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ISLAMIC LEGAL VIEWS ON PUBLIC INTERNATIONAL LAW: AN ANALYTICAL OVERVIEW

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The science of 'Al-Siyar' (Islamic International Law) as developed by Muslim jurists of the seventh century addressed not only the issues related to states and communities, but also the rights of the individual, for example, the individual Muslim living in a non-Muslim environment, and the individual non-Muslim living in a Muslim environment. We may recall that modem international law has only started taking notice of individuals and communities during the last quarter century. Islamic International Law has set out the pathway to International Law. It provided the foundation and directions to formulate a law. Al-Siyar is an Arabic term given to it that means the 'conduct' that explains the rule and instructions given by Islam to deal with enemies and civilians. This article addresses a comparative view of classical jurists on treaties in Islamic jurisprudence both theoretically and historically, and it relevance to the contemporary world. This article will, therefore, analysis the concept of Islamic International Law (Al-Siyar) and will also try to make a comparative study to modern international legal systems in order to draw the conclusions as how the Islamic International Law is holding true in the modern sense.

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INTRODUCTION

The scholars insist that the origins of modern international law lie in the state practice of the European nations of the sixteenth and seventeenth centuries. This approach fails to recognise and engage with other legal systems including Islamic legal traditions. Islam is concerned not only with religious but also with worldly matters related to relations between individuals, society and states. Islamic International Law is the general rules governing the international affairs of a Muslim country, which was applicable during the ten years of the political life of the Prophet Muhammad (*s.a.w.*), which has been developed in Medina, the first Islamic state, which was formed after the emigration of the Prophet Muhammad (*s.a.w.*) to Medina. Hence, Islamic International Law is those applicable rules of an international community in which both Muslim and non-Muslim countries are existing.

During the formative period of Islamic Law in the 8th and 9th centuries, a body of law has been developed which is commonly referred to as *Al-Siyar*,[1] literally meaning "motions" or "travels" before it was taken to denote the conduct of the Muslim community or Muslim rulers in their relationships with other, non-Muslim communities. The term itself appears in six verses of the Quran, but not yet in its later, legal-technical sense. It is unclear who originally devised the idea, but it is assumed today that the jurists of the legal school of *Abu Hanifa*, one of the founding fathers of Islamic Law, were the first to popularise the term in its legal meaning.[2] One of *Abu Hanifa*'s (150AH or 782 AD) star students, *Al-Shaybani*, (749-805 AD) wrote the first extensive and systematic works on the matter of *al-Siyar*, commonly referred to as "*Shaybani's Siyar*",[3] at the end of the 8th century. Imam Muhammad ibn Hasan al-Shaibani deserves special mention. Shaibani first wrote a relatively brief book, which he called *Kitab Al-Siyar Al-Saghir* (meaning, the Shorter Book on International Law). Later on, he wrote a more comprehensive book, which he called *Kitab Al-Siyar Al-kabir* (i.e. the Major Book on International Law).[4]

Although modern international law and its root is said to be rooted in early history of the Greeks and the Romans, in reality,

modern international law is an outcome of the developments of the last four hundred years, having little relevance to the Greeks and the Romans. Hence, the foundation of modern international law was laid down by Francisco Vitoria (1480-1546), Luis Suárez (1548-1617), Alberico Gentili (1552-1608), the Dutch scholar Hugo Grotius (1583-1645), as well as a number of other scholars, most of whom were professors of theology in different European universities. These scholars were Christian and European and did not believe in equality in ties with others. Even Grotius, who emphasised the law of nature as the basis of the modern law of nations, exhibited discriminatory treatment with non-Christian states. Modern writers of international law credit the Dutch writer Hugo Grotius, a writer of 17th century as the father of international law.[5] For the European scholars, the Crusades proved to be a turning point to learn warfare techniques from Muslims,[6] their conduct inspired Hugo (1802-1885) [7]and Rousseau and they took inspiration from Islam to formulate the law of war and human rights. For example, in Rousseau's famous work titled 'The Social Contract' Rousseau wrote: 'Muhammad had very sound views; he thoroughly unified his political system; and so long as his form of government survived under his successors, the Caliphs, the government was quite unified and in that respect good.'[8] Furthermore, as Charles Butterworth reminds us, Rousseau's admiration of the tolerance within Islam was based on the recognition of 'freedom Islam has traditionally accorded Jews and Christians'.[9] This evidence of toleration, for Rousseau was further testament to the positive example that Islamic civilisation offers in regards to tolerance, justice and social inclusivity.

Securely, we can say, the result of which the treaty of Westphalia 1648 came into existence. Reverend George Bush explained in his book titled: "the life of Muhammad" that no revolution could be seen if there was no Mohammadanism.[10] Bernard Lewis believes that the egalitarian nature of Islam "represented a very considerable advance on the practice of both the Greco-Roman and the ancient Persian world".[11]

Although origin of Islamic International Law can be traced

even from the Prophet Muhammad's promulgation of the Charter of Medina, in the first quarter of the seventh century, the first clause of which declared that the parties to the Charter were a nation 'to the exclusion of others' (Para. 15, Charter of Medina) thereby unequivocally proclaiming the independence of the city-State. The fledgling city-State of Medina, after uniting the Arabian Peninsula, expanded rapidly over the hundred years following the Prophet Muhammad's death in 632 CE, reaching the Iberian Peninsula (Spain) in the west and the frontiers of China and India in the east.

