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***Islamic International Law  
and  
The Concept of Peace***

**Research paper**

**By**

***Hany Fathy Georgy***

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## CHAPTER ONE

### Introduction

The concept and scope of international law has hardly been static. Last century witnessed the evolution of this concept in the face of different changes, industrial, scientific, social, political etc. International law is no longer state-centric although states still continue to be the most important players in this area. New actors are also vying for a place as the subjects of international law including international organizations, big multinational corporations, NGOs and last but not the least, the individual.

As we step into the new millennium, it is hardly contestable that religion still affects the lives of many people in one way or another. The impact of religion on the mind also reflects itself in our actions. My topic addresses Islamic International Law, particularly its concept of peace. About one sixth of the world's population are Muslim. The number of Muslim countries is almost one fourth of the total number of states in the world. Although, these states do not represent a united front due to various political factors notwithstanding common platforms such as Organization of Islamic Conference (OIC), this does not diminish the importance of the appellation they carry: Muslim.

There is a need to understand not only Islam, but more importantly Islamic Law, as it can play an important role in addressing the problems facing the world, especially those related to peace and security.

Islam has the undeniable merit of contributing to the history of mankind and to universal civilization in the fields of

religion, science, arts, commerce and industry.<sup>1</sup> Islamic International Law constitutes a vital part of the Islamic legal heritage.<sup>2</sup> If the process of the development of the modern law of nations is to be meaningful, the experiences of Islam, like those of other nations should be closely examined.<sup>3</sup>

Islamic Law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.<sup>4</sup> Since law and religion are closely linked to one another in Islam, it is impossible to understand Islam without understanding Islamic Law.<sup>5</sup>

Islamic Law has different branches e.g. Civil Law, Commercial Law, Taxation Law, Property Law, Family Law, Social Law, Administrative Law, Law of Contract, Criminological Law, Criminal Law, Procedural Law and finally International Law. Islamic International Law includes Human Rights, International Humanitarian Laws and or International Criminal Law.<sup>6</sup> There is a significant distinction between law of Muslims and Muslim law as the

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<sup>1</sup> Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine, Recueil des cours (Hague Academy of International Law)*, 1966, I (Vol.117), Sijthoff, 1967, p.221.

<sup>2</sup> C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, MacMillan, 1988, p.128.

<sup>3</sup> Majid Khadduri, *The Islamic Law of Nations, The Johns Hopkins Press*, 1966, p.4.

<sup>4</sup> Joseph Schacht, *An Introduction to Islamic Law*, Clarendon Press, 1982, p.1.

<sup>5</sup> *Ibid.*

<sup>6</sup> Farhad Malekian, *The Concept of Islamic International Law*, Graham & Trotman, 1994, p.3.

two are not identical: the former represents the customary laws at variance with the tenets of *Quran* and *Sunna*.<sup>7</sup>

The growth of Islamic International Law has not been static or smooth. The first five centuries were important in terms of development of the basic doctrinal framework. Legal research and juridical inquiry helped Muslim jurists to build up a theoretical and doctrinal infrastructure for the later expansion of the Islamic legal thought.<sup>8</sup> Interestingly, while the process of *Ijtihad*<sup>9</sup> suffered a serious blow around 10<sup>th</sup> century as a result of the closing of gates of *Ijtihad*,<sup>10</sup> Islamic law was still able to enjoy the highest degree of actual efficiency during 16-17 century under the Ottoman and Mogul Empires.<sup>11</sup> The doctrine of *Taqlid*,<sup>12</sup> which contrary to *Ijtihad*, encourages following the established schools of *fiqh* (Islamic Jurisprudence) rather than resorting to interpretation of the Holy texts directly has been followed until the early part of last century. Deprived of the tools of interpreting law according to modern needs, Islamic Law

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<sup>7</sup> Muhammad Hamidullah, *Muslim Conduct of State*, Lahore, 1945, p.36.

<sup>8</sup> Mahmood Ahmad Ghazi, ed., *The Shorter Book on Muslim International Law, Kitab Al-Siyar Al-Saghir*, by Muhammad ibn-al-Hasan al-Shaybani, Islamic Research Institute, Islamabad, 1998, p.xv.

<sup>9</sup> It is the general process of juristic endeavour to ascertain the terms of Shari'a. Noel. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, The University of Chicago Press, 1969, p.41.

<sup>10</sup> *Ibid.*, p.42-3.

<sup>11</sup> Schacht, *op cit.* n.4, p.4.

<sup>12</sup> Literally it means to 'follow' or 'imitate'. Coulson, *op cit.* n.9, p. 43.

Suffered stagnation in its growth for about a thousand years. However, despite this stagnation, there has not been any change in the postulate that Islam, as a religion, ought to regulate the sphere of law as well.<sup>13</sup> In practical terms this postulate implies an inevitable clash with the doctrine of *Taqlid* which has either to be discarded or seriously curtailed to allow the growth of Islamic Law through the process of *Ijtihad*. Modern legislation and judicial decision making in a number of Islamic countries in the last few decades has undermined the concept of *Taqlid*, perhaps to the extent of renunciation.<sup>14</sup>

As a logical inference from the universality of the Islamic nation (*ummat*), Islamic Law was conceived to be essentially universal, and consequently international in scope and character.<sup>15</sup> In sharp contrast, the basis of European (Christian) Law of Nations was much narrower.<sup>16</sup> For example, Grotius, who regarded European International Law as being applicable for a few civilized European States only, advocated discriminatory treatment against non-Christian states.<sup>17</sup> This narrow approach, spurred perhaps by religious prejudice, is reflective of the historical clash

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<sup>13</sup> *Ibid.*, p.3.

<sup>14</sup> *Ibid.*, p. 107.

<sup>15</sup> *Mahmassani, op cit. n.1, p.235.*

<sup>16</sup> *Farooq Hassan, The Concept of State and Law in Islam, University Press of America, 1981, p.210.*

<sup>17</sup> *Hassan, op cit. n.16, p.210.*

Comparative legal studies offer different methodologies to approach legal problems, which help not only in getting fresh insights but also in achieving revitalized solutions.<sup>18</sup>

The underlying idea behind this paper is the same. It aims at analyzing Islamic International Law's concept of peace through different concepts like the concept of universality, tolerance, coexistence, war and dispute settlement. It is not possible to lay down a firm foundation of peace without having a well-rounded approach, which not only strives for creating conditions for building peace, but also takes care of situations where peace has been breached by war or is seriously threatened by disputes. Thus both the basic conception of peace building within a legal system as well as the regulation of allied fields involving conflicts and dispute settlement is important.

Although the term Islamic International Law carries with it a religious undertone, the object of this paper is to outline the usefulness of Islamic International Law and its principles to the existing system of international law. It focuses on Islamic International Law's conceptualization of peace and coexistence through different subjects. Towards the end it presents a conclusion of what has been discussed in the preceding chapters.

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<sup>18</sup> Weeramantry, *op cit.* n.2, p.165.



## CHAPTER TWO

### Islamic International Law: Definition, Sources & Subjects

#### 2.1 Definition

Muslim scholars of the early second Islamic century adopted the word '*Siyar*' as the name for that branch of Islamic Law which deals with the relationship of the Muslim community with other international entities and communities.<sup>19</sup>

The first Muslim jurist to use this term '*Siyar*'<sup>20</sup> for Muslim international law in any extant legal compendium was Zayb ibn Ali<sup>21</sup>, (d. 120 H).<sup>22</sup> Abu Hanifa, who composed *Kitab -al- Siyar*, was the first Muslim jurist to compose an independent work on international law.<sup>23</sup> It is however, Muhammad ibn al-Hasan al-Shaybani (749-805 AD), who merits to be considered one of the founders of Islamic International Law in view of the role he played in its development and exposition.<sup>24</sup> Although he was not the

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<sup>19</sup> Mahmood Ahmad Ghazi, ed., *The Shorter Book on Muslim International Law, Kitab Al-Siyar Al-Saghir*, by Muhammad ibn-al-Hasan al-Shaybani, Islamic Research Institute, Islamabad, 1998, p.7.

