

Islamic International Law (*Siyar*): an Introduction

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Abstract

This work explains the origin, sources, and evolution of Islamic international law (Siyar). It attempts to locate the role and place of Islamic International law (Siyar). It argues that Abu Hanifa was the first jurist to treat Siyar as a separate legal science and who systematically explained the rules of Siyar. This work discusses the role of Siyar within the domestic law in Pakistan. It concludes that since Islamic law is not only one of the principal legal systems in the world but also that Islam is one of the main forms of civilizations; therefore, Islamic law must be one of the sources of international law. Finally, it argues that since public international law is not secular in nature, but rather 'neutral' so as to 'accommodate' Muslim states. Siyar only

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strengthens the obligations of Muslim states and does not impose Islamic law on non-Muslim states.

Key words: *siyar*, Islamic international law, role of *siyar*,

1.1 Introduction

ISLAMIC law provides comprehensive rules regarding relations between an Islamic state and non-Muslim states both during war and peace. It has an elaborate set of rules concerning the resort to war (*jus ad bellum*), treaties, the conduct of war (*jus in bello*), especially who should not be killed during the course of war, what objects should be protected, rights of prisoners of war (POWs), termination of their captivity, and the effects of war. *Shari'ah* also deals extensively with rebels and apostates with a set of binding rules for guiding the Islamic state; of deal with the non-Muslim citizens of a Muslim state (as this was also the subject matter of *Siyar* in the early Islam); how to deal with foreigners, especially businessmen from non-Muslim nations who visit the Muslim entity for business or requested asylum or protection from Muslim individuals or State; immunity of envoys; territorial jurisdiction, and a host of other issues that are essential for conducting the affairs of a Muslim state in the international arena. These rules were envisioned to be fully endorsed by the Muslim state and were to have the status of other rules of Islamic law.

The questions that are discussed in this work are: what is meant by *Siyar*; who was the first jurist to treat *Siyar* as a separate legal science; what was the role of Imam Abu Hanifa and his disciples, especially Shaybani; who were the first jurists to write on *Siyar*; who was the first jurist to write a separate book on *Siyar*; what is the role of *Siyar* today in the domestic law of a Muslim state, such as Pakistan; is there a change in the contents of *Siyar* since its' rules were

first formulated; what was the role of Ottoman Turkey in the development of international law, especially international humanitarian law (IHL); should the participation of Muslim states in international law making be called their ‘subjugation’; what is the attitude of Muslim states towards international law in cases when its provisions are against Islamic law? These are some of the questions that are explained in this work.

1.2 Meaning and Definition of *Siyar*

Literally *Siyar* is the plural of *Sira* which means conduct, practice, comportment, behavior, way of life, attitude, or acceptable behavior. An alternative meaning in its plural form is campaigns. The words *sair*, *sairura*, *maser*, *masira*, *masaran*, *tasyar* – are used to denote moving (on), setting out, to strike out, to start, get going; to move along; to march; to travel, journey, to go, go away, leave, depart; to run. And the phrase *Sara*, *siratan hasanatan* which means to behave well. *Sira* also denotes (*hala* plural *halat*) condition, state; situation or (*hai'a* or plural *hai'at*) form, shape; exterior appearance, guise, aspect. Allah said regarding Moses’s staff, “*We shall return it to its former state.*”¹ According to Zimahshari (d. 538/1144), *Sira* is from *Siyar* ... (*sara fulanan siratan hasanatan*) which means someone behaved well. Later on it was extended and modified to mean conduct and practice. In the expression *Siyar al-awwaleen* it stands for the conduct of the people in the past² and in *Shari'ah Siyar* refers to issues regarding the laws of war.³ This is why some authors used the title of *Kitab al-Jihad* rather than *Kitab al-Siyar* to describe the laws of war. The term *Sira* is used by some historians and traditionists as synonym to the term

¹ The Qur'an 20: 21.

² Abul Qasam Jarrallah Zimahshari, *Al-Kashaf 'un Haqiq al-Tanzeel*, Dar al-M'arifah, Beirut, vol. 2, p. 431.

³ Abul Fath Nasiruddin Muttrazi, *Al-Mugrib fi Tartib al-Mu'rib*, ed., Mahmood Fakhori, Maktab Usama ibn Zayd, Halab, vol. 1, p. 227.

Maghazi (wars). For example Ibn Kathir (d. 775/1373), while referring to *Sirat Ibn Ishaq*,⁴ mentions that, “Ibn Ishaq (d. 153/770) says in his *Al-Maghazi*.”⁵ The compilers of *ahadith* of the Prophet (Peace be upon him) have the titles of *Kitab al-Siyar*, *kitab al-Jihad*, and *Kitab al-Maghazi* to describe rules governing the conduct of war, the protection of civilians, the protection of POWs, cessation of hostility, signing and breach of peace treaties, territorial jurisdiction, and even the various rules for conducting business between Muslim and the non-Muslim states, and so on. Today these form the core topics of a standard book on international law although Muslim jurists never used the expression Muslim international law to describe *Siyar*. Historians used the term *Sira* to describe the conduct of the Prophet (PBUH) or his successors in their dealings with regard to the matters stated above. Such books were written very early in Islam an example of which is *Al-Sira al-Nabawiya* of Ibn Hisham (d. 218/833).⁶ This may well be termed as being as the biography of the Prophet (PBUH) because it describes every event from his childhood till his death in minute detail, the life of his companions, their achievements, migration to Madina, dealings with envoys, revelation, the spreading of Islam, as well as all the wars of the Prophet (PBUH) and his successors. With the passage of time, *Sira* came to be used to describe the biography of other persons too. Thus at the end of the third century after *hijrah* (migration), ‘Abdullah Ibn Ahmad Al-Blawi wrote a book titled *Sira Ahmad Ibn Tuloon*.⁷ In the fifth and sixth centuries after *hijrah* many biographers used the term *Sira* to write biographies. For instance, Ibn Jawzi (d. 597/1201) wrote *Sira ‘Umar Ibn al-Khattab* and *Sira ‘Umar Ibn ‘Abdul ‘Aziz*. Imam Fakhruddin al-Razi (d. 606/1210) wrote *Sira al-Imam al-Shafi’i* and so on.

⁴ Muhammad Ibn Ishaq, *Sira Ibn Ishaq*, ed., M. Hamidullah, Al-Maghrib, 1401 A. H.

⁵ Isma‘il Ibn Kathir, *Al-Bidaya wa al-Nihaya*, tabat Esa al-Halabi, 1398 (A. H.), vol. 3, p. 242.

⁶ ‘Abu Muhammad Ibn Hisham, *Al-Siyra Al-Nabawia*, ed., Mustafa Al-Saqa and others, Dar al-Marifah, Beirut.

⁷ ‘Abdullah Ahmad al-Balawi, *Sira Ahmad Ibn Tuloon*, ed., Muhammad kurd Ali, Matbat al-Taraqi, Dimascus, 1385.

