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**LAW, RELIGION AND VIOLENCE:
A HUMAN RIGHTS-BASED RESPONSE TO
PUNISHMENT (BY STATE AND NON-STATE ACTORS)
OF APOSTASY**

ABSTRACT

This article examines Islamic law on the punishment of apostasy and its use and abuse by state and non-state actors to justify the taking of human life. It highlights the traditional view of Muslim jurists that apostates must be killed. This approach is contrasted with the growing body of juristic opinion that holds that neither the Qur'an nor authoritative *hadith* requires apostates to be executed. This debate has assumed greater importance since al-Qaeda and similar groups have sought to justify acts of violence on the grounds that they are engaged in lawful jihad against apostates, apostate governments and collaborators. The thesis advanced here is that all laws (both secular and religious) that sanction the killing of apostates should be reconsidered for three reasons: they violate international human rights law; they are based on unsound Islamic jurisprudence; and they have been abused by both state actors (to punish political opponents and religious minorities) and non-state actors (including al-Qaeda and various other criminal organisations) who claim that their violent actions against apostates are justified under Islamic law. It is argued that all states party to the *International Covenant on Civil and Political Rights* (1966) ('ICCPR') should guarantee, through law reform if necessary, that crimes against religion (including apostasy) are not legally punishable. Put differently, ICCPR principles, including non-discrimination, should be codified by lawmakers and upheld by the judiciary. Under this approach, elements of Islamic law that are inconsistent with the ICCPR would not be enforced. This represents a significant departure from the current position of the Islamic law schools on the punishment of apostasy. Yet it is argued that such

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change is necessary if various categories of people, including those deemed apostates from Islam, are to be protected from violence and discrimination by state and non-state actors.

I INTRODUCTION

In the wake of the terrorist attacks of 11 September 2001, the issue of religious justifications for violence has gained international attention. One reason is that al-Qaeda and affiliate organisations have sought to justify deadly attacks on civilian targets on the basis of religious norms. They have, for example, declared various regimes to be ‘apostate governments’. Attacks upon local populations within such countries are regarded by al-Qaeda as legitimate measures taken in pursuit of jihad. Put differently, these non-state actors have purported to justify extra-judicial killings by invoking Islamic rules on crime and punishment. This raises sensitive issues regarding the nature and scope of such rules and who has the authority to enforce them. The article demonstrates that violence, whether judicial or extra-judicial in character, against persons on account of their religious beliefs is inconsistent with norms enshrined within the *International Covenant on Civil and Political Rights*¹ (‘ICCPR’). States that are party to the ICCPR are obliged to guarantee the rights contained within this instrument and prevent or punish breaches of the same. Failure by some countries to do so is noted below where relevant state practice is examined. Justifications offered by various state actors for the punishment of apostasy are noted, as is the comfort they give to non-state actors who claim that their acts of violence are legitimate for the same reasons.

The relationship between Islamic law (as practised in various states) and international human rights standards has been examined by various international actors (including the United Nations Commission on Human Rights) for decades.² Apostasy is regarded as a crime against religion under Islamic law and carries the death penalty in various Muslim-majority states.³ Judicial punishment of apostasy has drawn international criticism of the states involved.⁴ Unsurprisingly, a growing body of literature on human rights and the punishment of apostasy has emerged, which forms part of a wider body of scholarship on the relationship between Islam

¹ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR, 21st sess, Supp no 16, UN Doc A/6316 (1966).

² See generally the official website of the Special Rapporteur for Freedom of Religion or Belief <<http://www2.ohchr.org/ENGLISH/ISSUES/RELIGION/index.htm>> at 28 May 2009.

³ In all Muslim states where the approach of the established schools of Islamic jurisprudence is followed, apostasy is, in theory at least, punishable by death—unless legislation provides otherwise. There are some 46 states where Muslims form the majority of the population. Of these, fifteen have declared Islam the religion of the state and five are designated Islamic Republics: see Mashood Baderin, ‘A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence?’ (2001) 1 *Human Rights Law Review* 265, 265; see also Part VIII below.

⁴ See Mohamed S. El-Awa, *Punishment in Islamic Law: A Contemporary Study* (2000) 49–50, 53.

and human rights.⁵ A gap in this literature exists with respect to the abuse of Islamic legal concepts (including apostasy) by non-state actors (such as al Qaeda) to justify violence against civilians. This article extends existing scholarship by proposing a number of human rights-based measures to address this problem. It argues that the prosecution and punishment of apostates in states that enforce Islamic law gives unintended legitimacy to violence carried out, pursuant to the same religious norms, by various non-state actors. A decisive shift by these states towards international human rights-based approaches to law and punishment would address this problem. The proposals offered below complement the United Nations *Global Counter-Terrorism Strategy*⁶ by addressing an issue that the *Global Counter-Terrorism Strategy* overlooks: the use of religious norms, by both state and non-state actors, to justify violence against apostates and others whose ideas and beliefs are considered to be in breach of Islamic law.

II THE APPROACH ADOPTED IN THIS ARTICLE

This article commences by defining the notion of apostasy, with particular reference to Islam. The issue of punishment of apostasy is then addressed by reference to Islamic law and relevant state practice of parties to the ICCPR. Relevant obligations of such states under international human rights law are then considered. Of central importance to this discussion is the nature and scope of the right to freedom of religion and belief. Human rights-based proposals to curb violence against those deemed apostates are then outlined. They include the abolition of discriminatory religious crimes, including apostasy. It is argued that such responses reflect the obligations of all states that are bound, under treaty law, to uphold and implement the ICCPR. Whether non-parties to the ICCPR, such as Saudi Arabia, are similarly bound under customary international law is briefly addressed. Whether states party to the ICCPR are obliged, under treaty law, to repeal apostasy laws, prosecute those (including Islamist terror groups) who engage in violence against apostates, and take active measures to prevent such violence is also examined. Finally, religious justifications offered by non-state actors such as al-Qaeda for acts of violence are also outlined, and the way these justifications offend ICCPR norms is highlighted.⁷

⁵ See for example Mohammed Adeb al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (2009); Baderin, above n 3; Mashood Baderin, *International Human Rights Law and Islamic Law* (2003); Dennis e Jong, 'The Legal Obligation of State and Non-State Actors in Respect of the Protection of Freedom of Thought, Conscience and Religion or Belief' (2008) 3 *Religion and Human Rights* 1; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (1991).

⁶ *Global Counter-Terrorism Strategy*, GA Res 60/288, GAOR, 60th Sess, 99th Plen Mtg, UN Doc A/Res/60/288 (2006).

⁷ Whether religion or other factors is the key motivation for violence by non-state actors such as al-Qaeda, is the subject of ongoing debate. According to Robert Pape (*Dying to Win: The Strategic Logic of Suicide Terrorism* (2005)), nationalism rather than religion is 'the taproot of suicide terrorism' (79). His theory suggests that religion is a subsidiary cause of such violence. Defence of the homeland (84–87) and the desire to end alien occupation (83–84) are considered more significant causes. Pape states that 'the presence of American military forces for combat operations on the homeland territory of the suicide terrorists is stronger than Islamic

III BACKGROUND: CONTEMPORARY VIOLENCE IN THE NAME OF RELIGION

Over the last decade, a growing list of Islamist groups — including the perpetrators of the terrorist attacks of 11 September 2001 — have sought to justify their use of violence by invoking Islamic law. Much attention has focused on whether Islam sanctions the punishment of apostate governments and individual apostates. In this respect, arguments advanced by Ayman al-Zawahiri and Osama bin Laden as justification for al-Qaeda violence have attracted particular interest.⁸ These individuals have interpreted Islamic law as providing grounds for killing those deemed *kafirs* and apostates — even where such persons are unarmed civilians.⁹ Abu Musab Al-Zarqawi, for example, argued that Shi'ite Iraqis were legitimate targets of his organisation's campaign of violent jihad because of their 'heretical' beliefs and their support for a Shi'ite dominated 'apostate' government. For these radical Islamists, the perpetrators of such violence are noble *mujahedeen* ('soldiers of Islam') acting in defence of their religion, rather than terrorists. By contrast, the majority of Muslims regard the killing of civilians as contrary their faith.¹⁰ Moreover, Muslim governments, organisations and senior clerics across the world have condemned such attacks as extremist and contrary to Islam.¹¹ However, the

fundamentalism in predicting whether individuals from that country will become al-Qaeda suicide terrorists' (103). Moreover, al-Qaeda propaganda emphasises the 'Crusader' theme, which relates to occupation (117–24). Some commentators have concluded that religious fanaticism is neither a necessary nor sufficient factor in suicide terrorism: Bruce Michael Bongar et al, *Psychology of terrorism* (2007) 106. However, others have noted that many religious fanatics who have engaged in terrorism in Iraq sought to justify their conduct by reference to religious norms, including apostasy: see Mohammed M. Hafez, *Suicide bombers in Iraq: the strategy and ideology of martyrdom* (2007) 214–215; Bruce Hoffman, *Inside Terrorism* (2006) 325.

⁸ See Richard Bonney, *Jihad: From Qur'an to bin Laden* (2004) 362–265, 417; Ali Khan, *A theory of International Terrorism: Understanding Islamic Militancy* (2006); Jonathan D. Halevi, *Al-Qaeda's Intellectual Legacy: New Radical Islamic Thinking Justifying the Genocide of Infidels* (2003) Jerusalem Centre for Public Affairs, <<http://www.jcpa.org/jl/vp508.htm>> at 6 July 2009; Abdallah Saeed, 'Jihad and Violence: Changing Understandings of Jihad Among Muslims' in Tony Coady and Michael O'Keefe, *Terrorism and Justice: Moral Argument in a Threatened World* (2002) 72. See also *Views of Islam Remain Sharply Divided: Plurality Sees Islam as More Likely to Encourage Violence* (2004) Pew Research Centre for the People and the Press, <<http://people-press.org/commentary/?analysisid=96>> at 8 October 2008; Shaikh Abdur Rahman, *Punishment of Apostasy in Islam* (2007, Revised Edition) vii.

⁹ See 'Al Qaeda: World Islamic Front against Jews and Crusaders', *al-Quds al-Arabi* (London), 23 February 1998, 3. Critics of Islam also point to Islam's sacred texts as the source of politico-religious violence: see Ayaan Hirsi Ali, *Infidel: My Life* (2007) 169–92.

¹⁰ Saeed (2002), above n 8, 72.

¹¹ Ibid. An exception has been the approach adopted by the Organisation of the Islamic Conference and the Arab League toward deliberate or indiscriminate attacks against Israeli civilians. Whilst these organisations have regularly condemned terrorism in all its forms, armed resistance to occupation (which may include attacks on

frequency with which persons who identify as Muslims have engaged in terrorism in recent years suggests a genuine belief among some Muslims that, in some circumstances, the targeting of unarmed civilians is justifiable under Islamic law.¹² The problem of terrorist activity by radical Islamists raises further questions, such as why violence in contemporary Muslim states and societies has reached such levels; whether Islamic law is itself a motivating force behind such violence; and, if so, how this situation might be remedied. Careful analysis of these matters would require a thorough investigation of the causes of violence by radical Islamists. A range of issues affecting some Muslim states and societies would need to be addressed, including foreign occupation of Muslim territory; poor governance; autocracy; lack of economic and political development; poverty; nepotism; tribalism; tradition; culture; sectarianism; and religious extremism. These matters

the citizens of the occupying power) has often been excluded from the notion of terrorism: see, eg, *Final Communiqué of the Arab Summit Conference*, ILM (1996) 1288; *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, opened for signature 7 January 1999, annexe to OIC Res 59/26-P, art 2 (not yet in force); *Arab Convention for the Suppression of Terrorism*, opened for signature 22 April 1998 (deposited with the Secretary-General of the League of Arab States), Preamble (entered into force 7 May 1999); *Kuala Lumpur Declaration on International Terrorism* [6], adopted at the Extraordinary Session of The Islamic Conference Of Foreign Ministers on Terrorism, 1–3 April 2002; Ekmeleddin Ihsanoglu, *Statement of His Excellency Prof. Ekmeleddin Ihsanoglu, Secretary-General of the Organization of the Islamic Conference at the High-Level Plenary Meeting of the United Nations General Assembly* (2005) Permanent Observer Mission of the Organisation of the Islamic Conference to the United Nations, <<http://www.un.org/webcast/summit2005/statements16/islamic050916eng.pdf>> at 27 February 2008. See also *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, art 1(4) (entered into force 7 December 1978) ('Additional Protocol I'). Note that the notion that armed resistance to occupation may include the deliberate and indiscriminate targeting of civilians cannot be reconciled with international humanitarian law: see *Geneva Convention relative to the Protection of Civilians in Time of War of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 August 1949, 75 UNTS 287, art 33 (entered into force 12 October 1950); Additional Protocol I, art 44(3), 51(2); and International Committee of the Red Cross, *Customary International Humanitarian Law Vol I*, Rule 2, [384] ('Acts of threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'). Moreover, since 11 September 2001, international institutions are now moving towards outlawing all forms of armed struggle by any group against a state: Khan, above n 8, 188.

