

# Peace and Reconciliation in International and Islamic Law

“Kaleem Hussain’s book is an important scholarly contribution to the literature available on peace, reconciliation and conflict resolution, with diplomatic sensitivities in the context of International Law and Islamic Law. International humanitarian law and laws of war can learn a lot from Islamic history, which is replete with shining examples of mercy, forgiveness, generosity and chivalry.

Given the struggles of the people of Kashmir and Palestine, and so many other unresolved conflicts, Kaleem Hussain’s work is essential reading as it provides a scholarly perspective on the interface of International Law and Islamic Law, whose principles can make deft diplomacy and peace and reconciliation a force multiplier for a rules-based world order, which is the bedrock of international relations.”

**Senator Mushahid Hussain Sayed**  
**Journalist, Politician, and Chairman of the Senate Defence Committee in Pakistan**

“Kaleem Hussain offers smart, realistic and achievable solutions for a world torn apart by bitter grievances and conflict, and his thoughtful and evidence-based ideas deserve the widest audience. Drawn from a careful reading of history, and especially from Islamic Law and tradition, he has identified and beautifully explained key proven processes for de-escalating problems and restoring harmony.”

**Dr. Joel Hayward**  
**Professor of Strategic Thought, Rabdan Academy, United Arab Emirates**

“This book is a laudable contribution to the study of its very important and timely topic.”

**Dr. Ahmed Al-Dawoody,**  
**Legal Adviser for Islamic Law and Jurisprudence at the International Committee of the Red Cross (ICRC)**

“Hussain explores the intersections of diplomacy and International Law from the under-utilised lens of Shari’a principles. With conflict ravaging Muslim-majority countries, this timely book raises the issue of what role an Islamic approach to peace building might play.”

**Dr. Nasya Bahfen**  
**Senior Lecturer in Journalism, La Trobe University, Australia**

# Peace and Reconciliation in International and Islamic Law

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Kaleem Hussain

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Scholars  
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I dedicate this book to my wife and daughter who have continuously motivated me throughout the book's journey for which I am grateful, my beloved parents whose love, affection and grace one is forever indebted to, my comrades, friends and leaders in society whose courage and determination are utterly inspirational and to those around the world who are suffering under injustice and oppression.

Disclaimer when it comes to hadith citation, the author has not referred directly to the primary hadith source but has relied on the authoritative citation cited in the books and articles consulted that are mentioned in the reference section.

The viewpoints expressed by the author in this book are that of the author and do not in any way represent the viewpoints of the organisations the author has affiliations with currently or previously.



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## K WL DGM TS

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# INTRODUCTION

## Abstract

This chapter sets out the core premise of the book. This book introduces a new theological approach to international law and dispute settlement, drawing from the rich tradition of Islamic law. This new approach refines the tools that are available to international interlocutors to help arbitrate and foster peace and reconciliation between disputing parties. It also sets the stage for exploring the potentials and pitfalls of such a theological model for international conflict resolution, peace and reconciliation initiatives.

We inhabit a world that is deeply interconnected. In this kind of global order, multiple jurisdictions, international treaties, frameworks, conventions, and international norms are used and indeed *required*. These instruments help to resolve conflicts between nation states, establish peace, and reconcile issues between several international actors. In this context, the aim of this book is to shed light on the *normative principles of theological jurisprudence*—which can provide a new basis for negotiating these large-scale international disputes and working towards peace and reconciliation. While the parameters of public international law provide the legal framework for the conduct of nation states in conflicts and wars, I shall demonstrate here that supplementing these legal tools with a theological approach can assist the mechanisms of arbitration and peacekeeping to broker peaceful outcomes. This new approach—grounded in theology and informed by the developments of the modern world—has much to add to conflict resolution at a global scale.

It can be noted, of course, that such a theological basis often leads to conflict and stalemate in the first place and fuels global and regional disputes of a religious character. From this viewpoint, a *neutral* theological framework is best suited to broker a peaceful resolution to a conflict. I shall demonstrate what such a *neutral* theological framework would entail. I shall then show that while a theologically neutral jurisdictional framework can indeed be useful as a tool for conflict resolution, if these frameworks do not address the sensitive theological issues that drive certain conflicts, then they are less likely to succeed in resolving those conflicts.

This book brings a novel perspective to the peaceful resolution of disputes, as understood under the framework of international law. International law—or the way we see it today—is a product of a range of historic and cultural events. The birth of this legal system on a global scale can be traced to the systematic creation of international *institutions* in the post-world war era. Institutions such as the United Nations and its organs, including the World Bank, the World Trade Organization, the International Monetary Fund, and several other bodies, were created to achieve harmony, international peace, and cooperation between nation-states.

The faith in the power of these institutions—often termed *institutionalism*—is a core perspective in international law. One prominent tussle is between the *realists* and the *institutionalists*. Whereas the realists are sceptical about the role that these institutions can play in achieving cooperation (owing to power imbalances and the vested interests of nation-states), institutionalists see cooperation through systematic mechanisms from within the folds of international law as a real and achievable possibility. These two opposing narratives seem to frame early approaches to international law.