As already explained the term *Sira* was used by Muslim jurists to designate the conduct of the Prophet (PBUH) relating to the laws of war, dealing with rebels, apostates, and non-Muslim citizens of Muslim state. The meaning of *Sira* in the sense of the Prophet's (PBUH) conduct and behavior is evident from his sayings. Ibn Hisham reports that, "Then the Prophet (PBUH) ordered Bilal to hand over the banner to him (ʿAbdur Rahman Ibn ʿAwf). He did so. Then the Prophet (PBUH) eulogized Allah and asked for His mercy upon himself, then he said:

O son of ʿAwf! Take it [the banner]. Fight ye all in the path of God and combat those who do not believe in the path of God. Yet never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the demand of God and the *conduct* of His Messenger for your guidance."⁸

This citation shows that conduct of the Prophet (PBUH) in time of war, especially as to what is relating to the intentions of combatants, objectives of going to war, and the various acts prohibited in war, were referred to as his *Sira*.

However, there are other citations in which the term *Sira* is used to mean the conduct of the Prophet (PBUH) and his successors during peace time or their conduct in governance or in general. Imam Ahmad Ibn Hanbal (d. 241/857) reports that, "(After the Prophet) Abu Bakr became the Caliph and he acted according to his actions and *adapted his behaviour*. Then ʿUmar became Caliph, and he *adapted the behaviour* of them both."⁹

⁸ Ibn Hisham, *Sirah*, vol. 2, p. 632. This *hadith* is also narrated by Muslim in his *Sahih* in the chapters on *Jihad* and *Siyar*, from Suleman Ibn Buridah who heard it from his father. However, the phrase '*this is the demand of God and the conduct of his Messenger for your guidance*' are not mentioned by Imam Muslim. See Muslim Ibn al-Hajaj, *Sahih Muslim*, ed., M. Fu'ad ʿAbdul Baqi, Matb'at ʿEisa al-Halabi, 1374 A. H., vol. 3, p. 1357, *hadith* no. 1731.

⁹ Imam Ahmad Ibn Hanbal, *Musnad*, *hadith* no. 1055.

Ibn Sa'ad (d. 230/845) in his *Tabaqat* quotes a letter sent in by the Prophet (PBUH) to Akbar Ibn 'Abdul Qays in which he stated, *inter alia*, that, "... the Muslim garrison shall concede to them a share in the booty, skillfulness in government and moderation in *behaviour*. This is a decision which neither of the contracting parties may change."¹⁰ Ibn Jarir al-Tabari (d. 310/923) reports a letter sent by 'Umar – the second Caliph, who wrote to one of his commanders and said, "Thereafter Allah has prescribed excuses in everything in some circumstances except in two things: fairness in *conduct*"¹¹ Similarly, Tabari also reports a letter of 'Usman Ibn 'Affan – the third Caliph, who wrote to his deputies and said, *inter alia*, that "... the best *conduct* [for you] is to look into the problems that the Muslims face"¹² Thus the term *Sira* was used for the conduct of a Muslim ruler during times of both war and peace.¹³

Let us see how the term *Siyar* is defined by Muslim *fuqaha* (jurists) in their treatises on Islamic law. Imam Sarkhasi (d. 483/1090) of the Hanafi school of thought gives this definition:

Know that the word *Siyar* is the plural of *sira*. (Imam Muhammad Ibn al-Hasan al-Shaibany) has designed this chapter by it since it describes the *behaviour* of the Muslims in dealing with the polytheists from among the belligerents as well as those of them who have made a peace treaty (with Muslims) and live either as resident aliens or as non-Muslim citizens [of the Muslim state]; in dealing with apostates who are the worst of the infidels, since they renounce [Islam] after acceptance; and in dealing with rebels whose position is less (unworthy) than that of the polytheists, although they be ignorant and in their interpretation on wrong ground.¹⁴

¹⁰ Muhammad Ibn Sa'ad, *Al-Tabaqat al-Kubra*, Dar Beirut, 1400, vol. 1, p. 263. The book is narrated by Waqidi.

¹¹ Muhammad Ibn Jareer al-Tabari, *Tarikh al-Tabari*, ed., M. Abul Fazal, Dar al-Ma'arif, 1979, vol. 3, p. 585.

¹² *Ibid.*, vol. 4, pp. 244-245.

¹³ See, M. Hamidullah, *The Muslim Conduct of State*, Sheikh Muhammad Ashraf, Lahore, 1968, reprinted, 1996, p. 20.

¹⁴ M. Ibn Ahmad al-Sarakhasi, *Kitab al-Mabsut*, Dar Ehia al-Tourath al-'Arabi, Beirut, 2002, vol. 10, p. 5.

Some important areas discussed under the chapters on *Siyar* by Muslim jurists, including Sarakhasi, not forming part of this poetic definition, include peaceful relations with non-Muslim state(s), the law of treaties (especially peace and trade treaties between Muslim and non-Muslim states, although he mentions treaties with non-Muslim aliens/citizens), territorial jurisdiction, protection of envoys, and rules of business dealings between the former and the latter(s). As we shall know later, Sarakhasi himself discusses all the above issues as well as those described in his definition in *Kitab al-Mabsut* and especially, *Sharh Kitab al-Siyar al-Kabir* both penned by him.¹⁵

According to Najmuddin al-Nasafi (d. 537/1143), *al-Siyar* means the rules of war and these rules were designated by this term because most of these cases involve going to war [against the enemy] and journey towards the enemy.”¹⁶ Kasani (d. 587/1191) explains the reason for naming the chapter on *Siyar* in his book *Bada’i al-Sana’i* by saying, “because it describes the different ways [how] aggressors should behave [during the war] and the different situations that they could face or abide by.”¹⁷ According to Nawawi (d. 776/1278), “*Siyar* is the plural of *Sira* which means conduct and [most authors] use the title *Kitab al-Siyar* because its rules are derived from the conduct of the Prophet (PBUH) in his expeditions. And [these authors] discuss the rules of war. Other [authors] use the title ‘*Kitab al-Jihad*’, the title in the book *al-Tanbeeh fi al-Fiqah* [by Imam Abu Ishaq Ibrahim Ibn Ali Al Sherazi] (d.576/1083) is ‘*Kitab qital al-Mushrikeen*’ (chapter on war with polytheists).”¹⁸

¹⁵ *Ibid.*, pp. 5-135; and his *Sharh Kitab Al-Siyar Al-Kabir*, Dar Al-Kotob Al-’Ilmiyah, Beirut, 1997, 5 volumes.

¹⁶ Najmuddin Al-Nasafi, *Talaba al-Talabah fi al-Islahat al-Fiqhia*, ed., Khalil al-Mees, Dar Al-Qalam, Beirut, 1406, p. 165.

¹⁷ ‘Allau’ddin Abu Bakr al-Kasani, *Bada’i al-Sana’i*, Dar Ehia al-Tourath al-’Arabi, Beirut, 2000, vol. 6, p. 57.