¹² See generally Shaheen S. Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 *Journal of Conflict and Security Law*, 321; Hilmī Zawāṭī, *Is Jihād a Just War? War, Peace, and Human Rights under Islamic and Public International Law* (2001). See also *Support for Terror Wanes Among Muslim Publics: Islamic Extremism: Common Concern for Muslim and Western Publics* (2005) Pew Global Attitudes Project <<http://pewglobal.org/reports/pdf/248.pdf>> at 27 July 2009.

have received detailed attention elsewhere.¹³ This paper examines only one aspect of the problem of contemporary violence in Muslim states and societies: the use of Islamic concepts by state and non-state actors to justify violence against apostates, and the obligation of states party to the ICCPR to prevent the same.

IV THE CONCEPT OF APOSTASY

The English term ‘apostasy’ is derived from the Greek word *apostasias*, meaning a defection or revolt. It is generally used to describe the formal renunciation of one’s religious or political belief.¹⁴ The religious aspect of this concept may be traced back to antiquity.¹⁵ The notion that apostasy is a punishable crime against religion is most evident in the sacred texts of three Abrahamic faiths: Judaism, Christianity and Islam.

A Judaism

The Torah states that ‘if thy brother, the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, Let us go and serve other gods, which thou hast not known, thou, nor thy fathers; Namely, of the gods of the people which are round about you ... thou shalt surely kill him.’¹⁶ This writer is unaware of any case where a person has been punished in Israel for departing from the Jewish faith or any other. While Israel is party to the ICCPR and the (non-binding) 1948 *Declaration of the Establishment of the State* espouses a principle of freedom of religion, Israel’s constitutional Basic Laws do not explicitly recognise rights to equality and to freedom of conscience and religion.¹⁷ The state of Israel is described in two of its Basic Laws (Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Vocation) as a ‘Jewish and democratic state’.¹⁸ It has both Muslim and Rabbinical courts, with the secular legal system intervening on occasion.¹⁹ Anant

¹³ See *Global Counter-Terrorism Strategy*, above n 6, and the annexed Plan of Action. See also Thomas R. Mockaitis, *The ‘New’ Terrorism: Myths and Reality* (2007); Tore Bjørgo, *Root Causes of Terrorism: Myths, Reality and Ways Forward* (2005); Louise Richardson, *The Roots of Terrorism* (2006); Ben Clarke, ‘Terrorism Causes and Cures: An International Law Approach’ in Robert Imre, T. Brian Mooney and Ben Clarke, *Responding to Terrorism: Political, Philosophical and Legal Perspectives* (2008) 19–56.

¹⁴ Samuel Hosain Lamarti, *The Development of Apostasy and Punishment Law in Islam* (PhD Thesis, Glasgow University, 2002) 1.

¹⁵ See Stephen G. Wilson, *Leaving the Fold: Apostates and Defectors in Antiquity* (2004).

¹⁶ *Deuteronomy* 13:6–10 (King James Version).

¹⁷ See Anat Scolnicov, ‘Religious Law, Religious Courts and Human Rights within Israeli Constitutional Structure’ (2006) 4 *International Journal of Constitutional Law* 732, 738–9.

¹⁸ *Ibid* 732–740.

¹⁹ On freedom of religion, see H CJ 3261/93 *Manning v. Minister of Justice*, 47 (3) PD 282 (Barak J).

notes that aspects of personal law in Israel appear to be in breach of the religious freedom guarantee of article 18 of the ICCPR, as the law makes it compulsory for individuals to be subject to religious law and in some cases to the jurisdiction of religious courts.²⁰ While the precise scope of freedom of religion under Israeli law is uncertain, the rights to human dignity and liberty under Israeli Basic Laws would appear sufficient to enable the Israeli Supreme Court to override any conviction for apostasy, should it be imposed by a Muslim or Rabbinical court. However, no prosecutions for apostasy have been brought in religious courts in Israel.

B *Christianity*

In the present era, punishment of apostasy by death is carried out by Islamists who claim that their behaviour is justified under Islamic law. In the past, similar practices have been carried out by members of various Christian sects. The New Testament, the cornerstone of Christian theology, does not refer to punishment of those who depart from the Christian religion. However, the Old Testament (which includes the Torah) also forms part of the Christian Bible. In medieval Europe, the Old Testament doctrine of apostasy was invoked to provide a justification for punishment of those deemed apostates or heretics. Up until the Reformation, most of Europe was part of the Holy Roman Empire. The geographic area covered by this empire was known as Christendom. Persons suspected by local authorities of being apostates or heretics were often subjected to brutal methods of punishment after confessions were extracted under torture. Trials against alleged apostates were often little more than political show-trials by petty tyrants, or lynchings by ignorant and superstitious people. Politics and religion were often intertwined in this process. For example, Joan of Arc was convicted of apostasy in 1431. She was dealt with by French inquisitors at the request of English authorities. She was burned alive at the stake for her 'crimes' only to have her reputation 'rehabilitated' twenty years later by Charles VII, King of France.²¹ The Spanish Inquisition (1478–1614), arguably the most ruthless and brutal organised campaign of religious persecution, led to the torture and execution of thousands of apostates for various heresies.²² During this period, in a number of countries, politico-religious violence became an instrument of statecraft.

Further examples from different historical periods and locations are beyond the scope of this article. However, in concluding this discussion it is important to highlight the fact that during the United Nations era no state has suggested that the execution of apostates from Christianity is justified under either religious or secular law. Nor have state actors engaged in such conduct.

²⁰ Scolnicov, above n 17, 739.

²¹ Joseph Pérez and Janet Lloyd, *The Spanish Inquisition* (2006) 199.

²² See Lu Ann Homza, *The Spanish Inquisition, 1478–1614: an Anthology of Sources* (2006); Cecil Roth, *The Spanish Inquisition* (1964). While apostasy centres around the notion of abandonment of one's religion, heresy may involve speech, behaviour or beliefs that is deemed unorthodox and in breach of prevailing religious doctrine.

C Islam

There are two Arabic words for apostasy: *irtidad* and *riddah*. Both mean ‘to go back’.²³ Arabic is the language of the Qur’an, which is the primary source of Islamic law. The concept of apostasy is firmly established in Islamic law (*Sharia*) and jurisprudence (*fiqh*). Quitting the religion of Islam is a form of apostasy in Islam. *Murtad* is the term used to describe an apostate from Islam (that is, a Muslim who renounces the Islamic faith).²⁴ For many Muslims, quitting Islam is a serious breach of Islamic law which gives rise to the question of punishment. Whether those who leave Islam should be put to death is a matter of considerable debate.

Before examining this debate, it is important to make a few remarks regarding relevant terms and concepts and their use. Firstly, *riddah* has two distinct applications in Islamic jurisprudence. It is sometimes used to describe conversion from Islam to *kafir* (non-belief in Islam).²⁵ This needs to be distinguished from *riddah* involving treason (such as rebellion against an Islamic state). In the context of treason, the apostate is more akin to a dangerous criminal (who is a threat to the state) than a religious heretic.²⁶ Secondly, there is some overlap between relevant terms. Saeed and Saeed note that

apart from the explicit term *riddah* to cover apostasy, there are a number of associated terms and concepts such as blasphemy, heresy, hypocrisy and unbelief that amplify the notion and clarify its scope. There is a substantial amount of overlap between them; at times apostasy seems almost synonymous with them.²⁷

Indeed some early jurists did not attempt to differentiate between apostasy and blasphemy, which were often combined in the notion of *riddah*.²⁸ Thirdly, there is disagreement among Muslim scholars as to precisely what constitutes apostasy and whether it may be punished.²⁹ This gives rise to the question of whether apostasy should be treated as a crime. For those Muslim-majority states where apostasy is

²³ See Lamarti, above n 14, 1 (citation omitted).

²⁴ See ‘Oudah, Abdul Qadir, *Criminal Law of Islam* Volume II (S. Zakir Aijaz and Kitab Bhavan, trans, 1999), 259; see also Majid Khadduri, *War And Peace in the Law of Islam* (1955) 149.

²⁵ Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (2004), 36–37. See also Lamarti, above n 14, 47–52. ‘The opposite of Imān is kufr (unbelief): thus he who denies Allah or who merely commits a grave sin is kufr’: Khadduri, above n 24, 149 (citations omitted).

²⁶ See Saeed and Saeed, above n 25, 93.

²⁷ Ibid 37.

²⁸ Ibid. As to the separation of blasphemy and apostasy in Islam, see H.M, Kamali, *Freedom of Expression in Islam* (1997) 217.

²⁹ See Saeed and Saeed, above n 25, 47.

not a crime, the answer appears to be ‘no’.³⁰ By contrast, in states where apostates are still exposed to the death penalty, the opposite view prevails.³¹

V ISLAM AND PUNISHMENT OF APOSTASY: TWO VERY DIFFERENT SCHOOLS OF THOUGHT

The punishment of apostasy has been described as ‘one of the most contentious issues in Islam’.³² Whether ‘earthly punishment’ of apostasy is justified (or required) under Islam has been debated for centuries. The issue of penalty is of fundamental importance to the fate of apostates in some Muslim states and societies. It also informs discussion about wider contemporary issues including extra-judicial violence (that is, violence by non-state actors) against apostates and apostate regimes.³³ The debate about whether apostasy should be punished arises because, while apostasy is condemned in a number of verses of the Qur’an, no earthly penalty for this sin is prescribed.³⁴ As with all questions pertaining to Islamic law, analysis of whether the killing of apostates is permitted requires an examination of the various sources of Islamic law. Islamic law is discovered by referring to a hierarchal body of sources or foundations (*usul*). At the top of this hierarchy is the Qur’an, followed by *sahih hadith* (authentic verses of the words of Mohammed).³⁵ The selective use of analogical reasoning (*qiyas*) is another source, although it not universally accepted. Consensus (*ijmā’*) of the recognised body of religious experts

³⁰ Turkey is a prominent example. This secular state does not implement Islamic law.

³¹ Apostasy may be prosecuted in a range of Muslim states under Islamic law even though apostasy is not mentioned in penal laws of the state: see Ibn Warraq, ‘Apostasy and Human Rights’ (2005) International Humanist and Ethical Union, <<http://www.iheu.org/node/1541>> at 2 July 2009.

³² See Rahman, above n 8, vii.

³³ See Parts IX and X below.

³⁴ See Qur’an 4: 90; 5: 59; 16: 108.

³⁵ *Hadith* are a collection of the purported words and deeds of the Prophet Muhammad. In Islam, authoritative *hadith* are those which are *sahih*. *Sahih* means ‘of sound health’. *Hadith* of this character are of the highest grade: their *isnad* (attestation) reflect the highest grades of transmission. *Sahih hadith* yield certainty of knowledge whereas *hadith* that are weak (*da’if*) or even spurious (*maudu*) do not: see John Burton, *An Introduction to the Hadith* (1994) 200. Farooq notes that ‘the vast and comprehensive body of Islamic laws (*fiqh*) critically rests on the *hadith* literature. Islamic scholars, including the experts in *hadith*, have gone to a great extent to defend the sanctity of *hadith* literature and utilise it not just to expound Islamic knowledge, but also to formulate Islamic codes and laws pertaining to the entire gamut of life’: Mohammad Omar Farooq, *Islamic Law and the Use and Abuse of Hadith* (2006) Global Web Post <www.globalwebpost.com/farooqm/writings/islamic/law_Hadith.doc> at 3 July 2009. Nonetheless, some *hadith* identified as *sahih* by eminent Muslim jurists are of doubtful accuracy: see Muhammad Zubayr Siddiqi, *Hadith Literature: Its Origin, Development and Special Features* (1993) 57–58; M M Azami, *Studies in Hadith Methodology and Literature* (1977) 92. *Sahih hadith* are usually *mutawatir* (derived from ‘continuously recurrent’ or ‘a report by an indefinite number of people related in such a way to preclude the possibility of their agreement to perpetuate a lie’): see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2003) 93.

is a further source.³⁶ In order to ascertain whether such a consensus exists, reference may be had to interpretations of the Qur'an and *hadith* reached by jurists over the ages (including modernists). An exhaustive review of all sources of Islamic law of relevance to the issue of punishment of apostasy is beyond the word constraints of this article. However, attention is paid to key verses of the Qur'an (the primary source of Islamic law) that deal with apostasy and those that emphasise freedom of religion and belief. Regard is also had to *hadith* that form the cornerstone of the traditional approach to the punishment of apostasy. The opinions of a range of classical and modernist Muslim jurists and other commentators are also considered. Conclusions are then drawn with respect to whether the killing of apostates is justified under Islamic law.