Another dominant framework, which has gained traction with time, is the ‘liberal perspective’ to international law. The liberals adopt what has been called a ‘bottom-up’ approach, by emphasising that every state is rooted in an interdependent transitional society and polity and thus it is in the interest of nation-states to achieve cooperation and maintain global order. In contrast—or perhaps at least in a different vein—there are perspectives such as *constructivism* that seek not to adopt a particular political conception of international law, but instead to question how international law facilitates and contributes to a unique set of social norms.

Born from these constructivist developments (and perhaps in opposition to them), the period after the Second World War brought a new critical perspective to international law to the forefront—‘third world approaches to international law’ or ‘TWAIL’, as such theories are often called. TWAIL scholars see international law as a system that *legitimatises the power imbalance* of Western powers with colonial histories over the Global South. They argue for a ‘decolonisation’ of international law. Born of this general critical vein, we also see new perspectives to international law, including feminist, post-structuralist, and Marxist perspectives to international law and theory.

Considering these several perspectives and their development over time and context, we require a theoretical framework that reconciles these approaches—not in the abstract, but in terms of *contextual particulars*. Our theory must arise from and be informed by the realities of global conflict, and not vice versa. It is with this commitment that this book proceeds. I

hope to develop a perspective to international law that is informed by the particularities and nuances of context-specific readings of Islamic law. I shall demonstrate, through the findings of this book, that the core principles of the latter can provide a novel and valuable perspective with which to see the former.

In some ways, this project may seem to align well with the constructivist aims: by examining the social norms that emerge when we think of international law, from a lens of theological jurisprudence. It also has a general liberal commitment—by seeking to uphold peace, cooperation, and stability among individual states. This project could also be seen as a critical project that aligns with TWAIL because it draws from Islamic, non-dominant perspectives that are born out of the Global South. However, instead of seeing the Global South as a monolith or being committed to any particular political ideology, this book is set in the context of several real-world challenges. It draws from the realities of theatres of conflict across the world to show that Islamic law can help pave the way for peacebuilding and dispute-resolution under international law and policy.

In Chapter 1, I lay down the core principles of international law and provide a brief overview of peacebuilding and conflict resolution mechanisms under public international law.

In Chapter 2, I turn to Islamic Law and discuss the main principles of Islamic law before elaborating on the notions of peacebuilding as codified under Islamic law. Chapter 3 then undertakes a rigorous comparative analysis that draws from the material in the preceding chapters. I provide a comparative analysis of international law and Islamic law—discussing the many points of divergence, and importantly, of convergence between the two legal approaches.

The discussion in these three chapters sets the stage for Chapter 4, wherein I apply the findings on the confluence between international law and Islamic law to three major sites of geo-political conflict—Afghanistan, Israel and Palestine, and Kashmir. I focus on these three sites or ‘theatres’ of conflict because of their deep and complex connections with Islamic law and because of the prevalence of Islamic law in the regions that these disputes affect. I show that understanding these conflicts through the *intersection* of Islamic law and international law can help reframe and resolve core conflict points and pave the way for peaceful resolution of these disputes.

My analysis of these conflict sites also allows for a more general framing of the intersections between Islamic law and international law—by developing an approach that I theorise calling ‘theo-diplomacy.’ After outlining the contours of such an approach in Chapter 4, I elaborate on the

potentials and future avenues of this approach in the concluding section of the book.

One hopes that this book will be of benefit to think-tanks; inter-faith institutions; government departments; diplomats, ambassadors, statesmen and stateswomen; consulates; faith leaders; universities; public policy and political science departments; international relations analysts; counter terrorism and security experts; and academics. I hope that these stakeholders—all uniquely placed at the several intersections of international law, policy, and practice—will benefit from engaging with the core insights and claims made in this book. Taken together, this book aims to provide a neutral conflict resolution framework, rooted equally in faith-based understandings from Islamic law and the principles of dispute resolution and peace that frame international law and policy.

# CHAPTER ONE

## CONFLICT RESOLUTION, ARBITRATION, AND PEACEKEEPING/PEACEBUILDING BASED ON SOURCES OF PUBLIC INTERNATIONAL LAW

### Abstract

This chapter addresses some of the prime sources and procedures available in international law for the peaceful resolution of disputes and conflicts. It particularly focuses on how international law relates with conflict resolution, arbitration, peacekeeping, and building. It is important to note, preliminarily, that the international approach to these three discrete elements incorporates standardised universal norms. The comity of nations is required to abide by these norms, along with specific instructions directed at regions and nation states. As these norms are at the very centre of international law's *modus operandi*, international law itself sees its purpose as the establishment and maintenance of global peace and security.<sup>1</sup> Article 2 (3) of the United Nations Charter states, in a similar vein, that: “[A]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.”<sup>2</sup> The peaceful settlement of large-scale international disputes seems to thus be a core principle in international law.

