

The Relation between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran – A Multilayer System of Conflict?

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I. Introduction

Whether studying reports of United Nations Treaty Bodies and Special Rapporteurs¹ or publications of various NGOs in the human rights sector,² one can hardly fail to notice the very unsatisfactory human rights record of the Islamic Republic of Iran (I.R. Iran). Execution of perpetrators who were minors when committing crimes,³ applications of cruel and inhuman punishments like stoning and flogging and multiple forms of discriminations of religious minorities⁴ are prominent exam-

¹ For instance the report of Abdelfattah Amor, Special Rapporteur on Religious Intolerance of the former Commission on Human Rights of his visit to the I.R. Iran, Doc. E/CN.4/1996/95/Add. 2 of 9 February 1996; the one of Maurice Danby Copithorne, Special Representative of the former Commission on Human Rights on the Situation of Human Rights in the I.R. Iran, Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives, Situation of Human Rights in the I.R. Iran, Doc. A/52/472 of 15 October 1997 and Doc. E/CN.4/2002/42 of 16 January 2002; Committee on the Rights of the Child, e.g. Concluding Observations, I.R. Iran of 31 March 2005, Doc. CRC/C/15/Add.254, para. 22; Human Rights Committee, e.g. Concluding Observations of 3 August 1993, Doc. CCPR/C/79/Add.25, para. 8 et seq.; Committee on Economic, Social and Cultural Rights, e.g. Concluding Observations of 9 June 1993, Doc. E/C.12/1993/7, para. 5 et seq.; Committee on the Elimination of Racial Discrimination, Concluding Observations of 10 December 2003, Doc. CERD/C/63/CO/6 para. 14.

² For instance Amnesty International, *Iran Human Rights Abuses against the Kurdish Minority*, 2008; Human Rights Watch, *Guardians of Thought – Limits on Freedom of Expression in Iran*, 1993; Human Rights Watch, *Power Versus Choice*, Vol. 8, No. 1, 1996; Human Rights Watch, *Religious and Ethnic Minorities – Discrimination in Law and Practice*, Vol. 9 No. 7 (E), September 1997; Human Rights Watch, *World Report 2009*.

³ Human Rights Watch, *The Last Holdouts – Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, and Yemen*, September 2008.

⁴ Amnesty International, *Iran Human Rights Abuses against the Kurdish Minority*, 2008; Abdelfattah Amor, see note 1, Add. 2, para. 63; <<http://www.hrw.org/english/docs/2007/09/20/iran16906.htm>> Human

ples of breaches of internationally recognised human rights standards committed by the authorities of the I.R. Iran. Nevertheless, the I.R. Iran is party to most major international human rights treaties, in particular the International Convention on the Elimination of All Forms of Racial Discrimination,⁵ the International Covenant on Civil and Political Rights,⁶ the International Covenant on Economic, Social and Cultural Rights,⁷ the Convention on the Rights of the Child⁸ and the Convention against Discrimination in Education.⁹ With the sole exception of the Convention on the Rights of the Child all of these human rights instruments have been signed and ratified without any reservation. The Convention on the Rights of the Child is also the only major human rights treaty Iran has joined since the establishment of the Islamic Republic and it has been signed and ratified with the reservation that it will not apply any provision of the Convention which is incompatible with Islamic law.¹⁰ Moreover, Iranian officials regularly try to

Rights Watch; R.S. Moshtaghi, *Die menschenrechtlichen Situation sunnitischer Kurden in der Islamischen Republik Iran – Probleme der Verwirklichung der Menschenrechte in einer stark religiös geprägten Rechtsordnung im Spannungsverhältnis zwischen Völkerrecht, iranischem Verfassungsrecht und schiitischem religiösem Recht*, 2009, to be published in *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*.

- ⁵ International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, entry into force 4 January 1969, UNTS Vol. 660, 195 et seq. Signature by the then Iranian Empire, 8 March 1967 ratification 29 August 1968. Reservations were neither made upon signature nor ratification.
- ⁶ International Covenant on Civil and Political Rights of 19 December 1966, entry into force 23 March 1976, UNTS Vol. 999, 171 et seq. Signature by the then Iranian Empire 4 April 1968 and ratification 24 June 1975. Reservations were neither made upon signature nor ratification.
- ⁷ International Covenant on Economic, Social and Cultural Rights of 19 December 1966, entry into force 3 January 1976, UNTS Vol. 993, 3 et seq. Signature by the then Iranian Empire 4 April 1968 and ratification 24 June 1975. Reservations were neither made upon signature nor ratification.
- ⁸ Convention on the Rights of the Child of 20 November 1989, entry into force 2 September 1990, *ILM* 28 (1989), 1457 et seq. Signature by the I.R. Iran 5 September 1991, ratification 13 July 1994.
- ⁹ Convention against Discrimination in Education of 14 December 1960, entry into force 22 May 1962, UNTS Vol. 429, 93 et seq. The then Iranian Empire has ratified the Convention on 17 July 1968.
- ¹⁰ The I.R. Iran made the following reservations upon signature: “The Islamic Republic of Iran is making reservation to the articles and provisions which

justify breaches of internationally recognised human rights standards by references to Islamic law.¹¹ By the term Islamic law the I.R. Iran exclusively refers to Islamic law in the interpretation of the Shiite *ḡafari* school of law,¹² the religion of the majority of the Iranian people and the official creed of the Iranian state.¹³

These observations show that at least in the interpretation prevailing within the administration of the I.R. Iran, Islamic law and international law, in particular human rights law, are inconsistent in various aspects. In order to answer the question whether the I.R. Iran may invoke Islamic law to successfully justify breaches of international law, this article analyses the relationship between Islamic law and international law both from the perspective of international law and Iranian domestic law. As will be demonstrated, the latter establishes a kind of multilayer system between Islamic law, domestic law and international law.

The first section will provide a short overview of the Islamic legal terminology. The second one assesses the significance and rank of Islamic law and international law respectively according to the Iranian legal system. In the final section the conflict between international law on the one hand and Islamic law and the Iranian Constitution on the other will be examined including possible options provided by the different systems to bridge the conflict. It should be mentioned that due to the

may be contrary to the Islamic Sharī'a, and preserves the right to make such particular declaration, upon its ratification." Upon ratification: "The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect."

¹¹ Cf. for instance the Iranian delegate Khosroshahi before the Human Rights Committee, Summary Record of the 364th Mtg, Doc. CCPR/C/SR. 364 of 19 July 1982, 3 para. 4; cf. Ayatollah Khomeini, quoted in: Farhang Rajaee, *Islamic Values and World View – Khomeini on Man, the State and International Politics*, 1983, 81.

¹² The *ḡafari* school of law is named after its founding father Imam Ḡ'far as-Sādiq. Today the *ḡafari* school of law is the largest Shiite school of Islamic law. It is also referred to as the *imāmiya* or twelver Schia since its followers recognise a genealogic line of twelve legitimate successors to the prophet Mohammad called *Imāms*. For details on the *ḡafari* school of law refer to M. Momen, *An Introduction to Shi'i Islam*, 1985.

¹³ The official religion of Iran is Islam and the *Twelver Ḡa'fari* school, and this principle will remain eternally immutable. Article 12 of the Iranian Constitution (IC) of 15 November 1979, including the amendments of 28 July 1989, Official Gazette (*ruznāme-ye rasmi*) No. 12957, in: A.P. Blaustein (ed.), *Constitutions of the Countries of the World*, 2006.

complexity of the topics and restrictions of space, the following analysis will concentrate on structural discrepancies of the different legal systems. For discussions on individual conflicts between Islamic law and international law in detail, the reader is kindly asked to refer to the multitude of publications focusing on these special topics.¹⁴

II. The Terminology of Islamic Law

The expression “Islamic law” is generally applied to refer to the whole system of law connected to Islam. It therefore is used as a generic term encompassing both the primary sources of law, which are also referred to as the *šari'a*, and the rules which are derived from the *šari'a* by Islamic legal science (*feqh/fiqh*).¹⁵

- *šari'a*

The Arabic term *šari'a* in the religious context refers to the way God has stipulated for men which was heralded by his messenger, the prophet Mohammad.¹⁶ The *šari'a* is composed of the two primary sources, Koran und *sunna*. The first is the holy book of Islamic faith whereas the second term refers to traditions of the life of Mohammad in his function as the messenger of God, i.e. to actions, sayings, implicit approvals or omissions attributed to him. In his function as prophet, Mohammad is considered impeccable by Islamic doctrine. The *šari'a* is

¹⁴ For instance on the discrepancies between the prohibition of the use of force in international law and the concept of *ğihad* in Islamic law, A.E. Mayer, “War and Peace in the Islamic Tradition and International Law”, in: J. Kelsay/ J.T. Johnson (eds), *Just War and Jihad*, 1991, 195 et seq.; C.A. Ford, “Siyar-ization and Its Discontents: International Law and Islam’s Constitutional Crisis”, *Tex. L. Rev.* 30 (1995), 499 et seq.; I. Marboe, “Völkerrecht und Islamisches Recht: Unvereinbare Gegensätze?”, in: I. Marboe (ed.), 26. *Österreichischer Völkerrechtstag 2001, Zwangsarbeiter und Restitution – Streitbeilegungsverfahren im internationalen Wirtschaftsrecht – Dialog der Zivilisationen – Staatenverantwortlichkeit*, 2002, 88 et seq.; D.F. R. Pohl, *Islam und Friedensvölkerrechtsordnung*, 1988.

¹⁵ Irshad Abdal-Haqq, in: H.M. Ramadan (ed.), *Understanding Islamic Law*, 2006, 3.

¹⁶ Adel El Baradie, *Gottes-Recht und Menschen-Recht*, 1983, 22; Irshad Abdal-Haqq, see note 15, 4; in detail on the history of the term *šari'a*, T. Nagel, *Das islamische Recht*, 2001, 4 et seq.

perceived as the divine source of all principles of Islamic law. However, it encompasses not only legal norms, it also regulates all aspects of religion and is regarded as the binding source of Islamic belief including religious rituals and ethics.¹⁷

- feqh/fiqh

The Arabic term *feqh* or *fiqh* in Persian is translated by “to comprehend” and “to understand.”¹⁸ It refers to Islamic legal science.¹⁹ Due to the character of the *šarī'a* as God's law and the codification of his will, its origin and validity cannot be questioned by Islamic legal science. Therefore *feqh* exclusively focuses on discovering the will of God as expressed in the *šarī'a* and applying it to individual cases whether real or hypothetical.²⁰ The objective of Islamic legal science is to interpret the will of God for the assessment of human behaviour.²¹ *Feqh* is therefore described as the knowledge of the legal norms for individual cases, derived from the sources of law.²² Since the *šarī'a*, according to Islamic doctrine, has to be regarded as a comprehensive legal system, which is, however, in need of interpretation and concretisation, the object of *feqh* is to assess and regulate all aspects of life on the basis of the *šarī'a*.²³

¹⁷ For details of the term *šarī'a* please refer to Irshad Abdal-Haqq, see note 15, 4; Adel El Baradie, see note 16, 22; Nagel, see note 16, 4 et seq. Regarding doctrinal differences between Shiite and Sunni Islam concerning the *šarī'a* and its content, Momen, see note 12, 172 et seq.; H. Halm, *Der schiitische Islam*, 1994; cf. H. Modarresi Tabātabā'i, *An Introduction to Shī'i Law*, 1984, 2 et seq.; R. Cleave, *Inevitable Doubt – Two Theories of Shī'i Jurisprudence*, 2000, 1; M. Hāshemi, *Hoquq-e asāsi-ye ġomhuri-ye eslāmi-ye irān*, Vol. I, 1382 (2002), 108; H. Löschner, *Die dogmatischen Grundlagen des Schiitischen Rechts*, 1971, 86 et seq.; W. Buchta, *Die iranische Schia und die islamische Einheit 1979-1996*, 1997, 29.

¹⁸ In detail Nagel, see note 16, 6 et seq.; cf. Irshad Abdal-Haqq, see note 15, 6.

¹⁹ Adel El Baradie, see note 16, 43; N.J. Coulson, *A History of Islamic Law*, 1964, 75; Löschner, see note 17, 27; Said Mahmoudi, “*The Shari'a in the New Afghan Constitution*”, *ZaöRV* 64 (2004), 867 et seq., (867).

²⁰ Coulson, see note 19, 75 et seq.; cf. Irshad Abdal-Haqq, see note 15, 5; Nagel, see note 16, 6 et seq.; M. Asad, *The Principles of State and Government in Islam*, 1961, 11 et seq.; cf. F. Broschk, *Gottes Gesetz zwischen Elfenbeinturm und Außenpolitik – Schiitisches Völkerrecht in der Islamischen Republik Iran*, 2008, 18.

²¹ Nagel, see note 16, 9.

²² Löschner, see note 17, 27; cf. Adel El Baradie, see note 16, 43.

²³ Irshad Abdal-Haqq, see note 15, 5.