¹⁸ Muhyuddin Ibn Sharaf al-Nawawi, *Tahzeeb al-Asm’a wa al-Lughat*, Dar al-Kutub al-’Elmyia, Beirut, vol. 3, p. 159.

Badruddin Al-‘Ai’ni, (d. 855/1451) of the Hanafi school of thought has used the extended meaning of *Siyar* when he explains the term. “And *Siyar* is the name given to the conduct of the Prophet (PBUH) during war and the conduct of his companions and whatever is reported from them in this regard”¹⁹ says ‘Ai’ni. In his commentary on the famous Hanafi book *Al-Hidayah* (The Guidance) he further extends the meaning of the term and opines, while analyzing the title *Kitab al-Siyar*, “Because it describes the conduct of the Prophet (PBUH), his companions (May Allah be pleased with them) and the Muslims. And it may be given the meaning: [their] conduct in *ma‘amalat* (in social life or business).”²⁰ This is indeed an extended meaning of the term ‘*siyar*’ which has never been. It is this meaning attached to *Siyar* by Al-‘Ai’ni that is reflected in some later works.²¹

The first thing to mention is that *Siyar*, as discussed above, is translated as Muslim international law by many authors. Let us see how *Siyar* is defined by other scholars in the 20th century such as Nagib Arminazi,²² Muhammad Hamidullah (d. 1416 A.H/2002 A.D), Majid Khudori, Abu Zahra, and others. Nagib Arminazi was probably the first to attempt a good definition he defined it as, “the set of rules that are binding on Muslims in their relations with non-Muslims, whether they fight [the Muslim state] or have peaceful relations [with them], whether they are individuals or states, and whether they are inside Muslim territory or outside of it. And the set of these rules also include the situation of apostates, rebels and robbers.”²³ He seems to be influenced by the definition given by Sarakhasi discussed above. However, this definition is not in touch with reality even of his times. Hamidullah on the other hand defines it

¹⁹ Badruddin Al-‘Ai’ni, ‘*Umdaht Al-Qari Shrah Sahih Al-Bukhari*, Dar Al-Fikr, Beirut, vol. 14, p. 78.

²⁰ Badruddin Al-‘Ai’ni, *Al-Binayat Sharh Al-Hidayah*, Dar Al-Fikr, Beirut, 1400, vol. 5, p. 624.

²¹ See, for example M. Ali Farooqi, *Kashaff Istilahat Al-Funun*, ed., Lutfi Abdul Badei, Wazarat al-Awqaf wa al-Irshad, Cairo, 1382, vol. 3, pp. 170-171.

²² See, his *L’Islam et le droit international*, thesis, Paris, 1929. The same was published in Arabic with certain additions, as *Al-Shar’ Al-Duwali fi Al-Islam*, Matb’at Ibn Zaydun, Demascus, 1930.

²³ *Ibid.*, p. 44.

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.”²⁴ This seems to be a better definition than that of Arminazi given above. Imam Abu Zahrah, in his introduction to the *Sharh Kitab al-Siyar al-Kabir*, defines *Siyar* as:

The rules of *jihad* and war, what is allowed in it and what is not, and the rules of [permanent] peace treaties and temporary truce, and the rules of who should be granted alien status and who should not, the rules of war booty, ransom and enslavement, as well as other problems that arise during wars and its aftermath. In short, it designates the rules of international relations between Muslims and other [communities] during peace and war, although most of the discussion is about the war.²⁵

Another definition of the science of *Siyar* is attempted by a researcher who asserts that, “these are rules for relations with non-Muslims in *dar al-harb* and *dar al-Islam* during war and peace.”²⁶ Unfortunately, these definitions, by and large, do not take into account the changes that are brought about by the obligations of Muslim states under international law, especially the various conventions regarding the conduct of war, its aftermath, and the obligations of Muslim states under these conventions.

However, some of these definitions talk about the past rather than the present. Moreover, the definition given by ‘Usman Jum‘ah covers relations with non-Muslim individuals within and outside the Muslim state rather than with non-Muslim states only. Turning a blind eye to public international law would make the task of defining *Siyar* befittingly, quite cumbersome. Today

²⁴ Hamidullah, *The Muslim Conduct*, p. 3. The first version of the book was published in *Islamic Culture*, Hyderabad Daccan in 1941-2. Ja‘far ‘Abdul Salam argues that this definition focuses on what the Muslim state implements in its relations with other states. See, his *Qawa‘id al-‘Alaqa al-Duwaliyya*, Maktaba al-Salam al-‘Alamia, Cairo, 1401, p. 31.

²⁵ Abu Zahrah, *Introduction to Sharh Siyar al-Kabir*, M‘atb‘at Cairo University, p. 33.

²⁶ ‘Usman Jum‘ah Zamiriyya, *Usul Al-‘Alaqa Al-Duwaliyya*, Dar Al-M‘a‘li, ‘Amman, 1999, vol. 1, p. 240.

Muslim states deal with their non-Muslim citizens according to their constitutions and not according to *Siyar* (international law)! We, therefore, need to explain *Siyar* in the present day circumstances and not as an abstract object that does not fit and is irrelevant. Therefore the need of the time is to start afresh, which would aid not only in arriving at a definition of *Siyar*, but a definition which is relevant and suitable in present day circumstances.

According to Majid Khudori, Muslim international law is an extension of Islamic law “designed to govern relations of the Muslims, whether inside or outside the world of Islam.”²⁷ According to ‘Abdul Karim Zaydan, “it is that set of norms and rules of Islamic law that are binding for the Muslim state in its relations with other states.”²⁸ This definition seems to be much better than the rest of definitions as it seems to be in accord with the present day scenario. Those rules and principles of Islamic law that regulate relations between the Muslim state and other states are designated as Muslim International law. These rules are binding on the Muslim state because of *Shari’ah*. However, owing to the absence of Caliphate, there are more than 50 Muslim states today rather than one Muslim state. This is why the focus should be on the obligations of these states under Islamic law as well as treaties regulating the same. Thus, Sarakhasi’s definition must be modified in order to be made relevant to the present environment. Today the subject matter of international law has changed. States have traded some medieval concepts for newer ones. For example, the rights of non-Muslims citizens are not regulated by

²⁷ Majid Khudduri, *War and Peace in the Law of Islam*, The John Hopkins Press, Baltimore, 1955, p. 46; also see his, *Al-Harb wa Al-Silm fi Shir’a’ath al-Islam*, Al-Dar al-Mutahidah, Beirut, 1973, p. 17.

²⁸ ‘Abdul Karim Zaydan, *Majmu’ah Buhoos Fiqhiah*, Mu’asasa al-Risala, Beirut, 1402, p. 16.