There are several mechanisms available to states who are seeking settlement of international disputes. As stated in the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States*:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.”<sup>3</sup>

This chapter provides an overview of these mechanisms for the just settlement of disputes under international law. It is my aim that this

overview will set the stage for a comparative and theoretical discussion of the link between international law and Islamic law in the subsequent parts of this book.

### ***Conflict Resolution***

Conflict resolution is one of the core principles of international law. This is the mechanism for resolving differences of opinion or postures that either have or may instigate a conflict, by applying reconciliation and resolution mechanisms between the relevant parties to arrive at an amicable resolution. It is important to note that states, however, are *not obligated* to resolve their differences. The methods and mechanisms that are available to settle disputes require the consent of the states themselves. This is a key point that shows how important the consent of states is in the framework of conflict resolution under international law.

Note that this is not the case for Security Council Resolutions, which are binding in their application.<sup>4</sup> As Article 25 of the UN Charter states:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.<sup>5</sup>

With the exception of these decisions, however, states must consent (and are not bound) to resolve their differences through available mechanisms under international law.

Furthermore, disputes can fragment into legal or political disagreements that can be either justiciable or non-justiciable.<sup>6</sup> As a result, political and legal organs often deal with aspects of the same legal or political situations.<sup>7</sup> Parties to a dispute have an obligation to seek a settlement by alternative means, which must be agreed by all parties, in the event that a method fails. If a specific approach fails to resolve a dispute, and the continuation of that dispute is likely to endanger the maintenance of international peace and security, Article 37 (1) of the Charter stipulates that the parties shall refer it to the Security Council.<sup>8</sup>

A key precondition to reconciling conflicts and differences is meaningful and purposeful negotiation. Negotiations often require parties to compromise certain elements of their position to arrive at a peaceful resolution and require that one party takes the initiative to negotiate. The importance of consultation is endorsed by Article 84 of the Vienna Convention on the Representation of States, which stipulates that if a dispute arises between parties owing to the interpretation of the convention, any party can request consultations to resolve the dispute.<sup>9</sup>



There is nothing specific in the Charter, or under international law, that stipulates a rule to the effect that exhausting diplomatic negotiations is a pretext for a matter to be referred to the court. Tribunals can direct parties to engage in negotiations in good faith and may stipulate the factors that need to be considered in the course of negotiations between the parties. A key prerequisite when states resort to negotiations is that they should negotiate meaningfully, with a view to arriving at an early settlement that is acceptable to both parties.<sup>10</sup>

Another aspect of conflict resolution is that of the inquiry. Where a difference of opinion exists on factual matters related to a dispute between parties, the preferred solution is to institute a commission or inquiry, managed by reputable observers, to identify accurately which facts and issues are in contention. Such provisions were first proposed in the 1899 Hague Conference as an alternative to arbitration. As David Caron notes:

The 1899 Peace Conference was a point of inflection, a turn in the river, in the effort to move beyond ad hoc international arbitration to adjudication by a permanent international court as a means to avoid war and preserve international peace and security.<sup>11</sup>

There are, however, limitations to the inquiry process envisaged here. An inquiry can possess relevance only in the case of international disputes that involve neither the honour nor the vital interests of the parties, and where the particular disagreement at stake can be resolved via recourse to an impartial and conscientious investigation.<sup>12</sup>

The importance of inquiries within specific institutional frameworks is clear: they have been used, in particular, with the United Nations and by specialist agencies. For instance, consider the UN Secretary General Mission in 1988 to Iran and Iraq to investigate the situation of prisoners of war, at the request of those states (S/20147). Or we may recall the UN Compensation Commission, which was set up to resolve claims against Iraq resulting from its invasion of Kuwait in 1990. This was described by the UN Secretary General as performing an “essentially fact-finding function.”<sup>13</sup> Such mechanisms, however, can discourage states. As Shaw notes:

“In many disputes, of course, the determination of the relevant circumstances would simply not aid a settlement, whilst its nature as a third-party involvement in a situation would discourage some states.”<sup>14</sup>

Thus, despite its limitations, the inquiry or commission process continues to be an effective procedure to identify facts and issues at stake in a dispute.

## *Arbitration*

Other than conflict resolution through these means, arbitration is also an option available to states to peacefully settle their disputes. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation states that:

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.<sup>15</sup>

Article 33 (1) of the UN Charter discusses disputes that are likely to endanger international peace and security. It stipulates that states have a free choice regarding the mechanisms adopted for settling their disputes in these cases.<sup>16</sup>

A key characteristic of arbitration is the principle of good faith, which includes refraining from obstructive behaviour during the negotiation process. This point was emphasised by the International Court when it addressed the legality of either the threat or use of nuclear weapons.<sup>17</sup> Third parties play a crucial role here. In all arbitration proceedings, a third-party mediator applies the “good office” role to encourage contending parties to reach a settlement. Unlike the technique of adjudication, the process aims to persuade the parties to reach satisfactory terms for the termination of a dispute by themselves; the provisions for settling the dispute are not prescribed.<sup>18</sup> An example of the effective use of the good office function was performed by the USSR in assisting in the peaceful settlement of the India–Pakistan dispute in 1965. As well as through collaboration with office holders or regional organisations, the UN Secretary General can, on occasion, play a key role by exercising the good office Declarations on the Prevention and Removal of Disputes in situations which may threaten international peace and security.<sup>19</sup>