Practical details of this interaction were demonstrated by the Prophet Muhammad (*s.a.w.*) through his normative practice, the *Sunnah*, the model example. Based on the Quran and *Sunnah*, Muslim scholars and jurists of the second *Hijri* (AH) developed an independent legal-historical discipline known *Al-Siyar***.** Initially a branch of the biography of the the Prophet Muhammad (*s.a.w.*), with emphasis on the wars and other missions and expeditions in which he took part, *Siyar* soon became focused on delineating a set of rules for regulating international conduct. This exercise of second *Hijri*, Muslim jurists yielded many works seeking to codify the part of the *Shari'ah* that sought to regulate the interaction of Muslims with their non-Muslim contemporaries. Out of these efforts, around a dozen works have come down to our period, either fully or in parts. Three of these were written by Imam Muhammad ibn Hasan al-Shaibani.[12]

The Islamic International Law developed in response to how the early Muslim community would conduct its relations with the non-Muslim communities within and outside its own territory. To respond to this *Al-Siyar* was developed over centuries through the works of jurists who drew inspiration from the primary sources of law. *Al-Siyar* laid down rules for the treatment of diplomats, hostages, refugees, and prisoners of war; the right of asylum; conduct on the battlefield; protection of women, children, and the non-combatant civilians. Though *Al-Siyar* was never codified, but nevertheless it laid down principles and some specific rules of conduct that cover a number of modern international law topics.

EARLY DEVELOPMENT

The Muslim-Arab conquest of the vast area ranging from Morocco to Afghanistan took place within fifty years, leaving the Muslims slightly be-wildered at their unexpected success. It also forged them to deal quickly with several issues related to international law like the rules of war and peace, and how one should deal with conquered peoples. In most cases the Muslim-Arab armies often small in size, and sent on specific missions rode out with what in contemporary military terms is galled 'Terms of Engagement': rules on how to deal with the enemy, the conquered cities and their inhabitants, the conquered lands and its inhabitants, and, most importantly, strict rules on how to divide the booty.[13]

From an Islamic perspective, the world was divided into two dominions: one where Islam ruled - the House of Islam - and one where Islam did not rule - the House of War. This division and its naming did not imply the impossibility of concluding treaties or initiating official relations. On the contrary, wars with the Franks (in Spain, and later in the Middle East), Byzantines and Sassanides were mostly concluded by peace treaties negotiated by diplomatic emissaries. Also, four centuries of intermittent warfare between the Islamic and Byzantine empires did not prevent them from engaging in continuous trade and entering into diplomatic relations. Later, in the 12th and 13th centuries, many trade treaties were negotiated between Muslim rulers and Italian city-states like Genoa and Venice.[14] War was much less on the East-African and Asian frontiers of the Islamic Empire, and trade as well as diplomatic relations continued uninterrupted for many centuries.[15]

The division of sovereignty into two realms did not necessarily reflect a parallel division of inhabitants, many non-Muslims resided on Muslim territory. Once the conquests were consolidated, the Muslims ruled over vast regions of which the inhabitants were not Muslim, but Christian, Jewish or Zoroastrian. Forced conversion was hardly practiced, meaning that for several centuries the Muslims were a minority in their own empire.[16] The concept of nationality was non-existent in both the practice and doctrine of early Islam, but status was determined on the basis of religion. One

contemporary scholar reflected that Islamic International Law is merely an extension of Islamic law dealing with relations between Muslims and non-Muslims, whether within or outside the realm of Islam.[17]

Given the division of sovereignty into two dominions, the following categories of persons were developed. Non-Muslims were either residents of the House of War (*Darul Harbs*), or temporary visitors to the House of Islam (*Darul Islam* 'those with safe conduct'), or residents of the House of Islam (*Dhimmi*).[18] In the latter two cases, they were subject to Islamic law, with the exception of specific rules relating to their religion. For instance, they were allowed to trade in alcohol and pork, and to apply their own family laws. Muslims, on the other hand, were considered to always remain under the sovereignty of Islamic law, even if they travelled into non-Muslim countries, however imaginary the enforcement of that law may have been. At the same time, Islamic law also obliged the Muslim abroad to abide by the rules of those countries, unless they contradicted basic principles of Islamic law.[19]

With the passage of time, the League of Nations came into being as a natural development of the law. With the outbreak of World War II and the failure of the League of Nations, the League was replaced with the United Nations (UN), in which at least two member States needed to sponsor a candidate country and both had to verify that the candidate state is civilised and therefore it deserves to be treated in accordance with international law.

At the same time, a process of decolonisation of Asian and African countries started. Since all of the colonies belonged to the European countries, after decolonisation the successors of colonial powers started following their predecessors' style of government. This is how Muslim Countries became part of the prevailing international system.

DEFINITION OF *SIYAR*

The rules of Islamic law of war, peace and what is known as 'the conflict of laws' are generally found in the chapters on *Siyar* in the manuals of *Fiqh*, as well as a number of other sources that have

been written on this issue, under the same title '*Siyar*' is plural of *Sirah* which literally means conduct and behavior.[20] It was named *Siyar* because it contained conduct and dealings of the Prophet Muhammad (*s.a.w.*), his successors and other peoples as precedence in deferent situations. However, this term was used for international law at least after first century of *Hijra*.[21] Then almost all of the schools of Islamic Jurisprudence chose this term for this peculiar area of study and titled their works on international law as *Siyar*.

