

**International Law, Regional Developments: Islam**

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**Table of Contents**[A. Introduction](#)[B. The Juristic Framework in the Classical Period of Islamic Law \(9th–12th Century\)](#)

- [1. The 'Territory of Islam' \(Dar al-Islam\) and the 'Territory of War' \(Dar al-Harb\)](#)
- [2. The Transition from the State of Nature to the Legal Inviolability \('isma\) of Persons and Things](#)
- [3. The Rules of 'Civil' and International Warfare](#)
- [4. Customary International Law?](#)

[C. The Development of Islamic International Law through Treaties and Diplomacy](#)

- [1. Diplomacy in Early Islamic History](#)
- [2. Muslim-Christian Diplomacy in the Mediterranean World \(13th–16th Century\)](#)
- [3. Islamic Law and the Law of the Sea](#)
- [4. Muslim-European Diplomacy in the Early Modern Period \(16th–18th Century\)](#)
- [5. Inter-Muslim Diplomacy in the Pre-Modern Period](#)
- [6. Muslim Diplomacy from the 19th Century to the End of World War II](#)

[D. The Modern International Legal System and Islamic International Law](#)

- [1. Muslim Nation-States within the Dar al-Islam](#)
- [2. The End of the Dar al-Harb](#)
- [3. The Persistence of the Dar al-Islam in Normative Islamic Doctrine](#)
- [4. Muslim States and Modern International Relations](#)

[E. Conclusion](#)[Select Bibliography](#)[Select Documents](#)**A. Introduction**

- 1 The origins of Islamic international law can be found in the Prophet Muhammad's promulgation of the Charter of Medina in the first quarter of the seventh century CE, the first clause of which declared that the parties to the Charter were a nation 'to the exclusion of others' (para. 15 Charter of Medina) thereby unequivocally proclaiming the independence of the city-State.
- 2 The nascent city-State of Medina, after uniting the Arabian Peninsula, expanded rapidly over the 150 years following the Prophet Muhammad's death in 632 CE, reaching the Iberian Peninsula in the west and the frontiers of China in the east. Islamic States subsequently spread along trade routes into central Asia, the Indian subcontinent, sub-Saharan Africa, the east African coast, and south-eastern Asia. Under the Ottoman Turks, Islam made substantial inroads into eastern and central Europe. Today, approximately one billion of the world's estimated 1.3 billion Muslims live in 44 States which have a Muslim-majority population. 90% of the remaining 300 million Muslims live in India, Nigeria, China, Russia, Ethiopia, and Tanzania.
- 3 Muslim jurists, over the course of the 9<sup>th</sup>–12<sup>th</sup> century, developed legal standards to govern the relationship of the Islamic State with non-Muslim powers simultaneously with their articulation of other topics of Islamic law (see also → *Islamic Approach to International Law*). Questions of international law arose largely in connection with their analysis of the law governing international wars (*jihad* or *siyar*) and treaties (*hudna* or *muwada'a*). These rules represented a pre-political baseline upon which the Islamic State was authorized to enter into binding agreements with non-Muslims both as individuals and as States. When the Islamic State exercised its legal authority to enter into such an agreement, that agreement, provided it did not violate any mandatory rules of Islamic law, specified the terms upon which the Muslim party and the non-Muslim party could conduct a lawful relationship. Because of the importance of agreements in Islamic international law, Islamic international law, both as a historical and normative matter, must be understood as a combination of the pre-political rules described by Muslim jurists in legal treatises that apply in the absence of agreements, as well as the treaties entered into on behalf of the Muslim community by Muslim rulers throughout Islamic history which then displace those pre-political rules *pro tanto*.

- 4 With the adoption of European notions of territorial → *sovereignty* in the 20<sup>th</sup> century, the normative framework established by Muslim jurists was largely abandoned by Muslim-majority States. Certain moral ideas of pre-20<sup>th</sup> century Islamic law, eg inter-Muslim solidarity, however, continue to have moral and political salience among Muslims in the contemporary world as evidenced by the existence of international Islamic organizations such as the → *Organization of the Islamic Conference (OIC)*. Muslim jurists operating within the normative framework of pre-modern Islamic law, however, have made important but partial steps to reconciling the norms of modern international law to the norms of pre-modern Islamic international law.

## B. The Juristic Framework in the Classical Period of Islamic Law (9<sup>th</sup>–12<sup>th</sup> Century)

- 5 Muslim jurists derived the rules of Islamic law, including international law, from texts of revelation when possible. One such example is *Al-Anfal* 8:72, a verse from the eighth *Sura* of the *Qur'an* regarding the spoils of war, which provides that the Muslim State in Medina is only obliged to come to the aid of non-resident Muslims if they are suffering from religious persecution. This obligation lapses if a peace treaty (*mithaq*) exists between the Muslim State and the tribe of the persecuted non-resident Muslims, in which case the Muslim State had to respect the terms of the treaty. If revelation was silent, Muslim jurists relied on analogy, adopted customary law, followed precedent, and appealed to common sense reasoning in order to solve legal problems. International law, from the perspective of Muslim jurists, was simply another topic within the Islamic legal system, a fact that gives Islamic international law a monist character: it applied as part of an Islamic State's domestic legal order, whether or not non-Muslim States accepted it as binding.
- 6 This entry's discussion of historical doctrines of Islamic international law will focus largely on the views of the ninth century Iraqi Hanafi jurist Muhammad b al-Hasan al-Shaybani, along with the writings of his 11<sup>th</sup> century Central Asian commentator and redactor, Shams al-Din al-Sarakhsi. Given the sheer quantity of unexplored legal materials from this period, the conclusions set forth in this entry should be viewed as tentative.

