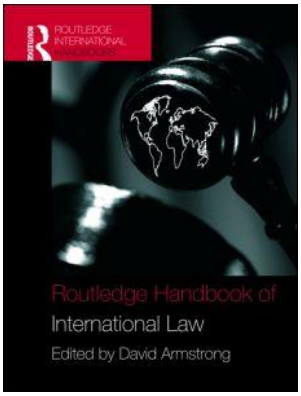

Routledge Handbook of International Law

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Religion and International Law

Publication details
https://test.routledgehandbooks.com/doi/10.4324/9780203884621.ch11
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Published online on: 22 Dec 2008

11

Religion and international law: an analytical survey of the relationship

Mashood Baderin

This chapter provides a general but contextualized and critical analytical survey of the relationship between religion and international law from four main perspectives: historical, theoretical, empirical and doctrinal. The historical perspective generally analyzes how religion has featured in the evolution of international law over time and its consequences for modern international law. The theoretical perspective analyzes the main theoretical viewpoints on whether or not religion ought to have any normative role in international law, while the empirical and doctrinal perspectives examine the practical and legal parameters of the relationship respectively.

Introduction

Religion[1] has played, and continues to play, a significant role in the evolution of international law, even though the relationship between the two is often perceived to be complex and controversial for different reasons. On the one hand, the controversy surrounding the relationship may be attributed to the apparent differences in the nature of religion (sacred) and that of international law (secular). Carolyn Evans (2005: 3) has noted in that regard that: "The place of religion in the international legal system, or indeed any legal system that purports to be secular, is likely to be controversial and complex." On the other hand, religion and law are identical in some other ways. Generally, both religion and law are important social phenomena that relate to fundamental social issues in human society, which has often stimulated "passionate disagreement about their proper content and functions"[2] in that regard (Jamar 2001: 609). Also, both religion and law can be politicized and manipulated by the elite to achieve particular intended objectives, which also adds to the complexity and controversy in their relationship. Owing to its complexity, the relationship between religion and international law can be analyzed from different perspectives depending on one's objective.

As a chapter in a handbook on international law, this essay aims at providing a general but contextualized analytical survey of the relationship from four main perspectives: historical, theoretical, empirical and doctrinal. These four perspectives are not strictly mutually exclusive, but are intrinsically interrelated as, for example, the theoretical perspective must, as a matter of necessity, not only be historically aware, but empirically meaningful and also doctrinally relevant. The historical perspective will generally analyze how religion has featured in the evolution of international

law over time and its consequences for modern international law. The theoretical perspective will analyze the main theoretical viewpoints on whether or not religion ought to have any normative role in international law. The empirical and doctrinal perspectives would examine the practical levels of the relationship and explore the legal scope of the relationship respectively. It is necessary to state that the term "religion" is used here in a very general sense, but reference would be made to specific religions where necessary to illustrate and provide context to relevant arguments.

Historical perspective

The history of international law is usually delineated by the Peace of Westphalia, which is often depicted as the beginnings of modern international law and international relations, and thus conventionally divided into the pre-Westphalian and post-Westphalian periods. This traditional division of the history of international law is essentially Euro-Christian in nature and has been described as being "to a certain extent, old fashioned" (see Steiger 2001: 180). The important point, nevertheless, is that religion has played a significant role in both historical periods.

Before the Peace of Westphalia in 1648, religion constituted a fundamental basis for the normative rules regulating the relationship between the political powers of that period in different parts of the world (see e.g. Bantekas 2007: 115; Bederman 2004). For example, while the earlier writings on rules of the law of nations by jurists in Europe relied heavily on Judeo-Christian religious sources, similar writings by jurists in the Muslim world also relied mainly on Islamic religious sources (see, e.g. Khadduri 1966). After Westphalia, international law materialized as an essentially secular and European construct but remained very much influenced by Christian religious dictates generally.[3] Heinhard Steiger (2001: 183) has observed in that regard that the epoch of international law from the thirteenth to the eighteenth centuries was an epoch of "international law of Christianity," with the law deeply rooted in religious or divine law. He noted that: "Christianity formed the major intellectual foundation of legal order for the entire epoch," which, *inter alia*, "brought Europe together, not only into an intellectual-religious unit, but also under the political idea of *res publica Christiana*," a term he identified as still "used in treaties as late as the 18th Century" (Steiger 2001: 184).

Writing from an Islamic perspective, Muhammad Hamidullah (1977: vii, emphasis in original text) had earlier made a similar observation in 1941, stating that what passed as international law in Europe up to the mid-nineteenth century was "a mere public law of *Christian nations*" and noted that 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 internationalizing the public law of Christian nations." To highlight however that the concept of international law was not limited to Europe in those times, Hamidullah (1977: vii) further observed notably that international law existed long before then within Islamic law, based principally on Islamic religious sources. There have also been observations by other scholars highlighting the existence in other religions of relevant rules for the regulation of the "interstate" relationships between political powers in the form of law of nations prior to the Peace of Westphalia in 1648 (see, e.g. Jain 2003; Weeramantry 2004: 17–30).