Sarakhsi (1096), the renowned jurist of Islamic International Law, who wrote a detailed commentary on "*Al-Siyar Al-Kabir*," says in his al-Mabsoot that this part of the law is called *Siyar* because it explains the behavior of Muslims in dealings with non-Muslims specially those who were the belligerents and those who had a pact with Muslims, among them the musta'min[22] and the dhimmi;[23] it also dealt with the apostates and the rebels.[24] Hedaya, the Magnum Opus of Hanafi Jurisprudence, says about *Siyar* that it is itemised to the conduct of the the Prophet Muhammad (*s.a.w.*) in his wars.[25] Imam Kasani (d. 587AH) says in his Badai' al-Sanai'[26] that *Siyar* is also known as the "Book of Jihad".[27] This is, as Philip Jessup (1897-1986) has remarked, for the reason that they lived in such a time, that relationship between Muslims and non-Muslims was war[28] and it does not necessarily meant that theoretically *dar al-Islam* is in state of war with *dar al-Kufr* perpetually.[29] This fact is further evidence of a war situation behavior when Muslims discuss peace treaties with *Dar al-Harb*, where Muslims give *Aman* to *Harbis*, and in other situations of peace, as mentioned in the same book.

However, there are also some Modern definitions of *Siyar*, some Muslim scholars/jurists such as Abu Zahrah (1898-1974), in his introduction to the commentary of the greater book of *Siyar* , defines *Siyar* perhaps in a detailed way. According to him, it is the rules of *jihad* and war, what are allowed in it and what are not, and the rules of permanent peace treaties and temporary truce, and the rules of who should be granted alien status and who should not, the rules of war booty, ransom and enslavement, as well as

other problems that arise during wars and its aftermath. In short, it designates the rules of international relations between Muslims and other communities during peace and war, although most of the discussion is about the war.[30] Muhammad Hamidullah, the eminent modern scholar of Islamic International Law, defines "Muslim International Law" in his Magnum opus "Muslim Conduct of state" as the part of the law, custom of the land and treaty obligations which a Muslim de facto or de jure state observes in its dealings with other de facto or de jure states".[31]

But as a separate science and independent subject of study, we come across it with Abu Hanifah and his contemporaries, perhaps for the first time in the Islamic annals. Abu Hanifah and his pupils worked on the subject and made it a separate branch of Islamic law. Therefore, today most of the earliest manuscripts of this branch of law belong to the Hanafi School of Islamic jurisprudence. However, the precise book written by Imam Abu Hanifah on *Siyar* is not preserved in its original form.[32]

SOURCES OF PUBLIC INTERNATIONAL LAW

Generally, the sources of public international law are mentioned in Article 38 (1) of the Statute of International Court of Justice (ICJ) as follows:

(a) International treaties: Any agreement made between the members of the international community and aimed at creating some legal effects.

(b) International custom: This means that in some cases, although countries have not written rules on a paper page, but in practice, they adhere to certain rules that their compliance with these rules is clearly implied from it. In terms of fundamental Islamic rules, there is also no obstacle that an Islamic state, in cases where it is allowed to conclude a treaty, can actually help to create an international custom.

(c) The general principles of the law adopted by the civilised nations.

(d) Judicial decisions of International court and the opinions of the most prominent lawyers, as a means of determining legal rules.

SOURCES OF ISLAMIC INTERNATIONAL LAW

On the other hand, the sources of Islamic International Law consist of primary sources such as (1) The Quran – The holy book which is the constitution and the axis of thought of the Islamic society and its miracles guarantee the survival of the Islam religion. Of the verses of the Holy Quran, about 500 verses are about practical laws and regulations; (2) Tradition (*Sunnah*) which includes speech, deed, or confirmation of the Prophet Muhammad (*s.a.w.*); and secondary sources such as (3) Consensus (*Ijma*): The consensus of the Islamic jurists in a legal issue; and (4) Wisdom (*Qiyas* or *Ijtihad*) - intellectual or mental effort in deducting or discovering legal principles.

The status of international law in a legal system can be divided into two: "international law" and "domestic law". They can be considered as independent legal systems, or a single system. If we accept the first one, we have come from the school of dualism, and if we consider them to be a single system, we would join the Monists. In addition, if domestic law and international law are considered one, another question arises; which of these two follows the other? If we understand the meaning of international law as "any binding rules that governs any international relations, then it includes any legal regulation governing any international relations"; namely, whether those rules have come from the domestic source of a country, or from the international treaty and custom. Whether it governs the relations between countries, or the relations between a person with an alien State, and even the relations of two individuals belonging to two different countries? In Islamic countries, there is no debate if the international rules are 100% based on the domestic rights of the Islamic State; because this category of regulations is an integral part of the legal system of Islam and there is no transposition for them. The rules are placed along one another and each is applicable in its place.

On the one hand, the duelists consider international law and domestic law as two equal, independent and separate systems, that none of them is superior to the other and it is not necessary that one be subordinate to another. Obviously, Islam is basically opposed to this thinking. Here, Islam takes a position of denial against the duelists, and is not harmonious to the followers of this school at all. On the other hand, the monists put international law and domestic law in the hierarchy, along each other, and know one of them as another follower.