A *The Traditional View*

Islam's schools of jurisprudence (the *Madh'hab*)³⁷ hold that sane adult male converts from Islam must be executed — even in cases that do not involve treason or rebellion.³⁸ This approach reflects Islamic legal tradition dating back to Caliph Abu Bakr, who succeeded Mohammed as leader of the nascent Muslim community. Pakistani writer on Islam and Islamic law, Muhammad Iqbal Siddiqi, offers an explanation for the traditional approach:

[T]he sayings and doings of the Holy Prophet (peace and blessings of Allah be upon him), the decision and practice of the Caliph Abu Bakr (Allah be pleased with him), the consensus of the opinion of the Companions of the Holy Prophet (peace and blessings of Allah be upon him) and all the later Muslim jurists, and even certain verses of the Holy Qur'an all prescribe capital punishment for an apostate.³⁹

Siddiqi's remarks echo the views of many classical and contemporary Muslim jurists. In his article 'Apostasy and Human Rights', Ibn Warraq notes early Muslim jurists who cited verses of the Qur'an as authority for the rule that apostates must receive the death penalty.⁴⁰ An example is al-Shafi (died 820 C.E.), founder of one of the four orthodox schools of law of Sunni Islam. According to Shafi, Qur'an 2:217

³⁶ Jonathon Porter Berkey, *The Formation of Islam* (2003) 145.

³⁷ Four of these schools are Sunni (Hanafi, Maliki, Shafi'i, and Hanbali) and one is Shi'ite (Ja'fari): see Mohammed Hameedullah Khan, *The Schools of Islamic Jurisprudence: A Comparative Study* (1997).

³⁸ See Rahman Doi, *Sharī'ah: The Islamic Law* (2007) 265; Patrick Sookhdeo, *Islamic Teaching on the Consequences of Apostasy from Islam* (2006) Barnabas Fund, <<http://barnabasfund.org/UK/News/Archives/Islamic-Teaching-on-the-Consequences-of-Apostasy-from-Islam.html?p=5&m=7%238&a=773&l=UK>> at 9 July 2009; Yohanan Friedman, *Tolerance and Coercion in Islam: Interfaith Relationships* (2003); Michael Nazir-Ali, *Islam, a Christian Perspective* (1984) 128. But see Baderin, above n 5, 123–124, 128.

³⁹ Muhammad Iqbal Siddiqi, *The Penal Law of Islam* (1979) 97.

⁴⁰ Warraq, above n 31 (extensive citations omitted).

meant that the death penalty should be prescribed for apostates.⁴¹ This reads, ‘but whoever of you recants and dies an unbeliever, his works shall come to nothing in this world and the next, and they are the companions of the fire for ever.’ Al-Razi adopted the same approach in his commentary on 2:217.⁴² Ibn Warraq also quotes commentaries by Baydawi (died c. 1315–1316) on Qur’an 4:89. Baydawi interprets this passage to mean ‘[w]hosoever turns back from his belief (*irtada*), openly or secretly, take him and kill him wheresoever ye find him, like any other infidel.’⁴³

As for modernists who follow the traditional approach to punishment of apostasy, they include the popular 20th-century Pakistani Muslim scholar Abul A’la Mawdudi, whose Qur’anic commentary is found in millions of Muslim homes.⁴⁴ Mawdudi’s views echo those of Majid Khadduri, who in the 1950s stated that ‘theologians agree that apostasy is a violation of the law punishable in this world and the next. Not only is the person denied salvation in the next world but is liable to capital punishment by the state.’⁴⁵

However, close examination of the Qur’an and *hadith* reveals that Islamic law on the punishment of apostasy is not as clear-cut as exponents of the traditional approach suggest. While the Qur’an condemns apostasy as a sin,⁴⁶ it does not *mandate* an earthly penalty.⁴⁷ Instead, verses of the Qur’an dealing with apostasy are silent on this point.⁴⁸ Muslim jurists who advocate the death penalty for apostasy therefore rely upon ‘indirect’ verses of the Qur’an which they claim endorse their approach⁴⁹ and various *hadith*.⁵⁰

⁴¹ Ibid.

⁴² Ibid. See also S Zwemer, *The Law of Apostasy in Islam* (1924) 34–35. Note that Rahman highlights the inadequacy of Zwemer’s uncritical endorsement of the approach of Al-Razi: see Rahman, above n 8, 24. See also Fakhr al-din al-Razi, *al-Tafsir al-Kabir* (Cairo, 1308 A.H.), Vol. 2, lines 17–20.

⁴³ Zwemer, above n 42, 33–34.

⁴⁴ Sookhdeo, above n 38, 1; see also Abul A’la Mawdudi, *The Punishment of the Apostate According to Islamic Law* (Syed Silas Husain and Ernest Hahn, trans, first published 1963, 1994 ed), 17.

⁴⁵ Khadduri, above n 24, 149–150.

⁴⁶ See Qur’an 4: 90; 5: 59; 16: 108.

⁴⁷ See Saeed and Saeed, above n 25, 79. See also Mahmoud Ayoub, ‘Religious Freedom and the Law of Apostasy in Islam’ (1994) 20 *Islamochristiana* 75–91, 79.

⁴⁸ See Qur’an 4: 90; 5: 59; 16: 108.

⁴⁹ See Saeed and Saeed, above n 25, 57.

⁵⁰ For in-depth examination of hadith cited as justifying the execution of apostates, see Saeed and Saeed, above n 25, 58–65; M.E. Asad Subhani, *Apostasy in Islam* (2004); Rahman, above n 8. See also Dr. Ahmad Shafaat, *The Punishment of Apostasy in Islam (Part II): An Examination of the Hadith on the Subject* (2006) Islamic Perspectives <http://islamicperspectives.com/PunishmentOfApostasy_Part2.html> at 3 July 2009.

With respect to the Qur'an, Khadduri points to 4:89, a verse dealing with hypocrisy.⁵¹ It states:

[t]hey wish that you disbelieve as they have disbelieved, then you become equal. Do not consider them friends, unless they mobilise along with you in the cause of God. If they turn against you, you shall fight them, and you may kill them when you encounter them in war. You shall not accept them as friends, or allies.

Other Muslim jurists, including former Chief Justice of Pakistan S A Rahman, have rejected Khadduri's interpretation of 4:89. Rahman considers the claim that execution is justified under this verse as impossible in the whole context of the hypocrisy verses.⁵²

Khadduri relies on a number of other verses of the Qur'an as justification for this position.⁵³ Interestingly, none of these verses states that the death penalty must be imposed by an earthly authority. In interpreting these verses, Khadduri states:

⁵¹ Khadduri, above n 24, 149–152.

⁵² Rahman, above n 8, 41. The hypocrisy verses are found at Qur'an 4:88–91. They are recited below:

How to Deal With the Hypocrites

[4:88] Why should you divide yourselves into two groups regarding hypocrites (among you)? GOD is the one who condemned them because of their own behaviour. Do you want to guide those who are sent astray by GOD? Whomever GOD sends astray, you can never find a way to guide them.

[4:89] They wish that you disbelieve as they have disbelieved, then you become equal. Do not consider them friends, unless they mobilize along with you in the cause of GOD. If they turn against you, you shall fight them, and you may kill them when you encounter them in war. You shall not accept them as friends, or allies.

[4:90] Exempted are those who join people with whom you have signed a peace treaty, and those who come to you wishing not to fight you, nor fight their relatives. Had GOD willed, He could have permitted them to fight against you. Therefore, if they leave you alone, refrain from fighting you, and offer you peace, then GOD gives you no excuse to fight them.

[4:91] You will find others who wish to make peace with you, and also with their people. However, as soon as war erupts, they fight against you. Unless these people leave you alone, offer you peace, and stop fighting you, you may fight them when you encounter them. Against these, we give you a clear authorisation.

⁵³ Qur'an 2.214: 'Or do you think that you would enter the garden while yet the state of those who have passed away before you has not come upon you; distress and affliction befell them and they were shaken violently, so that the Apostle and those who believed with him said: When will the help of Allah come? Now surely the help of Allah is nigh!'

Qur'an 4.90–91: 'Except those who reach a people between whom and you there is an alliance, or who come to you, their hearts shrinking from fighting you or fighting their own people; and if Allah had pleased, He would have given them power over you, so that they should have certainly fought you; therefore if they withdraw from you and do not fight you and offer you peace, then Allah has not given you a way against them.'

Although only the second of these four verses specifically states that [the] death penalty should be imposed on those who apostasise or turn back from their religion, all commentators agree that a believer who turns back from his religion (*irtadda*), openly or secretly, must be killed if he persists in disbelief.⁵⁴

However, the same writer concedes that ‘the law of apostasy did not prevent a few believers, during Mohammed’s career, from reverting to polytheism.’⁵⁵

As for the *hadith*, one verse in particular is raised by Muslim jurists who hold the view that the death penalty must be imposed for apostasy. It states, ‘kill the one who changes his religion.’⁵⁶ Khadduri, for example, offers this *hadith* as proof that apostates should be put to death without acknowledging its weak foundation.⁵⁷ This *hadith* was transmitted from Mohammad by only one person (that is, it was not confirmed by others). It is therefore *ahad*, or solitary *hadith*. Kamali notes that the majority of scholars ‘are in agreement that the prescribed penalties (*hudud*) cannot be established by solitary *hadith* (*ahad*), and that unbelief by itself does not call for the death penalty.’⁵⁸ Such *hadith* can be contrasted with *mutawatir*, a category of *hadith* that means ‘continuously recurrent’ or ‘a report by an indefinite number of people related in such a way to preclude the possibility of their agreement to perpetuate a lie.’⁵⁹

Another justification offered for this approach to apostasy is the legal tradition that developed around the practice of the early Caliphs during and after the *riddah* wars. Khuddari notes that the rule was strictly enforced after Mohammed’s death during the *riddah* wars and was endorsed by the practice of the early caliphs, who executed apostates.⁶⁰ Moreover, this practice was sanctioned by *imjā* (unanimity of

You will find others who desire that they should be safe from you and secure from their own people; as often as they are sent back to the mischief they get thrown into it headlong; therefore if they do not withdraw from you, and (do not) offer you peace and restrain their hands, then seize them and kill them wherever you find them; and against these We have given you a clear authority.’

Qur’an 5:59: ‘Say: O followers of the Book! do you find fault with us (for aught) except that we believe in Allah and in what has been revealed to us and what was revealed before, and that most of you are transgressors?’

Qur’an 16.108: ‘These are they on whose hearts and their hearing and their eyes Allah has set a seal, and these are the heedless ones.’

⁵⁴ Khadduri, above n 24, 150.

⁵⁵ Ibid 151.

⁵⁶ Sahih al-Bukhari, 9: 57 (*hadith*).

⁵⁷ Khadduri, above n 24, 150.

⁵⁸ Mohammad Hashim Kamali, *Freedom of Expression in Islam* (1997) referring to Mahmud Shaltut, *al-Islam Aqidah wa-Shari’ah* (1966) 292–93. See also Saeed and Saeed, above n 25, 64.

⁵⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2003) 93.

⁶⁰ See Saeed and Saeed, above n 25, 65; Sookhdeo, above n 38, 7; al-Jabri, above n 5, 199–200; Mohamed Charfi, *Islam and Liberty: The Historical Misunderstanding* (2005) 51.

opinion) and ‘there is no disagreement as to its validity’.⁶¹ Yet, according to some Muslim jurists, the dire situation that the nascent Muslim community found itself in during the *riddah* wars delimits the boundaries of the rule on punishment of apostasy by execution. The Hanafi school of Sunni jurisprudence, for example, only recognises that apostasy may be punished by death where the apostasy is coupled with acts of war against Islam.⁶² However, in modern Muslim societies, the notion of waging war to defend a religion is problematic. Under article 51 of the United Nations Charter, states have the inherent right to use force in self-defence when they are under armed attack. Any use of force is limited by the terms of the United Nations Charter and customary law. It must also be consistent with the *jus in bello* (humanitarian law).