Muslim international law but by constitutional law – the supreme domestic law of every state although individuals do remain the subjects of international law.²⁹

1.3. *Siyar* as a separate legal science

The early Muslim jurists who are known for their expertise in *Siyar* are Imam Al-Sha‘bi (d. 103/719), Imam Abu Hanifa Nu‘man Ibn Thabit (d. 150/767), Imam Abdul Al-Rahman Al-Awza‘i (d. 163/774), Imam Abu Yusuf (d. 182/798), Imam M. Ibn Al-Hasan Al-Shaybani (d. 189/805), Imam Sufyan Al-Sawri (d.161/769), Imam Al-Fazari, and many others. Imam Sha‘bi was a leading authority from Kufa³⁰ and was sent by ‘Abdul Malik Ibn Marwan (the Umayyad Caliph) to his counterpart of the Roman Empire as an envoy. He was well versed in the history of the campaigns³¹ of the Prophet (PBUH). According to Khateeb Al-Baghdadi (d. 463/1071), ‘Abdullah Ibn ‘Umar heard Sha‘bi talking about these campaigns and was so impressed that he remarked, “As if he has participated with us [in those campaigns].”³² What is clear from these reports cited below is that Sha‘bi has been very good in describing campaigns at the time of the Prophet (PBUH) and his companions. Although historians described him to have expertise in *Siyar* but it is only confined to his knowledge of the campaigns of the Prophet (PBUH) and there is no indication from these sources that he had the know-how of the complex rules regarding *Siyar*. The Muslim jurist who is unanimously credited for treating *Siyar* as a separate legal

²⁹ In the case of Pakistan the Constitutional provisions regarding the protection of minorities are: paragraphs no. six and nine of the Preamble to the Constitution and Article 20 and Article 36 of the Constitution of the Islamic Republic of Pakistan of 1973.

³⁰ See, Ibn Sa‘ad, *Tabaqat*, vol. 6, pp. 246-257; Abu Bakr al-Khateeb al-Bagdadi, *Tareek Baghdad*, Dar al-Kitab Al-‘Arabi, 1401 A. H., vol. 12, pp. 227-233.

³¹ As explained above *siyar* also means campaigns of war.

³² Al-Baghdadi, *Tareek*, vol. 12, p. 230. The same is reported from other sources. For example, see Mullah ‘Ali Qari, *Sharah Musnad Abi Hanifah*, Dar Al-Kutub Al-‘Elmiya, Beirut, 1405, pp. 1411-1412. Abu Hanifa is in the chain of this *hadith*. See also, Nuruddin Al-Haisami, *Majm‘a Al-Zawa‘id*, 3rd edition, 1402, vol. 10, p. 23.

science, as an authority on Muslim international law, one who had expertise of all the rules of *siyar*, and who taught it academically, is Imam Abu Hanifa – probably the leading *mujtahid* of all times.

According to authentic research he was the first *faqih* who used the term *siyar* for the set of rules governing relations between a Muslim state and non-Muslim states during war and peace. The earliest book called *Kitab al-Siyar* was written by Abu Hanifa who in turn dictated it to his disciples especially, Abu Yusuf, M. Ibn Al-Hasan Al-Shaybani, Zufar ibn Huzayl, Asad Ibn 'Amr, Ibrahim Al-Fazari, Hasan Ibn Ziyad Al-Lu'li', Hafs Ibn Ghyas Al-Nakha'i, 'A'afiya Ibn Yazeed, Hammad (Abu Hanifa's son), and many others. Some of these disciples edited these lecture notes and added to them. These lecture notes were in some cases attributed to these disciples rather than Abu Hanifa. For instance, *al-Siyar* of Hasan Ibn Ziyad, *Kitab al-Siyar* of Ibrahim Al-Fazari³³ and *al-Siyar al-Sagheer* of Shaybani.³⁴

Imam Awza'i (d. 157) of Syria criticized Imam Abu Hanifa's opinions on many issues after he came across either his *Kitab al-Siyar* or its edited copy *Al-Siyar Al-Sagheer* by Shaybani.³⁵ Imam Abu Yusuf responded with a rejoinder called *Al-Radd 'Ala Siyar Al-Awza'i* and defended the opinions of his teacher (Imam Abu Hanifa). Imam Shaybani has responded with his *Kitab Al-Siyar Al-Kabir*. This is the *magnum opus* study of *Siyar* and is simply

³³ Ibrahim Al-Fazari, *Kitab Al-Siyar*, ed., Farooq Hamadah, Mu'asasah Al-Risalah, Beirut, 1408.

³⁴ See, Abul Wafa Al-Afghani, Introduction to Abu Yusuf's *Al-Radd 'Ala Siyar 'Al-Awza'i*, Idara Al-Qur'an wa Al-'Uloom Al-Islamia, Karachi, n. d. p. 1; M. Zahid Al-Kousari, *Bulug Al-Amani fi Sirat Al-Imam Muhammad Ibn Al-Hasan Al-Shaybani*, Maktabah Dar Al-Hidayah, Cairo, n. d. p. 18.

³⁵ For details of the life, work and views on Islamic *jus in bello* see Ameer Zemalli, "Al-Imam Al-Awza'i wa Ba'dh Ara'uhu Al-Insaniya", in *Maqalat fi Al-Qanoon Al-Duwali Al-Insani wa Al-Islam*, (Arabic) ed., Ameer Zamalli, ICRC, 2nd edition, 2007, pp. 57-63. It is said that when Imam Awza'i was given either the book of Abu Hanifa or Shaybani he asked 'who wrote this book?' and was told that it is by Shaybani of Iraq. He is reported to have said that 'how could the Iraqis write about this science because they do not know *Siyar*'. He added that the campaigns of the Prophet (PBUH) were towards Syria and Hijaz and not towards Iraq which is conquered only recently. Ibid, p. 59.

unmatchable.³⁶ There are many editions of this latter book.³⁷ Imam Shafi'i (d.204/820) has recorded both books, i.e. *Siyar Al-Awza'i* and *Al-Radd 'Ala Siyar Al-Awza'i* in his treatise *Al-Umm*. The book cites text from Awza'i's as well as Abu Yusuf's books which are followed by the saying, "*Imam Shafi'i said*" and contains criticism of both of them and the opinion of Shafi'i regarding the same issue.³⁸ Hamidullah argues that, "henceforth the word [*siyar*] seems to have become a technical term commonly used by jurists of all times."³⁹

Some scholars⁴⁰ attribute to Imam Zayd Ibn 'Ali⁴¹ (d. 122/740) a book called *al-Majmu' al-Kabir*. It is the combination of two books – *Majmu' al-Hadith* and *Majmu' al-Fiqha* compiled by his pupil Abu Khalid Al-Wasithi. The chapterization of '*al-Majmu' al-Kabir*' are just like the books of *fiqha* (Islamic law).⁴² For example, there are chapters on '*Taharat*' (purification), '*Eibadat*', Sale', Partnership, '*Nikah*' (marriage), '*Talaq*' (divorce), '*Hudood*', (fixed penalty offences), which is followed by the chapter on '*Siyar*'. The division of this chapter is also interesting: it has the first section on *al-Gazwu wa al-Siyar* which is followed by the importance of *jihad*, martyrdom, booty, peace, ... fighting the apostates, rebels and obedience to the Imam (head of state).⁴³

³⁶ The book is only available along with its commentary by Imam Sarkhasi and has been published many times by many different publishers. It was first published in Hyderabad (India) in 1971 but has been printed many times elsewhere.