Hence, there is no possibility of *feqh* beyond the *šarī'a*. However, both terms are interrelated since the *šarī'a* is depending on *feqh* to facilitate an assessment of concrete, external human actions.²⁴ A decisive difference is that whereas the rules and principles of the *šarī'a* are perceived as being impeccable, eternal and resistant to change, the results and regulations reached by *feqh* may be modified due to the passing of time and change of circumstances.²⁵

A *fatwā* is a legal opinion of a scholar of Islamic law (*faqih*; pl. *foqohā*)²⁶ based on the *šarī'a* and the application of the methods of *feqh*.²⁷ The *foqohā* can rely on four methods to derive rules from the *šarī'a* and establish them. These methods are also referred to as the *usul al-feqh*.²⁸ These four sources of law are categorised into primary and secondary sources. The first of the primary sources is the deduction of rules and principles by the interpretation of the Koran. The second is the application of the principles embodied in the *sunna* to individual cases. Secondary source of law both according to the *ḡafari* school of

²⁴ Adel El Baradie, see note 16, 44.

²⁵ Irshad Abdal-Haqq, see note 15, 5; cf. G.M. Badr, "A Survey of Islamic International Law", in: M.W. Janis/ C. Evans (eds), *Religion and International Law*, 95 et seq. (95).

²⁶ The term *foqohā* is the plural of *faqih* which means "expert" in Arabic. In the *ḡafari* school of law it is used as a synonym for the term of a *moḡtabed*. The term *moḡtabed* in the terminology of *ḡafari* law refers to a member of the *ulamā* who is accepted as an expert on the interpretation of Islamic law. Prerequisite for obtaining such a rank are studies of Islamic law lasting many years at the end of which a person is awarded by its teacher the license (*eḡāze*) to issue independent interpretations based on the application of his rational powers (*aql*). The teacher has to be a *moḡtabed* himself. The process to reach a legal opinion based on rational consideration is called *eḡtebād*. The term literally means the exertion of all abilities to achieve a certain aim. For details on the process how to become a *moḡtabed* see D.J. Stewart, *Islamic Legal Orthodoxy*, 1998, 223 et seq.; on peculiarities of the terms *moḡtabed*, *faqih* and *eḡtebād* refer to Momen, see note 12, 186 et seq.; Hāshemi, see note 17, Vol. II, 1383 (2003), 113. Finally on the special role *moḡtabed* enjoy in the Iranian constitutional system and its problematic aspects in regard to human rights Moschtaghi, see note 4, Part 3, A.) 1.

²⁷ Cf. auch S. Tellenbach, *Untersuchungen zur Verfassung der Islamischen Republik Iran vom 15. November 1979*, 1985, 253.

²⁸ Irshad Abdal-Haqq, see note 15, 5.

law and its four orthodox Sunni counterparts is the consent (*iğma*) of the scholars of Islamic law.²⁹

However, the two sects of Islam hold a different perception regarding the question under which circumstances a sufficient consent is given.³⁰ A further secondary source of law according to the predominant perception³¹ of scholars within the *ğafari* school of law is reason ('*aql*').³² Rather than reason, the Sunni schools accept only analogy (*qi-yās*).³³

The difficulties regarding a correct delimitation of the terms *šari'a* and *feqh* are aggravated by the phenomenon that authors frequently fail to differentiate between them. This means that sometimes the rules established by *feqh* are referred to as parts of the *šari'a*.³⁴ However, to apply *šari'a* synonymously to Islamic law as a whole is highly problematic because this means that the line between the impeccable rules which have been revealed by Koran and have been applied and demonstrated in the *sunna* on the one hand and the principally fallible human efforts of *feqh* on the other is blurred.³⁵ It should be emphasised, however, that efforts to blur the delimitation between *feqh* and *šari'a* have a certain tradition in Islamic law. There are historic sources reporting on respective policies of Islamic potentates which date back to the time following the fall of Baghdad to the Mongol invaders. This policy was meant to elevate the rules determined by the scholars of the different schools of

²⁹ Irshad Abdal-Haqq, see note 15, 6; B. Krawietz, *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*, 2002, 182 et seq.; Löschner, see note 17, 111 et seq.

³⁰ For a detailed elaboration on *iğma* and its prerequisites in *ğafari* law refer to Löschner, see note 17, 134 et seq.; cf. Momen, see note 12, 186; H. Enayat, *Modern Islamic Political Thought*, 2004, 48.

³¹ Momen, see note 12, 117 et seq., 161 et seq.; Halm, see note 17, 127 et seq.; W. Buchta, *Schüten*, 2004, 41 et seq.; cf. R. Cleave, *Inevitable Doubt – Two Theories of Shī'i Jurisprudence*, 2000; id., “Akhbāri Shī'i usūl al-feqh and the Juristic Theory of Yūsuf al-Bahrānī”, in: R. Cleave/ E. Kermeli (eds), *Islam Law – Theory and Practice*, 1997, 24 et seq.

³² Momen, see note 12, 185 et seq.; in detail Löschner, see note 17, 149 et seq.; Hāshemi, see note 17, 109 et seq.

³³ Krawietz, see note 29, 203 et seq.

³⁴ Irshad Abdal-Haqq, see note 15, 6; As an example for confusing the terms *šari'a* and *feqh*, Abdur Rahman I. Doi, *Sharī'ah – The Islamic Law*, 1984, 6.

³⁵ Irshad Abdal-Haqq, see note 15, 6.

law to the rank of the *šarī'a* and thereby to let them participate in the divine character of the latter.³⁶

- *mazhab/mathhab*

Finally another important Islamic (legal) term is *mathhab* in Arabic or *mazhab* in Persian. The term, similar to *šarī'a*, means “way”.³⁷ In Islamic legal terminology the term refers to the schools of law, i.e. the *ḡafari mazhab* is the *ḡafari* school of law. While there were at least nineteen schools of Islamic law during the first centuries of Islam, their number dwindled significantly over the centuries and today only five major schools remain.³⁸ On the Sunni side these are the *hanafi*, *mailiki*, *shafii* and *hanbali* schools of law and on the Shiite side, the *ḡafari* school of law.³⁹ The different schools vary both in their doctrines and in practical aspects of religious rites and daily life. Every Muslim belongs to a certain *mazhab*, the rules of which are binding on him in rituals and legal matters, such as inheritance or marriage.⁴⁰

- *Imām*

The schism between *Shia* and *Sunna* dates back to the early years of Islam. To the Shiites 'Alī Ibn Abī Tālib the son-in-law and cousin of Mohammad was the only legitimate successor to the prophet. His followers who perceive all other caliphs as usurpers were called the party of 'Alī, i.e. *shī'at 'Alī* in Arabic, or the Shiites.⁴¹ The Shiites recognise 'Alī Ibn Abī Tālib, and eleven of his descendants from the marriage with Fatima, Mohammad's daughter, as the only legitimate leaders of the Muslims. 'Alī Ibn Abī Tālib and eleven of his offsprings bear the title of *Imām*. The twelfth and last *Imām* is perceived as the messiah who has not died but remains in occultation since 874 AD and will return at the end of time to establish a realm of truth and justice. According to Shiite doctrine, comprehensive knowledge of Islamic law and moral in-

³⁶ Irshad Abdal-Haqq, *ibid.*, 6.

³⁷ Irshad Abdal-Haqq, *ibid.*, 15, 24.

³⁸ For details on the different schools of law cf. Irshad Abdal-Haqq, see note 15, 24 et seq.; J. Schacht, *An Introduction to Islamic Law*, 1982, 28 et seq.

³⁹ Further Shiite schools of law which however have much less followers are the *ismaili* and the *zaidi* school.

⁴⁰ Buchta, see note 17, 32, there note 33.

⁴¹ On the history of the schism in detail Momen, see note 12, 11.

fallibility are indispensable prerequisites for the leader of the Muslims.⁴² These qualities are fully developed only in the *Imāms* who are regarded as specially inspired by God.⁴³ This inspiration is based on a special hereditary charisma within the family of the prophet. The special virtues of the *Imām* qualify him not only to be the political leader of the believers but provide him with unrestricted moral and religious competence. The special role of the *Imām* in Shiite law and its consequences is one of the major differences between Shiite and Sunni Islam.⁴⁴

III. International Law and Islamic *ḡafari* Law in the Iranian Constitution

1. Islamic *ḡafari* Law in the Iranian Legal System

The rather extensive preamble of the Iranian Constitution of 15 November 1979 strongly emphasises the role that Islam and Islamic law have played in the establishment of the I.R. Iran and its legal system in particular. In fact the Constitution is inclined to perpetuate and increase the role Islam plays in society and within the legal system. Evidence is given by the very first sentence of the preamble, reading:

“The Constitution of the Islamic Republic reflects the desire of the *umma* [i.e. the global community of all Muslims] to set forth the cultural, social, political and economic institutions of the Iranian society, based on Islamic principles and rules.”

One of the most important provisions regarding the integration of Islamic law into the legal system is article 4 of the Iranian Constitution (IC) which stipulates that all laws and regulations in the I.R. Iran must be based on Islamic law.⁴⁵ As the article explicitly promulgates, this

⁴² S. Ruhollah, *Khomeini, Islam and Revolution – Writings and Declarations of Imam Khomeini*, 1981, 60; cf. K.H. Göbel, *Moderne Schiitische Politik und Staatsidee*, 1984, 112 et seq.; S. H. Nasr in: Allāmah Sayyid Muhammad Husayn Tabātabā’ī, *Shi’ite Islam*, 1977, 174 et seq.

⁴³ Buchta, see note 17, 22; in detail on the virtues of the *Imām*, Momen, see note 12, 153 et seq.; cf. Göbel, see note 42, 114.

⁴⁴ For details on the *Imām* and the peculiarities of Shiite belief Momen, see note 12.

⁴⁵ Article 4 IC: “All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle is absolutely and generally binding to all articles of

does also encompass the Constitution. Hence, both parliamentary laws and the Constitution itself must comply with Islamic law and have to be interpreted in the light and spirit of its rules. The superiority of Islamic law is secured by article 72 IC stipulating that the parliament must not pass any legislation that is at variance with the official school of Islamic law (*mazhab*) of the country.⁴⁶

In order to enforce this limitation, a special constitutional organ, the so-called Guardian Council (*shurā-ye negabbān*)⁴⁷ is established by article 91 IC.⁴⁸ The Council consists of twelve members, six of them secular jurists and six scholars of Islamic law (*foqohā*). According to arts 4, 72,⁴⁹ and 96⁵⁰ IC, the latter are *inter alia* competent and obliged to re-

the Constitution as well as to all other laws and regulations and the *foqohā* of the Guardian Council are judges in this matter.”

⁴⁶ Article 72 IC: “The Islamic Consultative Assembly cannot enact laws contrary to the official religion *mazhab* (school of law) of the country or to the Constitution. [...]”

⁴⁷ The Guardian Council beside its competence to review the compliance of legislation with Islamic law and the constitution is supposed to supervise all elections and referenda in the I.R. Iran (article 99 IC). Although the establishment of this Council has been inspired by the French *Conseil Constitutionnel* practically there are only remote similarities. The Council has been criticised repeatedly for the extensive use of its veto powers to block legislation and the equally extensive disqualification of candidates for elections. For details on this council A. Schirazi, *The Constitution of Iran-Politics and the State in the Islamic Republic*, 1997; Tellenbach, see note 27; Moschtaghi, see note 4. For instance in the course of the presidential elections of June 2009 the Guardian Council accepted only four out of 475 candidates; *inter alia* all 42 female candidates were excluded from the elections <http://www.news.bbc.co.uk/2/hi/middle_east/8058884.stm>.

⁴⁸ Article 91: “In order to safeguard the commandments of Islam and the Constitution and to avoid any conflict between them and the legislation passed by the Islamic Consultative Assembly [i.e. the Iranian parliament], a council to be known as the Guardian Council with the following composition is to be established:

1. six *foqohā*, conscious of the needs and issues of the day, to be selected by the Leader, and
2. six jurists, specialized in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power.”

⁴⁹ Article 72 IC: “The Islamic Consultative Assembly cannot enact laws contrary to the official school of law of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred [...]”

view all drafts passed by parliament regarding their compliance with Islamic law.⁵¹ As an additional safeguard to ensure the superiority of Islamic law, the Constitution obliges Iranian judges to refrain from applying any executive decrees and regulations which are at variance with Islamic rules.⁵²

Therefore, according to the IC, Islamic law constitutes the superior law of the I.R. Iran, outranking executive decrees, parliamentary legislation and even the Constitution.⁵³ As can be discerned by an interpretation of article 4 IC read together with article 72 IC, it becomes clear that the term “Islamic law” in article 4 IC refers to *ḡafari* Islamic law only. Hence, in the I.R. Iran all rules which are perceived by the competent organs as being at variance with Islamic law according to the *ḡafari* school of law are invalid.

2. The Rank of International Law in the Iranian Legal System

a. International Treaty Law

As was mentioned in the introduction, the I.R. Iran is party to most major international human rights treaties and with the sole exception of the Convention on the Rights of the Child has signed and ratified them without any reservation. Regarding the domestic effect of international treaties, article 9 of the Iranian Civil Code promulgates:

⁵⁰ Article 96 IC: “The determination of the compatibility of the legislation passed by the Islamic Consultative Assembly with Islamic law rests with the majority vote of the *foqohā* of the Guardian Council [...].”

⁵¹ According to the opinion of the Guardian Council, its competencies do not just encompass the review of drafts which have not yet come into force, but the Council deems itself also competent to control whether legislation already in effect complies with Islamic law. Official Statement of the Guardian Council No. 1983 dated 8.2.1360 (1981) printed in Hāshemi, see note 17, 242. Since the Council according to article 98 IC is competent to issue binding interpretation of the Constitution, this opinion of the Council is binding on other state organs.