Over time after Westphalia, emphasis on the substantive role and influence of religion in international law declined gradually in Europe, until modern international law became perceived strictly as a secular positivist legal system with its foundation regarded as lying "firmly in the development of Western culture and political organization" (Bederman 2001a; Brierly 1963: 1; Shaw

2003: 13–22; Stumpf 2005). Carolyn Evans (2005: 2) refers notably to Mark Janis' observation in that regard that "by 1905, when Oppenheim published his classic *International Law*, religion no longer played the important role that it had in earlier texts: 'rather religion was part of the history of international law, something that once had mattered'" (see also Janis 2004: 138; Kennedy 2004: 145–53).

The adoption of the United Nations (UN) Charter in 1945 can be described as the climax in the formal substantive secularization and positivization of modern international law, as none of its provisions refers directly to religion as a legal or normative source of international law, except for its provisions on prohibition of non-discrimination on grounds of religion.[4] Christoph Stumpf (2005: 70) has, however, observed that this secularization of international law has European traditional underpinnings, and that this creates a source of "potential conflict in the relationship between secularized legal cultures which are customarily labeled 'Western', and other legal cultures that wish to uphold their religious root." Stumpf's observation is reflective of the fact that the world is today constituted of states that operate different legal cultures, with religion still playing a very visible role in the public sphere and legal culture of many states, particularly Muslim states. In the words of Ilias Bantekas (2007: 116): "To be certain, the world is divided into secular and non-secular countries." That, in essence, continues to have significant impact on the relationship between religion and international law at their different levels of interaction.

Thus, despite the substantive secularization of modern international law, the discourse on the relationship between religion and international law is no longer merely historically relevant, i.e. "something that once had mattered" (Evans 2005: 2) but has become, in the last few decades, relatively more substantively relevant, i.e. "something that still matters" (see, e.g. Hackett 2005: 661; Haynes 2005; Petito and Hatzopoulos 2003),[5] particularly after the 1979 Islamic Revolution in Iran and the al-Qaeda terrorist attack of September 11, 2001, both of which invoked Islamic religious sources as their basis of action and both of which have had important impacts on international law respectively. While this has placed Islam in the forefront of the contemporary discourse on the relationship between religion and international law, as will be reflected in the context of this chapter, it is by no means the only religion relevant in the discourse. For example, Richard Falk (2002: 4–5) has referred to the Falun Gong movement in China and the current political leverage of the religious right in the United States of America as relevant examples of the current religious dynamics in different parts of the world impacting on the relationship between religion and modern international relations and international law.

In the face of diverse contemporary international challenges, especially regarding issues of international peace and security, some international law scholars and jurists have proposed a general return to relevant principles of natural law as well as religious and cultural values to find ways of expanding the scope of the principles of modern international law to meet those challenges (see, e.g. Falk 2001; Meron 2000: 278; Weeramantry 2004). Also, many other commentators have, especially from an Islamic perspective, specifically challenged what they consider to be the continued European and Christian underpinnings and influences on modern international law and called for an appreciation of the necessary inputs that other religions, especially Islam, can offer to the development of modern international law (see, e.g. Abou-el-Wafa 2005; Baderin 2008; Shihata 1962). Thus, while Christianity had played an almost unilateral role in the historical development of modern international law, other religions now tend to be asserting their respective values as relevant factors to be considered in its continued evolution. This brings us to the examination of the different

theoretical perspectives around which the debate on the relationship between religion and international law are being diversely framed today.

Theoretical perspectives

The main theoretical question in the debate about the relationship between religion and international law centers on whether or not religion ought to have a normative role in modern international law. The complex aspect of the debate is that there are diverse views based on different worldviews and theoretical arguments. Richard Falk has noted in that regard that: "There are those who view religion as disposed towards extremism, even terrorism, as soon as it abandons its modernist role as a matter of private faith and belief that should not intrude upon governance . . . [and their] opponents argue the opposite thesis, which contends that without rooting governance in the dictates of religious doctrine, the result is decadence and impotence" (Falk 2002: 6–7). There is a third viewpoint in between. Thus, the current literature generally reflects three main theoretical perspectives on the subject, which may be classified as the "separationist," "accommodationist," and "double-edged" theoretical perspectives respectively.

