

# THE DOUBLE-EDGED SWORD: RELIGIOUS INFLUENCES ON INTERNATIONAL HUMANITARIAN LAW

CAROLYN EVANS\*

*[International humanitarian lawyers tend to relegate the role of religion to one of the historical sources of international law. This article demonstrates the way in which religion has an ongoing and complex relationship with international humanitarian law. By examining the role that religion has played both historically and in modern conflicts the author argues that even a secular lawyer who is committed to humanitarian norms has good reason to develop a better understanding of the power of religion if humanitarian law is to prosper in many cultural contexts. By examining religious teachings on the nature of humanity and the rules of war, and considering the religious influence on legal compliance and leadership, the article demonstrates that religious influence is double-edged. While religion can both undermine and support humanitarian law, the author concludes that closer engagement with religious teachings and leaders can be beneficial even for secular proponents of humanitarian law.]*

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## I INTRODUCTION

In an analysis of the way in which major textbooks on international law have changed their emphasis on religion<sup>1</sup> over time, Professor Mark Janis concludes

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\* BA, LLB (Hons) (Melbourne); DPhil (Oxon); Barrister and Solicitor of the Supreme Court of Victoria; Senior Lecturer, Faculty of Law, The University of Melbourne.

<sup>1</sup> While the generic term 'religion' will be used in this article, the focus will be on the three major monotheistic religions — Judaism, Christianity and Islam — as these have had the most significant influence on the development of modern humanitarian law. Caution is required in extrapolating the issues that are relevant for these religions to other religions, particularly polytheistic religions with their roots in Asian cultures. For an introduction to some of these issues outside the monotheistic context see Ved Nanda, 'International Law in Ancient Hindu India' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 51, 54–6; Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (2<sup>nd</sup> ed, 1998) 8–13; L R Penna, 'Traditional Asian Approaches: An Indian View' (1980) 9 *Australian Year Book of International Law* 168; Zhu Li-Sun, 'Traditional Asian Approaches: A Chinese View' (1980) 9 *Australian Year Book of International Law* 143. These works indicate that these polytheistic traditions share some of the double-edged nature of the monotheistic traditions that are examined in more detail here.

that by 1905, when Oppenheim published his classic *International Law*,<sup>2</sup> religion no longer played the important role that it had in earlier texts: '[r]ather, religion was part of the history of international law, something that once had mattered'.<sup>3</sup> A similar fate has befallen the treatment of religion in the major modern texts on international humanitarian law.<sup>4</sup> The clear link between religious teachings, such as the just war doctrine, and the development of the modern law on armed conflict means that most textbooks refer to religion as one of the historical sources of the modern law.<sup>5</sup> But the standard approach of most international humanitarian law books is to deal with religion in an early chapter on history or sources and to thereafter neglect the subject of religion altogether.

Yet even if religion is often distinguished from law in Western legal and political philosophy, and largely ignored in legal writing,<sup>6</sup> no such division can be neatly maintained in the real world. This is particularly the case in many parts of the world that are divided by armed conflict, where law and religion are often

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<sup>2</sup> Lassa Oppenheim, *International Law: A Treatise* (1<sup>st</sup> ed, 1905–06).

<sup>3</sup> Mark Janis, 'Religion and the Literature of International Law: Some Standard Texts' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 121, 138. See also David Kennedy's similar analysis that 'religion is something we used to have': David Kennedy, 'Images of Religion in International Legal Theory' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 145, 146.

<sup>4</sup> International humanitarian law has a more specific legal meaning than the lay concept of 'humanitarian'. International humanitarian law is the law that governs armed conflict. Aspects of this law include rules on the treatment of prisoners of war, the targeting of civilians, the protection of certain types of sites, the prohibition of particular weapons, and the treatment of occupied populations. Many of the key rules are contained in the four *Geneva Conventions* and their two *Protocols* of 12 August 1949: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively '*Geneva Conventions*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*'). However, this article will take a slightly broader approach to international humanitarian law and include within it also the crimes covered by the International Criminal Court and the International Criminal Tribunals for the former Yugoslavia and Rwanda: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'); *Statute to the International Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993); *Statute to the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994).

<sup>5</sup> See, eg, Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (1995) 1, 12–16; Ingrid Detter, *The Law of War* (2<sup>nd</sup> ed, 2000) 151; Timothy L H McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997).

<sup>6</sup> For a discussion of the way in which this has happened in international law see Janis, 'Religion and the Literature of International Law', above n 3, 121.

deeply intertwined and religion may play a more meaningful and significant role in influencing behaviour than does law.

The place of religion in the international legal system, or indeed any legal system that purports to be secular, is likely to be controversial and complex. The Enlightenment fear of the irrational passion and divisiveness of religion continues to discourage any overt discussion of the relationship between law and religion. And when religion *is* discussed in a context such as international humanitarian law, it is described either as an unmitigated good or as wholly evil.<sup>7</sup> Some writers focus only on the positive aspects of a particular religious tradition and dismiss any negative role played by that religion as a misinterpretation of its true meaning.<sup>8</sup> Other writers choose only to focus on the more dangerous and divisive aspects of religion.<sup>9</sup>

What position then might a secular international lawyer, committed to a law that restrains the worst abuses committed in times of conflict, take with respect to religion? In a leading article on developments in international humanitarian law, Theodor Meron came to the conclusion that a range of factors was moving international humanitarian law away from its roots in strict reciprocity and towards a system based more on humane values and human rights law.<sup>10</sup> He finishes his article with a warning, however, that law alone can only take this project so far. While humanitarianism has gained the upper hand in rhetorical and legal terms, the reality of warfare on the ground is still cruel and often involves serious atrocities. Meron concludes:

In the long run, humanitarian norms must become a part of public consciousness everywhere. Education, training, persuasion, and emphasis on values that lie outside the law, such as ethics, honor, mercy, and shame, must be vigorously pursued. This job cannot be left to the law alone. Public opinion and the social consensus that have proved so effective in the development of the law should be geared to transforming practice as well. For that, the creation of a culture of values is indispensable.<sup>11</sup>

Religion seems a likely candidate to play a role in this creation of a culture of values. It can have persuasive value to those who are, or who consider themselves to be, outside the scope of traditional international law, particularly the ever more important non-state actor. It can add an important moral or emotional dimension to reasons for compliance with international law. Even a pragmatic, secular advocate of international humanitarian law may see strategic advantages to the selective use of aspects of religious traditions to bolster compliance and commitment to the laws of war.

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<sup>7</sup> Although not all writers fall into this trap: see, eg, William Vendley and David Little, 'Implications for Religious Communities: Buddhism, Islam, Hinduism and Christianity' in Douglas Johnston and Cynthia Sampson (eds), *Religion, the Missing Dimension of Statecraft* (1995) 306.

<sup>8</sup> See, eg, Christopher G Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988).

<sup>9</sup> See, eg, Davis New, *Holy War: The Rise of Militant Christian, Jewish and Islamic Fundamentalism* (2002).

<sup>10</sup> Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239.

<sup>11</sup> *Ibid* 278.

Yet, this article will argue, such engagement will need to be strategic and pragmatic. Any religious tradition is complex and multifaceted with respect to humanitarian law, simultaneously working for and against international norms. This can be seen by considering four areas: the way in which religion constructs the idea of humanity, the potential of religion in bolstering respect for international rules, the role of religion in motivating compliance or noncompliance with rules, and the importance of religious symbolism and leadership. By looking in turn at each of these areas, this article will argue that there ultimately is a place for religion in helping to create a culture of values that underpins international humanitarian law. But this article will also demonstrate that such engagement is not without its dangers. For the humane pragmatist merely looking to shore up, and possibly extend, the developing legal principles, religion is a double-edged sword and there are reasons to be cautious about its wholehearted embrace.

In undertaking this analysis, this article avoids entering into debate over which interpretations of religious texts and duties are 'correct' or 'true'. Many of the issues discussed here are the subject of intense debate between members of the same religion. Some authors enter into these debates and construct an argument to say that certain passages in religious texts or teachings demonstrate the compatibility of international law and religious precepts, while ignoring or marginalising those teachings that are less congruent with legal norms.<sup>12</sup> Others use religious passages to argue against the same international norms. While it is important for coreligionists to enter into these debates with one another, Ebrahim Moosa makes the important point that, for academics, it 'may be convenient to employ an eclectic method in order to validate a particular point of view, but it does not provide a rigorous theoretical framework for a debate'.<sup>13</sup> Therefore, for the purposes of this article, all that is claimed is that each of the religious viewpoints put forward here are accepted by *some* members of the relevant religion as the authentic and binding teaching in relation to the issues discussed. Other members of the same religion often hotly contest the authority or interpretation of these teachings. Judgements as to which interpretation of a religious tradition is authentic or has a greater claim to truth are not made in the course of the article. This is an internal matter for believers. From an outsider's perspective, what is relevant is the extent to which groups of people claiming religious motivation or citing religious authorities do so in a manner that helps or harms international humanitarian law. As this article will argue, within each of the traditions it is possible to find examples of both helpful and harmful behaviour, with believers from the same religious groups claiming entirely opposing points of view.

This article also avoids the use of charged or emotive terms such as 'fundamentalist' in describing any religious practice or group. The technical meaning of the term fundamentalist refers to a particular theological approach —

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<sup>12</sup> Some of the work of Weeramantry, discussed below in Part III(A), arguably falls within this category. See also Weeramantry, *Islamic Jurisprudence*, above n 8. An example of a selective approach to religious texts can also be seen in Brian Leppard, *Re-Thinking Humanitarian Intervention: A Fresh Approach Based on Fundamental Ethical Principles in International Law and World Religions* (2002).

<sup>13</sup> Ebrahim Moosa, 'The Dilemma of Islamic Rights Schemes' (2000–01) 15 *Journal of Law and Religion* 185, 193.

the *Concise Oxford English Dictionary*, for example, defines it as ‘strict maintenance of the ancient or fundamental doctrines of any religion’.<sup>14</sup> Yet the term, as it is currently used in popular culture, carries with it implicit condemnation and, particularly when linked to Islam, insinuations that the fundamentalist group is violent. Rather than labelling particular groups or teachings in this way, which creates potential for misunderstanding of whether the term is being used technically or in its popular sense, this article will simply describe the particular religious teachings and practices in question.<sup>15</sup>

## II THE NATURE OF HUMANITY

### A Common Humanity

As Meron has argued, the legal rules of humanitarian law are undergoing a process of humanisation. While traditional concepts of reciprocity continue to play an important role in some conflicts, they are of far less relevance in others, particularly when non-state actors who believe that they have little to gain from reciprocity are involved.<sup>16</sup> For this new understanding of the core of international humanitarian law to be effective, combatants and military strategists need some sense of the common humanity even of their enemy.<sup>17</sup> This is recognised in common art 3 of the *Geneva Conventions*,<sup>18</sup> which requires the humane treatment of those who are not taking active part in hostilities. The common article requires this humane treatment ‘without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’. The preamble to *Additional Protocol II* recalls that the ‘humanitarian principles enshrined in art 3 common to the *Geneva Conventions* of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict’.<sup>19</sup> This principle of non-discrimination (including non-discrimination on the basis of religion) and respect for the human person is thus increasingly at the heart of modern international humanitarian law.

Yet in times of war and peace, large groups of people have been defined outside the community of the fully human — those who are entitled to the full protection of the laws of war. Historically such groups have included, at various times and in various places: women, people of colour, slaves, foreigners and, particularly relevant for current purposes, religious minorities, dissenters or

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<sup>14</sup> Judy Pearsall (ed), *Concise Oxford English Dictionary* (10<sup>th</sup> revised ed, 1995) 573.

