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Harmonization of Siyar in International Law: Some Reflections

Rahmat Mohamad
ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

I. Introduction

It has been said and sometimes overemphasized that international law is supposed to be universal, applicable among all the States in equal term in their relations with each other and in the words of the famous jurist, Oppenheim; "…as the body of rules which are legally binding on States in their intercourse with each other." He further declares that, "international law does not recognize any distinctions in the membership of the international community based on religion, geographical or cultural differences."[1]

In reality is modern international law truly universal? According to Professor Yasuaki Onuma, "International Law must constantly reorganize and conceptualize itself to rectify past wrongs and to respond to the new realities of the world. Only with such constant efforts can international law become global international law which is voluntarily accepted by peoples all over the world". He advises that only with "an inter-civilizational approaches" can the people of

Rahmat Mohamad is the Secretary General of the Asian African Legal Consultative Organization (AALCO) New Delhi. The views expressed in this paper are of the author and do not represent the views of the organization and its Member States. The author can be contacted at rmohamad@aalco.int

[1] See the leading literatures on universalism in international law; Robert Jennings & Arthur Watts (eds.), *Oppenheim's International Law*, vol.1 (9th edition, London, 1997), p. 4; R.P. Anand, *New States and International Law* (Delhi, 2008), p.116.

the entire globe "talk of *our* international law not only in the geographical sense but also in the civilizational sense".[2]

Before the application of modern international law[3], international law is thought to be a product of the Western European Christian States or States of European origin, and applicable to European States[4]. Oppenheim points out:

> "The old Christian states of Western Europe constituted the original international community within which international law grew up gradually through custom and treaty. Whenever a new Christian state made its appearance in Europe, it was received into the existing European community of states. But, during its formative period, this international law was confined to those states. In former times European states had only very limited intercourse with states outside Europe, and even that was not always regarded as being governed by the same rules of international conduct as prevailed between European states"[5].

The European Westphalian model was an embodiment of a paradox: it combined the logic of equality with the logic of inequality. In other words, the problem of 'order among sovereign states' arose only in the context of sovereign European states since sovereignty was designed in such a way as to

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[2] Yasuaki Onuma, "When was the Law of International Society Born?-An Inquiry of the History of International Law from an intercivilizational Perspective", *Journal of the History of International Law*, Vol.2 (2000), p.66.

[3] R.P. Anand observed that the contemporary international law makes no distinction between States and all new entities, as soon as they emerge as independent States, whether members of the United Nations or not, are accepted as members of the ever-expanding international society and are bound by its rules and seek its protection, this is only a recent phenomenon not older than the United Nations itself, see R.P. Anand, " Universality of International Law: An Asian Perspective", *Fifty Years of AALCO Commemorative Essays in International Law* (AALCO, New Delhi, 2007), p.2.1

[4] When Europe rose into power after the defeat of the Ottoman Empire, strong objections were made by Russia not to allow Turkey to join the community of European nations on the ground that Turkey was barbarous. See Majid Khadduri, "Islam and the Modern Law of Nations", *American Journal of International Law*, vol. 50 (1956), p. 365.

[5] Oppenheim's International Law, note 1, p. 87-88.

exclude the non European states.[6] This was sought to be done through the distinction between the civilized States and the uncivilized States which was crucial to the formation of sovereignty doctrine. As of the fifteenth century onwards the European commenced their global agenda in Asia, Africa and Latin America countries with the sole objective of their own needs and developed active trade and commercial relations and more importantly political relation. In this context, Professor Anand questioned what rules of inter-state conduct applied between the European states and the Asian countries? Without some common rules of international law, European could not have survived in Asian countries. And if some rules of international law and comity did apply between them and their international law among European countries during this period?[7]

Judge C.G. Weeramantry further questioned the early development of international law in Europe whether it was an independent take off or did it draw upon the pre-existing body of Islamic knowledge.[8]According to Judge Weeramantry that it is untenable to conclude that any study of international law proceed upon the tacit assumption that it was the West which triggered off the development of international law for several reasons;

> "First, the prior existence of a mature body of international law worked out by accomplished Islamic jurists in textbooks upon the subject is an incontrovertible fact. Secondly, the flow of knowledge in all departments of science and philosophy from the Islamic to the Western world, commencing from the eleventh century is an indisputable fact. Thirdly, the fundamental rule of Western international law, *pacta sunt servanda*, formulated by

[6] See Rahmat Mohamad, "Bringing Together Asian African States in Harmonizing the International Legal Order in the Post Westphalian Era", *Essays on Contemporary Issues in International Law* (AALCO, New Delhi, 2009), p. 14.
[7] See Anand, New States and International law, p. 118.
[8] See C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (MacMillan, London ,1988), p. 149.