<sup>20</sup> It should be noted that the subject of international law has been addressed under different titles by Muslim jurists. E.g., *Muslim International Law, Law of War or Jihad, Law of Nations*.

<sup>21</sup> Ghazi, *op cit.* n.1, p.7 using a quote from *al-Majmu' fi'l fiqh*.

<sup>22</sup> *The Muslim Calendars commence in 622 AD and are denoted as AH (Anno Hijra)*.

<sup>23</sup> *Ibid.*, p.7.

<sup>24</sup> *Ibid.*, p.xi.

first, he was undoubtedly the most prolific writer on the subject among the early jurists.<sup>25</sup> His 'Introduction to the Law of Nations' at the end of the 8<sup>th</sup> century is considered to be the world's earliest treatise on international law as a separate topic.<sup>26</sup> Grotius who wrote *De Jure Belli ac Pacis* almost eight centuries later in 1625, may still be called the father of 'modern' international law.<sup>27</sup>

*Siyar* (plural of *Sirah*) means life or the conduct of the Prophet Mohammed.<sup>28</sup> However, Shaybani never defined the term *Siyar* nor gave a precise meaning to it.<sup>29</sup> Sarakhsi, in his commentary on Shaybani's *Siyar*, defines it as:

“... the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (*musta'mins*) or permanently (*dhimmis*) in Islamic lands; with apostates..... and with rebels (*baghis*)”.<sup>30</sup>

Notwithstanding the apparent religious nature of this definition, what is significant about it is that it envisages a set of rules applicable not only to States but also to individuals in different capacities. Clearly the conception of

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<sup>25</sup> *Ibid.*, p.31.

<sup>26</sup> C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, MacMillan, 1988, p.130.

<sup>27</sup> *Ibid.*, p.132.

<sup>28</sup> Ghazi, *op cit. n.1*, pp. x, xi.

<sup>29</sup> Majid Khadduri, *The Islamic Law of Nations*, The Johns Hopkins Press, 1966, p.40.

<sup>30</sup> *Ibid.*, quoting Sarakhsi's 'Mabsut', vol X, (Cairo, 1324/1906), p.2.

Islamic International Law was not State-centric. Contrasting this definition with the one a modern writer on Islamic International Law gave, one cannot miss the influence of modern international law. Thus it has been defined 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’.<sup>31</sup>

Unlike the Western legal scholars who differed on the very nature of international law, whether it should be called law or positive international morality, Muslim jurists, on the other hand, have not been involved in this kind of controversy. As a branch of the *Sbari'a*, Islamic International Law never faced any conceptual problem in being treated as Law from the very beginning<sup>32</sup> and having all the characteristics of law that European International Law lacked. Conceptually, at least, it never faced the problem of lacking proper sanction and judicial forum to adjudicate disputes under it.<sup>33</sup>

## 2.2 Sources of Islamic International Law

The term used for sources in Arabic terminology is ‘*adillah*’, i.e., proofs of the Law.<sup>34</sup> Since the main source of Islamic Law in theory is the Holy enactment of the *Quran*

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<sup>31</sup> Muhammad Hamidullah, *Muslim Conduct of State*, Lahore, 1945, p.3.

<sup>32</sup> Ghazi, *op cit. n.1*, p.2.

<sup>33</sup> *Ibid.*, p.2.

<sup>34</sup> Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, *Recueil des cours (Hague Academy of International Law)*, 1966, I (Vol.117), Sijthoff, 1967), p.231.

and *Sunna*, other sources are used only as means to discover the Law.<sup>35</sup>

Islamic International Law has the same legal sources as any other branch of Islamic jurisprudence. Therefore, *Shari'a* is also the source of normative international relations between Muslim States and other States.<sup>36</sup> Like other branches of *Shari'a*, Islamic International Law is primarily based on two fundamental sources, the *Quran* and *Sunna*<sup>37</sup> which are the only authoritative Holy enactments, called *nass* (text) of Islamic jurisprudence. The secondary sources are based on opinion (*ra'y*),<sup>38</sup> mainly consisting of consensus of opinion (*Ijma*) and juristic deduction (*Qiyas*). The secondary sources can be expanded to include:

1. Orthodox Practice of the early Caliphs
2. Practice of other Muslim rulers not repudiated by the jurisconsults
3. Arbitral awards, treaties, pacts and other covenants
4. Official instructions to commanders, admirals, ambassadors and other State officials
5. The internal legislation for conduct regarding foreigners and foreign relations
6. Custom and usage<sup>39</sup>
  7. Reason and Equity (e.g., *Istihsan*, *Al-Masalih al-Mursalah*, *Istidlal*).<sup>40</sup>

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<sup>35</sup> *Ibid.*, p.231.

<sup>36</sup> Farhad Malekian, *The Concept of Islamic International Law*, Graham & Trotman, 1994, p.6.

<sup>37</sup> *Ibid.*, p.2.

<sup>38</sup> *Ibid.*, p.230.

<sup>39</sup> Hamidullah, *op cit.* n.13, p.18.

Both the primary and secondary sources will be explored in more detail below.

### **2.2.1 The Primary Sources**

#### **Quran**

The verbal noun meaning of *Quran* is "to read" or recite as in *Sura LXXV*, verse 17:

"It is for us to collect It and recite It."

Caliph Uthman used the name *Quran* for the whole collection of revelations made to the Prophet Mohammad. Originally it meant each separate revelation made to the Prophet.<sup>41</sup> It was collected in one authentic collection immediately after the death of the Prophet by one of his Companions, Zaid Ibn Thabit, by order of the first Caliph, Abu Bakr.<sup>42</sup> *Quran* contains the whole philosophy of Islam and constitutes the main sources of Islamic International Law and therefore regulates the rules, obligations and duties, which must be respected in normative state conduct.<sup>43</sup>

#### **Sunna of the Prophet**

The conduct of the Prophet (peace be upon him) in his international dealings constitutes the basis on which detailed Rules of law were developed.<sup>44</sup> *Sunna*

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<sup>40</sup> *Mahmassani, op cit. n.16, p.231.*

<sup>41</sup> *S.H. Tabandeh, A Muslim Commentary on the Universal Declaration of Human Rights, F.T. Goulding & Co. Ltd., London, 1970, p.94.*

<sup>42</sup> *Mahmassani, op cit. n.16, p.229.*

<sup>43</sup> *Malekian, op cit. n.18, p.6.*

<sup>44</sup> *Ghazi, op cit. n.1, p.3.*

explains and complements in detail the generality of the Quranic rules.<sup>45</sup> The Prophet's conduct included, besides his traditions, wars, exchange of letters/envoys, reception of delegations, negotiation of treaties of international importance, dealing with enemy property, prisoners of war.<sup>46</sup> It also includes treaties, instructions to tax collectors, charters, census reports and so on.<sup>47</sup> *Sunna* played an important role in the rapid development of Islamic international relations.<sup>48</sup> It is the practical interpretation of Islamic Law.<sup>49</sup>

*Quran* also supports that the *Sunna* be followed:

"This is an inspired revelation. He (the Prophet) is taught by one who is powerful and mighty (Gabriel)".  
53:3-4

Although *Quran* and *Sunna* both are primary sources of Islamic International Law, in quantitative terms *Sunna* provides more rules than are to be found in the *Quran*. It is the quality, however, in which *Quran* is superior. This distinction is due to the difficulty of proving the genuineness of a tradition.<sup>50</sup> Since international law or *Siyar* appeared as a separate discipline later, therefore no special and exclusive collections were ever made of the practice of

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<sup>45</sup> *Mahmassani, op cit. n.16, p.230.*

<sup>46</sup> *Ghazi, op cit. n.1, p. 3.*

<sup>47</sup> *Hamidullah, op cit. n.13, p.21.*

<sup>48</sup> *Malekian op cit. n.18, p.6.*

<sup>49</sup> *Ibid.,*

<sup>50</sup> *Hamidullah, op cit. n.13, p.21.*

either the Prophet or his Caliphs regarding international intercourse. Even if attempts have been made they are not exhaustive.<sup>51</sup>

Since the practice of Caliphs is also regarded as a possible source of Muslim international law, there can arise a theoretical problem, should there be a conflict between the practice of the orthodox Caliphs and the *Sunna* of the Prophet. In such cases it is presumed that Caliphs would not violate *Sunna*.<sup>52</sup> Thus the practice of the Caliphs may be accepted in addition to the *Sunna* but not against it.<sup>53</sup> The practice of other Muslim rulers is useful when it has not been repudiated by the contemporary or later jurisconsults. But since they constitute a secondary source of Islamic International Law, they should not be in contravention of the *Quran*, *Sunna*, or orthodox practice in order to be accepted as an authority for a rule of Islamic International Law.<sup>54</sup>

*Sunna* also refers to the customary law of Arabia.<sup>55</sup> It is therefore, interesting to note that in the early Islamic period the term was also used for the Arabian customary law (*jus gentium*).<sup>56</sup>

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<sup>51</sup> *Ibid.*, p.22.

