BUCHBESPRECHUNGEN / BOOK REVIEWS

Muhammad-Basheer A. Ismail: **Islamic Law and Transnational Diplomatic Law, A Quest for Complementarity in Divergent Legal Theories,** Palgrave Macmillan US, Basingstoke 2016, 280 pages, hardcover, ISBN 978-1-137-55876-3

Muhammad-Basheer A. Ismail's purpose in this book is to examine whether international diplomatic law and Islamic diplomatic law are compatible. He observes that there are three attitudes to this question, namely, understanding that these fields are not compatible, that they are compatible as Islamic principles in this area are equivalent to those of international law and even constitute part of international law, or the belief that both are not fully compatible but can be reconciled.[1] The author unravels this issue in seven chapters.

From the outset, Ismail is determined to make it work between Islamic and international law, either observing existing compatibility or adopting the third, reconciliatory approach, as he states that "[i]n an era in which the world is fast coming together under the canopy of globalization, it is necessary to bring Islamic law under the searchlight of international legal mechanisms for the purpose of having a cross-fertilization of the two legal systems"[2], and "[…] as one intends to adhere to the compatibility approach while analyzing legal questions in this book, it may also become necessary to apply the reconciliatory approach to resolve legal tension if need be."[3] This laudable objective which could arguably lead to better mutual understanding between international law and countries where Islamic law is applied can however be problematic from the point of view of comparative law as an academic exercise. That is, starting off the comparison with a conviction that either compatibility is to be found, or divergences have to be smoothened, may lead to paying only cursory attention to interesting differences whose detailed study could be productive to understand both international and Islamic law.

After the introduction, the second chapter describes diplomatic law and practice in different civilizations, including the Greek, Roman, Hindu, Chinese, African and Islamic ones.[4] Finally, the author attempts to unveil the impact of Islamic law on international diplomatic law, which is traditionally considered to be mostly influenced by Western principles.[5] The author observes that to a certain extent religion has swayed diplomatic practice

1 *Muhammad-Basheer A. Ismail*, Islamic Law and Transnational Diplomatic Law, A Quest for Complementarity in Divergent Legal Theories, Basingstoke 2016, pp. 9-12.

2 *Id*. pp. 13-14.

3 *Id*. p. 12.

4 *Id*. pp. 19-42.

5 *Id*. pp. 42-47.

across civilizational lines, and moves on to conclude that diplomatic practice "appears to be historically universal among different civilizations of the world".[6]

There are two important issues to highlight regarding this chapter. First, the author dedicates only ten pages to the study of the Islamic civilization, and eleven pages to all the rest, which turns out to be rather brief for a thorough analysis of diplomatic practice across the world. Furthermore, the civilizational divisions can be seen as problematic – the author groups together several peoples across time and space without explaining, for instance, why can we speak of an "African civilization" which is in turn constituted by many different peoples. Civilizations are presented in a pre-established and rather immutable way, without a more panoramic view of the historical evolution that diplomatic practice may have gone through in each of these scenarios. Although due to extension constraints a full overview of the evolution of diplomatic law and practice throughout times across the world may not be feasible, a more reduced but in depth scope would have strengthened the analysis.

More importantly, it is not surprising that the author observes universality in diplomatic practice across civilizations, given that early on in the chapter he states that "a historical analysis of diplomatic practice in different civilizations […] is presented with a view to establish commonality in their various diplomatic practices."[7] Moreover, given that he is set to highlight the relevance of Islam in shaping diplomatic law, it is not surprising that he underlines the religious elements that influenced diplomatic practice in other civilizations. In this line, a lengthier examination of diplomatic practice could have shed light on whether the religious element is an outstanding one, or whether there are any other components or instances when this element was downplayed that are worth bearing in mind. For the conclusion about the historical overview to be more persuasive, it would have been rather valuable to start the inquiry without a predetermined objective on what should come out of the analysis.

The enumeration and description of sources of both Islamic and international law in the third chapter sets a necessary base for the discussion about the relationship between both systems, and provides the necessary background for those readers who, being perhaps well versed in one of both fields, are less conversant with the other.