> Grotius in the seventeenth century is also a fundamental rule of Islamic international law, where it is based upon Quranic injunction and the Sunna of the Prophet. Fourthly, there had been contact between Christian and Islamic civilizations both in time of war and peace for many centuries dating back to the Crusades. Apart from war times, peaceful relations through trade exposed the West to Islamic concepts of international trade. Thus, it seems unrealistic to suggest that the West remained unaware of the body of international law worked out by the Islamic jurists. Fifthly, Western scholars were not insular in their attitudes when they set off the brilliant and intellectual resurgence which led Europe to world supremacy. In as far as international law are concerned, there was no literature from the great civilizations of Greece and Rome comparable to their literature in private law. Treaties dealing with duties of combatants, the right of non combatants or the disposal of enemy property were only found in the developed literature of Islamic International law. In Spain and Italy, a knowledge of Arabic was part of the literary equipment of the accomplished fifteenth and sixteenth – century scholars. Thus Arabic literature was not unknown in the days when the first seeds were being sown of what was to become Western international law".[9]

It is important to be aware of the comparative sources from which rules of our modern law may have come. This realization is, to say nothing else, helpful in making the norms of this law more acceptable to numerous nations as truly a law of nations and not merely a contemporary evolution of the last 200 years of the norms of European public law. This would increase the legitimacy of

[9] Ibid, p. 149

international law paving way for better acceptance and enforcement and leading to a more inclusive world order.

II. Contributions of Islamic International Law

A deep examination of the texts of Muslim international law would reveal that a great deal of what is observed today had already been outlined as rules binding on states in their international relations.[10]

Contemporary Islamic legal thought has no trouble subscribing to current principles of international law. Beyond that it aspires to enrich international law with its own contributions. What contemporaneous legal systems can contribute to each other and to international law is a different emphasis on values, a particular pattern of juridical reasoning and a distinctive methodology in the search for solutions to common problems. Establishment of the United Nations has rendered use of force impermissible save in the limited instances of self-defence or through sanctioning of the Security Council. As noted earlier, modern Islamic states accept the position advanced by the United Nations Charter on the prohibition of the use of force -- a position which is regarded as consistent with *Siyar*. Islamic states, while maintaining their Islamic credentials have, alongside other member States of the UN, renounced violence, aggression and terrorism. The insistence on prohibition on use of force in international relations by Islamic states therefore points towards a compatibility of the fundamental principle of international law with Islamic law and *Siyar.*

[10] A Survey of Islamic International Law, American Society of International Law Proceedings (April 22-24, 1982); see also the early work of Muhammad ibn al-Hasan al-Shaybani, *Kitab Al Siyar Al-Saghir*, edited, translated and annotated by Mahmood Ahmad Ghazi; Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore,1973); Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore, John Hopkin's Press, 1966); Ali, Shaheen Sardar, "Resurrecting Siyar Through Fatwas? (Re) Constructing "Islamic International law" in a Post- (Iraq) Invasion", *Journal of Conflicts and Security law*, vol. 14 (2009), pp.115 -144.

According to Jugde Weeramantry "when we note that Article 38(1)(b) of the Statute of the International Court of Justice, requires the ICJ to apply "the general principles of law recognized by civilized nations". According to the Judge having regard to the large number of Islamic nations now members of the United Nations, the international law of Islam is a body of knowledge which the court cannot afford to ignore. Indeed it must necessarily make an impact upon the content of contemporary international law.

The topics covered by Islamic international law vary from the law of war and peace and of human rights and humanitarian law which are the subject of modern treatises. Among the most important contributions of Islamic international law were its definite rules on prisoners of war, protection of civilian populations, limitations of belligerent activities and reprisal, asylum, pardon, safe conduct, diplomatic immunity, negotiations and peace missions.[11]

In the following areas Islamic law has much to offer to the ongoing process of development of international law.

- Islamic Treaty Law and Practice[12]
- Principles of Equality[13]
- Peaceful Settlements of Disputes[14]
- Law of Diplomatic Protection[15]

[11] Weeramantry, note 8, p. 135.