The *1899 Hague Convention for the Pacific Settlement of Disputes* includes several provisions on international arbitration, the object of which, under Article 15, was deemed to be “the settlement of differences between states by judges of their own choice and on the basis of respect for law.”<sup>20</sup> An agreement to arbitrate under Article 18 implies the legal obligation to accept the terms of the award. In addition, a Permanent Court of Arbitration was established. This court is not a court in the usual sense, because it is not composed of a fixed body of judges. It consists of a panel of persons, nominated by the contracting states (each one nominating a maximum of four), and including individuals “of known competency in questions of

international law, of the highest moral reputation and disposed to accept the duties of an arbitrator."<sup>21</sup>

One of the key components of arbitration is that of observing independence and impartiality. States are not obliged to submit a dispute to the procedure of arbitration. In the absence of their consent, several treaties primarily dealing with the peaceful settlement of disputes have declined in importance since 1945. The question of consent or compromise, or of special agreement, and the terms in which they are couched, are significant in determining how the arbitration process will work.

The law applied in arbitration proceedings is international law, but the parties may agree on certain principles to be considered by the tribunal and specify this in the compromise, such as the principles of law and equity.

There are also Rules of Procedures to be followed as part of arbitration. The *Hague Convention* of 1889, as revised in 1907, contains agreed procedural principles, which would apply in the absence of express stipulation:

It is characteristic of arbitration that the tribunal is competent to determine its own jurisdiction and therefore interpret the relevant instruments determining that jurisdiction.<sup>22</sup>

Arbitration as a method of settling disputes combines elements of both diplomatic and judicial procedures. Its success in resolving disputes depends on a certain amount of goodwill between the parties in drawing up the compromise, constituting the tribunal, and enforcing the subsequent award.<sup>23</sup> Arbitration is an adjudicative technique in that the award is final and binding, and the arbitrators are required to base their decision on law. Considering its similarities with the process of judicial settlement, the Permanent Court of Arbitration began to decline with the establishment and consolidation of the Permanent Court of International Justice in the 1920s.

However, despite this, arbitration continues to be an extremely useful process in cases wherein some specific technical expertise is required. Or furthermore, in cases where the parties despite greater flexibility and speed than what the International Court can provide them, arbitration once again becomes an attractive option.<sup>24</sup>

### ***The International Court of Justice (ICJ)***

Together with the mechanism of arbitration, the Permanent Court of International Justice (PCIJ) was established to provide a comprehensive system of dispute-settlement that served the interests of the international community. Although there are several international and regional courts that

are available to decide disputes in accordance with the rules and principles of international law, the most prestigious of these is certainly the International Court of Justice (ICJ). We shall now discuss the processes and functions of this court briefly to gauge its significance.

After the Second World War, Article 92 of the Charter established the ICJ as the “Principal Judicial Organ” of the United Nations. It was intended to prevent outbreaks of violence by providing freely accessible methods of dispute settlement. The ICJ is a continuation of the Permanent Court, with the same statute and jurisdiction, and with continuity in the line of cases; no distinction is made between those decided by the PCIJ and by the ICJ.<sup>25</sup> Article 2 of the Statute of the ICJ stipulates that it is composed of 15 members:

Elected regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are juriconsults of recognised competence in International Law.<sup>26</sup>

The ICJ decides cases based on international law as it stands at the date of the decision. It cannot formally create law as it is not a legislative organ. As part of the ICJ’s *modus operandi*, it is important to note that disputes are resolved in accordance with international law, and that the court refrains from adjudicating on points that are not included in the final submissions of the parties. Article 36 (2) of the Statute of the Court requires that matters before it should be a legal dispute.<sup>27</sup> A legal dispute, has roughly been defined by the Court, as “a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>28</sup> Furthermore, in the *Interpretation of the Peace Treaties Case*, the Court noted that “whether there exists an international dispute is a matter for objective determination” and further pointed out that in the present case “the two sides hold clearly opposite views concerning the question of the performance or the non-performance of certain treaty obligations so that international disputes have risen.”<sup>29</sup> The Court also specified that for a matter to constitute a legal dispute, it is sufficient for the respondent to an application before the Court merely to deny the allegations, even if the jurisdiction of the Court is challenged.<sup>30</sup>

