. Execution of a POW had been very rare in Islamic military history. The Prophet and his successors had exchanged POWs on certain occasions.

# Panel 2 - Islamic legal and Political Perspectives on the use of force

# Jann K. Kleffner: Moderator Panel 2

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## Biography

Jann K. Kleffner is Head of the International Law Centre and Associate Professor of International Law at the Swedish National Defence College. He is also Assistant Professor of International Law and Deputy Programme leader of the research programme on 'The Role of Law in Armed Conflict and Peace Operations', at the Amsterdam Centre for International Law of the University of Amsterdam in The Netherlands. A member of the Committee on ‘Compensation for Victims of War’ of the International Law Association, he has served as expert and consultant for a number of inter-governmental and non-governmental organisations, including International Committee of the Red Cross, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, and he has advised law firms in the areas of the law of armed conflict and international criminal law. He has also fulfilled a number of editorial functions, including as Managing Editor and Member of the Editorial Board of the Yearbook of International Humanitarian Law. He also acts as executive member of The Hague Initiative for Law and Armed Conflict and co-convenor of the Dutch Research Forum on the Law of Armed Conflict and Peace Operations.

The research of Dr. Kleffner is on public international law, with a specific focus on the law of armed conflict and peace operations, jus ad bellum, international criminal law, and human rights (particularly in armed conflicts).

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# Hilmi M. Zawati: *Jus ad Bellum* and the Rules of Engagement in the Islamic Law of Nations―the Shaybānī’s *Siyar*

## Biography

Hilmi M. Zawati, Ph.D., LL.M., M.A., DGSL, LL.B., is currently president of the International Legal Advocacy Forum (ILAF), and an international human rights lawyer. Dr. Zawati has an accomplished body of trans-disciplinary scholarship. His present primary research areas are: human rights legal advocacy; the international criminal justice system; women and war from a cross-cultural perspective; the Islamic law of nations (al-siyar): humanitarian and human rights law; and conflict analysis and resolution. He has been a human rights activist over the last three decades and has actively advocated human rights of wartime rape victims throughout the world ever since the first reports of war crimes during the Yugoslav dissolution war of 1992-1995. Dr. Zawati has a long list of publications, including a number of several prize-winning books on international humanitarian and human rights law.

## Abstract

 The word *jiha>d* may be one of the most misinterpreted terms in the history of Islamic legal discourse by both Muslims and non-Muslims. For more than a decade before the tragedy of September the 11th, 2001, precisely in the wake of the fall of the Soviet Union, misconceptions of *jihād* and the consequent branding of Islam as a “violent religion” and “the new enemy” in the writings of the leading political theoreticians of the Cold War era, namely Samuel Huntington and Bernard Lewis, have become routine in Western literature. The result has been a distortion of the term *jiha>d* to the point where it is virtually synonymous in the public mind with terrorism.

 A closer look at the provisions of the Islamic law of nations, embodied in the primary sources of Islamic law and in the treaties of prominent Muslim jurists, particularly the Shaybānī’s siyar, reveals that the laws governing the doctrine of *jiha>d* are realistic and practical. They regulate conduct during a *jiha>d* andset-up rules of engagement on the basis of human principles. As peace is the rule and war is the exception, *jihād* is based on the premise that an armed conflict should not arise between the Muslim state and other states unless it is for the purpose of: deterring aggression; eliminating oppression, extortion and injustice; achieving the human ideas that are considered as the aims of life, including the right to life and to respect one’s religious beliefs; and securing people against torture, terror, and inhuman treatment.

 The Islamic law of nations recognizes that war, by its nature, implies violence and suffering. Therefore, it instructs Muslim leaders to accept the enemy’s offer to peace even at the risk of possible deception. As a practical and realistic law, it strictly lays down humane rules governing the conduct of war and the treatment of enemy persons and property. Limiting violence to the necessities of war, Islamic law differentiates between combatants and civilians, as well as between military and civilian objects in time of war.

Furthermore, it provides a set of forbidden acts that relate directly to the above categories; combatants, civilians, and civilian objects.

 With respect to the first category, Islamic law deters Muslim fighters from the following acts: (a) starting warfare before inviting their enemy to adopt Islam or to conclude a covenant of peace. Even if the enemy declines, Muslim fighters are still bound not to start the fighting until the enemy attacks; (b) summary executions, decapitation and torturing of prisoners of war (*al-asrā*); (c) delivering a *coup de grâce* to the wounded; (d) burning captives to death; (e) mutilating dead bodies; (f) treachery and perfidy; (g) using poisoned weapons; and (h) killing of an enemy *hors de combat*.

 Islamic law of nations is rather cautious in dealing with civilians in times of war. It forbids (a) attacking, killing and molesting of non-combatant persons. This category includes children under 15 years of age, women, old men, monks, sick and disabled persons; (b) rape in war and sexual molestation. Any Muslim fighter who may commit fornication, rape and other forms of gender-based sexual violence is subject to stoning to death or, to lashing, according to the gravity of the crime and to his status as single or married; (c) brutal massacres and collective blood baths; and (d) killing of peasants, merchants, and diplomats. Furthermore, it prohibits unnecessary destruction of an enemy’s real or personal property; devastation of harvest and cutting fruitful trees; and demolition of religious, medical and cultural institutions.

 To this end, one may find that there is a unique relationship between *jihād* and the notion of just war. Islamic law of nations, under the doctrine of *jihād*, has affirmed and protected all personal individual rights, for all people, without distinction as to race, sex, language or religion. Thus, *jihād* as embodied in the norms of Islamic law should be recognized as the *bellum justum* of Islam.

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# Said Mahmoudi: Non-State Islamic Actors and International Humanitarian Law

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## Biography

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## Abstract

**Non-State Islamic Actors and International Humanitarian Law**

**Said Mahmoudi**

**Stockholm University**

Military operations that have been carried out in the Middle East in recent years by Hezbollah and Hamas against Israel and by groups allegedly close to Taliban against the United States and other States have had different purposes and justifications. They have been characterised by the perpetrators as self-defence against assault or occupation, fight against the oppressor or the infidel, fight against injustice and so forth. The groups that have been engaged in these operations have largely been classified as non-State actors even if there is a considerable variation as regards their link to States. Hezbollah is not only a strong military group in Lebanon but also a political party with considerable number of seats at the parliament and key cabinet positions in various Lebanese governments. Hamas as a political movement has built the elected government of the Palestinian Authority. Whether these movements can be considered as non-State groups proper is a matter of discussion. However, irrespective of these groups’ characterisation, their allegiance to or lack of respect for the rules of international humanitarian law can be studied with due regard to their raison d’être, their vision of their adversaries and their perception of their ultimate goal.

In analysing the conduct of Islamic non-State actors in the Middle East, several basic concepts have to be taken into consideration. The relations between Muslim and non-Muslim territories and traditional causes of war in Islam, namely infidelity or defence of faith are examples of such concepts. Militant groups affiliated to the Taliban network are generally inspired by the vision of fighting against the dominant Western (mainly American) infidel that threatens the Islamic faith. For Hamas, on the other hand, the issue is to fight against the injustice that has been done to the Palestinian people and to liberate them from the Israeli occupation. Although Islamic in words and deeds, Hamas has put much more emphasis on nationalistic goals when it comes to its military conduct against Israel. Hezbollah has taken a middle position by strongly emphasizing its Islamic character while at the same time justifying many of its operations on purely secular and political grounds.

The main issue is not to find out whether or not non-State actors in the Middle East really abide by IHL rules. It is more relevant to establish whether any possible disregard for these rules or parts thereof is due to these actors’ belief in the assumed incompatibility of IHL rules with Islamic laws of war.

# Panel 3 - Selected Topics : Islam and IHL

# Maha Azzam: The political theology of Al Qaida

**Chatham House, UK**

## Biography

Dr. Maha Azzam , D.Phil ( Oxford University) is an Associate Fellow at Chatham House, The Royal institute of International Affairs, London . Fellow of the Royal Society of Arts, U.K. Azzam has written extensively on political Islam and is a leading commentator in the media on the subject. Her forthcoming book is  *Islamism Revisited*, (Wiley 2010).

She was ‘Thought Leader’ for the World Economic Forum’s Project on the GCC and the World 2025. She was one of the experts on the Trans-national Threats Project at the Centre for Strategic and International Studies (Washington D.C) 2006-2007. She set up and was Head of the Security and Development in Muslim States Programme at the Royal United Services Institute for Defence Studies, London from 1995-1999.

Her publications include: ‘Understanding Al-Qaeda’, *Political Studies Review,* vol.6, no.3, September 2008, ‘U.S elections and the Islamic World’ *The World Today* (April 2008), ‘The Centrality of Ideology in Counter-Terrorism Strategies in the Middle East’ In James Forest (ed.) *Counter-Terrorism in the Twenty First Century* (Praeger Security International 2007). ‘Some Local and Global Dimensions in the Radicalisation of Muslim Communities in Europe’ , *The Brown Journal of World Affairs, Spring/ Summer 2007.*  ‘Identity and Islam: The battle of ideas’, *The World Today,* (May 2007) , ‘Islamism Revisited’, *International Affairs,* vol.82, no. 6, November 2006. ‘Al Qaeda- Five years on’, Chatham House Briefing Paper, London, September 2006. ‘Political Islam and the Ideology of Violence’ in James Forest (ed.) *The Making of a Terrorist* (Praeger 2005).

# Anisseh (Anicée) Van Engeland-Nourai: Islamic humanitarian approach and international humanitarian law: conflict or complementarity

**University of Bedfordshire**

## Biography

Anisseh (Anicée) Van Engeland-Nourai (LL.M Harvard Law School; Ma Iranian Studies Paris III Sorbonne; Ma International Relations Paris II Assas; PhD Islamic World, Institut d’Etudes Politiques de Paris) is a Reader in International Law at the School of Law, University of Bedfordshire, UK. She previously held fellowship position at McGill University and the European University Institute.

She is an international human rights jurist and a political analyst. She worked with ICRC, UNHCR, ILO, IOM and the French Minister of Foreign Affaires. She is a consultant for several universities, research centres and think thanks worldwide.

Her fields of expertise are international human rights, human rights in Iran, international humanitarian law, Islamic humanitarian law, refugees’ issues, terrorism and torture. She mainly works on the theories of the new hermeneutics of the Shari’a she used to encourage the reform of Iranian law to fit universal standards to the Islamic law of war.

She has published articles in all these research fields. Her most recent publications include an article “Islam and the Protection of Civilians in the Conduct of Hostilities: The Asymmetrical war from the Transnational Terrorist Groups’ Viewpoint and from the Muslim Modernists’ Viewpoint”. She also has a forthcoming on combatants and civilians in the 21st century (Oxford University Press).

Anisseh features in Who’s who in the World, Who’s who emerging leaders and the Dictionary of International Biography She also serves on the advisory board of the Irmgard Coninx Foundation in Berlin.

# Adel Maged: Gender violence prohibition in IHL and in Sharia law

**Supreme Court of Egypt, Durham University**

## Biography

**Justice Adel Maged**, LLB (Alexandria), LLM (Utrecht), Honorary Professor of Law at Durham University (UK).

Justice Maged is a judge at the Egyptian Court of Cassation (Criminal Division), the Supreme Criminal Court of Egypt & Director of the Department of International Cooperation. Previously he was a judge at the Egyptian Court of Appeals and for several years on secondment to the Ministry of Justice of the United Arab Emirates (UAE) as a Legal Advisor on International (Criminal) Law and Treaty Affairs. He was selected for this position after having spent two years serving in the Legislative Department at the Ministry of Justice in Egypt (2000-2002). He was a lecturer in international criminal law at the Institute for Training & Judicial Studies, Abu Dhabi, UAE. He has many years of experience in the fields of criminal justice and trial advocacy as a Public Prosecutor and Judge. In 1998 he was appointed Chief Prosecutor at the Criminal Division of the Court of Cassation. Justice Maged was appointed an honorary professor in the Law School, Durham University, UK, in 2007 for an initial period of three years. He is also Special Advisor to the Centre for Criminal Law and Criminal Justice of Durham University on Islamic Shari'a.