³⁷ Imam Abu Yusuf, *Al-Radd 'Ala Siyar Al-Awza'i*, ed., Abul Wafa Al-Afghani, Lajnaht Ehya Al-Ma'rif Al-N'umaniya, Hyderabad, 1357 and Idarat Al-Qur'an wa Al-'Uloom Al-Islamiya, Karachi, n. d.

³⁸ M. Ibn Idress Al-Shafi'i, *Al-Umm*, Taba'at Bolaq, reprinted, Dar Al-Sha'ab, Cairo, vol. 7, pp. 303-335. There is a new edited edition of the same book. For the above discussion, see, M. Ibn Idress Al-Shafi'i, *Kitab Al-Umm: Mawsua'a Al-Imam Al-Shafi'i*, ed., A. Badruddin Hasoon, Dar Qutaibah, Beirut, 2003, vol. 15, pp. 239-351.

³⁹ Muhammad Hamidullah, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1968, reprinted, 1996, p. 11.

⁴⁰ Hamidullah is one of them although he is a bit skeptical. See his *The Muslim Conduct*, p. 26 and f. n. 20.

⁴¹ His full name is Zayd Ibn 'Ali Ibn Al-Husayn Ibn 'Ali Ibn Abi Talib.

⁴² See, Imam Abu Zahrah, *Tareek Al-Mazahib Al-Fiqhiyya*, pp. 274, 675.

⁴³ See, Imam Zayd, *Musnad*, Maktabah Al-Hayat, Beirut, pp. 349-363; and Qazi Sharafuddin, *Sharah Majmu' Al-Fiqah Al-Kabir*, Maktabah Al-Mu'aid, Ta'if, 1388, vol. 4, 608, vol. 5, pp. 7-35.

There are two problems apparent in this work: first, Abu Khalid cannot be accepted as the narrator of *Majmu'* because he is accused by the Sunni scholars of fabricating *ahadith*, whereas he is trustworthy for the Zaydiya (the followers of Imam Zayd Ibn 'Ali); and secondly, the way this book was compiled is also questionable. Is it compiled by Imam Zayd and Abu Khalid simply recorded and compiled it from him? Or did he (Imam Zayd) dictate it to his pupils and one of them edited and arranged it later on? However, recent research shows that Abu Khalid's narration cannot be accepted because he has been known to tell lies and fabricate *ahadith*.⁴⁴ Moreover, the book gives special coverage to *Shi'a* jurists of that time but does not mention contemporary great Sunni jurists, and this is why it is simply a narrative. After looking at the subject matter of the book and its comparison with *Mu'atta* of Imam Malik and *Asar* of Shaybani it seems that it has better in contents than *Mu'atta* and is like the books of Shaybani and Abu Yusuf. In addition, the book is influenced by the Iraqi *fiqah* (of Abu Hanifa, Abu Yusuf and especially Shaybani). This is why a researcher has concluded that:

Al-Majmu' is the work of a *Shi'a* scholar who was not enough skilled; that he compiled it from Sunni sources; that his special education reveals strange things in the book. Thus he puts before him the Sunni *fiqah* of his time although he does not mention the same. The earliest time for him could only be the middle of the second century *hijrah* which is the time when *fiqah* exploded in Iraq because of Abu Hanifa, Abu Yusuf, Shaybani, Thawri, and others.⁴⁵

⁴⁴ Imam Ahmad Ibn Hanbal does not consider him trustworthy. Imam Athram, Abu Hatham and Waki'e Ibn Al-Jarrah assert that Abu Khalid was fabricating *ahadith*. Imam Bukhari called him 'Munkir al-Hadith'. He is accused of such things by Ibn Habban, Imam Al-Nasa'i, Imam Al-Dar Qutni and many others. See 'Abdur Rahman Ibn Abi Hatham, *Al-Jarah wa Al-Ta'deel*, Majlas Da'irat Al-Ma'rif Al-Umania, Hayderabad, 1271 A. H., vol. 6, p. 230; and Imam Bukhari, *Al-Tareekh Al-Sagheer*, ed., Mahmood Ibrahim Za'id, Dar al-wa'i, Halab, p. 139; Imam Al-Nasa'i, *Al-Dua'fa wa Al-Matrukeen*, ed., M. Ibrahim Za'id, Dar Al-Wa'i, Halab, p. 300; Ibn Habban, *Al-Majruheen Min Al-Muhadditheen wa Al-Dua'fa wa Al-Matrukeen*, Dar Al-Wa'i, Halab, vol. 2, p. 76; Imam Al-Zahabi, *Mizan Al-'Eitidal*, ed., Ali Al-Bajawi, Dar Al-Ma'rifa, Beirut, vol. 3, pp. 257-258; Ibn Hajr, *Tahzeeb Al-Tahzeeb*, Dar al-Fikr, Beirut, vol. 8, pp. 24-5. According to Imam Abu Zahra the [Zaydis] 'Ulama accept that Abu Khalid has narrated from Imam Zayd. He dispels all objections against Abu Khalid and considers him trustworthy.

⁴⁵ See 'Ali 'Abdul Qadar Hasan, *Nazrat 'Aamah fi Tareekh Al-Fiqh Al-Islami*, Dar Al-Kutub Al-Haditha, 1965, p. 182 and M. Yusuf Musa, 'Athar Nash'at Al-Mazahib, pp. 72-73.

What is crystal clear from the above discussion is that the attribution of the use of the word *Siyar* to Imam Zayd has not been free from error; however, what is very true is that Imam Abu Hanifa has been using the same term to designate international law.

1.4. Shaybani and *Siyar*

It is important to bear in mind that the original book of Abu Hanifa has not come down to us which is why much attention is paid to *al-Siyar al-Sagheer*' of Shaybani discussed above and his *al-Siyar al-Kabir*. The latter book is only found with its commentary by the Hanafi jurist M. Ibn Ahmad Ibn Abi Sahal al-Sarkhasi (d. 1090/483). In Islamic juridical literature it is undoubtedly the most significant *Siyar* work of all times. The Turkish translation of this latter book was published in Istanbul in 1825.⁴⁶ The Arabic edition was first published in 1917 in Hyderabad, Deccan. Hans Kruse considers Shaybani as the father of the legal formation of *Siyar*.⁴⁷ In 1827 Joseph Hammer von Purgstall – a German scholar, who reviewed the Turkish translation of the book *Sharh Kitab al-Siyar al-Kabir*, called Shaybani the Hugo Grotius of the Muslims (a considerable understatement).⁴⁸ However, it is unfair to equate the great Shaybani with Hugo. Historically, however, Hugo cannot be considered as the father of European international law, while Vitoria, and especially Gentili deserve more credit than him for being the first Europeans to separate international law from theology.⁴⁹ Vitoria seems to be familiar with *Siyar*: he

⁴⁶ See, Hans Kruse, "The foundation of Islamic international jurisprudence", *Journal of the Pakistan Historical Society*, III, Oct., 1955, p. 237.

