The European Proceedings of
Social & Behavioural Sciences
EpSBS

ISSN: 2357-1330

https://doi.org/10.15405/epsbs.2019.12.04.45

SCTCMG 2019

International Scientific Conference «Social and Cultural Transformations in the Context of Modern Globalism»

FEATURES OF THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW RULES IN MUSLIM COUNTRIES

Alisa Belenko (a)*
*Corresponding author

(a) Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of Russia, Moscow, Russia, alisa-belenko@mail.ru, +79646427666.

Abstract

The article deals with various issues related to the implementation of the rules of international humanitarian law by Muslim countries, such as: the impact of various elements of the legal systems of Muslim countries and Islamic law on the national implementation of international law; as well as compliance of Muslim humanitarian law with international humanitarian law (IHL) rules. The article also notes the role of classical Muslim law in the formation of some institutions of modern international humanitarian law. Among the other issues discussed is the growing influence of Islamic law on all components of the internal systems of law in Muslim countries, as well as on the law-making of Muslim international organizations, especially the Organization of Islamic Cooperation. Questions of historical formation of legal systems of the modern Muslim countries connected with influence of colonialism and reception of the Western legal models and institutes are touched upon. The author examines the attitude of the constitutions of Muslim countries to international treaties, as well as the concept of monism and dualism and their application in Muslim countries. The stages of implementation of the norms of international humanitarian law, including international legal implementation and national implementation, are covered. The issues of responsibility for violations of the laws and customs of war in Muslim law and in the law of Muslim countries, as well as the interaction of Muslim countries with the International criminal court are discussed.

Keywords: Implementation, international law, Islam, Islamic law, international humanitarian law.

https://doi.org/10.15405/epsbs.2019.12.04.45
Corresponding Author: Alisa Belenko
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

1. Introduction

One of the peremptory principles of international law, without which it could not exist, is the principle of the faithful implementation by the states of their international commitments. This principle is enshrined in the UN Charter, the Vienna Convention on the Law of Treaties (1969), the UN General Assembly Declaration on the principles of international law (1970) and other international legal documents. This principle has been recognized by the states since ancient times. However, with the development of the society, the state and the law, as well as the system of international law itself, the mechanisms for the implementation of the commitments undertaken by States has naturally become more complex. There are international law implementation mechanisms, laid down in the international treaties, and national implementation. The process of national implementation depends directly on the legal system of the state. Various historical elements of the legal system may have a direct or indirect impact on the implementation of international law. Such phenomena undoubtedly include legal awareness, the path of historical development and in the case of Muslim countries, undoubtedly, religion and its main institution – Islamic law.

International humanitarian law (also called the law of armed conflict, the laws and customs of war), along with human rights law, is one of the greatest achievements of human civilization. The first full-scale legal treatise on the laws and customs of war in the history of mankind was the work of the Muslim lawyer Muhammad Ibn al-Hassan al-Shaybani (749-805) (Khadduri, 1966). Today, Muslim countries are undergoing a period of transformation, which manifests itself in the political, social and legal spheres. At the same time, Islamic law, which temporarily ceased to be the main legal regulator of the life of Muslim countries during the period of their liberation from colonialism, replaced by the reception of European legal forms and models, still continues to develop and gains an increasing impact on the domestic legal systems, and on inter-state relations within the Muslim world. It should also be noted that both the Muslim world and Islamic law are extremely heterogeneous, which complicates the identification of general trends and patterns of their development.

2. Problem Statement

The signing and ratification of an international treaty does not always mean, unfortunately, its strict observance in the domestic law. One of the features of Muslim countries is their own understanding of international human rights law, the partial inconsistency of Muslim standards in this area with international law and, as a consequence, the development of their own standrads at the level of Muslim international organizations. However, the treaties of international humanitarian law are always easier to sign and ratify for Muslim countries than treaties in the field of human rights. While Muslim countries are in some cases reluctant to commit themselves to human rights law, stating their nonconformity with Islamic law, it is obvious that the humane ideas of international humanitarian law do conform with those of Islam. It is, however, important to identify the existence of a few contradictions between Islamic and international law in the field of the laws and customs of war, which is important with regards to their mutual interaction in the domestic laws of Muslim countries.

https://doi.org/10.15405/epsbs.2019.12.04.45
Corresponding Author: Alisa Belenko
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

3. Research Questions

There are a few questions that this study aims to answer. Among them is the question of the extentis to which the provisions of international humanitarian law are consistent with the provisions of the Islamic law of war, and what impact Islamic law has an on the legal systems of Muslim countries in the field of the law of armed conflict. It is also important to answer the question which other elements of the legal systems of Muslim countries have impact on the implementation of international humanitarian law.