<sup>52</sup> *Ibid.*, p.22-23.

<sup>53</sup> *Ibid.*, p.22.

<sup>54</sup> *Ibid.*, p.23.

<sup>55</sup> Majid Khadduri, *War and Peace in the Law of Islam*, The Johns Hopkins Press, 1955, p. 20.

<sup>56</sup> *Ibid.*, p.29.

### 2.2.2 The Secondary Sources

#### ***Ijma***

The secondary source of Islamic International Law, *Ijma* stands for the unanimous agreement of Muslim jurists in any particular age on a juridical rule not already covered by a Holy enactment.<sup>57</sup> It may be express or tacit.<sup>58</sup> It has been supported by various traditions of the Prophet like:

"My people will never be unanimous in error" and  
 "The hand of God is over the collectivity, and whoever quits it, is sent to hell".<sup>59</sup>

Likewise Quranic support is also found for consultation:

"Take Counsel with them in the conduct of affairs; and when you are resolved, put your trust in God. God loves those that are trustful." 3:159

A unanimous decision has the same validity as a verse of the *Quran* or the most reliably proven tradition of the Prophet.<sup>60</sup>

However, it can be abrogated by a later consensus.<sup>61</sup>

There have been disagreements among the scholars regarding the scope of consensus to be achieved. While conservative elements have held that it should include the consensus of all the jurists past, present and future, the moderates have considered the consensus of the present jurists as sufficient for *Ijma*.

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<sup>57</sup> *Mahmassani, op cit. n. 16, p. 230.*

<sup>58</sup> *Ibid.,*

<sup>59</sup> *Hamidullah, op cit. n. 13, p. 23-24.*

<sup>60</sup> *Ibid., p. 24.*

<sup>61</sup> *Ibid.,*



Initially it was considered to be government business to ascertain *Ijma*, but later it fell into desuetude due to civil wars and schisms.<sup>62</sup> Thus we saw the emergence of official jurisconsults. Consequently, private students and scholars of law cultivated the science.<sup>63</sup>

It should be noted that *Ijma* involves some practical problems. First, achieving consensus is not easy due to a host of reasons. Moreover, the modalities and mechanisms to organize and realize *Ijma* is far from simple. Thus from the constitution of *Ijma* to its implementation, there are problems that need painstaking attention. Therefore, it appears *Ijma* has limited utility in the present day set up. However, it may not be altogether a no-option. The revolution in information technology now makes it possible for people to sit across each other from all over the world and engage in an exchange of ideas. Jurists from different parts of the world can make use of this facility to exchange their ideas and hold discussions on different issues to achieve consensus. But this is as yet an uncharted territory. It would necessarily involve a conceptual reactivation of the process of *Ijma* itself as it has not been in use for a very long period of time. Thus the real utility of *Ijma* as a source of Islamic International Law in the future remains undetermined.

### *Qiyas*

*Qiyas* means the extension of the application of a certain legal rule prescribed for a given case to a new case on the ground of a common effective cause (*illat*) which is

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<sup>62</sup> *Ibid.*,

<sup>63</sup> *Ibid.*, p. 24-25.

identical in both cases.<sup>64</sup> Abu Hanifa distinguished himself as the chief advocate of analogy (*Qiyas*) as a source of law.<sup>65</sup> However, it is interesting to note that custom and reason played a more important role in the development of Islamic International Law than other sources.<sup>66</sup>

In the initial stages of expansion of the Muslim State to Syria, Iraq, Persia and Egypt, legal problems were encountered, encouraging the Caliphs and their jurisconsults to resort to personal opinion, *ra'y*.<sup>67</sup> Later it was abandoned on the ground that it permitted legislation by man.<sup>68</sup>

The scope of juristic interpretation is regulated to prevent *ra'y* (opinion) as forming the basis of *Qiyas*. It is circumscribed by the primary sources. However, *Qiyas* can be used to tone down a harsher interpretation into a moderate one on the ground of *Istihsan* (seeking the most equitable solution)<sup>69</sup> or *Istislah* (seeking the best solution for the general interest).<sup>70</sup>

### 2.3 Subjects of Islamic International Law

The list of subjects of Islamic International Law is rather broad, including:

1. Every independent state which has some relation or other with other states.

<sup>64</sup> *Mahmassani, op cit. n.16, p.231.*

<sup>65</sup> *Khadduri, op cit. n.37, p.29.*

<sup>66</sup> *Ibid., p.9.*

<sup>67</sup> *Ibid., p.28.*

<sup>68</sup> *Ibid., p.29.*

<sup>69</sup> *Noel. J. Coulson, Conflicts and Tensions in Islamic Jurisprudence, The University of Chicago Press, 1969, p.7.*

<sup>70</sup> *Ibid.*

2. Part-sovereign states which possess at least a limited right to foreign relations.
3. Belligerent rebels who have acquired resisting power and a territory over which they exercise the ordinary functions of state.
4. Highwaymen and pirates.
5. Resident aliens in Islamic territory.
6. Muslim citizens residing in foreign countries.
7. Apostates.
8. Privileged non-Muslims or the *Dhimmis*, that is non-Muslim subjects of a Muslim state as distinguished from ordinary resident aliens.<sup>71</sup>

This list makes it clear that, unlike the Western international or inter-statal law, which regulates the relationship among nations and states alone and not that of individuals, groups and communities, Islamic International Law recognized groups and communities as its important subject from the very beginning. As such an individual has never been deprived from seeking redress available under Islamic International Law.<sup>72</sup> Rather, the individual is recognized as an integral part of Muslim international law's anatomy. There is no difference between the international legal characterization of a group and that of a state. They are all considered subjects and are consequently treated equally under the provisions of Islamic Law.<sup>73</sup>

Another important aspect of this list is that it accepts the concept of different independent States. However, in view of the concept of Divine Sovereignty, the concept of State

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<sup>71</sup> *Hamidullah, op cit. n.13, p.14.*

<sup>72</sup> *Ghazi, op cit. n.1, p.20.*

<sup>73</sup> *Malekian, op cit. n.18, p.5-6.*

sovereignty is not absolute or unlimited. A state is merely a trustee of power.<sup>74</sup> While the Islamic concept of sovereignty may be useful in addressing the problems arising out of the existing concepts of State sovereignty, it may also evoke a rather adverse reaction from those who prefer a secular basis of law rather than one based on the concept of Divine sovereignty. Again, the Islamic concept of State sovereignty has yet to be tested practically in the modern day setting.

#### **2.4 Sanction behind Islamic International Law**

To a certain extent the sanction of Islamic International Law is the same as that of the ordinary Muslim Law of the land. The real sanction is rather religious, that is the belief in the afterlife and judgement by God. Spiritual conscientious inducing and deterring factors are more effective than temporal persuasions and prohibitions. This kind of sanction ensures compliance not just under coercion but even when there is none, except the fear of retaliation or scandal.<sup>75</sup>

#### **2.5 Role of Jurists in the development of Islamic Law**

The task of using *Ijtihad* is to adopt Islamic principles to modern times through inductive and deductive methods. While the first method uses *Quran* and *Sunna*, in the second method, use is made of *Qiyas*, *Ijma*, public interest and equities to interpret the Islamic provisions.<sup>76</sup> Jurists have played a rather leading role in exercising *Ijtihad*.