Justice Maged’s fields of interest comprise international criminal law and procedure and serious crimes (organized crime and terrorism). He has extensive expertise in comparative criminal justice and in criminal law reform. As a member of the American/Egyptian joint group, he participated in the reform of the Egyptian Code of Criminal Procedure. He has extensively contributed to the negotiation and the drafting of national and regional model legislation and treaties on anti-terrorism and international legal cooperation in criminal matters. He served as a member of specialized committees of the Arab League on organized crimes, terrorism and the ICC and is also a member of the National Committee for the ICC in Egypt. Currently, he is the Arab League's expert on combating human trafficking.

He has trained judges, prosecutors, police officers and government officials from Egypt, Kuwait, Sudan and United Arab Emirates as well as from Iraq, on issues such as international criminal law, international humanitarian law, techniques of criminal investigation and combating human trafficking.

His publications include articles on international criminal law in the Arab world, the ICC, international legal cooperation in criminal matters, and terrorism. He is the author of the Arabic books entitled “The International Criminal Court and National Sovereignty”, “Combating Trafficking in Human Being in International law and National Legislation” and “The Responsibility of States for Defamation of Religion and Religious Figures”. One of his recently published articles in English is "Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice", International Criminal Law Review, Vol. 8, 2008, 477-507.

Justice Maged is a member of the Editorial Board of the *International Criminal Law Review* and the Advisory Board of *Studies in International and Comparative Criminal Law*. He is also a member of the Hague Rule of Law Network and the World Justice Project MENA Group on the Rule of Law.

Judge Maged holds a Bachelor of Law from Alexandria University, Egypt; an LL.M on Internationalization of Crime and Criminal Justice from Utrecht University, The Netherlands; a Diploma on International Law and Organization for Development from the Institute of Social Studies, The Hague, The Netherlands.

## Abstract

The presentation will explore the existing body if IHL with the purpose to identify forms of violence against women. This will be done by referring to the Fourth Geneva Convention and its Additional Protocols, complemented by the case law developed by the current ad hoc tribunals and the ICC.

It will then test the rules of Islamic Law derived from the Holy Qura'n and Sunnah (and other established sources of Islamic Shari'a) to explore aspects of similarities and dissimilarities between Islamic law and IHL regarding the issue of gender violence prohibition. This will be done through a comparative study of the rules of IHL and that of Islamic Shari'a, which have a remarkable impact on the legal systems adopted in Islamic countries.

Special focus will be given to the crime of rape because of the current controversy raised in the academia on the compatibility of the Islamic Shari'a rules, regarding this crime and its evidentiary requirements, with existing norms of the current system of international criminal justice.

The presentation, in general, draws attention to the importance of understanding the cultural and religious specificities in a certain community to be able to address the IHL's violations in that community and to provide suitable remedies thereof.

## Article of interest

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**Arab and Islamic Shari’a Perspectives on the Current
System of International Criminal Justice**

**Adel Maged\***Judge at Cairo Court of Appeals (Egypt), on secondment to the (UAE)
Ministry of Justice as Legal Advisor on International Law and Treaties,
Honorary Professor of Law at Durham University (UK)

**Abstract**

~ e Arab World is currently witnessing various confl icts, which have resulted in the death and dis- placement of many innocent civilians. It is notable that the current system of international criminal justice has failed to address many of the atrocities committed during those confl icts. In order to rectify this, it is imperative that “voices of reason” accurately convey to the West the attitudes of the Arab people towards this system. ~ is article attempts to illustrate, on the one hand, that Islamic *Shari á* principles, which have had a remarkable impact on the Arab legal systems, are compatible with the provisions of the current system of international criminal justice, and to explain, on the other hand, Arab skepticism with regard to that system.

**Keywords**

Aggression; Arab world; Atrocities; double standards; International Criminal Court; international criminal justice; infl uence of Islamic *Shariá;* international criminal justice; obstacles to ratifi cation; special Tribunals; the Middle East crisis; terrorism

**1. Introduction**

Arab States1 have always supported the creation of an international criminal jus­tice system capable of bringing to justice the perpetrators of serious violations of

\*) I would like to thank the Offi ce of the Prosecutor of the ICC (OTP) for assisting me in concep­tualising the relation between the ICC and the Arab States, during my consultancy at the OTP last September, and also for providing me with necessary information on the Legal Tools Project (LTP). I would like to thank in particular Dr. Rod Rastan, Jurisdiction, Complementarity and Cooperation Division (JCCD), for his valuable assistance in this context. ~ anks also are due to Dr. Magda Maged, for her cooperation, in proofreading the translation of the religious texts included in this article. ~e views expressed in this article are those of the author and do not necessarily refl ect those of the Egyptian Ministry of Justice or any other Arab institution.

1) ~ e “Arab States” are here understood as the 22 member States of the Arab League: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. Fourteen Arab States signed the *Rome Statute* , and to date only 3 Arab States have ratifi ed it (Djibouti, Jordan and Comoros).

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humanitarian law. Further, most Arab States have shown signifi cant interest in the work of the International Criminal Court (ICC) established by the Rome Statute 2 from its inception. ~ ey have seen the establishment of the ICC as a major victory to humanity in general and to the Arab people in particular. However, looking at the status of the ratifi cation of the Rome Statute, one wonders about the reluctance of the Arab States to become parties to the treaty establishing the ICC. ~ e low level of ratifi cation of the ICC Statute by Arab governments has negatively aff ected the progress of international criminal law in the Arab region.

~ e Arab world is currently facing many challenges. One of these is the death and/ or displacement of thousands of innocent civilians. ~ e use of force is responsible for much of this loss. In order to prevent this from continuing, or happening in the future, it is imperative that “voices of reason” accurately convey to the West the thoughts and concerns of the Arab people.

~ e author highly appreciates the current trend of many international insti- tutions and academic fora to off er the opportunity to Arab scholars to present the concern of their countries and nations with respect to the global system of justice. ~ e strategic role of the Arab region, the number of confl icts that are currently taking place in Arab States and the West’s eagerness to comprehend the core concepts of Islamic justice are certainly some reasons behind that trend.

As we will see below, Arab governments have concerns regarding the current system of international criminal justice, at the apex of which stands the ICC. Unfortunately, government offi cials’ fears are mainly based on allegations of selec- tivity of cases and/or political interference from the Security Council or other major powers. ~ is has resulted in a degree of misunderstanding and mistrust towards the current system of international criminal justice.

~ is article attempts to examine the main factors that infl uence Arab States’ approaches towards the current system of international criminal justice and casts some light on the main reasons behind their reluctance to join the institutions of that system. In the Arab world, religion has its infl uence not only on the attitude of people, but also on the approach of governments towards many issues. It is imperative when examining the status of international criminal law in the Arab region to look at infl uence of Islamic *Shari’a*.

**2. Signifi cance and Specifi cities of the Arab Region**

~ e Arab World stretches from the Atlantic Ocean in the west to the Arabian Sea in the east, and from the Mediterranean Sea in the north to Sub-Saharan Africa and the Indian Ocean in the south. It consists of 22 countries with a combined population of some 325 million people spanning two continents

2) Rome Statute establishing the ICC, signed 17 July 1998, entered into force 1 July 2002.

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(Africa and Asia) . ~ e Arab world is, witnessing more confl icts with a variety of diff erent actors than any other place in the world. For many spectators, it has become a fi eld of experiment of international criminal justice; the Iraqi High Tribunal, the Lebanese Special Tribunal and the adjudication of the Darfur sit­uation by the ICC are some examples. All the factors indicated above suggest that more involvement from the Arab countries in the current system of inter­national criminal justice is needed. However, eff ective participation of the Arab countries will depend on their confi dence in the current system of international criminal justice and the awareness of international actors of the factors and particularities intrinsic to the Arab culture.

**3. Infl uence of Islamic *Shari’a* on Arab States Approaches to International Criminal Justice**

Islamic law, which fi nds its basis in Islamic *Shari’a* , remains one of the recognized legal systems of the world today. 3 It is worth noting that Islamic *Shari’a* basically is the main source of legislation in the majority of the Arab countries. ~ is does not only have implications on national legislation but also on their approach in responding to international treaties and the statutes of international tribunals. It is common practice for Arab and Islamic States to make reservations to provisions of international treaties that are in confl ict with the principles of Islamic law. ~ is and the spread of violence in many parts of the Islamic world have motivated many to try and examine the principal values of Islamic *Shari’a* and how far are they in harmony with the core concepts of international criminal law.

A scrutiny of the primary sources of Islamic *Shari’a* (*Qur’an* 4 and *Sunnah* 5) against the core concepts of the existing systems of international criminal justice will reveal that the values and principles of Islamic *Shari’a* are compatible with

1. *See David, Rene and Brierly, John* (1978), Major Legal Systems in the World Today, London: Stevens and Sons, p. 421; *Baderin, Mashood* (2004-2005), Eff ective Legal Representation in “ *Shari’ah”* Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States, II Year Book of Islamic and Middle Eastern Law 135.
2. ~ e Holy *Qur’an* is the principal source of Islamic *Shari’a* . It forms the basis for relations between man and God, between all persons whether Muslims or non-Muslims, as well as between man and all aspects of creation. ~ us, Islam, with its rules as contained mainly in the Holy *Qur’an* and the Prophet’s *Sunnah,* is a way of life, not merely religious rituals for worship. *Shari’a* , in general terms, also contains the rules by which the Muslim Nation- in the broadest sense of the word- is orga­nized, and it provides all the means necessary for resolving confl icts among individuals, or between individuals and the state.

5) *Sunnah, in its broad sense,* refers to both the sayings and practices of the Prophet Mohammad. ~ us, *Sunnah* constitutes the normative pattern of life established by Prophet Mohammad. *Sunnah* has been kept and recorded in the form of *hadith,* (sayings) as well as practices and deeds attributed to Prophet Mohammad. *Sunnah* in the form of *hadith* is supplementary to the Holy *Qur’an* itself. It helps to explain and clarify the Holy *Qur’an* and provides practical applications of its teachings.

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existing international criminal law norms. *Shari’a* addresses core issues of the rules of combat, protection of civilians, protection of cultural property, prohibi- tion of aggression, murder and torture and compensation of victims of serious crimes; etc. Justice is a core value of Islamic *Shari’a* and an aspiration of all Muslims. ~ is concept finds its roots in the principles and dictates of the Holy *Qur’an* and the *Sunnah*. ~ e Holy *Qur’an* clearly states “Allah commands ... that when you judge between people, *that you judge fairly*” [Emphasis added] .6 ~ e *Qur’an* also fi rmly stresses that “O you who believe, be steadfast in justice, as witnesses for Allah, even though it be against yourselves or (your) parents or (your) kin, be he rich or poor, Allah is a Better Protector to both (than you) .... ”. 7 ~ erefore, what Arabs, and Muslims in general, aspire to is to fi nd an interna- tional criminal justice system capable of enforcing the rules of international criminal law among all equally without discrimination and, most importantly, capable of deterring the strong and protecting the weak. Such a system would uphold the concepts of equality 8 and justice enshrined in Islamic *Shari’a*.

A good illustration of the application of the concepts of equality and justice is provided by the practices of Prophet Mohammad (Peace Be Upon Him) who once said in reaction to the attempted intercession by a number of his companions, including Usamah Ibin Zayd, who approached the Prophet to grant pardon to a woman who had committed theft, claiming that she was only newly converted to Islam. ~ e Prophet expressing annoyance at their attempted bias, reacted, saying: “ ' \* people before you perished because they would not punish those of noble descent when they committed theft, and only enforce punishment on the weak. By God, if Mohammad’s own daughter, Fatimah, committed theft, I shall (not hesitate to) cut off her hand. 9

Contrary to allegations stereotyping Islam as a source of violence, the basic rules of *Shari’a* promote tolerance and forgiveness. *Shari’a* is based on the well- known principle, stipulated by Prophet Mohammad: “avoid harm and infl ict no harm on others”. 10 More specifi cally, the *Qur’an* stresses that every individual is entitled to safety, and that only unfair aggressors should be attacked. On that meaning, the *Qur’an* declares in the broadest terms that: “there shall be no hostility except against the aggressors”. 11

In fact, Islamic *Shari’a* totally forbids violence against individuals. As narrated by Abdullah Ibn Omar, the Prophet said “a believer remains within the boundary of

1. *Qur’an* : Al-Nisaa 4:58.
2. *Qur’an* : Al-Nisaa 4:135.
3. For more details on the doctrine of equality in Islamic *Shari’a*, *see Oudah*, *Abdul Qadir* (2005)*,* Criminal Law of Islam, New Delhi: Kitab Bhavan, pp. 25-9.
4. *Abu Yusuf* , al-Kharaj, p. 166.
5. *Sunan Al-Darkatly* , 3/7 *hadith* No. 288; 2/227 *hadith* No. 83-5.
6. *Qur’an* : Al-Baqarah 2: 193.