4. Purpose of the Study

Due to the fact that the religion of Islam is a feature that unites a large number of countries, as shown by the number of member-states of the Organization of Islamic cooperation, and because of the increasing number of armed conflicts in the Islamic world, that accounts for most of the armed conflicts taking place in the world, there is an obvious need to identify patterns in the implementation of international humanitarian law.

5. Research Methods

The main methods of the study are the review of scientific literature on the topic of the implementation in international law with regard to the specifics of Muslim countries, as well as the content analysis of legal documents of Muslim countries, including their constitutions, domestic laws, decisions of their judiciary, etc. The comparative legal analysis of social and legal institutions of Muslim countries in their historical development was also used during preparation stage of this study.

6. Findings

For the purposes of this study, three main features are identified as criteria of belonging to Muslim countries, those are: the country's belonging to the Organization of Islamic Cooperation, the Muslim majority in the country's population, elements of Islamic law in its legal system. On the basis of these criteria, about 41 States can be named Muslim countries, including relatively "secular" Turkey and Indonesia, as well as the Islamic republics of Pakistan, Iran, Sudan, etc., along with the Gulf countries, among which is whose the Kingdom of Saudi Arabia legal system of is currently and historically consistently based upon the rules of classical Islamic law.

The rules of the law of the former colonial powers are reflected in the constitutions, the legislation and judicial practice of modern Muslim countries. During the period of colonial dependence and immediately after their achieving of independence, there was a wide reception of Western legal institutions. They were borrowed even by those countries that were not under the direct control of the colonial powers, for example: Iran, Afghanistan, Egypt. The main systemic influence was the influence of continental and common law, represented respectively by France and England. Until now, the Muslim countries of the British Commonwealth of Nations belong to countries with common law. Common law countries generally adhere to the concept of dualism. Dualism implies the existence of two independent systems of law – national and international, in which there is a special mechanism of implementation. "In this case,

https://doi.org/10.15405/epsbs.2019.12.04.45
Corresponding Author: Alisa Belenko
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

representatives of common law States (common law), usually use the concept of "incorporation" to refer to the direct application of international law and the concept of "transformation" – for their indirect application" (Nefedov, 2015, p.3). Such countries include Bangladesh, Malaysia, Pakistan, Nigeria etc. Higher courts in such countries may also apply international custom. The countries that were colonies of France, as a rule, belong to the continental legal family and tend to apply the monistic doctrine: Morocco, Algeria, etc. (Bourouba, 2015, pp. 24-30). Monism of the French type implies the primacy of an international Treaty over national law. Unsurprisingly, the French legal system influenced not only the colonies of France, but also countries like Egypt, Iran and Afghanistan which adopted some of the French legal models. For a long time Egypt, which was the leader of the Arab world, extrapolated its legal institutions, European in character and their roots, but adapted to the Arab reality to other Arab countries. Egypt is characterized by monism. The Constitution grants an international Treaty status equal to that of the law. In this case, it is theoretically possible to apply the principle of lex posterior derogat priori, but the practice of Egyptian courts points to their application of the principle of the primacy of international law (Amer, 2002, pp. 388-389). The constitutions of Bahrain, Qatar, and Kuwait followed the same path (Bourouba, 2015, pp. 34-35). The primacy of international law is enshrined in the article 78 of the Constitution of Mauritania of 1991 (Bourouba, 2015, p. 34). Most of the constitutions of Muslim countries do not regulate the position of the international Treaty in their legal systems. Speaking of international treaties in Muslim countries, it must be said that Treaty law is well-developed in Islamic law. Fiqh, based on the practice of the Prophet, demands that Muslims observe the treaties even when they were concluded with non-Muslims.

At the same time, almost all the constitutions of Muslim countries in one way or another affirm the position of Islam or Islamic law, and sometimes both. During the period of colonial dependence and the reception of Western legal models there was a temporary departure from traditional Islamic law. At the moment, there is no state in the world whose law would be exclusively Islamic, i.e. where classical Islamic law would be the only regulator of interactions within the society. Moreover, with some confidence we can assume that such a state never existed. Nevertheless, it should be noted that there is a "legal revision", expressed in the growing importance of Islamic law, and the increase in its influence on the legislations of Muslim states. More and more institutions and rules of Islamic law are being re-incorporated into their legal systems.