Separationist theory

The separationist theoretical perspective reflects a secular positivist view of international law, which advocates a strict separation between religion and law and argues that religion should have no normative role in international law at all. It draws mainly from the western, particularly American, liberal concept of the separation of church and state, which asserts that religion should be a personal matter restricted to the private sphere of individuals, "solely between Man and his God," and not allowed into the public sphere of governance generally and of law particularly (Jefferson 1802: para. 2). Scott Thomas (2005: 151) calls this the "Westphalian presumption" in international relations, "which says religious and cultural pluralism cannot be accommodated in a global multicultural international society, and so must be privatized or nationalized if there is going to be domestic or international order." It advocates a pure theory of international law aimed at ensuring neutrality of the law and devoid of religious and cultural reductionism or influence. Thus, the main logic of the separationist theory is the "neutrality argument," which asserts that a secular positivist international law is necessary to ensure neutrality in the operation and application of international law in a manner that ensures equality and non-discrimination in a multicultural and multi-religious global system.

Today, most scholars of international law, particularly from the western world, adopt the separationist theory and advocate a secular positivist international law that is separated from any religious persuasion. For example, in his critique of the arbitration tribunal's reference to Islamic law in the case of *Eritrea vs. Yemen (Phase Two: Maritime Delimitation)*,[6] Michael Reisman (2000a: 729) argued, *inter alia*, that: "The essential function of general international law, as a secular *corpus juris*, is to provide a common standard and to play a mediating role between states with different cultures, legal systems, and belief systems," and that international tribunals "would be well advised to stick to international law" in that secular form. A similar point, but in a different context, was made by Antonio Cassese (1988: 78) in his criticism of the Israeli Commission of Enquiry's reference to rabbinic law in the *Sabra and Shatila Inquiry* of 1982 and its shunning of international law in that regard. Also in his comments on the observation of the International Court of Justice (ICJ) in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (ICJ Reports 1980: 41) that the traditions of Islam has made substantial contribution to the principle of the inviolability of the persons of

diplomatic agents and premises, Ilias Bantekas (2007: 127) contended that there was no need for the court to have made a reference to Islam on this point as there was sufficient substantive international law the court could have relied on in that regard.

I submit to the contrary and argue that such complementary references to religious law by international tribunals in relevant cases, as seen earlier, reflect an accommodationist perspective, which can contribute to the development of customary international law. It must be emphasized however that this should not extend to the total jettisoning of international law for religious principles as appeared to have been the approach of the Commission in the *Sabra and Shatila Inquiry* as analyzed by Cassese. He noted that the Commission had set aside relevant international law and "referred exclusively *to moral and religious imperatives*" to formulate its reasoning on the question of "indirect responsibility" in that case (Cassese 1988: 79). Rather than completely sidelining international law, our argument here is that relevant religious law can be persuasively cited to complement international law for the purpose of establishing the existence of customary international law in relevant cases, especially where such religious law is a formal part of national law. There is no rule of international law that prohibits doing so. Actually, it is recognized under international law that states' municipal laws may in certain circumstances form the basis of customary rules (Shaw 2003: 79). I will further elaborate this point in the section on doctrinal perspectives in a later part of this chapter. Mark Janis (1993: 321–22) has advanced a similar argument to the effect that international law needs to "draw on the many different religious, political, economic and social traditions to find values common to the many nations, which may be adopted as norms in customary [international] law."

The neutrality argument of the separationist theory has however been challenged, both in its national and international context, on the contention that the argument is itself based on certain presumptions that are not really neutral in themselves. For example, Douglas Laycock (1990: 994) has referred, in that regard, to Michael McConnell's challenge that "neutrality is not a self-defining concept, because properly defined, it is often at odds with religious liberty," while according to David Cinotti (2003: 500), "neutrality is an indeterminate and vacant idea because one may always counter neutrality-based arguments by reframing the definition of neutrality or by making counterarguments also from neutrality" (see also Ravitch 2004).[7] The problem with the neutrality argument is that there is always the need for establishing an appropriate baseline from which deviations from neutrality can be assessed, the choice of which, especially in relation to the separationist theory, is itself not absolutely neutral (Ahdar and Leigh 2005: 90–92; Esbeck 1997: 5; Ravitch 2004: 493–506). Thus one of the main challenges to the separationist theory in respect of the relationship between religion and international law is that a strict secular system of international law may not necessarily be neutral in every sense of the word, as is often presumed. Carl Esbeck (1997: 1, 5) has argued in that regard that:

> Separationism is a value-laden judgement that certain areas of the human condition best lied with the province of religion, while other areas of life are properly under the authority of civil government. Separationism, this most dominant of theories is in no sense the inevitable product of objective reason unadulterated by an ideological commitment to some higher point of reference. Separationism cannot stand outside of the political and religious milieu from which it emerged and honestly claim to be neutral concerning the nature and contemporary value of religion or the purposes of modern government. The same must be said for its primary competitor, the neutrality theory. Indeed, to demand that any theory of church/state relations transcend its pedigree or its presuppositions and be substantively neutral is to ask the impossible.

