

**An Exploration of the ‘Global’ History of International Law: Some
Perspectives from within the Islamic Legal Traditions**

Ayesha Shahid

Chapter from: International Law and Islam - Historical Explorations (ISBN 978-9004388284), edited by Ignacio de la Rasilla and Ayesha Shahid

Accepted manuscript PDF deposited in Coventry University’s Repository

Publisher: Brill

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

An Exploration of the ‘Global’ History of International Law: Some Perspectives from within the Islamic Legal Traditions

Ayesha Shahid

Abstract:

In recent decades there has been a growing interest in global histories in many parts of the world. Exploring a ‘global history of international law’ is comparatively a recent phenomenon that has attracted the attention of international lawyers and historians. However most scholarly contributions that deal with the history of international law end-up in perpetuating Western Self-centrism and Euro-centrism. International law is often presented in the writings of international law scholars as a product of Western Christian states and applicable only between them. These scholars insist that the origins of modern (Post-Westphalian) international law lie in the state practice of the European nations of the sixteenth and seventeenth century. This approach that considers only old Christian states of Western Europe to be the original international community is exclusionary, since it fails to recognize and engage with other legal systems including the Islamic legal traditions. This chapter through the writings of eminent classic and contemporary Islamic jurists explores the development of *As Siyar* (Islamic international law) within the Islamic legal tradition and attempts to address the existing gaps in the global history of international law project.

Key Words: *As-Siyar*, Islamic Law of Nations, History of International Law, *Dar ul Islam*, Jihad, *Dar ul Harb*

Formatted: Not Highlight

Introduction:

In recent decades there has been a growing interest in global histories in many parts of the world. Exploring a 'global history of international law' is comparatively a recent phenomenon that has drawn the attention of international lawyers and historians.¹ However most scholarly contributions that deal with the history of international law end-up in perpetuating Western Self-centrism and Euro-centrism. International law is often presented in the writings of international law scholars as a product of Western Christian states and applicable only between them. These scholars insist that the origins of modern international law were conceived in the state practice of the European nations of the sixteenth and seventeenth century.² This approach that considers only old Christian states of Western Europe to be the original international

¹ A. Kemmerer, 'Towards a Global History Of International Law? A Review Symposium of Bardo Fassbender and Anne Peters, (eds) *The Handbook of the History of International Law*, ' *European Journal of International Law* 25 (2014) :1

² It was in the late 19th century when Ernest Nys, the Belgian international lawyer and student of Francois Laurent affirmed the European origins of international law in his publication *origins du droit international*. Later Oppenheim in his classical work on International law claimed that it was the *old Christian states of Western Europe that constituted the original international community within which international law grew up gradually through custom and treaty*'. Similarly Western lawyers like Carl Schmitt and JHW Verzijl not only defended the Western origins of international law but also considered that there has not been any substantive contribution by the non-Western legal traditions to the development of modern international law. For further details see L. Oppenheim *The Science of International Law: Its Task and Method*, *American Journal of International Law*, vol. ii, pp. 313–56 (1908) L. Oppenheim, *International Law: volume I, Peace* (1905; second edition, 1912), volume II, *War and Neutrality*, (1906; second edition, 1912) ; C Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. G.L. Ulmen, trans. (Telos Press, 2003). Original publication: 1950. J. H. W. Verzijl *International Law in Historical Perspective*, Volume 5 (Martinus Nijhoff Publishers, (1973) However it is interesting to note that the founders of modern international law for instance Hugo Grotius did not perpetuate Western Self- Centrism or Euro-centrism in his writings. Similarly Francois Laurent in his *Histoire de droit des gens et des relations internationales* discussed international relations of Greek city- states, Romans and Old Christianity. In his writings he referred to *jus fetiale* and *jus gentium* in Roman law. Another prominent name is of Spanish scholar and founder of the School of Salamanca Francisco de Vitoria, whose scholarly writings provided a narrative of the theory of just war and international law. Other scholars and historians such as Saxon Samuel Pufendorf, and Johann Jacob Schmauss to name a few along with other natural law scholars traced the origins of international law in Christian tradition and Greek and Roman civilizations but did not emphasise the 'western' context. For details see H. Grotius, *De Jure Belli ac Pacis, libri tres* (1625). F Laurent, *Historie du droit des gens et des relations internationales* 1851.; *Tome Premier: L'Orient* 1 (Paris: Durad.; Francisco de Vitoria: *Political Writings*, translated by Jeremy Lawrance, ed. Jeremy Lawrance and Anthony Pagden, Cambridge University Press, 1991; Pufendorf *De jure naturae et gentium, libri octo* (trans as *On the Law of Nature and Nations, in eight books*) (W Oldfather trans) (Oxford Clarendon Press 1934); JJ Schmauss *Einleitung zu der Staats-Wissenschaft I: Die Historie der Balance von Europa, der Barriere der Niederlande* (Göttingen 1751).

community is exclusionary, since it fails to recognize and engage with other legal systems including the Islamic legal traditions.

Islamic international law is best portrayed as a 'regionalized' system, and worst portrayed as one of the 'others' of international law.³ The exclusion of other civilizations and traditions amounts, in Syatauw's words, to a 'colossal distortion' of history.⁴ This distortion of history has been challenged from time to time since the beginning of the Decolonization period particularly since the 1960s. International lawyers belonging to the Third World started re-exploring a 'universal' history of international law beyond the West. RP Anand, while accepting international law as a universal phenomenon, rejected the Euro-centric perspective.⁵ He argued that rules of interstate conduct could be traced back to some of the most ancient civilizations like China, India, Egypt and Assyria.⁶ He was of the view that the European inter-state system was itself a regional order that interacted and coexisted with other regional orders before the Western colonization of the world.⁷ While Anand's scholarly contributions focused on the influence of Asian Maritime and trade law, other Third World international lawyers like Alexandrowich, Elias, and Mesah-Brown explored the history of International law in the African context.⁸ Chako, Singh and Rajvera focused on the history of international law in Ancient India whereas Wang focused on international law and Chinese civilization.⁹

Since 1990's the Third World Approaches to International Law (TWAIL) scholarship has expanded as a "decentralized and critical scholarly network" around the world.¹⁰ TWAIL scholars have generated a vibrant ongoing debate around questions of colonial history, power, identity, and difference and what these mean for international law.¹¹ Influenced by the Critical

³ A. Martineau, 'Overcoming Euro-Centrism? Global History in the Oxford Handbook of the History of International Law', (2014) 25 EJIL 1, at 334

⁴ J.J.G. Syatauw, "Some Newly Established Asian States and the Development of International Law" (1961), 29-30

⁵ R.P. Anand "On the Influence of History on the Literature on International Law", in Rst Mc Donald and D.M. Johnston *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory* (The Hague : Martinus Nijhoff , 1983) 342

⁶ Ibid

⁷ Ibid

⁸ For further details see C.H. Alexandrowich, 'An Introduction to the Law of Nations in the East Indies(16th, 17th and the 18th Centuries)' (1962); T.O.Elias, *Africa and the Development of International Law*, Leiden, A.W. Sijthoff; Dobbs Ferry, N.Y., (Oceana Publications1972); A.K.Mesah-Brown' Notes on International Law and Pre-colonial History of Modern Ghana' in K Mesha-Brown(ed) (African International Legal History(UN Institute for Trainig and Research Newyork 1975)p109.