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<sup>74</sup> Weeramantry, *op cit.* n.8, p.131.

<sup>75</sup> Hamidullah, *op cit.* n.13, p.15.

<sup>76</sup> Ezzeldin Foda, *The Projected Arab Court of Justice*, Martinus Nijhoff, 1957, p.131.

The increased role of legal scholarship in the development of Islamic Law may have to do with the absence of formal legislative bodies in the Muslim polity as the Law giver is only one and that is God.<sup>77</sup> This had led to the private provenance of law in Islam by private jurists in their capacities as scholars. Their legal opinions become acceptable because of the confidence of the community in their scholarship and piety.<sup>78</sup> It was then that jurists used the provisions within the law itself for 'further elaboration' to not only discern this elasticity of the Divine Law, but also utilized it to its fullest extent. This juristic role also served the purposes of imperial Muslims.<sup>79</sup>

In view of the role played by the jurists, it might appear that the Islamic Law presents an 'extreme' case of a 'jurist's law': It was created and developed by private specialists. Legal science and not the state plays the part of a legislator and scholarly handouts have the force of law.<sup>80</sup> However, modern legislation in a number of Islamic countries has added an as yet unfinished chapter to its more than millenary history.<sup>81</sup>

The role of jurists in the development of Islamic Law in the absence of a formal legislative apparatus is an ambivalent factor. On the one hand, it increases the juristic freedom to interpret law and lay down rules, not violating the basic constitutional sources of *Quran* and *Sunna*. On the

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<sup>77</sup> Ghazi, *op cit.* n.1, p.6.

<sup>78</sup> Ghazi, *op cit.* n.1, p.6.

<sup>79</sup> Hamidullah, *op cit.* n.13, p.6.

<sup>80</sup> Joseph Schacht, *An Introduction to Islamic Law*, Clarendon Press, 1982, p.5.

<sup>81</sup> *Ibid.*

other hand, the very absence of institutionalization in the process of legislation can undermine the whole process by exposing it to risks of personal likes and dislikes. This perhaps was one of the reasons for closing the gates of *Ijtihad* in the 10<sup>th</sup> Century. Had there been a proper institutional set up to regulate the process of *Ijtihad* through some kind of patronage and institutional support, the process of *Ijtihad* may not have been a victim of *Taqlid*.

Thus despite having a strong religious overtone reinforced through its primary sources, *Quran* and *Sunna*, in real terms the religious character of Islamic legal rules is rather exaggerated. Moreover, the use of *Ijtihad* in modern legislation gives prominence to the legal rather than the religious character of Islamic International Law. For example, *Dhimmis*, the non-Muslims living in Muslim territories, are no longer required to pay *kharaj*, land tax, to the state. Rather the state extends to them equal rights.

Although Islamic International Law stands on the same footing as any other branch of the *Shari'a*, in practical terms the issue of sanction in international legal affairs is far from resolved. But notwithstanding this failure in practical terms, the conceptual unity of national and international law under the Islamic legal system is significant and may be useful for the future of International Law by further developing this concept..

## **CHAPTER THREE**

### **Peace and Islamic International Law**

The primary message of Islamic International Law is peaceful relations with other communities and entities, both Muslims and non-Muslims. The concept of *Ummah*, bringing together people from all over the world on the basis of religious beliefs is one aspect of Islam's universalism. The other aspect is the reality of co-existence with other states, both Muslim and non-Muslim. It is the result of these two basic doctrines of Islamic Law, universalism and peacefulness, that so much stress is laid on such principles as peaceful coexistence, observance of treaties, tolerance and freedom of religion. It would not be out of place to repeat here that the concept of universalism does not rule out existence of independent States.

The mere fact of neighbourly cohabitation creates moral and legal obligations, which in the course of time crystallize into a system of international law.<sup>1</sup> The system of international law of Islam can have two fundamental conceptions for international legal relations:

A: international relations should be based on a principle of legality and

B: the practical and philosophical reasons for such international conduct should be clearly set forth.

According to the former principle 'international relations come under the union of laws, according to which international consensus should be achieved'. According to the latter, international relations should create a permanent

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<sup>1</sup> *Majid Khadduri, The Islamic Law of Nations, 1966, The Johns Hopkins Press, p.4, quoting Baron S.A. Korff.*

international peace within the system of international legal community.<sup>2</sup>

Muslim international law has been unilaterally followed by the Muslim states in their relations with their own non-Muslim citizens as well as with the contemporary international communities and entities with which they came into contact.<sup>3</sup> However, it should be pointed out that such practice relates to the early period of Islamic history and does not cover the later part of it, especially following the fall of Mogul and Ottoman Empires. One of the reasons for this inconsistency in practice might be the weakening of the Muslim states politically. This also highlights the fact that Islamic International Law has had a close nexus with the politics of Muslim states.

Historically the application of Islamic International Law was universal from the very beginning. During the first two centuries of Islam, Islamic International Law regulated the relations of the Muslim states, different peoples, nations and communities. E.g. European Christians of Spain, France and Italy, the Berbers of Morocco, the inhabitants of Ethiopia, the Hindus and Jains of India, the Buddhists of India and Central Asia and the Taos and Shintos of China and the Far East.<sup>4</sup> However, *universal* application and *equal* application

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<sup>2</sup> Farhad Malekian, *The Concept of Islamic International Law*, Graham & Trotman, 1994, p.5, quoting from 'The System of International Law, Formation, Treaties and Responsibility. (Uppsala, 1987, p.8).

<sup>3</sup> Mahmood Ahmad Ghazi, ed., *The Shorter Book on Muslim International Law, Kitab Al-Siyar Al-Saghir*, by Muhammad ibn-al-Hasan al-Shaybani, Islamic Research Institute, Islamabad, 1998, p.19.

<sup>4</sup> Ghazi, *op cit.* n.3, p.20.



are different things. More so, since Muslim jurists themselves differed on the concept of *Dar-al-Islam* and *Dar-al-harb*, questions may be raised whether such universal application envisaged equal treatment to other states and entities. Again, one must not overlook the influence of different Muslim jurists and rulers on Islamic International Law, who would typically follow a particular interpretation of the Islamic Law. However, the fact that today Muslim States do not maintain the distinction between States on the basis of religion in so far as international legal relations are concerned, reflects the adaptability of Islamic International Law.

This chapter is divided into three parts to cover different approaches included in the Islamic International Law towards peace. The first deals with steps, which promote peace, the second deals with war, and when and how it is allowed. The third part deals with the mechanisms to ensure peace through different dispute resolution means.

## **PART I**

### **3.1.1 Peacefulness and Universalism**

A number of Quranic verses lay down that the original and permanent nature of relationship between the Muslims and the non-Muslims is peace and understanding rather than war and hostility.<sup>5</sup>

The universal character of the Islamic Law is threatened by the two-fold division of world into *Dar-al-harb* and *Dar-al-Islam*.<sup>6</sup> The latter represents territory, which is governed by

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<sup>5</sup> *Ibid.*, p.4.

<sup>6</sup> Mohammed Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, Martinus Nijhoff, 1968, p.1-2. These terms are an innovation of the Abbassid legists,

Islamic Law while the former is outside the jurisdiction of Islamic Law.<sup>7</sup> This theory rules out peaceful coexistence between Muslim and non-Muslim states.<sup>8</sup> Rather it raises questions about the legal status of the non-Muslim states under Islamic International Law.<sup>9</sup> The use of *Jihad* is stressed to bring *Dar-al-harb* into the orbit of *Dar-al-Islam*. By ruling out mutual independence and legal equality this divisive theory reduces the Islamic system of international law to an exclusive, rather than a universal system.<sup>10</sup> But the participation of Muslim states in the existing international legal system<sup>11</sup> exposes the inapplicability of this doctrine.

Art 1 of Treaty between Suleiman and Francis stating that ‘ a valid and sure peace would be established between the two states and reciprocal rights granted to the subjects of each nation in the territory of the other’<sup>12</sup> also belies the assumption that Islamic International Law does not provide for peaceful coexistence among states.

