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International Law and Islamic Law

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Series Preface

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

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

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

ROBERT McCORQUODALE
General Series Editor
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Introduction

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

> There will be in the future an increasing need for non-Islamic countries all over the world to negotiate with Islamic countries on a multitude of matters ranging from questions of war and peace to mercantile contracts. Such negotiation will require more understanding of Islamic attitudes, history and culture.
>
> An excellent recent example of an opportunity lost through lack of such understanding was the hostage crisis in Iran.[1] The USA, asserting the well-accepted principle of diplomatic immunity and right to protection, kept referring continually to the formulations of this rule in the Western law books. Islamic law is also rich in principles relating to the treatment of foreign embassies and personnel. These were not cited, as far as the author is aware, nor was the slightest understanding shown of the existence of this body of learning. Had such authority been cited by the USA, it would have had a three-fold effect: its persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.
>
> It is not often sufficiently appreciated, especially in the Western world, that many of the current rules of international law are regarded by a large segment of the world's population as being principles from the rule-book of the elite club of world powers which held sway in the nineteenth century. In the midst of this general attitude of mistrust, the worthy rules are tarred with the same brush as the self-serving. World cultural traditions need to be involved, where available, to bolster up and reinforce these rules.
>
> Indeed, at the time of the hostage crisis, the author drew the attention of the US authorities to the need to research the Islamic material on this point and although this suggestion was referred to the Task force in Washington handling the crisis, the author is not aware of any steps taken in this direction. He was never informed of any consequent action following from this proposal and can only presume that it lapsed through lack of understanding or lack of expertise in the US office handling the matter.
>
> The same considerations apply at many other levels. The non-Islamic world neglects them at its own cost. (Weeramantry, 1988, p. 166)

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

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

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

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

Apart from the domestic influence of Islam in individual Muslim states, Muslim states have also, as members of regional organizations, collectively adopted regional instruments such as the Arab Charter on Human Rights,[4] the Charter of the Organization of Islamic Conference (OIC),[5] the OIC Cairo Declaration on Human Rights in Islam[6] and the OIC Covenant on

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

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

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

5 914, UNTS, p. 111.

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

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

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

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

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

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

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

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

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

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

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

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

General Principles of International Law

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

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

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

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

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

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

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

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

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

12 (1963) 27 ILR 117.

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

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

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

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

International Use of Force

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

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

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

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