⁵² Cf. article 170 IC.

⁵³ Hāshemi, see note 17, 167 et seq. and also 83 et seq.

“Treaty regulations which have been concluded between Iran and other states according to the constitution share the force of laws.”⁵⁴

Hence, treaty provisions, where the respective treaties have been ratified in compliance with the constitutional prerequisites, share the rank of regular parliamentary laws in the domestic hierarchy of norms.⁵⁵ As a consequence, Iranian law also provides for the possibility to invoke provisions of international treaties before domestic courts. The Iranian judiciary explicitly confirmed this finding in regard to the International Covenant on Civil and Political Rights.⁵⁶ Since the respective treaty provisions form an integral part of the Iranian legal order and share the rank of parliamentary legislation in the hierarchy of norms, in case of conflict between such a provision and a provision of parliamentary law the rule of *lex posterior derogat legi priori* is applied, according to which the more recent norm prevails.⁵⁷ However, since they share the rank of parliamentary legislation, international treaty provisions rank below the Constitution in the domestic hierarchy, which, from a comparative perspective, is quite a common regulation.⁵⁸

⁵⁴ Fakhreddin Badrian, *Qānun-e madani /The Civil Code of Iran*, Tehran 1380 / 2001; M.A.R. Taleghany, *The Civil Code of Iran*, 1995.

⁵⁵ M.R.Z. Bigdeli, *Hoquq-e bein’ol mellal-e omumi* (Public International Law), 2007, 89 et seq.; cf. also the elaboration on the I.R. Iran, Doc. HRI/CORE/1/Add. 106 of 15 July 1999, paras 79 et seq.

⁵⁶ Consideration of Reports Submitted by States Parties under article 40 of the Covenant: Iran, GAOR, Human Rights Committee, 46th Sess., 1193 Meeting; Doc. CCPR/C/SR. 1193 (1992) of 29 October 1992, 15; C. Harland, “The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents”, *HRQ* 22 (2000), 187 et seq. (225); Advisory Opinion No. 7/1669 of the Legal Department of the Iranian Judiciary of 19 October 1992; cf. regarding this Advisory Opinion also the elaboration of the I.R. Iran of 15 July 1999, Doc. HRI/CORE/1/Add. 106, para. 82; cf. also Bigdeli, see note 55, 74 et seq.; cf. the Iranian delegate Hossein Mehrpour in front of the Committee for the Elimination of Racial Discrimination, Doc. CERD/C/SR.1597 of 29 September 2003, para. 51; M. Nowak, *U.N. Covenant on Civil and Political Rights*, 2005, 59.

⁵⁷ Bigdeli, see note 55, 90.

⁵⁸ M. Herdegen, *Völkerrecht*, 2008, 156 et seq.; To name just one example, also in Germany the constitution surpasses provisions of international treaties in cases of conflict. Article 59 of the German Basic Law of 23 May 1949, BGBl. I 1949, 1; H. Jarass, “Artikel 59 GG”, in: H. Jarass/ B. Pieroth (eds), *Grundgesetz*, 2006, 699.

Nevertheless, article 4 IC, according to which all norms including the Constitution itself must comply with Islamic *ḡafari* law, provides for a peculiarity of the Iranian legal system. Since international treaties share the rank of parliamentary laws, and the latter according to arts 4 and 72 IC must not be at variance with Islamic law, international treaty provisions in the I.R. Iran are subordinated not only to the Constitution but also to Islamic (*ḡafari*) law. Hence, it is consistent from a domestic point of view that deputies of the various Iranian administrations repeatedly emphasised that in case of conflict between provisions of the International Covenant on Civil and Political Rights and Islamic law, the latter prevails.⁵⁹

In fact, there is evidence that the Iranian legislator promulgates theories which tend in the direction of strong monism giving precedence to domestic law and denying any binding force of treaty provisions which are inconsistent with Iranian domestic law or Islamic law.⁶⁰ Such tendencies are evident in the law⁶¹ regulating the accession of the I.R. Iran to the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁶² In spite of the fact that the I.R. Iran, upon signature of the Convention, only raised a reservation concerning its article 6 and did not make any reference to Islam or Islamic law, the accession act promulgated that treaty provisions which are at variance with domestic law or Islamic law are not binding for the I.R. Iran.⁶³

b. Rules of Customary International Law

Unlike the situation concerning treaty-based provisions, there are no provisions in the Iranian legal order regarding the domestic impact of non-treaty based rules of international law. According to Iranian doc-

⁵⁹ Cf. the report on the elaborations of the Iranian delegate Khosroshahi in front of the Human Rights Committee: "He [i.e. the delegate] felt bound to emphasize, that although many articles of the Covenant [i.e. the ICCPR] were in conformity with the teachings of Islam, there could be no doubt that the tenets of Islam would prevail whenever the two sets of laws were in conflict." Doc. CCPR/C/SR. 364 (1982) of 19 July 1982, para. 4; cf. Ayatollah Khomeini, see note 11.

⁶⁰ Bigdeli, see note 55, 90.

⁶¹ Quoted in Bigdeli, *ibid.*, 90.

⁶² Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, entry into force 11 November 1990, *ILM* 28 (1989), 497 et seq., ratification by the I.R. Iran 7 December 1992.

⁶³ Bigdeli, see note 55, 90.

trine, non-treaty based rules of international law become part of the domestic legal order only if they are transformed by a legal act.⁶⁴ From a domestic perspective this perception seems consistent. Arts 4, 72 and 170 IC are supposed to guarantee that in the I.R. Iran only regulations which comply with Islamic law are applied. Therefore, rules of customary international law can only be integrated into the Iranian legal system by a transformation act guaranteeing that these rules are not at variance with Islamic *ḡafari* law.

Summing up, the Iranian hierarchy of norms establishes an absolute precedence of Islamic law as it is interpreted by the *ḡafari* school of law. Hence, Shiite Islamic law enjoys superiority both to the Constitution and to treaty-based provisions of international law. Rules of customary international law have no impact on the legal system of the I.R. Iran as long as they have not been transformed into domestic law by an act of transformation which must comply with Islamic law in order to be valid.⁶⁵

IV. The Conflict between International Law and Islamic (*ḡafari*) Law

1. The Conflict from the Perspective of Islamic Law

Islamic law perceives itself as an all-embracing and, as far as the *ṣarī'a* is concerned, as a divine legal order. In fact this legal order constitutes in itself a substantive part of the Islamic message of salvation.⁶⁶ Islamic law claims to encompass all aspects of life and to be authoritative for every Muslim, no matter if he lives in a country with a Muslim majority or not.⁶⁷ In consequence Islamic law is unable to accept that the life of individual Muslims or a community of Muslims could be regulated by rules originating outside of Islamic law. Therefore, from an Islamic law

⁶⁴ Bigdeli, *ibid.*

⁶⁵ Cf. article 4, 72 IC concerning parliamentary legislation and article 170 IC regarding executive regulations.

⁶⁶ Nagel, see note 16, 3. This is demonstrated vividly by the story that during the crusades if a crusader turned to the Muslim side and converted to Islam, it was said that he had raised his fingers and had sworn to the law.

⁶⁷ M. Khadduri, "International Law, Islamic", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 1995, Vol. III 2, 1236 et seq.; Isam Kamel Salem, *Islam und Völkerrecht*, 1984, 149; Marboe, see note 14, 91.

perspective the legal system of every state with a Muslim population is only acceptable if it is consistent with Islamic law. This provides an explanation why in spite of all differences in detail, the supporters of an Islamic state and system of government, no matter if of Shiite or Sunni creed, agree in the perception that the establishment of the *šari'a* as superior law and its execution are the constitutive factors for a state to be considered Islamic.⁶⁸ Most Islamic states⁶⁹ try to fulfil this requirement and to avoid conflict between their domestic legal order and Islamic law by adjusting the former as far as possible to the latter. In consequence their constitutions either contain norms which limit the competencies of legislation to regulations consistent with Islamic law or introduce Islamic law as (the) source of legislation.⁷⁰

The relation of Islamic law to international law is much more complex. Although the claim of absolute validity held by Islamic law also encompasses international relations, this claim is not enforceable on the international level since it is beyond the power of Islamic states to enforce unilaterally the conformity of the international legal order with Islamic law. Hence, in order to provide information on the relationship between the two different legal systems it is necessary to analyse whether there are consistencies or divergences between them and how far the one may be subsumed into the other.

In order to do so, it is first necessary to give a short overview of the part of Islamic law which covers the external relations of the Muslims, the so called *siyar*. It must be emphasised straight away, however, that this term serves as a categorisation which is known in the Sunni schools of Islamic law only. Nevertheless, the *siyar* shall serve as the basis of the

⁶⁸ Ruhollah, see note 42, 40 et seq.; cf. also Sayyid Abdul A'la Maududi, *Islamic Law and Constitution*, 1960, 45 et seq.; M. Asad, *The Principles of State and Government in Islam*, 1961, 34; Seyyid Qutb, *Milestones*, 2003, 9.

⁶⁹ By the term "Islamic states" it is referred to states in which Islam is considered the religion of state. Applying the same terminology H. Krüger, *Fetwa und Siyar*, 1978, 21, footnote 14.

⁷⁰ Cf. article 4 of the Iranian Constitution; article 3 of the Afghan Constitution of 25 January 2004, promulgated by presidential decree 103, Official Gazette (*ğaride-ye rasmi*) No. 818, English text in: Blaustein, see note 13, Vol. I; article 227 para. 1 of the Pakistani Constitution of 12 April 1973 including the amendments of 31 July 2004, English text *ibid.*, Vol. XIV; article 2 of the Egyptian Constitution of 11 September 1971 including the amendments of 22 May 1980, English text *ibid.*, Vol. VI; cf. also the preamble of the Mauritanian Constitution of 16 July 1991, English text *ibid.*, Vol. XII.

elaborations because first, the rules of the Sunni schools of law are much more thoroughly researched and second, the categorisation of these rules in the *siyar* provides an excellent starting point for a comparison of the Islamic rules with other legal systems like international law. This is justified since, although a special category to match the Sunni *siyar* is missing in the *ḡafari* school of law, which might be related to the exclusion of Shiites from the actual execution of government authority in the first centuries of Islam, there is an agreement in principle between the different institutes of the *siyar* and the parallel rules of the *ḡafari* school.⁷¹ Cases in which there are divergences between the two sects of Islam will be mentioned in detail.

In the course of the following section first the term *siyar* representing Islamic “external law” will be explained. This is followed by an analysis of the subjects of the *siyar* and its sources in which the structural differences between Islamic law and international law are demonstrated. As will be shown, although the *siyar* is often denominated as “Islamic international law”, in fact only a very restricted part of it really can be addressed as international law. It is on this component of the *siyar*, which consists of Islamic international treaty law, that the final part of the overview will focus. In this part the requirements for the conclusion of international treaties according to Islamic law will be highlighted answering the question how far modern international law is consistent with the requirements of Islamic international treaty law.

a. The *siyar* as the Islamic “External Law” and an Overview of its Meaning

The Arabic term *siyar* is the plural of *sīra* which can be translated by “practice” or “shape.”⁷² In the context of Islamic law the term *siyar* refers to the practice of the prophet Mohammad in the course of his military expeditions and other forms of contact with non-Muslims.⁷³ In the early years of Islam the term *siyar* was used to refer to the narrative stories about the campaigns of the prophet and his companions out of which scholars of Islamic law, in the course of time, derived legal pre-

⁷¹ Cf. E. Kohlberg, “The Development of the Imāmī Shī’ī Doctrine of *jihād*”, *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 126 (1976), 64 et seq. (64); cf. also Broschk, see note 20.

⁷² For details on the etymology of the term H. Kruse, *Islamische Völkerrechtslehre*, 1979; cf. also Krüger, see note 69, 31.

⁷³ Kruse, see note 72.

requisites regulating the treatment Muslims should bestow upon the outside world.⁷⁴ Therefore, the *siyar* in the first place analyses rules regarding the relation between Muslims and non-Muslims, no matter whether the latter were living as so-called *Dhimmi* (“protected people”) under Muslim superiority in the territories conquered by the Muslims or in non-Muslim realms. However, the *siyar* also encompass regulations regarding apostates and rebels, even though the latter are Muslims themselves.⁷⁵ In order to understand the meaning of the *siyar* it is necessary to understand their conception as transitional regulations. They are based on the underlying perception that sooner or later the whole world will become part of the Islamic community, the *umma*, and therefore the *siyar* will become irrelevant once this transitional period is over.⁷⁶

Hence, the ultimate aim of the *siyar* is to guarantee peace in the territories already subject to Islamic law on the one hand, and to enlarge the realm of Islam on the other until it encompasses the whole world.⁷⁷ This conception renders the *siyar* an imperial system of law. In accordance with their basic conception, the *siyar* divide the world into two different categories of territories. On the one hand there is the so-called *dār al-islām* “the territory of Islam” and on the other the *dār al-harb* or the “territory of war”. The *siyar* define the *dār al-islām* as the territory controlled by Muslims and subject to the laws of the *ṣarīʿa*.⁷⁸ The term *dār al-harb* is attributed to the rest of the world which is controlled by

⁷⁴ Regarding Sunni Islam Muhammad al-Shaybani (deceased 805 AD) who devised the first systematic work on the rules of the *siyar* (for an English translation see M. Khadduri, *The Islamic Law of Nations – Shaybānī’s Siyar*, 1966, is of special importance. Whereas regarding Shiite Islam the work of Al-Nihaya of Abu Ġafar al-Tusi (deceased 1067 AD) has been very influential. See Mayer, see note 14, 195.