The concept of "Islamic humanitarian law" is a reflection of this trend. Modern Muslim scholars and state institutions, using the structure of IHL, re-interpret the Islamic laws of war and the provisions of the main divine sources of Islamic law – the Quran and the Sunnah. It is generally assumed that the father of modern international law is the outstanding Dutch lawyer Hugo Grotius. Many lawyers with a specialization in international law and some historians, however, believe that the ideas of Islamic law influenced his treatise "De jure belli ac pacis" ("On the law of war and peace") of 1625 (Boisard, 1980; Weeramantry, 1988, pp. 150-157; Hamidullah, 1945, pp. 60-65). Historically, international humanitarian law has evolved from the doctrine and custom, while the states, by their agreed will, established institutions in international treaties. With a high degree of probability it can be argued that some institutions (for example, the status of a prisoner of war) of modern IHL were the historical reception of Muslim practices.

https://doi.org/10.15405/epsbs.2019.12.04.45
Corresponding Author: Alisa Belenko
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

Kotlyarov (2013) lists the following principles of the law of armed conflict: “the principle of the humanization of armed conflicts; the principle of the protection of victims of war; the principle of the protection of civilian objects; the principle of the protection of the natural environment during armed conflicts; the principle of the protection of the interests of neutral States; the principle of limitation of belligerents in the choice of methods and means of warfare; the principle of responsibility of States and individuals for violations of international humanitarian law” (p. 56). The following principles of Islamic humanitarian law can be named: prohibition of: unjustified cruelty, unjustified destruction, destruction of crops and fruit trees, use of poisoned weapons and water, use of violence against the wounded and sick, violation of treaties, treachery; and distinction between combatants and civilians; and the requirement of humane treatment of prisoners (Badar, 2013). However, there are some fundamental contradictions between IHL and classical Islamic law regarding the possibility of killing and enslaving prisoners of war, seizing the property of the vanquished as well as their women and children (Muhammadin, 2015). It is in these provisions that the medieval nature of Islamic law manifests itself. Nevertheless, the mechanisms of renewal and adaptation to the relevant historical conditions are laid down in the Islamic law, and today the opinion of Muslim scholars is undoubtedly inclined towars the non-application of these provisions. Besides, there never was any unanimity between Muslim scholars of the Mediaevality concerning these provisions. They are only provided for in the doctrine –fiqh, not in the Quran, while the practice of the Prophet Muhammad was contradictory. Therefore, these provisions could be revised.

Muslim international organizations also contribute to the formation of regional rules of the law of armed conflict and the implementation of the basic standards of IHL. Thus, the Islamic Committee of the International Crescent (ICIC) has been working under the auspices of the Organization of Islamic Cooperation since 1982, along with the Islamic forum of international humanitarian law based under the Qatari Red Crescent Society, created to disseminate information about IHL. It regularly publishes a magazine devoted to IHL - "al-Wasiya", named in honor of the Instruction, which the second Righteous Caliph Abu Bakr gave to his commander. The Article 3 of the Cairo Declaration of Human Rights in Islam (1990) deals with the law of armed conflict, laying down the basic rules of classical Islamic law. The Article 41 of the Declaration of Human Rights adopted by the Gulf Cooperation Council in 2015 states: "the rules of international humanitarian law shall apply in armed conflict in accordance with all applicable international conventions and practices, subject to the rights of older persons, persons with disabilities, patients, women, children, prisoners and civilians" (GCC Human Rights Declaration, 2015, p.9). This document, while asserting the importance of Islamic law in other articles, nevertheless points to the binding nature of existing international treaties in the field of IHL. The Secretariat of the League of Arab States works very closely with the ICRC, regularly conducting educational activities in the member countries of the League, as well as publishing reports on the implementation of IHL in the Arab countries. In 2005, the Council of Arab Ministers of justice adopted the model law on crimes under the jurisdiction of the International Criminalourt (ICC). However, given that only three Arab League member-states have ratified the Rome Statute of 1998, which established the ICC, the model law is not yet very relevant. One of the leading scholars in the field of international criminal law, the late Bassiouni (2013) also dealt with the Islamic law of war. He insisted on the compatibility of the rules of IHL and those provided for under the institution of Islamic law – Jihad, which can be compared to the category of jus in bello. He also claimed

https://doi.org/10.15405/epsbs.2019.12.04.45
Corresponding Author: Alisa Belenko
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