<sup>15</sup> For similar reasons, the terms ‘cult’ and ‘sect’ will be avoided in this article.

<sup>16</sup> Meron notes the growing restrictions on the uses of reciprocity in contexts such as prisoners of war: Meron, above n 10, 248.

<sup>17</sup> The first of the Fundamental Principles on which the International Committee of the Red Cross (‘ICRC’) bases its activities is humanity. This principle requires an acknowledgement of the need to treat all people with humanity and dignity: see ICRC, *The Fundamental Principles of the Red Cross and Red Crescent* (1996) <[http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0513?OpenDocument&style=Custo\\_Final.4&View=defaultBody2#2](http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0513?OpenDocument&style=Custo_Final.4&View=defaultBody2#2)> at 1 May 2005.

<sup>18</sup> Above n 4.

<sup>19</sup> Above n 4.

nonbelievers.<sup>20</sup> The concept of what it is to be fully human has changed over time and may continue to be redefined in response to social and technological changes, such as the development of more sophisticated forms of artificial intelligence. Religion has played, and continues to play, a part in this process of defining who is fully human and is thus entitled to be treated with the respect and consideration that is the due of human beings. When religion promotes a wide-reaching concept of humanity, it helps to shore up one of the basic premises upon which modern international humanitarian law is based.

There is much in religious teachings that could be used as a basis for promoting the idea of a common humanity and the proper treatment even of those who are outsiders to the religious group. The basic texts of each of the three major monotheistic traditions, Judaism, Christianity and Islam, provide numerous examples of exhortations to treat all people with respect. In the Book of Leviticus — a holy text for all three of the major monotheistic traditions — the people of God are instructed to ‘not hate thy brother in thine heart’ and to ‘love thy neighbour as thyself’.<sup>21</sup> Rabbis who have commented on this passage over the years have also noted that the injunction to love one’s neighbour is not limited to those within one’s own community,<sup>22</sup> as soon after this passage there is the command to ‘love him [the stranger] as thyself’.<sup>23</sup>

The *Qur’an* emphasises the unity of all people as the creation of Allah: ‘O Mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other)’.<sup>24</sup> In another place the Prophet teaches that ‘if anyone slew a person — unless it be for murder or for spreading mischief in the land — it would be as if he slew the whole people: and if anyone saved a life, it would be as if he saved the life of the whole people’.<sup>25</sup> Islamic scholar Majid Khadduri describes ‘dignity and brotherhood’ as one of the five most important principles of human rights in Islam.<sup>26</sup>

In the Christian Gospel of Matthew, Jesus says, ‘Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you’.<sup>27</sup> When he later preaches that people should love their neighbours as themselves,<sup>28</sup> he uses the parable of the Good Samaritan to teach that ‘neighbours’ are all who show mercy to one another, rather than narrowly defined groups of coreligionists.<sup>29</sup>

These, and numerous other texts, have been used by religious individuals and groups who utilise religious arguments to encourage support for principles of

<sup>20</sup> For a critique of essentialist views of humanity see Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) 211–16.

<sup>21</sup> *Holy Bible* (Authorised King James Version, 1957 ed) Leviticus 19:17–18.

<sup>22</sup> See, eg, George Horowitz, *The Spirit of Jewish Law* (1953) 120.

<sup>23</sup> *Holy Bible*, above n 21, Leviticus 19:34.

<sup>24</sup> *Holy Qur’an* (Abdullah Yusuf Ali trans, 2000 ed) 49:13 (*Al-Hujurat* — The Inner Apartments).

<sup>25</sup> *Ibid* 5:32 (*Al-Mā'idah* — The Table Spread).

<sup>26</sup> Majid Khadduri, *The Islamic Conception of Justice* (1984) 236.

<sup>27</sup> *Holy Bible*, above n 21, Matthew 5:43–4.

<sup>28</sup> *Ibid* Luke 10:27.

<sup>29</sup> *Ibid* Luke 10:30–7.

humanitarian law. After the attacks of 11 September 2001, for example, the United States Conference of Catholic Bishops released a pastoral message urging compliance with international and moral law in response to the attacks in part because ‘every life is precious whether a person works at the World Trade Center or lives in Afghanistan’.<sup>30</sup> At such times of quite understandable national outrage, there is always a temptation to demonise those who share the same race or religion as the attackers. The stand of the Catholic bishops, which is merely one example of leaders from many religious groups,<sup>31</sup> attempted to emphasise the common humanity of the people of Afghanistan and of the US — an important step in seeking to ensure that the rules of international law were applied to any conflict that arose with Afghanistan.

Another example of a religiously inspired sense of common humanity in a time of even greater conflict and national division was the behaviour of the Muslim leaders of Rwanda during the genocide in 1994. While some leaders of Christian churches were directly involved in the massacres<sup>32</sup> (although many also acted courageously in defending their people), almost the entire Muslim community refused to participate in the killing.<sup>33</sup> In the words of Ramadhani Rugema, executive secretary of the Muslim Association of Rwanda, ‘[n]o Muslim wanted any other Muslim to die. We stood up to the militias. And we helped many non-Muslims get away’.<sup>34</sup> Religion created a sense of common identity that proved stronger in the Muslim community than the ethnic Hutu and Tutsi identities that the government promoted as a source of disunity and dehumanisation. Muslims now play a role in the interfaith commission that was set up to promote unity and tolerance in the aftermath of the genocide,<sup>35</sup> and the moral leadership that was given by the Muslim community has led to a near doubling of the number of Muslims in the predominantly Christian country in the 10 years since the massacre.<sup>36</sup>

These are only two examples from the long tradition of religious people standing against false divisions of humanity into those who are fully human and those who are not fully human. The tradition includes the fight against slavery,<sup>37</sup>

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<sup>30</sup> US Conference of Catholic Bishops, *A Pastoral Message: Living with Faith and Hope after September 11* (2001) <[www.nccbuscc.org/sdwp/sept11.htm](http://www.nccbuscc.org/sdwp/sept11.htm)> at 1 May 2005. See also Wesley Mission, Baptist World Alliance, ‘Worldwide Baptists Respond to United States Terrorist Attack’ (Press Release, 12 September 2001) available at <<http://www.wesleymission.org.au/releases/September01/010912/13.htm>> at 1 May 2005.

<sup>31</sup> Hundreds of religious groups responded to the September 11 attacks and a useful archive that demonstrates the range of responses can be found at Library of Congress, *September 11 Web Archive* (2004) <<http://lcweb4.loc.gov/911/9111/DrillSearch?x=d&t=Religious&dp=.t>> at 1 May 2005.

<sup>32</sup> See below n 54 and accompanying text regarding the Seventh-Day Adventist Church in Rwanda.

<sup>33</sup> Marc Lacey, ‘Since ’94 Horror, Rwandans Turn toward Islam’, *The New York Times* (New York, US), 7 April 2004, A1.

<sup>34</sup> *Ibid.*

<sup>35</sup> Laurie Goering, ‘Rwandans Turning to Islam as Faith Shaken by Genocide’, *The Seattle Times* (Seattle, US), 9 August 2002, A9.

<sup>36</sup> Lacey, above n 33.

<sup>37</sup> Seymour Drescher, *From Slavery to Freedom: Comparative Studies in the Rise and Fall of Atlantic Slavery* (1999) 35–56.

the international peace movement,<sup>38</sup> and the establishment of aid or poverty relief programs that attempt to ensure that all people are able to live with a level of dignity that is consonant with their humanity.<sup>39</sup> One way in which this capacity recently manifested itself in the sphere of international humanitarian law is in the strong support by many religious groups for the establishment of the International Criminal Court ('ICC').<sup>40</sup> While some of these examples are from outside the area of armed conflict they demonstrate a capacity for religious groups to work at a political and cultural level to attempt to change the legal status quo in a way that enhances respect for all human beings.

### B *Divided Humanity*

However, to focus on the way in which religion can bolster the concept of a shared humanity is to look at only half the story. Religious teachings and practices can be incompatible with the idea of a common humanity, and religion can be one of the greatest sources of division between people. All three major monotheistic traditions distinguish at least to some degree between true believers and nonbelievers. In the Book of Deuteronomy, a particularly bloody example of such a distinction occurs. In that Book, God commands the destruction of the Hittites, the Amorites, the Canaanites, the Perizzites, the Hivites, and the Jebusites for practising 'abominations'.<sup>41</sup> The army is told to 'utterly destroy them' and to 'save alive nothing that breatheth'.<sup>42</sup> This passage led both Christian and Jewish writers to agree that there was a category of religious war in which no constraint was permitted but, with the dispersal of the tribes in question, most Jewish writers concluded that the obligation to wage such divinely ordained total war (or *milhemet reshut*) has now lapsed.<sup>43</sup> The passage was revived by the Catholic Church, however, which claimed a right during the Middle Ages to determine whether the grounds for a holy war existed. This was the basis on which the Crusades were launched and it was used as a theological justification for some of the cruelty and refusal to give quarter practised at times during those wars.<sup>44</sup> After the Reformation, Protestant writers also took up the

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<sup>38</sup> Mark Janis, 'Protestants, Progress and Peace: Enthusiasm for an International Court in Early Nineteenth-Century America' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 191; Nicholas Grief, 'British Quakers, the Peace Tax and International Law' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 339.

<sup>39</sup> Examples of some groups operating in this area include World Vision, St Vincent de Paul, Muslim Aid and B'nai B'rith.

<sup>40</sup> See, eg, the American Non-Governmental Organizations Coalition for the International Criminal Court, *Faith and Ethics Network: Mission Statement* <<http://www.amicc.org/faith.html>> at 1 May 2005. This body describes itself as a

coalition of religious and interfaith NGOs that examine the moral, ethical and religious considerations surrounding the Court. Religious organizations have a special role to play in raising awareness at the grassroots level and helping to shape the ICC. The Caucus promotes the ICC by disseminating information about the Court to respective religious, ecumenical, and ethical communities.

<sup>41</sup> *Holy Bible*, above n 21, Deuteronomy 20:17–18.

<sup>42</sup> *Ibid* Deuteronomy 20:16–18.

<sup>43</sup> Horowitz, above n 22, 147–8.

<sup>44</sup> James Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981) 159.



notion of a holy war as part of the justification for the excesses of the Thirty Years War.<sup>45</sup>

Islamic teachings also created a basis for treating humanity as divided. In some Islamic teaching the world is divided into two spheres — *dar al-Islam* (the abode of Islam) and *dar al-harb* (the abode of war).<sup>46</sup> *Dar al-Islam* describes the parts of the world that have converted to Islam and *dar al-harb* is constituted by the parts of the world that have not yet converted.<sup>47</sup> A state of permanent warfare (although not necessarily outright hostilities) was to exist between the two spheres until the whole of humanity had been converted.<sup>48</sup> Even though early Muslim states were remarkably tolerant of the ‘people of the book’ (those who believe in a monotheist god from the Abrahamic tradition), non-Muslims were not given full status in the body politic and polytheists and heretics could be treated very badly (in some predominantly Muslim states this ill-treatment on the basis of religion continues).<sup>49</sup> In regard to warfare, Ibn Rushd in his discussion of jihad says that all jurists agree that the people who are to be fought are ‘all of the polytheists (*mushrikun*), because of the words of the Exalted, “And fight them until persecution is no more, and religion is all for Allah”’.<sup>50</sup>

Religious differences are still used to justify treatment of other people as less than human in the modern world. The reports of the United Nations Special Rapporteur on Freedom of Religion or Belief paint a grim picture of the way in which religious minorities are treated in many states.<sup>51</sup> Such mistreatment ranges from mild forms of discrimination, to the use of imprisonment, torture, rape, forced labour and execution as methods of terrorising religious groups. These methods often give rise to resistance and can be a source of the internal conflicts that cause such problems for the application of international humanitarian law.