Another vital component to international arbitration is jurisdiction—having the capacity to decide disputes between states, and the capacity to provide advisory opinions when requested so to do by qualified entities.<sup>31</sup> Article 36 (6) sets out the competence of the court to determine its own jurisdiction. In the *Fisheries Jurisdiction (Spain v Canada)* case, it was held that while the party alleging a matter of fact has to prove said fact before

the Court, the issue of jurisdiction is a *question of law* which can only be determined by the Court.<sup>32</sup> Once the court has reached a decision on jurisdiction, that decision assumes the character of *res judicata*—it is final and binding upon the parties to the dispute.<sup>33</sup> It is important to emphasise that the absence of jurisdiction to resolve disputes about compliance with a particular obligation under international law does not affect the existence and binding force of that obligation. As the court has stressed as part of international humanitarian law and international human rights law, states are required to fulfil their obligations under international law, and they remain responsible for acts contrary to international law which are attributable to them. The Court has jurisdiction under Article 36 (1) of its Statute in all cases referred to it by the parties, and regarding all matters specially provided for in the UN Charter or in treaties or conventions in force.<sup>34</sup> As in the case of arbitration, parties may refer a particular dispute to the ICJ by means of a special agreement or compromise, which will specify the terms of the dispute and the framework within which the Court is to operate. This method was utilised in the *Minquiers and Ecrehos* case, as well as in several others.<sup>35</sup> In matters pertaining to the Jurisdiction of the court and the consent of the parties, the court can also infer this from the conduct of the parties. For instance, consider the *Corfu Chanel* (Preliminary Objections) case, wherein consent was inferred from the actions and conduct of the plaintiff in that case—the United Kingdom—despite the absence of explicit agreement or consent to submit to the Court’s jurisdiction. Although the Court does indeed make such inferences, this is done with a great deal of caution. Consent, even if inferred, must be *clearly present* and cannot be a mere technical creation or fiction by the Court.<sup>36</sup> This kind of approach ensures that the Court respects the principle of consent—that it must be clear, voluntary and indisputable.<sup>37</sup>

The principle of *Forum Prorogatum* pertains to the consent of a state to the court’s jurisdiction, with reference to acts subsequent to the initial proceedings. This principle is set out in Article 38 (5). This is normally thought of as a two-step process: wherein the filing of an application by one state, is followed by an expression of consent to jurisdiction by the other state.<sup>38</sup> It usually arises when one party files an application with the Court, unilaterally inviting another state to accept jurisdiction regarding the dispute, where such jurisdiction would not otherwise exist with regard to the matter before it. If the other state accedes to this, then the Court will have jurisdiction in the matter.

The importance of the principle of consent in relation to third parties was mentioned in the case of *Cameroon v. Nigeria*,<sup>39</sup> where the ICJ stated that it would not entertain actions between states that implied a third state

without its consent.<sup>40</sup> This refrain from bringing in third parties has been termed in international law as the ‘indispensable third party principle’.<sup>41</sup> Furthermore, in Article 36 (6) of the Statute, it has been stated that the Court has the competence to decide its own jurisdiction in the event of a dispute.<sup>42</sup> Article 36 (2) provides an optional clause extending the jurisdiction of the International Court. This article is of immense importance and has often been called the ‘optional clause’ providing the option to significantly extend the Court’s jurisdiction.<sup>43</sup> Parties to the present Statute can at any time declare that they recognise as compulsory *ipso facto* and without special agreement—in relation to any other state accepting the same obligation—the jurisdiction of the Court in all legal disputes concerning:

- a) the interpretation of a treaty
- b) any question of international law
- c) the existence of any fact which, if established, would constitute a breach of an international obligation
- d) the nature or extent of the reparation to be made for a breach of an international obligation.<sup>44</sup>

As Shaw notes, this provision was intended to operate as a method of increasing the Court’s jurisdiction, through an increase in its acceptance by more and more states.<sup>45</sup> By the end of 1984, forty-seven declarations were in force and deposited with the UN Secretary General, comprising fewer than one-third of the parties to the ICJ Statute. By June 2020, this number had risen to seventy-four.<sup>46</sup> The day that one of those states accepts an offer by depositing in its turn the declaration of acceptance, the consensual bond is established, and no further obligation needs to be met.<sup>47</sup>

It is also important to emphasise that reciprocal declarations of two parties on the same issue or issues are not declarations of identical terms. The principle of time *ratione temporis* in the UN Secretary General’s office is elaborated further, as some states exclude the jurisdiction of the ICJ with respect to disputes arising before or after a certain date in their declarations. The Court has reiterated there is a fundamental distinction between the existence of the Court’s jurisdiction over a dispute, and the compatibility with international law of the acts which are subject of the dispute.<sup>48</sup>

The ICJ adopts the approach of observing equitable considerations within the framework of international law. This can be seen when the Court decided on the topic of self-defence. In the Advisory Opinion, *The Legality of the Threat or Use of Nuclear-Weapons*,<sup>49</sup> the Court took the view that it could not “conclude” definitively whether the threat or use of nuclear

weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.<sup>50</sup>

### *Evidence*

Now that we have some idea about the issue of jurisdiction under the ICJ, we can proceed to discuss the Court's position on evidence. Unlike domestic courts, the International Court is flexible regarding the introduction of evidence and does not have evidentiary rules that are as strict as most of its domestic counterparts.<sup>51</sup> The Court has the competence, *inter alia*, to determine the existence of any fact which, if established, would constitute a breach of an international obligation. In the *Genocide Convention (Bosnia v Serbia)* case, the Court emphasised that it had long recognised that "claims against a state involving charges of exceptional gravity must be proved by evidence that is fully conclusive."<sup>52</sup>