TREATIES AND THE DOCTRINE OF *PACTA SUNT SERVANDA*

All treaty obligations must be respected and be followed in good faith, representing the modem international legal norm of *Pacta sunt servanda* - agreements must be obeyed - is a basic doctrine of modern international law.[33] The Quran ordains Muslims to fulfill the covenant of God when you have a covenant and break not oaths after their confirmation.[34] Indeed, according to Islamic law, respecting international obligation is so strong that it could even override traditional principles of jihad. As the Quran commands, but if they seek your aid in religion it is your duty to help them, except against a people with .whom have treaty of mutual alliance.[35] The tradition derived from the Prophet Muhammad (*s.a.w.*) also confirms the sanctity and observance of treaty obligation. As the founder and head of the first Islamic State, the Prophet Muhammad (*s.a.w.*) entered into a range of international agreement emphasised the need for compliance with all aspects of these pacts and agreements.[36] The sanctity of treaties now forms part of established code of the state practices of the international community, consent among parties entering into treaty arrangement and its provision must not be coercive, unjust or oppressive towards one party.[37]As a consequence, it may be said that Islam recognises the *pacta* doctrine as a sacred principle of faith, religion and law. The principle has been originated from divine principle and the Prophet Muhammad (*s.a.w.*) has implemented it in the practical life situation setting examples for the Muslims and for the people at

large.

Al-Siyar derives its legal basis and general principles from the four main sources of the Islamic legal tradition, i.e., the Quran, the *Sunnah* of the Prophet Muhammad (*s.a.w.*), *Ijma*, i.e., consensus or agreement and *Qiyas* or reasoning by analogy. The jurists of various schools of law also employed other juristic techniques including *Ijtihad* (many established jurists place it in the category of sources of law) *Urf*, *Iikhtilaf*, *Takhayyur*, *Talfiq*, *Maslaha*, *Darura*, *Istishab*, *Istihsan* and etc.[38]

Much of the development of *Siyar* is dependent on these secondary sources and juristic techniques. Bassiouni argues that when analysed in terms of modern international law, the sources of the *Siyar* conform to the same categories as defined by modern jurists and by the statute of the International Court of Justice, namely, authority, custom, agreement, and reason.[39] The Quran and the *Sunnah* represent authority; the *Sunnah*, embodying the Arabian *jus gentium* is equivalent to custom; whereas rules expressed in treaties with non-Muslims fall into the category of agreement; and the juristic commentaries of Islamic scholars as well as the utterances and opinions of the Muslim rulers in the interpretation and the application of the law, based on analogy are said to form reason[40].

The use of a range of sources, methodologies and perspectives, through which *Siyar* has evolved over the centuries, represent an extensive legal plurality. *Al-Siyar* is based on not just divine sources i.e. the Quran and *Sunnah* but it has evolved out of the opinions of Muslim jurists who have applied human mind and reasoning to interpret the divine law for developing the corpus of *Siyar*. Muslim scholars belonging to different schools of thought while applying their own reasoning to the divine sources and agreeing on the basic principles differed in their interpretations of specific legal-religious rules.

The above mentioned scholarly contributions demonstrate how Muslim jurists, over the course of time developed legal standards to govern the relationship of the Muslim jurisdictions with non-Muslim jurisdictions on *Siyar* was thus the result of a continuous

process spread over centuries that was evolved out of the opinions of Muslim jurists who applied reasoning to interpret the primary sources of Islamic law, i.e., the Quran and *Sunnah* for developing the corpus of *Siyar*.

The classical concept of division is, old though it may be, not laid down explicitly anywhere in the Quran.[41] Instead, it is understood to be a legal and political structure developed by means of *Ijtihad*, i.e., individual logical deduction and conclusion by the *Hanafi* jurists based on certain indications in the religious sources, most notably two verses in the *Surah al-Mumtahana* of which one shall be quoted here for illustration: "God only forbids you, with regard to those who fight you for (your) Faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances), that do wrong" (60:9).[42] Islam has elaborate rules on international law. These generally follow Islam's historical developments of conquest and consolidation, followed by disintegration and foreign encroachment.

ISLAMIC GLOBAL VIEWPOINT TO INTERNATIONAL LAW

Islamic law has been, from the beginning, a multi-ethnic, multi-cultural legal system that provides a practical model and viable paradigm for a pluralistic society. It sought to create spiritual-moral unity in the diversity of human races and legal opinions. It also sought, at the same time, to maintain the diversity and cultural independence of different peoples and nations within the general framework of the unity of Islam. Like other parts of Islamic law, the Muslim international law was based on the Quranic concept of justice, which distinguishes between real justice and legal justice. The *Shari'ah* is perhaps the first legal system in human history that has created a distinction between legal justice, to be imparted by the State, its organs and machinery, and the real justice to be imparted by individuals. At the same time, it acknowledges the contractual foundation of international dealings and transactions. Islam wants to provide an interconnected nation

and a human unity from humankind on the planet.

Accordingly, the legal system of Islam can be viewed from two perspectives: (1) perfection (or what should be) - here, it is assumed that legal regulations should govern a society that is ideal of Islam and has been realised and fulfilled in the outside world; and (2) the status quo (or the undeniable facts that are now) - Given the current status of the world, and in conditions where unity and integrity still has not affected the human society, it is necessary to apply Islamic legal regulations in order to reflect on the current situation and to try to prepare the nature and mind of mankind by improving his thought in order to spread its universal system, in practice, throughout the universe. Therefore, with this view, it is necessary for the world with various languages, systems, customs and rules and regulations to be separated in a systematic and distinct way in the form of very large countries and territories with their own legal regulations, and the components of its nature are examined.

The science of *Siyar* as developed by Muslim jurists of the second century addressed not only the issues related to states and communities, but also the rights of the individual, for example, the individual Muslim living in a non-Muslim environment, and the individual non-Muslim living in a Muslim environment. We may recall that modem international law has only started taking notice of individuals and communities during the last quarter century. However, in the writings of Shaibani and his contemporary jurists, we find that they had recognised, from the earliest times, individuals and communities as subjects of international law. They dealt with the rights and privileges not only of individual citizens of the enemy state, but also of Muslim citizens visiting the enemy territory.