<sup>45</sup> Guy Roberts, ‘Judaic Sources of and Views on the Laws of War’ (1988) 37 *Naval Law Review* 221, 225. This was despite the fact that when Saint Augustine developed the idea of a ‘holy war’ it was hedged about by restraints, as the only time at which believers could be certain that a war was commanded by God was when the command came directly from God (as it did in a few passages in the Old Testament): see James Brundage, *Medieval Canon Law and the Crusader* (1969) 19–21.

<sup>46</sup> Majid Khadduri, *War and Peace in the Law of Islam* (1955) 52–3, 155–7, 170–1.

<sup>47</sup> Some recognition was also given to a third sphere of *dar al-sulh*, the realm of peaceful agreement, that is, territories to which Islamic communities gave limited recognition if they entered into peace treaties of limited duration. There was no obligation to wage war against such people: Sarvenaz Bahar, ‘Khomeinism, the Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology’ (1992) 33 *Harvard International Law Journal* 145, 166.

<sup>48</sup> For a reasonably pacific explanation of this distinction see Majid Khadduri, ‘Jihad as a Concept of Just War’ in Gerald Lampe (ed), *Justice and Human Rights in Islamic Law* (1997) 91. Khadduri claims that the distinction is best understood as a requirement to enter into warfare only when under attack from the *dar al-harb*. See also Bahar, above n 47, 167.

<sup>49</sup> For further discussion and suggestions about how these teachings need to be understood in the modern era, see Abdullahi An-Na’im, ‘Religious Minorities under Islamic Law and the Limits of Cultural Relativism’ (1987) 9 *Human Rights Quarterly* 1, 10–18. See also Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (3<sup>rd</sup> ed, 1999) ch 5.

<sup>50</sup> Ibn Rushd, *The Distinguished Jurist’s Primer* (Imran Ahsan Khan Nyazee trans, 1994 ed) vol 1, 455 [trans of: *Bidāyat Al-Mujtahid*].

<sup>51</sup> See, eg, Abdelfattah Amor, *Interim Report of the Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief*, UN GAOR, 58<sup>th</sup> sess, UN Doc A/58/296 (19 August 2003). See generally Carolyn Evans, ‘The Special Rapporteur on Religious Freedom’ in Nazila Ghanea (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (2003) 33.

When deep-seated religious animosity has been the basis for the persecution of a minority group, the parties to any ensuing conflict will often lack a sense of the common humanity of the opposing side. This can lead to some of the most serious breaches of international humanitarian law, including genocide.<sup>52</sup> In the case of the Rwandan genocide discussed above,<sup>53</sup> for example, while many religious leaders sought to protect their people (and some were killed doing so) others participated in the genocide, using religious justifications. One of the most notorious of these was the head of Rwanda's Seventh-Day Adventist Church, Elizaphan Ntakirutimana, who was found guilty of committing genocide, in part using his authority as a Church leader to achieve this end.<sup>54</sup>

Religion can also be a dividing factor in international affairs. While the first Gulf War drew broad support from many Muslim states, the recent war against Iraq has provoked reactions that have often been polarised on the basis of religion. Christian language used by President George W Bush to justify the attacks has only served to further this animosity and inter-religious suspicion.<sup>55</sup> Some Muslim leaders have emphasised that the war in Iraq opens up a religious division, arguing that it should be seen as an attack on all Muslims. Islamic scholars at the leading Sunni Al-Azhar University, for example, claimed in the lead-up to the attacks on Iraq that any US attack would give rise to a duty of jihad and called upon 'Arabs and Muslims throughout the world to be ready to defend themselves and their faith'.<sup>56</sup>

The events of September 11 appear to have exacerbated religious divisions in general and have, in particular, put a strain on relations between Muslims and Christians. The UN Special Rapporteur on Freedom of Religion or Belief has noted the 'profound impact' of September 11 on issues of religious freedom. He argues that

terrorist acts together with security measures taken by States have strengthened many people's isolationism, which focuses on religion and promotes distrust, intolerance and even rejection of others and is expressed through religion-based discrimination at all levels. Advocacy of or incitement to hatred and ... acts of violence against members of religious minorities have also become increasingly common.<sup>57</sup>

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<sup>52</sup> For an overview of many modern conflicts that have a religious element, see Susan Page and Jack Kelley, 'In God's Name: The Most Mortal of Combat', *USA Today* (McLean, US), 16 July 2002, 4. Theo van Boven claims that at least 25 regional or civil wars in the 1980s were based to 'a significant degree' on disputes that were at least partially based on religion or belief: Theo van Boven, 'Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs' (1991) 13 *Human Rights Quarterly* 437, 442.

<sup>53</sup> See above n 32 and accompanying text.

<sup>54</sup> *Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos ICTR-96-10 and ICTR-96-17-T (21 February 2003).

<sup>55</sup> Tracy Wilkinson, 'Arab World Sees the Conflict in Religious Terms', *Los Angeles Times* (Los Angeles, US), 18 March 2003, A15.

<sup>56</sup> Anthony Shadid, 'Scholars Urge Jihad in Event of Iraq War: Cairo Center Declares All Muslims Threatened', *The Washington Post* (Washington DC, US), 11 March 2003, A12. The statement went on to say that '[o]ur Arab and Islamic nation, and even our faith, are a main target for all these military build ups'.

<sup>57</sup> Amor, above n 51, [137].

He notes reports of anti-Muslim violence against individuals and places of worship in the US following September 11<sup>58</sup> and reports that the US Attorney-General stated on radio that 'Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you'.<sup>59</sup> At the same time, in Pakistan, there were numerous attacks against Christians and Christian organisations, including an attack on a Christmas service for children in a Presbyterian church in which three children were reported killed.<sup>60</sup> Neither the US nor the Pakistani Government condoned these attacks and indeed each uses the criminal law to pursue those who murder and destroy property in the name of religion,<sup>61</sup> but the growth in spontaneous attacks by members of one religious group against another in many parts of the world is a reflection of how frail a sense of common humanity can be and the way in which religious tribalism can lead to violence and hatred directed at other people solely on the basis of their religion.

It should be remembered, however, that often the invocation of religious differences simplifies complex disputes that overlap into issues of land, political power, and revenue. At one level, for example, the conflict between North and South Sudan can be characterised merely as a clash between Muslims and Christians with the implication that Muslim Arabs are unable to see animists and Christians as fully human and entitled to the benefits of equal citizenship in Sudan. There is some truth in this representation. The manner in which the central government has gone about creating an Islamic state is another demonstration of the way in which religion can be used to divide humanity. Human Rights Watch reports that the Sudanese regime 'discriminates against non-Muslim citizens in the most fundamental ways' and that the 'vast majority of non-Muslim Sudanese ... suffer systematic discrimination, repression, and degradation every day simply because of their status as non-Muslims'.<sup>62</sup> But while such a characterisation has some level of truth, it ignores the fact that one key reason for attacks against Southerners (and a reason for Southern resentment) was the discovery of lucrative oil reserves in Southern Sudan.<sup>63</sup> There is almost always more at stake in conflicts than the simple pitting of one religious group against another.

However, even if this complexity is granted, it is still notable that when leaders look for a reason to set one part of the population against another, religion is often a popular candidate because of its potential potency as a source of division. Ancient and modern examples abound of religion being used to undermine the humanity or worth of a group from a different religion or denomination. Furthermore, religious teachings are a common justification for inequality. While religious groups may have led the fight against slavery and

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<sup>58</sup> Ibid [41]–[47].

<sup>59</sup> Ibid [46].

<sup>60</sup> Ibid [84].

<sup>61</sup> In federal criminal cases in the US, for example, harsher penalties apply for crimes that were committed because, among other things, of the religion of the victim: see *Hate Crime Sentencing Enhancement Act 1995*, 28 USC § 994 (2002).

<sup>62</sup> Human Rights Watch, *Sudan: 'In the Name of God': Repression Continues in Northern Sudan* (1994) <<http://www.hrw.org/reports/1994/sudan>> at 1 May 2005.

<sup>63</sup> Jemera Rone, Human Rights Watch, *Sudan: Rebels, Religion and Oil* (2003) <<http://hrw.org/editorials/2003/sudan112503.htm>> at 1 May 2005.

racism, religious justifications have also been given (and in some places continue to be given) for their maintenance.<sup>64</sup> And whatever progress may have been made in recent years, historically none of the major monotheistic religions have a good record for the treatment of women as equals, which may be part of the explanation for the terrible treatment of women during times of war and occupation.<sup>65</sup> Thus, if a sense of common humanity is a requirement for an effective system of humanitarian law, religion is just as capable of undermining that shared sense of humanity as it is in helping to sustain it.

It is worth noting that the dual nature of religion with respect to a sense of common humanity is shared by international humanitarian law as well. At one level, as discussed above,<sup>66</sup> international humanitarian law is increasingly dependent on more humane and human rights based approaches to war. Yet, so long as the basic principles of international humanitarian law remain in place, full respect cannot be paid to the dignity and worth of the human person — even the civilian. The laws of war are just that — laws to regulate a state of conflict in which taking lives of combatants and the deprivation of freedom for prisoners of war are permitted. Even civilians, while they cannot be targeted, can be deprived of their lives, property, and freedom if this is necessary ‘collateral damage’ from a proportionate and necessary military action.<sup>67</sup>

### III RESPECT FOR INTERNATIONAL HUMANITARIAN LAW NORMS

#### A *Support for International Norms*

In addition to the general sense of common humanity, the secular international humanitarian lawyer may utilise the teachings of various religious groups to bolster support for particular international norms. Religious teachings have dealt with the issue of the appropriate way in which to wage war for thousands of years. Some of those teachings have been used as a basis for developing the modern rules of international law and others seem to fit neatly with the modern rules and could thus be seen to add moral legitimacy and cross-cultural relevance to those rules.

Yet this is a complex area for the secular lawyer with his or her pragmatic aims. As a general rule, such a lawyer will simply want to borrow the support of religion for pre-existing international rules, or possibly for a limited extension of such rules in a manner that complies with the underlying principles of international humanitarian law. But how can this be done? At one level — the level that will appeal to the lawyer — it is by maintaining that the sources of international law remain the positivist set of treaties and custom. International humanitarian law is, therefore, defined by its legal instruments and the custom

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<sup>64</sup> David Goldenberg, *The Curse of Ham: Race and Slavery in Early Judaism, Christianity and Islam* (2003); Shaun Marmon (ed), *Slavery in the Islamic Middle East* (1999); Douglas Johnston, ‘The Churches and Apartheid in South Africa’ in Douglas Johnston and Cynthia Sampson (eds), *Religion, the Missing Dimension of Statecraft* (1994) 177.

<sup>65</sup> See John Raines and Daniel Maguire (eds), *What Men Owe to Women: Men’s Voices from World Religions* (2001) which sets out both the strengths and weaknesses of religion in relation to women. For a discussion of the effects of war on women, see Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (2001) ch 2.

<sup>66</sup> See above n 17 and accompanying text.