### 1. The 'Territory of Islam' (*Dar al-Islam*) and the 'Territory of War' (*Dar al-Harb*)

- 7 The most fundamental concept in Islamic international law was that of the 'territory of Islam' (*dar al-islam*) and the 'territory of war' (*dar al-harb*). An intermediate category of 'the territory of peace' (*dar al-sulh*) was applied to States formally at peace with an Islamic State. Islamic law and the political power of the Muslim community prevail in the *dar al-Islam*, whereas in the *dar al-harb*, Islamic law recognized only the fact of possession, whether by → *conquest* or otherwise. Non-Muslims physically present in the territory of war were called *harbis*, a term designating their status as being in a legal state of war with the Islamic State, and with one another. A *harbi* lacks both rights and duties (*'isma*) under Islamic law, similar to Roman law's doctrine that the *ius civile* applied only to Roman citizens (in this entry, *harbi* will sometimes be translated as 'outlaw', and due to its similarity to 'alien' in modern law, sometimes as 'alien' [→ *Aliens*]).
- 8 A territory's designation was decisive for choice of law purposes. Conduct in Muslim territory between persons lawfully present in Islamic territory was subject to normative Islamic law, including the forces of warring Muslim rulers, or armed conflict between Muslim rebels and a Muslim ruler. In contrast, from the perspective of Islamic law, the law of conquest governed conduct in the *dar al-harb*, whether the conduct involved non-Muslims exclusively, or involved Muslims and non-Muslims, whether as individuals or States.
- 9 Under Islamic law anyone in the *dar al-harb*, whether Muslim or non-Muslim, could imprison, seize the personal property of, enslave, or even kill, other persons also situated in the *dar al-harb* without legal sanction from an Islamic State; Islamic law was simply silent as to the legal consequences of conduct in the *dar al-harb* unless it involved Muslims exclusively. The lawlessness of the *dar al-harb*, however, did not necessarily extend to moral obligations: the Islamic doctrine of the *dar al-harb* was fundamentally jurisdictional, not moral. Accordingly, a Muslim who, for example, intentionally killed a non-combatant in enemy territory, committed a sin but was not answerable to the courts of an Islamic State for his conduct. Finally, while the classification of a territory as part of *dar al-harb* permitted an Islamic State to incorporate it forcefully into the *dar al-islam*, Muslim jurists were divided as to whether the Islamic doctrine of *jihad* obligated Islamic States to engage in a policy of conquest whenever possible, or whether peace was permissible despite the feasibility of conquest. The *dar al-harb* is therefore akin to a state of nature.

### 2. The Transition from the State of Nature to the Legal Inviolability (*'isma*) of Persons and Things

- 10 Muslim jurists recognized various means by which peace could emerge from a state of war. The simplest was conversion to Islam combined with residence in Islamic territory. In that case, two sources of inviolability (*'isma*) would exist: religious and political. The former arises by virtue of Muslims' mutual adherence to the teachings of Islam, which renders their lives, property, and honour mutually inviolable regardless of political circumstances. The latter arises by virtue of the

fact that legal residence in Islamic territory affords persons living within that territory inviolability through the Muslim community's collective political power (*mana'a*). Religious inviolability, however, is contingent upon shared belief, and therefore cannot bind non-believers. Political inviolability, in contrast to religious inviolability, accrues to all who live in the polity irrespective of belief and in that respect is superior to religious inviolability. Unlike religious inviolability, however, political inviolability is territorial, and thus stops at the border. Accordingly, the political but not moral protection of Islamic law ends at the boundaries of the *dar al-islam*.

- 11 Muslims outside the *dar al-islam* undertook the risks of the state of nature. For example, Islamic law would not permit a Muslim to retrieve his goods that were plundered in the *dar al-harb* by a non-Muslim if they were subsequently imported into the *dar al-islam*. Had a Muslim plundered his goods, however, Islamic law would have recognized his claim. Accordingly, Islamic law was both territorial and personal: territorial insofar as it applied to conduct in the *dar al-islam*, regardless of religious differences, personal insofar as the conduct involved only Muslims, regardless of the where the conduct occurred.
- 12 A non-Muslim could obtain inviolability under Islamic law by entering into a relationship of 'protection' or *dhimma*, with the Islamic State. Such a person was called a *dhimmi*, or a 'protected person'. Only a ruler of an Islamic State or his authorized representative could enter into such an undertaking. An Islamic State could also negotiate a treaty of *dhimma* with a non-Muslim ruler, but in so doing, it could not accept terms that were repugnant to Islamic law, for example, an agreement with a non-Muslim king who offered to put his kingdom under the protection of the Islamic State and pay to the Islamic State the required poll tax (*jizya*) on condition that he be allowed to continue his practice of enslaving his subjects and subjecting them to Islamically impermissible punishments. In this case, the repugnant conditions would be deleted from the agreement and the non-Muslim ruler would be given the option of affirming the revised treaty or returning to a state of war with the Islamic State.
- 13 In exchange for payment of an annual poll tax, and an agreement to abide by those rules of Islamic law that were secular in character, a *dhimmi* enjoyed the same rights to the protection of his person and property as a Muslim, whether inside the territory of the Islamic State or outside of it: just as the Islamic State was obliged to redeem Muslim prisoners the enemy seized, so too it was obliged to redeem *dhimmis* the enemies seized. If a *dhimmi* was enslaved in the *dar al-harb* pursuant to non-Islamic law, and then was brought to Islamic territory, the Islamic State was required to liberate him from → slavery just as it would be required to liberate a Muslim enslaved in similar circumstances.
- 14 The third means by which a person or property could obtain inviolability under Islamic law was through a grant of security (*aman*). The concept of the *aman* provided the normative foundation for medieval Muslim diplomatic practice. Any adult Muslim, free or slave, male or female (but not a *dhimmi*), could grant security to a non-Muslim alien, even if that alien were the subject of a State engaged in active hostilities against the Islamic State and even if the grant of security was in contravention of a standing order of the ruler. The grant of security could be explicit or implicit. The Islamic State could grant specific individuals or classes of individuals, eg foreign merchants or subjects of the King of England, security. Only the ruler of the State or his duly authorized representative, however, could grant security to an indeterminate set of people. If an alien was granted security in contravention of a standing order of the ruler, or mistakenly but reasonably believed he obtained a grant of security, he could be deported at the ruler's discretion, but was not to be treated as an outlaw. Finally, foreign ambassadors, as well as foreigners desiring to learn about Islam, were granted security as a matter of law upon proof of their claimed status.
- 15 The grant of security represented in principle only a temporary resolution of hostilities that, according to Muslim jurists, could only last one year. The recipient, called a *musta'min*, was only guaranteed protection of his person and goods as against Muslims, not as against the entire world, unless the express terms of the *aman* so provided, or the recipient lacked the power to defend itself against attack. Upon expiration of the grant of security, the *musta'min* had the option of leaving the *dar al-islam* for his territory, or agreeing to become a *dhimmi*.
- 16 An offer of security did not become effective until accepted. Once accepted, however, a *musta'min* was free to renounce it at any time and leave the *dar al-islam*. Breaches of the grant of security were generally treated as a renunciation of the relationship, and therefore were generally remedied by deportation. Renunciation had to be open; therefore, mere violations of criminal law were not sufficient to repudiate the *aman* and instead were treated as ordinary crimes under Islamic law.
- 17 Truces (*hudna* or *muwada'a*) with enemy powers, although similar in legal effect to grants of security, differed from grants of safe passage insofar as a truce was a bilateral agreement between two sovereigns. The ruler of the Islamic State was not to enter into a truce with the enemy unless it was for the benefit of the Muslim community. For example, it was prohibited to make peace with an enemy that would require Muslims to surrender their ability to practice Islam. Otherwise, truces on the condition of payment of tribute to a non-Muslim State, for example, or other humiliating