⁷⁵ Krüger, see note 69, 32; M. Khadduri, in: M. Khadduri/ H.J. Liebesny (eds), *Law in the Middle East*, 1955, 350; Kruse, see note 72, 32; M. Hamidullah, “Theorie und Praxis des Völkerrechts im frühen Islam”, *Kairos* 5 (1963), 100 et seq., (101); Salem, see note 67, 97 et seq.; cf. also Broschk, see note 20, 19.

⁷⁶ Khadduri, see note 75, 350; Salem, see note 67, 98.

⁷⁷ Khadduri, see note 67, 1236 et seq. (1236).

⁷⁸ Kruse, see note 72, 57; Cf. also Broschk, see note 20, 33 et seq.; cf. for the terms of *dār al-islām* and *dār al-harb* also A. Bouzenita, *Abdarrāḥmān al-Auzāʿī – ein Rechtsgelehrter des 2. Jahrhunderts und sein Beitrag zu den Siyar erarbeitet auf der Grundlage des ar-Radd ʿalā siyar al-Auzāʿī*, 2001, 194 et seq.

non-Muslims, i.e. non-believers.⁷⁹ A peculiarity of *ḡafari* law is the existence of a third category of territory called the *dār al-imām*. The *dār al-imām* is a subcategory to the *dār al-islām* and part of it. It is distinguished from the *dār al-islām* by the fact that it is subject to Islamic law as interpreted by the Shiite *ḡafari* school.⁸⁰

According to the *siyar*, the relationship with the world outside the *dār al-islām* is almost exclusively characterised by aspects of *ḡihad*,⁸¹ i.e. religious war, which is considered the regular situation between the two territories.⁸² The participation in *ḡihad* is a religious duty for every able Muslim.⁸³ The ultimate aim of *ḡihad* is the islamisation of the non-Muslim territories which will render the *siyar* unnecessary.⁸⁴ However, war in the sense of *ḡihad* is not necessarily a continuing deployment of

⁷⁹ In particular in the doctrine of the Sunni *shafi* schools of law there is a third category beside the two, the so called *dār al-sulh*. Referring to the territories which have achieved an autonomy status within the Islamic empire by an agreement on tribute. However this category has not been accepted by the majority of the other schools. It has been correctly emphasised that a substantive characteristic of the peace treaty between the *dār al-sulh* with the *dār al-islām* is the acceptance of the suzerainty of the latter due to which this territories consequently are regarded as being part of the *dār al-islām* by the other schools. Cf. Pohl, see note 14, 74 et seq. For the striking parallels of the *siyar* and the atavistic view of the world of Ayatollah Khomeinis, see note 11, 78 et seq.

⁸⁰ A.K.S. Lambton, "A Nineteenth Century View of Jihād", *Studia Islamica* 32 (1979), 181 et seq.; cf. Kohlberg, see note 71, 69.

⁸¹ Although the Arabic term *ḡihad* literally means "extortion" and can be understood also as the "fight" against base instincts instead of "war", the principle of *ḡihad* as religious war cannot be denied without rendering the classical doctrine of the *siyar* absurd. Kruse, see note 72, IX; cf. on the principle of *ḡihad* also M. v. Bredow, *Ibn-Abī-Zaid al-Qairawānī, Abdallāh: Der Heilige Krieg (ḡihād) aus der Sicht der mālikitischen Rechtsschule*, 1994.

⁸² Khadduri, see note 75, 353 et seq.; also note 67, 1236; Salem, see note 67, 97; Kruse, see note 72, 31; Marboe, see note 14, 96; Mayer, see note 14, 196; G. M. Badr, "A Survey of Islamic International Law", in: M.W. Janis/ C. Evans (eds), *Religion and International Law*, 95 et seq. (95); cf. also N. Qorbāniā, *Feqh va hoquq-e bein ol'mellal* ('*Feqh* and International Law'), *Faslenāme-ye qabsāt* 15/16, 1379 (2000), 1 et seq. (10).

⁸³ Kohlberg, see note 71, 64 et seq.

⁸⁴ Ford, see note 14, 500 et seq.; Badr, see note 82, 95; E. Gräf/ H. Krüger, "Völkerrecht", in: K. Kreiser/ R. Wielandt (eds), *Lexikon der islamischen Welt*, 1992, 276 et seq. (276).

armed force.⁸⁵ For instance, a formal maintenance of the state of war and constant preparation for future combat might be perceived as sufficient to fulfil the duty of *ḡihad*.⁸⁶ In spite of the basic concurrence between the *ḡafari* school of law and its Sunni counterparts regarding the duty of *ḡihad* against the *dār al-harb*, the *ḡafari* perspective of *ḡihad* is distinguished by the extension of this duty also to fight and convert the non-Shiite part of the *dār al-islām* to the *dār al-imām*.⁸⁷ This is justified by the argument that the part of the *dār al-islām* which has not yet become part of the *dār al-imām* is the realm of rebels who are Muslims but who have revolted against the rightful authority of the *Imām* and are still doing so by refusing to accept *ḡafari* law.⁸⁸

b. The Subjects of the *siyar* and the Structural Differences between the *siyar* and modern International Law

According to the *siyar* only the community of Muslims, the *umma*, and its individual members are considered being legal subjects, whereas in contrast the *dār al-harb* and its inhabitants lack any legal subjectivity.⁸⁹ Rather the *dār al-harb* and its inhabitants are mere objects for the *siyar* and conquest in the course of *ḡihad*. The political organisation of the *dār al-harb* is not recognised. It is regarded as legally indifferent (*mubāh*)⁹⁰ and as a merely factual organisation of power.⁹¹ There are no differences between the Sunni and Shiite schools of law regarding this perception. Hence, the *siyar* like Islamic law as a whole, provide for a personally structured legal system that extends internal and unilateral regulations of Islamic law on the actions of Muslims towards the external (non-Muslim) world.⁹² The *siyar* provide neither non-Muslim communities nor their individual members with the capacity to participate on an equal basis in the legal order and to influence its rules. This

⁸⁵ Ford, see note 14, 502.

⁸⁶ Khadduri, see note 75, 354.

⁸⁷ Kohlberg, see note 71, 69.

⁸⁸ Kohlberg, see note 71, 69 et seq.; on the history of the schism in detail Momen, see note 12, 11.

⁸⁹ Khadduri, see note 67, 1236; also, "The Islamic Theory of International Relations", in: J.H. Proctor (ed.), *Islam and International Relations*, 1965, 24 et seq. (25); cf. Salem, see note 67, 149.

⁹⁰ Krüger, see note 69, 122; Kruse, see note 72, 57.

⁹¹ Kruse, see note 72, 60, 70; Krüger, see note 69, 120.

⁹² Kruse, see note 72, 8; Khadduri, see note 67, 350.

phenomenon constitutes the decisive difference between the regulations of Islamic law and modern international law, since in contrast to the rules of the *siyar*, Article 2 para. 1 of the UN Charter stipulates the principle of sovereign equality as one of the cornerstones of modern international law.⁹³ In consequence, international law is understood as the total of norms regulating the relations of states, international organisations and other subjects of international law that in its authority does not depend on its acceptance by individual states, but whose basic principles are accepted by the overwhelming majority of states as binding in their mutual relations.⁹⁴

In striking contrast the acceptance of Islamic law and its principles by non-Muslim individuals and states from the perspective of Islamic law is of no consequence to its validity.⁹⁵ According to the *siyar* there are principally no rules between sovereign and equal states but between believers and non-believers.⁹⁶ Hence, although the rules of *siyar* are often referred to as “Islamic law of nations” or “Islamic international law,”⁹⁷ at least not the whole body of the *siyar* may be regarded as regulations of international law.⁹⁸ Rather the *siyar* share similarities with the roman *ius gentium*. Similar to the *siyar* the *ius gentium* was domestic Roman law which regulated the relation between Roman citizens and foreigners.⁹⁹ Hence, the *siyar* instead of “Islamic law of nations” have correctly been addressed as “external law” of the Islam.¹⁰⁰ Islamic law provides a scope for rules that really provide for mutual rights and obligations only in so far as it allows treaties between the *umma* and non-

⁹³ Cf. G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol. I/1, 1988, 214 et seq.

⁹⁴ Dahm/ Delbrück/ Wolfrum, see note 93, 27 et seq.; Herdegen, see note 58, 2.

⁹⁵ Kruse, see note 72, 8; Khadduri, see note 67, 350.

⁹⁶ Gräf/ Krüger, see note 84, 276; cf. K.H. Ziegler, *Völkerrechtsgeschichte*, 2007, 63.

⁹⁷ For instance Subhī Maḥmāsānī, “The Principles of International Law in the Light of Islamic Doctrine”, *RdC* 117 (1966), 206 et seq. (235); Khadduri, see note 74, 3.

⁹⁸ Kruse, see note 72, 3 et seq.; cf. Pohl, see note 14, 56; cf. also Broschk, see note 20, 19 et seq.

⁹⁹ Cf. M. Khadduri, *War and Peace in the Law of Islam*, 1955, 45; cf. also Krüger, see note 69, 34, who compares the *siyar* with international private law.

¹⁰⁰ Kruse, see note 72, 9.

Muslim states.¹⁰¹ In these instances Islamic law provides facilities for legal regulations based on reciprocity and mutual acceptance. However, since treaties generally are not determined unilaterally, such treaties cannot be considered genuinely Islamic. Rather only the prerequisites that these treaties have to fulfil in order to be valid according to Islamic law are Islamic. In order to examine them in detail it will be necessary to come back to these aspects of the *siyar* which may be termed Islamic international treaty law.

First it is important to shed light on another fundamental discrepancy between *siyar* and modern international law, consequence to the concept of the *umma* in Islamic doctrine.¹⁰² All schools of Islamic law concur in the perception that there is only one community of believers, one *umma* which in conformity to the unity of God is attributed with a uniform organisation and leadership. In consequence Islamic law claims that the *umma* has to be headed by a single leader.¹⁰³ Therefore according to Islamic legal doctrine the *umma* is principally indivisible and only the *umma* as a whole and its individual members enjoy legal subjectivity. Consequently there are no legal categories for fractions of the *umma* and hence no legal subjectivity. Therefore Islamic law in principal does not provide for legal regulations of the relations between different Islamic states.¹⁰⁴

A system of international law whose subjects are Muslim states is alien to Islamic legal doctrine.¹⁰⁵ Scholars of Islamic law have accepted the factual fragmentation of the Islamic world only in very exceptional

¹⁰¹ Id., see note 72, 8.

¹⁰² For a detailed analyses of the structural differences between the *umma* and the state as the central subject of international law please refer to Pohl, see note 14, 51et seq.

¹⁰³ Kruse, see note 72, 4; Krüger, see note 69, 34, 104 et seq.; Mayer, see note 14, 196; Khadduri, see note 99, 21; vgl. Pohl, see note 14, 49; Ford, see note 14, 505; J.M. Mössner, *Die Völkerrechtspersönlichkeit und die Völkerrechtspractice der Barbareskenstaaten*, 1968, 66.

¹⁰⁴ Kruse, see note 72, 4; Krüger, see note 69, 35; also Salem, see note 67, 97; Ford, see note 14, 505; Mössner, see note 103, 64; Gräf/ Krüger, see note 84, 277; Ziegler, see note 96, 65.

¹⁰⁵ Kruse, see note 72, 4; Krüger, see note 69, 35; Salem, see note 67, 97; Ford, see note 14, 505; Mössner, see note 103, 64; cf. Ziegler, see note 96, 95.

cases.¹⁰⁶ Regularly they have applied the rules the *siyar* provide concerning rebellion and apostasy to give a legal assessment of the factual circumstances.¹⁰⁷ There was a heated debate within the Sunni schools of Islamic law whether the leadership of the *umma* is divisible or not. In the end the doctrine of its principal indivisibility prevailed and was maintained in spite of the factual fragmentation of the Islamic world.¹⁰⁸ In this regard there is no divergence between *ḡafari* law and its Sunni counterparts. Although the former discerns between *dār al-islām* and *dār al-imām*, this categorisation is based on the difference between true believers and their territory, i.e. the *dār al-imām* on the one hand and such Muslims on the other who refuse to accept the authority of the *Imāms* and therefore are considered rebels.¹⁰⁹

Hence, since the beginning of the increasing fragmentation of the Islamic world, the *siyar* have reflected an ideal to strive for rather than provide a legal description of reality. Hence although there have been legal regulations concerning the relation between Islamic states, these were not based on the *siyar* but rather on practical considerations, and therefore Islamic law remained largely unheeded regarding questions of tribute and sovereignty between Islamic states.¹¹⁰

¹⁰⁶ Kruse, see note 72, 5; Krüger, see note 69, 34; Salem, see note 67, 97; Mössner, see note 103, 64.

¹⁰⁷ Krüger, see note 69, 34; cf. Ziegler, see note 96, 96.