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*as these are not found in Quran or Hadith, p.184. Hadith refers to the compilation of Sunna of the Prophet Mohammad.*

<sup>7</sup> Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine, Recueil des cours (Hague Academy of International Law)*, 1966, I (Vol.117), Sijthoff, 1967, p.250-1.

<sup>8</sup> Ghunaimi, *op cit.* n.6, p.2.

<sup>9</sup> Khadduri, *op cit.* n.1, p.11-12. He considers that non-Muslims are only the objects of Islamic international Law and not its subjects.

<sup>10</sup> Ghunaimi, *op cit.* n.6, p.2.

<sup>11</sup> Ezzeldin Foda, *The Projected Arab Court of Justice*, Martinus Nijhoff, 1957, p.137.

<sup>12</sup> C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, MacMillan, 1988, p.143.

The two-fold division of the world could have factual significance when it relates to reality. This division under the Abbassids corresponded to the factual relations between the Muslim state and non-Muslim states<sup>13</sup>. Thus this division was also driven by political reasons to accommodate the interests of an expanding state.<sup>14</sup>

Philosophy of Islamic jurisprudence is based on the practical aspects of the principles of peaceful international relations and full respect for the rights of those who are non-Muslims and do not wage war against Muslims. Any interpretation that Islam is in a perpetual state of war with non-Muslim nations may have been valid in the early period of Islamic state when expansionist policies of the state necessitated a legal/religious justification for war. But conceptually such an interpretation goes against the Islamic spirit. Therefore, an assertion today that Islam is in a perpetual state of war with the non-Muslim states would be groundless as it runs counter to the principles of equality, justice and brotherhood found in *Shari'a*.<sup>15</sup>

### **3.1.2. Tolerance and Understanding**

Peace can be cemented by tolerance and understanding as the combination of these two works against prejudice and promotes acceptance of diversity and accommodation. There are many examples of tolerance and accommodation in the history of Islamic International Law. For example, in the Battle of *Khaibar*, Prophet Mohammad allowed Jews of *Qainuqa* to fight by his side. Likewise, Safwan ibn

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<sup>13</sup> Ghunaimi, *op cit.* n.6, p.184.

<sup>14</sup> Foda, *op cit.* n.11, p.135.

<sup>15</sup> Malekian, *op cit.* n.2, p.8.

Ummayyah, a polytheist, fought by the Muslims' side in the *Ghazawh of Hunain*.<sup>16</sup> Similarly the Prophet granted a charter by way of the terms of a treaty to the monks of the monastery of St. Catherine near Mount Sinai.<sup>17</sup> Another example of tolerance can be found in the treatment meted out to the heathens of Quraish on the day of the victory of Mecca.<sup>18</sup>

### **Equal treatment and respect for non-Muslims**

In order to foster respect for others, knowledge and understanding is crucial. Therefore, Islam urges Muslims to increase their knowledge and understanding so as to contribute to human welfare and establish world peace.<sup>19</sup>

*Bahr'ar Raiq*, a famous compendium of Hanafite law, lays down that the graveyards, life, property and honour of non-Muslims is to be respected as much as of Muslims.<sup>20</sup> What is equally noteworthy is the concept of equality transcending religious bonds. It can be understood in two ways: to encourage reciprocal good treatment of Muslims by the non-Muslims and to highlight the common denominator for good treatment: human being. Such a construction would be useful in the context of international human rights.

Both *Quran* and *Sunna* encourage this process:

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<sup>16</sup> Farooq Hassan, *The Concept of State and Law in Islam*, University Press of America, 1981, p. 209-19.

<sup>17</sup> *Ibid.*, p. 201.

<sup>18</sup> Hassan, *op cit.* n. 16, p. 201.

<sup>19</sup> *Ibid.*, p. 196.

<sup>20</sup> Muhammad Hamidullah, *Muslim Conduct of State*, Lahore, 1945, p. 111.

"My Lord, increase me in knowledge" 20:114

Prophet is reported to have said:

"The acquisition of knowledge is an incumbent duty on every Muslim male and female". And " It (knowledge) enables the possessor to distinguish right from wrong, it lights the way to heaven". <sup>21</sup>

The above sayings of the Prophet may be interpreted to mean that it is incumbent on every person to strive to learn more to fight prejudices that stymie human progress. Obviously the concept of right and wrong is closely tied to justice and equity. So knowledge is the key to doing justice and equity. This is a rather progressive approach to peace building. Thus we can also say Islam favours modernity by urging the acquisition of knowledge and increasing understanding.

**Violence in religion is expressly prohibited:**

No compulsion in religion is to be used:

"Remind them, for you are but a remembrance. Your are not at all a warder over them". 88:21,22<sup>22</sup>

"And if the Lord had willed, surely all those who are in the earth would have believed all of them; wilt thou therefore compel men till they become believers?" 10:99<sup>23</sup>

Understanding of other religions is encouraged:

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<sup>21</sup> *Ibid.*, p.196.

<sup>22</sup> *Hassan, op cit. n.16, p.209.*

<sup>23</sup> *Hassan, op cit. n.16, p.196.*

"And revile not those unto whom they pray besides Allah lest they wrongfully revile Allah through ignorance". 6:109<sup>24</sup>

*Quran* is against the use of war for the propagation of Islam: "unto you your religion and unto me my religion. (10:96).<sup>25</sup>

This can be interpreted to mean that the universalisation of Islamic faith does not mean (unity of faith) and ideology. God does not intend the creation of one political unit, subjecting the world to one government.<sup>26</sup> Rather the above verses bring point out that religious pluralism and diversity is envisaged in the *Quran* itself. Additionally the emphasis on respect for other religions may be understood in terms of avoiding conflicts, which result from mutual disrespect for each other's beliefs. Such conflicts reduce human capacity to understand and accommodate diversity of beliefs and hence endanger peace.

### **3.1.3. Observance of Treaties**

Islamic theory provides for a firm basis for international treaty obligations.<sup>27</sup> Fundamental principles related to contracts in Islam are to honour them and to observe them in good faith.<sup>28</sup> Muslims were obliged to honour their treaties even with non-believers to the end of their term (9:4), and 'not to break oaths after making them' (16:93).<sup>29</sup> Again it is

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<sup>24</sup> *Ibid.*, p.201.

<sup>25</sup> *Ibid.*, p.202.

<sup>26</sup> *Ibid.*, p.209.

<sup>27</sup> *Ghunaimi, op cit. n.6, p.212.*

<sup>28</sup> *Weeramantry, op cit. n.12, p.140.*

<sup>29</sup> *Ibid.*, p.141.

stressed that, 'It is righteousness. to fulfil the contracts ye have made' 2:177<sup>30</sup>

God is considered to be a third party in every treaty a Muslim concludes. Therefor the breach of treaty is considered to be renouncement of obligation towards Allah.<sup>31</sup> *Pacta Sunt Servanda* is the underlying doctrine of Islamic International Law. Utmost good faith is required in the performance of treaty, irrespective of formalities.<sup>32</sup> No dispensation from treaty obligations on religious or other grounds is provided by the Islamic doctrine.<sup>33</sup> Moreover, the concept of ratification of treaties and multilateral agreements is also part of Islamic International Law.<sup>34</sup> Treaties envisage legal and religious obligations. Interestingly the objectives of a treaty may very well be political<sup>35</sup> in nature and not necessarily religious.

The Prophet himself set forth the principle of *Pacta Sunt Servanda* and called on Muslims to perform their treaties in good faith. In 622 the principle of state succession was also upheld by the observance on the part of Muslims of a trade agreement entered into between Mecca and Negus of Abyssinia before the creation of the Islamic state of Mecca<sup>36</sup> The Prophet also concluded a treaty in 622 with the

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<sup>30</sup> *Ibid.*, p.132.

<sup>31</sup> *Ghunaimi, op cit. n.6, p.212.*

<sup>32</sup> *Weeramantry, op cit. n.12, p.141.*

<sup>33</sup> *Weeramantry, op cit. n.12, p.141.*

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

<sup>35</sup> *Majid Khadduri, War and Peace in the Law of Islam, The Johns Hopkins Press, 1955, p. 205.*

<sup>36</sup> *Ibid.*, p.133.