Based on Article 48 of the Statute, the Court has the authority to join cases into a single proceeding where the same overall situation is in evidence but this is rare. It can make all arrangements with regard to the taking and collection of evidence.<sup>53</sup> With reference to counter claims, the Court has directed that a party can introduce a new claim, provided that the additional claim is implicit in the application, or it must arise directly out of the question which is the subject matter of the application.<sup>54</sup>

### *Remedies*

If an applicant state makes a declaratory judgement stating that the respondent has breached international law, such declarations may extend to provisions of future conduct as well as characterisation of past conduct. Requests for declaratory judgements may also be coupled with a request for reparation for losses suffered because of illegal activities, or damages for inquiry of various kinds, including non-material damage. In the *I'm Alone* case, the request was not only for direct injury to the state in question, but also with reference to its citizens or their property.<sup>55</sup>

In terms of principles of enforcement, Article 60 stipulates that the judgement of the court is final without appeal. Furthermore, Article 61 of the Statute stipulates that an application for revision of a judgement may only be made upon the discovery of a decisive fact which was, when the judgement was given, unknown to the Court and to the party claiming revision—provided that any ignorance was not due to negligence.<sup>56</sup> Application must be submitted no later than six months from the discovery of a new fact and ten years from the date of judgement.

### *Advisory Jurisdiction of the Court*

Article 65 of the Statute declares that “the Court may give any advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.” Article 96 of the Charter notes that as well as the General Assembly and Security Council, other organs of the UN and specialised agencies, where so authorised by the Assembly, may request such opinions on legal questions arising within the scope of their activities, and offer legal advice to those organs and institutions requesting the opinion.<sup>57</sup>

With regard to the Court’s jurisdiction in providing opinions, Article 96 (2) of the Charter provides that, in addition to the Security Council and General Assembly:

“[O]ther organs of the United Nations and specialised agencies which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”<sup>58</sup>

### *Conciliation*

The process of conciliation involves a third-party investigation of the basis of the dispute, and the submission of a report proposing suggestions for a settlement.<sup>59</sup> As such, it involves elements of both inquiry and mediation, and in fact the process of conciliation emerged from treaties providing for permanent inquiry commissions.<sup>60</sup>

Conciliation reports are only proposals and, as such, do not constitute binding decisions.<sup>61</sup> They are thus different from arbitration awards that are binding and which were used more widely in the period between the world wars. “Nevertheless”, Shaw notes, “conciliation processes do have a role to play. They are extremely flexible and, by clarifying the facts and discussing proposals, may stimulate negotiations between the parties.”<sup>62</sup>

Article 15 (1) of the Geneva General Act, as amended, provides that:

“The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the term of settlement which seems suitable to it, and lay down the period within which they are to make their decision.”<sup>63</sup>



There are many multi-lateral treaties that provide reconciliation as a means of resolving disputes. The 1948 American Treaty of Pacific Settlement; The 1957 European Convention for the Peaceful Settlement of Disputes; the 1964 Protocol on the Commission of Mediation; the 1969 Vienna Convention on the Law of Treaties; the 1975 Convention on the Representation of States in relation with International Organisations; the 1978 Vienna Convention on the Succession of States in respect of Treaties; the 1982 Convention on the Law of the Sea—and even the 1985 Vienna Convention on the Protection of the Ozone Layer—are all examples of this phenomena.<sup>64</sup>

In sum, the conciliation process's flexibility and unique way of facilitating dispute settlement is an important mechanism under international law.

### ***International Institution Dispute Settlement***

Regarding regional organisation, Article 52 (1) of Chapter VIII of the UN Charter provides that nothing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security, as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the UN.<sup>65</sup>

Article 52 (2) stipulates that member of the UN entering such arrangements or agencies are to make every effort to settle local disputes peacefully through such regional agencies, before referring them to the Security Council, and that the Security Council encourages the development of the peaceful settlement of local disputes through such regional arrangements. Article 52 (4) stresses that the application of Articles 34 and 35 of the UN Charter relating to the roles of the Security Council and General Assembly remains unaffected. Furthermore, Article 53 (1) stipulates that no enforcement action can commence without the authority of the Security Council.<sup>66</sup> In recent years, there has been a proliferation of Courts and Tribunals in international law at both an international and regional level. This development is reflected in the increasing scope and utilisation of international law, on the one hand, and the increasing emphasis on the value of resolving disputes by impartial third-party mechanisms, on the other. Shaw highlights the development of referral to courts and tribunals as an “an accepted international practice” for settling differences in a manner that is reflective of the rule of law and the growth of international cooperation.<sup>67</sup>

The developments described above further reinforce the importance of international law in an era of globalisation. There is also a range of regional organisations and forums that can be considered, when resolving disputes

based on international law. These include the African Union, the ECOWAS, SADC, the Arab League, The European Convention for the Peaceful Settlement of Disputes, among others.