⁴⁷ *Ibid.*, p. 238.

⁴⁸ See, his *Jahrbuecher der Literatur*, 40, Vienna, 1827, p. 48.

⁴⁹ Perhaps the earliest writers on international law in Europe were Spanish Churchmen of the fifteenth and sixteenth centuries who wrote about ethical problems during warfare. Francisco de Vitoria, Professor of Theology at Salamanca from 1526 to 1546, whose *Relectiones theologicae*, published after his death, talks about the expansion

suggested that it was unlawful to kill Muslim children (who are innocent) and women (who are presumed innocent).⁵⁰ Justice Weeramantry gives 16 reasons to prove that Hugo was possibly influenced by *Siyar* (Muslim international law).⁵¹ There is more evidence of this in the literature of Hugo. For example, by stating that, “Between enemies those laws which nature dictates or the consent of nations institutes are binding”,⁵² he emphasizes the principle which requires that a treaty must be honoured or what is otherwise known as *pacta sunt servanda*.⁵³ Sticking to the terms of a treaty is a core principle of Islamic international law since the time of the Prophet (PBUH) as is explained elsewhere.⁵⁴ Moreover, according to Hugo it is necessary for the legality of war that it be waged under the authority of one who holds supreme power in the state. This principle was asserted by the famous Hanafi jurist Imam Abu Yusuf (the first Muslim Chief Justice) when he stated that “No expedition shall be sent without the permission of the head of state or his deputy.”⁵⁵ In Hugo’s opinion a state may wage war in self-defense. This is the unavoidable conclusion according to Islamic international law.⁵⁶ Hugo tried to make war more humane. Again, this is the core area of Islamic *jus in bello*.⁵⁷ Some of the many *temperamenta* of

of international law to the New World (Spanish colonies in Americas). Weeramantry argues that some of these Spanish writers were very much influenced by Islamic law. See C. G. Weeramantry, *Islamic Jurisprudence*, Macmillan, London, & St. Martin Press, New York, 1988, reprinted Sarvodaya Vishva Lekha, 1999, p. 158. Alberico Gentili commonly known as Gentilis, an Italian Protestant who fled to England to avoid persecution and became professor of Civil Law at Oxford was perhaps the first European writer to separate international law from theology and ethics and to treat it as a branch of jurisprudence. His most important work was *De jure belli* published in 1598. Hugo himself was greatly indebted to this book. See, J. L. Brierly, *The Law of Nations*, ed., Sir Humphrey Waldock, Clarendon Press, Oxford, 1963, reprinted, 1981, pp. 25-27. Also see, Lord McNair, “The Practitioners’ Contribution to International Law” III, *Ind JIL*, 1963, pp. 272-273. Brierly argues that when Hugo wrote *De jure belli ac pacis*, published in 1625, he was already so eminent that anything from his pen would have attracted attention. *Ibid*, p. 28. Thus Hugo cannot be equated to Shaybani.

⁵⁰ Francisco de Vitoria, “The second relection on the Indians, or on the law of war made by Spaniards on the barbarians” in A. Carnegie (ed.) *De Indis et de iure belli relectiones*, trans. J. P. Bate, New York, 1917, p. 179.

⁵¹ See, Weeramantry, *Islamic Jurisprudence*, p. 132, & pp. 150-158.

⁵² See Hugo Grotius, *Prolegomena*, pp. 25, 26.

⁵³ See, Hugo Grotius, *Prolegomena*, pp. 25, 26.

⁵⁴ See, my “*The Law of treaties in Islam*” forthcoming.

⁵⁵ Abu Yusuf, *Kitab al-Kiraj*, p. 385.

⁵⁶ See, my, “Islamic *jus ad bellum* and *jus in bello*”, in *Research Papers*, vol. VI, 2006, pp. 779-784.

⁵⁷ See, my, *Ahkam al-Madan’een fi Al-Harb: Dirasah Muqaranah Bain Al-Fiqh Al-Islami wa Al-Qanoon Al-Douwali Al-Insani* (Arabic), unpublished LLM thesis submitted to the Faculty of Shar’iah & Law, International

war that he suggested have been incorporated into current international law.⁵⁸ It is interesting to note that the law of inter-state relations was not called international law by the European writers; it was known as ‘European public law’ (*ius publicum europaeum*; *driot public de l’Europe*)⁵⁹ and only Europeans were allowed to benefit from it. In 1856, the Paris Peace Treaty admitted Turkey (as the first non-Christian nation) to the Concert of Europe.⁶⁰

As a tribute to Shaybani, scholars created Shaybani’s Society of International Law, in Gottingen, Germany. Professor ‘Abdul Hameed Badawi was the first President and professor Salahuddin al-Munjid was its Vice President. In 1970 the University of Paris celebrated, as a tribute to Shaybani, his 1200th death anniversary.⁶¹

In 1966 Majid Khadduri of John Hopkins University, in the search for *al-Siyar al-Sagheer* of Shaybani, translated chapters on *siyar* from another book of Shaybani known as *Kitab al-Asal* or *Kitab al-Mabsut*; wrote a lengthy introduction to it and renamed it *The Islamic Law of Nations*.⁶² This was not the original book. The text of the original book was preserved by Hakim Shaheed al-Marwazi – a Hanafi scholar, in his book *al-Kafi fi Furu’ al-Hanafia*, which was never published till late Professor Mahmood Ahmad Ghazi translated, edited and annotated this original in 1998 under the title ‘*The Shorter Book of Muslim International Law*’.⁶³

Islamic University, Islamabad in 1997. This work will soon appear as “Non-combatant Immunity in Islamic Law”, in my book *The Law of War and Peace in Islam*, forthcoming.

⁵⁸ A detailed and point by point study of similarities between what Hugo stated and the dictates of Islamic international law is needed.

⁵⁹ See, Peter Malanczuk, *Akehurst’s Modern to International Law*, Routledge, London, 1997, p. 11.

⁶⁰ The Treaty of Paris specifically refers to European public law. See, the text in 114 CTS 409. Also see, T. Schieder, “Paris Peace Treaty” *EPIL* 7, 1984, pp. 376-8. Hamidullah calls it ‘public law of Christian nations’. See, Hamidullah, *The Conduct*, p. vii.

⁶¹ See, Sobhi Mahmassani, *al-Qanoon wa al-‘Alaqat al-Duwaliya fi al-Islam*, Dar al-‘Elm Lilmala’een, Beirut, 1972, p. 42, f. n. 2.

⁶² See, Majid Khadduri, *The Islamic Law of Nations: Shaybani’s Siyar*, The John Hopkins Press, Baltimore, 1966, p. 70.