The comparison of both types of sources in the end of the chapter, however, could have benefitted from more detail. The author here shows some interesting similarities between sources of law in Islamic and international law, such as the obligation to honor international treaties, which is evinced by maxims under both systems;[8] the fact that custom plays a role under both, with shared principles such as the respect for diplomatic personnel;[9] and the existence of general principles of law in both systems.[10]

6 *Id*. p. 47.
7 *Id*. p. 19.
8 *Id*. pp. 72-73.
9 *Id*. pp. 74-75.
10 *Id*. pp. 75-76.

Still, in addition to the fact that more examples of particular customary rules that are either alike or antithetical under both systems would have been desirable, we should recall here that when describing sources of Islamic law, the author stated that different Islamic scholars have given different degrees of weight to custom as a source of Islamic law, and the position of custom as a source has been controversial.[11] Given also the difficulty in international law to agree on what constitutes general practice for custom to have normative status,[12] the question arises of what could be the practical consequences of the fact that both systems contemplate custom as a source. That is, to assess the normative strength of a concrete customary rule under both systems, it would be necessary to ponder not only the fact that it exists under both, but also whether such rule is widely supported under different thought perspectives in Islamic law and whether it is considered to enjoy general practice and thus has legal effect under international law.

Secondly, the observed similarities in terms of general principles could have been developed further. Although the author's citation of *Eritrea v. Yemen*, where the ICJ acknowledges the usefulness of *moralistic* principles of Islamic law to buttress international law,[13] one may well ask whether from an Islamic law perspective it would be satisfactory enough to play an accessory role to international law, and to do so as a moral system and not a legal one. Additionally, the author points to certain likeness between the concepts of *istihsaan* (juristic preference) and equity.[14] Beyond these general references and the fact that both systems give weight to general principles in law, more examples of important general principles under international and Islamic law, and whether such key principles in each system are compatible with each other or could have areas of discordance once they move beyond an abstract principle to a rule applied in practice could have elevated the discussion.

Finally, the author discusses Islamic law in general, even though there have been different degrees of inclusion of Islamic law in the legal system in different countries, as many so-called Islamic countries have Western-style constitutions, at times influenced by the colonial rulers, and legal systems that derive from them.[15] Overall, despite the interesting analysis of similarities between Islamic and international law in terms of sources, more discussion of possible inconsistencies under these systems and how these could be navigated could have further enriched the comparison.

In the fourth chapter the author moves from the general discussion of sources of the third chapter to the particular case of diplomatic immunity under these systems. From the perspective of international law, Ismail examines three theories that explain diplomatic immunity, namely, the representative character theory whereby diplomatic agents enjoy im-

11 *Id*. p. 60.

12 *Id*. pp. 66-67.

13 *Id*. p. 74.

14 *Id*. p. 76.

15 See e.g. *Rainer Grote / Tilmann Röder*, Introduction, in: Rainer Grote / Tilmann Röder (eds.), Constitutionalism in Islamic countries, Between Upheaval and Continuity, Oxford 2012, pp. 3-10.

munity because they enshrine the sovereignty of the foreign state, the fiction of extraterritoriality under which the diplomat's residence and office would be considered part of the state he represents even if situated abroad, and the functional necessity theory based on which immunity is seen as a necessary precondition for diplomats to be able to carry out their functions.[16] According to Ismail, the leading perspective from which Islamic law recognizes diplomatic immunity is that of functional necessity, as evidenced by the statements of some Islamic law jurists and Article 13 of the 1976 Convention of the Immunities and Privileges of the Organization of the Islamic Conference.[17]

He then goes on to offer an overview of codification of diplomatic immunity principles under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the process by which these came to be, as well as the Treaty of Hudaybiyyah entered into by Prophet Muhammad and the non-Muslim inhabitants of Mecca in 628, which, in addition to some Qur'anic injunctions and Prophetic traditions, recognized diplomatic immunity and set forth the binding character of international treaties.[18]

Ismail's shift to the specific and detailed discussion in this chapter, providing a description of the particular point within diplomatic law of diplomatic immunity is refreshing. Based on the establishment of diplomatic immunity under both systems, which is explained in detail, the author concludes that Islamic law and international law are compatible in this area. This positive conclusive note is taken one step further to a more debatable assertion, as the author understands that congruity between Islamic law and the Vienna conventions can lead us to conclude that the Vienna conventions are indeed a codification of Islamic law. It is worth asking whether from an Islamic law perspective a modern codification of diplomatic law beyond the Treaty of Hudaybiyyah would differ from the cited international conventions (as indeed an agreement on the immunities and privileges for the organization of the Islamic Conference exists), perhaps not due to the specific rules codified, but in terms of nuances and points of reference that inspire the particular rules and that would stem from specificities of the Islamic law background, such as perhaps the underlying sources of law on which codification is based. That is, a similarity of objectives – without prejudice of possible contrasting accounts of diplomatic immunity that do not find such a striking similarity – should however not eclipse the particularities of each system.