⁹ C.J.Chako, 'Indian's Contribution to the Field of International Law Concepts'(1958)93 Recueil des Cours del'Academie de Droit International de La Haye117-222;N. Singh 'India and International Law(Chand Dehli 1973); R. Ranjvera 'The Malagacy Monarchy and International Law' in African International Legal History. p 127 T.Wang' China and International Law, a Historical Perspective' in TMC Asser Instituut(ed) International Law and the Grotian Heritage(TMC Asser Instituut The Hague 1985) p260

¹⁰ For further details on TWAIL see, M. Mutua, 'What is TWAIL?' *Proceedings of the Annual Meeting -American Society of International Law*, 2000-94. Also D. Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World and the Future Direction of International Law', *Chinese Journal of International Law* 2003-1, pp. 29-76. James Thuo Gathii (2011) "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography *Trade Law and Development*, Vol. 3, No. 1, p. 26.

¹¹ ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW, 2005 ; James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007), B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV 3 (2006). Obiora Chinedu Okafor,

Legal Studies (CLS) and post-modernism approaches, TWAIL scholars with common commitments and concerns have attempted to establish a link between international law and colonialism. By doing so TWAIL scholarship has also brought the colonial encounter between Europeans and non-Europeans to the centre of historical re-examination of international law. TWAIL Scholars by doing so have pushed the agenda of the Third World in International law beyond examining the Third Worlds' participation in the making of international law and international institutions.

It is in this background that this chapter seeks to explore whether modern international law is a mere product of a monolithic source of law or does its origins lie in some of the most ancient religions and legal traditions including the Islamic legal tradition? whether modern international law been influenced by the plurality of norms operating in different regions and territories? whether the principles of *As-Siyar* or Islamic international law resonate in modern international law? What are the characteristics and parameters of Islamic international law? How has it been defined by classical and contemporary Islamic scholars using different perspectives? And finally whether Islamic international law has been adopted in the state practice of present day Muslim states?

This chapter attempts to capture a brief and schematic history of *As-Siyar* to show that within the Islamic legal tradition a distinctive system of Islamic international law developed as an integral part of the Islamic legal tradition which regulated the relations between the Muslim and non-Muslim states for centuries. The concept of *dar-al-harb* (abode of war) *dar-al-Islam* (abode of Islam), *dar ul Ahd* and *jihad* are also examined to see whether *Siyar* in general or certain elements of *As-Siyar* have any relevance in the present day context. The chapter further attempts to search for the 'contextual equivalents and indicative parallels'¹², in Islamic international law to find out whether there had been any influence of the Islamic legal traditions on modern international law? Engaging with Islamic international law will thus give legitimacy and validation to the 'global history of international law' project. Finally the chapter proposes an inclusive and accommodative methodological approach to contribute to a better appreciation of the global history of international law.

1. Evolution and Development of *As-Siyar* in the Islamic Legal Tradition

This section examines the meaning, scope, and definitions of the term *As-Siyar* as given by classical and contemporary Islamic scholars in order to understand how *As-Siyar* gradually

Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective, 43 OSGOODE HALL L.J. 171, 176 (2005) ANGHIE, A.; CHIMNI, B.S. *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003). ANGHIE, A.; CHIMNI, B.S.; MICKELSON, K.; OKAFUR, O EDS. *THE THIRD WORLD AND INTERNATIONAL LEGAL ORDER: LAW, POLITICS AND GLOBALIZATION* (Brill Publishers 2003).

¹² The two terms have been used by Prof Shaheen Sardar Ali in her monograph *Modern Challenges to Islamic Law*, Cambridge University Press, 2016.

developed as a distinctive international legal system within the Islamic legal tradition that laid down the foundations of the rules regulating the relations between the Muslims with non-Muslims during war and peace. *As-Siyar* is the plural of the noun *sira*, which means literally a 'path, way of life, conduct, practice, attitude, or behaviour'. *Sira* has been used in the chronicles in a singular form in the sense of life or biography, i.e., the conduct of an individual. In its plural form it has been used by jurists to denote the conduct of a state in its relations with other communities.¹³ According to Zimahshari (d.1144), *Sira* is from *As-Siyar* ... (*sara fulanan siratan hasanatan*) which means someone behaved well. Following this, it was extended and modified to mean conduct and practice.¹⁴ *As-Siyar al-awwaleen* and *Shari'ah As-Siyar* are the two other terms where *As-Siyar* has been used in relation to the conduct of the people of the past and the issues relating to the laws of war.¹⁵

The earlier use of the term *As-Siyar* shows that it was often used to denote the conduct of the Prophet Muhammad. It was also sometimes used interchangeably for *Al-Maghazi* (military campaigns of the Prophet) for instance Ibn Hisham (d. 833) used the term in his *al-Sira al-Nabawiyya* a biography of Prophet Muhammad's life, which also included accounts of the battles that took place during the life time of the Prophet.¹⁶ Another prominent work is of Muhammad Ibn Ishaq (d.768), whose *Sira* of the Prophet is the culmination of the historical trends that existed in his era. These scholars studied the military expeditions and campaigns carried out by the Prophet and his companions to find out the legal norms underlying those military operations.

The term *Sira* was also used in the context of the biographies of scholars and caliphs for instance Ahmad ibn Yusuf al-Misri (d. 951) became the first writer to employ it for the biography of another individual in his work, entitled *Sirat Ibn Tulun*. Similarly *Sirat* was used by Ibn al-Jawzi's (d. 1201) in his treatise *Sirat 'Umar ibn al-Khattab* and *Sirat 'Umar ibn 'Abd al-'Aziz*, and al-Razi's (d. 1261) also used in his treatise, *Sirat al Shafi'i*, and *Manaqib al-Shafi'i*.¹⁷ 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 *As-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.