The historical awareness of the separationist perception of international law is based on the fact that it is generally motivated by a post-Reformative and post-Westphalian interpretation of international relations informed by the European historical experience of the long years of religious wars of the sixteenth and seventeenth centuries. The Peace of Westphalia was reached after a century of religious wars that ravaged Europe between 1550 and 1650. Scott Thomas (2005: 22) has noted that this experience has led to the general impression in modern international relations that "when religion is brought into domestic or international public life . . . it inherently causes war, intolerance, devastation, political upheaval, and maybe even the collapse of the international order," and thus must be excluded from both the political and legal realms of international relations generally and international law specifically.[8] He described this interpretation of the wars of religion in Europe as both a "political mythology of liberalism," and the "myth of the modern secular state" which continues to affect "the way culture and religion are interpreted in international relations today" (Thomas 2005: 22), and thereby proposed the view that "[a] new approach to international order is required which overcomes this 'Westphalian presumption' " (Thomas 2000: 815).

Thus, while the separationist theory is historically aware, its historical awareness is not necessarily universal but based on a European experience, which has been challenged in the contemporary debate on the relationship between religion and international law. The general contention in that regard is that the war of religions experienced in Europe may not necessarily reflect the religious experiences of other civilizations in relation to the accommodation of religious norms within the public sphere of law and governance and does not thus, necessarily, reflect a universal worldview on the subject. Furthermore, a strict dichotomy between the private and the public sphere, as required under this theory, is not easily determinable in a clear way because the private and public spheres overlap extensively in all societies, which makes it difficult to separate the two spheres in relation to issues regarding religion and international law in many societies today (Thomas 2005: 35). Christine Chinkin has noted that: "The location of any line between public and private activity is culturally specific and the appropriateness of using Western analytical tools to understand the global regime is questionable" (Chinkin 1999: 390). Carolyn Evans (2005: 2) has thus observed that:

> [E]ven if religion is often distinguished from law in Western legal and political philosophy, and largely ignored in legal writing, no such division can be neatly maintained in the real world. This is particularly the case in many parts of the world . . . where the law and religion are often deeply intertwined and religion may play a more meaningful and significant role in influencing behavior than does law.

Practically, the separationist theory does not yet have a universal reception, as religion still plays a significant public role in many states today and the world still divided into secular and non-secular countries. This brings me to the second theoretical perspective – accommodationist theory.

Accommodationist theory

In contrast to the separationist theory, the accommodationist theoretical perspective advances the view that religion can play an important normative role in international law and must therefore be accommodated in that regard. This perception is based generally on a naturalist view of international law, which was traditionally underpinned by religion as analyzed in the historical perspective earlier. Proponents of this view assert that religious considerations are too important for the majority of the world's population to be considered irrelevant or problematic for accommodation in the public sphere of law

generally and of international law particularly.[9] The main argument of this theory is that since many aspects of international law, such as human rights, humanitarian law, environmental law, disarmament and maintenance of international peace and security, are all underpinned by humaneness, considerations of morality and human dignity, religious norms and values can make an important contribution in that regard and must therefore be normatively accommodated within the principles of international law. For example, Christopher Weeramantry (2004: 15), a former judge of the ICJ, has observed:

> Given the strength in the modern world of religious traditions, such as the Buddhist, Christian, Hindu and Islamic, and that they command the allegiance of over three billion of the world's population, there cannot be any doubt that future thinking on international law can benefit deeply from the teachings contained in these traditions.

Similarly, in answering the question of whether religion has served as a catalyst or impediment to international law, Mark Janis (1993: 321–22) identified that religion could play three important facilitative roles in international law as follows:

> First, religion traditionally has been one of the most fertile sources of the rules of international law. It may well be that all religious traditions have norms that are applicable to the relations of states and their peoples . . . One of the major tasks confronting international lawyers in the modern era is to draw on the many different religious, political, economic and social traditions to find values common to the many nations, which may be adopted as norms in customary law. This should be a mission, not only for scholars of international law, but also for scholars of all the world's religious faiths.
>
> Secondly, religious belief has been one of the chief motivations for enthusiasts of international law. Religious principle and dedication were, for example, at the heart of the movement in the nineteenth century for the promotion of international arbitration and adjudication. Many twentieth-century achievements of international law and international organization stem from the nineteenth-century religious enthusiasts of international law. That such religiously based enthusiasm for international law still exists is easily seen by an observation of the record religious groups surrounding such international causes as human rights law, disarmament and environmental law.
>
> Thirdly, the morality of religion has provided some of the glue that has made international law stick. The binding force of any law, international law included, cannot rest solely on force. The legitimacy of international law and international organizations ultimately is a function of widespread individual beliefs that the law and its authorities are right and appropriate. International lawyers have long recognized the potential of religious and moral belief for building a sense of international community whereby the peoples of the globe will be concerned with the fate of all the nations, not just their own.