conditions were acceptable so long as the Muslim community could not be reasonably expected to resist the enemy's forces. Jurists held different views regarding the maximum length of time for which a truce could remain in effect, with some jurists delegating this question to the judgment of the ruler, while others limited truces to a maximum of 10 years, based on the length of a truce entered into by the Prophet Muhammad with pre-Islamic Arab pagans.

- 18 Truces could be renounced by either side, after sufficient notice. Islamic law required delivery of a formal notice renouncing the truce to the non-Muslim king. Truces could also be repudiated by conduct contrary to the terms of the truce, if the violations could reasonably be viewed as having been authorized by the other party's ruler.

### 3. The Rules of 'Civil' and International Warfare

- 19 Different rules governed warfare with non-Muslim powers (*jihad*) and warfare within the *dar al-islam* (known as *hurub al-masalih* or 'wars [for the] public interest'). The latter included wars against rebels (*bughat*), apostates (*murtaddun*), and brigands (*muharibun*). Conflicts between Muslim rulers were treated as a species of civil war (*fitna*), even when the rulers were equally sovereign over the territory under their control. Accordingly, prisoners taken in such conflicts were not subject to treatment as outlaws, but instead, the law of rebellion operated as a temporary and limited suspension of the inviolability granted to them under Islamic law for such time as the hostilities continued. Accordingly, rebel prisoners could not, as a general matter, be executed, and upon conclusion of hostilities, had to be released. Likewise, the personal property of combatants in a civil conflict remained inviolable. The civil character of intra-Muslim conflict was reflected in the practice of denominating intra-Muslim peace agreements as documents of reconciliation (*sulh*) rather than truces (*hudna*), the latter term being reserved for peace agreements between Muslim and non-Muslim powers.
- 20 *Jihad*, then, was the only kind of international war recognized by Islamic law. The obligation to fight this kind of war depended on the nature of the hostilities: if a non-Muslim power launched an assault against the *dar al-islam*, repelling the enemy became the obligation of every Muslim in the area under attack until such time as hostilities ceased. If the people of a particular region were unable to defend themselves against attack, individual Muslims from the adjoining parts of *dar al-islam* also came under an obligation to come to the military aid of their co-religionists. Theoretically, an invasion by non-Muslims of one part of the *dar al-islam* could impose upon the entirety of the *dar al-islam* an obligation to enter the war on the side of their co-religionists if that was the only way to repel the invaders. From this perspective, *jihad* can be viewed as a collective defence mechanism intended to preserve the territorial integrity of the *dar al-islam*, and the personal security of its inhabitants. Warfare between Islamic States did not trigger this collective defence mechanism. In such a circumstance the generality of Muslims were to abstain from the armed conflict and seek a peaceful settlement of the dispute.
- 21 The collective defence function of *jihad* also placed important restrictions on the foreign policy powers of the Islamic State: it could not, for example, make peace on terms that allowed a non-Islamic State to continue holding Muslims or *dhimmi*s as prisoners. And while Muslims were strictly required to honour their obligations to non-Muslims when in their territory pursuant to a grant of security, if they encountered a group of Muslims or *dhimmi*s in a non-Islamic territory that was not at peace with the Islamic State, and that group of Muslims had sufficient collective strength (*mana'a*) to give them a reasonable prospect of liberating the captive Muslims or *dhimmi*s, they were obliged to renounce the grant of security and fight for the captives' freedom.
- 22 *Jihad* as a collective defence mechanism, in circumstances where failure to resist militarily would result in the killing of Muslims with impunity (*istibahat dima' al-muslimin*), represented the universally accepted minimum obligation of *jihad*. Whether *jihad* was obligatory when no threat existed, however, was controversial. Some jurists saw *jihad* as a particular instance of the general Islamic religious duty of commanding the good and forbidding the evil. On this view, Muslims collectively had an obligation to fight even peaceful non-Muslims, after first offering them an opportunity to become Muslims or *dhimmi*s, in order to reduce the power of false religions. Others argued that the obligation of *jihad* could be satisfied merely by providing adequate defence of the frontiers. Others suggested that the obligation of *jihad* had lapsed entirely with the Prophet's triumph over the pagans of Arabia except in circumstances where the ruler declared war (Al-Qarafi 385–86).
- 23 In the event of international hostilities, Muslim jurists placed certain limitations on the manner in which the war could be conducted (*ius in bello*). The most important restrictions included the prohibition against the *intentional* killing of non-combatants and the wanton and intentional destruction of property. Women and children were presumptively non-combatants, but they could lose that status if they engaged in hostilities. Conversely, able-bodied men were presumptively combatants, unless they had withdrawn from public life by, for example, becoming a monk, living in a monastery and devoting themselves exclusively to religious pursuits. The prohibition of killing non-combatants, however, did not categorically preclude the use of medieval siege weaponry, such as mangonels, or the use of tactics

such as flooding and setting fire to a besieged town—even if their use resulted in the death of non-combatants—if the military need for such tactics was sufficiently strong. Here, it appears that the standard used by Muslim jurists was one of reciprocity, and while Muslim jurists were reluctant to authorize the introduction of ‘new’ methods of indiscriminate destruction—for instance, they refused to authorize the use of poisoned arrows—they did not appear to have similar objections to using such weapons once they had been introduced.