[12] The binding force of treaties is well emphasized in many Quranic verses, of which the following may be quoted; "Fulfil the covenant of God when you have covenanted and break not oaths after their confirmation". Surah 16:91; "And fulfil the covenant, for the covenant entails responsibility". Surah 17:34; See Sobhi Mahmassani, The Principles of International Law in the Light of Islamic Doctrine, *Recueil Des Cours*, 1966. Vol.1.

[13] Islam considers that all mankind are equal before the law, in their rights as well as in their obligations, without any distinction of race, nationality, colour, family or creed. "O Mankind! We have created you of one male and one female, and have divided you into peoples of tribes, that you may become mutually acquainted. The most dignified (noblest) of you, in the sight of God, is the most pious (of you); S 49:13.

[14] Islamic law recognized the legality of arbitration and mediation as peaceful settlement of disputes. See Mahmassani, *Legal Systems in the Arab States* (in Arabic, 3rd edition, Beirut, 1965).

- Islamic Humanitarian Law (Law of War)[16]
- Human Rights and Duties[17]
- Law of Asylum[18]
- Private International Law[19]

Modern Day Challenges and Islamic International Law

The well developed Islamic International law should provide an option open for the modern day challenges by international community. All great cultures and religious systems have made contributions to humanity. The history of Islamic thought is rich in ideas. The former Prime Minister of Malaysia, Mahathir Mohamad in his speech at the Second General Assembly of the Regional Islamic Dahwah Council of Southeast Asia and the Pacific in June 1983 observed: "Indeed the richness of the Muslim world lies in its religious, cultural and ideological heritage. It can bring fresh approaches in solving the problems faced by modern man, based on its ideals of justice and brotherhood of man, ideals which are vital to the realization of an equitable world order". [20]

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[15] Diplomatic agents in Islamic law enjoy certain immunities and privileges to those accorded by modern international law. Prophet Mohamad (SAW) himself granted these immunities to diplomatic envoys. This practice established by the Prophet was followed by his Companion and successive Caliphs. Mahmassani, note 12.

[16] See Al-Ghunaimi, M J., The *Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968); See Weeramantry, note 8, pp 134-138.

[17] Islam preaches human fraternity and world unity. It enjoins religious tolerance and cooperation with all people, without distinction of religion or tribe, on the basis of equality and justice. "God enjoins justice and charity": S 16:90; "And let no enmity with any people prevent you from acting justly. Act justly, that is closer to piety", S 5: 8.

[18] See Weeranmantry, note 8, p.143.

[19] D. De Santillana, the eminent Italian jurist has this to say: "Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (girad), and certain technicalities of commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts, and therein lies its enduring merit". De Santillana, D., *The Legacy of Islam* (Oxford: 1931).

[20] Arabia: *The Islamic World Review*, Aug 1983, p. 29.

A. Terrorism and armed conflicts

Islam is often stereotyped as hostile and violent in the Western discourse. Western media and policy documents often project the violent and aggressive images of Islam. Islam is a religion of peace and the application of Islamic principles will bring justice, harmony, order, and thus peace. The full potential of Islam to address social and political conflicts is yet to be fully realized. Both Islamic religion and tradition have a multitude of resources with which conflict can be resolved peacefully and nonviolently. Islamic scripture and religious teachings are rich sources of values, beliefs, and strategies that promote the peaceful and nonviolent resolution of conflicts. Islamic law recognized the legality of arbitration as a peaceful means of settling disputes both in civil law and public law. Islamic law recognizes the validity of arbitration, whether between two Muslim parties or between Muslim and non-Muslim groups. Apart from arbitration, Islamic law recommends mediation, as a preliminary peaceful step before resorting to war. Interpreting and viewing Islamic religion, tradition, and cultural patterns through nonviolence and peace building lenses become important in accurately understanding and capturing the meaning of Islam. Though a wide variety of Islamic religious teachings and practices address conflicts and peace building, the validity of their application depends on the type of interaction involved in the conflict situation.

B. Global Financial Crisis

Recent Global financial crisis started from the setbacks in the national banking & financial sectors which later developed into a global crisis. The crisis has evoked interest amongst the international community in Islamic Banking and financial services. Many Muslim countries have successfully implemented Islamic Banking and finance services. Malaysia is one such country. The ultimate aim of Islamic finance and banking is to fulfil socio ethnical responsibility to bring prosperity among humankind as it has very strong *Shariah* foundation and very

strong moral ethical dimension which are rooted in the system itself. The prohibition of interest is the ethical and economic foundation of the Islamic finance industry. The strict prohibition of interest in Islam is a result of its deep concern for the moral, social, and economic welfare of humankind. According to Islamic scholars the rationale for this prohibition is that there shall be no profit without participation in business risk. Other elements of Islamic finance include the emphasis on equitable contracts, the linking of finance to productivity, the desirability of profit sharing, and the prohibition of gambling and certain types of uncertainty.