### *Use of Force*

Article 2 (4) of the United Nations Charter urges that all members refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the UN.<sup>68</sup> The provision—which is deeply significant in international law and polity—is worded as follows:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>69</sup>

The 1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States* stipulates that no state has the right to intervene, directly or indirectly, regardless of the reason, in the internal or external affairs of any other state.<sup>70</sup> Subsequently, armed intervention and all other forms of interference, or attempted threats against the personality of the state or against its political, economic, and cultural elements, are condemned. This was reaffirmed in the 1970 *Declaration on Principles in International Law*, with the proviso that not only are such manifestations condemned, but they were also held to be in violation of international law.<sup>71</sup> The nucleus of these conclusions lay in the mutual respect by independent states of each other's territorial sovereignty.<sup>72</sup> There are numerous measures of self-help, ranging from economic retaliation to the use of violence, pursuant to the rights of self-defence that have historically been used. However, since the establishment of the charter, three classifications of compulsion are open to states under international law: retorsion, reprisal, and self-defence.

### *The Right of Self Defence: Article 51*

The conventional definition of the right of self-defence in customary international law emanated out of the *Caroline* case.<sup>73</sup> Furthermore, in the *Nicaragua* case, the Court stated that this right of self-defence existed as an inherent right under customary international law as well as under the UN Charter.<sup>74</sup> The UN Secretary of State stated that the essentials of self-defence need to be “overwhelming, leaving no choice of means and no moment for deliberation.”<sup>75</sup> The conditions of self-defence are legitimate, but the action taken in pursuance of it must not be unreasonable or

excessive, “since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”<sup>76</sup> There is thus a prevalent understanding that while self-defence is legitimate, it must be balanced by notions of proportionality or necessity: the action performed in self-defence must not be an *excessive use of force*. Indeed, the concepts of necessity and proportionality are central to the law on self-defence in international law.<sup>77</sup>

It is also important to consider the question of armed attacks and self-defence by non-state actors. While the notions of self-defence were normally or historically restricted to state actors, this cannot be read to mean that self-defence does not exist where there is an attack by a non-state entity emanating from a territory outside the control of the target state.<sup>78</sup> Another area to explore in this arena is the concept of anticipatory self-defence linked to modern warfare, drone, and nuclear attacks. An example of the principle of state anticipatory self-defence is provided by Israel’s strike on its Arab neighbours in 1967. In contrast, preventive self-defence is based on the use of force to prevent a possible attack, or to engage in armed action to deter an avoidable attack. With regard to the US action in Afghanistan in 2001, the US to the UN on 7 October 2001 stated “we may find that our self-defence requires further actions with respect to other organisations and other states.”<sup>79</sup> The 2002 National Security Strategy of the U.S.,<sup>80</sup> which was reaffirmed in the 2006 National Security Strategy, emphasised the role of pre-emption.<sup>81</sup> Shaw reiterates that “In so far as it goes beyond the Caroline Criteria, this doctrine of pre-emption must be seen as going beyond what is currently acceptable in international law.”<sup>82</sup>

Another important principle in international humanitarian law is that of reprisals and the principle of proportionality. In *the Legality of the Threat or Use of Nuclear Weapons* case, the International Court took the view that the proportionality principle may “not in itself exclude the use of nuclear weapons in self-defence in all circumstances;” but that “a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict.”<sup>83</sup> In practice, we can understand this principle better through illustrations. Consider the case of the US and its intervention in Iraq. In 2020, the US President Donald Trump ordered a drone strike that killed Iranian Military Commander Qasem Soleimani in Iraq and exclaimed that it was undertaken to “deter future Iranian attack plans.”<sup>84</sup> A 2010 UN report on “targeted killings” said there was a weighty body of scholarship that viewed the self-defence argument as having the right to use force “against a real and imminent threat when the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of

deliberation.”<sup>85</sup> The initial US Department of Defence statement omitted the word “imminent”,<sup>86</sup> and said that the strike was aimed at deterring future Iranian attacks and that Iran’s top military leader Soleimani was “actively developing plans to attack American diplomats and service members in Iraq and throughout the region.” In later statements, US officials, including President Trump, said Soleimani had been plotting “imminent attacks.”<sup>87</sup>

In this case, many proponents of international law felt that the test of anticipatory self-defence had not been met by the USA in this scenario.<sup>88</sup> There was also a feeling that, in this situation, the US had not sought the consent of Iraq to carry out the drone strike, and deemed it a “brazen violation of Iraq’s sovereignty.”<sup>89</sup>

In addition, in other instances we can see that, for states to force to repeal an attack, such as in the *Falklands Conflict*, it was clear that after the Argentinian invasion of the territory, the United Kingdom possessed, in law, the right to act to restore the status quo ante and remove the Argentinian troops.<sup>90</sup> These illustrations help clarify the stance on armed self-defence.