¹⁰⁸ For details on this argument refer to Khadduri, see note 74. Krüger, see note 69, 104 et seq.; Ford, see note 14, 507. While the orthodox perception due to the unity of god still held on to the necessity of a uniform leadership for the *umma*, there were voices that propagated that a partition of the *umma* into different territories under different rulers is, in principle, possible, if there are natural borders like oceans or mountain separating the Islamic territory. The decisive prerequisite for them was that due to a lack of any mutual influence, a uniform leadership was impossible. However, it has correctly been pointed out that the prerequisite that there is no contact between the two territories renders any information on the mutual relation of its rulers impossible. Mössner, see note 103, 66 et seq. Moderating scholars held the opinion that the existence of local rulers is compatible with Islamic law as long as these recognise the suzerainty of the Caliph.

¹⁰⁹ Kohlberg, see note 71, 69 et seq.

¹¹⁰ Pohl, see note 14, 60 et seq.; Gräf/ Krüger, see note 84, 277. To discern this domain from the regulations of the *siyar* it is named Muslim, i.e. inner-Islamic, international law which is rightfully described as belonging in essence to legal reality rather than Islamic legal doctrine. Cf. *ibid.*, 9; also Krüger, see note 69, 36 who correctly pointed out the limitations regarding

Summing up, it has been established that there are fundamental differences between modern international law and the *siyar*. Points of contact exist only in so far as the *siyar* permit international treaties with non-Muslim communities. However, there are voices who, often by reference to the practice of Islamic states, argue that the *siyar* have changed in the course of the centuries and that today the identified structural differences between the two legal orders have been eliminated by an accommodation of the *siyar* to modern international law. By an examination of the different sources of the *siyar* it will be analysed whether this claim is correct and there has truly been an evolution of the *siyar*.

c. Evolution of the Islamic “External Law”?

The decisive factor for understanding the sources of the *siyar* as well as the respective institutes of the *ḡafari* school of law and thereby for answering the question whether the practice of Islamic states has led to an evolution of the Islamic “External Law” is to understand that the *siyar* do not form a separate part of Islamic law following rules of its own. Rather they constitute an integral part of Islamic law and are therefore based on the general sources of law, i.e. Koran, *sunna*, consent (*iḡmā*) and reason (*'aql*) as far as the *ḡafari* school of law is involved and analogy (*qiyas*) for the Sunni schools of law respectively.¹¹¹ In concurrence with the *usul al-feqh* the *siyar* were mainly developed out of the *sunna* of the prophet Mohammad, i.e. the traditions of his military campaigns and his practice of government *vis-à-vis* non-Muslims. In contrast, the practice of subsequent Muslim rulers or states according to Islamic legal doctrine might only be regarded as a source of law in case these rulers have been specially distinguished and hence their actions might be categorised under one of the sources of Islamic law.¹¹² This could be considered if their conduct could be interpreted as being part of the *sunna*.

the categories of rebellion and apostasy which constitute genuine Islamic rules; cf. also Pohl, see note 14, 82 et seq.

¹¹¹ Khadduri, see note 99, 47; the same, in: Khadduri/ Liebesny, see note 75, 350; also, The Islamic Law of Nations, see note 74, 8; Kruse, see note 72; Krüger, see note 69; Salem, see note 67, 98; Ford, see note 14, 500; Şubhī Maḥmāsānī, see note 97, 235; M.R.Z. Bigdeli, *Eslām va hoquq-e bein'ol mellal* ('Islam and International Law'), Tehran 1385 (2006), 27 et seq.; Broschk, see note 20.

¹¹² Mayer, see note 14, 196; Khadduri, in: Khadduri/ Liebesny, see note 75, 512.

However, in Shiite law beside the prophet himself this quality is only ascribed to the twelve *Imāms*, and only the first *Imām* 'Alī Ibn Abī Tālib actually wielded state power as the fourth caliph. On the Sunni side, at most the state practice of the first four caliphs who are also called the rightly guided ones might be attributed such quality. Although their actions are not deemed themselves part of the *sunna*, special significance is attributed to them regarding the confirmation of the *sunna* of the prophet since they have been his trusted companions (*ashabā*). In contrast, the practice of other Muslim governments can neither be regarded as a source of law for the *siyar* nor for the rest of Islamic law. From the Shiite point of view, the insignificance of state practice for the evolution of Islamic law is increased by the fact that according to traditional Shiite doctrine until the return of the twelfth *Imām*, every worldly power is stained by the blemish of illegality. It was not until the advent of Ayatollah Khomeini and his doctrine of the rule of the supreme religious scholar that this dogma was challenged and this doctrine is still rather the perception of a minority within Shiite Islamic law.¹¹³ Moreover, there is no hint that the followers of this doctrine perceive the actions of the supreme religious scholar as a source of Islamic law.

Since the practice of Islamic states is no source of law for the *siyar*, the variances Islamic states allowed from its rules in their relations to other states were not sufficient to reform the *siyar*. Hence, neither the rules governing the relation between the factually independent local potentates within the Islamic caliphate, whose number since the tenth century A.D. has increased more and more, nor the rules of international law which developed in the relationship between parts of the *dār al-islām* and non-Muslim states, in particular on the Iberian peninsula, were able to herald an evolution of the *siyar*.¹¹⁴

Another option for an evolution of the *siyar* could be a reinterpretation of its principles by the scholars of Islamic law in reaction to the practice of Islamic states. For instance, starting with the sixteenth century, there have been numerous treaties between the Ottoman Empire

¹¹³ For details on Ayatollah Khomeini's doctrine of the rule of the supreme religious scholar (*velāyat-e faqih*) see Asghar Schirazi, *The Constitution of Iran—Politics and the State in the Islamic Republic*, 1997; Tellenbach see note 27; Moshtaghi, see note 4.

¹¹⁴ In detail on the situation on the Iberian peninsula Salem, see note 67, 184 et seq.; cf. also R. Lohlker, *Islamisches Völkerrecht – Studien am Beispiel Granadas*, 2006.

and Safavid Persia,¹¹⁵ which due to the religious difference between the two realms necessarily had to be concluded on a rather secular basis.^{116 117}

It has been rightly highlighted that by these agreements both states, at least indirectly, had to accept that their actions should be separated from questions of religious doctrine and thereby they had to accept a secularisation of state practice and a mutual recognition based on the principle of equality and reciprocity.¹¹⁸ However, although some authors deem it otherwise,¹¹⁹ this did not result in a reform of the *siyar*. It has been rightly noted that there is no factual basis for such a perception.¹²⁰ By his detailed analyses of legal opinions of Ottoman scholars of Islamic law between the seventeenth and nineteenth century, Krüger has demonstrated convincingly that if they have given opinions on the relationship of Islamic states at all, they have applied the traditional categories of the *siyar* regarding rebellion and apostasy rather than adapting the *siyar* to the reality of a multitude of independent Islamic states.¹²¹ Therefore the war against Safavid Persia was regarded as a police action only slightly different from actions against highway robbers.¹²² However, this categorisation could hardly provide a correct description of reality, because the major part of the Safavid territory had never been under Ottoman rule. The categorisations undertaken by the Islamic scholars motivated by political opportunity were meant to pro-

¹¹⁵ In particular the treaty of Amasya of 29 May 1555 as the first formal peace treaty between the two empires should be mentioned. cf. C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, 1967, 91 et seq.

¹¹⁶ Khadduri, see note 67, 1240; also, *The Islamic Law of Nations*, see note 74, 62 et seq.

¹¹⁷ While the Ottoman dynasty established the Sunni *Hanafi* school of law as religion of state, Ismā'īl I. established the *ḡafari* school of law in 1501 as the official creed of the realm and pursued the conversion of his subjects to Shiite Islam.

¹¹⁸ Khadduri, see note 67, 1240; also, *The Islamic Law of Nations*, see note 74, 61.

¹¹⁹ Khadduri, see note 74, 61 et seq.; see also note 67, 1240.

¹²⁰ Mössner, see note 103, 66.

¹²¹ Krüger, see note 69, 124 et seq.

¹²² Krüger, see note 69, 124 et seq. As Krüger convincingly demonstrates these advisory opinions due to reasons of political opportunism applied rules of the *siyar* to situations on which they were hardly applicable.

vide reality with the pretence of Islamic legitimacy.¹²³ Hence, the relation between the two empires was based on rules that had no basis in Islamic law but rather were born out of the necessities of the mutual relationship.¹²⁴ As detailed analyses show, neither did the actions of the Ottoman Empire towards non-Muslim nations and the legal opinions issued by the scholars of Islamic law in this regard led to a reform of the *siyar*.¹²⁵

Since neither the Sunni nor the Shiite scholars of law undertook a reinterpretation of the *siyar* in reaction to the changes of state practice, it must be ascertained that a true reform of the *siyar* and the respective “external law” of the *ğafari* school has not been achieved until today. Even though there are several approaches to achieve such reform,¹²⁶ none of these has been accepted by a significant number of scholars of Islamic law. Therefore, the perception of a slow convergence of Islamic law and international law over the centuries lacks any evidence.¹²⁷ Islamic legal scholars, no matter if of Sunni or Shiite creed, have tended to perpetuate the ideas established by their ancestors in the early centuries of Islam rather than to observe the factual state practice. Thus the rules of Islamic law became more and more detached from the rules and regulations derived from factual state actions.¹²⁸ Hence, the only possible conclusion is that Islamic law and present international law represent two fundamentally different legal systems.

d. Islamic Treaty Law as a Point of Contact between Islamic Law and International Law

However, in spite of this finding it might be possible to subsume modern international law into the prerequisites of the Islamic law of international treaties. The *siyar* and also the respective rules of the *ğafari*

¹²³ Krüger, see note 69, 125 et seq.

¹²⁴ [...] *ein der Rechtswirklichkeit angehörendes Verkehrsrecht*. Kruse, see note 72, 9; Krüger, see note 69, 36.

¹²⁵ Krüger, see note 69, 123 et seq.

¹²⁶ For an overview on these views Marboe, see note 14, 97 et seq.; cf. Qorbāniā, see note 82; Broschk, see note 20, 26 et seq.

¹²⁷ Also Kruse, see note 72, IV.

¹²⁸ Mayer, see note 14, 196; regarding the relation between Islamic states Krüger, see note 69, 124 et seq.; Ford, see note 14, 505; Mössner, see note 103, 70; L. Milliot, “La Conception de l’état et de l’ordre légal dans l’Islam”, *RdC* 75 (1949), 597 et seq. (598).

school of law explicitly provide for the possibility of treaties between Muslims and non-Muslim communities.¹²⁹ Moreover, Muslims are religiously obliged to fulfil treaty obligations. The rule *pacta sunt servanda* is derived *inter alia* directly from the Koran and therefore enjoys paramount importance in Islamic law.¹³⁰ All Islamic schools of law concur in the perception that this is both a legal and religious obligation.¹³¹ The obligation to fulfil treaty obligations also includes treaties concluded with non-Muslims.¹³² Even though treaties do not constitute a source of Islamic law, they nevertheless influence its content indirectly, since the fulfilment of a treaty becomes a religious duty for the community and the individuals bound by the treaty. Therefore, if the content of modern international law could be subsumed under the prerequisites of Islamic treaty law, even though this would not change the fundamental difference between both legal systems, international law as a permissible treaty arrangement would also nevertheless be binding from an Islamic law perspective. In order to examine whether this is the case, the prerequisites and limitations the *siyar* and the *ğafari* school of law establish concerning treaties will be examined in detail.

aa. The Treaty of Protection (muwāda'a) as a Facility to suspend ġihad and its Prerequisites

It has already been mentioned that according to the basic concept of the *siyar* the normal condition between the *dār al-islām* and the *dār al-harb*

¹²⁹ Lohlker, see note 114, 23; Bigdeli, see note 111, 39 et seq.; Broschk, see note 20, 26 et seq.; Qorbāniā, see note 82, 3 et seq.

¹³⁰ Krüger, see note 69, 121; Khadduri, in: Khadduri /Liebesny, see note 75, 366; Pohl, see note 14, 81; Ziegler, see note 96, 65; W.M. Ballantyne, "The Shari'a", *Arab Law Quarterly* 2 (1987), 12 et seq. (19 et seq.); Qorbāniā, see note 82, 3; Bigdeli, see note 111, 39 et seq.

¹³¹ Kruse, see note 72, 81; Mayer, see note 14, 201; Salem, see note 67, 198; Noor Mohammad, "Principles of Islamic Contract Law", in: .H.M. Ramadan (ed.), *Understanding Islamic Law*, 2006, 95 et seq. (96); Qorbāniā, see note 82, 3.