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the faith unless he kills someone unlawfully”. 12 Murder, in Islam is a deadly sin except in the events of “ *qasas*”13 (retribution) and self-defense. ~ e Holy *Qur’an* states that murdering an innocent human being unlawfully is equal to murdering the whole of mankind. ~ is rule is well established in the fi rst source of Islamic *Shari’a* , i.e, the Holy *Qur’an* , which states in unequivocal terms that: “if anyone murders a human being — unless it be [in punishment] for murder or for spreading corruption on earth —, it shall be as though he had murdered all humankind; whereas, if anyone saves a life, it shall be as though he had saved the lives of all humankind”.14 ~ ere is a consensus among Islamic scholars, who belong to the four Islamic schools of legal thought, that the killing of civilians, especially women and children, is strictly prohibited by Islam. 15 ~ is approach has been fi rmly established in the second source of Islamic *Shari’a, i.e. Sunna*. ~ e following are two confi rmed sayings by the Prophet narrated by Abdullah Ibin Omar and Anas Ibn Malik, respec­tively. ~ e fi rst, narrates that during one of the Muslim conquests, a woman was found killed, and in response, the Prophet said “she shouldn’t have been killed”, he disapproved of the killing of women and children. 16 On another occasion, the Prophet commanded his followers who were on their way to battle: “go in the name of Allah and on the path of his Prophet, and never kill an elderly person, nor a child, nor a youngster, nor a woman”. 17 ~ is means that the Prophet himself extended this protection to other non-combatants like the elderly and the weak.

~ e four *Rashid Khalifa* s (who succeeded Prophet Mohammad in governing the Islamic nation) followed strictly the authentic rules of Islamic *Shari’,a* as expressed in the Holy *Qur’an* and *Sunnah*. ~ e fi rst Rashid Khalifa (i.e. Rightly­Guided Caliph), Abu-Bakr Al-Seddiq, instructed his army commander who was on his way to a battle saying: “ I give you ten commandments which you must observe: Never kill a woman, nor a child, nor an elderly person; never cut a fruit­bearing tree; never destroy an inhabited place; never slaughter a sheep nor a camel except only for food; never burn nor inundate a palm-tree; and neither be revengeful nor cowardly.” 18

1. *Sahih Al-Bukhâri* , the book of *Diyat* Chapter 81, *hadith* No. 2168.
2. *Qasas* is prescribed in Islamic law for murder/intentional killing, and intentional physical injury. In cases of intentional killing and intentional physical injury, the family of the victim may waive their right to retribution and accept *diyyah* (monetary compensation). Moreover, the victim’s family can pardon the perpetrator and withdraw their right to *qasas*.
3. *Qur’an* , Al-Ma’idah 5:32.
4. *Ben Al-Tala’a* (Abu Abed Allah Mohammad Ibn Farag Al-Maleki), Akdeiat rasool Allah sala Allah alaihi w salam (Cases of the Prophet Mohammad, Peace Be Upon Him), edited by Mohammad Deia’ a Al-Rahman Al-Azami (1982), Second edition, Beirut: Dar al ketab al-lebnany (Lebanese Publisher Establishment), p. 660.
5. *Sahih Al-Bokhâri* , the book of *Jihâd* , Chapter 69, *hadith* No. 1293.
6. Narrated by *Abu Dawood* No. 3/86, the book of *Jihâd* , Chapter 3.

18) Cited in *Ahmad Abu Al-Wafa* (2001), ketab al eelam bkawaed al kanoon al dawly w al elakat al dawilya fi shari’at al islam (Treatise on International Law Rules and International Relations in Islamic *Shari’a* ), dar al-nahdah al-arabia, Cairo, 1 st edition, p 123.

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Islamic *Shari’a* strictly prohibits the mass killing of even enemy soldiers. ~ e proof is contained in an authentic incident narrated about the Second Rashid Khalifa, Omar Ibn Al-Khatab, who in response to the exceptionally large number of enemy soldiers killed in a battle that was launched by his best and most renowned army commander, Khalid Ibn Al-Waleed, immediately and strictly ordered Khalid to abdicate and replaced him by another commander. 19 According to the rules Islamic *Shari’a* elaborated above, the systematic annihilation or physical extermi- nation of a part or whole of a group people or the infl iction of destructive conditions of life would fall under the most sinful acts that the Islamic *Shari’a* condemns. Islamic *Shari’a* prevents the intentional destruction of human groups partially or entirely, thus refl ects the main aim of the Genocide Convention of 1948. 20 Examples of massive human rights violations that occurred in some Muslim coun- tries or by some “so-called” Muslims should not be regarded as examples illustrative of the behaviour of true Muslims. Such violations are not only at variance with international norms, but even more strictly so with the basic concepts of *Shari’a*.

For example, the crime of aggression was defi ned by and proscribed in Islamic *Shari’a* 1,400 years ago. *Shari’a* uses the term aggression, in some situations, to denote the unlawful waging of war. ~ e Holy *Qur’an* repeatedly prohibits all acts of aggression. ~ e Holy *Qur’an* emphasizes that “there shall be no hostility except against the aggressors” . 21 ~ is verse prohibits committing any act of hos- tility against those who have not committed acts of aggression, and only allows hostility against aggressors. 22 Muslim scholars have cited among the examples of unlawful wars those conducted for the purpose of occupation, colonialization, seizure or partition of territories for the purpose of avarice, selfi sh glory or eco- nomic gains. Each of such aggressive acts of unjustifi ed violence is considered an aggressive war and has been prohibited under *Shari’a* 23 ever since the birth of Islam centuries ago. It should be emphasized that war is mostly called for in Islam either for combating injustice, or for defensive purposes, but never for off ensive purposes. 24 Indeed, the Holy *Qur’an* guides Muslims to the path of justice and strictly stipulates: “And fi ght in the way of Allah those who fi ght you and do not transgress limits; for God likes not the transgressors” . 25 As noted

1. *Ibid* , p. 112.
2. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly in Resolution 3/260, UN GA (1948); 78 UNTS (1949).
3. *Qur’an* : Al-Baqarah 2: 193.
4. *See Mohammad Hashim Kamali*,~ e right to Safety ( *Haqq Al-Amn* ) and the Principle of Legality in Islamic Shari’a, in: *Muhammad Abdel Haleem, et al* , (eds.) (2003), Criminal Justice in Islam: Judicial Procedures in the Shari’a, London: I.B. Tauris, p. 59.
5. *See Malekian, Farhad* (1994), ~e Concept of Islamic International Criminal Law: A Comparative Study, London: Graham & Trotman Limited, p. 49.
6. *Ahmad Abu Al-Wafa* , op. cit. note 18, p. 32.

25) *Qur’an* , Al-Baqarah 2:190.

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before, the Holy *Qur’an* asserts: “Let there be no transgression except against the oppressors”.26 Accordingly, wars in Islam may be waged in self-defense. ~ e Holy *Qur’an* illustrates this concept as they explain that: “ Permission is given to those against whom war is made, because they have been wronged; — and verily, God is most capable to render them victorious; those who have been expelled from their homes (unjustly), only because they said “our Lord is Allah”. For had it not been that Allah checks one group of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of God is much commemorated. God will certainly aid those who aid His (cause); Truly, Allah is All-Strong, All-Mighty”. 27

Islam also encourages defending those who are under oppression or those sub­jected to aggression. Indeed, it has acknowledged centuries ago the rules that govern what we nowadays call ‘humanitarian intervention’. Interestingly, the the­ory of humanitarian intervention may find a basis in the verses of the Holy *Qur’an, which* urges believers to come to the aid of the weak and oppressed. As an illustration, the following verses are cited: “and what is wrong with you that you fi ght not in the cause of Allah and for those weak, ill-treated and oppressed among men, women and children, whose prayer is “Our Lord! Rescue us from this town whose people are oppressors; and bestow on us someone you raise to support us, and bestow on us someone you raise to render us victorious”. 28

*Shari’a* supports the principle of proportionality, as reiterated in many of the verses of the Holy *Qur’an* that we have presented before, such as: “And fi ght in the way of Allah those who fi ght you, but do not transgress the limits. Truly, Allah likes not the transgressors” 29 : and “if you punish, then punish with the like of that with which you were affl icted. But if you endure patiently, verily, it is better for those who remain patient” 30 ; and “the recompense of a sin is a sin like thereof; but whoever forgives and makes reconciliation, God will reward him. Verily God likes not the oppressors”. 31

Islamic *Shari’a* also recognizes the concept of reparation and compensation for victims of crimes. It provides detailed rules for providing compensation in lieu of any harm infl icted against the physical (and also the moral) integrity of persons. In this respect, the Islamic criminal justice system is based on the prin­ciple that “no blood goes in vain in Islam”. Victims of violent crimes or families of deceased victims are entitled to “ *diyya* ”, i.e. compensation either from the perpetrator himself or from his family or tribe. Moreover, in cases where the

1. *Qur’an* : Al-Baqarah 2: 193.
2. *Qur’an* , Al-Hajj 22:39-40.
3. *Qur’an* : Al-Nisa 4: 75.
4. *Qur’an* : Al-Baqarah 2: 190.
5. *Qur’an* : Al-Nahl 16:126.
6. *Qur’an:* Al-Shura 42:40.

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perpetrator is bankrupt, impoverished or unknown, compensation would be provided by the *Bayt al-Mal* i.e. the state treasury.

Alternatively, justice may also be achieved through forgiveness in the Islamic criminal justice system thus striving to attain higher spiritual values of forgiveness far beyond the mere enforcement of justice through infl icting punishment 32 on the perpetrator or accepting the *diyya* (compensation). ~ is attitude is most appreciated and praised in such cases as when the victim or his family opt to for- give the wrongdoer and for reconciliation. Only in modern times has the concept of reconciliation been recognized in solving internal and international confl icts.

Peace is a core value in Islam, and one of the 99 attributes of God, i.e. a syn- onym to the word “God”. Islam calls for peaceful co-existence among nations and stresses the value of universal cooperation. In the Holy *Qur’an* , God instructs Prophet Mohammad: “And if they incline to peace, you should also incline to it, and (put your) trust in Allah. Verily, He is All-Hearing, All-Knowing ... .”; 33 “So if they withdraw from you, and fight not against you, and off er you peace, then Allah has opened no way for you against them” . 34 ~ is emphasis on the prefer- ence of peace as an option and the immediate and positive response to it is indeed a core concept in *Shari’a* . Islamic *Shari’a* promotes dialogue for achieving its goals, rather than the use of force and intimidation. In the Holy *Qur’an*, God Almighty urges the Prophet to gently debate his point, Saying: “Invite ( mankind) to the way of your Lord (i.e. Islam) with wisdom and fair preaching, and argue with them ( gently) using the better way (to convince them). Truly, your Lord knows best who has gone astray from His path, and He is best aware of those who are guided”. 35

To sum up, the main objectives of an effi cient international criminal justice system from the prospective of Islamic *Shari’a* would be:

– To prevent the commission of serious crimes and acts of aggression;

– To bring to justice persons allegedly responsible for committing such grave crimes; – To protect the civilians and other protected groups;

– To render justice to the victims;

– To deter criminals from committing crimes;

– To contribute to the restoration of peace by achieving justice and promoting reconciliation.

1. For a detailed discussion of the concerns raised against some of the prescribed punishments applicable under Islamic *Shari’a*, *see* e.g. *Abd al-Aziz al-Alfi* , Ahmad (1982), Punishment In Islamic Criminal Law, in *Bassiouni, M. Cherif* (1982), ~e Islamic Criminal Justice System, Oceana Publications Inc., pp. 227-36; *Salim El-Awa, Mohamad* (2000), Punishment In Islamic Law, American Trust Publications, pp. 134-8; *Baderin, Mashood* (2004-2005), op. cit. note 3, at 140-7.
2. *Qur’an* , Al-Anfal 8:61.
3. *Qur’an* , Al-Nisâ 4:90.
4. *Qur’an* : Al-Nahl 16: 125.