Martin Dixon has enumerated five principles on the basis of which the success or failure of an international law can be judged. According to him, the primary function of international law is to prevent war and control the use of force. If a law fails to achieve this objective, it is a failed law.[43] The five principles are:

(a) To prevent a war;

(b) To resolve the dispute peacefully with compromise;

(c) To contain the war to the minimum;

(d) To contain the effects of war; and

(e) To protect the affected of war.

All of these criteria are found in the Quran and the sayings of the Prophet Muhammad (*s.a.w.*) and have further been expatiated upon by Muslim jurists.

It is also noteworthy that the question of the validity of international law, which remains unsettled in the West, did not pose any problems in Islamic International Law. From the days of Hugo Grotius up to the middle of the twentieth century, the West heatedly debated the legal character of international law. Some scholars and lawyers have contended that international is not law in the real sense. Among those who thus deny the 'legal' character of international law are John Austin, Hobbes, Bentham, to quote only a few.[44] Some other scholars such as Holland[45] says it is a vanishing point of jurisprudence; in other words, it is withering away as a legal authority. Others say it is only a positive international morality. Still others have said that international law is simply a set of international ethical values. These scholars deny the legal character of international law mostly because: (1) there is no recognised body to make or create its rules; (2) there is no hierarchy of courts with compulsory jurisdiction to settle disputes under or over these laws; and (3) there is no accepted system for enforcing these laws.

Thus, a sizeable community of lawyers and jurists asks how, in the absence of a legal order, a judiciary and an executive, can these principles or rules be considered law? And what is the legality of international law when it has no sanction and no teeth, and no authority to enforce or defend it? However, the other camp of scholars has always upheld that international law is law in the real sense.

This question was never raised by Muslim jurists. To them, Islamic International Law had the same sanction as that enjoyed by the municipal law of Islam. Indeed, both types of law get their

legitimacy from the Quran and draw their authority from the *Sunnah* of the Prophet Muhammad (*s.a.w.*), the two perennial sources of Islam, which are considered authoritative and obligatory in character by the Muslim rulers and Muslim masses alike. Therefore, Muslim jurists experienced no problem in deciding whether the international law of Islam was law, or whether it required any separate sanction of its own, and we do not find any controversy regarding this matter in any early book on Islamic International Law.

Islamic International Law also dealt long ago with the type of new developments crystallising in Western international law today in the context of the reorganisation of Western communities into bodies like the European Union (EU). The critical question being raised by lawyers and jurists in different countries, particularly in Western Europe, is whether the law regulating the EU and the authority exercised by the European Parliament has undermined or is going to deprive the European nation-states of their claimed sovereignty.

The British Parliament is already supposed to surrender or, at least, share some of its authority and power with the European Parliament; it has compromised the absolute and once acclaimed sovereignty of the British Parliament. This question is being discussed in legal circles around the globe. Answers have been given by British lawyers, emphasising the sovereignty of British Parliament, despite the fact that they have conceded some of their authority to the European Parliament.

Such questions were discussed by Muslim jurists in the second and third centuries of *Hijrah*, when two or more administrations had come into existence under the common law of the *Dar al-Islam* and within the frontiers of the single territory of Islam. We can, to some extent, liken the *Dar al-Islam* of the nine and tenth centuries onwards with the present European Union, where citizenship has been made common to a large extent, and where many areas once restricted to nationals have been opened up to citizens of other countries, at the cost of the countries own identity and, to some extent, their sovereignty. By and large, with some

differences, this was the situation and the nature of the relationship between the *Dar al-Islam* and the different Muslim administrations within it.

DAR UL HARB, *DAR UL ISLAM* AND *DAR UL AHD* IN AS-*SIYAR*

At the heart of these early works on *Siyar* were two concepts which are closely related to each other and which served as the first basis of Islamic International Law. The first one is *Jihad*, a term with different – and today notoriously disputed – connotations that in this context means the military spreading of Islam.[46] At this time, Islam was in a phase of great expansion;[47] necessarily, the first basic *Siyar* rules dealt mostly with war-related issues, such as legitimate reasons for waging a war, rules on the taking of booty, or the conduct of Muslim soldiers in battle.[48] It is noteworthy in this respect that Islamic Law at this time already knew some important rules of "modern" humanitarian law, especially the concept of distinguishing between combatants and non-combatants.[49] The fundament of all such legal rules in relation to non-Muslims outside of Islamic territory, whether in actual times of war or within other political relations, was the second, overarching concept of dividing the world, politically and legally, along the line between Muslim and non-Muslim communities, that is, between the *dar al-Islam*, the domain or abode of Islam, and the *dar al-harb*, the abode of war, where the unbelievers dwell.[50]

According to Muslim scholar Dr. Wahbeh al-Zuhili, there is no precise definition of *Dar al-Harb* and *Dar al-Islam* in the existing religious sources of Quran or the *Sunnah*.[51] Most Muslim jurists state in their writings that the interpretation of these two concepts is debatable. Islamic scholars consider these concepts subject to *ijtihad*, which is an effort to achieve an independent interpretation of problems not dealt with by the Quran or *Sunnah*.[52]

In the Quran and *Sunnah*, one does not find any reference or sound argument for this division of the world into two dominions; *dar-al-Islam* and *dar-al-harb*.[53] This division was the creation of the scholars of legal schools of thought who gave varying

interpretations to the Quranic text that deals with the concept of war or *Jihad* in Islam. Shaybani for instance in his writings on *As-Siyar* considered a permanent state of war between *dar ul harb* and *dar ul Islam* in which the non- Muslim always retained the status of a belligerent. Thus constructed, the *dar al- Islam* was always at war with the *dar al-harb* and peace between the two could only be achieved for a limited period. Some other jurists like Abu Yusaf and al-Sarakshi have restricted the period of truce to ten years' duration on the basis of the treaty of Hudaybiya which was entered by the Prophet Muhammad (*s.a.w.*).