¹³² Kruse, see note 72, 81 et seq.; Mayer, see note 14, 201; Salem, see note 67, 198; G.M. Badr, "A Survey of Islamic International Law", in: M.W. Janis/C. Evans (eds), *Religion and International Law*, 95 et seq. (98); Mössner, see note 103, 77; Ziegler, see note 96, 65; Ford, see note 14, 518 et seq.; cf. also Broschk, see note 20, 26 et seq.

is *ġihad*.¹³³ However, under certain conditions the *siyar* allow agreements with the *dār al-harb* suspending *ġihad*.¹³⁴ Such a treaty is called a *muwāda'a*.¹³⁵ The instrument of *muwāda'a* is based on the tradition of the prophet Mohammad, who negotiated an armistice of ten years with the then still non-Muslim people of Mecca in Hudaibiya in the year 628 AD. This tradition being part of the *sunna* of the prophet is also recognised by the *ġafari* school of law¹³⁶ and since the *ġafari* school establishes rules regarding circumstances under which a *muwāda'a* might be cancelled in case of *ġihad* it may be deduced that it also accepts the instrument of *muwāda'a*.¹³⁷

It is characteristic for the *siyar* and the respective regulations of *ġafari* law that as a consequence of the permanent state of war between the *dār al-islām* and the *dār al-harb*, it is the suspension of *ġihad* which necessitates special justification rather than warfare.¹³⁸ However, as may be observed by the treaty of Hudaibiya, permanent warfare was practically unfeasible, even in the times of the prophet. Hence a *muwāda'a* might be negotiated in case the aim of the *ġihad*, i.e. the conversion of the non-Muslims to Islam, cannot be achieved by armed combat at the moment.¹³⁹ Such an agreement must focus on a certain legal consequence and has to fulfil the general prerequisites Islamic law introduces for treaties to become valid.¹⁴⁰ A *muwāda'a* not only encompasses the cessation of hostilities between the parties and thereby suspends an ongoing combat, such a treaty moreover includes a temporary mutual guarantee of security from the military actions of the signatory and may include services in return.¹⁴¹

¹³³ This is also valid for the *ġafari* school of law, cf. Qorbāniā, see note 82, 10, who describes the perception as prevailing although he himself rejects it.

¹³⁴ Krüger, see note 69, 119; Khadduri, in: Khadduri/ Liebesny, see note 75, 350; Qorbāniā, see note 82, 3 et seq.

¹³⁵ Krüger, see note 69, 119; Qorbāniā, see note 82, 3 et seq.

¹³⁶ Qorbāniā, see note 82, 3 et seq.; Bigdeli, see note 111, 39 et seq.; cf. Broschk, see note 20, 29.

¹³⁷ Kohlberg, see note 71, 85 et seq.

¹³⁸ Cf. Khadduri, in: Khadduri/ Liebesny, see note 75, 358 et seq.; Salem, see note 67, 199; Pohl, see note 14, 65; Marboe, see note 14, 96; Qorbāniā, see note 82, 4, 10.

¹³⁹ Krüger, see note 69, 120; cf. Qorbāniā, see note 82, 4.

¹⁴⁰ Lohlker, see note 114, 91; Bigdeli, see note 111, 44 et seq.

¹⁴¹ Kruse, see note 72, 86 et seq.; Salem, see note 67, 198; cf. Qorbāniā, see note 82, 4.

For a treaty to become valid, the person acting on the Muslim side must be competent to conclude a treaty. It is very interesting that according to Islamic legal doctrine, in principle, every individual Muslim is competent to conclude a *muwāda'a*.¹⁴² Although the scholars of Islamic law tried to limit the mandate to conclude treaties at least internally to the leader of the *umma* or the leaders of groups of the *umma*, internal prohibitions, even though they render the perpetrator liable to punishment could not affect the validity of the agreements.¹⁴³ Therefore the lack of legal subjectivity of Islamic states according to Islamic law has had no effect on the mandate of its leaders to conclude a *muwāda'a*.

The *siyar* does not establish any prerequisites concerning the position and competences of the person acting on the non-Muslim side of the treaty. Therefore the non-Muslim treaty party may be a king or any other sovereign within the *dār al-harb*, or a tribe, or a city. The decisive factor is only that the treaty partner wields factual power over his subjects and is recognised by them as their ruler.¹⁴⁴ A *muwāda'a* might also be concluded with Muslim rebels or apostates.¹⁴⁵ However, it should be emphasised that a *muwāda'a*, like any other treaty, must respect the limits of the *šarī'a* in order to be valid according to Islamic law.¹⁴⁶

As has been already mentioned, the major challenge in legal doctrine regarding the *muwāda'a* is the question under which circumstances such a treaty and the imminent suspension of the duty to wage *ḡihad* is justified.¹⁴⁷ Moreover, in accordance with the circumstances surrounding the treaty of Hudaibiya such treaties must have a temporary character with a maximum duration of ten years.¹⁴⁸ ¹⁴⁹ The *ḡafari* school of

¹⁴² Kruse, see note 72, 103.

¹⁴³ Ibid., 103.

¹⁴⁴ Ibid., 104; Mössner, see note 103, 78.

¹⁴⁵ Krüger, see note 69, 133; Khadduri, see note 74, 222, 234. Concerning rebels a *argumentum a fortiori* is applied, by arguing that if it is allowed to conclude such an agreement with unbelievers it must be even more so regarding Muslims. In regard to apostates the possibility of such agreements is justified by comparing them with the inhabitants of the *dār al-harb*.

¹⁴⁶ Salem, see note 67, 198; Ford, see note 14, 521; Bigdeli, see note 111, 44 et seq.

¹⁴⁷ Krüger, see note 69, 121; Salem, see note 67, 199; Kruse, see note 72, 101 et seq.

¹⁴⁸ In the *hanafi* and *maliki* school of law the maximum duration is fixed at between three and four years, because the Meccans broke the treaty prematurely. In detail Khadduri, see note 67; also, *War and Peace in the Law of Islam*, 1955, 134; Ford, see note 14, 504 note 23; Pohl, see note 14, 81.

law concurs with its Sunni counterparts in the perception that a *muwāda'a* between Muslim and non-Muslim communities must be temporary if the non-Muslims do not accept the suzerainty of the Muslims.¹⁵⁰ Concerning possible justifications for a *muwāda'a* with non-Muslims, the various schools of Islamic law concur in the perception that necessity might be such a justification, e.g. due to a temporary superiority of the non-Muslim forces.¹⁵¹ The *ḡafari* schools of law and parts of the Sunni schools deem a *muwāda'a* also permissible if it serves the interests of the Muslims.¹⁵² However, in this case the Sunni schools of law reduce its duration to four months.¹⁵³ A particularity of *ḡafari* law is the suspension of the duty to participate in aggressive *ḡihad*, i.e. *ḡihad* aiming at the extension of the Muslim territory, until the advent of the twelfth *Imām*.¹⁵⁴ Based on this particularity of *ḡafari* law there is a temporary armistice (*hudna*) with the opponents of the Shiites until the return of the twelfth *Imām*, as long as their opponents do not undertake actions which render defensive *ḡihad* obligatory.¹⁵⁵

A *muwāda'a* triggers a fundamental change in the relations between the *umma* (or its part) and the respective non-Muslim community for the duration of the treaty. Whereas Islamic law generally perceives states within the *dār al-harb* as a mere factual organisation for the execution of power without any legal significance,¹⁵⁶ by the conclusion of a *muwāda'a* the community associated with the *umma* by the agreement enters the horizon of Islamic law since the *muwāda'a* legitimises the existing legal organisation of the respective state in the view of the

¹⁴⁹ This provides an explanation why the Leader of the HAMAS proposed to Israel on 22 April 2008 a ceasefire limited to ten years, since this is the maximum duration of a *muwāda'a* according to the *siyar*.

¹⁵⁰ Qorbāniā, see note 82, 4.

¹⁵¹ Kruse, see note 72, 102; Krüger, see note 69, 120 et seq.; Salem, see note 67, 143, 199; Ziegler, see note 96, 64; Qorbāniā, see note 82, 4.

¹⁵² Qorbāniā, see note 82, 4. As an example for a permissible situation it is mentioned that the non-Muslims within the duration of the *muwāda'a* become Muslims.

¹⁵³ Kruse, see note 72, 105; Salem, see note 67, 143, 199; cf. Lohlker, see note 114, 36.

¹⁵⁴ A.K.S. Lambton, "A Nineteenth Century View of Jihād", *Studia Islamica* 32 (1979), 181 et seq. (183); Kohlberg, see note 71, 78 et seq.; cf. Momen, see note 12, 1985, 189 et seq.

¹⁵⁵ Kohlberg, see note 71, 78.

¹⁵⁶ Kruse, see note 72, 60, 70; Krüger, see note 69, 120.

umma.¹⁵⁷ Due to the mutual recognition for the duration of the *muwāda'a* there is a valid and common norm for the actions of both communities and the legally deficit status of the non-Muslim state is healed for the purposes of the treaty.¹⁵⁸ The possibility of a *muwāda'a* to be based on equality of the parties and to encompass temporary mutual recognition is already implied in the text of the treaty of Hudaibiya.¹⁵⁹ In its text all references to a superior rank of Mohammad and to his position as prophet and messenger of God are avoided.¹⁶⁰

Hence a *muwāda'a* constitutes a temporally and regionally limited legal system between the participating states.¹⁶¹ In consequence, the *muwāda'a* serves as an instrument to establish temporary relations based on equality between Muslim and non-Muslim states and therefore has been denoted correctly as nucleus of a law of international treaties within Islamic law.¹⁶² The concept of *muwāda'a* has vividly been labelled a compromise between idea and reality, whose basis is the political and military need for the Muslim community to reach a cease-fire and thereby to become a subject of bilateral treaty law.¹⁶³ Therefore it might be possible to interpret modern international law from an Islamic law perspective as a form of *muwāda'a*, based on the necessity for the *umma* to accept the reality of a permanent coexistence of different states.

bb. Modern International Law as a Form of muwāda'a?

A major argument for the perception that Islamic law accepts modern international law as a form of *muwāda'a* is that Islamic law by allowing the institute of *muwāda'a* arranged for a legal institute by which mutual obligations between states might be established. Moreover, the fulfilment of these obligations is ensured by the superior importance the rule *pacta sunt servanda* enjoys in Islamic law.¹⁶⁴ However, first it should be remembered that Islamic law does not accept the partition of the *umma*

¹⁵⁷ Krüger, see note 69, 120; Pohl, see note 14, 81; Lohlker, see note 114, 33 et seq.

¹⁵⁸ Kruse, see note 72, 71; Pohl, see note 14, 81; Lohlker, see note 114, 92.

¹⁵⁹ Khadduri, in: Khadduri/ Liebesny, see note 75, 365.

¹⁶⁰ Also Pohl, see note 14, 80; Lohlker, see note 114, 34.

¹⁶¹ Kruse, see note 72, 81 et seq.

¹⁶² Pohl, see note 14, 81, 84; Kruse, see note 72, 9.

¹⁶³ Kruse, see note 72, 129 et seq.; Gräf/ Krüger, see note 84, 277.

¹⁶⁴ So apparently Qorbāniā, see note 82, 3 et seq.

into different states. Therefore according to the rules of Islamic external law, treaty regulations between Muslim states might only be concluded under the fiction that each of the parties regards the other one as rebel or apostate. Such a perception is however hardly consistent with the principle of sovereign equality as a basic pillar of modern international law.

Second, a *muwāda'a* between Islamic and non-Islamic states according to Islamic law has to be temporary. One might be tempted to rely on an implied extension of a treaty as long as it has not been terminated, to achieve a permanent commitment to treaties which possess permanent character. However, the compliance of such a solution with the temporary nature of treaties according to Islamic law would be a mere farce.

Finally from the perspective of Islamic treaty law, the binding nature of customary international law for Islamic states is hard to explain and might be achieved by the fiction of an imaginary conclusion of a respective treaty. Although Islamic law in principle accepts customary law as subsidiary source of law,¹⁶⁵ it is accepted only under the condition that Islamic law is silent in the respective matter and that the rules of customary law do not breach other rules of Islamic law.¹⁶⁶ Since the *muwāda'a* provides prerequisites for a suspension of *ḡihad* exclusively there is no room for customary law in these matters.

Therefore Islamic law on the one hand and modern international law on the other form two separate and different legal systems. Although there are overlaps between the two systems, since some principles like *pacta sunt servanda* are recognised by both, the fundamental differences mean that modern international law cannot be explained in terms of Islamic law.

In spite of the discrepancy between the two systems, there is no doubt that today Islamic states perceive themselves as being principally bound by international law.¹⁶⁷ This is demonstrated in particular by the fact that all states with a majority Muslim population have decided to join the United Nations and to participate in its various principal and subsidiary organs. The acceptance of the principles and aims of this or-

¹⁶⁵ It should be mentioned that the term customary law (*orf*) applied in Islamic legal doctrine mainly refers to domestic law.

¹⁶⁶ Bigdeli, see note 111, 35.

¹⁶⁷ Also Krüger, see note 69, 23; Khadduri, see note 67, 67 et seq.; Ford, see note 14, 514 et seq.; cf. Badr, see note 25, 98; Kruse, see note 72, 170.

ganisation by all of these states is demonstrated vividly by the fact that the preamble of the Charter of the Organisation of the Islamic Conference,¹⁶⁸ which all these states have joined, explicitly emphasises the commitment of its members to the Charter of the United Nations. Even the I.R. Iran, which has relied repeatedly on Islamic law to justify breaches of internationally recognised human rights standards, has demonstrated constantly that in spite of discrepancies between Islamic law and international law, it perceives itself principally bound by the latter.¹⁶⁹ For instance although in the course of the hostage crisis in 1979/80 the I.R. Iran refused to appear before the ICJ and challenged the jurisdiction of the court it did not base a single argument on Islamic law, but rather referred to the interventions by the United States in Iran since the 1950s, which they deemed relevant for the case and therefore refused to accept a decision limited to the actual occupation of the embassy. The I.R. Iran did not challenge being bound by its international obligations, and explicitly emphasised the respect the I.R. Iran held *vis-à-vis* the court and its merits for peaceful reconciliation.¹⁷⁰ The I.R. Iran based all its arguments on categories of international law rather than Islamic principles.¹⁷¹ To refer to a more recent case, also in the course of the present dispute on the Iranian nuclear programme, the I.R. Iran avoids any references to Islamic law but instead bases its arguments on international law invoking the Treaty on the Non-Proliferation of Nuclear Weapons and the Statute of the International Atomic Energy Agency to plead its case.¹⁷²

Historic examples provided by several authors give evidence that in spite of the rigidity of Islamic legal doctrine, already in former times the practice of Islamic states demonstrated that these states adjusted their actions to the necessities to accept the reality of a permanent coexis-

¹⁶⁸ Charta of the Organisation of the Islamic Conference of 4 March 1972, entry into force 28 February 1973, UNTS Vol. 914, 111 et seq.