Even so, arguments raised by traditionalists in support of the death sentence in apostasy cases tend to downplay an obvious difficulty: the requirement that a rule sanctioning the death penalty be founded upon clear, reliable and unambiguous authority derived from the Qur’an and/or *sahih hadith*. Ayoub highlights this point in the following way:

Had the Qur’an considered apostasy a public offence deserving maximum punishment (*hadd*) like theft, adultery or murder, these verses would have been the proper place for such a ruling. In fact, traditions concerning the occasions of the revelation of the verses do not mention that the persons who had turned away from the faith and later returned penitent were required to make a public confession of their repentance. Nor was apostasy an issue of major concern for classical commentators on these verses.⁶³

It is of interest that the Organisation of the Islamic Conference (‘OIC’), which represents at least 57 Muslim countries, while recognising that apostasy is a sin, has avoided the issue of punishment of apostates.⁶⁴

⁶¹ Khadduri, above n 24, 151.

⁶² See David A. Jordan, ‘The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence’ (2003) 9 *Washington and Lee Race and Ethnic Ancestry Law Journal* 55, 62 (citations omitted).

⁶³ Ayoub, above n 47, 75–91.

⁶⁴ According to Article 10 of the OIC *Declaration of the Rights of Man in Islam* (1992), it is forbidden to change religion because Islam is the ‘natural’ religion. Apostasy is punishable by death in Saudi Arabia, Somalia, Qatar, Yemen, Iran, Sudan, Afghanistan, the Comoros Islands and Mauritania. In various other Muslim countries, apostasy is theoretically a capital crime but the death penalty is not actually imposed. In some instances the death penalty has been commuted on appeal. Lesser penalties are sometimes imposed.

B *The Minority View*

A growing number of Muslims jurists and other commentators argue that Islamic law does not sanction the earthly punishment of apostasy.⁶⁵ Kamali notes that a minority of medieval Islamic jurists held this view. They include the Hanafi jurist Sarakhsi (d. 1090), Maliki jurist Ibn al-Walid al-Baji (d. 494) and Hanbali jurist Ibn Taymiyyah (1263–1328).⁶⁶ In recent years, a number of senior Islamic clerics have issued *fatwas* (legal opinions) that reflect this view. They include the Grand Mufti of Egypt Ali Gomaa⁶⁷ (a Sunni Muslim) and Grand Ayatollah Hossein-Ali Montazeri⁶⁸ (a Shi'ite Muslim).

Baderin highlights the main thrust of the 'no earthly punishment' approach. He notes that

apostasy simpliciter, in the sense of an individual denouncing Islam without more, whenever mentioned in the Qur'an does not stipulate any worldly punishment, but is only describes apostasy as attracting 'severe punishment in the hereafter'.⁶⁹

Thus,

it is not the changing of one's religion simpliciter that is prohibited under Islamic law but its manifestation in a manner that threatens public safety, morals and freedom of others, or even the existence of the Islamic State itself.⁷⁰

⁶⁵ The expanding body of authors favouring 'no earthly punishment of apostates' and the rethinking of the Sharia rule on punishment of apostasy include: Rahman, above n 8, 133; Mayer, above n 5, 169–170; Charfi, above n 60, 48–51; Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (2008) 118–123; Abdulaziz Abdulhussein Sachedina, *The Islamic Roots of Democratic Pluralism* (2001), 100; and Saeed and Saeed, above n 25. See also al-Jabri, above n 5, 224; Leonard M Hammer, *The International Human Right to Freedom of Conscience* (2001), 135; Mohammad Omar Farooq, *On Apostasy and Islam: 100+ Notable Islamic Voices affirming the Freedom of Faith* (2007) Islam By Choice, <<http://apostasyandislam.blogspot.com/>> at 29 June 2009.

⁶⁶ See Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia' (1998) 13 *Arab Law Quarterly*, 203–234 (citations omitted).

⁶⁷ Grand Mufti Ali Gomaa, 'Gomaa's Statement on Apostasy', *The Washington Post*, 25 July 2007 <<http://newsweek.washingtonpost.com/onfaith/>> at 6 July 2009; Nashwa Abdel-Tawab, 'Whosoever will, let him disbelieve', *Al-Ahram Weekly*, 9–15 August 2007, <<http://weekly.ahram.org.eg/2007/857/eg9.htm>> at 6 July 2009.

⁶⁸ Grand Ayatollah Hossein-Ali Montazeri, 'Not Every Conversion is Apostasy', BBC Persian, 2 February 2005 <http://www.bbc.co.uk/persian/iran/story/2005/02/050202_mj-montzari-renegade.shtml> at 3 July 2009.

⁶⁹ As to differences among Muslim jurists on this issue, see Baderin, above n 5, 123–4.

⁷⁰ Baderin, above n 5, 125.

Saeed and Saeed summarise the central arguments against the earthly punishment of apostasy:

1. the Qur'an offers no justification for temporal (earthly) punishment of apostasy;⁷¹
2. apostasy laws have been misused to eliminate opponents and shore up authoritarian regimes;⁷² and
3. these laws developed from isolated *hadith (ahad)* and interpretations of these *hadith* on the basis of analogy (*qiyas*) and *ijtihad*.⁷³ As these sources and their interpretation do not guarantee certainty of knowledge (*ilm qati*) as understood in Islamic jurisprudence, Muslims in the modern period have the opportunity to re-think these laws.⁷⁴

Similar arguments have been presented by a range of other jurists. Many note that *sahih* Al-Bukhari (9:57) ('He who changes religion kill him!') is of doubtful authenticity and provenance, having been reported by one person only.⁷⁵ Jordan notes that this verse is about treason rather than apostasy (that is, to face the death penalty the apostate in question must wage war on Islam rather than merely renounce the faith).⁷⁶ Forte notes that the verse reflects challenges faced by the nascent Muslim community, which was fighting for its very existence in the aftermath of Mohammed's death. Its unity was threatened at various times by defection, treachery, and insurrection by tribes that had returned to their pre-Islamic

⁷¹ Saeed and Saeed, above n 25. Of the fourteen passages in the Qur'an that refer to apostasy, seven refer to punishment (mostly referring to punishment in the next life).

⁷² Ibid 40, 43, 100, 103. Charfi argues that the death penalty for apostasy is a political and not a religious rule. This rule was used to justify the wars of apostasy waged in the aftermath of Mohammed's death, and has been deployed in the service of authoritarian politics subsequently: Charfi, above n 60, 51; see also Hamadi Redissi and Jan-Erik Lane, 'Does Islam Provide a Theory of Violence?' in *The Enigma of Islamist Violence* (2007) 38. For Charfi, lack of freedom of religion in Muslim countries is the product of underdevelopment: Charfi, above n 60, 48–9. This reflects the view of United Nations Rapporteur Mr Abdelfattah Amor ('action to promote freedom of religion or belief is inextricably linked to action to promote democracy and development'): Abdelfattah Amor, *Civil and Political Rights, Including: Freedom of Expression*, [6] E/CN.4/1999/58 (1998).

⁷³ Saeed and Saeed, above n 25, 167; see also Charfi, above n 60, 51. On *ijtihad* in classical Sunni jurisprudence, see Éric Chaumont, 'Ijtihad et histoire en islam sunnite classique selon quelques juristes et quelques théologiens' in Robert Glkove (ed), *Islamic Law: Theory and Practice* (1997), 7–23. An interesting development that may strengthen the minority position is the current review by the Turkish Ministry of Religious Affairs of *hadith* of dubious authenticity (with a view to removing ideas and practices that have no sound basis in Islam): see Brian Whitaker, 'Islamic Newspeak', *The Guardian Online*, 26 February 2008, <<http://www.guardian.co.uk/commentisfree/2008/feb/26/islamicnewspeak>> at 3 July 2009.

⁷⁴ Saeed and Saeed, above n 25, 168.

⁷⁵ Charfi, above n 60, 49; Redissi and Lane, above n 72, 27–46; Lamarti, above n 14, xii.

⁷⁶ See Jordan, above n 62, 61–2.

beliefs.⁷⁷ This distinction between treason (which is a threat to the government) and individual acts of apostasy involving religious belief (which pose no such threat) is the reason why some Muslim states do not prosecute individuals for simply leaving Islam for another religion.⁷⁸

Various verses of the Qur'an may be invoked to argue against the earthly punishment of apostasy. Grand Mufti Sheikh Ali Gomaa of Egypt listed a number of these verses in a recent article that appeared in *The Washington Post*. According to Gomaa, punishment of apostates 'is left until the Day of Judgement, and it is not to be dealt with in the life of this world. It is an issue of conscience, and it is between the individual and Allah.'⁷⁹ Gomaa states that

the essential question before us is can a person who is Muslim choose a religion other than Islam? The answer is yes, they can because the Qur'an says, 'Unto you your religion, and unto me my religion,' (Qur'an, 109:6), and, 'Whosoever will, let him believe, and whosoever will, let him disbelieve', (Qur'an, 18:29), and, 'There is no compulsion in religion. The right direction is distinct from error', (Qur'an, 2:256).⁸⁰

Other verses from the Qur'an that may be invoked to support this view include 'exhort them; your task is only to exhort. You cannot compel them [to believe]' (Qur'an 88:21–22).

As for *hadith*, Farooq points to a concrete example of 'how the Prophet handled a case of simple apostasy, not related to any treason or rebellion.'⁸¹ Significantly, the death penalty was not imposed on the apostate.⁸²

In concluding this discussion, it is clear that an increasing number of Muslim jurists do not agree with the approach of the schools of Islamic jurisprudence on the issue of punishment of apostasy. There are compelling arguments, derived from the text of the Qur'an, that whilst apostasy is a sin, Islam guarantees religious freedom and does not compel Muslims to remain in the religion. Nor does it mandate earthly

⁷⁷ David F. Forte, 'Apostasy and Blasphemy in Pakistan' (1994) 10 *Connecticut Journal of International Law* 27, 44.

⁷⁸ According to the Hanafi school of Sunni jurisprudence, only apostasy coupled with acts of war against Islam merits death: see Jordan, above n 62, 62.

⁷⁹ Ali Gomaa, 'The Meaning of Jihad in Islam', *The Washington Post*, 21 July 2007, <http://www.aligomaa.net/news_files/4.html> at 27 June 2009.

⁸⁰ Gomaa, above n 79.

⁸¹ Farooq, above n 35.

⁸² Sahih al-Bukhari, 9: 318 states that: 'A bedouin gave the Pledge of allegiance to Allah's Apostle for Islam. Then the bedouin got fever at Medina, came to Allah's Apostle and said, "O Allah's Apostle! Cancel my Pledge," But Allah's Apostle refused. Then he came to him (again) and said, "O Allah's Apostle! Cancel my Pledge." But the Prophet refused. Then he came to him (again) and said, "O Allah's Apostle! Cancel my Pledge." But the Prophet refused. The bedouin finally went out (of Medina)...'

punishment of those who choose to depart from the faith. Growing support for this position reflects, amongst other things, the influence of the human rights movement.

The issue of whether the punishment of apostasy can be reconciled with international human rights law is now addressed.⁸³

VI THE PUNISHMENT OF APOSTASY AND HUMAN RIGHTS STANDARDS

As is evident from the preceding discussion, the right to freedom of religion and belief provides the foundation for a human rights-based analysis of punishment of apostasy. This right is recognised under a range of international instruments and resolutions, including United Nations General Assembly resolutions, international human rights law treaties, and general comments of the Human Rights Committee established under the ICCPR ('Human Rights Committee').

The key provisions on freedom of religion and belief include the following:

1. 1948 *Universal Declaration of Human Rights* ('UDHR'): '[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief';⁸⁴
2. ICCPR: '[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice';⁸⁵
3. United Nations *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*:⁸⁶

⁸³ According to An-Na'im, '...there should be no penal or other negative legal consequences for apostasy and all the related concepts from an Islamic perspective, because belief in Islam presupposes and requires freedom of choice which can never be valid under coercion or intimidation': An-Na'im, above n 65, 122. For An-Na'im's survey of scholarly debate on the punishment of apostasy in Islam, see 117–122. See also Abdullahi Ahmed An-Na'im, 'Islamic Foundations of Religious Human Rights' in John Witte Jr and Johan D van der Vyver (eds) *Religious Human Rights in Global Perspectives: Religious Perspectives* (1996) 337–359; see generally Mohammad Omar Farooq, *On Apostasy and Islam: 100+ Notable Islamic Voices affirming the Freedom of Faith* (2007) <<http://apostasyandislam.blogspot.com/>> at 29 June 2009.