#### 4. Customary International Law?

- 24 Because Islamic international law purports to bind only Muslims and the Islamic State regardless of the agreement of non-Muslims or non-Muslim powers, some authors have argued that non-Muslims are simply the object of Islamic international law, and not its subject (Kadduri [1966] 6). Muslim jurists, however, appear to have assumed that some doctrines were shared by other human communities—if only implicitly—and thus they may have recognized a rudimentary → *customary international law*. The most important shared doctrine was the principle of → *pacta sunt servanda*, and that human beings, having given their word, could be trusted to be faithful to it (*al-zahir fi-l-nas al-wafa' bi-l-muwada'a*). Scrupulous adherence to treaties (*al-muslimun 'inda shurutihim*) and the desire to avoid the appearance of treachery (*al-taharruz 'an al-ghadr*) seem to be the most important substantive values animating the Islamic law of treaties. One can also find evidence for other doctrines of international customary law in pre-modern doctrines of Islamic law, such as the rule that a person can only have one → *nationality*, and that upon marriage, the woman takes the nationality of her husband. Muslim jurists also appealed to international custom to resolve disputes, such as the territorial designation of ships, by adopting the → *flag of ships* principle. The Islamic → *law of the sea* also appears to be a species of international customary law (see paras 31–32 below). Another such example is the immunity of foreign ambassadors (→ *Immunity, Diplomatic*), a practice whose universality Muslim jurists affirmed. It is unclear from the writings of Muslim jurists, however, whether such customary practices bound the Islamic State because of their universal status or because the Islamic state of its own accord chose to adhere to them.
- 25 Islamic international law begins with an assumption that in the state of nature no law binds human beings. Law emerges from the state of nature via adherence to Islam, through political agreements between non-Muslim States or individuals with the Islamic state, or agreements of non-Muslims with individual Muslims in the Islamic State. Once such an agreement was made, provided that its terms were not contrary to Islamic law, the agreement provided the relevant rule of law regulating the conduct of the Muslims and the non-Muslims party to the agreement. While Islamic law as elaborated by jurists assumes a lawless state of nature, it authorizes the practice of diplomacy by providing that valid treaties are part of the Islamic legal system. Historical Islamic international law, therefore, is largely a history of Islamic diplomacy, a topic to which we now turn.

### C. The Development of Islamic International Law through Treaties and Diplomacy

#### 1. Diplomacy in Early Islamic History

- 26 The Prophet Muhammad inaugurated Islamic diplomatic practice when he initiated diplomatic correspondence with the rulers of Byzantium and Persia. He also entered into agreements with pagan Arab tribes and a 10-year truce with the Makkans (known as the Treaty of Hudaibiya) which subsequently became a model for Islamic diplomatic practice. The immediate successors to the Prophet Muhammad also entered into numerous treaties in connection with the first wave of Islamic conquests which purported to set out the rights of the non-Muslim inhabitants of these newly incorporated territories. The early Islamic State also entered into a peace treaty with the Nubians in the mid-seventh century, which is said to have lasted some 600 years (Spalding 580). Muslim trading communities in India and China also entered into agreements with the local rulers that respected the religious freedom of local Muslim communities and provided them with limited autonomy, including the right to have a Muslim judge apply Islamic law to settle their own disputes (Hamidullah 52–59; → *Religion or Belief, Freedom of, International Protection* ).

#### 2. Muslim-Christian Diplomacy in the Mediterranean World (13<sup>th</sup>–16<sup>th</sup> Century)

- 27 The Mamluks, who ruled Egypt and the Fertile Crescent between the 13<sup>th</sup> and 16<sup>th</sup> century, entered into numerous truces (*hudna*) with Crusader States and commercial agreements (styled as grants of security) with Italian city-States such as Venice and Florence. Truces with Christian powers during this period (largely the Crusader kingdoms in the eastern Mediterranean) included undertakings such as ‘to be friends of my friends, and an enemy of my enemies’; to respect the frontiers; to release prisoners, their retinues and their property, and provide official escort of the prisoners to the common frontier; to pay tribute or surrender territory; to refrain from interfering with merchants and undertakings that merchants would use only civilian ships for commerce; to implement immediately the treaty's terms; to provide the other side notice of its intent to renew the truce or allow it to lapse upon expiration of its term; and to provide persons from the

other side on its territory a grant of security enabling them to return to their own territory safely in the event that a truce expired without renewal. Truces could be renounced by either side for cause, provided that sufficient notice was given. Diplomatic custom required the renouncing party to state the grounds that justified termination of the truce. Truces from this period also included a religious oath whereby each ruler (or his representative) swore to uphold the truce's terms.

- 28 Crusader-era truces routinely provided for the joint administration and sharing of revenue from border regions (*munasafat*) and for the joint investigation and prosecution of criminal acts committed along the frontiers. These agreements also included provisions providing merchants the rights to pass securely through the territory of each party, guaranteeing that property belonging to alien merchants who died in the territory of the other party would be preserved and returned to the decedent's heirs, and providing that salvage from shipwrecks would be returned to their rightful owners or their estates (Holt [1980] 72–75). Renegades, if they freely adopted the religion of the other side, were allowed to remain, subject to a requirement that all personal property of such renegade be returned. If renegades were unwilling to convert, they were to be returned after negotiation of an amnesty (Al-Qalqashandi 56–57).
- 29 Commercial agreements with Florence and Venice would typically guarantee their merchants testamentary rights; freedom of worship, burial, and dress; provision of ships' repairs, emergency rations, defence against attack by pirates (→ *Piracy*), and return of shipwrecks to their rightful owners; the right to lodge complaints directly to the ruler rather than to ordinary courts; and the elimination of joint and several liability for the debts of their fellow merchants. Agreements with the Italian city-States also included a 'most-favoured-nation clause', guaranteeing that whatever privileges were granted to the merchants of one city would be granted to the merchants of another (Wansborough [1971] 32–34; → *Most-Favoured-Nation Clause*).
- 30 While commercial agreements typically did not include a term, truces with the Crusaders did not exceed 10 years. On the other hand, the Moroccan ruler of a port in the western Mediterranean entered into a peace treaty (*mu'aqada*) with Venice in 1508, which was to last for so long as the Venetians 'came and went'. This treaty included, among other things, mutual promises not to enslave persons from either territory and, in the event that any person from either territory was held in captivity by the other, that such person was to be liberated immediately (see Wansborough [1962] 459–60).