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**4. Arab Concerns Towards the Current System of International Criminal Justice System**

Arab concerns towards the current system of international criminal justice are mainly based on the concept of sovereignty and other political issues.

4.1. *Concerns Based on the Concept of Sovereignty*

T e treatment of the issue of national sovereignty is problematic in terms of (Arab) perception. All Arab States were subjected to colonialism. T eir inspira­tion has always been to achieve their freedom from (Western) colonial powers and to overcome any limitation on their national sovereignty. T is experience has left a deep concern in the minds of Arabs with regard to any external interference in their domestic aff aires. T e Arab concept of sovereignty has its foundation in national sentiment and in the psychology of the people. Some Arabs believe that the current system of international criminal justice could be used to enforce the political agenda of certain (Western) governments and could be used to erode their national sovereignty. T is applies to most international and international­ized criminal justice institutions. For example, some mistakenly regard the ICC as an alien institution that could encroach on their autonomy and infringe upon their territorial sovereignty. Generally, the relationship between international criminal tribunals and states is a complex on e. 36 In a formal legal sense, the sover­eignty of states makes them free to decide on the relationship between their own national legal order and any international criminal institution or order created by such institutions like the ICC Statute. However, irrespective of each Arab govern­ment’s approach to the ICC, it seems that the emergence of the current system of international criminal justice has increasingly confronted them with ‘extra­national’ norms and rules.

Another sensitive issue related to the sovereignty sphere revolves around the complementarity regime. It is often said that the complementarity regime of the Rome Statute serves in fact to protect or support sovereignty, in the sense that the ICC will always give priority to the exercise of national jurisdiction. However, states with well-developed criminal justice systems that have the ability and the capacity to investigate and prosecute ICC crimes would benefi t more from this (see statements from UK, Australia, etc.). 37 States from the Arab world may com­plain that this is a biased statement, in the sense that Western States can take

1. *Ochoa, Juan Carlos* (2007), T e Settlement of Disputes Concerning States Arising From the Application of the Statute of the International Criminal Court: Balancing Sovereignty and the Need for an Eff ective and Independent ICC, 7:1 International Criminal Law Review 3.
2. *See* comments of *Ross Cranston*, Te Solicitor-General, on the UK International Criminal Law Bill at the House of Commons, as produced at: <http://www.parliament.the-stationery-office.com/pa/> cm200001 /cmstand/d/st010503/pm/10503s04.htm; *see also* presentation of Philip Ruddock, the Attorney

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cover behind the principle of complementarity to preserve their own exercise of jurisdiction, whereas it will be precisely states from other regions (e.g. the Arab world, or less developed countries, etc.) whose systems will be judged to be incapable of holding genuine proceedings. For these states, it is said, their sover- eignty will not be protected by the ICC - rather it will be even more exposed. In addition, their systems will be assessed by judges from those same Western- based countries.

Admitting the importance of respecting the national sovereignty of states, the ICC Prosecutor in his fourth report to the Security Council declared “[i]t is important to reiterate that the admissibility assessment is not a judgement on the Sudanese justice system as a whole, but an assessment as to whether or not the Government of Sudan has investigated or prosecuted, or is investigating or prose- cuting in a genuine manner the case selected by the Prosecutor for presentation to the Court”. 38~ is is a clear indication that the ICC organs demonstrate respect for the autonomy of national legal systems. Besides, we should not forget that the drafter of the ICC Statute, recognizing the importance of the concept of sover- eignty to States, had indicated that the ICC shall be always complementary to international criminal jurisdictions. 39

Apart from issues directly emanating from sovereignty, there are other factors which constitute (legal) barriers for the Arab States to uphold the Rome Statute. For instance, the majority of Arab States find that the abolition of the immunity of Heads of States for international crimes goes against the foundation of their constitutions, which grant them absolute immunity. 40 However, immunity should not stand as a barrier to the implementation of the norms of international criminal justice system in cases of perpetration of mass killing and grave human rights vio- lations. ~ is is a core principle that has already been enshrined in Islamic *Shari’a*.

4.2. *Political Concerns*

4.2.1. *~e Middle East Crisis*

A final settlement of the Arab-Israeli confl ict had defi ed the best eff orts of several generations of the world leaders. ~ e overall situation has become more complex,

General of Australia at “~ e International Criminal Court Regional Advocacy Seminar”, 6 August 2007, as produced at: <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2007>\_Speeches\_6\_August~\_2007\_7~\_Speech \_ - \_ International \_ Criminal \_ Court\_Regional\_Advocacy~\_Seminar.

1. Forth Report of the Prosecutor of the International Criminal Court to the Security Council Pursuant to UNSCR 1539 (2005).
2. Para. 10 of the Preamble of the ICC Statute and Article 1 of the ICC Statute.

40) For more elaboration on further examples that constitute constitutional barriers to ratify the ICC Statute in the Arab States, *see Maged*, *Adel* (2005), Status of Ratifi cation and Implementation of the ICC Statute in the Arab States, in *Kress, Claus et al* . (eds.) (2005), ~ e Rome Statute and Domestic Legal Orders, Vol. II, pp. 469-78.

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more fragile and more dangerous than it had been for a very long time. 41 As we will see below, the 2006 Israeli-Lebanon war had been a reminder of how danger­ous it was to leave this confl ict unresolved, and how interconnected the region’s problem are. 42

T ere is no doubt that the Arab-Israeli confl ict is negatively aff ecting the course of international criminal justice in the Arab world. It is believed that some Arab States’ decision not to ratify the Rome Statute is aff ected to a certain extent by that confl ict. Some Arab leaders hold the point of view that commit­ting themselves to the rules of the Rome Statute could limit their power to defend themselves against any potential aggression, especially if a decision on the occurrence of the crime of aggression lies within the control of the Security Council. T ey believe that in such case the international justice system will work in favour, for example, of Israel supported by its Allies. T is might explain why the crime of aggression is of great concern to the Arab States. Some Arab delegations participating in the 3rd session (29 November – 17 December 1999) of the UN Preparatory Commission for the ICC expressed their concerns with regard to the Security Council’s sole discretionary authority in determining whether the crime of aggression had occurred. T ey also voiced their fears that the discretionary power of the Security Council would deprive the ICC of jurisdiction and make it unable to decide upon a certain case if the Security Council failed to arrive at an agreement on determining the occurrence of an existing crime of aggression.

4.2.1.1. More Justifi cations for the Arab Focus on the Crime of Aggression

As mentioned above, the belief of many Arab governments is that in situations where the existence or non-existence of aggression has to be decided by the Security Council, any resolution will be in favour of Israel, with regard to its alliance with the US and the support it receives from other Western Security Council members. 43

1. *See* former UN Secretary-General, Kofi Anan statements on the Middle East crisis to the Security Council on 12 December 2007, ‘Security Council 2006 Round-Up’, SC 8940, 12 January 2007, available at: <http://www.un.org/News/Press/docs/2007/sc8940.doc.htm.>
2. *See* former UN Secretary-General, Kofi Anan statements on the Middle East crisis at a ministerial­level-meeting of the Security Council held on 21 September 2007 in the margin of the General Assembly’s annual debate, ‘Security Council 2006 Round-Up’, SC 8940, 12 January 2007, available at: <http://www.un.org/News/Press/docs/2007/sc8940.doc.htm.>

43) It should be mentioned here that under paragraph (b) of Article (13) of the ICC Statute, the Security Council may, acting under Chapter VII of the UN Charter concerning preservation of international peace and security, refer a case to the ICC where a national of a State has committed one or more crimes referred to in the Statute if the Security Council fi nds, in its opinion, that these crimes constitute a breach of the international security and peace. T e Security Council’s record shows that describing a situation as constituting a breach of international peace and security is not limited only to the crimes of aggression or war but go beyond that to cover crimes against humanity and the crime of genocide. Te former Yugoslavia, Rwandan and the recent situation in Darfur are some examples that can be cited here.

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~ is explains how politics with respect to the crime of aggression has aff ected the Arabs’ approaches to the current system of international criminal justice. In the light of the diffi culties that stood in the way of reaching a defi nition of the crime of aggression, because the current defi nition does not cover all vari- ables and developments that have taken place at the international level since formulating the defi nition of aggression, and because of the wish of some states, fi rst among them Egypt, to include this crime amongst the crimes that fall within the jurisdiction of the ICC, the crime of aggression has been included in Article 5 of the Statute provided that the ICC’s jurisdiction is delayed until there is agreement on a defi nition of the crime and the conditions under which the ICC will exercise jurisdiction over it. 44 During the second day of the Sixth Assembly of State Parties to the ICC, 45 Egypt’s representatives stated: “~ e Delegation of Egypt attaches importance to the current eff orts aiming at reach- ing a defi nition to the crime of aggression without linking it to a role of the Security Council to decide that an act of aggression took place. Our position emanates from the complete conviction that *committing a crime of aggression against peoples is only the beginning of a chain of crimes* against humanity, includ- ing mass expulsion and murder, enforced deportation [Emphasis added].” Egypt and other Arab States are among those countries which assert that in order to maintain the ICC independence and protect the rights of the accused persons, the ICC itself must determine all elements of the crime of aggression. Attempts have been made to bridge the distance between the one group of States in favour of exclusive Security Council determination on the crime of aggression and the other group which prefer an exclusive authority to the ICC in this matter. ~ is includes the suggestion that the Security Council determine the occurrence of an act of aggression only as a precondition to the activation of the Court’s juris- diction, allowing the Court to make a second, independent determination in the course of the trial of an accused . 46 Other proposals would place time limits on the Council’s ability to make the requisite determination, or seek to involve other organs of the United Nations. 47 A solution that will allow the ICC to act in the absence of a determination by the Security Council where the latter does

1. It should be noted that the crime of aggression is given priority, as may be gathered from its inclusion in article 5 of the Statute and from the work currently being carried out by the Special Working Group on the Crime of Aggression of the Assembly of States Parties to the Rome Statute of the International Criminal Court both in the course of various sessions of the Assembly of States Parties and during inter-sessional discussions ( *see* ICC-ASP/6/INF.3).
2. Held at New York, USA, 30 November - 14 December 2007.
3. *McDougall*, *Carrie* (2007), When Law and Reality Clash - ~e Imperative Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression, International Criminal Law Review, 7: 2-3, p. 279.
4. *Ibid* .

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not make a determination within a six-month period after the date of notifi cation by the Court could be viable and thus would certainly gain the approval of the Arab States as it will limit the role of the Security Council and maximize the independence of the ICC.