As-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, *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) *Iikhtilaf*, *Takhayyur*, *Talfiq*, *Maslaha*, *Darura*, *Istishab Istihsan*,

¹³ L. Bsoul, 'Historical Evolution of Islamic Law of Nations/*As-Siyar*: Between Memory and Desire', (2008) 17

DMES 48, at 50

¹⁴ A. J. Zamakhshari, *Al-Kashf 'ul Haqaiq al-Tanzeel*, Dar al-M'arifah, vol. 2, at 431

¹⁵ A. F. N. Muttrazi, '*Al-Mugrib fi Tartib al-Mu'rib*', in M. Fakhori, M. U. I. Zayd, A. Halab, (eds.), Vol. 1, at 227

¹⁶ L. Bsoul, *supra* note 7 p51

¹⁷ L. Bsoul, *supra* note 7, at 52

Saddal-Dhara to develop the corpus of Islamic international law.¹⁸ Much of the development of *As-Siyar* is dependent on these secondary sources and juristic techniques. Bassiouni argues that when analyzed in terms of modern international law, the sources of the *As-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.¹⁹ The *Qu'ran* 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.²⁰

The development of *As-Siyar* as a separate branch of Islamic law is attributed to a number of Muslim scholars from the 5th century onwards. Imam Al-Sha'bi (d. 723) is considered to be the first scholar to contribute to *As-Siyar*. Al-Sha'bi was a leading authority from Kufa and his contribution to *As-Siyar* is in the form of his in-depth knowledge about the Prophet Mohammad's military campaigns.²¹ However Al-Sha'bi's contribution was limited to the narratives of the campaigns led by the Prophet and he did not contribute towards developing the rules of *As-Siyar*.

Imam Abu Hanifa al-Nu'man ibn Thabit is regarded as the founder of *As-Siyar*. Imam Abu Hanifa used the term *As-Siyar* for the set of rules governing relations between a Muslim state and non-Muslim states during war and peace. He introduced the notion of territoriality in the relationships between Muslims and non-Muslims. Muslims and non-Muslims were viewed as juridical personalities both as individuals and territorial groups.²² He developed the rules of *As-Siyar* by using individual reasoning and *qiyas* (analogical deduction) rather than the narratives of the Prophet and his companions.²³ It was in fact through the works of Imam Abu Hanifa's disciples that the term *As-Siyar* became so widely used in later centuries to represent this area of the law. Abu Amr Abd al-Rahman ibn Amr ibn Yuhmad al-Awza'i (d.163) the third century Syrian scholar criticized Imam Abu Hanifa's opinions on many issues and produced a work on *As-Siyar* in response to the opinions expressed by Abu Hanifa. Later, Abu Hanifa's disciple, Abu Yusuf(d.182), wrote a refutation of al-Awza'i's opinions in a treatise known as *al-Radd 'ala As-Siyar al-Awza'i*. Later, a second Hanafi jurist, Muhammad ibn Hasan ibn Farqad al-Shaybani also responded to al-Awza'i's formulation of *As-Siyar* in a work entitled *al-As-Siyar al-Kabir*.

¹⁸ For detailed discussion on sources see A. Rahim, *Muhammadan Jurisprudence* (Mansoor Book House, Lahore 1995)44-145, N. J.

N.J.Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh 1994) 80-81as cited in S. S.Ali, 'Resurrecting *Siyar* through *Fatwas*? (Re) Constructing 'Islamic International Law' in a Post-(Iraq) Invasion World' (2009) *Journal of Conflict & Security Law*.

¹⁹ C. Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* Cambridge University Press, New York 2013)p15

²⁰ Ibid., p 15

²¹ Abdullah Ibn 'Umar had heard Al-Sha'bi talking about these campaigns and was so impressed by his knowledge and description of campaigns that he remarked 'it seems as if Al-Shabi'i has participated with us in those campaigns.'

²² L. Bsoul, *supra* note 7, at 58

²³ Ibid., at 58

Furthermore, Imam Shafi'i, in his large legal work, *al-Umm*, discusses Al- Awza'i's opinion on the subject with reference to the *Radd* of Abu Yusuf.

Malik ibn Anas, founder of the Maliki School of thought in his treatise *Al-Mudawwana al-Kubra* devoted a chapter entitled *Kitab-ul-Jihad* in which he laid down rules that prohibited the killing of women, children, elderly men and monks and hermits in their cells. He also instructed that the property of monks and hermits should not be touched as that is their only means of sustenance. As compared to *Al-Mudawwana* Imam Malik in his other book *Al- Muwatta* provides more detailed rules on granting immunity to non-combatants.

Abu Ishaq Ibrahim ibn Muhammad ibn al-Harith al-Fazari, an expert on hadith literature from Kufa, wrote a treatise on *As-Siyar*, in which he dealt with the subjects of *maghazi*, *As-Siyar*, *jihād* and other rulings.²⁴ In addition, he analyzed the nature of the relationship between Muslims and non-Muslims, including *ahl al-dhimma* (inhabitants of territory protected by a treaty of surrender) and *muharibīn* (non-Muslims dwelling in *dār al-harb*).

Abu –al- Hasan Ali -Ibn-Muhammad Al-Mawardi (d.1058) a Shafi jurist renowned for his legal scholarship wrote several *belles lettres' works*.²⁵ His *al Hawai-al-Kabir* is the most important treatise on the topic of jihad from that time. It provides an analysis of the classical theories of military *jihad* and the necessity of undertaking it in specific circumstances.²⁶ Using *Qur'anic* verses he argues that *jihad* was not mandatory until the time of Battle of Badr but subsequent *Qur'anic* verses established its mandatory nature.²⁷ Muwardi considers *jihad* to be a collective duty as its purpose is to protect Islamic realms from the incursions of the enemy and to thereby ensure the safety of the lives and property of Muslims. However, in his view *jihad* becomes an individual duty of all those capable of participating in combats if the enemy attacks Muslim territory.²⁸

The medieval scholars such as Sarakhsi (d.1090), Najumuddin ibn Hafis al-Nasafi (d.1132) and Kasani (d.1191) in their writings laid down rules to regulate several kinds of relations between Muslims and non-Muslims including: *murtaddūn* (apostates), *musta'mins* (enemy aliens who have been given *aman*, (the promise of security and safe conduct, given to an enemy by Muslims) and *ahl al-dhimma* (non-Muslims subjects of the Islamic state).²⁹ These scholars transformed the concept of *As-Siyar* from narrative to adopt normative character, especially with regard to rules concerning the resort to war (*jus ad bellum*), treaties, and the conduct of war (*jus in bello*).³⁰

²⁴ A. I. al-Fazari, 'Kitab Al-Siyar', F. Hamada (ed.), (1408/1987), 62 at 78.