⁶³ See, Muhammad Ibn al-Hassan al-Shaybani, *The Shorter Book of Muslim International Law*, transl. M. A. Ghazi, Islamic Research Institute, Islamabad, 1998.

Shaybani's first book has received much attention which perhaps, is because of his second book *Kitab al-Siyar al-Kabir*. It would not be erroneous to assert that the latter, which happens to be the best book in this science ever written, caused scholars to develop such interest in his first book. Whatever the case may be, it is this great Iraqi jurist of the Hanafi school of thought who is undoubtedly the father of *Siyar* (international law).

1.5. The Sources of *Siyar*

Since *Siyar* is an integral part of the Islamic *corpus juris*, its sources are the same as of Islamic law. There are three primary sources of Islamic law namely, the *Qur'an*, the *Sunnah*, *Ijma'* (consensus) and secondary sources namely, analogy (*Qiyas*), public interest (*maslaha*), custom (*'urf*) and many others. These are also the sources of *Siyar*. However, when one studies the books of Shaybani, Abu Yusuf, and other jurists, one finds many other sources used by them in arriving at a ruling. These include (apart from those mentioned above):

1. The practice of the early Caliphs;
2. Arbitral awards;
3. Treaties;
4. Custom.

Hamidullah has mentioned other sources as well, such as, (1) the practice of other Muslim rulers not repudiated by the jurists⁶⁴, (2) official instructions to commanders, admirals, ambassadors and other State officials; (3) reciprocity; and (4) internal legislation of international nature and unilateral declarations.⁶⁵ However, the last four are already implied in the conduct of the Caliphs, whereas the first cannot be something different from the conduct of the Caliphs as well.

1.6. *Siyar* as the Source of Law

1.6.1 *Siyar* as a source of domestic law

It is interesting to enquire about the status of *Siyar* itself as a source of law, especially in domestic cases involving inter-state relations as well as in law formulation at the international level. At the national level there is one decision of the Pakistani Supreme Court in which Justice Afzal Zullah mentioned Islamic international law specifically. In *A. M. Qureshi v. Union of Soviet Socialist Republics*,⁶⁶ a Pakistani party to a contract claimed damages for breach of contract against the former Soviet Union and its trade representative. The contract involved the sale of military equipment from the former USSR to Pakistan. The USSR claimed state immunity under general international law as well as provisions of the Code of Civil Procedure of

⁶⁴ In this category he mentions the precedent left behind by Muslim rulers such as the Umayyads, 'Abasids, and Awrangzeb Alamghir in India. See Hamidullah, *The Conduct*, p. 23.

⁶⁵ Hamidullah, *The Conduct*, p. 18. Perhaps there is a mistake in the book because on page 18, he talks of internal legislation for conduct regarding foreigners and foreign relations but on page 33, he talks of international legislation and unilateral declarations. Moreover, originally he has given ten sources of *Siyar* but in his explanation he has added another one, making a total of 11 sources.

⁶⁶ PLD 1981 SC 377.

Pakistan.⁶⁷ The case is interesting for more than one reason since four separate decisions were given stating that the former USSR could be sued under contract law in Pakistan. Karam Elahee Chuhan and Nasim Hasan Shah, JJ., (as they then were) reasoned that there was no implied bar – to sue the USSR. Both judges relied on ‘Western’ jurisprudence and case law, Justice Afzal Zullah reached the same conclusion while relying on Islamic international law.⁶⁸ Justice Zullah held that had it been found that under ‘Western’ international law, the Soviet Union enjoyed sovereign immunity and could therefore not have been sued in Pakistan, he would have applied Islamic international law:

Mr. Khalid Farooq Qureshi, the learned counsel for the respondents, tried to spell out an implied bar from the customary International Law but as shown by my learned brothers Karam Elahee Chuhan and Nasim Hasan Shah, JJ., in an elaborate treatment of the subject, the effort has not succeeded. On my part, even if any such implied bar would have been discoverable in what is called customary International Law and that too on the basis other than that of “justice”, I would have, consistently with the view taken in *Haji Nizam Khan’s* case (particularly when there is dissent thereto, so far, rather it is being endorsed and relied upon), applied the Islamic International Law.⁶⁹

Justice Zullah, however, did not give details of how a sovereign state would be liable under Islamic international law. Earlier, as a judge of the Lahore High Court, he has penned another decision which is also relevant in our discussion of *Siyar*. The *State Bank of India v.*

⁶⁷ Rule 11 (d) of Order VII and sections 86 and 87 of the Code of Civil Procedure 1908, which govern the situations under which foreign sovereign entities such as states and office holders of such states can sue and be sued in Pakistan.

⁶⁸ He referred to his earlier decision in *Haji Nizam Khan v. Additional District Judge, Lyallpur*, PLD 1976 Lah 930, in which he held that the formula ‘justice, equity and good conscience’ meant Islamic law to the exclusion of all others. Thus, all areas of law not occupied by statute or binding precedent were to be decided in accordance with Islamic law. The formula ‘justice, equity and good conscience’ was imported from England and effectively used by Anglo-Indian judges to apply English law as residual law to fill any legal lacunae. See, J. D. M. Derret, “Justice, Equity, and Good Conscience”, in J. N. D. Anderson, *Changing Law in Developing Countries*, London, 1963, pp. 114-154. Also see, Martin Lau, *The Role of Islam in the Legal System of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, p. 40.

⁶⁹ At p. 432.

*Custodian of Evacuee Property*⁷⁰ concerned the ability of the State Bank of India to pursue civil actions against the Custodian of Evacuee Property after the outbreak of war between India and Pakistan in 1965. The Defense of Pakistan Ordinance 1965 and the Defense of Pakistan Rules 1965 had prohibited enemy aliens from pursuing civil action against Pakistani citizens. Justice Afzal Zullah interpreted the above-mentioned laws in the light of U.S. case law and common law principles. However, he also discussed the Islamic law of war at length and held that the right of the enemy to pursue civil actions was merely suspended during the period of hostilities but was not completely extinguished.

The above two cases have not been considered noteworthy by authors of Islamic international law. It should be noted that the first decision was given at the height of the Islamization process in Pakistan during the time of General Zia-ul-haq while the second was given much earlier.

Let us see the state practice of Pakistan on another issue. Its' delegation actively participated in the adoption of the Convention on the Rights of the Child, on 20 November 1989. However, the provisions relating to 'Adoption' were found to be repugnant to Islamic law which does not recognize adoption as a mode of filiation. Consequently, Pakistan attached a reservation to its ratification, which reads: "[P]rovisions of the convention shall be interpreted in the light of the principles of Islamic laws and values."

1.6.2 *Siyar* as a possible source of international law

⁷⁰ PLD 1969 Lah 1050.