<sup>67</sup> On the limits to the humanisation of humanitarian law see Meron, above n 10, 240–2.

that has grown up around them. Religion simply plays a role in demonstrating the cross-cultural relevance of the norms of international law and in convincing religious people that these norms are both acceptable and part of their legal tradition, rather than an outside imposition.

There is merit in this approach, but it must be recognised that those well versed in their religion may well question why a more fully religious understanding of the laws of war is not adopted. Why are some parts of religious teachings on war ignored while others are applauded by the international community? Once the path of accepting that religious teachings have a pragmatic role to play in bolstering the acceptance of international humanitarian norms is taken, the question of whether those religious teachings should play a greater role in determining the content of the norms arises. As will be seen in the judgments of Judge Weeramantry discussed below, this is a question for which there may not yet be a satisfactory answer.<sup>68</sup> Despite this difficulty, it is worth considering how the pragmatic lawyer might use religious teachings to bolster respect for specific norms of international humanitarian law.

If humanisation is, as Meron says, the future of international humanitarian law, reciprocity is international humanitarian law's past, and it continues to play an important role today as one of the principles underlying international humanitarian law.<sup>69</sup> Reciprocity involves the assurance that restraint from one side of the conflict will be met by restraint from the other side and at the same time suggests a threat about the consequences of illegal behaviour. Many, including the Parliament of the World's Religions, have argued that all the world religions contain within them a Golden Rule of treating others as one would be treated.<sup>70</sup> This notion of reciprocity is neatly contained in the response of Hillel the Elder to a gentile who asked Hillel to convert him to Judaism and to teach him the whole *Torah* while he stood on one foot. Hillel replied '[w]hat is hateful to you, do not to your neighbour: that is the whole *Torah*, while the rest is commentary thereof'.<sup>71</sup> Similarly, Jesus teaches his disciples to do unto others what they would have others do unto them.<sup>72</sup>

This commitment to reciprocity is one of the pragmatic underpinnings of the international humanitarian law regime. The expense of complying with the *Geneva Conventions*,<sup>73</sup> for example, can be considerable both in military and financial terms. Militarily, armed forces are required to show constraint in the selection of targets and are prohibited from targeting civilians, even when this

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<sup>68</sup> See below n 99 and accompanying text.

<sup>69</sup> Meron, above n 10, 243.

<sup>70</sup> See William George, 'Looking for a Global Religion? Try International Law' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 483, 486; James Nafziger, 'The Functions of Religion in the International Legal System' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 164.

<sup>71</sup> *The Babylonian Talmud* (translated under the editorship of Isidore Epstein, 1935–48 ed) *Tractate Shabbath* 31a.

<sup>72</sup> *Holy Bible*, above n 21, Matthew 7:12.

<sup>73</sup> Above n 4.

might have military benefits.<sup>74</sup> In financial terms, creating appropriate facilities for the detention of prisoners of war is a far more costly exercise than the slaughter of the captured and wounded that was once the norm.<sup>75</sup> Yet one basis on which those engaging in modern warfare have been convinced to pay this price is that the rules apply reciprocally. While the government may have to pay for decent treatment of enemy prisoners of war, the enemy is also abiding by the rules regarding treatment of prisoners.<sup>76</sup>

However, sometimes the pragmatic force of reciprocity may be inadequate. Armed religious groups fighting for a cause that they consider holy or just may be prepared to take the consequences of reciprocal punishments for their breaches of the law. Extending quarter or treating prisoners decently may be equated by some to betrayal of the cause, and potential martyrdom if caught by the other side may be an acceptable price to pay.<sup>77</sup> In such cases, it may be that the religious language of reciprocity — that is less concerned with punishment and more concerned with the moral value of treating people as you would have them treat you — may be a powerful way of conveying the need for reciprocal decency in times of war.

As well as the broad concept of reciprocity, there are many religious teachings that directly deal with rules for warfare. Indeed most early rules regulating warfare had a religious rather than a legal basis. An early example of religious teaching being used to mitigate the harshness of war can be seen in the injunction in Deuteronomy that when the army draws near to a city it should offer the city the chance to surrender without fighting and, if the city accepts this offer, that the army should refrain from the normal practice of killing the men and enslaving the women and children, and rather should accept the service of all the people

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<sup>74</sup> One of the key principles of international humanitarian law is the distinction between civilian and military populations: see *Additional Protocol I*, above n 4, art 48, which provides that the '[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'. The restrictions that this places on the military are set out in detail at arts 49–56.

<sup>75</sup> For the modern law on the treatment of prisoners of war see *Geneva Convention III*, above n 4. This sets out the requirements with respect to quarters, food and clothing of the prisoners at arts 25–8, including the requirement that the quarters for prisoners shall be 'as favourable as those for the forces of the Detaining Power who are billeted in the same area' at art 25. There are also provisions for hygiene and medical attention at arts 29–32, and for religious, intellectual and physical activities at arts 34–8.

<sup>76</sup> This was the reason that some American military figures have expressed concern about the treatment of those detained in the 'war on terror': see, eg, Walter Schumm, 'Kansas State University: Humane Treatment of Prisoners of War Cannot Be Assumed to Occur Automatically, K-State Professor Says', *M2 Presswire Newsfeed*, 25 May 2004. Schumm, a former Army Reserve Colonel, and now Professor at the School of Family Studies and Human Services at Kansas State University, lists reasons for treating prisoners humanely as including

that those who treat their prisoners well usually find that the enemy reciprocates this treatment with their own captured soldiers. In addition, if enemy soldiers know their capture means humane treatment, they are often more likely to surrender than to fight to the death. In the end, more of one's own soldiers are likely to be killed if the enemy fears surrendering or has heard that prisoners will be abused or shamed once captured.

<sup>77</sup> See the discussion of spiritual fear in relation to the Lord's Resistance Army in Uganda, and the rewards of martyrdom in relation to Palestinian suicide bombers, below in Part IV(B).

within the city.<sup>78</sup> From these and other biblical texts, Nahmanides states that one of the purposes of the *Halakah* is to teach the Jewish people ‘to deal mercifully even with our enemies in time of war ... and this is a *mitzwah* for all generations’.<sup>79</sup> Shabtai Rosenne concludes that ‘it is not surprising that the moral tone of Mosaic Judaism should have attempted to modify’ the cruel practices of primitive wars.<sup>80</sup> In his analysis, the role that the Jewish religion plays in developing rules of war is towards restraint of the cruelty and barbarism that exists in many wars.

There are many limits on the methods of waging war set out in the sharia.<sup>81</sup> An oft-quoted example of the congruence of Islam and humanitarian law can be found in the address to the first Syrian expedition of Abu Bakr, in which he said:

Stop, O people, that I may give you ten rules to keep by heart! Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm-tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives.<sup>82</sup>

The concern to protect the noncombatant, the rejection of treachery and respect for religious institutions has a strong resonance with modern developments in international law.<sup>83</sup> In its insistence on the importance of protecting the natural environment — both plant and animal — the speech in many ways moves ahead of the current state of international humanitarian law,<sup>84</sup> where only relatively recently has some requirement of care for the environment been included in *Additional Protocol I*.<sup>85</sup> Some Jewish writers have interpreted similar texts to prohibit the ‘wanton destruction’ of the environment when engaged in war.<sup>86</sup>

<sup>78</sup> *Holy Bible*, above n 21, Deuteronomy 20:10–14. See also Michael Broyde, ‘Battlefield Ethics in the Jewish Tradition’ (2001) *American Society of International Law: Proceedings of the 95<sup>th</sup> Annual Meeting* 92, 95.

<sup>79</sup> As cited in Horowitz, above n 22, 150–1.

<sup>80</sup> He also gives an overview of sources of authority for various modifying rules: Shabtai Rosenne, ‘The Influence of Judaism on the Development of International Law: An Assessment’ in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 63, 77.

<sup>81</sup> A Ibrahim, ‘Traditional Asian Approaches: A Malaysian View’ (1995) 9 *Australian Year Book of International Law* 217, 225–32, gives an overview of some of these rules on issues such as: treatment of the sick, wounded and dead; forbidden acts; the treatment of prisoners of war; and rules for civil war. Sharia can be loosely interpreted as Islamic law and sets down rules that cover what would be considered both legal and religious obligations in Western law. For an overview see Wael Hallaq, *A History of Islamic Legal Theories* (1997); Weeramantry, *Islamic Jurisprudence*, above n 8.

<sup>82</sup> As quoted in Khadduri, *War and Peace in the Law of Islam*, above n 46, 102.

<sup>83</sup> Abdur Rahman I Doi, *Sharī‘ah, The Islamic Law* (1984) 445; but see Rushd, above n 50, 461, for a debate over the full implication of these words.

<sup>84</sup> Weeramantry, *Islamic Jurisprudence*, above n 8, 138.

<sup>85</sup> Article 55(1) provides that ‘[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage’.

<sup>86</sup> See, eg, Horowitz, above n 22, 150–1; Roberts, above n 45, 231; Broyde, above n 78, 98.

It is from the early Christian writers that the rules of international humanitarian law are generally said to trace their roots.<sup>87</sup> Saint Augustine, while permitting nations to engage in just wars, held that a war was not just if it was carried out for the wrong reasons. He argued that, '[t]he passion for inflicting harm, the cruel thirst to vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war'.<sup>88</sup> The distinction between *jus ad bellum* (just war) and *jus in bello* (right behaviour in the conduct of war), which is still used in international law today, has its roots in Christian teaching.<sup>89</sup>

These teachings, however, are not simply historical texts of limited modern relevance. They are used by religious groups and individuals when they engage in modern arguments about the appropriate responses of their own communities or the international community to current conflicts, such as the terrorist attacks on the US,<sup>90</sup> or the use of force against Iraq.<sup>91</sup> The most recent version of the Catechism of the Catholic Church (an authoritative outline of the teachings of the Church) draws very directly from international law in its definition of sinfulness in times of conflict. Rule 2313 states:

Non-combatants, wounded soldiers, and prisoners must be respected and treated humanely. Actions deliberately contrary to the law of nations and to its universal principles are crimes, as are the orders that command such actions. Blind obedience does not suffice to excuse those who carry them out. Thus the extermination of a people, nation, or ethnic minority must be condemned as a mortal sin. One is morally bound to resist orders that command genocide.<sup>92</sup>

A later rule (Rule 2314) states that the indiscriminate destruction of whole cities or areas and their inhabitants is a 'crime against God and man' and it comes close to condemning the mere possession of weapons of mass destruction as providing the opportunity to commit such crimes — another example of religious teaching arguably moving in advance of international law.<sup>93</sup>

Religious authority can also be important for rebutting religious justifications used by those who breach the rules of warfare. In the first Gulf War, for example, Saddam Hussein attempted to gain support for his invasion of Kuwait and resistance to the Coalition by calling for a jihad against the Western armed

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<sup>87</sup> See Malcolm Evans, *Religious Liberty and International Law in Europe* (1997) 20–41, for a good overview of historical links between Christian theology and laws relating to war, particularly the notion of a just war.

<sup>88</sup> Quoted in Saint Thomas Aquinas, *Summa Theologiae*, vol 35 (Thomas Heath trans, 1964–81 ed) 83.

<sup>89</sup> Nafziger, above n 70, 164–6.

<sup>90</sup> The US Conference of Catholic Bishops, above n 30, directly used the teachings on just war taken from Saint Augustine and Saint Thomas Aquinas in its discussion of the ethics of the attacks on Afghanistan.

<sup>91</sup> See, eg, Michael Novak, 'Wrong: War to Topple Saddam is a Moral Obligation', *The Times* (London, UK), 12 February 2003, T2–5.