4.2.1.2. Some Reflections on the Crime of Terrorism

Apart from the crime of aggression, the author believes that the Israeli- Palestinian confl ict has produced grave consequences with regard to the crime of terrorism. Many commentators assert that the phenomenon of suicide bombing, which has spread in the Arab region and abroad, is bred of that confl ict. As recognized by the international community, despair, poverty, unemployment and ignorance are funda­mental causes of terrorism. ~ere is also consensus amongst Muslims and Arabs, many Westerners, and also among many Israeli activists, that oppression is a principal root cause of terrorism, in that area of the world. In order to eradicate terrorism, it is of fundamental importance to address all the causes. It has also been proven that wars have never brought down terrorism, they have only exacerbated it. It is worth mentioning that Islamic *Shari ’a* ’ primary sources prohibit the intimidation of individuals. ~ is is illustrated in the severe punishment the *Shari’a* provides for the *heraba*48 and *baghi*49 crimes, and many Islamic *Shari’a* scholars apply its rules, by analogy, to the crime of terrorism. According to the sources of *Shari’a,* killing civil­ians is totally forbidden in all its forms and manifestations; within or outside the concept of *jihad*. ~ ere is a consensus among Islamic scholars, who belong to the four well-known Islamic schools of jurisprudence 50 , that the killing of civilians, especially women and children, is strictly prohibited. ~ is Islamic concept which prohibits the killing of civilians is broadly accepted by the Islamic legal authorities, *Sunni* and *Shi ’a* alike. It must be stressed that this concept, derived from the pri­mary sources of Islamic *Shari ’a,* is settled and not to be contradicted by subsequent *ijtihad.*51 Accordingly, Islamic States have consistently condemned all terrorist

1. *Heraba* is among the most serious of all types of crimes in Islam. It is defi ned as highway armed robbery perpetrated by a group of persons against a passer-by that usually takes place outside vil­lages and cities. Terror and violence are always involved in the commission of this crime. Because of the extreme implications of this crime for public safety and order, it is to be considered as a crime against state security.
2. *Baghi* in Arabic and *Shari ’a* is the transgression or rebellion against the legitimate leader (imam) by the use of force. ~ e crime of *baghi* includes for example acts of destruction of public property.
3. Maliki, Hanbali, Hanafi and Shafei.
4. Literally, *ijtihad* means independent reasoning. It could be only utilized when the *Qur’an* and *Sunnah* are silent or not exhaustive on an issue. *Ijtihad* is always used to interpret actual data of *al-wahi* (revelation). However, credible *ijtihad* must pose no contradiction to the explicit textual records of both *Qur’an* and *Sunnah* ; it must be pure from the malice of contamination, stemming from personal ambitions and wishful aspirations and self-inclinations. *Ijtihad* is always practiced through *qiyas* (analogical or syllogistic reasoning). *Qiyas* implies trying to draw a directive for a situ­ation, which is not expressly mentioned in the (primary) sources of Islamic *Shari’a* , from another

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acts, including those perpetrated by states, directly or indirectly, which spread violence and terror and aim at destabilizing countries and communities . 52 However, Islamic and Arab States distinguish between acts of terrorism and the struggles of peoples under colonial and alien domination and racist regimes in order to exercise their right of self-determination and independence. Some states consider this kind of struggle as legitimate and in full accordance with the princi- ples of international law. 53 Islamic countries support a comprehensive interna- tional convention that clearly diff erentiates between terrorism and the right of peoples to self-determination and to combat foreign occupation. 'Ih is approach has been already incorporated in the three Arab/Islamic regional conventions in force. 54 For these reasons, Islamic and Arab States have always maintained the view that to launch a successful anti-terrorism strategy involves addressing the conditions conducive to the spread of terrorism; a point of view that has also been adopted by the international community. 55 Arab commentators believe that the crises in the Middle East are the main cause for terrorism at the present time.

situation, which closely resembles it and about which there is an express directive of the *Shari’a*. *Ijtihad* would be an acceptable concrete source of Islamic *Shari’a* when there is *ijma* (consensus) among Muslim scholars on a certain issue subject to *ijtihad.* One who carries out *ijtihad* should be competent and sincere. 'Ih ere are rules that a Muslim should follow to deduce judgments on a cer- tain issue in Islamic *Shari’a* . Failure to observe such rules might lead to a wrongful/false judgment. Moreover, practicing *ijtihad* or *quias* requires more strict qualifi cations and conditions - a compre- hensive knowledge of *Qur’an*, *Sunnah* , thorough knowledge of theology, *usul- al-fi qh* (legal theory) and of Arabic.

1. *See* paragraph 6 of the preamble of Resolution No. 58/26-P, on the convention of an interna- tional conference under the auspices of the U.N. to defi ne terrorism and distinguish it from the peoples struggle for national liberation, adopted by the Twenty-Sixth Session of the Islamic Conference of the Foreign Ministers, (Session of the Peace and Partnership for Development), Ougadougou, Burkina Faso, 28 June to I July 1999; as produced in the website at: [http://www.oic-oci .org/english/conf/fm/26/26th-fm-political3.htm#54.](http://www.oic-oci.org/english/conf/fm/26/26th-fm-political3.htm#54.)
2. *See* UN GA Res. 3103 on the Basic Principles of the Legal Status of the Combatants Strugglingagainst Colonial and Alien Domination and Racist Regimes, UN Doc. A/9120 (1973).

54) First convention promulgated by the League of Arab States, second convention promulgated by Gulf Cooperation Countries Council, and third convention promulgated by Organization of Islamic Conference:

1. Arab countries, through the League of Arab States, approved a comprehensive treaty on terrorism, 'Ihe Arab Convention on the Suppression of Terrorism, which was signed by all Arab countries in a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998 and entered into force in 7 May 1999.
2. On 4 May 2004, the Gulf Cooperation Countries Council has concluded the Anti-terrorism Treaty, 'Ih e Gulf Cooperation Countries Council Treaty on Anti-terrorism, which entered into force on 6 June 2006.

3) 'Ihe Organization of Islamic Conference Convention on Combating Terrorism, 1999, has not yet entered into force.

55) *See* , for more information, annexed Plan of Action to the UNGA resolution, as produced in the website at: <http://www.un.org/terrorism/strategy-counter-terrorism.html>

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4.2.1. *Past and Current Atrocities 56*

“[D]uring this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. 57 “[S]uch grave crimes threaten the peace, security and well-being of the world”. 58 “[T]he most serious crimes of concern to the international community as a whole must not go unpunished and their eff ective prosecution must be ensured ....”. 59 Arab observers and human rights organizations allege that these principles have not been enforced in the Arab region. Against the backdrop of past massacres committed against women and children in some parts of the Arab world – such as that of Sabra and Shatila 60 and Quana61 – and the daily indiscriminate killing of civilians in Palestine and Iraq 62 without the perpetrators being brought to jus­tice, this has grave consequences in shaping Arab public opinion towards the cur­rent system of international criminal justice as it causes scepticism as to the role of the international system in bringing the perpetrators of such international crimes to justice. Acknowledging this fact, in the wake of an Israeli air strike that had killed dozens of civilians in a southern Lebanese village (Qana), during the 2006

1. The author admits that the media has played a signifi cant role in formulating Arab people’s opinion towards such atrocities. One who watches the Arab news will observe the magnitude of the killing of civilians in diff erent area in the Arab world, e.g. Palestine, Iraq, Sudan, without any kind of accountability for the perpetrators of these atrocities.
2. Para. 2 of the Preamble of the ICC Statute.
3. Para. 3 of the Preamble of the ICC Statute.
4. Para. 4 of the Preamble of the ICC Statute.
5. In 1982, the UN General Assembly issued Resolution 37/123D of 17 December 1982, adopted at the 109 th plenary meeting, in which it (1) condemned in the strongest term the large-scale mas­sacre of Palestinian civilians in the Sabra and Shatila refugee camps and (2) resolved that the massa­cre was and act of genocide. ~ e resolution was adopted by 123 states approved the resolution as a whole with no objection and 22 states abstained from voting, whereas the second paragraph of the resolution, in which the term “genocide” appeared, won the approval of 98 states and was objected to by 19 states, while 23 states abstained from voting, *see* U.N. Doc.A/37/PV.108, para. 152.
6. Qana 1st : in its resolution A/RES/50/22 of 4 December 1995, adopted at the 117 th plenary meeting, the UN General Assembly condemned the Israeli military attack against the United Nations base at Qana (United Nations Interim Force in Lebanon (UNIFIL) camp in Qana) in which more than 100 civilian persons were killed.

Qana 2ed : on 31 July 2006, in a presidential statement, the Security Council expressed “its extreme shock and distress” at the Israeli attack that killed an estimated 60 people in the southern Lebanese village of Qana. A preliminary Human Rights Watch investigation into the July 30 Israeli air strike in Qana during the 2006 Israeli-Lebanon war, found that 28 people are confi rmed dead thus far, among them 16 children, available at: [http://hrw .org/english/docs/2006/08/02/lebano13899.htm.](http://hrw.org/english/docs/2006/08/02/lebano13899.htm.)

62) It is estimated that 80% of the causalities in Iraq are civilians. ~e number of child causalities result­ing from the war against Iraq is shocking. An NGO was able to compile a list of 753 children who died as a result of the US/Coalition attacks. *See* Civilian Child Casualties: ~ e War in Iraq, ~e Tender ness Network, available at: <http://66.102.9.104/search?q=cache:sp2fw4SKEBgJ:www.tendernesstour.com/> id131.html+Adel+Maged&hl=en&ct=clnk&cd=56&gl=ae&lr=lang\_en. It is also mentioned in this website that “it’s important to note that for every body identifi ed in Iraq, it is estimated there are an additional nine casualties. ~ is list is of confi rmed casualties of children as a result of violence during the War in Iraq”, last visited, 22 July 2007.

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Israeli-Lebanon war, United Nations Secretary-General Kofi Annan said “ [t]he authority and standing of this Council are at stake. People have noticed its failure to act fi rmly and quickly during this crisis”. He continued that the deadly attack had created “a moment of extreme gravity for the people of the Middle East”. 63

~ e 2006 Israeli-Lebanon war that left hundreds of civilian casualties without any sort of accountability has also left a sense of mistrust in the current system of international criminal justice among the Arabs. A year after that war, Amnesty International censured the absence of steps, in both Israel and Lebanon and by the international community, to prosecute those “responsible for war crimes and other grave violations” committed during the confl ict. 64 *Sarah Leah Whitson*, Middle East director at the New York-based Human Rights Watch, also stated that “ [b] oth sides in this confl ict violated the laws of war, but a full year later, no one has been held accountable”. According to Human Rights Watch’s recent report on civilian casualties in Lebanon during the 2006 war, “the confl ict resulted in at least 1, 109 Lebanese deaths, the vast majority of whom were civilians, 4,399 injured, and an estimated 1 million displaced. Hezbollah’s indiscriminate rocket attacks on Israel, the subject of another Human Rights Watch report, 65 resulted in the deaths of 43 Israeli civilians and 12 Israel Defense Forces (IDF) soldiers, as well as the wound- ing of hundreds of Israeli civilians” . 66 All of the above-mentioned incidents constitute flagrant violations to the obligations arising from the Charter of the United Nations and other instruments the provision of the Geneva Convention. Unfortunately, the lack of knowledge with regard to how this system of interna- tional justice operates and the involvement of international politics, in most cases, in triggering that system has undermined the role of the international criminal justice in the eyes of Arabs. ~ e role that the Security Council plays in deciding whether or not to establish a certain judicial mechanism to adjudicate certain sit- uations or to trigger the jurisdiction of existing mechanisms has, of course, great implications on that issue. Accordingly we are facing many situations in which the current system of international criminal justice is unable to hold the perpetra- tors of the most serious crimes accountable. ~ is counters Arab sentiment which is mainly, derived from *Shari’a* concepts about accountability. In general, *Shari’a* encourages Muslims to prevent the wrongdoings and to hold abusers accountable.

1. Security Council 5498th meeting, 30 July 2006, UN Doc SC/8789.
2. As produced on: <http://www.amnesty.org/en/alfresco_asset/2ca85839-a30b-11dc-8d74-6f45f>39984e5/mde020012007en.html.
3. *Human Rights Watch* , ‘Civilians under Assault: Hezbollah’s Rocket Attacks on Israel during the 2006 War’, August 2007 Volume 19, No. 3 (E), available at: [www.hrw.org/reports/2007/iopt0807/](http://www.hrw.org/reports/2007/iopt0807/) +Civilians+under+Assault:+Hezbollah.
4. *Human Rights Watch* , ‘Lebanon – Why they Died? Civilian Causalities in Lebanon during the 2006 War’, Vol. 19, No. 5 (E), September 2007, p. 4.