²⁵ Al-Mawardi, *al-Hawi al-kabir fi fiqh maddhab al-imam al-shafi'i radi allahu 'anhu wa-huwa sharh mukhtasar al-muzani*, (1994) vol.14 ed. 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud: Daral-kutub al-'arabiyya, 102.

²⁶ See al-Mawardi *supra* note 13, at 120

²⁷ (9: 73);(22:78);(22:183) ;(2:216);(9:36) and(9:5).

²⁸ See Al-Mawardi, *supra* note 13, at 120

²⁹ A. Sarakhsi, *Kitab al-Mabsut*. 10 at 2. H. A. Nasafi, *Tilbat al-Talaba fi al-Isitlahāt al-Fiqhiyya*, (ed.), K. A. Mays, (1985) at 165. Kasani, *Badā'i' al-Sanā'i'i*. 9 at 429

³⁰ K. Bennoune, 'As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence', (1994) 15 MJIL 4, at 30

The most prolific jurist who contributed towards the development of *As-Siyar* is Mohammad Al-Shaybani(d.750) often described as the Hugo Grotius of the Muslims.³¹ Al-Shaybani at a young age had the privilege of studying Islamic jurisprudence under the guidance of Imam Abu Hanifa. After the death of the Imam Abu Hanifa Shaybani came under the tutelage of Imam Abu Yusuf. Shaybani also had the privilege to receive guidance from other distinguished scholars as Sufyan ath Thawari ibn Sayed and Abu Amr Al Abd al Rehman ibn-Amr al-Awazi. Al-Shaybani wrote many books covering different aspects of Islamic jurisprudence and Islamic Law of Peoples.³² His two exclusive books are *Kitab-Al As-Siyar Al-Saghir* (The Shorter Book on the Law of Peoples? and *Kitab Al As-Siyar Al Kabir* (The Longer Book on the Law of Peoples). *Kitab Al Kabir* is considered to be his *magnum opus*. Khadduri describes him as the most eminent Muslim jurist who wrote on Islam's legal relationship with other nations and may well be called the father of the science of Islamic law of nations.³³ Judge Weeramantry considers that Hugo Grotius writings on *jus gentium* may have been influenced by the works of Al -Shaybani on the subject.³⁴ Al-Shaybani was the first to contribute towards the systematization of the Law of Peoples from an Islamic perspective. In exploring the 'global history of International law' project one cannot simply ignore or brush aside the colossal contribution of scholars like Al-Shaybani. who preceded Hugo Grotius some eight centuries ago.³⁵

Al-Shaybani provided an in-depth analysis of the lawfulness of settlements of disputes over usurped property, blood-money payment, and ownership of dwellings and slaves.³⁶ In Al-Shaybani's writings one also find references to questions related with day to day administrative matters in war such as distribution of war booty, treatment of women and children etc. ³⁷ He emphasized that when women and children are captured in war a certain code of conduct needs to be followed for instance transport for women and children is considered an obligation, so much so that if a means of transport is not immediately at hand, and the captives are unable to walk, the commander must hire transport for them. Moreover, he also considered how territoriality affect familial relations and argued that the marital status of captives could be altered, depending on whether and when a husband and wife are brought into Islamic territory. Granting *aman* (safe conduct or pledge of security) to non-Muslims upon entering into Muslim territory for a fixed period of time for the purposes of safe entry and residing or carrying out trade, is an area that has been dealt with in detail by al-Shaybani in *As-Siyar Al- Kabir*. *Aman* was considered as a sacred promise in which the foreigner receiving it came under the full protection of the receiving state during its term and within its jurisdiction. It could be given both in times of war and peace. In times of war if a Muslim gave *aman* to a person, then his life would be saved and security had to be provided even if that person was fighting. Similarly, in

³¹ Joseph Freiherr von hammer-Purgstall, a 18th/19th century Austrian diplomat and pioneer orientalist was the first to compared Al Shaybani to Hugo Grotius.

³² For instance one of his earliest works on Islamic jurisprudence was *Kitab-ul- Asl* also known as *Kitab al Mabsut*. It was a compilation of a dialogue between Imam Abu Yusuf and Al Shaybani commenting upon the legal doctrines and opinions of Imam Abu Hanifa.

³³ M. Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*. p18

³⁴ See Weeramantry, *supra* note 29 ,at132

³⁵ M. Baderin, 'Muhammad Al -Shaybani (749/50-805)', in B. Fasbender and A. Peters (eds.), *The Handbook of the History of International Law* (2014) at 1082

³⁶ M. Ibn Al-Hasan Al-Shaybani, *Kitab al-Siyar Al-Kabir* (1997), 250

³⁷ Ibid ., at 252-53

times of peace the objective of giving *aman* was to facilitate international trade, travel and interaction between nations through envoys.³⁸

The use of a range of sources, methodologies and perspectives, through which *As-Siyar* has evolved over the centuries, represent an extensive legal plurality. *As-Siyar* is based on not just divine sources i.e. the *Qur'an* 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 *As-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. *As-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 *Qur'an* and *Sunnah* for developing the corpus of *As-Siyar*.

In this sense *As-Siyar* predates its western counter part by several centuries. *As-Siyar* was developed much earlier than the classical Law of Peoples. The origins of *As-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, from the Salamanca School in the early 16th century onwards. As in the words of the Judge Bedjouï of the International Court of Justice

“... it be borne in mind that it arose at the beginning of the 7th century. In various astonishing ways it nevertheless resonates strongly to our own era. This reminder of the remote origin in time of a legal system enables one to measure the extent of what Islam introduced into a dimming mediaeval West. It will also enable us to realize the still vital relevance of this corpus juris laid down..., one thousand years before Grotius, Gentilis, Ayala or Pierre Bayle.”