<sup>92</sup> This rule reflects (in abbreviated form) the requirements of humanitarian law with respect to non-combatants, the wounded and prisoners of war and also reflects the modern rejection of the superior orders defence. The explicit reference to the relatively modern term 'genocide' is a demonstration that the laws of the Catholic Church adapt to modern concerns and legal language.

<sup>93</sup> Cf *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 ('*Nuclear Weapons Advisory Opinion*').



forces arrayed against him. His attempt to portray his actions as jihad was opposed by the majority of mainstream Islamic scholars and leaders from many Muslim states. A council of scholars from Al-Azhar University's sharia faculty, for example, condemned the invasion of Kuwait and also the methods used by Iraq in its occupation as 'deeply in the wrong and deserving of severe punishment',<sup>94</sup> and many other scholars and Muslim political leaders utterly condemned his attempts to use Islamic arguments to support his cause.<sup>95</sup>

There is currently a sophisticated debate between Muslim scholars as to the acceptability of Osama bin Laden's war of terrorism with scholars such as Professor Bernard Haykel, Assistant Professor of Middle Eastern Studies at New York University, arguing that 'the war bin Laden has engaged us in cannot be labeled a jihad ... [and] a strong case can be made that he has acted contrary to the tenets of Islam and can be ostracized from the community of believing Muslims'.<sup>96</sup> Such arguments may be more important to some Muslims than arguments derived from international law or the domestic law of Western powers.

Yet, as mentioned above in this part, complexities arise when international lawyers engage with religion. The work of Christopher G Weeramantry in both his academic and judicial roles demonstrates this. As an academic and promoter of international humanitarian law he has written about the way in which various religious traditions, most particularly Islam, are compatible with the norms of international humanitarian law.<sup>97</sup> He uses this work to bolster both the standing of Islam within international law and the standing of international law within Islam. This seems to be a good example of the way in which religion can be used to create respect for international norms.

Complexities arise, however, when he takes the same approach while acting in a judicial role. In the decision of the ICJ in the *Nuclear Weapons Advisory Opinion*,<sup>98</sup> Judge Weeramantry's dissenting judgment looked in some detail at the insights of different cultural and religious traditions in regards to the use of nuclear weapons.<sup>99</sup> In a lengthy section headed 'Multicultural Background to the Humanitarian Laws of War' he argues that it

greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture ... it is deep-rooted in many cultures — Hindu, Buddhist, Chinese, Christian, Islamic and traditional African.<sup>100</sup>

<sup>94</sup> John Yemma, 'Islam Judges Saddam Hussein; Key Scholars Condemn Actions against Kuwait', *The Boston Globe* (Boston, US), 14 January 1991, 3.

<sup>95</sup> Michael McAteer, 'Does Saddam Have the Right to Call This War Holy?', *The Toronto Star* (Toronto, Canada), 9 February 1991, K10; Michael Hirsley, 'Koran Can Justify Both Sides in a Holy War', *Chicago Tribune* (Chicago, US), 3 February 1991, C12; Kenneth Freed and Michael Ross, 'Muslim Leaders Reject Hussein's Call for War on the "Infidels"', *Los Angeles Times* (Los Angeles, US), 21 January 1991, 5.

<sup>96</sup> 'Two Views: Can the Koran Condone Terror?', *The New York Times* (New York, US), 13 October 2001, A15. See also Roy Mottahedeh, 'Islam and the Opposition to Terrorism', *The New York Times* (New York, US), 30 September 2001, Section 4, 13; 'Muslim View of this Vile Act as UnIslamic', *The Herald* (Glasgow, UK), 14 September 2001, 25.

<sup>97</sup> Weeramantry, *Islamic Jurisprudence*, above n 8, 134–5.

<sup>98</sup> [1996] ICJ Rep 226.

<sup>99</sup> *Ibid* 429 (Dissenting Opinion of Judge Weeramantry).

<sup>100</sup> *Ibid* 478.

He goes on to say that the

multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength ...<sup>101</sup>

He then discusses the Hindu story of hyper-destructive weapons from the story of Rama and Ravana in the epic *Ramayana*, as well as quoting from Deuteronomy, citing studies of traditions of restraint and clemency in traditional African societies, giving an overview of the historical Christian involvement in the laws of war, the Islamic traditions of warfare, and the pacifism inherent in Buddhism.<sup>102</sup> He concludes that, in rendering his advisory opinion, 'it would be a grave omission indeed to neglect the humanitarian perspectives available from this major segment of the world's cultural traditions'<sup>103</sup> — although this position of cultural blindness is precisely the one adopted by most judges of the ICJ in the majority of cases, including this one.

Yet in his judgments Judge Weeramantry seems to deliberately avoid specifying the role that religion plays. It is 'background' and something that 'greatly strengthens' the concept of humanitarian law. He implicitly criticises the majority for failing to deal with the religious teachings on war, but does not clearly explain why it is essential for them to do so. Is it because religion is a source of international law in this area? If so, is it part of custom or an independent source, or maybe even a general principle?<sup>104</sup> If it is a source of international law, does that mean that the ICJ should pay heed to all the aspects of religion that undermine the norms of international humanitarian law?<sup>105</sup> The answer to the last question is almost certainly no, as Weeramantry in his other writings has tended to focus on ways of demonstrating the compatibility of Islam and international law, and has been reluctant to engage with or acknowledge those elements of Islam that are incompatible with international law. This suggests that Judge Weeramantry is engaged in a personally principled, but legally pragmatic, attempt to use religion in a way that bolsters the standing of norms developed within the international legal system.

Even the majority of the ICJ recognised to a limited degree the importance of demonstrating the relationship between international humanitarian law and Islam in *United States Diplomatic and Consular Staff in Tehran (US v Iran)*.<sup>106</sup> Given that the case involved the taking of US hostages by supporters of a new government that expressly based its legitimacy in Islam, it is unsurprising that it forced one of the few recognitions of religion by the Court. In its discussion of the legality of the taking hostage of American diplomats by Iranian students, the Court referred to the 'principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions' as one of the foundations of the 'long-established' legal regime surrounding diplomats.<sup>107</sup> The judgment of the

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid 478–82.

<sup>103</sup> Ibid 481.

<sup>104</sup> See *Statute of the International Court of Justice* art 38.

<sup>105</sup> Discussed below in Part III(B).

<sup>106</sup> [1980] ICJ Rep 2.

<sup>107</sup> Ibid 40.

Court briefly notes that ‘the traditions of Islam made a substantial contribution’ to the development of the regime.<sup>108</sup>

Judge Tarazi, in his dissenting opinion, develops this argument in greater detail. In his judgment he quotes from a work entitled *International Law* published by the Institute of State and Law of the Academy of Science of the Union of Soviet Socialist Republics. The passage that he quotes observed that Arab states had a well-developed concept of international law even in the Middle Ages and that this was linked to religion.<sup>109</sup> In particular,

[t]he Arabs recognised the inviolability of Ambassadors and the need for the fulfillment of treaty obligations. They ... considered the observance of definite rules of law necessary in time of war (‘the blood of women, children and old men shall not besmirch your victory’).<sup>110</sup>

While Judge Tarazi dissented from the majority’s decision, he concurred with the majority in regard to its reasoning relating to diplomatic immunity.<sup>111</sup> His judgment is one of the clearest contemporary recognitions in the ICJ of the ongoing relevance of religion to understanding and giving legitimacy to international legal obligations. It is interesting to contrast the detailed consideration that he gives to the issue of the requirements of Islamic law in regard to the treatment of diplomats — even in times of revolution and warfare — compared with the muted, single line recognition of this point in the judgment of the majority. While the majority’s reference to Islam is an acknowledgment of the importance of demonstrating the intercultural relevance of the rule in question (particularly in the context of the nature of the dispute between the US and Iran), the majority judges are reluctant to fully develop this point perhaps because, as discussed earlier, it is far from clear how and why religion should play a role as a source of international law or what the full implications of taking such a position would be.

Thus many religious teachings can be and have been used to bolster the principles of international humanitarian law. From the basic norm of reciprocity to more specific rules protecting the vulnerable or limiting military tactics, there is congruence between some religious teachings on warfare and the modern international rules. This congruence has the potential to enable those promoting international humanitarian law in a variety of contexts to draw on religious rules to promote the legitimacy of the international rules. This may be particularly important in contexts where the international rules are treated with suspicion and more credence is given to local religious leaders and teaching.

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid 59 (Dissenting Opinion of Judge Tarazi).

<sup>110</sup> Academy of Sciences of the USSR, Institute of State and Law, *International Law: A Textbook for Use in Law Schools* (Dennis Ogden trans, 1961 ed) 35; as cited in *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 2, 59 (Dissenting Opinion of Judge Tarazi).

<sup>111</sup> *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 2, 58 (Dissenting Opinion of Judge Tarazi).

B *Undermining of International Norms*

Again, however, religious teachings and practices have a double edge in respect to the standards required in war.<sup>112</sup> While the selection of certain religious texts seems to show religious traditions as supportive of international humanitarian norms, a different selection (often from the same sources) creates a significantly different picture.<sup>113</sup>

In the three traditions examined there are numerous examples of exhortations to act in a manner that is inconsistent with the laws of war. The Book of Jeremiah (in a passage that was used by the Crusaders to justify their tactics) states: ‘Cursed be he that doeth the work of the Lord deceitfully; and cursed be he that keepeth back his sword from blood’.<sup>114</sup> The *Talmud* teaches that soldiers are ‘exempt from the performance of other commandments’, including that of restraints on destruction,<sup>115</sup> and Guy Roberts notes that Jewish traditions regarding ‘the treatment of civilians, occupation, the use of poisoned weapons and the treatment of prisoners of war during wartime greatly differ from the modern codes of conduct’.<sup>116</sup>

In stark contrast to Weeramantry’s gentle interpretation of the requirements of Islam, Majid Khadduri concludes that

jihādists are permitted to besiege enemy cities, to use siege artillery (hurling machines) for the destruction of city walls and houses, and to burn or flood enemy territory. They are also permitted to cut water canals and destroy water supplies ... Poison, blood, or any material that may spoil the drinking water may be thrown into the water supplies or canals in order to force the enemy to capitulate.<sup>117</sup>

Ibn Rushd, in his work on Islamic law, discusses the harm that may be inflicted during jihad and concludes that the execution of prisoners of war was permitted (despite some disagreement among scholars), as was the enslavement of both soldiers and defeated civilians.<sup>118</sup> He also deals at some length with the distribution of the spoils of war (one fifth of which went to the needy and four

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<sup>112</sup> For a brief overview of some differences, see Dino Kritsiotis, ‘On the *Jus ad Bellum* and *Jus in Bello* of Operation Enduring Freedom’ (2002) *American Society of International Law: Proceedings of the 96<sup>th</sup> Annual Meeting* 33.

<sup>113</sup> Roberts, above n 45, 231–3. Religious or spiritual perspectives can also act in a constructively critical way in regards to current orthodoxies in international humanitarian law. For an interesting critique of the ICC using Gandhian principles of *satyagraha* see Carrie Gustafson, ‘Gandhi’s Philosophy of *Satyagraha*: Cautionary Notes for the International Penal Lobby’ in Carrie Gustafson and Peter Juviler (eds), *Religion and Human Rights: Competing Claims?* (1999) 88.

<sup>114</sup> *Holy Bible*, above n 21, Jeremiah 48:10.

<sup>115</sup> *Babylonian Talmud*, above n 71, *Sotah* 44b. See also Roberts, above n 45, 229–30.