Islamic banking involved all parties participating on just terms. The profit and loss sharing principle implied less likelihood of contracts being broken and promoted solidarity and brotherhood. For proponents of Islamic finance it is beyond doubt that *riba* is not restricted to usury only but covers all forms of interest in loan contracts. As the alternative in harmony with ethics and morals of Islam, Islamic economists designed a financial system based on the idea of partnership and sharing of risks and rewards. The substitution of loans and debt by sharing agreements became the distinguishing factor and the basic premise on which all claims of distinctiveness and superiority were based. It is also observed that many of the characteristics of Islamic banking can benefit both the investors and the players such as risk and benefit sharing as it provides more equal opportunities to both parties.

C. War Crimes

In the recent past, the war crimes are on the rise. War crimes committed by the occupation forces in Iraq, Afghanistan and Palestine are well documented. Islam established the sanctity of life, honour, and property in times of war, and made rules for the conduct of war and ensured their enforcement, centuries before the West declared them to exist in the various present-day international instruments. Protection of human life, property and dignity at the times of war is

the primary aim of the Islamic Humanitarian Law. Conduct of war is clearly laid down in the Islamic law of war. Declaration of war, commencement of war, conduct of hostilities, and rights of the soldiers and much more find place in the Islamic law of war. Islamic humanitarian law apart from making a clear distinction between combatants and non-combatants, and their rights, it seeks to protect the rights of prisoners of war and the rights of women, children and the old[21]

The rights to benefit from nature are linked to accountability and maintenance or conservation of the resource. The fundamental legal principle established by the Prophet Muhammad is that "The benefit of a thing is in return for the liability attached to it". Much environmental degradation is due to people's ignorance of what their Creator requires of them. People should be made to realize that the conservation of the environment is a religious duty demanded by God. The all-inclusive approach of Islam to human beings, without any discrimination, and Islam's all-inclusive approach to the universe, regarding the welfare of the whole without excluding from consideration any of its parts, is the essence of the ecological consciousness. Indeed the fundamental criterion for all development and conservation of the environment in Islam is to serve the Creator. It is a distinctive characteristic of Islamic law that it aims explicitly at the universal

[21] Mahmassani, note 12, p. 277.

common good of all created things. The conservation of the natural environment is a moral and ethical imperative.

A major interreligious conference called "Many Heavens, One Earth" was held from 2 to 4 November 2009 at the United Kingdom, where many of the world's faiths presented seven-year plans for greening their activities and promoting climate stabilization. The conference was convened by the Alliance of Religions and Conservation (ARC) in partnership with the United Nations Development Programme. Thirty-one plans were presented by the major faiths, including Islam, the Baha'i Faith, Buddhism, Christianity, Daoism, Hinduism, Judaism, Shintoism, and Sikhism.

Perhaps most notable are the commitments by Muslim leaders, which appear to signal a new and substantial engagement on environmental issues by Islamic institutions. Under the Muslim seven year plan submitted at the conference, the holy city of Medina will become a model green city. It also calls for creation of a Muslim Association for Climate Change Action (MACCA), which will represent Islamic nations and faith communities from around the world, and for a "Green Hajj" to make the traditional Islamic pilgrimage environmentally friendly within a decade.

D. Environmental degradation and climate change

E. Poverty

An important element of the Islamic economy is the principle of social justice. Islam exhorts moderation and distributive justice, (*Holy Qur'an*; 9-60; 59:7). The principle of social justice is embodied by Islam in the system of distribution of wealth. This principle could very well be extended to an international plane. The Islamic form of social justice comprises two general principles, each having its own lines and details. The first one is that of general reciprocal responsibility and the other one is that of social balance. It is through reciprocal responsibility and the balance, with their Islamic sense, that just social

. It also highlights the sanctity of treaties, which is the cornerstone of modern day international relations. Islamic law of war clearly prohibits massacre and genocide in the enemy territory and also looting and destruction in the enemy country. Revengeful acts and torture are also prohibited. Sanctity of property and religious places has to be preserved. Also destruction of trees, animals and depriving of food and water is also prohibited in the Islamic humanitarian law. Sanctity of the dead bodies and return of the dead body is assured.

values are materialized and it is therewith that Islamic ideals of social justice come into existence. The measures taken by Islam towards bringing about a better human society clearly showed how great importance it attached to this main element of its economy. Attachment of this importance was reflected clearly in the first address given by the Prophet (PBUH) at the time of the first political activity conducted in his new State.