With specific reference to international humanitarian law, Carolyn Evans (2005: 2) has equally argued that religion "can have persuasive value to those who are, or who consider themselves to be, outside the scope of traditional international law, particularly the ever more important non-state actor. It can add an important moral or emotional dimension to reasons for compliance with international law. Even a pragmatic, secular advocate of international humanitarian law may see strategic advantages to the selective use of aspects of religious traditions to bolster compliance and commitment to the laws of war."

The accommodationist theory has often been found useful by other religious advocates who seek to challenge the European and Christian foundations of modern international law and its perceived continued

influence on many aspects of the system despite its formal post-UN secularization. The contention is that through the accommodationist theory, other religions can contribute positively to the development of international law in a way that makes its principles much more universally persuasive to all religions. Ibrahim Shihata (1962: 101–102) has argued in respect of Islamic law that through the accommodationist theory, "contemporary international law will probably prove to be a more readily accepted system to [the] vast part of the international community vaguely referred to as the 'Muslim world'."

The main shortcoming and challenge to this theory is that it is usually one sided and most of its advocates do not often acknowledge that there are provisions in almost all religions that are evidently inimical to some principles of international law. There are many contemporary examples of violations of some fundamental principles of international law by states and non-state actors invoking religious provisions and viewpoints to justify their actions. Thus in his answer to whether religion has served as a catalyst or impediment to international law, Mark Janis (1993) further noted that apart from its potential of facilitating international law religion also has the potential "to complicate the work of international lawyers," which, in essence, brings us to the examination of the third theoretical perspective of the relationship between religion and international law – double-edged theory.

Double-edged theory

The double-edged theoretical perspective lies between the separationist and accommodationist theories. It generally reflects a realist view of the relationship between religion and international law and argues primarily that religion is like a double-edged sword that could be utilized either positively or negatively in its relationship with international law. In advancing the double-edged theory in relation to international humanitarian law, Carolyn Evans (2005: 2) argued that in addressing the relationship between religion and international law "[s]ome writers focus only on the positive aspects of a particular religious tradition and dismiss any negative role played by that religion as a misinterpretation of its true meaning," while "[o]ther writers choose only to focus on the more dangerous and divisive aspects of religion" without acknowledging the positive aspects. That demonstrates a one-sided approach that does not present a full perception of the relationship. The double-edged theory remedies that one-sided approach by advocating, on the one hand, the important need to recognize that there are religious provisions that are international law friendly and can be utilized to promote compliance with international law, while emphasizing, on the other hand, the need to also acknowledge that there are religious provisions that are apparently conflicting with international law.

In addressing the relevance of religion to modern global governance, Richard Falk not only advances the double-edged theory but also points out the effect of each of its two edges and proposed how to deal with each of them. He noted that:

> [A]ll great religions have two broad tendencies within their traditions: the first is to be universalistic and tolerant toward those who hold other convictions and identities; the second is to be exclusivist and insistent that there is only one true path to salvation, which if not taken, results in evil. From such a standpoint, the first orientation of religion is constructive, useful, and essential if the world is to find its way to humane global governance in the decades ahead, while the second is regressive and carries with it a genuine danger of a new cycle of religious warfare carried out on a civilizational scale. The hope of the future is to give prominence and support to this universalizing influence of religion and, at the same time, to marginalize religious extremism based on an alleged dualism between good and evil.
>
> (Falk 2002: 7)

While Falk's proposition for dealing with each of the two edges of this theory (i.e. "give prominence and support to [the] universalizing influence of religion" and "marginalize religious extremism based on an alleged dualism between good and evil") is logical, the problematic aspect is with the latter point on how to marginalize religious extremism. Realistically, it would be extremely difficult to achieve such marginalization of religious extremism at the grassroots level in many religious societies as long as the principles and application of secular international law are continued to be seen at the grassroots, especially in the developing world, as being politically manipulated by the political elite in the developed world, and consequently regarded as incapable of impartially resolving long-running international crisis such as the Israeli–Palestinian crisis in the Middle East. For example, the Israeli–Palestinian crisis continues to influence the religious attitude of many Muslim states, organizations and individuals in ways that have impacted seriously on the relationship between religion and international law. Marc Gopin has emphasized the need for the international community to appreciate the fact that religion plays an important role in the Israeli–Palestinian crisis. He argued that international law's failure so far in resolving the crisis "stems in large part from its complete neglect of cultural and religious factors," and thus called for "greater integration of the religious communities of the region into the peace-building efforts" asserting that "only by including religion in the peace process can we move past fragile and superficial agreements and toward a deep and lasting solution, to the crisis" (Gorpin 2002: inner front jacket).