### 3. Islamic Law and the Law of the Sea

- 31 Islamic law generally upheld the principle of freedom of navigation, and Islamic States did not claim sovereignty beyond what was necessary for self-defence, which was defined as 'the distance at which the top of a vessel's masts could still be discerned from land', (Khallieh 138) or approximately six miles. The Ottoman Empire did, however, claim the → *Aegean Sea*, the → *Black Sea*, the → *Red Sea*, the → *Dardanelles and Bosphorus*, and the Strait of Otranto as part of its own territory. And while the → *high seas* were technically considered to be part of the *dar al-harb*, Muslim jurists discouraged hostile actions against commercial shipping during times of political tranquillity unless it could be proven that the ships intended to raid Muslim territories or attack Muslim shipping. This policy enabled Muslim commercial ships to sail regularly to China and the Malayan archipelago as well as European cities. Likewise, Muslim ports were open to ships from China and Europe throughout the Middle Ages (ibid 135).
- 32 Muslim control of the Near East helped establish the commercial unity of the Indian Ocean region and led to important developments in the law of the sea, including the promulgation of the maritime codes of Malacca at the end of the 15<sup>th</sup> century as well as other maritime codes. These codes governed the rights of the ship's captain to maintain order on the ship, maintain law and order on the high seas, and organize trade on the ship. Responsibility for navigation and other technical details, meanwhile, were vested in the ship's pilot. When a ship entered a port, the captain's exclusive jurisdiction over the vessel was replaced by that of the harbour master. More generally, these maritime codes all supported the principle of the freedom of the seas in the Indian Ocean, a practice that continued until the arrival of the Portuguese at the end of the 15<sup>th</sup> century.

### 4. Muslim-European Diplomacy in the Early Modern Period (16<sup>th</sup>–18<sup>th</sup> Century)

- 33 Beginning in the 16<sup>th</sup> century, the Muslim world entered into a period of relative political consolidation. The most important Muslim empire of this period from the perspective of the history of international law was the Ottoman Empire which enjoyed a 500-year history in Eastern Europe and the → *Middle East*.
- 34 By the Ottoman period, the distinction between a grant of security and a truce had lost much of its legal significance and even where an agreement was denominated as a grant of security and was thus a unilateral act from the perspective of Islamic law (→ *Unilateral Acts of States in International Law*), negotiations usually preceded finalization of its terms,

and there would generally be reciprocal undertakings. Ottoman agreements with European powers would typically be concluded over three stages. An interim peace (*temesük*), negotiated by the sultan's representatives in the field, would be reached. The sultan in Istanbul would then confirm the interim agreement by issuance of the formal text of the agreement (*'ahdname* or *berât*). If the agreement involved a power that shared a border with the Ottomans, a document demarcating the frontier (*hududname*) would then be prepared (Kolodziejczyk 46–56, 58). In early Ottoman practice, a grant of the *'ahdname* would be formalized by the sultan's personal oath, but thereafter this requirement was abandoned in favour of his confirmation of the terms in the *temesük* (ibid 78).

- 35 The Ottomans granted *'ahdnames* to non-Muslim powers and their subjects on the theory that the non-Muslim power promised 'friendship and peace' or 'friendship and sincere goodwill'; it could therefore be terminated if the sultan found that the recipient had behaved in a manner inconsistent with this undertaking. The Ottoman *'ahdanames* were the origin of the → *capitulations* that granted, initially, foreign merchants in Ottoman territories limited extraterritorial privileges, but later, when fully developed in the 19<sup>th</sup> and 20<sup>th</sup> centuries, effectively led to the loss of Ottoman sovereignty over its domestic economy.
- 36 Ottomans entered into agreements of indefinite duration with numerous European powers that, due to their distance from Ottoman territories, were not viewed as enemies, eg France (1536), England (1580), and the Netherlands (1612). They also entered into similar open-ended arrangements with States that had been reduced to the status of Ottoman vassals, eg Venice and Hungary. Ottoman agreements with the Hapsburg Empire, by contrast, never exceeded eight years until 1606, when it entered into a 20-year agreement (GE Noradounghian [ed] *Recueil d'actes internationaux de l'Empire Ottoman* vol 1 1300–1789 [Librairie Cotillon Paris 1897]). Agreements with one sultan, however, lapsed upon the succession of a new ruler, and therefore were in need of the succeeding ruler's confirmation. It was not until the Ottoman-French Treaty of 1740 that the Ottoman Sultan purported to bind his successors, thereby negating the practice of renegotiating the terms of each treaty upon the accession of a new sultan (Capitulations between France and Turkey [done 28 May 1740] 36 CTS 41; Kolodziejczyk 10, 83–84).
- 37 Treaties of this period also customarily included provisions to suppress the slave trade in the nationals of the parties to the treaty and to liberate any nationals of the other side held in slavery on the territory of the other party (Kolodziejczyk 511–512; Hurewitz 19–22, 29–34, 42–44, 44–49). Such provisions were included in numerous treaties concluded between European and North African Muslim powers that were formally Ottoman provinces over the course of the 16<sup>th</sup> century's Mediterranean 'piracy wars', but these treaties were generally short-lived. The continued dependency of the French on Muslim slaves for their navy's galleys well into the 18<sup>th</sup> century—even after North African navies had adopted sailing vessels—was the principal cause for the inability to secure Mediterranean shipping during this period. (Hurewitz 29, 42, 45–46).

### 5. Inter-Muslim Diplomacy in the Pre-Modern Period

- 38 Islamic law regulated the relationship of Muslim powers without need for any political agreement amongst them. Peace agreements between Muslim rulers, therefore, were called 'reconciliations' rather than truces. Accordingly, because Islamic law provided certain guarantees to the signatories of a reconciliation, eg the return of property and the release of prisoners, agreements between Muslim powers during the pre-modern period were less detailed than those entered into between Muslim and non-Muslim powers. Instead, inter-Muslim peace agreements generally were limited to demarcating the boundaries between the two parties, largely for the purposes of determining the right to collect taxes and to place limits on the movement of the soldiery of each side, and spelling out commitments not to interfere with the free movement of people and goods between the two territories.
- 39 Because Muslim rulers were legally at peace, their agreements were not supposed to include a term, although sometimes they would state that the terms of the agreement would be 'forever binding'. Instead of a religious oath, inter-Muslim agreements (as well as grants of amnesty to former rebels) prior to the Ottomans would often be accompanied by personal oaths of the rulers, violation of which would result in the automatic divorce of their wives and manumission of their slaves.
- 40 Although it has been suggested that the Treaty of Amasya in 1555 between the Ottomans and the Safavids began a process by which the *dar al-islam* was transformed 'into a set of sovereign States' (Khadduri [1995] 1240), diplomacy between the Ottoman Empire and the Safavid Empire did not substantially depart from the pattern set out in the Middle Ages. Recent scholarship on Ottoman-Safavid relations confirms that their relationship was conducted within the traditional paradigm of the existence of numerous Muslim dynasties that were equal members of the single *dar al-islam* (Mitchell 354–355). Far from ignoring Safavid religious heresies, for example, the Ottomans insisted that the Safavid State commit itself to refrain from its most heterodox (from the perspective of the majority *Sunni* community) practices