⁸⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), 2nd sess, 177th plen mtg, UN Doc A/810, art 18.

⁸⁵ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR, 21st sess, supp no 16, UN Doc A/6316 (1966), art 18(1).

⁸⁶ *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, supp no 51, UN Doc A/36/684 (1981), art 1(1).

- a. '[e]veryone shall have the right to freedom of thought, conscience and religion. This shall include freedom to have a religion or whatever belief of his choice';
- b. '[n]o one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or other belief';⁸⁷
- c. '[a]ll States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life';⁸⁸ and

4. Human Rights Committee *General Comment No. 22*:

- a. '[a]rticle 18 does not permit any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice';⁸⁹
- b. 'the Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief'.⁹⁰

One of the purposes of the 1981 Declaration was to clarify the nature and scope of article 18 of the ICCPR. Like the UDHR, the 1981 Declaration is not legally binding upon states. Nonetheless, it is possible to infer a certain level of consensus regarding the right to freedom of conscience among state delegates who participated in drafting it.⁹¹

While the right to freedom of religion is a fundamental and well established human right, Baderin notes that, as expressed in article 18(3) of the ICCPR, this right is not absolute.⁹² It may be subject to such limitations as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Such limitations, however, do not include a right to take measures to punish those who exercise the right to freedom of religion by changing or abandoning their religion. In its second periodic ICCPR report, Sudan stated that conversion from Islam is not an offence in Sudan *per se*, but only the manifestation

⁸⁷ *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, supp no 51, UN Doc A/36/684 (1981), art 2(1).

⁸⁸ *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, supp no 51, UN Doc A/36/684 (1981), art 4(1).

⁸⁹ Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion* [3] UN Doc CCPR/C/21/Rev.1/Add.4 (1993).

⁹⁰ *Ibid* [5].

⁹¹ Hammer, above n 65, 60–1.

⁹² Baderin, above n 5, 124.

of such conversion in a manner that adversely affects public safety. Put differently, Sudan has purported to define apostasy in a manner that places it within the realms of the exception in article 18(3) of the ICCPR.⁹³

VII CAN THE PUNISHMENT OF APOSTASY BE RECONCILED WITH INTERNATIONAL HUMAN RIGHTS LAW?

The human rights standards noted above challenge the approach adopted by the schools of Islamic jurisprudence with respect to the punishment of apostasy. They raise two important legal questions. First, can the crime of apostasy (and punishment of the same) be reconciled with international human rights law? And second, are states that are bound by the ICCPR *and* retain the crime of apostasy acting in accordance with their obligations under international law?

According to most legal commentators who address these questions from a human rights law perspective, the answer to both questions is in the negative. Those who take the opposite position generally interpret human rights standards in accordance with a traditional view of Islamic law. Their approach invariably assigns priority to their view on Islamic law.

United Nations human rights bodies have adopted the view that the punishment of persons who depart from Islam cannot be reconciled with fundamental human rights standards.⁹⁴ The Human Rights Committee's *General Comment No. 22* on the ICCPR states that all human beings, regardless of who they are and where they live, have the right to

choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views... Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.⁹⁵

The Human Rights Committee has also made clear that the ICCPR

⁹³ See Baderin (2001), above n 3, 295–6. Section 126 of the *Criminal Act 1991* (Sudan) recognises the crime of apostasy, which is punishable by death. Sudan has explained this law by stating that those who commit apostasy are a danger to the fabric of society and are akin to traitors: see Report of the Human Rights Committee, [127] UN Doc/A/46/40 (1991); see also Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 51.

⁹⁴ For a list of commentators who have highlighted the fundamental character of the right to change religion under article 18 of the ICCPR, see Hammer, above n 65, 44.

⁹⁵ Human Rights Committee, above n 89, [5]; see also Asma Jahangir, *Civil and Political Rights, Including the Question of Religious Intolerance*, [47] UN Doc E/CN.4/2005/61.

does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference from the State.⁹⁶

Moreover, the Human Rights Committee has confirmed that 'in accordance with Articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.'⁹⁷

For these reasons, states parties to the ICCPR (which include almost all Muslim states) have a responsibility to protect persons who choose to change their religion. Laws which permit the punishment of those who leave Islam, or any other religion or ideology for that matter, are in clear violation of the ICCPR. This is evident from the following comment by the Committee:

the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.⁹⁸

A further layer of protection under international law for those who change or abandon their religion arises from the status of the right to freedoms of religion and belief as a peremptory norm of international law.⁹⁹ In *General Comment No. 24*, the Human Rights Committee stated that 'the fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.'¹⁰⁰ It also noted that

[r]eservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the

⁹⁶ Human Rights Committee, *ibid* [3].

⁹⁷ *Ibid*.

⁹⁸ *Ibid* [5]; see also Asma Jahangir, *Civil and Political Rights, Including the Question of Religious Intolerance: Addendum* (Country Visit to Sri Lanka) [73] UN Doc E/CN.4/2006/5/Add.3; Ibn Warraq, 'Apostasy, Human Rights, Religion and Belief', paper delivered at 'Victims of Jihad' conference held parallel to the United Nations' 61st commission of Human Rights on 18 April 2005, Geneva, Switzerland.

⁹⁹ See Human Rights Committee, above 89, [5].

¹⁰⁰ Human Rights Committee, *General Comment No. 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocol Thereto, or in Relation to Declarations under Article 41 of the Covenant*, [1] UN Doc CCPR/C/21/Rev.1/Add.6 (1994).

subject of reservations. Accordingly, a State may not reserve the right to... deny freedom of thought, conscience and religion.¹⁰¹

Thus, a state may not reserve the right to deny freedom of thought, conscience and religion. In any case, as a number of commentators have observed, no Muslim state has ever entered a reservation to the ICCPR with regard to imposition of the death penalty for apostasy.¹⁰² Such states are therefore bound, under treaty law at least, to guarantee the right to freedom of religion to their citizens. However, not all Muslim-majority states are parties to the ICCPR: prominent non-parties include Saudi Arabia and Malaysia.

The extent to which non-parties such as Saudi Arabia are bound, under customary international law, by norms contained in the ICCPR is the subject of doctrinal debate. The existence of a customary norm is dependent upon both state practice and *opinio juris* pointing towards its existence.¹⁰³ According to Goldsmith and Posner, while there is said to be a large body of customary international human rights law, it does not reflect a general and consistent body of state practice.¹⁰⁴ Instead, what is commonly identified as customary international law on human rights is based largely on human rights consensus found in General Assembly resolutions, multilateral treaties and the writings of scholars. This body of ‘law’ has very little influence on state behaviour. Doubts therefore arise as to whether it indeed constitutes binding custom.¹⁰⁵ Nonetheless, there are a number of human rights which have been identified as peremptory norms of international law. The Human Rights Committee has recognised that freedom of religion is such a norm. It has observed that this norm is not capable of derogation.¹⁰⁶ This reflects the prevailing view among legal scholars that there can be no derogation by states from peremptory norms.¹⁰⁷ If this is the case, Saudi Arabia cannot ignore it and must recognise and protect the right of its citizens to exercise freedom of religion and belief — even though it is not bound by the ICCPR under treaty law. *General*

¹⁰¹ Ibid [8].

¹⁰² Rosalyn Higgins, *Problems and Processes: International and How We Use It* (1994) 98. On reservations to human rights treaties by Muslim countries see Nisrine Abiad, *Sharia, Muslim States and International human rights treaty obligations: A comparative study* (2008) 67–82. For withdrawal of Islamic reservations, see 90–92. Mayer notes that the right to change religion was added to the UDHR with direct reference to Islam and apostasy. The right was added at the behest of a Lebanon’s delegate, who objected to the ban on conversions from Islam (in 1948, Lebanon was a pluralistic society comprised for the most part of Christians, Muslims and Druze). A number of Muslim countries opposed this move, although Pakistan’s representative spoke forcefully in defence of the provision as being in full accord with Islam. All Muslim countries eventually voted for the UDHR, except Saudi Arabia: see Mayer, above n 5, 164.

¹⁰³ See *North Sea Continental Shelf Cases*, [1967] *International Court of Justice Reports* 74, 77.

¹⁰⁴ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (2005) 132.

¹⁰⁵ Ibid 132.

¹⁰⁶ See Human Rights Committee, above n 100.

¹⁰⁷ Ibid. See also B G Ramcharan, *The Right to Life in International Law* (1985) 133.

Comment No. 24, which suggests that the right to freedom of religion forms part of customary international law, reinforces this view.¹⁰⁸

The gap between international human rights law and the practice of killing persons because they have left Islam has been well documented with respect to the Bahá'ís of Iran. As noted above, many members of the Bahá'í religion have been executed for refusing to renounce their faith and 'revert' to Islam. In some cases, those executed were never Muslims, having been raised as Bahá'ís. Under the wide approach to apostasy which has been applied by courts in Iran, Muslim ancestry is sufficient for Bahá'ís to be deemed apostates. According to this view, US President Barak Obama, who professes the Christian faith, is an apostate who may be punished by death unless he 'reverts' to Islam, the religion of his father and ancestors.¹⁰⁹ Such an approach is at odds with the globalised society in which we live and cannot be reconciled with international human rights standards embraced as early as 1948 by all states (except Saudi Arabia) at the United Nations General Assembly upon passage of the UDHR.

VIII THE PUNISHMENT OF APOSTATES: STATE PRACTICE

Having noted the fundamental character of the right to change religion and the obligation of parties to the ICCPR to protect those who do so, attention now turns to relevant law and practice in a range of Muslim-majority states that have ratified or acceded to the ICCPR. The purpose of this exercise is to identify states that are not affording apostates the protections guaranteed under the ICCPR. Of particular importance is the work of Special Rapporteurs on Freedom of Religion and Belief. In 1986, the Commission on Human Rights appointed Angelo Vidal d'Almerida Ribeiro as Special Rapporteur. Ribeiro produced seven reports on the 1981 Declaration. By 1996, his successor as Special Rapporteur, Abelfattah Amor, had issued seventeen reports. Some of these reports identify cases where apostates have been subjected to judicial or extra-judicial punishment in various Muslim states. Sharia mechanisms for prosecuting apostates include *takfir* (charging a person with blasphemy) and *zandaqa* (charging a person with heresy). In some states, prosecutions may be commenced through the application of provisions of national criminal codes. In Iran, both systems may be used to pursue apostasy charges. States that continue to recognise apostasy as punishable by death under their legal systems include Afghanistan, Iran, Nigeria, Pakistan, Saudi Arabia, Qatar, Yemen, Mauritania and Sudan. All except Saudi Arabia are parties to the ICCPR. Some states recognise the crime but may try to avoid prosecuting apostates or at

¹⁰⁸ Human Rights Committee, above n 100, [8]; see also Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* (2006) Institute for the Study of International Politics, <http://www.ispionline.it/it/documents/wp_7_2006.pdf> at 26 September 2009.

¹⁰⁹ This somewhat sensational but nonetheless intriguing argument was presented in the *New York Times*: see Edward N. Luttwak, 'President Apostate?', *New York Times*, 12 May 2008, <http://www.nytimes.com/2008/05/12/opinion/12luttwak.html?_r=2&partner=rssnyt&emc=rss&oref=slogin&oref=slogin> at 3 July 2009. See also readers' critical comments on this article.

least commute the death penalty (Afghanistan). Other Muslim-majority states do not recognise apostasy as a crime at all (Turkey). The following survey highlights recent cases where Muslim-majority states have prosecuted and/or punished apostates. It also examines cases where extra-judicial violence has been threatened or carried out against apostates.

A Afghanistan

In 2006, an apostasy case in Afghanistan attracted international publicity. It involved Abdul Rahman, who had converted from Islam to Christianity. Rahman was arrested in February 2006. His case put President Karzai in a very difficult position. Reliant upon both internal and external supporters, Karzai had to strike a delicate balance between conservative religious views of tribal leaders who dominate the Afghan parliament and the interests of the government's backers, the United States and the North Atlantic Treaty Organisation. The Bush administration came to power with the support of the conservative Christian lobby. Such groups, together with various Western countries, were naturally concerned that their taxes were being used to support a state that not only prohibits conversion to Christianity but permits the death penalty in such cases.¹¹⁰ Meanwhile, many Afghans were calling for Sharia to be enforced and the death penalty to be imposed.¹¹¹ Once again there was a widespread view that Rahman must be insane, and should therefore be spared the death penalty.