Medinan tribes called, 'Second Pledge of *al-Aqaba*'.<sup>37</sup>

### **Treaty practice Of Muslim States:**

1. Suleiman the Magnificent (Ottoman King) and King Francis I of France, signed a treaty in 1535.
2. Trading agreements between Islamic sultans and European rulers for trading companies.
3. Treaties between Islamic states inter se like the Mogul emperors and non Muslim Indian rulers.
4. Treaty of 804 AD between Harun-al Rashid of Baghdad and the Emperor Nicephorus.<sup>38</sup>

### **Diplomatic Relations:**

Contrary to the theory of perpetual war between Muslim state and non-Islamic world, the doctrine of recognition of states was much practiced by Islamic sovereigns.<sup>39</sup> The Prophet exchanged delegations with the neighbouring states.<sup>40</sup> He sent envoys to the rulers of al Yamama, Bahrayn, Uman, and the Governors of Damascus and Alexandria.<sup>41</sup> The concept of Diplomatic immunity also existed in the Islamic International Law.<sup>42</sup>

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<sup>37</sup> *Ibid.*, p.132.

<sup>38</sup> *Ibid.*, p.141.

<sup>39</sup> *Ibid.*, p.143.

<sup>40</sup> *Ibid.*, p.132.

<sup>41</sup> Afzal Iqbal, *The Prophet's Diplomacy*, Claude Stark & Co., 1975, p.77-8.

<sup>42</sup> Weeramantry, *op cit.* n.12, p.142.



### **Principle of Reciprocity:**

Islamic Law recognizes the principle of reciprocity in respect of other political entities, which is one of the fundamental principles for regulating international relations.<sup>43</sup> Caliph Umar operationalized these principles by issuing directives based on reciprocity, termed *mujazah*, or *mu'amalah bi'l mithl*. E.g. the imposition of customs duty on non-Muslims traders entering the territory of Islam on the basis of reciprocity).<sup>44</sup> However, the rules of Islamic International Law are binding on Muslims even if they run counter to their own interests. It is because these are basically a set of self-imposed rules invested with moral and religious sanctions and are not based on any reciprocity.<sup>45</sup>

Interestingly, the principle of reciprocity in itself is a limiting concept involving elements of justice and equity. It is a check against disproportionality or excess. However, the real scope of reciprocity both in terms of subjects to which its is applicable and the subject areas where it is allowed needs further investigation.

## **PART II**

### **War**

#### **3.2.1. Background of Islamic Law of War**

In pre-Islamic Arabia clannish tendencies among Arabs reigned supreme and war was the ultimate resort for settling disputes. Chief purpose of Islamic International Law therefore was to mitigate if not to banish, egotistical feelings

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<sup>43</sup> Ghazi, *op cit.* n.3, p. 3.

<sup>44</sup> Ghazi, *op cit.* n.3, p.3.

<sup>45</sup> *Ibid.*, p.18.

and preach as a substitute fraternity, peace and security.<sup>46</sup>  
The message of Islam has been:

' O mankind! Lo! We have created you male and female, and have made you nations and tribes that you may know one another. Lo! the noblest of you, in the sight of Allah , is the best in conduct. Lo! Allah is knower, Aware". 49:13<sup>47</sup>

Thus, no priority is accorded to the needs of any one tribe and as such no group has the license to commit aggression upon any other.<sup>48</sup> Peace is therefore the normal condition and wars the exception.<sup>49</sup> However, the subject of 'aggressive' nature of Islam has been one of controversy. It is believed by some writers that the initial objective of Islam was aggressive in order to convert the whole world to Islam. As such, it is stated that the law of war of Islam presented but a temporary phase, until the whole of mankind had been proselytized.<sup>50</sup> There are others who strongly disagree with this assertion and stress that Islam's objective was ever peaceful and that *Jihad* did not mean an aggressive war to conquer the entire world.<sup>51</sup>

### **3.2.2 Non Aggression:**

Aggression under Islamic International Law has been defined as:

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<sup>46</sup> Ghunaimi, *op cit.* n.6, p.4.

<sup>47</sup> Mahmassani, *op cit.* n.7, p.243.

<sup>48</sup> Weeramantry, *op cit.* n.12, p.133.

<sup>49</sup> Mahmassani, *op cit.* n.7, p.250.

<sup>50</sup> Khadduri, *op cit.* n.1, p.5.

<sup>51</sup> Ghunaimi, *op cit.* n.6, p.162-184.

'An action or inaction which directly or indirectly jeopardizes the jurisdictional independence and security of another state by means of ideological conflicts and/or armed invasions.<sup>52</sup>

The scope of aggression is broader in Islamic Law, as it includes besides armed conflict, ideological aggression as well. An aggressive war is one, which is conducted for the purposes of: occupation, colonization, seizure of territories or to reduce a territory to the status of trusteeship.<sup>53</sup> Thus a war for purposes other than these or for the purposes of luxury is considered unlawful.<sup>54</sup> Likewise war for the purposes of personal glory, or power is also not allowed.<sup>55</sup>

### 3.2.3 Defensive Nature of War

Since the permission for waging war is rather limited, it is legalized only when it is for defensive purposes.

"Fight in the way of Allah against those who fight against you, begin not hostilities, Lo Allah loves not aggressors" 2:190, 192<sup>56</sup>

"Sanction is given unto those who fight because they have been wronged.... those who have been driven from their homes unjustly only because they said: 'our Lord is Allah....." 22:39, 40<sup>57</sup>

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<sup>52</sup> *Malekian, op cit. n.2, p.48-9.*

<sup>53</sup> *Ibid., p.49.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Weeramantry, op cit. n.12, p.162.*

<sup>56</sup> *Hassan, op cit. n.16, p.205.*

<sup>57</sup> *Ibid.*

Moreover it must be carried out in accordance with certain regulations in the Islamic Humanitarian Law of armed conflicts and the principles of proportionality.<sup>58</sup> The wars fought by Prophet Mohammed were defensive and not offensive in nature.<sup>59</sup> Much of the confusion about the nature of war under Islamic Law arises due to the narrow interpretation of the term *Jihad*. This term is not synonymous with war. It literally means striving in the way of Allah. *Jihad* can be of different types.<sup>60</sup>

### 3.2.4 Permission for War

War is permitted only in certain situations for:

1. The path of Divine Law or
2. The protection of the rights of man from unjustified acts of aggression.<sup>61</sup>
3. And it should be limited to:
4. defense against an attack
5. routing *fitnah* (persecution inspired by religious prejudices which eliminates the freedom of thought and belief).<sup>62</sup>

The religious persecution justifying war should be on a large scale.<sup>63</sup> It need not be directed against the Muslims alone to warrant use of war. Rather, persecution directed against the cloister, church or the synagogue should also be put down.<sup>64</sup>

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<sup>58</sup> *Malekian, op cit. n.2, p.8.*

<sup>59</sup> *Ghunaimi, op cit. n.6, p.184.*

<sup>60</sup> *Hassan, op cit. n.16, p.202.*

<sup>61</sup> *Malekian, op cit. n.2, p.49.*

<sup>62</sup> *Hassan, op cit. n.16, p. 205.*

<sup>63</sup> *Ibid., p.197.*

<sup>64</sup> *Ibid.*

War is also allowed in case of organized political persecution.<sup>65</sup>

"But fight them until there be no persecution and religion be unto Allah (alone); but if they desist, then let there be no hostility save against the unjust". 2:193<sup>66</sup>

### 3.2.5 Conduct of war

The conduct of war should be within certain limits. Islamic Law lays down certain rules for conducting actual war. Accordingly it forbids certain acts during war such as:

1. Cruel ways of killings
2. Killing of non combatants
3. Killing of prisoners of war
4. Mutilation of human beings as well as beasts
5. Unnecessary destruction of harvests and cutting of trees
6. Adultery and fornication with captive women
7. Killing of envoys even in retaliation
8. Massacre in the vanquished territory
9. The use of poisonous weapons<sup>67</sup>