—in particular their practice of cursing the first three caliphs—as the price of admission to the community of legitimate Muslim sovereigns ruling the *dar al-islam*. The Safavid willingness to accommodate Ottoman religious objections to the regime's *Shi'ism* was, moreover, a policy that Iran's post-Safavid rulers largely followed, and in some cases, even exceeded, despite creating tension with its *Shi'i* clergy (Tucker 40–41, 98, 115).

## 6. Muslim Diplomacy from the 19<sup>th</sup> Century to the End of World War II

- 41 European powers, by virtue of their increasing military and economic superiority to the Ottomans, expanded both the scope of the extraterritorial privileges they enjoyed under the various capitulations, and the persons to which they applied, so that even non-Muslim Ottoman subjects came to enjoy many extraterritorial protections under the various capitulatory regimes. Loss of control over the domestic economy led to various 19<sup>th</sup> century revolts by Ottoman notables. For example, Mehmet 'Ali Pasha, the governor of Egypt, in the first half of the 19<sup>th</sup> century, attempted to reassert control over the domestic economy by encouraging local industry and instituting protective tariffs. European powers, led by England, induced the Ottomans to enter into the Convention of Balta Liman (Convention of Commerce and Navigation between Great Britain and the Ottoman Empire [signed 16 August 1838, entered into force 1 March 1839] 26 BSP 688), pursuant to which the Ottomans were obliged to eliminate domestic monopolies and protective tariffs instituted by Ottoman provinces, thereby thwarting the economic policies of Mehmet 'Ali and others. That agreement also had the effect of turning the Ottoman Empire into a virtual free trade zone for the benefit of European merchants with little to no protection for domestic industry. By the end of the 19<sup>th</sup> century, all important public services, such as banking, railways, mines, gas and electricity, ports and telephones, were in the hands of European companies, and therefore, outside the reach of the regulatory powers of the Ottoman State. The expansion of the capitulations in the 19<sup>th</sup> century led to situations in which even Ottoman subjects became exempt from domestic taxes in certain cases and foreigners had gained virtual immunity from both civil and criminal suit in Ottoman courts.
- 42 Abolition or reform of the capitulations became a constant focus of Ottoman diplomacy, especially after the Ottoman Empire was admitted to the → *Concert of Europe* in 1856. When World War I broke out in 1914, the Ottomans sought promises from the Allies that they would support repudiation of the capitulations in exchange for Ottoman neutrality, but when they refused, the Ottomans entered the war on the side of Germany which had previously committed itself to their abolition. The Ottoman sultan abolished the capitulations on 8 September 1914, but the Allies only recognized their abolition following the conclusion of the Treaty of Lausanne (Treaty of Peace with Turkey, with Related Documents [signed 24 July 1923, entered into force 6 August 1924] 28 LNTS 11).
- 43 The capitulations that applied to Egypt, which had gained quasi-independent status by the middle of the 19<sup>th</sup> century, meanwhile, were even more far reaching than those that applied to other Ottoman territories. Europeans, for example, were exempt from the payment of any taxes to the Egyptian government without the consent of their governments, a power that was used to block the introduction of many new taxes, including an income tax.

## D. The Modern International Legal System and Islamic International Law

### 1. Muslim Nation-States within the Dar al-Islam

- 44 With the demise of the Ottoman Empire at the conclusion of World War I, the Islamic conception of States existing within the *dar al-islam* gave way to the European model of the nation-State. While republican Turkey adopted this model with enthusiasm, much of the Islamic world which was largely under colonial domination accepted this development more as a *fait accompli* rather than as fulfilling a long-standing political ideal. Accordingly, many local Muslim elites adopted the language of nationalism as a strategy to achieve independence, without necessarily abandoning a trans-national sense of Muslim (or Arab) solidarity, as evidenced in the formation of transnational organizations such as the → *League of Arab States (LAS)* and, in the late 1960s, the OIC.
- 45 The observation in the 1950s that Muslim States had fully adapted to the nation-State system was probably somewhat exaggerated (Khadduri [1956] 370–71). From the normative perspective of Islamic international law, the existence of sovereign Muslim nation-States—and theorizing the nature of their inter-relationships—has proven to be more conceptually problematic than adapting the concepts of pre-modern Islamic law to the relationship of Muslim States to non-Muslim States. The failure to reconcile, systematically, the existence of a plurality of sovereign Muslim nation-States with the pre-modern Islamic conception of the *dar al-islam* results in substantial contradictions between modern concepts of international law and religiously-derived conceptions of international law. The persistence of the traces of pre-modern Islamic conceptions such as the *dar al-islam*, moreover, may account for some of the idiosyncratic positions

taken by Muslim States in the international arena, particularly with respect to the relationship of → *terrorism* to → *wars of national liberation* and struggles for → *self-determination*.