Article 130 of the *Constitution of the Islamic Republic of Afghanistan* (Ratified January 26, 2004 ('the *Constitution*') allows for the prosecution of crimes that are punishable under 'Hanafi jurisprudence.'¹¹² This branch of Islamic jurisprudence recognises the crime of apostasy as punishable by execution. However, article 129 of the *Constitution* states that the death penalty is only to be carried out with the approval of the President. In the end, Rahman avoided trial and punishment. This outcome was probably the result of at least two factors: pressure from donor countries *and* a contradiction in the *Constitution*. While recognising Hanafi jurisprudence, the *Constitution* also allows for a limited form of freedom of religion under article 2. The presiding judge appears to have alluded to this normative

¹¹⁰ Patrick Goodenough, 'Islamic Scholars Wrestle With Death-For-Apostasy Issues', *CNS News*, 30 April 2009, <www.cnsnews.com/Public/content/article.aspx?RsrcID=47401> at 27 July 2009. For a somewhat sensational discussion of these matters see: Julie Rawe, 'A Convert's Plight', *Time Magazine Online*, 26 March 2006, <<http://www.time.com/time/magazine/article/0,9171,1176990,00.html>> at 3 July 2009.

¹¹¹ 'Rice Calls Karzai on Christian Convert's Fate', *Fox News Online*, 23 March 2006, <<http://www.foxnews.com/story/0,2933,188936,00.html>> at 3 July 2009.

¹¹² The full text of the *Constitution of the Islamic Republic of Afghanistan* (2004) can be found at the website of the Office of the President of the Islamic Republic of Afghanistan: <http://www.president.gov.af/root_eng.aspx?id=68> at 12 October 2009. See also the submission by Saïd Amir Arjomand (State University of New York) to The Constitutional Commission of Afghanistan, 6 February 2003, *The Role of Religion and the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan*, <<http://www.cic.nyu.edu/peacebuilding/oldpdfs/E14RoleofReligioninConstitutionArjomand.pdf>> at 12 October 2009.

conflict in a statement on 26 April 2006, saying ‘the case, because of some technical as well as legal flaws and shortcomings, has been referred back to the prosecutor’s office.’¹¹³ Three days later, Italian Prime Minister Silvio Berlusconi announced that Rahman had been granted asylum and had already arrived in Italy.¹¹⁴

B *Egypt*

In the 1970s, attempts were made by Islamists in Egypt to impose an apostasy law (*qanun al-riddah*) that enshrined Sharia (including the death penalty). The proposed law was to cover Christians who convert to Islam temporarily, a practice adopted by some Coptic Christians for practical reasons. The idea was dropped after Coptic uproar about the encroachment upon freedom of religion.¹¹⁵

In 1995, Abu Zeid was sued by Islamist lawyers who sought to force a divorce upon the Zeid and his wife against their will. A divorce order was imposed on the grounds that Zeid was an atheist and apostate from Islam. After the Cairo Appeal Court confirmed the ruling of apostasy in June 1995, the armed Islamic Jihad group condemned Zeid to death and described anyone who objected to the ruling of apostasy on grounds of freedom of expression or opinion as an infidel.¹¹⁶

In April 2006, an Egyptian court recognized the Bahá’í religion. In response, a number of Islamist clergy pressured the government to appeal the decision. Gamal Akl, a member of Parliament belonging to the Muslim Brotherhood, declared the Bahá’ís apostates, whom should be killed on the ground that they had changed their religion.¹¹⁷ By contrast, Egyptian human rights and civil society groups welcomed the judicial decision as a victory for the freedom of belief guaranteed (in theory) under the *Constitution*.¹¹⁸

¹¹³ ‘Hundreds protest reports Afghan convert to be freed’, *CNN Online*, 27 March 2006, <<http://www.cnn.com/2006/WORLD/asiapcf/03/27/afghan.convert/index.html>> at 3 July 2009.

¹¹⁴ Elisabetta Povoledo, ‘Afghan Christian Convert Granted Asylum in Italy’, *New York Times Online*, 29 March 2006, <http://www.nytimes.com/2006/03/29/international/asia/29cnd-afghan.html?_r=1&oref=slogin> at 3 July 2009.

¹¹⁵ See Ami Ayalon, ‘Egypt’s Coptic Pandora’s Box’ in Ofra Bengio and Gabriel Bender (eds) *Minorities and the State in the Arab World* (1999) 58.

¹¹⁶ Kevin Boyle and Juliet Sheen (eds), *Freedom of Religion and Belief: A World Report* (1997) 32. Zeid fled to the Netherlands after the Court of Appeal decision. In July 1995 the verdict of the Court of Appeal was upheld by Egypt’s Court of Cassation: see Mary Anne Weaver, ‘Revolution by Stealth’, *The New Yorker*, 8 June 1998, 38. In August 2000, Zeid’s application to the Supreme Constitutional Court, contesting the constitutional validity of the 1996 decision, was rejected. However, the Egyptian Parliament subsequently passed a law making it harder for courts to declare persons apostates.

¹¹⁷ ‘State to appeal ruling that favours Egypt’s Baha’is’, *Khaleej Times Online*, (Dubai, United Arab Emirates) 3 May 2006, <<http://www.khaleejtimes.com>> at 3 July 2009.

¹¹⁸ *Ibid.*

While Egypt has no laws against apostasy, laws against ‘insulting Islam’ or ‘creating sectarian strife’ have been used to arrest, torture and in some cases kill converts.¹¹⁹ In recent months there has been discussion about passing a law categorising Bahá’ís as criminals and specifying the charges to be levied against them for their alleged apostasy.¹²⁰

C Iran

One of the main concerns about apostasy laws is their misuse for ideological reasons, including the punishment of minorities, dissidents and others who fall out of favour with the ruling elite.¹²¹ The persecution of the Bahá’ís in Iran, and the execution of Bahá’ís for refusing to renounce their faith, is a classic example.¹²² The Islamic regime in Iran regards Bahá’ís as apostates because they believe in prophets born many centuries after Mohammed’s death. This contradicts a central pillar of Islam: that Mohammed is the final prophet.¹²³

In 1993, an Islamic judge of the south Tehran suburb of Shahr-e-Ray declared that he had freed two brothers who had burned a man to death during a robbery. He stated that under Islamic law he had no option as the killers had been Muslims and the victim an apostate (Bahá’í).¹²⁴

In 1997, a world report on freedom of religion and belief, endorsed by Abdelfattah Amor of the University of Tunis and then-United Nations Special Rapporteur on Religious Intolerance, noted the scale of the persecution of Bahá’ís in Iran:

[t]he Baha’i community in Iran has been virtually annihilated. Over two hundred of its leaders are known to have been executed in government prisons after long periods of torture. An unknown number have been killed

¹¹⁹ Paul Marshall, ‘Apostates from Islam: The Case of the Afghan Convert is Not Unique’, *Weekly Standard* (Washington, DC), 2 April 2006, <www.weeklystandard.com/Content/Public/Articles/000/000/012/059fpgn.asp> at 3 July 2009.

¹²⁰ Mohammed Shebl, ‘What is apostasy, and are Baha’is apostates?’, (Iran Press Watch trans) *Al Qahirah*, (Cairo) 5 May 2009, <<http://basmagm.wordpress.com/2009/05/05/%D9%85%D8%A7%D9%87%D9%89-%D8%A7%D9%84%D8%B1%D8%AF%D8%A9/>>.

¹²¹ Saeed and Saeed, above n 25, devote a chapter to this issue.

¹²² See United Nations High Commissioner for Human Rights, ‘Special Rapporteur on Freedom of Religion or Belief Concerned about Treatment of Followers of Bahá’í’ (Press Release, 20 March 2006), <<http://www.unhchr.ch/hurricane/hurricane.nsf/0/5E72D6B7B624AABBC125713700572D09?opendocument>> at 1 June 2007; see also Jordan, above n 62, 63–65.

¹²³ For the Iranian government’s perspective on why Bahá’í may be punished for apostasy and analysis of the same, see Mayer, above n 5, 171–3 and 178–9.

¹²⁴ See Boyle and Sheen, above n 116, 424. See also ‘Oudah, Adbul Qadir, above n 24, 259–260 (‘if the courts or other judicial institutions do not award punishment for the offence of apostasy, as is generally the case with courts in Islamic countries today, then these competent institutions are not empowered to award punishment to the killer of an apostate’).

by mobs. Others have emigrated and the bulk of the laity have been driven underground or forcibly converted. Dozens languish in gaols under extreme conditions.¹²⁵

Recently the Iranian government has taken steps to codify the crime of apostasy in national law. In February 2008, a proposed Bill for *Islamic Penal Law (Penal Code)* was placed before the Iranian Parliament.¹²⁶ The draft legislation mandates the death penalty for apostates from Islam (arts 225–8). It also declares that the legislation would have extra-territorial effect (art 112). However, in June 2009 the Legal and Judicial Committee of the Iranian Parliament recommended the removal of the articles in the draft law that stipulate the death penalty for apostasy.¹²⁷ Nonetheless, the crime of apostasy remains punishable by death through the operation of existing Iranian laws.¹²⁸

In its 2008 report, the UK Foreign and Commonwealth Office highlighted the plight of the Bahá'ís in Iran, while also noting that Iranian Christians have been charged with apostasy.¹²⁹ In May 2008, at least eight Bahá'í leaders were arrested and detained by Iranian authorities.¹³⁰ At the time of writing (October 2009) these people were still in detention awaiting trial.

D *Iraq*

In the wake of the 2003 invasion of Iraq, a number of radical Islamist groups engaged in a sustained campaign of violence against those they regarded as apostates. Prominent among these groups were al-Qaeda in Iraq ('AQI') (a transnational terrorist group seeking to replace regional governments and pursue permanent jihad) and the Ansar al-Sunna Group ('ASG') (who advocated revolutionary Islam through removal of the new political order). These groups

¹²⁵ Boyle and Sheen, above n 116, 424.

¹²⁶ Relevant excerpts from the draft penal code are available at <http://news.bahai.org/documentlibrary/606/1_ExcerptsFromProposedIranianPenalCode_en.pdf> at 12 October 2009.

¹²⁷ Robert Williams, 'Iran Takes Step Towards Scrapping Death Penalty for Apostasy and Stoning', *Christian Post*, 27 June 2009 <<http://www.christianpost.com/article/20090627/iran-takes-step-towards-scrapping-death-penalty-for-apostasy-and-stoning/index.html>> at 12 October 2009. On 30 October 2008, the United Nations General Assembly expressed its 'deep concern' at 'the provision in the proposed draft penal code that sets out a mandatory death sentence for apostasy': [2(g)] UN Doc A/C.3/63/L.40.

¹²⁸ These laws include art 26 of the *Press Code 1985*; art 214 of the *Criminal Procedure Code*; and art 167 of the Constitution: see Iran/Death Penalty: A State Terror Policy (2009) International Federation of Human Rights, <<http://www.unhcr.org/refworld/docid/49f9ad372.html>> at 26 September 2009.

¹²⁹ United Kingdom: Foreign and Commonwealth Office, Annual Report on Human Rights 2008 - Iran, 26 March 2009, available at: <<http://www.unhcr.org/refworld/docid/49ce361a2.html>> at 13 October 2009.

¹³⁰ See 'Iran arrests Bahai 'leadership'', BBC Online, 19 May 2008, <http://news.bbc.co.uk/2/hi/middle_east/7409288.stm> at 6 July 2009.

pursued their goals by, inter alia, targeting civilians as well as police, security forces and others working for the ‘apostate regime.’¹³¹ They sought to install a ‘true’ Islamic government.¹³² Their belief in the heresy of the Shi’ites is central to their justification of a sustained campaign of violence against the Shi’ite population.¹³³ The Shi’ite population were targeted for two reasons: because they controlled the government (installed with the support of the occupying forces) and for their religious beliefs.¹³⁴ AQI and ASG relied upon the jurisprudence of classical Islamic scholar Ibn al-Qayyim al-Jawziyya to ‘justify’ the killing of apostates without giving them the chance to repent.¹³⁵ Zarqawi’s speeches are replete with references to *riddah* (apostasy) and *kafir* (heresy/impiety).¹³⁶ Zarqawi’s campaign of violence is discussed further below. It is important to emphasise that al-Qaeda, a criminal network whose members are listed by a United Nations committee as members of a terrorist organisation, lacks the authority to issue fatwas that sanction the use of violence against others. Significantly, no state and no school of Islamic jurisprudence has recognised al-Qaeda as having the authority to sanction or engage in violence. Put differently, neither international law nor the domestic law of states permits al-Qaeda to take the law into its own hands by punishing those it regards as apostates.