### 3.2.6 Humane Treatment

Even in case of war, justice is instructed to be followed:

'And let not the hatred of a people (to you) make you swerve to wrong and depart from justice. Be just as that is nearer to piety and fear Allah. Allah is well acquainted with what you do" 5:9<sup>68</sup>

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Weeramantry, op cit. n.12, p.134.*

<sup>68</sup> *Hassan, op cit. n.16, p.197.*

The Prophet said:

"A true warrior is he who fights his passions".<sup>69</sup>

While addressing his troops whom he dispatched against Byzantine, the Prophet said:

"In avenging the injuries inflicted upon us, molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infant at the breasts or those who are ill in bed; abstain from demolishing the dwellings of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit trees; and touch not the palm trees".<sup>70</sup>

His instructions to another expedition against an aggressor tribe were:

"Do not kill the very old not the infants not the minors nor the women folk. Do not cheat. Do not break trust. Do not mutilate and disfigure the bodies of your dead enemies" (*Hadith* Abu Daud and Ahmad).<sup>71</sup>

The Prophet prohibited in all cases the killing of any living creature by burning or drowning.<sup>72</sup>

The first Orthodox Caliph, Abu Bakr, enjoined his commander:

"O Yezid, be sure you do not oppress your own people nor make them uneasy, but consult them in all your affairs, and take care to do that which is right

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<sup>69</sup> *Ibid.*, p.203.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

and just, for those who do otherwise shall not prosper. When you meet your enemies show yourselves like men and not turn your backs and if you gain victory, kill not little children, nor old people, nor women. Destroy no palm trees, nor burn any fields of corn. Cut down no fruit trees, nor do any mischief to cattle, only such as you kill for necessity of subsistence. When you make any covenant or article, stand to it, and be as good as your word. As you go on, you will find some religious persons that live retired in monasteries, who propose to themselves to serve God that way. Let them alone, and neither kill them nor their monasteries".<sup>73</sup>

Muhammad Abduhu (1842-1905) a prominent Muslim scholar of modern times, insisted on the defensive nature of *Jihad*.<sup>74</sup> In his following lecture, Abduhu, points out that the Islamic conquests of later period were for power and not necessarily valid:

"The wars of the Prophet were all for defending the truth and its followers, and protecting Islam. God had obligated war on us neither for the shedding of blood and taking away lives nor for material gains.....The early wars fought by the companions (of Mohammed) were for protecting the call of Islam and saving Muslims from being dominated by aggressors.....The Islamic conquests which occurred later were a result of the nature of power and not all of them valid in Islam".<sup>75</sup>

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<sup>73</sup> Hassan, *op cit.* n.16, p.203-4.

<sup>74</sup> *Ibid.*, p.207.

<sup>75</sup> *Ibid.*

Thus the difference in the theory and practice of Muslim rulers with regard to wars is significant.

### **3.2.7 Discontinuation of War**

Islamic International Law also governs the cessation of hostilities once they have begun. Immediate discontinuation of defensive war is required if the aggressive party has desisted from actual fighting.<sup>76</sup> Muslims should opt for peace as soon as the enemy opts for it (*Quran*, 86:1).<sup>77</sup> As regards those who are neutral, kind and just treatment is to be extended to them:

"Allah does not forbid you respecting those who have not made war against you on account of (your) religion, and have not expelled you from your homes that you show them kindness and deal with them justly; surely Allah loves the just". 60:8<sup>78</sup>

Thus the very concept of war is rather limited. Far from being a perpetual war, permission for war is allowed only in certain conditions for defensive purposes. The actual conduct of war itself is regulated by humane considerations supported by concepts of justice, equity and tolerance. Peace is required to be resorted to as soon as the aggressive party has ceased the aggression. Thus war other than that covered under Islamic International Law of War is unjust. However, the rights of the affected party subjected to aggression and the penalties for the aggressor need to be explored further. More importantly, there is a need to

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<sup>76</sup> *Ibid.*, p.8 quoting Hamidullah, *The Battlefields of the Prophet (Muhammad)*, (England 1953), p.35.

<sup>77</sup> Ghazi, *op cit.* n.3, p.4.

<sup>78</sup> Hassan, *op cit.* n.16, p.197.



Examine the nature of rules in case the subject of aggression and aggressor are both Muslim states, or one or none of them is a Muslim state. This would be particularly interesting in the wake of Iran-Iraq war in the 1980s and Iraq's invasion of Kuwait in August 1990.

### **PART III**

#### **Dispute Settlement**

In addition to encouraging peace and preventing and regulating war, another important component of Islamic Law for maintaining peace, is use of different peaceful methods for resolving disputes. For injustice can be as potent a threat to peace as any other.

Islamic Law stresses and emphasizes that human disputes should be solved by peaceful consultation. Justice is the prerequisite for settling disputes. Therefore, mankind should cooperate and help each other in the cause of justice.<sup>79</sup>

*Quran* urges voluntary methods to be followed by litigants for peacefully settling disputes through mutual consent.<sup>80</sup>

The conflicting parties are obliged to exhaust all possible means for a peaceful settlement including negotiation, arbitration, mediation and conciliation.<sup>81</sup> The Arab method of *solh* is also an important method for peaceful settlement of disputes. It has been used under different names, good offices, mediation, conciliation and sometimes arbitration.<sup>82</sup>

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<sup>79</sup> Hassan, *op cit.* n.16, p.195.

<sup>80</sup> Foda, *op cit.* n.11, p.130.

<sup>81</sup> Malekian, *op cit.* n.2, p.50.

<sup>82</sup> Foda, *op cit.* n.11, p.129.

### 3.3.1 Arbitration

Arbitration (*Tahkim*) was known in early Arabia among the various tribes.<sup>83</sup> It is recognized as one of the important methods of solving political disputes under Islamic Law.<sup>84</sup>

Its validity is confirmed by the *Quran*, *Sunna* and *Ijma*.<sup>85</sup>

"But no, by thy Lord, they will not become (true) believers unless they make thee the arbitrator of their disputes and do not afterwards feel aversion from what you decide, but submit with submission." 4: 65<sup>86</sup>

"O ye who believe! Be ye staunch in justice, witness for Allah, even though it be against yourselves or (your) parents or (your) kindred, whether (the case be of) a rich man or a poor man, for Allah is nearer unto both (than ye are). So follow not passion lest ye lapse (from truth) and if ye lapse or fall away, then Lo, Allah is ever informed of what ye do." 4: 135<sup>87</sup>

Notwithstanding the moral and religious nature of this verse, the emphasis on justice, with impartiality has profound legal implications for international dispute settlement, since impartiality is the basis of justice and justice is the basis of peace.

The above verses encourage not only arbitration but also mediation for peacefully settling disputes with the clear aim

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<sup>83</sup> *Mahmassani, op cit. n.7, p.271.*

<sup>84</sup> *Malekian, op cit. n.2, p.51.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Foda, op cit. n.11, p.1.*

<sup>87</sup> *Hassan, op cit. n.16, p.200.*

of achieving justice.<sup>88</sup> The validity of arbitration is recognized by Islamic Law whether between two Muslims parties, or between Muslims and non-Muslim groups.<sup>89</sup> The Prophet himself resorted to arbitration to resolve the dispute with the Jewish tribe of *Quraiza*.<sup>90</sup>

**Examples** of use of peaceful means for resolving conflicts:

1. Peaceful settlement by Prophet Mohammad of a dispute over fixing the sacred black stone, *Hajr-e-Aswad* at the time of reconstruction of *Ka'ba*.<sup>91</sup>
2. The first treaty of Islam with the people of Medina and the Jews<sup>92</sup>
3. Acceptance by the fourth Caliph, Ali, of arbitration as an effective method of stopping aggressive activities by a conflicting party.<sup>93</sup>

### 3.3.2 Sanction behind peaceful settlement of disputes

"And if two parties of Believers fall to fighting, then make peace between them, and if one party of them doeth wrong to the other, fight ye that which doeth wrong till it return unto the Ordinance of Allah; then if it return, make peace between them justly and act equitably. Lo! Allah loveth the equitable" 49:9<sup>94</sup>