After these two comparative chapters, in the fifth chapter Ismail illustrates diplomatic practice in Muslim states through three case studies. The cases he selected are the Raymond Davis case in Pakistan, the 1979 Iranian hostage crisis and the 1984 Libyan Bureau shootout that took place in London.

16 *Id*. pp. 80-84.

17 *Id*. p. 85. Article 13 of the 1976 Convention of the Immunities and Privileges of the Organization of the Islamic Conference reads as follows: "Immunities and privileges are accorded to the representatives of Member States not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the Organization […]."

18 *Id*. pp. 85-111.

In the Raymond Davis case, the diplomatic issue arose when the namesake CIA consultant from the US Consulate in Lahore shot two Pakistani citizens dead, allegedly in self-defense as they were trying to rob him.[19] Although the US claimed diplomatic status for Davis, it was debated whether he was really a diplomatic agent or he was carrying out espionage activities.[20] In the midst of diplomatic tension between the US and Pakistan, and mounting popular pressure in Pakistan pushing for his trial and conviction, the incident was finally solved through the Islamic law concept of *diyat*. Under Islamic criminal law as applied in Pakistan, blood money may be accepted as compensation to the victim's relatives in lieu of pursuing a conviction for murder, which was the route taken in the Raymond Davis case to settle the matter.[21] Regardless of whether the requirements for *diyat* are to be valid under Islamic law, and whether the victims' families freely consented to the settlement, it is worth examining what this case study does to Ismail's argument. Ismail explains how the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations are incorporated in the Pakistani legal framework by means of the Diplomatic and Consular Privileges Act, 1972.[22] However, this episode was not solved through discussions on diplomatic law, and the issue of whether Raymond Davis was indeed diplomatic personnel was never decided – even though the solution came from Islamic law, it was not from Islamic diplomatic law, but from Islamic *criminal* law. The connection of this case with the author's argument, therefore, is rather feeble, and reduced to the fact that a diplomatic crisis was solved through an Islamic law argument.

The second case study does more to support Ismail's argument. The detention of US diplomatic and consular personnel by Iranian protesters, triggered by the US decision to allow former Shah of Iran Mohammed Reza Pahlavi to stay there for medical attention, gave rise to a thorny diplomatic impasse between these two nations. The author adeptly shows how Iran, by approving of the protesters' actions and forestalling the liberation of the hostages, violated the rules of how diplomatic envoys are to be treated both under the several international conventions on diplomatic relations that Iran had ratified[23] and Islamic law rules.[24] If Iran indeed considered that the US staff had been undertaking espionage ac-

19 *Id.* pp. 114-121; *Mark Mazzetti*, How a single spy helped turn Pakistan against the United States, http://www.nytimes.com/2013/04/14/magazine/raymond-davis-pakistan.html?_r=0 (last accessed on 7 February 2019); *Declan Walsh*, A CIA spy, a hail of bullets, three killed and a US-Pakistan diplomatic row, https://www.theguardian.com/world/2011/feb/20/cia-agent-lahore-civilian-deaths (last accessed on 7 February 2019).

20 *Mazzetti*, note 19.

21 *Ismail*, note 1, pp. 119-121.

22 *Id*. p. 114.

23 *Id.* p. 125. In particular, VCDR, VCCR, 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.