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Examples of *Shari’a* approaches to accountability may be found in many *hadith* of the Prophet Mohammad. In a famous *hadith* , Prophet Mohammad declared

“If any of you sees something evil, he should set it right with his hand; if he is unable to do so, then with his tongue, and if he is unable to do even that, then [let him denounce it] in his heart. But this is the weakest form of faith” . 67

In another *hadith* , the Prophet asserted that this approach should also apply to high ranking offi cials, he said:

“~ e best form of *jihad* is to tell a word of truth to an oppressive ruler”. 68

4.2.2. *Double Standards*

Criticism has always been expressed by Arab scholars against the role of the Security Council, when it acts on confl icts in the region, such as Palestine, Lebanon, Iraq etc. On one hand the crimes committed in these regions are almost neglected. On the other hand, the determination to resort to international criminal justice would be only against weak and developing countries, 69 as the Security Council agenda is heavily infl uenced by geopolitical and regional realities and preferences . 70 As the Special Rapporteur for the Draft Code of Crimes against the Peace and Security of Mankind noted in his Ninth Report: “It would be shocking if, because a State had the right of veto, its leaders, or those of a State which it protected, were to be treated diff erently from the leaders of another smaller, or more isolated, State”. 71

All these statements illustrate how Arab States defi ne the term ‘double stan­dards practice’. As one authority has already noted: “We do not want the Security Council to be selective and decide and pick to choose and set up a tribunal on political or geopolitical grounds” . 72 Another study suggested: “[~ is] would make a mockery of the guarantees provided by the Rome Statue and other human rights instruments of equality before the law” . 73 ~ e double standards hypothesis has ultimately created a negative approach towards the current system of international

1. Muslim ibn Hajjaj Al-Nishapuri, Mukhtasar Sahih Muslim, Mohamad Nasir Al-Din Al-Albani (1984), Second edition, Beirut: Dar Al-Maktab Al-Islami, p. 16, No. 34.
2. *Muhammad Al-Qawzini Ibn Majah* , ‘Sunan Ibn Majah’, Istanbul, Cagly Yayinlari, 1981, Kitab al-Fitan, Bab al-amr bi al maruf wa al-nahy an al-munkar, hadith No. 4011.
3. *See Pellet, Alain* (2004), Internationalized Courts: Better than Nothing ..., in *Romano, Cesare et al*.(2004), Internationalized Criminal Courts, Oxford: Oxford University Press, pp. 440-1.
4. *See Maloned, David* (2004), Conclusion, in *Malone, David* (ed.) (2004), ~e UN Security Council: From the Cold War to the 21 st Century, Lynne Rienner Publishers, p. 625.
5. Report of the International Law Commission on the Work of its forty-third Session, UN GAOR, 46 th sess, supp. no 12, UN Doc. A/46/10 (1991), 91.
6. *Cassese*, *Antonio* (2004), ~e Role of Internationalized Courts and Tribunals in the Fight Against International Criminality, in *Romano, Cesare* (2004), op. cit. note 69, p. 12.

73) *McDougall, Carrie* , op. cit. Note 46, p. 312.

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criminal justice. ~ is approach has been adopted, not only by Arab critics, but also by prominent figures advocating international criminal justice. For example, ICTY Prosecutor Carla Del Ponte, at a seminar of international prosecutors, criticized international double standards with respect to violations of international humani- tarian law, citing the example of the recent confl ict between Lebanon and Israel. “We are faced with confl icts where, according to credible reports, serious violations of international humanitarian law were committed, for instance during the recent Israel-Lebanon confl ict, but no independent criminal investigation is taking place.”74 Consequently, the fear of Arabs is that the current system of international criminal justice could end up judging only Arab and other weak states.

~ e aforementioned approach has been recently intensifi ed by the implications of the referral of the Darfur situation by the Security Council to the ICC. ~e Sudanese government is relying on the double standards argument to justify its refusal of the Security Council resolution 1593/2005 referring the situation to the ICC. On 27 May 2007, during a briefi ng to the a diplomatic briefi ng in ~e Hagu e 75 , Arab Ambassadors referred to the Darfur situation as an example to point out some mis- understandings and confusion concerning the application of certain rules in the Statute to a specifi c case. ~eir main concern revolved around the following ques- tions: Why does the International Criminal Court only focus on the Arab region? And why other situations in the Arab world are being ignored? According to them there are a lot of grave crimes being committed elsewhere; however no case has been brought to the Court. It is worth mentioning, in this context, that the Arab League of States has given special attention to the situation in Darfur , 76 and its approach to that issue is characterized by professionalism and wisdom. ~ e Arab League did not rebut the aforementioned resolution. However, it recommended that the Sudanese government should establish its jurisdiction on the crimes committed in Darfur through reforming its national legal system to be capable of addressing the interna- tional crimes committed in Darfur, and to ensure that such system is in conformity with the highest standards of criminal justice as recognized in the ICC Statue. 77

~ e Sudanese government tried to show its willingness and capability to adju- dicate the crimes committed in Darfur by its national judiciary. 78 However, the

1. As produced at: <http://www.naharnet.com/domino/tn/newsdesk.nsf/0/31A3C08A16B6636> AC225720000317A9C?OpenDocument.
2. *See infra* 7.1.2.
3. ~e Arab League had sent a delegation during April and May 2004 to the Darfur region. ~is delegation had confi rmed the deteriorating humanitarian condition there.
4. Report of the Committee of Arab Experts and Representative of Arab States to Coordinate Arab Positions on International Conferences and Treaties, according to the Council of Ministers of Justice of the Arab League Resolution No. 492- 10/4/2005 on the Legal Consequences of the Security Council Resolution 1593.

78) ~e Darfur Special (national) Court has been presented by the Government of the Sudan as an alternative to the prosecution of cases by the International Criminal Court - invoking the complementarity framework underpinning the Rome Statute.

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United Nations experts voiced disappointment in the eff orts of Sudan’s govern­ment to address those crimes, where confl ict has been marked by massive dis- placement, rights abuses and widespread killings. 79 Despite the allegations of a double standards approach towards the Darfur situation, this situation has shown the need for Arab States to pay enough attention to the current system of inter­national criminal justice. 80 However, in many parts of the Arab and Islamic world, the double standard allegations have led to grave consequences: ‘Double stan­dards’ has become a catchword being misused to foster extremism and violence. Terrorists are now justifying their heinous acts on the basis of justice imbalance and double standards. ~ is state of aff airs has given terrorists the moral frame­work to justify their acts and recruit more individuals.

4.2.3. *Doubts about the Fairness of the Current System of International Criminal Justice: ~e Iraqi High Tribunal as an Example*

Arabs have doubts about the fairness of the current system of international crimi­nal justice. ~ ey consider this system to be shaped according to the West’s best interests and derived mainly from the political will of the powerful countries. ~ ey refer to the Iraqi High Tribunal (IHT) as an example of how justice and fairness was compromised for political ends. Many commentators have indicated numer­ous shortcomings that allegedly contaminated the first trial of the IHT (the *Dujail* trial).81 Because of the negative impression Arab people had adopted concerning this trial, it is imperative to shed some light on the circumstances surrounding its establishment and evaluate what has happened during this trial.

1. Statements of Juan Mendez, Special Adviser of the Secretary-General on the Prevention of Genocide, on 16 December 2005, available at: <http://www.un.org/apps/news/storyAr.asp?NewsID> =16966&Cr=Sudan&Cr1=Darfur&Kw1=Juan+Mendez&Kw2=&Kw3=#, last visited 8 January 2008.
2. A conference on the ICC entitled “the International Criminal Court (ICC) and the Darfur crisis”, organised by the Egyptian and Arab Coalitions for the International Criminal Court was held in Cairo Egypt. ~ e conference concluded on 18 January 2008 with the following recommendations:

– ~ e Sudanese government must cooperate with the ICC in application of Security Council
resolution 1593, passed on 31st March 2005 which referred the Darfur case to the ICC.

– ~e Sudanese government must cooperate with the ICC’s prosecutor’s offi ce and arrest and hand over Ali Koshayb and Ahmed Haroun, who are accused of involvement in, and responsibility for war crimes and crimes against humanity against civilians in Darfur. An arrest warrant was issued against both men by the ICC’s Pre-trial Chamber on 27th April 2007.

– Sudanese civil society institutions must cooperate with the ICC and submit anything which provides evidence of the crimes and identifi es victims and witnesses.

– Arab governments must join the ICC. ~ is constitutes a step towards ensuring that international justice takes root and that the necessary amendments are made to national legislation in order to ensure that it is in line with the Rome Statute.

81) The *Dujail* Case was conducted against Saddam Hussein and seven other high ranking offi cials from the *Ba’ath* for the 1982 murder of 148 Iraqi Shiites in the town of *Dujail* in retaliation for an assassination attempt against him.

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Although the IHT is domestic in nature, it is regarded by Arab scholars and politicians as symbolising how the current system of international criminal justice is operating, due to the fact that it was mainly established to adjudicate equivalents to international crimes. Similar to the Bosnian War Crimes Chambers in Sarajevo, it could be regarded as an internationalised tribunal, as its Statute and rules of pro- cedure are modelled upon the UN war crimes tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, and as its Statute provides that the IHT is to be guided by the precedent of the UN tribunals . 82 Article 7(2) of its Statute allows its judges and prosecutors to be assisted by international experts (in an advisory capacity). However, unlike in the cases of, for example, the former Yugo-slavia and East Timor, there was no international UN Commission of Experts established to make recommendations as to what course should be taken. Instead, the decisions were made by the US-led Coalition Provisional Authority (CPA), in collaboration with the CPA-appointed Interim Governing Council, with minimal input from either Iraqi or international outsiders. 83 For this reason, many commentators have ques- tioned the legality of the IHT. 84 Apart from the legality question, the international confl ict in Iraq coincides with the internal disturbance that was and is taking place there was not a good basis for the creation of such tribunal. Domestic jurisdictions are not always the best forum to adjudicate international crimes, 85 particularly when one or more of the following conditions exist:

— Internal confl icts or civil wars in the territory of the state concerned; — ~e prevalence of a dictatorship regime;

— Instability and lack of security;

— Inability and incapacity to adjudicate such crimes of international character.

In such cases, resort to international or hybrid tribunals would be preferable to achieve the goals of international justice. Another important factor in determining

1. *See Scharf, Michael P.* (2007), Saddam Hussein on Trial: What Went Awry? – ~ e Iraqi High Tribunal: A Viable Experiment in International Justice?, 5 Journal of International Criminal Justice 259.
2. *See de Bertondano, Sylvia* (2007), Were ~ere More Acceptable Alternatives to the Iraqi High Tribunal?, 5 Journal of International Criminal Justice 295.
3. *See* e.g. *Sissons, Miranda and Bassin, Ari S* . (2007), Was the Dujail Trial Fair?, 5 Journal of International Criminal Justice 276; Newton, M.A. (2006), Legal Authority for the Creation of the Iraqi High Tribunal, in *Scharf, Michael P. and McNeal, Gregory. S.* (eds) (2006), Saddam on Trial: Understanding and Debating the Iraqi High Tribunal, Durham, NC: Carolina Academic Press, pp. 15-23, available at: <http://www.cap-press.com/books/1625>. *Bassiouni, M. Cherif* (2005), Post- Confl ict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 Cornell International Law Journal 327.
4. For more details on the preference to adjudicate international crimes by international justice system, *see Pellet, Alain* (2004), op. cit. note 69, at 439-40.

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whether a given crime should be adjudicated by a national or an international judicial institution is the nature of the crime committed and whether it entails national or international characteristics. ~ e gravity of the crimes that were under adjudication and the sectarian aspects surrounding the commission of those crimes require judicial panels with experience in adjudicating interna­tional crimes. Despite the fact that the Iraqi judicial system has a long tradition of justice, 86 the existence of an operating domestic justice system does not always encompass the capability of such system to adjudicate international crimes, which requires special skills, expertise, resources independence and impartiality.87 Certainly the last two requirements were undermined by the political pressure surrounded the establishment of the IHT, thus violating Article 14 of the International Covenant on Civil and Political Rights (ICCPR). 88 ~ e conditions surrounding the establishment of the IHT should have sug­gested the inability of the tribunal to adjudicate the crimes committed by the former Iraqi leaders, bearing in mind that the case in Iraq was diff erent from that of ‘average’ former dictators since the Iraq question itself has been interna­tionalized since 1990. 89 In addition, Iraq was under the threat of sectarian vio­lence, the lack of security which among other things resulted in the murder of three defence counsel, as well as that of two investigating judges and family members of a third; the tribunal personnel were under constant fear for their safety and, last but not least, the legal profession was bitterly divided. ~ e worst impact of the establishment of this tribunal is that it deeply divided the Iraqi people in two categories. ~ e fi rst, which is composed mainly of Iraqi *Shi’a* and *Kurds* , who wanted to see Saddam and his henchmen tried and executed before their eyes, and the second one, which is mainly composed of *Sunni* Iraqis, who questioned the fairness of the trial if held in Iraq and controlled by *Shi ’a* or *Kurds* . Apart from the criticism directed at the validity and the legality of the IHT and the circumstances surrounding its establishment, allegations of unfair­ness were directed at all levels of the *Dujail* proceedings, which have been con­sidered by many as breaches of fair trial standards. 90 ~ ey consider that the IHT did not adhere to the standard of international criminal justice enshrined in

1. *See de Bertondano, Sylvia* (2007), op. cit. note 83, at 299.
2. For the required standards of independence and impartiality of international judges, *see* *Bohlander, Michael* (2007), ~ e International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics, in *Bohlander, Michael* (ed.) (2007), International Criminal Justice: A Critical Analysis of Institutions and Procedures, London: Cameron May, pp. 362-8.
3. International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171. Article 14 of the ICCPR provides that in the determination of any criminal charges “every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal estab­lish by law”.
4. *See Pellet, Alain* (2004), op. cit. note 69, at 439-40.