that Islamic law provides for liability for violations of these norms (Bassiouni, 2013). Malekian (2017) speaks of the need to establish an Islamic International Criminal Court on the ad hoc basis, which would apply the rules of "Islamic international criminal law" and would consist of judges qualified to apply Islamic law. To date, less than ten Muslim states have ratified the Rome Statute of the ICC, while many of them have signed it. The reason for this is hardly the incompatibility between international criminal law and Islamic law, but the likelihood of the ICC interfering in the internal affairs of these states (Badar, 2018), as illustrated by the situation with the Sudan. Carswell identifies four main components necessary for effective compliance by the state armed forces with the rules of international law of armed conflict. First of all, the state should be a party to the main conventions of the law of armed conflict, then, take domestic legislative measures to confirm its international obligations, develop a mechanism to objectively determine the existence of an armed conflict, identify the opposing party or parties and, thus, initiate the application of IHL rules; take measures to ensure the inclusion of IHL rules in the operational practice of the armed forces (Carswell, 2014, p. 921). It must be said that most of the Muslim countries are parties to the main treaties in the field of IHL, its rules are incorporated into domestic legislations, and the armed forces are provided with appropriate guidelines. The implementation of IHL rules in Muslim countries is mainly compromised at the level of compliance and liability.

7. Conclusion

The process of implementation of international treaties and custom depends on the legal mechanisms and institutions of the colonial powers, mainly England and France. The primacy of international law is almost nowhere enshrined in the constitutions but is generally ensured by the judiciary. The principles of international humanitarian law are comparable to those of the Islamic law of war, with the exception of certain aspects that can be reviewed in accordance with the requirements of the times and the public interest. Moreover, Islamic law and international humanitarian law have some common origins. The activities of Muslim international organizations are an example of semi-effective combining of the rules of Islamic law with the rules of IHL, the adherence to which is affirmed in the same documents. The two regimes can fruitfully complement each other in the regulation of armed conflicts within the Muslim world.

References

Amer, S. (2002) Public International law. In N. Bernard-Maugiron & B. Dupret (Eds.), *Egypt and Its Laws* (pp. 377-391). Arab and Islamic Laws Series. Kluwer Law International.

Badar, M. E. (2013). Ius in Bello under Islamic International Law. *International Criminal Law Review, 13,* 593-625.

Badar, M. E. (2018). Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court? In G. Tallyn (Ed.), *Islam and International Criminal Law and Justice. Nuremberg Academy Series* (pp. 201-232). Brussels: Torkel Opsahl Academic EPublisher.

Bassiouni, M. C. (2013). *The Shariʿa and Islamic Criminal Justice in Time of War and Peace*. Cambridge University Press.

Boisard, M. A. (1980) 'On the Probable Influence of Islam on Western Public and International Law'. *International Journal of Middle East Studies, 11,* 429-450.

Bourouba, S. (2015). *Jurisprudence in the Application of Human Rights Standards in Arab Courts: Algeria, Iraq, Jordan, Morocco, Palestine*. Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

Cairo Declaration on Human Rights in Islam (1990). Retrieved from http://www.icla.up.ac.za/images/un/use-of-force/intergovernmentalorganisations/oic/THE%20CAIRO%20DECLARATION%20ON%20HUMAN%20RIGHTS%20IN%20ISLAM.pdf 03.02.2019

Carswell, A. J. (2014). Converting Treaties into Tactics on Military Operations. *International Review of the Red Cross, 96 (895/896),* 919–942.

GCC Human Rights Declaration (2015). Retrieved from http://www.gcc-sg.org/en-us/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/Human%20Rights/1453192982.pdf 02.02.2019

Hamidullah, M. (1945). *Muslim Conduct of State (being a treatise of Muslim public international law, consisting of the laws of peace, war and neutrality, together with precedents from orthodox practice, and preceded by a historical and general introduction*). Lahore,

Khadduri, M. (1966). *The Islamic Law of Nations: Shaybani's Siyar*. The John Hopkins University Press. Baltimore.

Kotlyarov, I. I. (2013). *The Regulation of Armed Conflicts in International Law*. Moscow: Jurlitinform.

Malekian, F. (2017). *Corpus Juris of Islamic International Criminal Justice*. Cambridge Scholars Publishing.

Muhammadin, F. M. (2015). Achieving an Honest Reconciliation: Islamic and International Humanitarian Law. *MIMBAR HUKUM, 27*(3), 579-597

Nefedov, B. I. (2015). Self-executing treaties and the International Human Rights Pacts. *Moscow journal of International Law, 4,*18-26. Retrieved from https://doi.org/10.24833/0869-0049-2015-4-18-26 04.02.2019

Weeramantry, C. G. (1988). *Islamic Jurisprudence: An International Perspective*. Palgrave Macmillan.