## 2. The End of the *Dar al-Harb*

- 46 The most important doctrinal development in Islamic international law in the post-World War II era was the conclusion by prominent Muslim jurists that the category *dar al-harb* was obsolete. These include jurists such as Mahmud Shaltut, who served as the rector of the Azhar Mosque University in Egypt in the middle of the 20<sup>th</sup> century and authored two treatises on the Islamic law of warfare, *Muhammad's Mission and Warfare in Islam* (1933) and *The Quran and Warfare* (1948) (see Peters) in which Shaltut sought to recast the classical Islamic law of warfare to make it consistent with the newly emerging world order; Muhammad Abu Zahra, a traditionally-trained, but reform-minded scholar of Islamic law and professor of law at Cairo University Faculty of Law active in the inter-war period and immediately after World War II and author of *International Relations in Islam* (1964); and Wahba al-Zuhayli, a prominent contemporary Syrian jurist of Islamic law and member of the influential Islamic law committee of the Organization of the Islamic Conference and author of *International Relations in Islam: a Comparison with Modern International Law* (1981).
- 47 This group of Muslim jurists denied that the category of *dar al-harb* had any normative significance, and argued that it was instead an empirical category and that *jihad* was only authorized against hostile non-Muslims. The rise of international law and institutions such as the United Nations that purported to guarantee the independence of all States, secure the self-determination of the colonized, and protect → *human rights*, radically changed the political environment in which Muslims found themselves. This change in the international environment, according to these jurists, meant that international relations had changed from one in which war and conquest was the default rule to one in which peace and friendship was the default rule. And, according to these writers, Islam could fulfil its universal aspirations simply by virtue of international guarantees of religious freedom and the commitment by non-Muslim States to maintain a posture of neutrality with respect to the Islamic religion. In short, according to these theologians and jurists, any State that committed itself to providing Muslims freedom of religion and permitted Islam to be taught freely could not be considered part of *dar al-harb* (Al-Zuhayli 17–18, 21, 26–27).
- 48 The rejection of the category of the *dar al-harb* also had consequences for the Islamic law of warfare: if the *dar al-harb* no longer existed by virtue of the guarantees of modern international law, then it could no longer be lawful from an Islamic perspective to launch wars except for the purpose of self-defence, and indeed, that is the position taken by these jurists (ibid 15, 26–27). According to them, military *jihad* with the purpose of expanding the territory of the Islamic State could only be justified when a non-Muslim State is engaged in some sort of anti-Islamic policies such as suppression of Islamic missionaries or refusal to allow the open practice of Islam. The right of Muslims to teach Islam, and practice it, having been guaranteed by the international order, thus becomes the linchpin in contemporary Islamic thought for concluding that the concept of *dar al-harb*, and the concomitant permission or duty to incorporate it into *dar al-islam* (for those Muslims who believed such a duty existed), had become obsolete.
- 49 It should be noted, however, that while rejection of the continued vitality of the *dar al-harb* probably represents the majority position of contemporary Muslim jurists, there are certainly dissenters who maintain that *dar al-harb* is a normative Islamic doctrine used to describe any territory that is not governed by Islamic law (see 'Abd al-Karim Zaydan or Muhammad Khayr Haykal).

## 3. The Persistence of the *Dar al-Islam* in Normative Islamic Doctrine

- 50 If the norms of post-World War II international order were sufficiently consonant with Islamic moral and political ideals that the category of the *dar al-harb* had become obsolete, one might have expected that the category of the *dar al-islam* would have met a similar fate: if all States as part of their membership in the international order are required to meet certain minimum standards that result—from the Islamic perspective—in the dissolution of a state of war, then one might argue that all states are essentially equal from an Islamic religious perspective. The reality of 19<sup>th</sup> and 20<sup>th</sup> century → *colonialism* and occupation, however, as well as the establishment of the State of → *Israel* on the territory of → *Palestine*, and the global Muslim resistance to the Soviet invasion of Afghanistan in 1979 precluded such a doctrinal development, however. Instead, modern conceptions of the right to self-determination, anti-colonialism, and the territorial integrity of States reinforced older conceptions of Muslim solidarity—especially as manifested in the ancient conception of *jihad* as a means of collective self-defence—and produced a new conception of *dar al-islam*, one that was defined in territorial terms derived from the borders of the *dar al-islam* prior to the colonialist interregnum, regardless of whether the domestic legal order of contemporary successor States is Islamic (Kingdom of Saudi Arabia), partially Islamic (Arab Republic of Egypt), or entirely secular (Republic of Turkey).

- 51 Writing at the end of the 1970s, al-Zuhayli, even as he affirmed the obsolescence of the *dar al-harb* to the post-World War II international order, nevertheless reaffirmed the continuing vitality of the *dar al-islam* as a collective defence mechanism, explaining that Muslims

are obliged to defend [the *dar al-islam*] and to liberate such of its parts which have been seized. This obligation is a collective one, but if [liberation] is not achieved, struggle [ie *jihad*] becomes obligatory upon every individual Muslim—[beginning with those] in closest [geographical proximity] to the seized territories, until [the obligation to struggle] encompasses every Muslim. Accordingly, Palestine and like territories which were colonized, form a part of the *dar al-islam*, and it is obligatory to expel the invaders from such territories when there is sufficient strength to do so (al-Zuhayli 105).

- 52 Al-Zuhayli's analysis of the *dar al-islam* departs from the medieval doctrine in a number of significant ways. The first is that the *dar al-islam* is a territory with well-defined and fixed boundaries in contrast to the historically fluid boundaries of the pre-modern *dar al-islam* that ebbed and flowed with the fortune of the various historical Islamic States. The second is that Muslims are under a duty—collectively at least—to liberate those portions of the *dar al-islam* that are occupied by non-Muslims. Because it was always lawful to wage war against a non-Muslim power in the pre-modern era provided that no treaty of peace was in place, and because States did not have a lawful entitlement to the territory they occupied, the pre-modern Islamic conception of war had no concept of a war of liberation as distinct from a war of conquest. To the extent that Muslim jurists continued to describe certain territories with large Muslim populations that had come under the political domination of non-Muslim powers as being part of the *dar al-islam*, eg Egypt following the Napoleonic invasion, they did so largely if not entirely for the purpose of securing the rights of the individual Muslims in such territories against other Muslims, by declaring that any transactions conducted by the foreign occupier, eg grants of land, remained subject to the rules of Islamic law rather than that of the foreign conqueror. The effect of such a rule, of course, was to deny legitimacy to the regime of the foreign occupier. It did not, however, create an obligation on individual Muslims living under a regime of occupation to rise up in armed resistance against the foreign occupier. Contemporary Muslim jurists, however, interpret the doctrine of *jihad*, as a result of this revised notion of the *dar al-islam* to require that all Muslims living under a regime of foreign occupation must resist that occupation using all means available to them ('Should Iraqis Take the Occupation a Fait Accompli?') For example, on the eve of the United States invasion of Iraq in the spring of 2003, a group of leading Islamic jurists announced in Cairo that if the United States invaded Iraq, *jihad* against the US forces would become obligatory for every Muslim, stating that 'according to Islamic law, if the enemy steps on Muslims' land, *jihad* becomes a duty on every male and female Muslim' (Anthony Shadid 'Scholars Urge Jihad in Event of Iraq War' Washington Post [11 March 2003]).
- 53 While the modernized religious doctrine of the *dar al-islam* clearly supports the modern system of peaceful relations between States insofar as it represents a rejection of aggressive war, it also provides a robust religious justification for the organization of trans-national armed → *resistance movements* inside the Muslim world under the justification that they are fighting a war of resistance or liberation against non-Muslim invaders. The modernization of religious doctrines of warfare, moreover, is reflected in the language of Islamist resistance groups in Palestine, Lebanon, and Iraq, all of which use the modern nationalist term *muqawama*, meaning 'resistance', to describe their activities rather than the traditional term of *jihad*.