Within *dar ul-Islam*, everyone regardless of his or her religion is subject to the rules of Islamic law; these rules apply to the Muslims in *dar al-Islam* themselves as well as to their dealings with non-Muslims. A non-Muslim could obtain inviolability under Islamic law by entering into a relationship of 'protection' *aman* with the Islamic state.

Such a person was called a *dhimmi*, or a 'protected person'. An Islamic state could also negotiate a treaty of *dhimma* with a non-Muslim ruler, but in so doing, it could not accept terms that were repugnant to Islamic law. The *Ahli-kitab* (people of the book, i.e., Jews and Christians) had the alternative to pay *jiziya* (poll tax). Besides, peaceful co-existence with non-Muslims is also possible under a third category known as *dar-ul-sulh.*. Imam Sha'afi the founder of the *Sha'afi* school of thought introduced this third division of *dar ul-sulh* (territory of peaceful arrangement) or *dar ul-ahd* (territory of covenant) consisting of those territories of peace or states that did not recognise Islamic rule over them but were not hostile towards Muslim states and made peace treaties with them. In simple words, *dar ul-sulh* could be equated with the territory of friendly nations.[54]

Dr. Munir in his discussion on the notions of *Dar al-Harb* and *Dar al-Islam* maintains that division of world into *Dar al-Harb* and *Dar al-Islam* was based on the prevailing situation of war between the Islamic and the non-Islamic territories and it is derived by the jurists themselves, thus it is no longer relevant today. He, while discussing the implications of division of the world,

says that: "it is never mentioned anywhere by the great jurists that there should be permanent enmity and hostile relations between the two rival domains."[55]

On the contrary, Dr. Muhammad Mushtaq Ahmad believes that division of world into *dar* is still relevant. Like Ghazi, he asserts that this division is based on territorial jurisdiction. In his article on Notions of *Dar al-Harb* and *Dar al- Islam*, in concluding remarks,[56] he says: "The division of the world by Muslim jurists into *Dar al-Islam* and *Dar al-Harb*, especially as expounded by the *Hanafi* jurists, has no necessary link with the view that the Islamic State should normally be looked in hostility with non-Islamic states. This division rather represented an affirmation of the principle of territorial jurisdiction".

To conclude, bifurcation of the world into two *Dar* is based on the principle of territorial jurisdiction and has some legal implications, as Muslim Scholars have indicated, and it has no necessary link with the theory of perpetual war, as conceived by some orientalists.[57] Today, the principles of *Dar al-Islam* and *Dar al-Harb* are no longer incorporated into the legal systems or international relations of Muslim states. However, Islamic militant non-state actors apply their own version of a fundamental interpretation of those concepts and use them as a justification to launch terrorist attacks on Western interests worldwide. These actions have given impetus to many Muslim scholars to discuss the definition of these concepts with the aim of reaching a universal moderate consensus regarding the principles of *Dar al-Islam* and *Dar al-Harb* under Islamic *Shari'ah*.

AN ANALYSIA OF *AL- SIYAR* BY CONTEMPORARY SCHOLARS

The concept of a nation state as we understand and experience today did not exist in the 7th century Arabia and for a long time thereafter. Modern nation states, including Muslim jurisdictions have visibly different governance structures to that of the 7th century State of Medina.[58] The use of the term *As-Siyar* as the 'Islamic Law of Nations' is a much later development that became prominent among scholars

during the early 20th century.[59] Al-Ghunaymi provided a definition of *As-Siyar* as 'collection of rulings observed or arrived at by Muslims in the early period that represent Islamic teachings and are acceptable in the field of international relations'.[60]

Khadduri was of the view that "Al-*Siyar*, if taken to mean the Islamic law of nations, is but a chapter in the Islamic corpus juris, binding upon all who believed in Islam as well as upon those who sought to protect their interests in accordance with Islamic justice".[61] Whereas Hamidullah defined it as: "that part of the law and custom of the land and treaty obligations which a Muslim de facto or de jure State observes in its dealings with other de facto or de jure States".[62] He uses the term Muslim International Law to describe Islam's system of public international law and argues that Muslim International Law depends wholly and solely upon the will of the Muslim State, which in its turn is controlled by the *Shari`ah*.[63] It derives its authority just as any other Muslim Law of the land. Muslim International Law is only that which is observed by a state which acknowledges Muslim law as the law of its land in its dealings with Muslim and non-Muslim states. In other words, Hamidullah considers that Muslim International Law though part of *Fiqh*, "derives its authority not from any foreign source, but from the sovereign will of the Muslim state itself, which will is subject to the Divine law of the Quran".[64] Hamidullah argues that, as the Quran and *Sunnah* provide only guiding principles, it was the Muslim jurists who after the death of the Prophet Muhammad (*s.a.w.*), expanded those guiding principles and developed "a complete system of law which served all the purposes of the Imperial Muslims, even at the height of their widest expansion from the Atlantic to the Pacific Oceans".[65]

Hamidullah's definition highlights the fact that, though Islamic International Law principles are derived from the Quran and *Sunnah*, the state practice varies amongst states. He also considers that "even the obligations imposed by bilateral or multilateral (international) treaties unless they are ratified and executed by the contracting Muslim party, are not binding; and their non-observance does not create any liability against the Muslim State".[66]

Here, it is relevant to distinguish between Islamic International Law and Muslim state practice as the two are not necessarily synonymous. Muslim majority states such as Iran and Iraq have not always subscribed to similar norms of Islamic law and been at war with each other. Likewise, Iraq and Kuwait have been at war in disregard of the norms of *Al-Siyar*.