<sup>116</sup> Roberts, above n 45, 232.

<sup>117</sup> Khadduri, *War and Peace in the Law of Islam*, above n 46, 106; cf *Additional Protocol I*, above n 4, art 54(2), which (among other things) prohibits the destruction or rendering useless of ‘objects indispensable to the survival of the civilian population’, including ‘drinking water installations and supplies and irrigation works’.

<sup>118</sup> Rushd, above n 50, 456–8. However, the execution of women and children was not permitted as long as they were not participating in the fighting.

fifths of which went to the soldiers)<sup>119</sup> — behaviour which would now be prohibited as pillage under *Geneva Convention IV*.<sup>120</sup>

The Jewish teaching in relation to sieges began with the benign requirement that civilians (or even soldiers) should always be given the opportunity to flee the besieged city, but this led to an assumption that those who did not flee were not to be considered ‘innocents’. Thus, there was not the same concern for protecting the lives of noncombatants as has developed in the modern law.<sup>121</sup>

Even a writer such as Saint Augustine, who tends to be associated with the development of restraints on the conduct of warfare (through the development of the just war doctrine and his vivid descriptions of the evils that come about through war), allowed for behaviour which would now be considered in opposition to some of the most basic principles of international humanitarian law. In a careful analysis of Saint Augustine’s teachings on killing, Richard Hartigan concludes that Saint Augustine ‘exhibited an unexpected degree of harshness and seeming indifference to the fate of the innocent’ in the carrying out of a just war.<sup>122</sup>

Modern day examples of religious justifications being used to undermine the laws of war or religious leaders condoning breaches of international standards are sadly still common. The calls to total warfare, for example, are clear in the words of the chief of the Lashkar-e-Tayyaba who has preached that ‘Muslims should not rest in peace until we have destroyed America and India’.<sup>123</sup> Similarly, in the fatwa issued by the World Islamic Front (an organisation established by Osama bin Laden) on 22 February 1998, the organisation said that ‘we hereby give all Muslims the following judgment: The judgment to kill and fight Americans and their allies, whether civilians or military, is an obligation for every Muslim who is able to do so in any country’.<sup>124</sup> Such instructions breach the legal requirement to distinguish between combatants and civilians — one of the most fundamental principles of humanitarian law.

Complete disregard for the ordinary rules of warfare can be found in the behaviour of the Lord’s Resistance Army in Uganda. While the aims of the group remain somewhat obscure, its origins and leadership have an allegedly spiritual basis; the army is tightly controlled in terms of worship and spiritual practice and it has sometimes claimed that its aim is to ensure that Uganda is governed by the Ten Commandments.<sup>125</sup> In its efforts to achieve dominance in the bloody civil war that has wracked the country, the Lord’s Resistance Army

<sup>119</sup> Ibid 466–83. See also *Holy Qur’an*, above n 24, 8 (*Al-Anfāl* — The Spoils of War).

<sup>120</sup> Above n 4, arts 16, 33.

<sup>121</sup> Broyde, above n 78, 97.

<sup>122</sup> Richard Hartigan, ‘Saint Augustine on War and Killing: The Problem of the Innocent’ (1966) 27 *Journal of the History of Ideas* 195, 195.

<sup>123</sup> Quoted in Arnaud de Borchgrave, ‘Oozing Venom and Jihad’, *The Washington Times* (Washington, US), 19 August 2004, A19. The Lashkar-e-Tayyaba is a Kashmiri independence group seeking the creation of an Islamic Kashmiri state using violent means.

<sup>124</sup> Peter Bergen, *Holy War, Inc: Inside the Secret World of Osama bin Laden* (2001) 96. See also John Esposito, *Unholy War: Terror in the Name of Islam* (2002) 20–1.

<sup>125</sup> For an explanation of the spiritual dimension to the hold that leaders have over the army, see World Vision, *Pawns of Politics: Children, Conflict and Peace in Northern Uganda* (2004) 13–14 <[http://www.child-rights.org/PolicyAdvocacy/pahome2.5.nsf/cractionnews/49B263F8D988FD6488256F1C004C960A/\\$file/Pawns\\_Of\\_Politics.pdf](http://www.child-rights.org/PolicyAdvocacy/pahome2.5.nsf/cractionnews/49B263F8D988FD6488256F1C004C960A/$file/Pawns_Of_Politics.pdf)> at 1 May 2005. This is further discussed below in Part IV(B).

has violated almost every norm of international humanitarian and human rights law. It is particularly notorious for kidnapping children and inculcating them into the army through religious rites, horrific physical abuse, and forced participation in brutalities (for example, by requiring children to kill others, even relatives, to seal them to the group through guilt and a sense of complicity).<sup>126</sup> Boys are used as soldiers and girls, including some as young as eight and nine, are used as sex slaves.<sup>127</sup> The Army makes no meaningful distinction between civilians and members of the armed forces and subjects the civilian population to torture and arbitrary killings.<sup>128</sup> The brutality of the Army's leadership, which has undoubtedly been exacerbated by the abuses committed by the Ugandan Government and armed forces, is a terrible demonstration of a war unbound by the ordinary legal rules of right conduct and inspired by religious or spiritual zeal.

Religion is, therefore, no easy companion to international humanitarian norms. Even if some of the rules of warfare permitted by religions are compatible with international law, religious teaching at many times has permitted — and sometimes required — behaviour that is fundamentally incompatible with international law. This helps to explain and at least partially justify the caution that judges of the ICJ have when including reference to religion in their judgments. It may give the secular lawyer pause before too enthusiastically legitimising a central role for religion in norm creation and raises the reasonable question of whether, once religion is used to justify certain rules, it may not also be used to undermine others.

#### IV COMPLIANCE

##### A *A Motive for Compliance*

Creating motives for compliance is one of the primary challenges for international humanitarian law and one that has not always been met, as the need for the ICC demonstrates.<sup>129</sup> Religion has played a part in encouraging compliance with the laws of war through systems of both legal and moral enforcement. Historically, church institutions played a role in directly enforcing the laws of warfare of the time. One example of this is the penitential rites imposed on the Norman forces for the 'harrying of the North' after the 1066 invasion of England.<sup>130</sup> While the religious nature of these punishments may

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<sup>126</sup> Human Rights Watch, *Abducted and Abused: Renewed Conflict in Northern Uganda* (2003) 21–2 <<http://www.hrw.org/reports/2003/uganda0703>> at 1 May 2005. Chapter IV of this document outlines the numerous atrocities involving the Army and, in particular, its abuse of children.

<sup>127</sup> *Ibid* 26–31.

<sup>128</sup> *Ibid* 35–41.

<sup>129</sup> The preamble to the *Rome Statute*, above n 4, affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation', but it also aims to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. This implicitly recognises that such a culture of impunity exists at present and increases the likelihood of genocide, war crimes and crimes against humanity being committed.

<sup>130</sup> Hilaire McCoubrey, 'Natural Law, Religion and the Development of International Law' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 177, 182.

seem a long way removed from modern trials and imprisonment under UN tribunals, in societies that were deeply religious, fear of incurring divine wrath or the disapprobation of the Church could act as a deterrent to grave breaches of the laws of war of the time. Even now, particularly in countries that incorporate elements of sharia into domestic law, it may be that religious courts are directly involved in the enforcement of laws regarding conduct in warfare. During the first Gulf War, Saudi *ulema* (religious authorities) floated the idea that Saddam Hussein and leading members of his regime should be tried in an international sharia tribunal.<sup>131</sup> Hussein was not captured during that war and the question became moot, but it is interesting to consider how recent history might have changed if he had been tried and punished by a sharia court for his actions in Kuwait rather than being allowed to remain as the President of Iraq for so many years.

Another way in which religion may encourage respect for the rules of humanitarian law is through the respect for treaty obligations, particularly in this context the *Geneva Conventions*. Treaties are understood as an important religious obligation by many religious groups.<sup>132</sup> Even when the prophet Joshua was deceived into entering into a treaty with the Gibeonites, the treaty was adhered to because of the importance of acting honourably in relation to peace treaties.<sup>133</sup> Thus even the exigencies of war were no excuse for noncompliance. In the ancient world, such treaties were often accompanied by religious sacrifices or ceremonies to reiterate the important moral/religious obligation that underlay formal agreements between states.<sup>134</sup> As the primary rules of international humanitarian law are in treaty form, one method of encouraging compliance with the rules in signatory states might be to remind the leaders or populace of the religious importance of adhering to treaties. Introduction of religious ceremonies to accompany the entry into treaties of relevance to international humanitarian law (such as treaties that seek to regulate or end internal armed conflict) may also help to shift the focus away from the formal, legal status of such treaties onto the moral and religious importance of adhering to the terms within them.

Compliance, however, is not merely a matter of formal legal sanctions, courts or treaties. In many ways the most important motivator for compliance is the creation of a culture of compliance — a culture where individuals or groups see compliance as an important part of their personal or group integrity and self-understanding. The creation of a culture that values humanitarian law or other forms of restraint in times of armed conflict is a complex matter, but religion can certainly play a role in creating such a culture. Historian Barbara Donagan argues for example that, during the English Civil War, relatively high standards of conduct were maintained, in part, because each soldier perceived

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<sup>131</sup> Kathy Evans, 'Islam Seeks Right to Try Hussein', *The Guardian* (London, UK), 25 January 1991, 3.

<sup>132</sup> Horowitz, above n 22, 152; *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 2, 59 (Dissenting Opinion of Judge Tarazi).

<sup>133</sup> *Holy Bible*, above n 21, Joshua 9:2–19. See also Rosenne, above n 80, 78.

<sup>134</sup> David Bederman, 'Religion and the Sources of International Law in Antiquity' in Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999) 1, 12–18.

himself as 'a soldier, a *Christian* and a gentleman'.<sup>135</sup> The message of the importance of honour (especially regarding issues such as surrender and prisoners of war) was reiterated from the pulpit and by soldiers themselves, and helped to create a modern, professional form of warfare.<sup>136</sup>

The capacity of religion to play a role in encouraging compliance with the rules of war has not been ignored by modern writers. Professor Ibrahim argues that international law is less effective as a form of compulsion to adhere to the rules of warfare than Islamic law because states only obey international law when it is enforced, but the rules of Islam are followed by 'Muslims in all circumstances, irrespective of the behaviour of the enemy' because they are 'injunctions of God'.<sup>137</sup> Thus religious belief can create a motive for individuals involved in armed conflict to comply with the laws of war even in the (very many) cases where formal enforcement is not possible.

Religious influence is also used to pressure governments to behave in accordance with the requirements of international law in many states. For example, the US Conference of Catholic Bishops issued a statement very soon after the September 11 terrorist attacks condemning the attacks, but also calling upon the US Government to adhere to international law, particularly the requirement of proportionality and protection of civilian lives, in any response to the attacks.<sup>138</sup> In societies where religion plays an important role or in which religious leaders are considered moral or ethical leaders, such pressure may be part of creating a culture of compliance.