#### 4. Muslim States and Modern International Relations

- 54 Normative Islamic religious doctrines (including the 20<sup>th</sup> century revisionist doctrines of *jihad*, the *dar al-harb*, and the *dar al-islam*) do not represent the official positions of Muslim States vis-à-vis the international system. As Professor Khadduri first suggested in the 1950s, the approach of contemporary Muslim States toward their Islamic heritage, on the one hand, and modern international law, on the other hand, are characterized by a degree of ambivalence that can be traced to the collapse of the Ottoman Empire after World War I. Whether to continue to legitimize the State in Islamic (or quasi-Islamic) terms or only on nationalist grounds was vigorously debated in post-World War I Egypt, for example, with the advocates of a modernized Islamic identity triumphing (Khadduri [1956] 369–70). This same debate occurred in other Muslim countries with the result that contemporary Muslim countries are committed both to general international norms as well as a vague set of weak and idiosyncratic international commitments arising out of vague sentiments of Islamic solidarity.
- 55 The most prominent legal advocate of a modernized Islamic basis for Egypt (and by extension the rest of the Islamic world) was 'Abd al-Razzaq al-Sanhuri, a French-trained jurist of comparative law who was active in the Egyptian and Arab legal systems as a draftsman, scholar, and law professor in the aftermath of World War I and World War II. The main justifications for a modernized body of Islamic law—which would include a modernized version of the caliphate—in Sanhuri's view were secular: promoting Muslim solidarity in the face of imperialist domination, promoting

the independence and development of Muslim peoples, and promoting peace and stability among independent (or soon to become independent) Muslim States by tempering nationalist zeal. For Sanhuri, the modernized caliphate that he envisioned would be akin to an 'Oriental League of Nations', and it would be consistent with the progressive developments of a humanist international legal order.

- 56 Sanhuri's theory of a secularized and modernized Oriental League of Nations arguably formed the theoretical basis for the subsequent formation of the Organization of the Islamic Conference in 1972 when the Charter of the Organization of the Islamic Conference ('OIC Charter') was adopted at the Third Meeting of the Islamic Conference of Foreign Ministers. The OIC, however, is not a resurrection of juridical notions of the *dar al-islam*, or even an attempt to accommodate modern realities to pre-modern Islamic theories of the relations among Muslim States, but is instead an organization of independent and sovereign States which thus rejects the core legal doctrine defining the *dar al-islam*, namely, that universal Islamic law bound all Muslims, including their rulers (Moinuddin 84–85).

## E. Conclusion

- 57 Muslim jurists, beginning in the ninth century, began the systematic articulation of the principles of Islamic international law. That body of law begins with the assumption that human beings' default relationship is one of war, and that the origins of peace is what requires legal justification. For Muslims, shared belief provided the legal basis for peace. For non-Muslims, the only basis for peace was political agreement. Accordingly, Islamic rules of international law are best understood as providing legal baselines that were to regulate the conduct of the emerging Islamic State in the absence of treaty commitments with non-Muslims, while at the same time enabling that state to enter into peaceful relations with non-Muslims.
- 58 For this reason, Muslim jurists after the classical period did not take an abiding interest in further developing legal doctrines of international law because, aside from setting certain limits on State behaviour, the actual substance of treaties and how they should be interpreted was something they willingly delegated to the rulers of the various historical Islamic States. The same general attitude prevails among contemporary Muslim jurists committed to the Islamic religious tradition. From a normative Islamic perspective, contemporary Muslim jurists have not attempted to promulgate an alternative conception of a 'modern' Islamic international law, nor is it likely that they will do so in the future. This is because Islamic international law is largely a set of rules that enable the creation of binding international agreements rather than impose a set of mandatory universal rules. Accordingly, Muslim jurists focus their attention on whether the particular undertakings of Muslim States are consistent with their understandings of Islamic law. For that reason, one sees that for modern Muslim jurists, the normative status of *jihad* in light of the realities of the modern international system is of central concern, but not the general theoretical question of the status of international customary law under Islamic law.
- 59 While Muslim jurists have generally endorsed the post-World War II international order as one that is, in principle, just and therefore consistent with Islamic law, or at a minimum is sufficiently just to allow Muslims to disclaim the resort to war except in cases of self-defence, Muslim jurists have preserved the notion of the *dar al-islam* pursuant to which Muslims, as a religious community, have collective obligations of self-defence that go beyond any conception of self-defence in modern international law. The function of *jihad* as a tool for the self-defence of the Muslim religious community rather than that of a particular State is particularly important in understanding how what otherwise appear to be local conflicts, eg Israel and Palestine, the United States in Iraq, and the former Soviet Union and Afghanistan, are transformed into trans-national conflicts. Arguably, however, it would seem that the very features of the post-World War II international system that led 20<sup>th</sup> century Muslim jurists to recast the doctrine of *jihad* as a purely defensive war should have led them to dispense with the notion of *jihad* as a tool for the collective defence of the Muslim religious community, but reconsideration of the defensive doctrine of *jihad* has yet to take place.
- 60 The most intractable of these inter-State conflicts appears to be that of Israel and Palestine where Muslim jurists who otherwise endorse the international system nevertheless conclude that the establishment of the State of Israel in 1948 was an act of → *aggression* against the *dar al-islam* to which Muslims cannot simply acquiesce. This analysis of the Israel-Palestine conflict merges quite comfortably into the more secular arguments grounded in self-determination advanced by secular Palestinian organizations and Muslim States, thus giving Muslims and Muslim States both religious and secular reasons to oppose the legitimacy of the State of Israel, a fact that makes resolution of this conflict within the parameters of international law especially urgent.

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