One can thus argue that there has been a lack of engagement by the western scholars with the history of Islamic international law. Due to Euro-centric approach they have failed to fully recognize the nurturing role of cross-cultural interactions and to engage sufficiently with the history of other legal traditions including the Islamic legal tradition. However *one* possible reason for this lack of engagement by the western scholars with the *As-Siyar* could be that it was only in 1960's when the first English translation of Al Shaybani's work appeared in the writing of Prof Majid Khadduri's *The Islamic Law of Nations: Shaybani's Siyar*. Unfortunately Khadduri's translation has not done full justice to the seminal contribution made to the development of Islamic international law by

³⁸ For further details see K.R. Bashir, 'Treatment of Foreigners in the Classical Islamic state with special focus on Diplomatic Envoys: Al-Shaybani and Aman' in M. Frick and A. Muller *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (2013) 149.

Shaybani. Khadduri focused on only one chapter of *Kitab ul Asl* and not on Shaybani's *Kitab al Siyar As Saghir* and *Kitab Al Siyar Al Kabir* and claimed that the two treatises on *Siyar* have been lost.³⁹ As compared to Khadduri's translation a comparatively recent translation of Shaybani's *Kitab al Siyar al Saghir* by Mahmood Ahmad Ghazi entitled *The Shorter Book of Muslim International Law* provides an in-depth coverage of Shaybani's colossal contribution to the development of principles of war and peace including the treatment of non-Muslims, distribution of war booty, dealing with rebel forces, truce, diplomatic relations, and peaceful settlements.⁴⁰

As- Siyar in the Eyes of Early 20th Century and 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.⁴¹ 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.⁴² 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'.⁴³

Khadduri was of the view that "*As-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".⁴⁴ 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".⁴⁵

Hamidullah 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 Muslim Law (*Shar'iah*).⁴⁶ 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

³⁹ For a comparative analysis of the two translations see in this edited collection a chapter by Jean Ellain Khadduri as Gatekeeper of the Islamic Law of Nations

⁴¹ Shaheen ,S.Ali (2016) Modern Challenges to Islamic Law, Cambridge University Press.

⁴² Since the second half of the 20th century the other two terms used interchangeably with the term "Islamic Law of Nations" are "Muslim Law of Nations" and "Islamic International Law".

⁴³ M. al-Ghunaymi, al-Ahkām al-'Āmma fī Qanūn al-Umam, 37

⁴⁴ M. Khadduri, The Islamic Law of Nations: Shaybani's *As-Siyar* (1966), 66

⁴⁵ M. Hamidullah *The Muslim Conduct of State*, The Other Press 1961. Some excerpts from the book are also available online at <http://muslimcanada.org/conductofstate.html>

⁴⁶ Ibid.,

the sovereign will of the Muslim state itself, which will is subject to the Divine law of the Qur'an".⁴⁷ Hamidullah argues that, as the Quran and Sunnah provide only guiding principles, it was the Muslim jurists who after the death of the Prophet, 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."⁴⁸

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."⁴⁹ 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 *As-Siyar*.

However, contemporary scholars such as Bouzenica and An-Naim do not accept equating *As-Siyar* with the term "Islamic Law of Nations", "Muslim international law" or "Islamic international law". Bouzenica considers that as *As-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.⁵⁰ An-Naim argues that considering *As-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."⁵¹ 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.⁵² 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.⁵³ Instead, An-Naim calls for taking into account the political and social context which is pertinent in relation to the *Qur'anic* verses relating to *jihad* (holy war) and killing of infidels. These are often misinterpreted without considering the context in which those verses were revealed.

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 *As-Siyar* with international law while accepting differences in terminology and divergent theoretical understandings of the two systems.

⁴⁷ Ibid.,

⁴⁸ Ibid.,

⁴⁹ Ibid.,

⁵⁰ A. Bouzenita, 'The Siyar – An Islamic Law of Nations?', (2007) 35 *AJSS* 19, at 44

⁵¹ Workshop on Islamic Law: Islamic Law and International Law, Joint AALS, American Society of Comparative Law and Law and Society Association, 2004 (Annual Meeting) www.aals.org/am2004/islamiclaw/international.htm 2-6

⁵² Ibid., at 17-18

⁵³ Ibid., at 17-18.

⁵⁴ A number of common principles can be found in the substantive content of the *As-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 *As-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. *As-Siyar* also set out rules for protecting individuals seeking asylum in Muslim jurisdictions. Likewise, *As-Siyar* recognised and extended 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 recognized 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 humanitarianization with which the Islamic law of war was imbued.”⁵⁵

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 United Nations 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 *As-Siyar*.

Muslim states membership of the United Nations Organization and acceptance of the United Nations 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”.

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 recognizes the influence of Islamic legal principles on international law. As such international law cannot be claimed as purely a western concept, rather rules of international law have been in existence much earlier than the birth of modern international law.

⁵⁴ S. S. Ali, ‘Resurrecting *Siyar* through *Fatwas*? (Re) Constructing ‘Islamic International Law’ in a Post-(Iraq) Invasion World’ (2009) *Journal of Conflict & Security Law*

⁵⁵ H. Kruse, ‘The Foundations of Islamic International Jurisprudence’, (1955) 3 *JPHS* 1, at 31

In the next section the distinction between the juridical concepts of *dar-al-harb* (abode of war), *dar-al-Islam* (abode of Islam) and *darul Ahd* is analysed in order to understand their relevance in the present day context.

2. Categorization of *Dar ul harb*, *Dar ul Islam* and *Dar ul Ahd* in *As-Siyar*

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* (abode of the *Ummah*, the Muslim community or territory of Islam) and *dar-al-harb* (abode of the unbelievers or enemy territory).⁵⁶ This division was the creation of the scholars of legal schools of thought who gave varying interpretations to the *Qur'anic* 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 *darul 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 Yusuf and al-Sarakshi have restricted the period of truce to 10 years duration on the basis of the treaty of Hdaybiya which was entered by the Prophet Muhammad.