Another important principle in international humanitarian law is that of collective self-defence. While the right of state to take up arms in self-defence is an established rule in international law, Article 51 also interestingly mentions the “inherent right of ... collective self-defence”.<sup>91</sup> There is much to be discussed regarding this collective right. Principally, would we consider it to be a collection or merely a “pooling” of several individual rights? Or rather, is there something else to the collective that cannot be thought of merely as a sum of its constituent parts? Shaw notes that if an approach closer to the latter is taken, it can pave the way for “comprehensive regional security systems”.<sup>92</sup> This is an area of emerging interest for scholars and practitioners in the field of international law.

## *Civil Wars*

International law treats civil wars essentially as internal matters for states to deal with—with the possible exception of self-determination conflicts.<sup>93</sup> Article 2 (4) of the UN Charter<sup>94</sup> prohibits the threat or use of force in international relations, in domestic situations. There is, however, no rule against rebellion in international law.<sup>95</sup> The domestic jurisdiction of states is left to be addressed by internal law. For third parties, traditional international law developed the categories of rebellion, insurgency, and belligerency. Humanitarian interventions that are carried out under the pretext to protect the lives of certain persons situated within a particular state—and not necessarily nationals of the intervening state—are permissible in strictly defined situations. However, this is difficult to reconcile with

Article 2 (4), which permits temporary violations of the right of customary law.

The Kosovo Crisis of 1999 firmly raised the issue of intervention in order to avoid a humanitarian catastrophe. The operation to evacuate British nationals and eligible Afghans from Afghanistan in 2021, Operation Pitting, can also be deemed an example of this. McKinley's *Foreign Policy* piece titled "Afghanistan's Looming Catastrophe" raises serious concerns, however, about the post-withdrawal situation that has unfolded in Afghanistan and advocates certain reforms of international law to prevent a humanitarian catastrophe from unfolding.<sup>96</sup>

The situation in Afghanistan raises another key principle in international law, that of the "responsibility to protect", which includes the obligation to prevent catastrophic situations and to react immediately when they do occur and to rebuild thereafter.<sup>97</sup> A further critical area of importance is that of terrorism and international law, along with its interaction with principles of human rights. Progress has been made on the rules in international law regarding terrorism, but the definition of terrorism in customary international law is a matter of some controversy. The UN has attempted to address the question of terrorism in a comprehensive fashion. In December 1972, the General Assembly set up an ad hoc committee on terrorism,<sup>98</sup> and in 1994 a Declaration on Measures to Eliminate International Terrorism was adopted. There are thus a range of regional instruments that are used to suppress terrorism.<sup>99</sup>

### ***International Humanitarian Law***

As with the subject of the laws of war, armed conflict tends to be looked at within the rubric of international humanitarian law. It is primarily derived from international conventions and some customary international law. It is feasible to say that several customary international law principles exist over and above conventional rules, albeit international humanitarian law is one of the most highly codified parts of international law.

There has been an alignment of international humanitarian law, human rights, and criminal law. The laws of war were codified at the Hague Conferences of 1899 and 1907. The Four Geneva "Red Cross" Conventions of 1949 dealt respectively with the care of wounded, sick and shipwrecked members of the armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war. The Fourth Convention was an innovative step, and a significant attempt to protect civilians who, because of armed hostilities or occupation, were under the power of a state of which they were not nationals. Owing to the influence of human rights

law and relevant domestic provisions, this offshoot of the law is increasingly complex and sophisticated.

International humanitarian law also deals with the situation of combatants and non-combatants. Common Article 2 of the Geneva Convention provides that the Convention:

Shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognised by them and to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>100</sup>

The rules cited in these Conventions cannot be reneged by those intended to benefit from them, thus precluding the likelihood that the power which has control over them may seek to influence the persons concerned to agree a mitigation of protection.

The scope and protection under international humanitarian law include the wounded and sick. The First Geneva Convention concerns the wounded and sick on land, along with members of the armed forces and organised militias, including those duly accompanying them, are to be respected and protected in all circumstances.”<sup>101</sup> The Second Geneva Convention, addressing “Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea” is similar to the first convention. The Third Geneva Convention of 1949 address the positions of prisoners of war. It consists of a comprehensive code centred upon the requirement for humane treatment in all circumstances. The definition of prisoners of war in Article 4, however, is of particular importance since it has been regarded as an elaboration of combatant status. Articles 43 and 44 of Protocol I, 1977 state that combatants are members of the armed forces of a party to an international armed conflict.<sup>102</sup> Article 13 stipulates that prisoner of war are to be treated humanely, protected against acts of violence, intimidation, and against “insults and public curiosity.” Displaying prisoners of war on TV (for instance) in a humiliating fashion is considered to be a breach of the convention. Measures of reprisal against prisoners of war are also prohibited. Article 14 provides that prisoners of war are entitled in all circumstances to respect of their persons and their honour.<sup>103</sup>

The Convention on prisoners of war applies only to international armed conflicts, but Article 3, which is common to the four conventions, provides that, as a minimum, “persons taking no active part in the hostilities, including members of the armed forces, who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, and any other cause, shall in all circumstance be treated humanely, without any adverse