¹⁶⁹ Broschk, see note 20, 53 et seq.

¹⁷⁰ United States Diplomatic and Consular Staff in Tehran, Provisional Measures, ICJ Reports 1979, 7 et seq. (10 et seq.); Case Concerning United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, 3 et seq. (8 et seq.).

¹⁷¹ Mayer, see note 14, 196.

¹⁷² See the letter of the Iranian Minister of Foreign Affairs to the General Secretary of the United Nation of 24 March 2008, Annex to the letter of information from the International Atomic Agency INFCIRC/724 of 28 March 2008, <<http://www.iaea.org/Publications/Documents/Infcircs/2008/infcirc724.pdf>>.

tence of different states, by almost completely disregarding the rules of *siyar* in their relations with other states no matter whether Islamic or non-Islamic.¹⁷³ With regard to the discrepancies between Islamic law and modern international law and the practice of Islamic states which is more or less consistent with the latter, the observations of these authors seem perfectly correct also for the present situation. Khadduri elaborates in this regard:

“Twentieth-century Islam has found itself completely reconciled to the Western secular system [i.e. modern international law][...]. Even the jurists who objected to the secularization of Islamic Law governing domestic affairs have accepted marked departures from the law and practice governing external relations.”¹⁷⁴

Although the author can endorse this finding in large part, there is the important constraint that neither Islam nor Islamic law has really accepted modern international law because the voices of the scholars of Islamic law supporting a reinterpretation of Islamic law consistent with modern international law in general and human rights in particular remain scarce and have still not prevailed.¹⁷⁵ Hence, although Islamic law is still at odds with international law, Islamic states have largely accepted the binding character of the latter in spite of its discrepancy to Islamic law.

There are multiple articles and statements which purport the consistency of both legal systems by evading problematic regulations like the temporal limitations of the *muwāda'a* or by claiming that the practice of Islamic rulers which has not been consistent with the *siyar* resulted in its reform.¹⁷⁶ The latter perception which is, for example held regarding the actions of Islamic rulers on the Iberian peninsula is based on the argument that the respective rulers have perceived themselves as extremely orthodox and Islamic and therefore their actions in defiance of traditional *siyar* must either reflect a reform of the *siyar* or must have led to this reform. Lohlker deems it unlikely that these strictly orthodox and pious rulers might have failed to follow the regulations of the

¹⁷³ Mayer, see note 14, 196 et seq.; Krüger, see note 69, 89 et seq.; Kruse, see note 72, 89 who supposes that already during the Umayyad Caliphate the state practice in the first place followed practical considerations rather than the *siyar*; Ziegler, see note 96, 166 et seq.; Ford, see note 14, 513.

¹⁷⁴ Khadduri, see note 67, 1241.

¹⁷⁵ For an overview on the different approaches of the reinterpretation of Islamic law see Marboe, see note 14, 97 et seq.

¹⁷⁶ Lohlker, see note 114, 94 et seq.

siyar.¹⁷⁷ However, this perception has no hold in Islamic legal doctrine. As has been examined in detail above, the practice of Islamic states and its rulers is principally no source of Islamic law and there is no hint for a reinterpretation of the *siyar* which might have been reflected in the practice of these rulers and their communities. Moreover, Krüger has provided ample evidence that the Ottoman Sultans who perceived themselves likewise as devout Muslims and as the keepers of orthodoxy within Islam, had departed substantially from Islamic law and the *siyar* concerning their international relations. However, Islamic law has neither been reformed by this discrepancy nor by Islamic scholars in reaction to the practise of Islamic states.¹⁷⁸

Hence, Islamic law, perceiving itself as a comprehensive legal system of an absolute character, can accept modern international law only in individual aspects but not as a whole. However, regarding the practice of Islamic states this discrepancy remains largely irrelevant, since these states have adopted their actions principally to the rules of international law. There are just a few instances when Islamic states reject their commitment to international treaties with the argument that these are inconsistent with Islamic law. Islamic states and in particular the I.R. Iran mostly tend to raise this claim regarding the universal validity of human rights.¹⁷⁹

In order to avoid treaty obligations inconsistent with Islamic law many Islamic states have raised reservations regarding regulations which are at variance with Islamic law when joining multilateral treaties.¹⁸⁰ However, the I.R. Iran, from time to time, has also contested its obligation to fulfil treaty provisions which it perceived inconsistent with Islamic law even though it had not raised any reservation in this regard when signing and ratifying the treaty.¹⁸¹ Ayatollah Khomeini,

¹⁷⁷ Lohlker, *ibid.*

¹⁷⁸ Krüger, see note 69.

¹⁷⁹ Marboe, see note 14, 88 et seq.; Ford, see note 14, 499 et seq. Although there are discrepancies between the prohibition of force as promulgated by the Charter of the United Nations and the Islamic concept of *ghihad* no Islamic state denies being bound by the prohibition of the use of force.

¹⁸⁰ Cf. the reservations of Islamic states to the Convention on the Rights of the Child.

¹⁸¹ Regarding the ICCPR for instance the Iranian delegate declared: “[...] there could be no doubt that the tenets of Islam would prevail whenever the two sets of laws were in conflict”, in: Consideration of Reports Submitted by States Parties under article 40 of the Covenant: *Iran, Yearbook of the Human Rights Committee 1981 – 1982*, Vol. I, 345, para. 4 also 363,

the founder of the I.R. Iran, had declared that he opposed any international treaty if it was inconsistent with Islamic law.¹⁸² From an Islamic law perspective this opinion seems consequent since the principle of *pacta sunt servanda* according to Islamic doctrine may only apply if the *šarī'a* as the “Constitution of Islam” is being respected, because otherwise Islamic law does not even allow for the conclusion of the treaty.¹⁸³

In the following section the conflict between both legal systems and the consequences of the discrepancies between the international obligations of an Islamic state and Islamic law will be analysed from an international law perspective.

2. The Conflict between the two Systems from the Perspective of International Law

a. Islamic *ğafari* Law

From an international law perspective, the relation between Islamic law and international law is quite problematic. Whereas the state is the principal subject of the religiously neutral international legal order, Islamic law perceives itself as an ideal and timeless legal system which has been established by God rather than men. Its only subjects are the *umma* and the individual Muslims.

One may contemplate whether Islamic law or at least the *šarī'a* as its core might be regarded as a particular system of international law between Islamic states. However, it has been demonstrated that the very structure of Islamic law is opposed to the idea of a legal system between different states regulating its mutual relation on the basis of sovereign equality. Therefore only individual regulations of Islamic law might be part of a particular system of international law but not Islamic law as a whole. Hence, although Islamic law perceives itself as an absolute legal order which claims to be binding on every Muslim, it has no direct relevance within the system of modern international law. However, in some cases Islamic law might acquire an indirect relevance since it constitutes one of the major legal systems in the sense of Article 9 of the

para. 12 et seq.; cf. also the Iranian law on the ratification of the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of the United Nations, see note 62.

¹⁸² Mayer, see note 14, 201; Farhang Rajaei, see note 11.

¹⁸³ Salem, see note 67, 198; Ford, see note 14, 521.

Statute of the ICJ.¹⁸⁴ Due to this qualification and based on Article 38 para. 1 (c) of the Statute, Islamic law can have an impact on the adjudication of the court.^{185 186}

Besides, the key for understanding the relation between international law and Islamic law lies in the fact, that with the exceptions mentioned above, Islamic law acquires relevance for international law only insofar as Islamic states orientate their domestic legal systems towards Islamic law. Moreover, they tend to raise reservations upon signature and/or ratification of multilateral treaties which they perceive to be partly inconsistent with Islamic law; this happened in particular regarding human rights treaties. Hence, Islamic law in spite of its own claim to absolute validity is dependant on states adopting and recognising it as part of their domestic legal system and thereby taking over its effective implementation. Although millions of Muslims around the world might interpret Islamic law as binding for themselves, it is the individual state which chooses to introduce and enforce Islamic law of a certain school within its domestic sphere.¹⁸⁷ If an individual state, like the I.R. Iran regarding the rules of *ḡafari* law, integrates Islamic law into its domestic legal order, Islamic law becomes effective as part of domestic law. Therefore, in the following the relation between domestic law and international law will be analysed.

b. The Relation between Domestic Law and International Law from an International Law Perspective

Even though there is no rule in international law according to which domestic law being inconsistent with the international obligations of a state becomes automatically void,¹⁸⁸ it is recognised that if domestic law is at variance with international law, the state is obliged to amend its

¹⁸⁴ Cf. B. Fassbender, “Art. 9”, in: A. Zimmermann/ C. Tomuschat/ K. Oellers-Frahm (eds), *The Statute of the International Court of Justice*, 2006, 274; cf. Saudi Arabia v. Arabian American Oil Company (Aramco) Arbitration of 23 August 1958, *ILR* (1958) 27, 117 et seq. (162).

¹⁸⁵ Khadduri, in: Khadduri/ Liebesny, see note 75, 372.

¹⁸⁶ Regarding the importance of the major legal systems in Article 38 para. 1 (c) cf. A. Pellet, “Art. 38”, in Zimmermann/ Tomuschat/ Oellers-Frahm, see note 184, 770.

¹⁸⁷ Mayer, see note 14, 152 et seq.

¹⁸⁸ Dahm/ Delbrück/ Wolfrum, see note 93, 34. I. Brownlie, *Public International Law*, 2003, 34.

regulations in accordance with the latter.¹⁸⁹ The principle that states have to adjust their domestic law to their international obligations and may not invoke it to justify breaches of international law has already been recognised in the *Alabama Arbitration* of 1872 and has been constantly confirmed by international courts since then.¹⁹⁰ Also article 27 of the Vienna Convention on the Law of Treaties¹⁹¹ stipulates:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Since the principle invoked in the article is a codified rule of customary international law,¹⁹² it is binding also on states which, like the I.R. Iran, have not yet ratified the Convention. In consequence, no matter which rank the respective norm of domestic law enjoys, a state may not invoke it to elude its international obligation.¹⁹³ This principle derives from the argument that the actions of the legislator including the constitutional legislator cannot be regarded as actions of a third person acting outside of the responsibility of the state.¹⁹⁴ The state, as a subject of international law, is bound to fulfil its obligations and cannot provide

¹⁸⁹ Ibid., 102 et seq.; K.J. Partsch, “International Law and Municipal Law”, in: Bernhardt, see note 67, Vol. II 2, 1992, 1183 et seq. (1190); Bigdeli, see note 55, 74, 91; Brownlie, see note 188, 35; cf. Herdegen, see note 58, 154.

¹⁹⁰ J. Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 1898, 653 et seq. (659); Advisory Opinion of the Permanent Court of International Justice of 21 February 1925, Exchange of Greek and Turkish Population, *PCIJ Series B* No. 10, 20; Advisory Opinion of the Permanent Court of International Justice, Greco-Bulgarian Communities Case, of 31 July 1930 *PCIJ Series B* No. 17, 32; ICJ, Nottebohm Case, of 6 April 1955, *ICJ Reports* 1955, 4 et seq. (20 et seq.); Brownlie, see note 188, 34 et seq.

¹⁹¹ Vienna Convention on the Law of Treaties of 23 May 1969, entry into force 27 January 1980, *UNTS* Vol. 1155, 331 et seq. The then Iranian Empire signed the Convention on 23 May 1969 but it has not been ratified until today.

¹⁹² Explicitly already the Advisory Opinion of the Permanent Court of International Justice of 31 July 1930, Greco-Bulgarian Communities Case, *ibid.*, 32; cf. L. Oppenheim/ R. Jennings/ A. Watts, *International Law*, Vol. I/1, 1992, 84.

¹⁹³ Dahm/ Delbrück/ Wolfrum, see note 93, 103; Bigdeli, see note 111, 74, 91; Brownlie, see note 188, 34 et seq.; Partsch, see note 189, 1190; Oppenheim/ Jennings/ Watts, see note 192, 84.