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 *jizya* (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 recognize 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.⁵⁷

⁵⁶ *Dar ul Islam* was the abode of Muslims whether by birth or by conversion, and the people of the tolerated religions (Jews, Christians and Zoroastrians) who preferred to remain non-Muslims by paying a poll tax to the state. The *dar al-harb* was the abode of Non-Muslims or *Harbis* i.e. people of the territory of war. A harbi did not have any rights or duties under Islamic law, a concept similar to Roman law's doctrine that the *ius civile* applied only to Roman citizens. *The Encyclopaedia of Islam*. New Edition. Brill, Leiden. Vol. 2, at 128 Also see M. Khadduri *Islam and the Modern Law of Nations: The American Journal of International Law*, Vol. 50, No. 2 (Apr., 1956), 359

⁵⁷ <http://www.oxfordislamicstudies.com/article/opr/t125/e496>

The ancient state of permanent warfare has long been challenged. Badr, for instance, argues that this tripartite notion of the world i.e. the *dar-al-Islam*, *dar-al-harb* and *dar-al-sulh* represents the three stages of Islam in historical perspective i.e. stage of expansion, stage of interaction, and stage of coexistence.⁵⁸

During the stage of expansion *jihad* was the rationale for waging war against non-Muslims.⁵⁹ In this expansionist phase the lines between violence and pure and simple *jihad* were blurred. Opposing interpretations of the religious text by Islamic scholars as well as the political aspirations and practice of the Muslim rulers to rule the world impacted on the meaning, scope and application of *jihad* and Muslim perspectives on international law.⁶⁰ The age of expansion lasted over a century, however after the age of expansion it became evident that the objective of carrying Islam to the four corners of the world was unattainable.

The 'age of interaction' saw the main change in legal thought in the rationale for waging war against non-Muslims. During this age of interaction the dichotomy of *dar-al-Islam*/*dar-al-harb* was replaced by a tripartite division of the world into *dar-al-Islam*, *dar-al-harb* and *dar-al-sulh*, i.e. the 'abode or territory of peace'.⁶¹ Ali and Rehman argue that "the realities of interaction with non-Muslim powers imposed new juridical formulations, although some jurists carried over to the age of interaction the norms and thinking of the previous age".⁶²

The third stage in Islamic international law also known as the age of co-existence coincides roughly with the formative stage of international law as we know it today. In the age of coexistence, which continues to this day, peace has come to be more widely recognised as the 'normal' relationship between the Islamic and non-Islamic states, and treaties of amity no longer need to be of fixed duration.

The categorization of the world into *dar-ul-harb* and *dar-ul-Islam* was rendered as obsolete by Islamic scholars of the early 20th century.⁶³ They considered the territorial division by classical scholars a legal and political construct. This group of Muslim jurists held that the *dar-al-harb* category did not have any normative significance, rather it was an empirical category and *jihad* in their view was only authorized against hostile non-Muslims.⁶⁴

⁵⁸ G.M. Badr, 'A Survey of Islamic International Law', (1982) 76 *Proceedings of the American Society of International Law* 56.

⁵⁹ *Ibid.*, at 58

⁶⁰ *Ibid.*, at 58

⁶¹ *Ibid.*, at 57

⁶² S.S. Ali and J. Rehman, 'The Concept of Jihad in Islamic International Law' *Journal of Conflict & Security Law* (2005), Vol. 10 No. 3, 321–343

⁶³ Jurists such as Mahmud Shaltut, served as the rector of the Azhar Mosque University in Egypt in the middle of the 20th century and authored two treatises on the Islamic law of warfare, *Muhammad's Mission and Warfare in Islam* (1933) and *The Quran and Warfare* (1948); Muhammad Abu Zahra, a traditionally-trained, but reform-minded scholar of Islamic law and professor of law at Cairo University Faculty of Law active in the inter-war period and immediately after World War II and author of *International Relations in Islam* (1964); and Wahba al-Zuhayli, a prominent contemporary Syrian jurist of Islamic law and member of the influential Islamic law committee of the Organization of the Islamic Conference and author of *International Relations in Islam: a Comparison with Modern International Law* (1981).

⁶⁴ Mohammad Fadel "International Law, Regional Developments: Islam", in: R. Wolfrum (ed.),

Such ancient division has completely lost its relevance in the present day context as Muslim states are now part of the international community as members of the United Nations. The recognition of the right to self-determination, acceptance of the principle of state sovereignty that purported to guarantee the independence of all states, and protection of human rights under the UN declarations and treaties has radically changed the political environment in which Muslims found themselves today.

This change in the international environment means that international relations have changed from one in which war and conquest was the default rule to one in which peace and friendship is the default rule. Al-Zuhayli, an eminent Syrian jurist and member of the Islamic law committee of the Organization of the Islamic Conference argues that any State that committed itself to providing Muslims freedom of religion and permitted Islam to be taught freely could not be considered part of *dar al-harb* (Al-Zuhayli 17–18, 21, 26–27).⁶⁵ Therefore, the old tripartite division is only of academic interest today as the Muslim states have accepted the rules of both public and private international law.

Against this background, it should be noted, however, that, whereas on the one hand, a majority of contemporary Muslim jurists, consider *dar-ul-harb* to be obsolete, on the other hand, many of them reaffirm the continuing vitality of the *dar al-islam* as a collective defence mechanism.⁶⁶ This is clearly reflected in Al Zuhayli's writings who is of the view that Muslims:

“are obliged to defend [the *dar al-islam*] and to liberate such of its parts which have been seized. This obligation is a collective one, but if [liberation] is not achieved, struggle [ie *jihad*] becomes obligatory upon every individual Muslim—[beginning with those] in closest [geographical proximity] to the seized territories, until [the obligation to struggle] encompasses every Muslim. Accordingly, Palestine and like territories which were colonized, form a part of the *dar al-islam*, and it is obligatory to expel the invaders from such territories when there is sufficient strength to do so”.⁶⁷

Al-Zuhayli's analysis differs from classic and medieval scholars in the sense that he refers to *Dar ul Islam* as a well defined and fixed territory and he considers *jihad* to be a self- defense mechanism which becomes obligatory in terms of foreign occupation. In other words he justifies jihad to achieve the right to self-determination as recognized under modern international law.

One can thus argue that although the state of permanent warfare between *dar ul harb* and *darul Islam* has ceased to exist but Zuhayli's interpretation does provide a strong justification for resistance movements in the Muslim world against foreign occupation. This form of interpretation is reflected in the language of Islamist resistance groups in Palestine, Lebanon, and

MPEPIL, 2010, online edition, margin number 58, available at <<http://www.mpepil.com>>.

⁶⁵ W al-Zuhayli *International Relations in Islam: A Comparison with Modern International Law [al-'Alaqa al-duwaliyya fi al-islam: muqarana bi-l-qanun al-dawli al-hadith]* (Mu'assasat al-Risala Beirut 1981). Also see a journal article by the same author W. Al-Zuhayli "Islam and International Law", Int'l Rev. of the Red Cross No. 858 (2005), 269-278.