90) *See* e.g. *Sissons, Miranda* and *Bassin, Ari S.* (2007), op. cit. note 84, at 441.

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other international Statutes and applied a penalty that is already abolished in the international settings in a hostile environment.

Saddam Hussein’s execution has been perceived by the Arabs as an aff ront to all Muslims. As the UN Special Rapporteur on extrajudicial, summary or arbi- trary executions, Philip Alston, said: “~ e trial and execution of Saddam Hussein were tragically missed opportunities to demonstrate that justice can be done, even in the case of one of the greatest crooks of our time”. 91 He also called for “far-reaching reforms, and said a number of basic measures must be taken at once, including commuting the other death sentence to life imprisonment or other long terms, eliminating the Government’s powers to remove a judge “for any reason,” and amending the 30-day time period between fi nal judgement and execution to ensure full respect for the right to appeal”. 92Harsh international criticism of the execution and the way it was carried out have been deplored, not only by human rights experts, but also by world leaders, including those who were against Saddam Hussein’s acts of aggression and oppression. In a press inter- view the Egyptian President Hosni Mubarak denounced the entire Hussein pro- cess. He stated that “..the pictures of the execution were revolting and barbaric, and I am not discussing here whether he deserved it or not”. 93

In addition to the dilemma surrounding Saddam Hussein’s execution, the month following his execution has been the bloodiest since the invasion in 2003. After that, the phenomenon of sectarian violence and revenge intensifi ed in Iraq. ~ us, the IHT has not proven to be an eff ective mechanism for reconciliation, 94 a goal that is aimed at by the system of international criminal justice. In light of all the above mentioned shortcomings, the UN Special Rapporteur on the inde- pendence of judges and lawyers reiterated his criticisms of the Iraqi High Tribunal, namely, that its jurisdiction is limited to certain groups of individuals, that it was set up in the context of an armed occupation, that it violates the right to be tried by an impartial tribunal and, under those conditions, is empowered to impose the death penalty. 95 Following the same line of thoughts, Arab people have criti- cized the IHT for its failure to deliver fair trials with high standards of justice. What adds to this dilemma is the Arab media negative perception of the IHT. Arab media do not usually give enough attention to the work of the international

1. As produced on the UN News Centre, 4 January 2007, available at: <http://www.un.org/apps/> news/story.asp?NewsID=21155&Cr=iraq&Cr1, last visited 18 January 2008.
2. *Ibid*.
3. *See Hibbittes, Bernard* (5 January 2007), Bush admits Saddam hanging could have been ‘more dignifi ed’ as outcry continues, Jurist Legal News & Research, available at: <http://jurist.law.pitt.edu/> paperchase/2007/01 /bush-admits-saddam-hanging-could-have.php, last visited 18 January 2008.
4. *See Scharf, Michael P.* (2007), op. cit. note 82, at 261.

95) *See* the statements made by Leandro Despouy, the UN Special Rapporteur on the independence of judges and lawyers, as produced at: [www.un.org/apps/news/story.asp?NewsID=18985&Cr=Iraq](http://www.un.org/apps/news/story.asp?NewsID=18985&Cr=Iraq) &Cr1 - 17k -

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criminal tribunals and other internationalized criminal courts. However, because of its signifi cance and implications in the Arab region, Arab media have covered the IHT trials closely. ~ e shortcomings of these trials and the brutal execution of Saddam Hussein left a negative impact among the public as to the fairness of such trials. Regrettably, the Arab public mistakenly attributes all the shortcomings of the IHT to the current system of international criminal justice.

Saddam Hussein’s trial could have avoided the criticism directed against it if it had been conducted by a purely international tribunal composed entirely of inter­national judges trying cases under international criminal law or by an internation­alized court with a mixed bench composed of international and local Iraqi judges in a courtroom outside the territory of Iraq. Such a tribunal is more likely to be seen as legitimate as it would be run by international jurists with proven records of overseeing complex prosecutions and of scrupulously respecting international fair- trial standards. 96 Another advantage that would characterize such a tribunal is that it would avoid the political pressure which is inherent in a domestic court operat­ing in a society where the confl ict is ongoing. It would have reduced the security concerns as it would have been able to operate outside Iraq. 97 ~ e flaws associated with the Saddam Hussein trial and its disastrous consequences have proven that in such incidents committed by Heads of States, especially in countries suff ering from occupation, international confl icts and sectarian violence the resort to international criminal justice system is the best way to address such cases.

**5. Impact on the ICC**

Arab States have eff ectively contributed to the drafting of the Rome Statute, the language of which gives reason to believe that the ICC will dispense justice in an independent and fair manner in the way the Arabs wish it to. Moreover, the drafters of the provisions of the ICC Statute have overcome the concerns of many Arab and Muslim States with respect to the rules of punishment and penalties 98 and the categories of crimes against humanity. Arab delegations, with the support of other delegations, managed to include the crime of forcible transfer of population among the ICC crimes. It is fair to point out that the delegations of the Arab States participating in the Rome Conference succeeded in achieving most of the

1. *Kenneth, Roth* (15 December 2003), Try Saddam in an International Court, ~ e International Herald Tribune, as produced on website: <http://hrw.org/english/doc/2003/12/15/iraq12973.htm> (last visited 30 December 2007).
2. *See de Bertondano, Sylvia* (2007), op. cit. note 83, at 297.

98) Illustrative is Article 80 of the ICC Statute on ‘non-prejudice to national application of penalties and national laws’, which provides that “[n]othing in this Part aff ects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part”.

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goals to which they aspired. 99 Since the Rome Statute came into force, the Arab region has been witnessing a growing and increasingly vocal civil society move- ment in the region in support of the ICC in particular and the system interna- tional justice mechanisms in general. However, the political fears explained before have resulted in a degree of misunderstanding and mistrust associated with the role of some international judicial institutions such as the ICC. It is mostly based on the misconception of the ICC’s independence and impartiality. Arab States are now observing the ICC in its current investigations and prosecutions. ~ us, it is very important for the advocates of the ICC to show to the Arab audience that the ICC with its high-profi le procedure is designed to protect justice and freedom. And it could serve the Arab countries as a shield against potential aggres- sion on their territory, as any armed attack that might constitute one of the crimes within the Statute will fall under the ICC’s jurisdiction.

**6. Impact on Other Tribunals**

One of the latest tribunals is the Lebanon Special Tribunal (LST). ~ e new tribunal will be handling a politically highly sensitive issue inasmuch as foreign elements is believed to have played a leading role in the 2005 attack in which Rafi k Hariri, a popular and anti-Syrian politician, lost his life. Arab governments fear that this new tribunal is derived from political motives, both national and international. ~ is would explain why Arab governments do not want to get involved in the work of the LST. However, many Arab scholars are convinced that this tribunal could act in a fair and impartial manner. ~ ere is no doubt that the establishment of the LST, like other ad-hoc tribunals, will make an important contribution toward ending impunity for the crimes falling within its jurisdiction. ~ e Lebanese special tribunal provides an example of how to overcome domestic complications to adjudicate the crime of terrorism. It constitutes the fi rst forum comprised of international and national judges to adjudicate this crime. It is safe to say that it is the first time in history the UN participates in adjudicating the crime of ter- rorism on that scale. ~ e Statute of that tribunal with its constituent provisions incorporating the highest normative standards of national and international jus- tice will guarantee its judicial independence. ~ e LST, in the eyes of Arab people, represents another test for the current system of international criminal justice, and its outcomes will greatly infl uence the approach of the Arab public towards the this system.

99) *See Maged*, *Adel* (2001) Al Mahkamah Al Genaia Al Dawlia w Al Siyada Al Watania (~ e International Criminal Court and National Sovereignty), al-Ahram Centre for Political & Strategic Studies, Cairo, p. 141.

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**7. How to Change the Current Negative Perspectives: Solutions and Prospects**

7.1. *Required Actions*

International criminal law has made immense strides in its development in the last decade, resulting in the emergence of operating international criminal justice institutions. ~ e ICC Statute represents the fi rst comprehensive codifi cation of international criminal law, and it affi rms and clarifi es customary international criminal law. 100 It contains the highest standard of international criminal justice. ~ e ICC Statute and Rules of Procedures and Evidence contain many innova­tions which, as mentioned in the ICC’s Strategic Plan, 101 are just beginning to be deployed in practice. ~ e best guarantee for the application of certain norms or rules is a general public who is informed about the most signifi cant of the norms and rules that have been developed for their benefi t. ~ e ICC, through its diff erent offi ces and its State Parties, should take considerable steps to pro­mote awareness about its role and functions among the Arab public. For justice at this Court to be seen to be done, it is imperative for the Arab audience to be aware of the ICC’s proceedings and judicial activities. It is also very important to show to the Arab audience that the ICC is a tool that is designed for their benefi t and that it does not only represent States Parties but the interests of international justice.

In this process, ICC offi cials should use appropriate methods to present to the Arab audience evidence of the Court’s impartiality and independence. ~ e ICC organs should engage the Arab States in support of the Court and encourage them to strengthen their national legal systems with regard to the core crimes. ~ e following priority objectives should be achieved:

— To inform the Arab States and communities of the role and mandate of the ICC;

— To improve understanding of how the Court functions, particularly with regard to fundamental aspects such as its jurisdiction and its relation with the Security Council;

— To acquire as many ratifi cations/accessions of the ICC Statute as possible within the Arab region;

— To implement the normative provisions of the ICC Statute at the Arab national level;

— To establish eff ective cooperation between the ICC and the Arab States;

1. For more details on the development of international criminal law and justice, *see* generally *Werle, Gerhard* (2005), Principles of International Criminal Law, ~ e Hague: T.M.C. Asser Press.
2. *See* Strategic Plan of the International Criminal Court (ICC-ASP/5/6).

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Raising public awareness of the ICC and its function would create a grass-roots pressure to enhance a state’s legal order to be compatible with the developing inter- national legal order. And this would obviously coincide with top-down pressure on the national legal system resulting from the globalization of international norms. ~ is would also help to create a culture against impunity in the Arab region.

~ e ICC’s actions and endeavours in the Arab region encouraging the signature and ratifi cation/accession to the ICC Statute should mainly focus on addressing political and other fears towards the ICC and its institutions should help Arab States to overcome their constitutional barriers, respond to and clarify any misconcep- tions. It should present to the Arab audience evidence of the Court’s impartiality and independence and also prove how the ICC, is designed to protect justice and freedom. In this process, it is very important to identify the target group or persons of the international criminal justice campaign in the Arab world. Focusing on deci- sion-makers is very important in this process. Arab States, like other developing countries, are still in a transitional democratization status. It is realistic to recognize that political powers are concentrated in the hand of the governing authority, family or party. Political leaders play a key role in determining their countries’ attitude towards the ICC or the current system of international criminal justice in general. Hence, it is of vital importance to be aware of the decision-making hierarchy in each Arab State and to identify the main actors who could infl uence the decision-making process. However, this should not preclude the ICC and other international actors to seek the support of other sectors of the community and the public in general.