Moreover, while Iraq is a party to the ICCPR, it cannot be held responsible for violence by non-state actors, such as al-Qaeda cells, who infiltrated the country during foreign occupation and over whom it exercises no control. However, the post-occupation government in Iraq has an obligation to take necessary measures to prevent lawless violence by non-state actors within its borders. Over the past four years it has done so (with international assistance) by suppressing a range of violent groups including AQI.

As for the position of apostates under Iraqi law, apostasy is not a crime under Iraq’s *Penal Code 1969* (as amended). Rather, the 2005 Iraqi *Constitution* guarantees a range of religious rights found in the ICCPR. While Islam is the official religion of the state (article 2(1)), the *Constitution* provides that ‘each individual shall have freedom of thought, conscience and belief’ (article 42) and ‘Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law’ (article 41). The *Constitution* goes further, guaranteeing ‘the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazedis, and Mandi Sabeans’ (article 2(2)).

¹³¹ Hafez, above n 7, 129, 215.

¹³² Ibid 215.

¹³³ Ibid 126.

¹³⁴ Ibid 128.

¹³⁵ Ibid 127 (citations omitted).

¹³⁶ Ibid 81.

E Kuwait

In late 1995, Hussein Ali Qambar, a Shi'ite Kuwaiti businessman, converted to Christianity. Qambar's conversion became publicly known during a custody dispute when his wife refused to give him access to his children. This event, which was practically unheard of in the Arabian Peninsula, caused a sensation. By January 1996, when it became clear that Qambar would not change his decision, popular anger against him began to rise. Anh Nga Longva offers a detailed account of what happened next:

[i]n the National Assembly an Islamist deputy called for legal actions to be taken against the convert. Not long after, an Islamist lawyer sued Qambar for apostasy. ... Meanwhile, the home of the convert was vandalised, he was entirely barred from seeing his children, and when his father passed away, he was forbidden from receiving his share of the inheritance. Gradually, the number of people suing Qambar for apostasy grew. At the same time, he found no lawyers willing to defend him. In May 1996 the judge in the shi'a lower court issued a ruling that officially declared Qambar an apostate and recommended that the death penalty be pronounced against him. Qambar appealed against the apostasy ruling. His appeal was to be reviewed in September 1996. One month before that date, the authorities issued Qambar a passport and he left Kuwait for the USA.¹³⁷

By November 1997, Qambar had reconverted to Islam and returned to Kuwait. Anh Nga Longva's description of the episode offers an insight into the seriousness with which the people of Kuwait viewed conversion from Islam to another religion. Longva notes that

[p]ractically everyone agreed that Qambar's conversion was a serious crime and as is the case with all crimes, it had to be punished. They also agreed that depriving him of all his civil rights was an adequate punishment. The only topic which gave rise to some disagreement and a subdued sense of unease within some circles was the question of the death penalty.

Those who opposed it based their position on the Qur'anic verse (2:257) that says '*no compulsion is there in religion*'. But more often than not, the same verse was quoted in front of me to show that precisely because Islam is such a tolerant religion, there are no possible excuses for apostasy. Mostly for this reason, apostates are traditionally considered insane unless there is irrefutable evidence that they were in their right mind when they apostated. This explains why some people in Kuwait, when they did not want to see

¹³⁷ Anh Nga Longva, 'The apostasy law in the age of universal human rights and citizenship: Some legal and political implications' (Paper presented at The Fourth Nordic Conference on Middle Eastern Studies: The Middle East in Globalising World, Oslo, 13–16 August 1998). <<http://www.hf.uib.no/smi/pao/longva.html>> at 12 October 2009.

Qambar condemned to death, argued that the man was insane, and called him a ‘lunatic’, ‘a case for psychiatry’.¹³⁸

The reaction to Qambar’s conversion reflects the position adopted by Kuwait during negotiations leading to the *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief* promulgated by the United Nations General Assembly on 25 November 1981. Along with representatives of Egypt, Iraq and Saudi Arabia, Kuwait was adamant that the words ‘to adopt a religion or belief of his choice’ and ‘to change one’s religion or belief’ be deleted before they could support the proposed text. Attempts by Western delegates to explain that this language was already part of the ICCPR — which Muslim-majority countries including Algeria, Egypt, Iran, Iraq, Jordan, Lebanon, Libya, Morocco, Pakistan, Senegal, Sudan, Syria and Tunisia had adopted without objection or reservation — were unsuccessful. The text was revised to remove explicit reference to the ‘right to change religion’.¹³⁹

F Pakistan

Article 20 of the *Constitution of the Islamic Republic of Pakistan* (1973) guarantees every citizen the right to profess, practise and propagate his religion, subject to law, public order and morality. However, in 1996, United Nations Special Rapporteur Abelfattah Amor noted that the Pakistani judiciary tends to hold that conversion from Islam to another religion is an offence, even though Pakistani authorities assert that converts are not prosecuted.¹⁴⁰ In 2002, the Special Rapporteur expressed concern ‘at the fact that death sentences continue to be handed down for apostasy, as shown by the communications sent to Pakistan and mentioned in the present report’.¹⁴¹

On 9 May 2007, a draft *Apostasy Act 2006* was tabled before Pakistan’s National Assembly. This Bill proposed the death sentence for male apostates and imprisonment until penitence, or death, for female apostates. The government did not oppose the Bill and sent it to the relevant standing committee. Section 5 of the Bill states that the court should give a proven apostate at least three days (a month at the maximum) to return to Islam. Those who refuse face the death penalty.¹⁴²

¹³⁸ Ibid.

¹³⁹ J A Walkate, ‘The Right of Everyone to Change His Religion or Belief’ (1983) 2 *Netherlands Journal of International Law* 146, 152. For a useful analysis of whether the text of the 1981 Declaration amounts to a weakening of article 18 of the ICCPR, see Natan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years after the 1981 Declaration* (2006) 140, 140–142.

¹⁴⁰ UN DOC E/CN.4/1996/95, Ad 1. But see [100] UN DOC E/CN.4/2002/73 (the withdrawal of a blasphemy charge after the matter was raised by the Special Rapporteur).

¹⁴¹ [83] UN DOC E/CN.4/2002/73.

¹⁴² ‘Afghan backs MMA against blasphemy law reform bill’, *Daily Times* (Pakistan) 9 May 2007 <http://www.dailytimes.com.pk/default.asp?page=2007\05\09\story_9-5-2007_pg1_6> at 3 July 2009; Qaiser Felix, ‘New apostasy bill to impose

The danger of abuse of such laws was recently highlighted by the Human Rights Commission of Pakistan in its response to the bill. Asma Jahangir, chairperson of the Human Rights Commission of Pakistan, stated on 12 May 2007 that:

HRCP believes it is imperative that authorities carefully consider any decision in this regard given the tendency to abuse laws in the country. The blasphemy law, widely used to settle petty, personal disputes is a case in point with suffering inflicted on many innocent persons through its misuse.

It is also a fact that there is apparent lack of unanimity among Islamic scholars on the application of centuries-old concepts in the modern age. There is as such a danger the new law could ignite further sectarian friction and acrimony.

The authorities need also to carefully consider global opinion, Pakistan's obligations to uphold human rights and its image in the international community. A new law on religion may further damage the country's standing in the comity of nations, particularly at a time when violence by extremist groups has already brought it a bad name.¹⁴³

In 2008, an elected government in Pakistan acceded to the ICCPR. As a result, any statute or custom permitting the prosecution of apostates in Pakistan would violate Pakistan's international human rights obligations under the ICCPR.

G *Sudan*

One of the most widely publicised cases in which the death penalty was actually imposed for apostasy took place in Sudan. It involved Sudanese Islamic reformer Mahmud Muhammad Taha. Taha viewed Islam as an egalitarian order fully compatible with norms of international human rights.¹⁴⁴ These ideas were not welcomed by the regime of Ja'far al-Nimeiri regime and were deemed offensive to Islam. Taha was officially declared an apostate from Islam and executed in 1985 followed a televised trial.

As noted above, the Human Rights Committee has indicated, with reference to Sudanese law and practice, that the crime of apostasy is incompatible with the ICCPR.¹⁴⁵

death on anyone who leaves Islam', *Asia News*, 5 September 2007, <<http://www.asianews.it/index.php?l=en&art=9218>> at 12 October 2009.

¹⁴³ 'HRCP declares draft apostasy law 'disturbing' *Daily Times* (Pakistan) 12 May 2007 <http://www.dailytimes.com.pk/default.asp?page=2007\05\12\story_12-5-2007_pg13_10>; see also Forte, above n 77.

¹⁴⁴ Mayer, above n 5, 182.

¹⁴⁵ UN Doc \A\53\40 vol I (1998), 23 (Sudan).

IX ORGANISED ATTACKS BY RADICAL ISLAMISTS
AGAINST ‘APOSTATE GOVERNMENTS’

Terrorist attacks in Muslim countries such as Iraq, Yemen, Pakistan, Jordan and Saudi Arabia by al-Qaeda (or affiliate organisations) provide examples of the lengths to which extremists have gone in order to attack what they regard as apostate (*kafir*) governments and their people. Non-Muslim countries (for example, the United States, the United Kingdom and Spain) have also been targeted in this manner by extremists. Many al-Qaeda attacks against those it regards as apostate governments (heretical regimes inside Muslim territory) or ‘infidel nations’ (non-Muslim countries located outside Muslim territory) have been carried out in response to military involvement in Muslim countries such as Afghanistan and Iraq. According to al-Qaeda, its attacks against so-called apostate governments (for example, Saudi Arabia and Jordan) are justified on account of assistance or cooperation provided by these nations to ‘infidel nations’ that have a military presence in Muslim territory. Such justifications are outlined in, inter alia: speeches by prominent figures including Osama bin Laden, Ayman Al-Zawahiri and Abu Musab Al-Zarqawi; video messages left by suicide bombers prior to terrorist attacks in countries including the UK, Iraq and Israel; and video recordings made during the beheading of unarmed hostages (for example, in Afghanistan, Pakistan and Iraq). During these various presentations, Islamic law (including verses of the Qur’an and *hadith*) is often recited. Extremists often claim that lethal violence is permitted under Islamic law and may be carried out without state authority if Muslim nations fail to act. Abu Musab Al-Zarqawi invoked Islam to justify his brutal campaign of mass killings in Iraq between 2003 and 2006. Specific reference was made to apostasy in a letter from the Al-Qaeda leadership to Zarqawi. The letter was read by bin Laden and recorded on video. The video was broadcast on Al-Jazeera on 27 December 2004. The letter is entitled ‘To the Muslims in Iraq in Particular and The [Islamic] Nation in General’. It states:

[a]jiding America, or the Allawi government [in Iraq] which is apostate [*Murtada*], or the Karzai government [in Afghanistan], or the Mahmoud Abbas government [the Palestinian Authority] which is apostate, or the other apostate governments in their war against the Muslims, is the greatest apostasy of all, and amounts to abandonment of the Muslim community.

Participation in the Iraqi or Palestinian Elections is Apostasy [italics added].

Muslims must beware of these kinds of elections. They must unite around the *Jihad* warriors and those who resist the occupiers. ... Anyone who participates in these elections ... has committed apostasy against Allah.