⁶⁶ Mohamad Fadel (*supra* note 64)

⁶⁷ Al Zuhayli (*supra* note 65) at 105

Indian occupied Kashmir, all of which use the modern nationalist term *muqawama*, meaning ‘resistance’, to describe their activities.⁶⁸

In recent years the terminology of *jihad* as an aggressive war, and division of states into *dar-ul-harb* and *dar-ul-Islam* categories has once again been used by militant and terrorist groups like Al Qaida, Taliban and ISIS.

This highlights the challenge of employing contextual methodologies for evolving an inclusive international law as groups, states, and a variety of constituencies can appropriate the interpretative space and revive the dar-al-Islam/dar-al-harb dichotomy.

The next section will examine the concept of *jihad* and how the term has been misinterpreted in the present day context by terrorist organisations and groups such as *Daesh(ISIS)* and *Al-Qaida*.

3. Concept of Jihad in As Siyar

The concept of jihad in the Islamic legal tradition has become a subject of considerable debate due to misconceptions regarding its meaning, content and scope. The literal meaning of the term *jihad* derived from the root word *juhd* is “to strive for”, “exert” or “struggle”. In the *Qur'an*, the term is regularly linked to the phrase “in the path of God”. *Jihad* in the *Qur'an* includes, but is not limited to, war or armed struggle *per se* but a righteous cause before God. However this meaning has undergone a considerable change with varying emphasis on militarily offensive and defensive *jihad*.

Offensive *jihad* was never supported as a general principle and an aggressive act in the *Qur'an*. The *Qur'an* states:

‘Sanction is given unto those who fight because they have been wronged; and God is indeed able to give them victory; those who have been driven from their homes unjustly only because they said: Our Lord is God. For had it not been for God’s repelling some men by means of others, cloisters and churches oratories and mosques, wherein the name of God is oft mentioned, would assuredly have been pulled down. Verily God helpeth one who helpeth Him. Lo! God is Strong, Almighty’^(39:40).

These verses show that permission for fighting was granted in a particular context when newly converted Muslims were oppressed and unjustly expelled by their enemies from their homes. Secondly, the permission was only given as a defensive measure against the atrocities of the non-Muslim Meccans. It was also restrictive and limited as destruction of churches, synagogues, and mosques was strictly prohibited. In other words, the sanctity of places of worship was upheld. Thirdly, the verse demonstrates that the goal of victory in Islam is to establish freedom of religion, to establish prayer, to give charity and to command the good and forbid evil. This last justification also means that as long as the preaching and practice of Islam are not circumscribed, the Muslims

⁶⁸ Muhammad Fadel(*supra* note 64)

cannot fight a *jihad* against a country in which Muslims freely practice their religion and teach Islam. War and military action was thus allowed only in self-defence and as a non-aggressive principle. A certain criterion was also laid down for what could constitute a *jihad* for instance *jihad* had to be declared by a person in legitimate authority over the community of Muslims, it had to aim for a just cause (to ward off the threat to Islam posed by the enemy), with a right intention (in the pursuit of God's order), and with a sound hope of success (as stated in 2:195).

Early scholars and exegetes considered that this verse articulates the principle of non-aggression and indicates that even though fighting against the enemy is sanctioned under Islamic law, such action has to be within certain bounds. Mujahid b Jabr an early exegete of the *Qur'an* interpreted this verse by saying that this verse means one should not fight until the other side commences fighting. This verse commanded Muslims to fight only if Pagan Makkans had initiated hostilities and to refrain from combat when the Pagan Makkans refrain from fighting. The text also suggests a kind of code of conduct for fighters. In other words, it unambiguously forbade the initiation of military action and any military hostilities could only be launched against actual and not potential combatants.

However, the subsequent *Qur'anic* verse 'Slay them where you find them and expel them from where they expelled you, for persecution is worse than killing' (191) is often used as a justification for offensive *jihad*. Varying interpretations have been given by the early and late commentators of this verse. From 9th century onwards jurists like *Abu Amr Abd al-Rahman ibn Amr Al-Awza'i* (d. 773 C. E.), Al Mawardi and Al Tabari started advocating for "offensive jihad" to the extent that Al Awazi claimed that offensive jihad could be an individual's obligation as well. Al-Mawardi(d.1058) and Al-Tabari(d.839) went on to endorse the principle of offensive *jihad* by invoking the theory of *Naskh* or abrogation.⁶⁹ They were of the view that this verse abrogated the previous verses of the *Qur'an*. This verse according to Al-Mawardi, encode divine permission to fight equally those who fight and those who detest from fighting. Interpreting this verse as a justification of offensive *jihad* resulted in allowing Muslim rulers to launch pre-emptive wars against non-Muslim polities.

Al-Mawardi while applying the theory of *Naskh* did not consider the context in which this verse was revealed. The verse referred to a particular group of Arabs, the Meccan 'idolaters', who were accused of oath breaking and instigating warfare against Muslims. In comparison to the interpretations of Al-Mawardi and Al Awazi an early scholar Maqatil b Suleman considered this verse to be a denunciation of the Makkans who had commenced hostilities at Hudaibya and who began fighting during the sacred months in the sacred sanctuary which led to a repeal of the prohibition imposed upon Muslims against fighting near Kabah and was clearly an act of aggression. This verse according to him abrogated the earlier complete prohibition against fighting especially in the sanctuary. These early juridical and exegetical works reflect adherence to the *Qur'anic* principle of unqualified non-aggression. Similarly Al Tawhri drawing upon the literal meaning of the word *jihad* and on the basis of *Ahadith* of Prophet Muhammad contended that, the

⁶⁹ Abul-Hasan Ali al-Mawardi, *Ahkamal Sultaniyyah wal-wilāyat al-Dinnīyah* (Beirut: Daʿ al-Kutub al-ʿIlmiyyah) 1999, pp. 35–41; Imam Muhammad ibn Jareer al-Tabari *Jaami' al-Bayaan fi Ta'weel Aayi-'l-Qur'an*.

jihad ideology is exclusively one of self-exertion and peaceful co-existence.⁷⁰ These opposing interpretations of the religious text by early and medieval Islamic scholars have led to the controversy over the concept of *jihad*.

Besides, such interpretations are also difficult to believe as one single verse could not abrogate the other 124 verses of the *Qur'an* that talk about peace and the defensive nature of *jihad* for instance the *Qur'anic* verse '*And fight them until there is no more tumult or oppression, and there prevails justice and faith in God; but if they cease, let there be no hostility except against those who practice oppression*' (193:2) shows that fighting is exhorted until oppression is ended. Thus, with the words "but if they cease" God legislates that fighting should then end.