Thus, it is important to note that, similar to religion in its relationship with international law, international law can equally have a double-edged effect in its relationship with religion. On the one hand, international law can positively facilitate the flourishing of religion through its guarantee of international religious freedom and international religious non-discrimination, but could, on the other hand, also be negatively applied to restrict religious beliefs and norms that may be indiscriminately considered incompatible with relevant principles of international law. A strict and indiscriminate secular interpretation of international law may sometimes have negative impacts on personal religious beliefs and practices of individuals and groups, which could diminish their confidence in a strictly secular system of international law. This is exemplified, for example, in the current jurisprudence of the European Court of Human Rights on the wearing of headscarves by Muslim women as required by their religious beliefs,[10] which has been criticized by some commentators (see, e.g. Ali 2007; Hoopes 2006; Vakulenko 2007). The possible negative impacts of an indiscriminate international secularism on the relationship between religion and international law are well reflected in Elizabeth Hurd's (2004: 240) observation that:

> [I]n an interdependent world in which individuals draw from different sources of morality, an indiscriminate secularism leads to three risks. There is the potential of a backlash from proponents of non-secular alternatives who are shut out of deliberations on the contours of public order. There is a risk of shutting down new approaches to the negotiation between religion and politics, in particular those drawn from non-Western perspectives. Finally, there is a risk of remaining blind to the limitations of secularism itself.

Richard Falk (2002: 7) also advances a similar view regarding what he calls "secular intolerance" in his own observation that:

> [S]ecular views that hold the line against their perception of religion also can adopt fundamentalist canons of belief, and view those who seek to center their identity on religious affiliation as intrinsically evil. Such secular intolerance is as unwelcome with respect to informing patterns of

> global governance as its religious counterpart. Both religionists and secularists can only contribute to the emergence of humane forms of global governance if they adhere to an ethos of tolerance.

The double-edged theory thus provides us with an important perceptive tool for a critical evaluation of the relationship between religion and international law. It serves as a very practical and objective analytical process for understanding and managing that relationship in a manner that can lead to a mutually beneficial interaction between the two, leading to the realization of a more humane and universal international law. This theory, however, calls for pragmatism and legal dynamism, which brings us to the examination of the empirical and doctrinal perspectives of the relationship.

Empirical and doctrinal perspectives

Empirically religion, and international law may interact at four main levels as analyzed in this section. While the formal public role of Islam in the domestic laws of many Muslim states makes it feature prominently in the illustrations that follow, the analyses applies similarly to other religions in that regard.

The first level of interaction is in relation to the domestic laws of states where religion plays a formal role in national laws and policies. Owing to its public role in such domestic systems, religion becomes directly relevant in the interaction of international law with the domestic law of such states. Currently, this level of interaction between religion and international law occurs mostly in Muslim states whose constitutions formally recognize Islam as the religion of the state and Islamic law as part of state law. There are currently a significant number of Muslim states in that regard (see, e.g. Stahnke and Blitt 2005: 7–12). The formal role of Islam in such states has often influenced the state practices of the relevant Muslim states in relation to international law in different ways, sometimes positively and sometimes negatively (see, e.g. Baderin 2001). I have analyzed, elsewhere, the different approaches and perspectives to such interaction between Islam and international human rights law in Muslim states and argued that such relationships need not necessarily be negative and adversarial but could be positive and harmonistic in ways that can facilitate the realization of the ideals of international law in Muslim states (Baderin 2007). The formal interaction between religion and international law at this level is relatively limited in states where religion has no direct formal role in the domestic law. For example, Ilias Bantekas (2007: 117) has noted in that regard that while Christianity as the dominant religion does inevitably influence a variety of policies in some western countries, the policy of those countries remains essentially and formally based on secular principles in relation to international law.

The second level of interaction is in relation to regional inter-governmental organizations (RIGOs) in which religion plays a formal role. The importance of RIGOs in international law is very well reflected in Chapter 8 of the UN Charter, thus where religion plays a formal role in the objectives of a RIGO that can inevitably create possible interaction between such religion and international law at the regional level. Similar to the example of domestic law in Muslim states above, the Organization of Islamic Conference (OIC) is a distinctive example in that regard. The OIC Charter provides that the organization is, among other objectives, to promote Islamic spiritual, ethical, social, and economic values among the member states as an important means of achieving progress for humanity.[11] The OIC has in that regard adopted instruments that make reference to Islam as a relevant factor in relation to international law in the Muslim world. However, it has also consistently expressed its commitment to international law and

cooperation with the UN but usually emphasized the role of Islam in that regard. In 2004 the organization made a submission to the UN General Assembly in respect of proposed reforms of the UN Security Council stating 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."[12] This obviously reflects an accommodationist approach. Formal interaction between religion and international law at this level is also relatively limited in RIGOs where religion does not play a formal role in the system. For example, a proposal by European churches for a formal recognition and reference to Christianity in the Constitution of the European Union (EU) during the drafting and consultation stages of the constitution was discarded in the end, which was obviously a reflection of the separationist theory (Bantekas 2007: 129–30).