However, contemporary scholars such as Bouzenica and An-Naim do not accept equating *Siyar* with the term "Islamic Law of Nations", "Muslim international law" or "Islamic International Law". Bouzenica considers that as *Al-Siyar* lacks the concept and definition of a territorial state which constitutes one of the basic elements of modern international law' therefore it cannot be equated with modern international law.[67] An-Naim argues that considering *Al-Siyar* as international law is a misnomer as there can only be one international law. In his words, "… it has to be truly international by incorporating relevant principles from different legal traditions, instead of the exclusive Eurocentric concept, principles and institutions of international law as commonly known today".[68] An-Naim proposes that the relationship between Islamic law and international law should be seen in terms of a more inclusive approach to the latter, rather than conflict or competition between the two.[69] This could only be possible if the relationship between these two legal systems is founded on a clear understanding of differences in their nature and development, as well as appreciation of the political and sociological context in which they operate. An-Naim is not in favour of using a compatibility/incompatibility frame of reference for generating a positive debate.[70] Instead, An-Naim calls for taking into account the political and social context which is pertinent in relation to the Quranic verses relating to *Jihad*. These are often misinterpreted without considering the context in which those verses were revealed.[71]

Shaheen Ali on the other hand proposes a more balanced approach by suggesting that it would be useful to compare the substantive content and contours of *Al-Siyar* with international law while accepting differences in terminology and divergent

theoretical understandings of the two systems.[72] This shows that during the early classic period the term *Siyar* did not refer as much to the concept of international interstate relations. It was only during the medieval period of Islam that *Al-Siyar* developed as a set of rules to govern the conduct of war and regulate the conduct of the Muslim community or Muslim rulers in their relations with other non-Muslim communities.

A number of common principles can be found in the substantive content of the *Al-Siyar* and modern international law. The principles that today form the basis of *jus in bello* and *jus in bellum* in modern international law were developed much earlier within the Islamic legal tradition. For instance, *Al-Siyar* sets the rules for providing protection to envoys, diplomats, foreigners, especially businessmen from non-Muslim nations who visited the Muslim entity for business. These rules now form part of the principle of diplomatic immunity under modern international law. *Al-Siyar* also set out rules for protecting individuals seeking asylum in Muslim jurisdictions. Likewise, *Al-Siyar* has recognised and extended the protection to individuals during armed conflict from the very initial stage. Sexual violence in war was considered a war crime since the early days of Islam whereas in modern international law, rape and sexual violence during armed conflict were not recognised as a crime until the adoption of the 1993 Statute of the International Criminal Tribunal of the Former Yugoslavia. The developments referred had to wait to be codified in the Western world beginning with the international humanitarian law conventions ranging from the 1856 Convention that established the International Committee for the Red Cross, The Hague Conventions of 1899 and 1907, and the four 1949 Geneva Conventions and their 1977 Additional Protocols. As in the words of Hans Kruse, "the positive international law of Europe had more than eight centuries later not yet reached the high degree of humanitarianisation with which the Islamic law of war was imbued".[73]

Present day Muslim states have also taken important steps to reconcile the norms of modern international law with the norms of

Islamic International Law. Such examples offer a space for mutual dialogue and constructive engagement with Islamic International Law. The insistence on the prohibition on the use of force in international relations by Muslim states under the UN Charter and endorsement of principles of international humanitarian law point towards an overlap of the fundamental principle of international law with those of Islamic law and *Al-Siyar*. Muslim states membership of the UN and acceptance of the UN Charter and its rules on the prohibition of the use of force, active participation of Muslim states in the formulation of various human rights treaties, and their accession to these treaties (albeit with reservations in the name of Islam), are examples which show that due to the compatibility between modern international law and Islamic International Law principles Muslim states are not hesitant to adhere to the modern international law. It is therefore pertinent to re-examine the history of international law project and to look into the contribution of other legal systems. As noted by Judge Jessup of the International Court of Justice, "the effectiveness of public international law […] would be seriously impaired if there were no tolerance of certain differences stemming from various legal systems".[74] One can thus argue that these examples invite researchers and scholars to re-explore the history of international law by adopting an inclusive approach which recognises the influence of Islamic legal principles on international law.

Islamic International Law is, in principle, as asserted, the development of *Siyar* or the global rules, norms and principles which have come into force through the conclusions of international treaties and agreements based on Islamic sources. The same is true in the case of public international law which was originally developed from the conclusions of international treaties.

There were no special differences, from the point of development, between the *Siyar* and the European Law of Nations. Both systems were extended from the law of war and the law of peace with the difference that one relied originally on the concept of divine law, and the other, was a combination of the law of man and the law of Christianity (divine law). The European Law of Nations and *Siyar*, have basically dealt with three main subjects. These are the law of war, the law of peace and the law of neutrality.

ISLAMIC INTERNATIONAL LAW (*SIYAR*) AND INTERNATIONAL HUMANITARIAN LAW (IHL)

The UN has in its preamble stated "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom".