Zakah, or obligatory alms giving, is one of the Five Pillars of Islam and is an essential part of Islam. *Zakah* is a tax on personal wealth that is paid on, or more properly taken from, the three items of human economic activity, namely, Crops, livestock and money. The acquisition and accumulation of wealth is permitted if it is pursued through lawful means, if the individual meets all of the attendant obligations (paying *Zakah* and such voluntary taxes as *sadaqah* and *kharaj*), and if it does not distract one from the remembrance of God. So *Zakah* and *sadaqah* (voluntary charity) are part of an effective social apparatus to ensure distributive equity and social justice.

The Possible Methodology to Contribute To the Development of the Modern International Law

A. Effective Dialogue between the Islamic international lawyers and the Western World

Effective dialogue occurs in an atmosphere of trust and peace. More scope for dialogue between the Islamic international lawyers and the western world could be opened. This would give an opportunity for the Western world to understand the true essence of the principles of the Islamic international law. It remains that Islamic jurists have the duty of making their legal system better known to their colleagues in other parts of the world. It is also incumbent on the latter to make an effort at reaching a better understanding of Islamic law.

B. Greater participation of the Islamic world in international law making and development

i) Role of the Islamic States

In today's universal community of nations, Islamic states are Members of the international bodies and organizations. Islamic States can make valuable contributions to the progressive development of the international law. Certain basic principles of Islamic international law lend themselves to consolidating and expanding the scope of contemporary international law. Those principles have not changed throughout the historical evolution of Islamic international law and are not likely to change in the future because they are rooted in Quranic commandments. However, the fact is that the Islamic States, with their strength of more than 50 States could not make the impact they could have made in the progressive development of international law. Islamic States have to produce more experts in various fields of international law and *Siyar*. Universities, Research Organizations and national societies have to come up to fill the gap and produce eminent experts who could negotiate in the international meetings and law making bodies. Capacity building exercise in the field of Islamic International Law is a must for the Officials and negotiators, so that principles of *Siyar* could be incorporated in the modern international law.

ii). Role of Islamic Organizations, including the Organization of Islamic Conference (OIC)

Even though OIC participates in the global negotiations, the collective strength of the 56 Member OIC is still not fully channelized to reflect the aspirations of the Islamic Countries in international law making. OIC while committing to the principles of the United Nations Charter, and International law and to contribute to international peace and security have the stated objective to ensure active participation of the Member States in the global decision making processes to secure their common interests. The Charter of the OIC envisages for

an International Islamic Court of Justice and Independent Permanent Commission of Human Rights. A Research and Training Centre for Islamic International Law or a Committee for harmonizing Siyar in international law could very well be established under the auspices of the OIC. Placing the Islamic international law principles through a collective forum can make a major difference.

iii). Muslim Academia and Law Practitioners

The role and responsibility of the Muslim academia and practitioners cannot be underestimated. If we analyze the literature on international law, the contribution from the Islamic World is negligible. The bulk of the literatures are from the Western scholars, and they tend to ignore the contribution of Islam and Islamic International law. Some scholars are even ignorant of the contributions of Islam in this field partly due to non-availability of authentic sources. Here academia and practitioners from the Islamic world have a crucial role to play. More and more well researched books and articles on Islamic international law have to be produced and wider dissemination of their works. Workshops, Seminars and Conference on the various aspects of the Islamic International Law with active participation from the academia, officials and decision makers from the non-Muslim world makes dissemination much more effective.

iv.) Institutionalization of Islamic International Law and its Dissemination

The international community must continue and willing to understand and accept the greatness of the cultural and religious diversity for humanity. There must be continuous discourses on the subject of Siyar complementing international law.

III. Conclusion

Islamic international law constitutes not only a vital part of the Islamic legal system but also offers a practical option to the current shortcoming in international law. Given the established assumption that it is the European that contributes the

making of international law and without prejudice and ignorance of the history of the Islamic civilization, the richness in Siyar should offer positive solutions to the progressive development of international law.