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<sup>88</sup> *Hassan, op cit. n.16, p.200.*

<sup>89</sup> *Mahmassani, op cit. n.7, p.273.*

<sup>90</sup> *Ibid., p.272.*

<sup>91</sup> *Iqbal, op cit. n.40, p.1-3.*

<sup>92</sup> *Ibid., p.10.*

<sup>93</sup> *Malekian, op cit. n.2, p.51.*

<sup>94</sup> *Hassan, op cit. n.16, p.200.*

Although this verse applies to rebels, its international connotation is of capital importance, because it promotes cooperation for the cause of international peace, enjoins mediation and conciliation as a preventive measure and finally imposes the use of sanctions in aid of the oppressed party against the aggressor party. These sanctions are legally compulsory and therefore very efficient as compared with those provided for in modern international charters.<sup>95</sup>

It is interesting to note that while the concept of sanction is mostly religious and voluntary in normal state relations, it is in matters of dispute resolution or breach of peace that compulsory sanction is allowed. Thus, the Islamic concept favours voluntary approach for observance of its rules and resorts to sanctions in case of clear violation followed by a refusal to accept peaceful settlement. This shows that use of force is kept to the minimum in international law by limiting the concept of war and by introducing sanctions as the last means in dispute settlement.

Again we are discussing the concept and not its practical observance. The present discourse on strengthening international dispute settlement mechanism can benefit from this concept. Further it is interesting to note that there is an obligation to mediate and make efforts for dispute resolution between the conflicting parties. This means compulsory dispute settlement. The rationale behind this compulsion is that the peace is a shared concept. It cannot be achieved or maintained in isolation. Thus all those who have a stake in the system can and should initiate efforts for the peaceful settlement of disputes.

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<sup>95</sup> *Mahmassani, op cit. n.7, p.273.*

Although the verse addresses Muslims, the concept can be extended to non-Muslims. This is very close to the concept of an organized and responsive society wherein members are obligated to respect rules of the organ and accept peaceful solutions in case of disputes. The concept of collective sanctions may be more useful in providing better deterrence. Sanctions may not be in the form of armed force alone. These can be in different forms like social, economic blockade etc. or suspension from membership of organization and, or denial of membership benefits.

## CHAPTER FOUR

### Conclusion

Each branch of knowledge offers its own richness of ideas. These ideas are influenced by other branches of law. The process of synthesis and assimilation should continue. What obstructs this process is prejudice and bias. We need to work against the barriers of prejudice and myopic attitudes to be able to benefit from the riches of cross-cultural and cross-civilisational experiences.<sup>96</sup>

Muslim international law through further study in the light of the experience of modern international law can be used to provide a moral basis of rules for controlling international behaviour.<sup>97</sup> The sources of Islamic International Law conform generally to same categories as outlined in Art. 38 of International Court of Justice.<sup>98</sup> Sunna and local practices serve as custom; Quran and Hadith and decisions and instructions of the Caliphs serve as authorities; principles and rules as laid down in treaties with non-Muslims may be described as agreement; and juristic writings may be categorized as reason.<sup>99</sup> This demonstrates

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<sup>96</sup> C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, MacMillan, 1988, p.165.

<sup>97</sup> Farooq Hassan, *The Concept of State and Law in Islam*, University Press of America, 1981, p.201.

<sup>98</sup> Majid Khadduri, *The Islamic Law of Nations*, The Johns Hopkins Press, 1966, p.9, and Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, *Recueil des cours (Hague Academy of International Law)*, 1966, I (Vol.117), Sijthoff, 1967, p.235-6.

<sup>99</sup> Majid Khadduri, *The Islamic Law of Nations*, p.9.

not only the compatibility of Islamic laws to the modern day setting it also warrants further study into this subject to explore its possible uses for peace and humanity. For example, with its monist<sup>100</sup> character, having a concept of Divine sovereignty<sup>101</sup> which rules out absolute sovereignty, Islamic International Law can play an important role in overcoming the problems faced due to the existing concept of state-sovereignty. Thus there is need to tap the conceptual potential of Islamic Law by understanding *Shari'a* through its perennial sources, in the context of today's essential facts.<sup>102</sup>

Notwithstanding the Divine nature of Islamic International Law, its rules have a legal value for the whole world. Foremost is its recognition of peoples, nations and entities like states as subjects of Islamic International Law. Thus it moves away from state-centricism. That does not mean it is against the concept of separate and independent states. The empowerment of individuals, nations and communities as subjects of Islamic International Law, has the capacity of giving them more say in matters affecting them. From self-determination to human rights, the possibilities are immense. This rather encourages a decentralized system where communities can have more say in their own affairs. This bottom up approach meshes well with the ongoing

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<sup>100</sup> Weeramantry, *op cit.* n.1, p.131.

<sup>101</sup> *Ibid.*, p.133.

<sup>102</sup> Mahmood Ahmad Ghazi, ed., *The Shorter Book on Muslim International Law, Kitab Al-Siyar Al-Saghir*, by Muhammad ibn-al-Hasan al-Shaybani, Islamic Research Institute, Islamabad, 1998, p.xiv.

debate of global governance against centralized forms of government structures. In the field of environment this gives the communities greater say in managing their affairs.

However, such empowerment of individuals and communities has far reaching implications which calls for certain arrangements to take care of their role as direct subjects of international law. From enhancing reporting mechanisms to better judicial forums and increasing accountability for violators of international legal norms, a number of issues need to be taken into account.

Likewise, the emphasis on peace through three fronts is significant. Although it does not directly include an important aspect of peace i.e. development, concepts such as understanding, proportionality, equity, and justice can be used as the basis of rules/norms in different fields including environment, human rights and development.

The concept of war has been reduced to a very limited size to be allowed only for defensive purposes. It is interesting to note that the concept of aggression is broadened to include ideological aggression as well. Ideological aggression may not necessarily be religious in nature. Such broadening of the conception of aggression does not mean outlawing disagreement. The emphasis is rather on tolerance and understanding. However, the exact contours of ideological aggression need to be defined in the light of present day realities.

The dispute settlement mechanism favours measures for peaceful settlement. The use of sanctions for enforcing the decision of the arbitrator serves not only to make the process of arbitration more meaningful, it also reduces the likelihood of its violation. In case of actual dispute, others



have an obligation to help the parties to the conflict in resolving their dispute. Any dispute threatening peace may be tackled under this system in a cooperative spirit. Thus, the dispute settlement mechanism under Islamic International Law provides a useful idea for modern international law. The main problem lies in its implementation. This requires more research and investigation.

Jurisprudence in Islam is the whole process of intellectual activity, which ascertains and discovers the terms of Divine will and transforms them into a system of legally enforceable rights and duties.<sup>103</sup> Essential difference between the traditional and modern legal philosophy is that a social practice or institution can find its justification in the traditional view only by 'positive support' of Divine revelation. In the modern view, justification is found by the 'absence of any negative precept of Divine revelation. Thus law may be legitimately founded upon and generated by social needs provided it does not infringe the limits set by the Divine command.<sup>104</sup>

The in-built capacity of Islamic Law to adapt itself to modern times needs to be exploited further. There is no doubt that a new era of Islamic jurisprudence lies ahead, as full of vitality as any of the ages past and as full of determination to make of the Islamic Law an instrument relevant to the solution of the most complex and modern problems.<sup>105</sup>

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<sup>103</sup> Noel. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, The University of Chicago Press, 1969, p.2.

<sup>104</sup> Coulson, *op cit.* n.7, p.107.

<sup>105</sup> Weeramantry. *op cit.* n.1, p.123.

As a separate science, Islamic International Law holds much promise for modern international law. It is not possible to address this vast subject in such a short paper. I hope I have been able to some extent in bringing out the peaceful character of Islamic International Law which can serve as the foundation for achieving peace and understanding in the contemporary world.

Islamic International Law seeks to secure peace through a combination of direct and indirect approaches. Although these rules are yet to be tested in the modern day setting they do have the potential to form the existing international legal system in some ways and in some areas. This possibility in itself justifies further deep study into Islamic Law as well as other possible source of law which can contribute to peace and security.

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