#### B *Justification for Noncompliance*

While the strength of religious conviction may be sufficient to bolster commitment to decent treatment of the enemy even in difficult circumstances, it may also provide a justification for noncompliance with international law. As discussed earlier in Part III(B), the idea of a holy war as one that permitted no mercy or restraint was developed by the Catholic Church as an exception to the rules required in ordinary warfare. Religious warfare, crusades or jihad can inflame passions and convictions in a manner that pulls against international humanitarian laws or the official teachings of a religion. The perpetrators of the September 11 terrorist attacks, for example, may have acted in conflict with the teachings of Islam in regard to suicides or the killing of innocents, but religious belief appears to play a powerful role in the continuing attraction of al Qaeda methods and ends.<sup>139</sup>

The power of religion as a justification for breaches of international humanitarian law is magnified when religion and ethnicity are intermingled. This can lead to the insidious situation in which religion, because of its merging with

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<sup>135</sup> Barbara Donagan, 'The Web of Honour: Soldiers, Christians, and Gentlemen in the English Civil War' (2001) 44 *The Historical Journal* 365, 389 (emphasis added). Interestingly, Donagan notes that this notion of Christianity cut across sectarian divides and was shared by Catholic and Protestant soldiers.

<sup>136</sup> *Ibid* 372.

<sup>137</sup> Ibrahim, above n 81, 232.

<sup>138</sup> US Conference of Catholic Bishops, above n 30.

<sup>139</sup> For a small sample of the large literature in this area see Roland Jacquard, *In the Name of Osama bin Laden: Global Terrorism and the bin Laden Brotherhood* (2002); Bergen, above n 124.



race, becomes seen as an inherent characteristic.<sup>140</sup> Thus, in the name of the ‘true religion’, the slaughter or mistreatment of whole populations becomes justified. An example of this mind-set can be seen in the speech of Pope Urban II at the Council of Clermont in 1095, where he urged secular leaders to take up the Crusades in order to wrest the Holy Land from ‘unclean races, utterly alienated from God’.<sup>141</sup> This dangerous mixture of religious and racial politics evident in some phases of the Crusades led John France to conclude that

ideological war, especially when informed by feelings of racial superiority, produced something like total war, in which whole populations could suffer terribly. Crusade and conquest in the European experience were justified by religious exclusiveness, and produced a savagery that was otherwise reserved for heretics.<sup>142</sup>

In the modern context, religiously fuelled warfare and violence are becoming ever more common, which can make it far more difficult to resolve conflicts and to ensure respect for the rules of international humanitarian law. As former US Secretary of State Madeleine Albright has noted, ‘[w]hen you add a religious layer [to conflicts], it makes it harder to find pragmatic solutions ... [a]nd that’s what you have to do if you’re going to negotiate a problem’.<sup>143</sup> Religious claims can be difficult to back away from, for who has the power to negotiate away the will of God or to compromise religious truth? It can also be more difficult to argue that secular legal limits should be observed in fighting for higher truths than in more mundane conflicts over land or wealth. As Michael Howard observes in relation to medieval Europe, the

restraints observed in warfare within Christendom did not apply to ‘just wars’ which Christians fought to defend, to purify, or to extend their faith. To submit to restraints which prejudiced ones [sic] chances of victory when fighting in a righteous cause, to accept the concept of a *jus in bello* when one had an unquestionable *jus ad bellum*, was a paradox which few warring communities, then or since, found it easy to accept.<sup>144</sup>

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<sup>140</sup> The UN Special Rapporteur on Religious Intolerance, Abdelfattah Amor, has noted that ‘the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects. Hence, many instances of discrimination are aggravated by the effects of multiple identities’: see World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Preparatory Committee, *Racial Discrimination and Religious Discrimination: Identification and Measures*, [6], UN Doc A/CONF.189/PC.1/7 (13 April 2000).

<sup>141</sup> John France, *Western Warfare in the Age of the Crusades, 1000–1300* (1999) 205.

<sup>142</sup> Ibid 233; cf ibid 227–8. For an argument that a similar conflation of race and religion in an attempt to define an ‘enemy’ is occurring in the US today, see Leti Volpp, ‘The Citizen and the Terrorist’ (2002) 49 *University of California Los Angeles Law Review* 1575, 1576, who describes the emergence of a ‘new identity category that groups together persons who appear “Middle Eastern, Arab, or Muslim”. This consolidation reflects a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens’. Volpp also cites figures that suggest that one third of Americans believe that Arab-Americans should be interned: at 1591.

<sup>143</sup> As quoted in Page and Kelley, above n 52.

<sup>144</sup> Michael Howard, ‘*Temperamenta Belli: Can War Be Controlled?*’ in Michael Howard (ed), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 1, 5.

While compliance with rules of mercy and restraint may be appropriate in most circumstances, such compliance in a holy war may look more like half-heartedness about the justice and truth of the holy cause.

Religious and spiritual beliefs may also decrease the likelihood of compliance with the rules of international law if they lead combatants to believe that they are immune from the usual vicissitudes of war.<sup>145</sup> Compliance with any set of legal norms depends at least in part on fear of punishment for breach of the laws. While regimes for punishment of international crimes, including war crimes and crimes against humanity, are developing in international and many domestic legal systems, they are not likely to be effective against people who consider themselves invulnerable because of the power of their religion. In Uganda, for example, newly kidnapped recruits of the Lord's Resistance Army undergo a spiritual initiation that they are told protects them from killing and also allows them to be traced by mystical means if they attempt to escape from the army.<sup>146</sup> The new child recruits are told that 'they can overcome bullets' in their fight for the Army.<sup>147</sup> The leader of the group, Joseph Kony, is considered by many of his followers to be a powerful spiritual medium and this bolsters his authority and the fear and respect in which he is held.<sup>148</sup> The spiritual power that he holds over his followers may be part of the explanation of the extent to which they have been prepared to commit terrible crimes in the Ugandan civil war. Fear of criminal punishment is undermined if those who carry out international crimes are more afraid of the immediate spiritual power of the leader (and/or are prepared to trust in the spiritual protection of the leader) than in the power of often distant domestic or international courts.

Similarly, difficulties for compliance with international humanitarian law are created by religious creeds that emphasise rewards in the afterlife. These problems are exemplified by suicide bombers who target civilians and otherwise breach the laws of war. In some cases the motivation behind such attacks is in part the desire to become a martyr and obtain the rewards in the afterlife that come from carrying out the work of God on Earth. A UN study involving failed suicide bombers quoted a member of Hamas about training people for suicide bombings. The trainer said: 'We focus his attention on Paradise, on being in the presence of Allah, on meeting the prophet Muhammad ... and on fighting the Israeli occupation'.<sup>149</sup> It is difficult to see how the ordinary fear of criminal punishment can act as a motive for compliance in relation to a person who is

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<sup>145</sup> For example, Human Rights Watch reported that some of the young men who were killed with clashes with security forces in Southern Thailand in April 2004 may have been 'deceived into participating in the initial attack on spurious religious grounds and under the belief that spells would protect them from bullets fired at their bodies': Human Rights Watch, 'Thailand: Prosecute and Discipline Officials Responsible for Southern Violence' (Press Release, 5 August 2004) <<http://hrw.org/english/docs/2004/08/05/thaila9188.htm>> at 1 May 2005.

<sup>146</sup> Human Rights Watch, *Abducted and Abused*, above n 126, 20.

<sup>147</sup> World Vision, above n 125, 14.

<sup>148</sup> Even the Ugandan Minister of State for Defence Ruth Nankabirwa said during a press briefing that Kony is 'a man of spirits. This is for real': as quoted in *ibid*.

<sup>149</sup> As quoted in Michael Bond, 'The Making of a Suicide Bomber', *New Scientist* (London, UK), 15 May 2004, 34, 37. The same article notes the 'complicated' relationship between suicide bombings and religion by making the point that many suicide bombers are not religiously motivated, for example, the Tamil Tigers in Sri Lanka.

prepared to give up their own life to achieve their goals and whose mind is focused on the next world rather than this one.

Thus there are a variety of ways in which religion can act as a rationale for noncompliance with the rules of international humanitarian law. This is particularly the case when the violating act is interpreted by the person carrying it out as according with the will of God. In such a case, the higher demands of religion are likely to trump secular fear of punishment or a desire to obey human laws. Yet this also suggests that simply working within a legal framework is unlikely to resolve these issues. Proliferating legal norms and newly created international criminal courts and tribunals can only have a limited impact against the kinds of rationales for noncompliance discussed here. It may be that only religious arguments and leadership can effectively cast doubt on the promises of rewards in the afterlife or spiritual protection. Secular arguments and punishments are so far removed from the motivating forces for people who commit atrocities in the name of religion that there is reason to be skeptical about their effectiveness if they are not buttressed by discourse that is more familiar and powerful to the religiously motivated.

#### V SYMBOLISM AND LEADERSHIP

As Professor Thomas Franck has argued, symbolism can play a significant role in developing a sense of the legitimacy of, and thus compliance with, international law.<sup>150</sup> Religious leaders may also play an important role in a community even though their role may not be formal or part of the official constitutional order. Their authority may also be, in a sense, symbolic. Religious symbolism has sometimes been harnessed or acknowledged by both domestic and international law. The notion of a church as sanctuary, for example, allowed a space in which the conventional hostilities of war or violence had to give way to a gentler mode of activity.<sup>151</sup> The sanctity of places of worship — and the importance that many civilisations put on protecting that sanctity — has led to the modern prohibition of ‘acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’.<sup>152</sup> Similarly, the special role of religious personnel attached to armed forces is a recognition by international humanitarian law of the important role of spiritual guidance and support for members of the armed

<sup>150</sup> Thomas Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 705, 729–30.

<sup>151</sup> See Dawn Marie Hayes, *Body and Sacred Place in Medieval Europe 1100–1389* (2000) 20–3. The continuing resonance of the concept of sanctuary can be seen in the sanctuary movement in the US: see Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (1995); Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the US Sanctuary Movement* (1993). This movement in the US grew out of the assistance that religious volunteers offered to Central American refugees in the early 1980s: Coutin, above this note, 3.

<sup>152</sup> *Additional Protocol I*, above n 4, art 53(a); see also *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956); *Rome Statute*, above n 4, arts 8(2)(b)(ix), 8(2)(e)(iv); Dettler, above n 5, 294–6.

forces, and probably also traces its roots back to the protection of clerics in many religions.<sup>153</sup>

While at an abstract level it has been possible to gain agreement about the importance of religious symbols and places of worship, religious symbolism has the potential to divide as well as to unite. The most significant example here is the role played by the red cross symbol of the International Committee of the Red Cross ('ICRC'). The simple symbol of a red cross on a white background was not originally chosen for its religious import; it was simply the obverse of the Swiss flag and, if anything, symbolised national rather than religious pride.<sup>154</sup> The symbol has played an important role in allowing representatives and places under the control of the ICRC to be readily identified and protected during times of conflict. Once the ICRC expanded its sphere of operation into Arab countries, however, the symbol was perceived as religious. The red cross on a white background had painful associations not only with Christianity generally, but with the Crusades in particular, and led to a hostile response by Arab and later other Muslim states.<sup>155</sup> In an effort to deal with these sensibilities, the ICRC permitted two alternative symbols: the Red Lion and Sun for what was then Persia (which is no longer in use) and the Red Crescent.<sup>156</sup> While the Red Crescent has allowed the ICRC to work in Muslim countries, it has had the unfortunate effect of underlining the seeming Christian symbolism of the original cross.<sup>157</sup> This has made it unacceptable to states such as Israel that are not prepared to use either the crescent or the cross. The ICRC, concerned at the dilution of the effectiveness of its symbol, is still in the process of considering its options.<sup>158</sup>

While the original choice of a clear and plain symbol for the ICRC was not influenced by the religious sentiments of the ICRC founders, it was also made without any consideration of the religious sensibilities of others. The ramifications of this lack of consideration continue even now. It is thus clear that in developing modern symbols and seeking modern sources of inspiration, those who seek to promote international humanitarian law must be aware of the importance of religion in many parts of the world. It is not enough to act with

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<sup>153</sup> For an overview of the rules relating to religious personnel and a brief overview of the laws protecting them see Stefan Lunze, 'Serving God and Caesar: Religious Personnel and their Protection in Armed Conflict' (2004) 853 *International Review of the Red Cross* 69. For a more general discussion of the role of religion in the *Geneva Conventions*, see David Llewellyn and H Victor Conde, 'Freedom of Religion or Belief under International Humanitarian Law and International Criminal Law' in Tore Lindblom, W Cole Durham and Bahia Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 125.