The third level of interaction is in relation to the religious freedom of individuals and groups, while the fourth level is in relation to other non-state actors such as religious non-governmental organizations (NGOs) and institutions. As international law has, today, moved beyond its traditional state-centric nature, it applies not only strictly to states but may impact directly or indirectly on the lives and activities of individuals, groups and other non-state actors respectively. Thus the interaction between religion and international law occurs not only in relation to the practices of states and inter-governmental organizations but also in relation to the religious beliefs and practices of individuals and groups. Relevant aspects of international law, such as human rights, environmental law, refugee law, and humanitarian law brings international law into direct contact with the religious beliefs and practices of individuals and groups in different parts of the world today. As earlier noted, international human rights law acknowledges the importance of religion in human society by providing for the right to freedom of religion, which includes the right to collective practice and public manifestation of religion by individuals and groups as long as this does not violate public order or the fundamental rights of others.[13] It also prohibits religious discrimination against individuals and groups,[14] which apparently facilitates the flourishing of religion and enables individuals and religious groups to plead the right to religious freedom in defense of their religious beliefs and values, which augurs for a harmonious relationship. By the same token, international law does challenge religious norms in different ways, which equally raises the possibility of a conflicting relationship between the two in relation to individuals and groups. A common example is the possibility of conflict between the limits of freedom of expression and freedom of religion under international human rights law.

Apart from the relationship at the level of individuals and groups, there are also today many non-governmental organizations (NGOs) motivated mainly by religious principles and values into participating actively and positively in different areas of international law. The need for interaction between religion and international law at the level of NGOs and other religious institutions was demonstrated in the hosting of a conference on interfaith cooperation to promote world peace within the context of international law at the UN headquarters in June 2005 at the end of which the conference recommended "an expansion and deepening of the relationship between the United Nations and civil society, including religious NGOs."[15] The relationship at this level is also demonstrated by the active involvement and influence of religious institutions such as the Roman Catholic Church on issues such as abortion, death penalty, use of force, human rights and other important issues of international law (Bantekas 2007: 131–32).

The consequential question from the empirical perspective is whether these different levels of interaction between religion and

international establish any legal basis for religion as a possible source of obligation or right under international law, which brings us to the doctrinal perspective of the relationship.

As stated earlier, the UN Charter makes no direct reference to religion as a source of international law. However, the Charter also does not contain any provision prohibiting relationship or interaction between religion and international law. Under Article 38 of the ICJ Statute,[16] the main sources of international law are international treaties, customary international law and general principles of law recognized by civilized nations.[17] Certainly, where state parties to an international treaty consent to the inclusion of a religious principle or norm as a provision in a treaty, this would be binding on the parties as long as such religious principle or norm does not violate a norm of *jus cogens* under general international law.[18] A good example of this is the provision in Article 20(3) of the UN Convention on the Rights of the Child (1989b) which includes "*kafalah* of Islamic law" as a recognized means of alternative care for a child temporarily or permanently deprived of his or her family environment. This inclusion of a relevant principle of Islamic law in a substantive provision of a treaty under international law demonstrates the practicality of the accommodationist theoretical perspective analyzed earlier.

With regards to customary international law, I argued earlier that the approach of the international tribunals in the *Eritrea vs. Yemen* and *United States Diplomatic and Consular Staff in Tehran* cases, each of which referred to relevant religious principles respectively, can contribute to the development of customary international law especially in relation to the identification of local custom among a group of states that follow particular local practices accepted as law between them. For example, in the *Eritrea vs. Yemen* case the tribunal had referred to Islamic religious principles to establish that "the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen," which must be preserved for their benefit.[19] That approach was, in my view, a relevant and valid means of establishing the local custom in that context between the parties based on the facts before the tribunal. Similarly, in the case of *Saudi Arabia vs. Aramco* the arbitrator referred to relevant principles of Islamic law to support the customary nature and the universal recognition of the principle of *pacta sunct servanda* in international law by observing 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'."[20] Another significant example can be cited of Judge Weeramantry's (as he then was) dissenting opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*,[21] in which he referred notably to different religious traditions as follows:

> It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture. The concept is of ancient origin, with a lineage stretching back at least three millennia. As already observed, it is deep-rooted in many cultures – Hindu, Buddhist, Chinese, Christian, Islamic and traditional African. These cultures have all given expression to a variety of limitations on the extent to which any means can be used for the purposes of fighting one's enemy. The problem under consideration is a universal problem, and this Court is a universal Court, whose composition is required by its Statute to reflect the world's principal cultural traditions. The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength – the strength resulting from the

> depth of the tradition's historical roots and the width of its geographical spread.[22]

The learned judge then went on to provide detailed analysis of the relevant principles of the different religions to accumulate universal support for his opinion that the use or threat of use of nuclear weapons is illegal in all circumstances.