Criminal organisations such as AQI exploit the notion of apostasy to justify an ideology of hatred and violence. In doing so, they have built upon a long tradition of invoking Islamic jurisprudence on the punishment of *kafir* to justify killing those with different political or religious views. In modern times, this tradition can be traced back to Egyptian dissident Sayyid Qutb, who argued (from his gaol cell) that it was necessary to rid, not only the Islamic world, but also the entire planet of

the ‘structure’ of Jahiliyya (godless ignorance).¹⁴⁶ Qubt’s writings inspired Ayman al-Zawahiri, a senior al-Qaeda figure and apologist for its ideology.¹⁴⁷ Al-Zawahiri continues to promote an ideology that actively encourages criminal attacks on civilians, including Muslims, who are deemed apostates. This far-reaching doctrine has been invoked to justify attack upon non-Muslim states, as well as on Muslim governments that are deemed apostate.¹⁴⁸ Osama bin Laden’s theological direction was heavily influenced by both Al-Zawahiri and Abdullah Azzam (a Palestinian academic who masterminded a new ultra-extreme form of wahhabism).¹⁴⁹ Azzam, who was killed by a massive explosion in Peshawar in 1989, was admired by bin Laden for both his scholarship and his mujahedeen credentials (gained from his involvement in the jihad against the Soviet occupation of Afghanistan). Azzam’s legacy is a popular ideology, keenly exploited by bin Laden, which justifies mass killing in an attempt to overthrow apostate regimes and eliminate those who support them.¹⁵⁰

X VIGILANTE ATTACKS ON INDIVIDUALS WHO ARE DEEMED APOSTATES

Extra-judicial violence against apostates is not limited to well-organised attacks by al-Qaeda and similar groups. Vigilante attacks against individual apostates are a problem in a number of Muslim-majority states and from time to time in other states. In Holland and the UK, individuals have been threatened or attacked for leaving Islam and for voicing opinions that are deemed by their attackers to be offensive to Islam. The author Salman Rushdie is a well known target of such threats. In 2006, Marshall noted that:

[v]igilantes have killed, beaten, and threatened converts in Pakistan, the Palestinian territories, Turkey, Nigeria, Indonesia, Somalia and Kenya. In November, Iranian convert Ghorban Tourani was stabbed to death by a group of fanatical Muslims. In December, Nigerian pastor Zacheous Habu Bbu Ngwenche was attacked for allegedly hiding a convert. In January, in Turkey, Kamil Kiroglu was beaten unconscious and threatened with death if he refused to deny his Christian faith and return to Islam.¹⁵¹

Wilson notes that between 2004 and 2006 in Afghanistan, ‘Islamist militants murdered at least five Christians who had converted from Islam.’¹⁵² The concern

¹⁴⁶ See Abel Bari Atwan, *The Secret History of al-Qaeda* (2006), 72–3.

¹⁴⁷ Gene W Heck, *When Worlds Collide: Exploring the Ideological and Political Foundations of the Clash of Civilisations* (2007) 79.

¹⁴⁸ See Atwan, above n 146, 176–178.

¹⁴⁹ Ibid 70. See also Monte Palmer and Princes Palmer, *Islamic Extremism: Causes, Diversity and Challenges* (2008) 147.

¹⁵⁰ See Atwan, above n 146, 43 and 193; Palmer and Palmer, above n 149, 146–7.

¹⁵¹ Paul Marshall, ‘Apostates from Islam: The Case of the Afghan Convert is Not Unique’, *Weekly Standard* (Washington, DC) 2 April 2006, <www.weeklystandard.com/Content/Public/Articles/000/000/012/059fpgrn.asp> at 3 July 2009.

¹⁵² Ibid.

here is that while state-ordered executions for ‘apostasy’ may be rare, ‘killings by vigilantes, mobs, and family members, sometimes with state acquiescence’ are not.¹⁵³

Why do extra-judicial killings of apostates persist in various Muslim states that are bound by the ICCPR? Two reasons are noted here: a lack of judicial will or authority to punish those who are acting in accordance with Sharia; and the failure of some Muslim states and societies to repeal laws that permit the punishment of apostasy. These two factors were recently demonstrated in an Iranian court case that involved the robbery and murder of a Bahá’í. The judge declared that he lacked the authority to punish Muslims who killed Bahá’ís (apostates).¹⁵⁴ The abolition of discriminatory laws that allow violence against apostates to go unpunished is one way of curbing such human rights violations.

XI THE OBLIGATION OF STATES PARTY TO THE ICCPR TO HALT THE PUNISHMENT OF APOSTASY

Judicial and extra-judicial violence against individuals, governments and populations on the ground of apostasy is a serious breach of various fundamental human rights. As has been noted above, punishment of those who depart from Islam cannot be reconciled with the right to freedom of religion and belief under article 18 of the ICCPR. It also offends article 2(1) of the ICCPR, which states that:

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

With respect to violence by non-state actors (including al-Qaeda) against those they deem apostates, states party have a range of obligations under the ICCPR as well as under numerous resolutions of the United Nations Security Council¹⁵⁵ and the United Nations General Assembly.¹⁵⁶ What these instruments and resolutions do not address is the role Islamic law appears to be playing in providing a foundation for the ideology of al-Qaeda and similar organisations (and what, if anything, states should do about this). The issue is not addressed due to its ‘particularly sensitive’ nature; the punishment of apostasy is, according to the Islamic schools of law, consistent with Sharia.¹⁵⁷ Nonetheless, the apostasy rule *is* being abused

¹⁵³ Ibid.

¹⁵⁴ See Jamie Glazov, ‘Sharia Goes Global’, *FrontPageMagazine.com*, 3 October 2005, <<http://www.frontpagemag.com/readArticle.aspx?ARTID=7088>> at 3 July 2009.

¹⁵⁵ See, eg, *United Nations Security Council Resolution 1373*, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373, 1. A comprehensive list of United Nations Security Council resolutions on terrorism is available at <<http://www.un.org/terrorism/securitycouncil.shtml>> at 8 July 2009.

¹⁵⁶ See *Global Counter-Terrorism Strategy*, above n 6.

¹⁵⁷ United Nations Rapporteur Ribeiro, UN Doc E/CN.4/1992/52, 177.

by various actors for a range of reasons. One is to promote sectarian hatred and politico-religious violence. Al-Zarqawi, for example, exploited this rule during his campaign of sectarian violence in Iraq (which resulted in appalling numbers of civilian casualties between 2003 and 2006). To Al-Zarqawi and like-minded Sunni extremists, the Shi'ite were apostates who could be killed with impunity.¹⁵⁸ The willingness of some Muslims to join Al-Zarqawi's campaign was no doubt influenced by a belief that extra-judicial violence against apostates is legitimate where state authorities fail to enforce Islamic law by punishing apostasy.¹⁵⁹

One practical step that Muslim states bound by the ICCPR could take to undermine the ideology of al-Qaeda and its ilk (and at the same time to bring their law and practice into closer conformity with the ICCPR) is to amend their domestic law so that the punishment of apostasy is prohibited. In those states in which the views

¹⁵⁸ See Hafez, above n 7, 129 and 215.

¹⁵⁹ The notion that non-state actors (including al-Qaeda) may enforce Islamic law is flawed, because they lack the authority to declare or enforce the law. Domestic law may only be declared and enforced by the relevant state authority. Under international law, no norm exists under the various sources of law including treaty law (multi-lateral agreements between states) and customary law (state practice and *opinio juris*) that gives non-state actors the authority to enforce Sharia. On the identification of rules of international customary law, see *The Continental Shelf (Libya/Malta) case*, (1985) 13 *International Court of Justice Reports* 29–30. Al-Qaeda lacks the authority under both domestic and international law to authorise and conduct a campaign of violence. It also lacks authority under Islamic law to issue a fatwa calling for the use of violence, whether in pursuit of jihad or to punish apostates. Traditionally, a fatwa (which is simply an answer to a religious question given by persons who are qualified to respond) may, under Sunni Islam, be issued by a Mufti with a profound knowledge of Islam. Today an official Mufti is often appointed in Sunni Muslim states. Under this system, fatwa ratifying a death sentence or declaration of war would be issued by the properly constituted chief Mufti in response to a request by a state authority. Under Shi'ite Islam, definitive fatwa may be issued by a Grand Ayatollah: see Bernard Lewis and Buntzie Ellis Churchill, *Islam* (2008) 190–191; Olivier Roy, Antoine Sfeir, and John King, *The Columbia World Dictionary of Islamism* (2007) 324. The system of authority for the issue of fatwa outlined above reflects the contemporary role of Islamic law in Muslim States. In this context it is important to note that, since colonial times, codified state law has replaced Sharia in many areas of public and private law. This reflects the emergence of nation-states in the Islamic world, many of which were created and had their borders defined by colonial powers. Like all states, they have their own sovereign laws and legal systems. Moreover, like other former-colonial territories, most Muslim states have legal systems that maintain elements of the legal regime imposed by the former colonial power. Thus, the role of Islamic law is different in modern Muslim states than under classical Islamic law. Whereas classical Islamic law was 'independent of any state mechanism', modern Islamic law is 'controlled by the state because the state often controls the legal scholars': see Sameer S Vohra, 'An American Muslim's Right to Die, Incorporating Islamic Law into the Debate' (2006) 27 *Journal of Legal Medicine* 341, 348. For these reasons, under contemporary domestic and international law, non-state actors such as al-Qaeda lack authority to use or sanction the use of force. Nor do they have authority to issue fatwa or enforce Sharia. The authority to do rests with the legitimate authorities of states. I am indebted to an anonymous referee for emphasising this point.

of schools of Islamic law prevail, the legal changes advocated here will require a rethink of Sharia with respect to punishment of apostasy. Their transition to a legal system that recognises and fully protects international human rights (such as the right to change religion) would be enhanced by the support of these schools. For this to occur, robust application of the doctrine of *ijtihad* (reinterpretation of Islamic law) may be needed, with the Islamic law schools taking into account obligations under international human rights law and perhaps wider factors which shape the modern world (globalisation, pluralism and democracy). At a political level, such reform will require an ideological shift in some states. However, given the history of abuse of apostasy laws, those Muslim states seeking to build stronger and more stable democracies may benefit from the abolition of these laws.¹⁶⁰

Such reform would undermine a central plank of al-Qaeda's ideology: the notion that the killing of apostates is justified under Islamic law. Muslim states could go further and abolish all crimes against religion (Islam) that operate in a discriminatory manner.¹⁶¹ The introduction and enforcement of non-discriminatory laws that protect all members of society from religious hatred and violence could be accompanied by public awareness campaigns to promote the necessary cultural changes.¹⁶²

XII CONCLUSION

This article has examined one dimension of the tension between Islamic law and fundamental human rights guaranteed under international law: the ongoing use of religious doctrine (including Islamic rules on punishment of apostasy) to justify acts of violence against those who have abandoned the Muslim faith or otherwise breached Islamic law in a manner that attracts such punishment. Two related issues have been emphasised: the authority of Islamic courts in various Muslim countries to impose the death penalty for apostasy; and the absence of a prohibition against the punishment of apostasy. While these norms persist, judicially sanctioned execution of apostates is likely to continue in conservative Muslim states. So is the

¹⁶⁰ Ayoub has noted that 'Muslims have themselves politicised apostasy by using it as an ideological weapon against one another': see Ayoub, above n 47, 75–91.

¹⁶¹ Ideally, all crimes would be defined in a non-discriminatory manner in accordance with fundamental principles of international human rights law. Under this approach, one measure of a good law is that it does not discriminate against minorities (whether religious or otherwise) but instead treats all persons as equal before the law. The right to change religion or belief is underpinned by the principle of non-discrimination. This principle protects members of all religions (and none) from adverse treatment on the basis of their religion or beliefs. Thus, under international human rights law, departing from a religion is not a punishable act. It is instead a fundamental human right.

¹⁶² The United Nations General Assembly has often emphasised the importance of education, economic development, friendly cooperation between states and peaceful resolution of the Middle East conflict as ways to bring an end to politico-religious violence and extremism in the Arab world: see, eg, 'Measures to address the conditions conducive to the spread of terrorism', *Global Counter-Terrorism Strategy*, above n 6.

refusal of some courts to punish those who engage in extra-judicial violence against apostates — precisely because such conduct is regarded as consistent with Sharia. The abuse of apostasy laws by governments (to punish political opponents) has also been noted. However, the issue of most relevance to the international community at large is the abuse of Sharia by al-Qaeda and similar entities. Their message — violence against apostate regimes and populations is justified under Islamic law — has clearly been accepted by some Muslim followers. This is evident from Al-Zarqawi's statements and the actions of his cells in Iraq. By asserting that attacks upon civilians can be justified on religious grounds, such actors have harmed the reputation of Islam. Moreover, their ideology and actions have had a destabilising effect in various Muslim states and societies. For these (among other) reasons, measures that would undermine al-Qaeda's ideology should be given serious consideration. It is not suggested that the measures proposed above would be easily implemented. Nor would they guarantee an end to violence against apostates by non-state actors. However, they could play an important role — as part of a broader counter-terrorism strategy — in addressing the causes of politico-religious violence by non-state actors who claim that their conduct is justified under Islamic law.¹⁶³

¹⁶³ The current international strategy to address terrorism (including terrorism by groups that seek to justify their actions by reference to Islam) is set out in the *Global Counter-Terrorism Strategy* (ibid). Interestingly, the International Islamic Fiqh Academy, an organ of the Organisation of the Islamic Conference ('OIC'), recently decided to review the issue of whether apostates should face the death penalty: see Goodenough, above n 110.