Universal Human Rights and International Humanitarian Law (IHL) are the body of international law that began to be developed by treaties and agreements – mostly between European powers – in the 19th Century then, after World War Two, its rules were formalised in the Geneva Conventions 1949 (which were added to in 1977 with the two Additional Protocols). Its rules have also been developed by judicial decisions, including those immediately after the Second World War as well as more recent trials set up by the international community such as the International Tribunal of the Former Yugoslavia.[75] International customary law, documented extensively by the International Committee of the Red Cross, has also elaborated some areas of IHL and "filled in the gaps".

IHL and Islamic laws of war have a lot in common and, in fact, Islamic may have informed IHL. Some have claimed the codification of Islamic law began 1AH/622AD – with the Constitution of Madinah providing equality before the law.[76] Many account the earliest scholarly work on international law to Islamic scholar Muhammad Al-Shaybani in the 8th Century. Thus, 800 years before Hugo Grotius – who is considered the father of IHL – Islamic laws of war had been developed. Christopher Werameantry provides evidence that Grotius was influenced by Islamic thinkers.[77]

The essential values of IHL are, arguably, its "four core principles": proportionality, distinction, unnecessary suffering and

military necessity. Proportionality requires civilian casualties not excessive in relation to the concrete military advantage. This principle accepts there will be civilian deaths but aims to minimise them.[78] Distinction requires that civilians (and civilian objects) are distinguished from combatants (and military objects); and that only combatants and combatant objects can be targeted. In IHL, the term civilian applies to a wide range of "noncombatant" targets including religious and medical personnel, medical and religious sites.[79] Further, if combatants are placed *hors de combat*, through surrender, capture or injury, they cannot be targeted.[80] Unnecessary suffering prohibits the use of weapons, materials and methods which cause suffering disproportionate to the military advantage. Finally, military necessity allows all actions, not prohibited by IHL, to be used for security but requires no more violence or force is exerted than is necessary.

The four core principles of IHL are prominent in Islamic laws of war. Syrian Islamic scholar, Dr Wahbeh Al-Zuhili notes "the protection of human life, property and dignity… are universal Islamic doctrines that predate IHL". Proportionality is fulfilled because reconciliation is so important in the Muslim faith that it obligates no excessive force to allow for peace after war.[81] In fact, Islamic laws show more consideration for excessive deaths than IHL, which focuses only on civilian casualties. The Quran says "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors".[82] In terms of distinction, Islamic laws of war "lay out comprehensive guidelines for the protection of noncombatants". The Prophet Muhammad (*s.a.w.*) saw the corpse of a woman lying on the ground and said: "she was not fighting. How then she came to be killed?". Similarly, Caliph Abu Bakr said to his commander: "don't kill little children, nor old people, nor women".[83] Sacred places are protected under Islamic laws of war. The Quran says: "Do not kill monks in monasteries" and "Do not kill the people who are sitting in places of worship". Similarly, the Prophet Muhammad (*s.a.w.*) said "[d]o not attack a wounded person". Unnecessary suffering has been dealt with by Islamic jurists long before the creation of IHL. It

was because of this concept that Muslim scholars declared the catapult as un-Islamic. Of military necessity, "Islamic norms stress the importance of not doing more harm than is necessary to accomplish the goal at hand". Islam encourages peace and shares many values in the field of IHL. Those who commit acts of atrocities in the name of Islam do not speak for all those who practice the religion and should not be allowed to add "credence" to the idea that Islam is inherently violence, which it is not true in real sense.

CONCLUSION

The *Al-Siyar* was developed over centuries through the works of jurists who drew inspiration from the primary sources of law. *Al-Siyar* laid down rules for the treatment of diplomats, hostages, refugees, and prisoners of war; the right of asylum; conduct on the battlefield; protection of women, children, and the non-combatant civilians. Muslim jurists have played a pioneering role in the development of international law. It is Imam Muhammad b. Hasan al-Shaybani who deserves to be credited for his work. In this sense, *Al- Siyar* predates its western counter part by several centuries. *Al-Siyar* was developed much earlier than the classical Law of Peoples. The origins of *Al-Siyar* can be traced back to the 7th century while the European classical Law of Peoples, is conventionally retraced to have developed, on the basis of the doctrines of the Catholic Church and Roman legal sources in the early 16th century onwards.

The historical examination of Al-*Siyar* has also shown that the study of the history of international law project has failed to capture the development of the norms and principles of *Al-Siyar* which later came to be known as the law of armed conflicts. As noted by de La Rasilla, "the Euro-centric and state-centric paradigm, which dominated the study of the history of international law throughout most of the 20th century, has left behind a double exclusionary bias regarding time and space in the history of international law".[84] This paper demonstrates that international law cannot be labelled as exclusively Western. To understand Islamic International Law

rules, contextual and not literal equivalents need to be identified through a historical lens. If the purpose of international law is to serve the interests of a wide and diverse international community of States and individuals, then the global history project has to look beyond the euro-centric historiography of international law. By adopting an inclusive and accommodative approach it can explore the principles and rules of conduct of war and peace developed by the other legal traditions.

Notes

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aggressive westerners seeking to conquer Muslim or Arab lands became extremely potent for Islamists and Arab Nationalist leaders alike, and Saladin, as the man who recaptured Jerusalem, stands as the man to aspire to." by Jonathan Phillips is Professor of Crusading History at Royal Holloway University of London and the author of Holy Warriors: A Modern History of the Crusades (Vintage, 2010).

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26 Ibid.

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