All these cases and references by the different international tribunals just examined establish that while religion may not serve directly as sources of obligation under international law, it could nevertheless serve as a valid complementary means of establishing customary international law in relevant cases as confirmed by the tribunal in the *Eritrea vs. Yemen* 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 mankind."[23] The same is true of relevant "moralistic general principles" of all other religions, as was eruditely reflected by Judge Weeramantry in his dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons* case earlier cited.

Similarly, there have been representations for indirect reference to religious principles through "the general principles of law recognized by civilized nations" as well as through Article 9 of the ICJ Statute, which 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 under the League of Nations, which was subsequently adopted as Article 38 of the ICJ Statute (Mahmassani 1966: 222). A survey of different statements by Muslim states and by the OIC reflects that this perception is still held by many Muslim states today. A similar assertion has been made by Shabtai Rosenne (2004: 63), in the context of Judaism and the development of international law, to the effect that the provisions of Article 9 of the ICJ Statute is a positive acknowledgment of the need for international law to "draw upon the general legal experience of mankind," which, he argued, "draws attention to certain features of what might be termed the intellectual components of public international law, and as such, as is being increasingly recognized, it has wider implications."

Conclusion

The current growing wave of scholarship on religion and international law is a strong indication that religion is still very relevant to the modern evolution and future development of international relations and international law, even though this, as observed by Jonathan Fox (2001), is often overlooked by the mainstream literature on international law and international relations. However, it has been asserted notably that if international law must achieve its aim of developing "a legal framework that emphasizes our common humanity and dignity" in today's world, then "international lawyers can no longer afford to ignore the importance that religion plays for many individuals and many societies" (Janis and Evans 2004: vii).

[Author note: I thank Professor Robert McCorquodale and professor Mathew Craven for reading through the draft of this chapter and for their kind comments. Responsibility for the views expressed herein is, however, mine alone.]

Notes

1 For an analysis of the complexity of defining religion in international law, see, e.g. Gunn 2003.
2 Jamar (2001: 609) observes eloquently that: "Religion is like law: the more closely we try to define it, the more it slips through our grasp. Religion is like law: both address fundamental issues about ordering society and the status and nature of the individual within it. Religion is like law: both engender passionate disagreement about their proper content and functions."
3 See Peace Treaty of Westphalia of 24 October 1648, http://www.yale.edu/lawweb/avalon/westphal.htm.
4 See, e.g. United Nations Charter (1945) Art. 1 (3); Art. 13(1)(b); Art. 55(c) and Art. 76(c).
5 For example, Haynes (2005) observed that "[r]eligion's role in international relations has recently become an increasingly important analytical focus," and Hackett (2005: 661) observed that "the early 1990s marked an upsurge in literature recognizing the role of religion in the public sphere."
6 *Eritrea vs. Yemen* 119 ILR, 417.
7 See also Ravitch 2004, who asserted that "neutrality, whether formal or substantive, does not exist."
8 See also Ahdar and Leigh 2005: 73, where the authors argue that: "For Enlightenment separationists, separating church and state ensured that dangerous religious passions and 'superstitions' would be confined to the private sphere. When religion and government mixed the outcome could be disastrous as the Wars of Religion testified."
9 See, e.g. Weeramantry 2004: 368, who observed that more than 4 billion of the world's population are inspired by religious beliefs and norms.
10 See the case of *Layla Sahin vs. Turkey* (2005).
11 See the Preamble and Article II(A)(1) of the OIC Charter.
12 UN Doc. A/59/425/S/2004/808 (11 October 2004), para. 56.
13 See, e.g. Article 19 of ICCPR.
14 See, e.g. Art. 2 of ICCPR.
15 "Report of the Convening Group of the Conference on Interfaith Cooperation for Peace: Enhancing Interfaith Dialogue and Cooperation towards Peace in the 21st Century", 22 June 2005: 2.
16 The ICJ Statute is annexed to the UN Charter, of which it forms an integral part.
17 The subsidiary sources are "judicial decisions and teachings of the most qualified publicists of the various nations" and are not considered here.
18 This is pursuant to Article 53 of the Vienna Convention on the Law of Treaties (1969).
19 Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, para. 101.
20 *Saudi Arabia vs. Aramco* 1963: 27 ILR 117.
21 *Legality of the Threat or Use of Nuclear Weapons* 1996: 35 ILM.
22 Dissenting Opinion of Judge Weeramantry, para. 2.
23 *Eritrea vs. Yemen* 119 ILR, 417.