¹⁹⁴ Brownlie, see note 188, 2003, 34.

an excuse not to do so.¹⁹⁵ Therefore even the claim that special constitutional requirements prevent necessary amendments of domestic law does not affect international obligations.¹⁹⁶ It is interesting to note that in spite of tendencies of the Iranian legislation regarding its domestic law as being superior to international law, Iranian legal science recognises the duty of the state to adjust its laws to international norms as being an evident and basic requirement to ensure the effectiveness of the international legal order.¹⁹⁷

Due to this principle Islamic *ḡafari* law as any other domestic law including the Constitution may not be invoked by the I.R. Iran to avoid its international obligations. Hence, even though article 4 IC demands all laws to be based on Islamic law and not to be inconsistent with its rules, this regulation does not affect the international obligations of the I.R. Iran. As a result the I.R. Iran is internationally liable *inter alia* to fulfil its human rights obligations no matter whether these are partly deemed inconsistent with the *ḡafari* law and therefore with the Iranian Constitution. Although the I.R. Iran due to the peculiarities of its Constitution might not fulfil its international human rights obligations without fundamental changes of its constitutional order, this requirement nevertheless does not affect its international obligation to do so.

c. Options for Islamic States to Avoid International Obligations Inconsistent with Islamic Law

As has been elaborated above, the precedence of international law over Islamic law in spite of their fundamental differences is mostly accepted by Islamic states with regard to their external relations. However, conflict arises if Islamic states reject being bound by individual norms of

¹⁹⁵ Cf. Oppenheim/ Jennings/ Watts, see note 192, 85.

¹⁹⁶ Ibid., 85; cf. Advisory Opinion of the Permanent Court of International Justice of 4 February 1932, Treatment of Polish Nationals and other Persons of Polish origin and speech in the Danzig Territory, PCIJ Series A/B No. 44, 24; Georges Pinson Case, in: A.D. McNair/ H. Lauterpacht (eds), *Annual Digest of Public International Law Cases 4 (1927 – 1928)*, 9 et seq. (10 et seq.). In regard to the ICCPR including references to the respective practice of the Human Rights Committee of the United Nations, A. Seibert-Fohr, “Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2”, *Max Planck UNYB 5 (2001)*, 399 et seq. (439 et seq.).

¹⁹⁷ Bigdeli, see note 111, 74, 91 et seq.

international law which in their opinion violate Islamic law. As said this almost exclusively takes place regarding the universal validity of human rights. Viewed from legal doctrine this claim is relatively unproblematic concerning treaty obligations as long as the respective states apply the regular instruments international law provides for such instances, i.e. they refrain from joining the respective treaties or they raise reservations to multilateral treaties regarding individual regulations.

aa. Reservations as an Instrument to Prevent Conflict between International Obligations and Islamic Law

Article 2 para. 1 d) of the Vienna Convention on the Law of Treaties defines a reservation as:

“[...] a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”¹⁹⁸

This definition is a codification of customary international law¹⁹⁹ and therefore is also binding on states which are not party to the convention.

A valid reservation therefore provides states with an instrument to exclude the application of individual regulations of a treaty on itself without being forced to refrain from joining the treaty. Several Islamic states have used this instruments when signing and ratifying the human rights instruments mentioned in the introduction. However, the I.R. Iran has raised a reservation only in regard to the Convention on the Rights of the Child. It has declared that it reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic law and the international legislation in effect.²⁰⁰ Aside it should be mentioned that there is substantive doubt regarding the validity of reservations that, without any concretisation, reject the com-

¹⁹⁸ G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol.1/3, 2002, 558.

¹⁹⁹ H. von Heinegg, in: K. Ipsen (ed.), *Völkerrecht*, 2004, 167.

²⁰⁰ Upon signature: “The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic *Shari’a*, and preserves the right to make such particular declaration, upon its ratification.” Upon ratification: “The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect.”

mitment to all regulations of a treaty inconsistent with Islamic law because, in order to be valid, a reservation must be specific and its scope must be clearly distinguishable. Otherwise it would not be feasible for other State Parties to understand its scope and decide whether to object.²⁰¹ In case of a blanket reservation not to be bound by any regulations inconsistent with Islamic law this is hardly possible, because particularly with non-Islamic states, a detailed knowledge of Islamic law cannot be expected.

Moreover, there are a multitude of different interpretations of Islamic law which are partly conflicting. Finally, it is not even clearly distinguishable to which school of Islamic law the reservation refers. Unspecific reservations are in particular problematic concerning human right treaties. It is convincingly held that reservations to such treaties must not be so unspecific as to prevent individuals from understanding the scope of their rights established by these treaties.²⁰² Due to the questionable validity of the reservation of the I.R. Iran several state parties have objected.²⁰³

But what if treaties are perceived to be (partly) inconsistent with Islamic law and no objections have been made?

bb. The Solution of Conflicts between Treaty Obligations and Islamic Law in Case no Explicit Reservations have been raised

As already mentioned the I.R. Iran has joined numerous human right treaties without any reservation. Nevertheless, the I.R. Iran has rejected obligations following from the International Covenant on Civil and Political Rights insofar as they are perceived incompatible with Islamic

²⁰¹ See Human Rights Committee of the United Nations, General Comment No. 24 of 4 November 1994, Doc. CCPR/C/21/Rev.1/Add.6, para. 19; see also the rejections of Denmark and Italy against the Iranian reservation to the Convention on the Rights of the Child. Regarding doubts about the reservation of Kuwait to the ICCPR with largely similar wording M. Nowak, *U.N. Covenant on Civil and Political Rights*, 2005, 594 including the annexed objections of Finland and Sweden rejecting the Kuwaiti reservation, 972 and 982 respectively.

²⁰² R.L. Bindschedler, "Treaties, Reservations", in: R. Bernhardt, see note 67, Vol. IV 2, 2000, 965 et seq. (977).

²⁰³ Denmark, Italy, the Netherlands and Austria have rejected the Iranian reservation.

law.²⁰⁴ It is questionable whether the argumentation of the Iranian government has any basis in international law and whether there is an option for Islamic states to solve such conflicts in favour of Islamic law without violating their international obligations.

As a consequence to the lack of direct relevance of Islamic law within the system of international law, there is no direct consequence in respect of the international obligations of Islamic states if these obligations violate Islamic law. Therefore there is no basis in international law for refusing *per se* any obligations of Islamic states which are inconsistent with Islamic law in general or the *šari'a*. Hence, the idea of a “silent” implied reservation of Islamic states to any such obligation must also be rejected. Moreover, such a reservation would be diametrically opposite to the *bona fide* principle because if a “silent” reservation were valid there would be no certainty for the parties to a treaty whether the other parties are bound by the treaty and to what extent. Finally, States Parties must have the option to react to a reservation and to object to it, which would be hardly feasible in case of a “silent” reservation.

A final possibility for the I.R. Iran to avoid obligations inconsistent with Islamic law would be to presume a subsequent reservation raised after the Islamic revolution concerning international obligations which are inconsistent with the *šari'a* or Islamic law in general. However, a reservation must be raised at the latest together with the last act necessary for the binding effect of the treaty.²⁰⁵ This principle of customary international law has been adopted in arts 2 para. 1 d) and 19 of the Vienna Convention on the Law of Treaties and due to its customary law character is also binding if the Convention is not applicable. Hence, such a reservation would not be valid. Although even an invalid reservation might be recognised by the other States Parties, there is no possibility for such a recognition since the I.R. Iran never officially made such a reservation.

²⁰⁴ Cf. the elaborations of the Iranian delegate Khosroshahi in front of the Human Rights Committee: “He [i. e. the Iranian delegate] felt bound to emphasize, that although many articles of the Covenant [i. e. the ICCPR] were in conformity with the teachings of Islam, there could be no doubt that the tenets of Islam would prevail whenever the two sets of laws were in conflict.” Summary Record of the 364th Mtg of 19 July 1982, Doc. CCPR/C/SR. 364 (1982), 3 para. 4; cf. also Ayatollah Khomeini, quoted in: Rajaei, see note 11, 81.

²⁰⁵ Von Heinegg, see note 199, 167; cf. T. Stein/ C. v. Buttlar, *Völkerrecht*, 2005, 24 et seq.; cf. also Bindschedler, see note 202, 965; Dahm/ Delbrück/ Wolfrum, see note 198, 565 (601 et seq.).

Hence, there is no doubt that the I.R. Iran is also bound by the treaties joined before the Islamic Revolution of 1979 and the establishment of the Islamic Republic, although Ayatollah Khomeini declared his opposition to everything inconsistent with Islamic law no matter whether constitutional provisions or international treaties.²⁰⁶ According to the well-established principle of the continuity of states, the identity of a state is not affected by changes of its constitutional system, no matter if changes have been of a revolutionary character.²⁰⁷ Therefore each subsequent administration inherits the international rights and obligations established by its predecessors.²⁰⁸ Moreover the principal commitment to the human rights treaties joined by the pre-revolutionary government was expressively acknowledged by the I.R. Iran.²⁰⁹ Further evidence is given by the fact that the I.R. Iran never contested its obligation to provide reports to the Human Rights Committee following from article 40 of the International Covenant on Civil and Political Rights.

Therefore, with the exception of the Convention on the Rights of the Child the I.R. Iran may not invoke any reservation to justify violation of its treaty-based obligations to protect and ensure human rights. A conflict between treaty obligations and Islamic law can only be prevented by a valid reservation. Since the I.R. Iran only raised a reservation to the Convention on the Rights of the Child it is bound in full to the international human rights conventions ratified prior to the revolution and may not reject its obligations established by these treaties based on the argument that these are (partly) inconsistent with Islamic

²⁰⁶ Farhang Rajaei, see note 11, 81.

²⁰⁷ Dahm/ Delbrück/ Wolfrum, see note 198, 601 et seq.; also, see note 93, 138; Oppenheim/ Jennings/ Watts, see note 192, 204 et seq.; Brownlie, see note 188, 80; A. Zimmermann, *Staatennachfolge in völkerrechtliche Verträge*, 2000, 37; A. Verdross/ B. Simma, *Universelles Völkerrecht*, 1984, 230 et seq.; K. Doehring, *Völkerrecht*, 2004, 128.

²⁰⁸ Dahm/ Delbrück/ Wolfrum, see note 198, 601 et seq.; see note 93, 138; Oppenheim/ Jennings/ Watts, see note 192, 204 et seq.; Zimmermann, see note 207, 37; Verdross/ Simma, see note 207, 230 et seq.; Doehring, see note 207, 128.

²⁰⁹ Explicitly Hossein Mehrpour, the head of the Iranian delegation before the Human Rights Committee, Summary Record of the 1253rd Mtg of 30 July 1993, Doc. CCPR/C/SR.1253 para. 2.

law or the *šari'a*. In case of conflict between Islamic law and international law, from an international law perspective the latter prevails.²¹⁰

V. Conclusion

Islamic law recognises domestic law only insofar as it is consistent with Islamic law. The Iranian legal system tries to solve this problem by conceding superior rank to Islamic *šari'a* law and ordering domestic law to comply fully with it.

According to article 4 IC, Islamic law is perceived as the basis of all Iranian laws and regulations, and every norm including the Constitution has to be interpreted in the spirit of it. This principle also affects the impact of international law on Iranian law, since article 9 of the Iranian Civil Code establishes that international treaties joined by the I.R. share the quality of parliamentary legislation which ranks below the Constitution. Hence, provisions of international treaties according to the domestic hierarchy of norms rank below both the Constitution and Islamic law.

From an Islamic law perspective international law can only be accepted as far as it complies with the former. However, there is no real "Islamic international law" in existence, since the *siyar* are not based on the principle of equality of states but constitute a personal legal order whose only subjects are the *umma* and its individual members. Hence, there is in principle no room for a coexistence of different states in Islamic law. Options for a relation between states based on equality are in existence only insofar as the *siyar* authorises international treaties. The prerequisites for such treaties according to the *siyar* might be addressed as Islamic law of international treaties. However, also in this respect there are fundamental discrepancies between the *siyar* and modern international law. Hence, both systems differ substantially and share points of contact in individual aspects only.

Nevertheless, this conflict is of practical relevance concerning only a very limited number of topics, because all Islamic states have in principle, accepted the validity of modern international law and have adopted their state practice to its prerequisites to a very large extent. However,

²¹⁰ Cf. T. Opsahl, in: "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Iran", *Yearbook of the Human Rights Committee 1981 – 1982*, Vol. I, 348 para. 55; also A. Dieye in the same Volume, 354 para. 18; also there C. Tomuschat, 357 para. 10.

concerning human rights Islamic states and in particular the I.R. Iran have repeatedly emphasised that several aspects of the internationally established human rights standards are inconsistent with Islamic law and/or the *šari'a* according to its traditional and still predominant interpretation. The *šari'a* as the “Constitution of Islamic law” enjoys superior rank within Islamic legal doctrine and any treaty inconsistent with it is invalid. Therefore from an Islamic law perspective at least the *šari'a* must prevail in case of conflict. In consequence, it must be argued that from the perspective of Islamic Law Islamic states cannot be bound by any international obligation contradicting the *šari'a* no matter whether this obligation has been established by treaty or customary international law.

From an international law perspective neither the IC nor Islamic law can affect the international obligations of the I.R. Iran. Otherwise a universal system of international law would not be feasible. Islamic law is part of domestic law and the obligation to adjust domestic law to the international obligations of a state is a well established principle of international law. Islamic states might rely only on the regular instruments provided by international law to exclude the application of certain provisions, i.e. reservations to treaties and objections to norms of developing customary international law which contradict their interpretation of Islamic law or the *šari'a*. Legal devices like “silent” or subsequent reservations must be rejected as they have no basis in international law.

Hence, the I.R. Iran is bound in full by international human rights treaties ratified before the Islamic Revolution of 1979, no matter whether or not the rights established by these treaties are perceived as consistent with Islamic law or not.