Similarly *Qur'an* states "*And fight them until there is no more tumult or oppression, and there prevail justice and faith in God altogether and everywhere; but if they cease, verily God doth see all that they do*" (39:8). This verse clearly shows that peace is not only permitted but called for, after the adversary, even if still antagonistic, ceases his aggression. However, precaution and watchfulness is not to be abandoned in this situation, for here God reminds the Muslims of His own attribute, 'verily God doth see all that they do.'

War and military action was thus allowed only in self-defense and as a non-aggressive principle as it is stated in the *Qur'an* 'Fight in the path of God. Those who are fighting you; But do not exceed the bounds. God does not approve transgressors.' (2:190).

Justifying military *jihad* has also been criticized by contemporary Islamic scholars. After a close reading of the *Qur'an* they argue that the early juridical and exegetical works and the other very early sources reflect adherence to the *Qur'anic* principle of unqualified non-aggression.⁷¹ Mahmassani considers that the verses which forbid the initiation of war by Muslims and which uphold the principle of non-coercion are in sharp contrast with this later conception of waging an offensive *jihad* and permission to launch pre-emptive war against non-Muslim states.⁷² He emphasizes the need for reading the *Qur'an* holistically, and in the light of social and political circumstances and events of that age and time. Afsaruddin is of the view that such position of the later jurists is reflective of their political affiliations and serving the interest of the Muslim Empire. Many jurists enjoyed royal patronage during the Muslim conquest and, in return, provided Muslim authorities religious justifications to help legitimize the expansion of the empire through waging war.⁷³ One can thus argue that the historical processes that reflected the political aspirations and

⁷⁰ The Prophet Mohammad stated that "exertion of force in battle is a minor *jihad*, whereas 'self-exertion in peaceful and personal compliance with the dictates of Islam (constitutes) the major or superior *jihad* and the 'best form of *jihad* is to speak the truth in the face of an oppressive ruler".

⁷¹ A. Afsaruddin, 'The *As-Siyar* Law of Aggression: Juridical Reinterpretations of *Qur'anic* Jihad and their Contemporary Implications for International Law', in M. Frick and A. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (2013), at 45.

⁷² S. Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine', (1966) 117 *RCADI* 239, at 265

⁷³ A. Afsaruddin, (*Supra* note 72) at 45

practice of the Muslim rulers impacted on the meaning, scope and application of *jihad*. The concept of offensive *jihad* emerged during the Umayyad dynasty when Umayyad rulers were engaged in wars with the Byzantine Empire. The Umayyad rulers at that time needed a religious and legal basis for justification of wars. These imperial aspirations cannot be ignored as these were a major factor behind promoting the offensive *jihad*.

Whereas Ali and Rehman argue that this version of *jihad* ideology reflects the expansionist phase of Islam. During this phase there were instances where the lines between violence and pure and simple *jihad* were blurred.⁷⁴ Similarly political conflicts soon after the death of the Prophet that resulted in the assassination of the first three caliphs of Islam, the territorial dispute based around a sectarian divide and the tragedies of inter-Muslim conflicts such as the incident of Karbala have led to the perception of Islam in the West as ‘a religion of the sword...glorify[ing] military virtues’.⁷⁵

Since the *Qur’anic* verses lend themselves to multiple readings and extrapolations, the controversy over the concept of *jihad* and what it means for Muslims today continues.⁷⁶ In the present day context, there has been a re-emergence of the concept of offensive *jihad* in the war ideology of militant groups and non-state actors such as the ISIS and other non-state actors who are using this terminology to restore “Islamic caliphate”. Osama bin Laden, the *Al Qaeda* leader issued two fatwas in 1996 and 1998 in which he declared that in the current circumstances *jihad* is the individual duty of every Muslim. It is justified to attack and kill the enemy and his allies in order to liberate the holy places and in order to move the enemy armies “out of all lands of Islam”. In his fatwas who drew inspiration from the 14th century scholar Ibn Taymiyya.

A similar approach has also been taken up by the *Tehrik-e-Taliban* in Pakistan who also follow the Ibn Taymiyya approach which allows radicalized groups to fight against their own fellow Muslims. *Tehrik-e-Taliban* considers that as a US ally Pakistani government, its armed forces and all those complying with the orders of the State are deemed apostates therefore they deserve to be killed. As the government follows a western agenda therefore it must be overthrown through violent *jihad*.

This version of *jihadi* ideology does not represent the official positions of Muslim states vis-à-vis the international system. The Charter of the Organisation of Islamic Co-operation (OIC), among other statements, contains pronouncements implying agreement to conduct their relations with other states on the basis of equality and reciprocity. Objectives of the OIC do not allude to the international community of states as being divided along the *dar-ul-harb/dar-ul-Islam* categorisation and include ‘taking all necessary measures to support international peace and security founded on justice’.⁷⁷

Similarly Muslim states condemnation of the Charlie Hebdo killings as well as terrorist attacks carried out in the name of *jihad* either by the ISIS, *Al-Qaida* and *Tehrik-e-Taliban* point towards the

⁷⁴ S.S. Ali and J. Rehman, (*Supra* note 62)

⁷⁵ S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996) 263. J.L. Payne, *Why Nations Arm* (1989) 121. As cited in S.S. Ali and J. Rehman, ‘The Concept of Jihad in Islamic International Law’ *Journal of Conflict & Security Law* (2005), Vol. 10 No. 3, 321–343

⁷⁶ S.S. Ali and J. Rehman (*Supra* note 76), at 128

⁷⁷ *ibid.*, at 128

fact that any misinterpretation of religion and misuse of the principle of *jihad* is not acceptable to the Muslim states and Muslims in general. Such misinterpretations are categorically rejected and not endorsed by Muslim states. The military action against Al Qaida and various factions of *Taliban* in Pakistan and air strikes by Turkey and Saudi Arabia on ISIS occupied areas in Syria and Iraq are examples of non-acceptance of offensive *jihadi* ideology of these militant groups by the Muslim states.

Conclusion

This chapter has shown that 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 *As-Siyar* was developed over centuries through the works of jurists who drew inspiration from the primary sources of law. *As-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 *As-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.

The historical examination of *As-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 *As-Siyar* which later came to be known as the law of armed conflict. 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 twentieth century, has left behind a double exclusionary bias regarding time and space in the history of international law”.⁷⁸ This chapter has demonstrated 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.

⁷⁸ I. De La Rasilla Del Moral, *International Legal Theory: The Shifting Origins of International Law*, *Leiden Journal of International Law* (2015), 28, pp. 419–440