<sup>154</sup> For a history of the emblem see Francois Bugnion, *Towards a Comprehensive Solution to the Question of the Emblem* (2<sup>nd</sup> ed, 2003) 5–10, available from <<http://www.icrc.org/web/eng/siteeng0.nsf/html/emblem!Open>> at 1 May 2005; Timothy L H McCormack, 'What's in an Emblem: Humanitarian Assistance under Any Other Banner Would Be as Comforting' (2000) 1 *Melbourne Journal of International Law* 175.

<sup>155</sup> McCormack, 'What's in an Emblem', above n 154, 177–8.

<sup>156</sup> Bugnion, above n 154, 11–12.

<sup>157</sup> Bugnion notes that 'the juxtaposition of the two emblems — the red cross and the red crescent — endows the original emblem with a religious connotation that it did not necessarily have at the outset': *ibid* 25.

<sup>158</sup> Updates on this issue can be found at ICRC, *The Red Cross and the Red Crescent — Towards an Additional Emblem* (2005) <<http://www.icrc.org/web/eng/siteeng0.nsf/html/emblem!Open>> at 1 May 2005.

good will or to claim ignorance of religious significance, as President George W Bush learnt when he used the term ‘crusade’ to describe the war on terror.<sup>159</sup> A truly international symbol needs to be one that does not have religious connotations that some groups will find offensive or alienating. On the other hand, effective symbols at a regional or national level may have religious links. The record of some of the Muslim leaders during the Crusades who adhered to humanitarian ideals even in the face of aggression and invasion<sup>160</sup> might be a potent restraining example for many Arab states. Such a symbol would probably not have the same effect elsewhere.

Because of the potential potency of religious symbolism and language, international law faces a complex task in considering the extent to which they should be used. The debate over the inclusion of specific reference to God in international human rights instruments,<sup>161</sup> such as the *Universal Declaration of Human Rights*,<sup>162</sup> demonstrates that there are no simple answers to such questions. While the secularist viewpoint (which prevailed in the case of international treaties on human rights and humanitarian law) is that the exclusion of religious language and symbolism makes such instruments acceptable to people of all or no faiths, others find the exclusion offensive or alienating.<sup>163</sup> While there are dangers in too readily accepting a symbol such as the Red Cross which was understood to have religious overtones, the mere exclusion of religious symbolism and language creates its own set of problems and is not always the most appropriate response when developing symbols for humanitarian law, particularly at a local level.

In leadership too, the role of religious leaders in community understanding and actions can be significant. In Nigeria, for example, opposition to vaccination by religious and traditional leaders led to an 11 month ban on polio immunisation. The ban came about because these leaders believed that the immunisation included a substance that could make girls infertile.<sup>164</sup> It was not until the concerns of the religious leaders were taken seriously by coreligionists (notably Saudi Arabia) and a compromise was reached involving the vaccine

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<sup>159</sup> Wilkinson, above n 55, A15.

<sup>160</sup> See, eg, Peter Holt, *The Age of the Crusades: The Near East from the Eleventh Century to 1517* (1986) 7.

<sup>161</sup> See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 89, 146–7, 161.

<sup>162</sup> GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948).

<sup>163</sup> See the debate between Max Stackhouse, ‘Human Rights and Public Theology: The Basic Validation of Human Rights’ and Louis Henkin, ‘Human Rights: Religious or Enlightened?’ both in Carrie Gustafson and Peter Juviler (eds), *Religion and Human Rights: Competing Claims?* (1999) 12–30, 31–5. The Nineteenth Islamic Conference of Foreign Ministers, *The Cairo Declaration on Human Rights in Islam* (1990) (Annex to Res No 49/19-P), makes clear links between Allah and human rights in the preamble, which states in part that ‘fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion ... they are binding divine commandments, which are contained in the Revealed Books of God’.

<sup>164</sup> Lawrence Altman, ‘WHO Advises Full Polio Immunization for Travelers to Nigeria’, *The New York Times* (New York, US), 1 July 2004, A7.

being imported from Muslim Indonesia that the program of immunisations could recommence.<sup>165</sup>

Therefore, in choosing partners to work with at local levels, those working in international humanitarian law need to be aware of the significant symbolic and social power that can be wielded by religious leaders. If those leaders feel alienated from programs to increase respect for norms of international humanitarian law — as some religious leaders have felt in regard to immunisation programs — they have the power to severely disrupt those programs. If, however, the time is taken to discuss the issues with them in a spirit of respect for their religious knowledge and authority then they can make important partners. The ICRC, for example, now regularly includes religious leaders in its training programs on international humanitarian law.<sup>166</sup>

Religious leaders, symbols and rituals can also be important for work related to the prevention of conflict or the restoration of peace in a society in transition from conflict to a stable legal system. When there have been significant breaches of international humanitarian law and prolonged conflict, the danger that such conflict will reignite and that the breaches will recur is significant. Religion can play a role in the restoration of societies torn apart by war; a role that may not be able to be played by lawyers or well-meaning outsiders, but that can be essential in helping victims of war and in creating conditions in which atrocities do not recur. There are times when it is better for the aid worker to stand back and let religious or cultural rites take centre stage. For example, it might be appropriate to particular situations that aid workers leave enough space for religious rites for those who are dying or have died during a war.<sup>167</sup> The focus of aid workers or international law experts on the practical and the legal can sometimes fail to perceive the significance and importance of religious or burial rites for those close to the victims of armed conflict.<sup>168</sup> For the families of the victims of conflict, the comfort of religious symbols in a time of distress can be considerable and should not be undermined by the more pragmatic priorities of secular aid workers.

In Iraq too, it is clear that religious leaders will have to play a role in assisting the country in its time of transition and in influencing the extent to which violence continues to be part of Iraq's political landscape. In a recent survey by Oxford Research International and Oxford University, those surveyed overwhelmingly identified religious leaders as the most trusted group in Iraqi

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<sup>165</sup> Saudi Arabia threatened to exclude Nigerians from the hajj if they did not make efforts to stem the rise of polio: John Donnelly, 'Headway Seen in Africa on Polio Immunizations', *The Boston Globe* (Boston, US), 3 August 2004, A8; David Newberry, 'Nigeria Key to Polio-Free World', *The Washington Times* (Washington, US), 29 June 2004, A16.

<sup>166</sup> See, eg, ICRC, 'Senegal: Spreading Knowledge of Humanitarian Law in Southern Regions' (Press Release, 22 August 2002); ICRC, 'Afghanistan: ICRC Starts "People on War" Consultation' (Press Release, 16 June 1999).

<sup>167</sup> Sylvain Froidevaux, 'Humanitarian Action, Religious Ritual and Death' (2002) 848 *International Review of the Red Cross* 785, 798.

<sup>168</sup> *Ibid* 796.

society.<sup>169</sup> The Muslim cleric Saeed Sistani was identified as one of the more trusted leaders in the country.<sup>170</sup> Even though most Iraqis do not want to see religious government,<sup>171</sup> they do turn to some religious leaders for guidance on important issues, presumably including the way in which post-conflict transition to Iraqi government should take place. Whether outsiders may see such influence as appropriate or not is to a large degree irrelevant. The influence exists and those seeking to ensure that international standards are maintained in Iraq ignore it at their peril.

Symbolism and moral leadership can play an influential role in shaping societies and in influencing their receptivity to norms such as those set out in international humanitarian law. For the pragmatic, secular lawyer who seeks to promote humanitarian law, it is important to be aware of the meaningful symbols and the identity of religious leaders in the particular community in which they are working. It is possible for international lawyers to unintentionally alienate people through a lack of thought (as has the ICRC with its symbol) and to miss opportunities to work with people who are held in esteem in local communities if they do not have a good understanding of the role religion plays in particular communities.

## VI CONCLUSION

What then is the pragmatic, secular lawyer, who wishes to promote compliance with international humanitarian law, to make of religion? Is it a worthwhile partner in the struggle to develop a 'culture of values' that effectively limits abuses and atrocities in times of war? There are some good reasons for hesitancy about entering into such a partnership. As both modern and ancient history demonstrate, religion can play a destructive and dangerous role in times of war. The international lawyer might be concerned that opening a door to religion will legitimise its place in the international legal system and allow the 'dark' side of religion to play a negative role in armed conflicts in the future. It is easy enough to see the hatred that is preached in the name of religion, the discord that is sown, the conflict that is exacerbated, and to conclude that it would be better to try to distance law from all of the complexities and potential problems created by religion. This Enlightenment-inspired response to religious conflict tries to lift a secular, neutral legal system above religious strife.

Yet this is a world where religion continues to play an influential role and where some legal systems are (quite rightly) treated with suspicion and mistrust by the people that they govern. Religion continues to be a vital and influential power in many regions, including some of the most war-wracked and conflict-ridden. It is quite possible that, at least in the short term, the damage that is sought to be done in the name of religion can only be countered by a pragmatic partnership between people of good will working together from both religious

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<sup>169</sup> Over 76 per cent of those surveyed trusted religious leaders 'a great deal' or 'quite a lot', despite the fact that the majority of Iraqis did not perceive religious issues to be particularly important in the reconstruction of Iraq and did not want to see a religious government: Oxford Research International, *National Survey of Iraq* (2004) 22, <<http://www.oxfordresearch.com/Iraq%20February%202004%20Frequency%20Tables.pdf>> at 1 May 2005.

<sup>170</sup> *Ibid* 20–1.

<sup>171</sup> *Ibid* 24.

and legal perspectives. Such a partnership may well have to be pragmatic, even if it is respectful. International lawyers may reasonably try to limit the influence of religion — to keep it away from the sources of law, to confine its influence to bolstering pre-existing laws, and to respect its symbols and leadership only where they can be of use. Religious leaders may reasonably seek to extend the influence of religion, expect its teachings to be followed in preference to the law where there is a conflict, and lay claim to the first allegiance of their religion's adherents. Yet, as this article has argued, there is much common ground and many areas in which a partnership (even a cautious, limited one) could prove beneficial to both.

As for the concerns of the secularists not to open the door to religion even this far in case less benign religious influences intrude, the simple answer is that those who use religion for abusive purposes are already powerful players in the way many conflicts unfold. Those who have sought to declare total warfare or to justify attacks on innocents have not hesitated to use religious language and claim divine mandates for their actions. While this usage of religion might reasonably raise concerns about the role of religion, there are rich sources in many religions that should not be lightly discarded by international lawyers. In seeking to explain legal rules, or to encourage compliance with them, advocates of international humanitarian law can draw on religious traditions and practices that match modern legal rules. Religious leaders and religious symbols may help to encourage compliance with and respect for rules in some cultures, particularly those where secular legal systems can be perceived as degraded currency. And the deep tradition of respect for all humanity that can be found in religious teachings can help to create a strong, durable basis for the reciprocal rights and obligations in humanitarian law. Religion might be a double-edged sword, but it remains a powerful weapon that should not be left only to those who advocate violence in its name.