*National Legislation*

Arab governments should be informed of the fundamental importance of the eff ectiveness of their national legal systems to make them capable of dealing with international crimes to the level of eff ectiveness of the international criminal jus- tice system. Any state would fi nd it almost impossible to investigate and prosecute those crimes without having proper national legislation. Many Arab countries are parties to a number of international instruments that deal with human rights norms, humanitarian law norms and international criminal law norms. Consequently, those states are responsible for performing treaty obligations, and ensuring their required eff ects internationally and domestically. ~ is includes the adoption of new legislation or the amendment of existing legislation. For exam- ple, the four 1949 Geneva Conventions, to which most of the Arab States are parties, contain identical provisions obligating the parties to implement legisla- tion to suppress violations of the Conventions. Unfortunately, most Arab States have not taken serious steps to implement international humanitarian law norms into their national legislation. ~ us, the current state of legislation in the Arab States remains inadequate in terms of the scope of the core international crimes covered by the defi nitions of those crimes, the principles of criminal responsibility,

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defences and other obstacles to eff ective prosecution. Consequently, Arab States wishing to fulfi l their existing treaty and customary law obligations or to ratify the ICC Statute will find that their existing national legislation is inadequate to enable them to apply international criminal law norms under current international law and under the terms of the ICC.

~ e ICC and its supporting states should take the necessary measures to encour­age and/or assist Arab States in enacting national legislation that ensures that their national authorities can investigate and prosecute crimes falling under the juris­diction of the Court. Arab States should also be advised on the importance of drafting a national legislation defi ning international crimes and determining their punishment as this will safeguards their states’ sovereignty over international crimes committed on their territories or by their nationals in all cases.

7.1.2. *~e ICC Endeavours to Address Arab States’ Concerns*

Recognizing the signifi cance of the Arab region, ICC offi cials are exerting great eff orts to address Arab Stats concerns. For example, on 27 May 2007, the director of the Jurisdiction, Complementarity and Cooperation Division at the Offi ce of the Prosecutor (JCCD), on behalf of the Prosecutor of the International Criminal Court held a meeting with the representatives of the diplomatic missions of the Arab States in the Hague as part of the JCCD’s preparation to the 5th report to the UNSC, to brief them of the current development of the ICC and to respond to their queries and concerns *vis à vis* the ICC. Representatives from 16 Arab countries attended: Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Palestine, Qatar, United Arab Emirates, Yemen, Tunisia, Saudi Arabia, Mauritania, Oman and the head of the Arab League mission. An interesting debate went on concerning the situation in Sudan and the diff erent legal issues holding back the Arab States from ratifying the International Criminal Court Statute. All States spoke in favour in joining the International Criminal Court while rais­ing the same concerns discussed in this paper, as obstacles to ratify the ICC Statute, mainly the relationship of the Security Council with the International Criminal Court, the absence of the defi nition of aggression, and the impact of some provisions of the ICC Statute on the States’ sovereignty. ~ e principle of complementarity and its implications was also discussed in the meeting.

7.2. *Prospects*

7.2.1. *~e Arab Model Law on International Crimes*

Despite the somewhat pessimistic undertone of this article, there are some facts that encourage a better realization of international criminal justice in the Arab world. For example, there are statements of key Arab figures and resolutions of Arab orga­nizations that support the ICC. One important declaration is the Resolution of the Council of the Arab League No. K: 6096 - D. A. (115) - G2 – 12/3/2001

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in which it emphasized the importance of establishing the ICC, granting it with necessary guarantees to enable it to fulfi l its mandate independently and impar- tially, to exercise its jurisdiction on all persons without discrimination or selectiv- ity and to adhere to the principles of international criminal justice and implement the provision of international humanitarian law among all nations. Despite the fact that most Arab States have not yet ratifi ed the Rome Statute, there is consen- sus among scholars and government offi cials that they should reform their legal systems and adopt national legislation that deal with the international crimes enshrined in the Rome Statute.

Recognizing this fact, the Arab League has made considerable eff orts to draft the Arab Model Law. In its Resolution No. 453- D18-25/10/2002, the Council of Ministers of Justice of the Arab League stressed the necessity to prepare the Model Law. Ithas assigned this task to the Committee ofArab Experts and Representatives of Arab States to Coordinate Arab Positions on International Conferences and Treaties (Committee of Arab Experts). On 19 September 2005, the Committee of Arab Experts submitted the fi nal Arab Model Law draft to the Council of Ministers of Justice of the Arab League. On 29 November 2005, the Council of Ministers of Justice of the Arab League adopted Resolution No. 598- D21-29/11/2005 approv- ing the Model Law and asking the Department of Legal Aff airs to circulate it among Arab countries with a view to use it as a guidance in drafting their own national legislation comprising the ICC core crimes. ~ e Arab Model Law on International Crimes constitutes the first attempt in the Arab world to incorporate the principles of international criminal law (as contained in the Rome Statute) into domestic legislation. It was drafted in such a way as to allow non-States parties to incorporate it into their national criminal law. ~ e aim of the Arab Model Law is twofold: first, to ensure the compatibility between Arab national legislation and relevant international treaties in force, specifi cally the 1949 Geneva Conventions, the Additional Protocols thereto and, the Genocide Convention; second, to ensure that Arab Courts will always have primary jurisdiction to act, in accordance with the principle of complementarity of the ICC Statute. 102 ~ e Arab Model Law could be very useful in assisting Arab States to draft their own national legislation comprising all crimes within the jurisdiction of the ICC. ICC experts and other supporters of the ICC could rely on this law as a basis for their endeavours to assist the Arab States to enact implementing legislation.

7.2.2. *~e ICC Legal Tools Project*

Despite the creation of the International Criminal Court, the prime responsibility for punishing serious human rights violations that may qualify as core interna- tional crimes belongs to national legal systems. Often, national legal systems are

102) *El Zeidy*, *Mohamed M.* (2005), Egypt and current eff orts to criminalize international crimes, 5:2 International Criminal Law Review 247–65.

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not equipped, for various reasons, to prosecute these crimes. 103 ~ e so-called ICC Legal Tools Project (LTP) will serve as an aid to these national jurisdictions, assist­ing them in identifying the legal requirements in their investigation, prosecution and adjudication. ~ e ICC LTP is currently endeavouring to build collections and databases of legal documents, together with legal research and reference tools from diff erent legal systems. Among the collections are the legal tools on National Jurisdictions which provide an overview of national legal systems including infor­mation for conducting comparative research on criminal law and procedure and on the legal status of core international crimes in the systems; national cases involving core international crimes, which compiles the most relevant decisions issued by domestic courts and tribunals concerning genocide, crimes against humanity and war crimes, both in civil and criminal matters; and national imple­menting legislation which collects national legislation implementing the ICC Statute, in both draft and fi nal form. In sum, ~ e LTP will serve among other things as a database of all legal systems of the world. ~ e ICC Prosecutor has shown interest in referring to sources of *Shari’a* in the filings and submissions of his Offi ce. It is obvious that the ICC is eager to have as much input as possible and wishes to increase the visibility of Islamic Law in the international legal forum. ~ us cooperation with Arab and Muslim States in this area would assist in identifying Islamic authorities on diff erent legal topics that could be incorpo­rated in the Legal Tools database.

~ e LTP currently has very little relevant materials or jurisprudence from the Arab region, bearing in mind that Islamic law is one of the major legal systems of the world. ~ erefore, Arab and Muslim experts should assist the OTP in identify­ing jurisprudential sources in international criminal law from Islamic *Shari’a* as well as from domestic court judgments in the Arab world to be incorporated in the LTP. Undoubtedly, this would greatly enhance the attention given to Islamic legal thinking by overcoming the language barrier and making it possible for Western experts to read about it in their own language.

**8. Conclusion**

~ is article has tried to show how the rules of Islamic *Shari ’a* are compatible with the contemporary norms of international criminal law. ~ is should be considered as an incentive for the Arab and Muslims States to support those norms.

It is disappointing to note that while the international community has finally managed to acquire a sophisticated system of international criminal justice we are still witnessing the daily killing and displacement of women and children in many

103) *SeeAnabela Atanásio Alves* , Presentation at the Seminar on the ICC Legal Tools Programme, the Norwegian Centre for Human Rights, Oslo, 27 September 2007 (without title).

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parts of the Arab region. ~ e Arab region is yearning for security, peace and prosperity. All these aspirations will never be achieved, as many have said before, without justice. Justice in all its aspects including international crimi- nal justice is indispensable to achieve these aspirations. Arab States have no serious reservations towards the content of the current system of international criminal justice as such. ~ eir reservations in essence are directed at the poli- tics that surround that system, in particular against the Security Council when it acts inconsistently in similar situations. ~ is article has also endeavoured to demonstrate the substance of those concerns, their scope and validity, and of the existing barriers toward the current norms of international criminal law, while attempting at highlighting methods to overcome such concerns and barriers. ~ ere is substantial consensus among Arab legal scholars that the current international legal framework is being exploited, and even distorted, in some instances, for political gains. One authority has even called this state of aff airs a “liquidifi cation” of international law. 104 Accordingly, to establish an eff ective system of international justice, they call for an independent and impartial international criminal justice system free from political interference. I believe that the ICC could be the heart of such justice system.

Unfortunately, the concerns that the Arab States hold towards the current sys- tem of international criminal justice have negatively infl uenced their approach to the ICC, and notably to its independence. ~ e reservations that Arab States have toward the ICC are mostly based on misconceptions about of its independence and its role. ~ us, it is very important for the advocates of international criminal justice in general and for the ICC Member States in particular to promote the importance of international criminal law in the Arab region and to assist the Arab countries in developing their domestic system so as to be able to deal with the current system of international criminal justice. ~ e core message that should be conveyed to Arab offi cials in this context is that the existence of a national judi- ciary capable of dealing with international crimes is the best mean of guarantee- ing their state’s judicial sovereignty; and this cannot be achieved except by preparing jurists with suffi cient knowledge in the area of international criminal justice. ~ e Arab world should take part in the current rapid development and progress of the fi eld of international criminal law. Adding another 19 countries in a troubled region which has been and still is suff ering from internal and interna- tional confl icts to the pool of States Parties to the ICC Statue would constitute a triumph to the cause of international justice. ~ e Arab States should work on drafting national legislation defi ning international crimes, and determining their

104) *Amer, Salah* (July 2002) al kanon al dawly fi alam modtarb (International Law in a Turbulent World), International Politics Journal, 153 Al-Ahram 91. For an extensive analysis of the current state of international law, *seeAmer, Salah* , mokadema lderasat al kanoon al dawly al am (Introduction to Public International Law), dar al-nahdah al-arabia, Cairo, pp. 139 *et seq* .

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punishment. ~ is should take place whether they ratify the ICC Statute or not because it safeguards a state’s sovereignty over international crimes committed on their territories in all cases. ~ e Arab League Model Law on International Crimes could be used as a model in this process. ~ e Arab League has played a signifi cant role on harmonising Arab States’ stand towards the ICC. It is advisable that coop­eration between relevant institutions and the Arab League should be established to foster Arab States positive approach towards the ICC.

Doing justice is described in Islamic *Shariá* as a serious challenge. In this con­text, Prophet Mohammad said: “On the day of judgment, a faire judge would be brought for judgment (before God). He would then wish that he had never adju­dicated between two persons, not even concerning half a date (because of the rig­orousness of God’s judgment)”. 105 One of the leading disciples of the Prophet Mohammad, Abdullah Ibn Masood, is reported to have said that the Prophet said: “To sit as a judge (in a dispute between two people is of greater merit than seventy years of worship”. 106

One can imagine the huge burden that lies upon those who participate in dis­pensing justice in the current international criminal justice system. Such a system should be based on the highest standards of justice and should be free from politi­cal interference. Unfortunately, from the inception of the international criminal justice system until now, it seems that politics has taken over the reins of interna­tional criminal justice. It is time that justice takes over the reins of politics and

I believe that the ICC with its Statute comprising the highest standards in crimi­nal justice and guarantees for independence and impartiality is the hope for doing that. International justice can only be achieved through the participation of all the members of the international community, including Arab and other Muslim States. During this tragic period of time the international community is witness­ing, we need voices of reason that call for peace and not for war, voices which aim at establishing dialogue rather than at creating hatred among nations and, last but not least, voices that seek to achieve justice by an independent and impartial system that is capable of delivering the highest standards of justice.

1. *Musnad Ahmed*, *hadith* No. 23324, available at: <http://hadith.al-islam.com/Display/Display> .asp, last visited 18 February 2008.
2. Al-Zuhayli, al-Fiqh al Islami, VI. , 740, cited in *Kamali, Mohammad Hashim* (2002), Freedom, Equality and Justice in Islam, Islamic Texts Society, Cambridge, p. 108.