24 *Id*. pp. 126-129. Specifically, the fact that under Islamic law covenants are to be respected (and as a result, if Iran had entered into the aforesaid international conventions, it was to follow them).

tivities and as a result it understood that it was not obliged to follow the treaties it had ratified, it should have properly notified the US government.[25] The author's analysis of this incident from both a conventional and an Islamic diplomatic law perspective is a useful tool to further his argument of the commonalities between conventional and Islamic diplomatic law. Indeed, shifting the discussion from international treaties to Islamic law principles can be useful to strengthen an assertion in the framework of a diplomatic standoff such as the Iran hostage crisis, as it would be more difficult for a defiant government in a country where Islamic law is part of the legal system to dismiss an Islamic law argument than an international law one.[26]

As with the Raymond David case study, the succinct three-page reference to the Libyan Bureau shoot-out case does not serve the author's thesis as strongly as the inquiry into the Iran hostage crisis. He rightly points out that the death of a British police constable as a result of gun shots apparently coming from the Libyan Bureau in London and the negative of Libyan officials to allow a search of the Bureau are not actions warranted either under international or Islamic diplomatic law. Nevertheless, the author does not discuss any legal arguments that the Libyan representatives may have brought up to explain their actions, and the discussion of the incident is thus reduced to a mere description of an event condemnable from international and Islamic angles, and not of a two-sided legal argumentation about it from which we could better understand the symbiosis between international and Islamic diplomatic law.

All in all, the reference to actual experiences where international and Islamic diplomatic law have interacted can be an effective way to buttress the book's thesis by showing the practical application of such thesis. However, for such endeavor to be fruitful, the selected case studies would have to, as in the discussion of the Iran hostage crisis incident, present elaborate international and Islamic diplomatic law arguments around the issue that can contribute to better understand the interaction of these two fields. The level shift in the Pakistani case, where it was criminal law what stole the show, and the cursory examination of the Libyan Bureau case, which lacked depth in the analysis, did not help the argument in the way that the analysis of the Iran hostage crisis did.

The last chapter explores the concept of *jihad* in Islamic law, to establish that terrorist attacks against diplomatic institutions cannot be justified as legitimate *jihad*. The author discusses the circumstances under which *jihad* may be declared, bringing up arguments against the legitimacy of unprovoked attacks against non-Muslims and highlighting the historical context of aggression against Muslims within which the revelation of the "sword verses" occurred.[27] Further, he finds the declaration of *jihad* by entities other than Muslim

25 *Id*. pp. 128-29.
26 *Id*. p. 122.
27 *Id*. pp. 146-151.

states dubious,[28] and shows how terrorist attacks are also considered criminal acts under Islamic law.[29]

Given that *jihad* is not the main subject of the inquiry, rather than dedicating a whole chapter to it, this discussion on whether *jihad* may justify attacking diplomatic missions could have been incidentally undertaken in the fourth chapter, in the framework of diplomatic immunity under Islamic law. Still, it is an interesting point to bring up, as even though there is abundant recent literature which thoroughly deals with the concept of *jihad*,[30] it is important to dispel the doubts on whether *jihad* may provide an exception to diplomatic protection under Islamic diplomatic law and to connect these two areas of Islamic law.

The author concludes the inquiry by restating the observed compatibility between international and Islamic law. In line with the above, the incompatibilities that have been observed by other authors and the problems that incompatibility can entail for diplomatic relations could have been further discussed in order to strengthen this conclusion. On the positive side, a forceful element of Ismail's book is his reliance on both international and Islamic law arguments. For Muslim states or individuals who cast doubt on the need to follow international norms, even when ratified by the state at hand, it is not so easy to dismiss the conclusion supported not only by international treaties, but also by Islamic law. Conversely, staunch supporters of the international legal order may be missing the commonalities existing between a Westphalian-origin international law and Islamic law, thus losing important argumentative tools when dealing with states where Islamic law is applied. And beyond the field of diplomatic law, the idea of exploring arguments from different thought systems that seem to have very different starting points but could have similarities at a deeper level can contribute to breach the gap in intractable discussions.

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28 *Id*. p. 153.

29 *Id*. pp. 160-164.

30 See e.g. *Onder Bakircioglu*, Islam and Warfare: Context and Compatibility with International Law, New York 2014; *ElSayed Amin*, Reclaiming Jihad: A Qur'anic Critique of Terrorism, Nairobi 2014; *Natana J. Delong-Bas*, Wahhabi Islam: From Revival and Reform to Global Jihad, Oxford 2004; *Rudolph Peters*, Jihad in Classical and Modern Islam: A Reader, Princeton 2005; *David Cook*, Understanding Jihad, Berkeley 2005.