Some authors are of the opinion that the Islamic *jus in bello* (rules governing the conduct of war) has influenced European laws and customs since the time of the Crusades.⁷¹ According to Baron de Taube the modern public international law of declarations of war was adopted from Islamic doctrine, having passed into chivalric codes during the Crusades, through the Christian church, and subsequently into the modern law of war.⁷²

It is true that Muslim nations did not play a big role in the shaping of international law in general. But the reasons are obvious: Turkey, which was the representative of Sunni Muslims at large, was admitted to European public law (as international law was called then) only in 1856. Turkey has played quite a role in the development of international humanitarian law since then. It did not participate in the 1863 conference which gave birth to the Red Cross Committee, but subsequently in 1865, it ratified the 1864 Geneva Convention.⁷³ Persia – the second Muslim state, followed in 1874.⁷⁴ Since then Turkey participated in every international conference and made some difference till *Calaphat* collapsed in 1924 and Turkey became a secular republic.⁷⁵ A Majority of the remaining Muslim nations that are independent today, were colonized at that time and had no role to play in international law making. However, in the latter half of the 20th century, Muslim states have been playing their part in the shaping of international law. For example, when the UN Declaration on Social and Legal Principles with Reference to Foster Placement and Adoption Nationally and Internationally was under negotiation, most of the Muslim states, including Pakistan, refused to agree to the provisions on ‘adoption’ and considered them as being

⁷¹ See, for example Marcel Boisard, “On the possible influence of Islam on western public and international law”, *International Journal of Middle East Studies*, vol. 11, 1980, pp. 429-50.

⁷² Baron Michel de Taube, “Etudes sur le developpement historique du droit international dans l’Europe orientale” in *Recueil des Cours*, 1926, pp. 393-4.

⁷³ Turkey ratified the Convention on 5th July 1865.

⁷⁴ On 5th December 1874.

⁷⁵ For the role of Muslim nations in general and the Ottoman Turkey and Persia in particular see James Cockayne, “Islam and international humanitarian law: From a clash to a conversation between civilizations” 84 *IRRC*, September 2002, 597-626.

repugnant to the principles of Islamic law. Consequently, the UN General Assembly recognized the principle of ‘*Kafala*’ of Islamic law as an equivalent humanitarian principle that could be applied by states practicing Islamic law.⁷⁶ Moreover, several Muslim member states of the UN – including Pakistan, have attached reservations to their instruments of ratifications/accessions to the Covenant on Social and Political Rights 1966 as well as the Convention on the Prevention of all Forms of Discrimination Against Women of 1979. In addition, Muslim states largely ignored the Hague Convention on Civil Aspects of International Child Abduction of 1980 because of its conflict with some of the Islamic legal norms.

Some scholars consider the integration of Islamic States into the modern community of nations as a form of ‘subjugation’ i.e., “a kind of Europeanization predicated upon the reconstitution of the Islamic *umma* in distinct nation-state units”;⁷⁷ the reality is that, it is ‘accommodation’ rather than ‘subjugation’, the former being a more appropriate term to describe the situation as compared to the latter. The argument of subjugation is based on the presumptions that public international law is a secular law; that Muslim States suspect its legality;⁷⁸ and that *Siyar* was meant for imposing Islamic law on non-Muslim nations. As I have noted elsewhere⁷⁹ all these presumptions are flawed because public international law is not secular in nature as it has accommodated all major civilizations and systems. Article 9 of the Statute of the Permanent Court of International Justice provided that “[A]t every election, the electors shall bear in mind

⁷⁶ Jamshed A. Hamid, “International Law and Pakistan’s Domestic Legal Order”, 4 *Asian Yearbook of International Law*, (1994), 137; and his *The Status of Treaties in Islam: A Comparison with Contemporary Practice*, (Islamabad: Shariah Academy, 2001), 130-131. The above declaration was adopted by the 41st Session of the General Assembly on 20 November 1986 (document No. A/41/896). See in particular para 6, 7 and articles 22 and 23.

⁷⁷ Cockayne, 2002, at 611; Majid Khadduri, “Islam and the modern law of nations”, 50 *American Journal of International Law*, 1956, 353-372, at 358.

⁷⁸ See David Westbrook, “Islamic International Law and Public International Law: Separate Expressions of World Order”, 33 *Virginia Journal of International Law*, 1993, p. 821 and ‘Ali Ibn Nufa’i al-‘Ulyani, *Ahmiyyat al-Jihad*, 1985, Dar al-Tayyba, Riyadh, 1985, p. 459. This book is banned in Saudi ‘Arabia since the start of Islamic militancy in the Kingdom.

⁷⁹ See, my, “Public international law and Islamic international law: Identical expressions of world order”, 1 *Islamabad Law Review*, No. 3 & 4, pp. 425-429.

that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.”

Article 38(3) of the Statute, then provided that the Court should apply, *inter alia*, “[T]he general principles of law recognized by civilized nations.” First, Islam constituted precisely one of the main forms of civilization to which the Statute referred, and secondly, Islamic law is one of the principal legal systems of the world. Islamic law is subsequently one of the sources of international law.⁸⁰ It is wrong to argue that public international law is secular in nature instead it would be more appropriate to conclude that it is ‘neutral’. Muslim States sign treaties when these are not against the fundamentals of Islam; are beneficial for them; can have reservations against un-Islamic provision(s); and, would be bound by their treaty obligations. Finally, *Siyar* does not

⁸⁰ The Statute of the ICJ leaves open the possibility that the ICJ will look to Islamic legal norms as mentioned in Article 38(1) (C). Secondly, international treaties might incorporate norms derived from Islamic legal traditions. Thirdly, the ICJ might be asked by contesting states to look to their reservations based on Islamic law. Fourthly, the Court might look to international legal norms insofar as Islamic legal considerations may have helped to define legal practice. Finally, judges could look to Islamic law to help them determine how an existing legal norm of international law be applied. For a detailed discussion of how the ICJ could use Islamic law, see, Clark B. Lombardi, “Islamic Law in the Jurisprudence of International Court of Justice: An Analysis”, 8 *Chicago Journal of International Law* 85 (2007), especially pp. 91-93 (the author is very critical of the references made by some judges of the ICJ mostly in their dissenting opinions because these judges were not trained in Islamic legal tradition and their contribution is marginal). So far some judges have made only sparing references to Islamic legal traditions and have most often cited secondary works of Islamic law in their discussions. Examples of cases in which Islamic law was cited include: *North Sea Continental Shelf*, 1969 ICJ 3, in which Judge Fouad Ammon of Lebanon wrote a separate opinion and referred to ‘equity’ under Islamic law; *Western Sahara*, 1975 ICJ at 12, in which Judge Alphonse Boni, an ad-hoc appointed by Morocco and Judge Ammon wrote separate opinions and resorted to Islamic law; *Aegean Sea Continental Shelf (Greece v. Turkey)*, 1978 ICJ 3, in which Judge Salah El Dine Tarazi of Syria made a remark about Islamic law; *United States Consular and Diplomatic Staff in Tehran (US v. Iran)*, 1980 ICJ 3, in which Judge Tarazi referred to Islamic law once again; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. US)*, 1992 ICJ 114, in which Judge Ahmed Sadek El-Kosheri and Judge Weeramantry resorted to Islamic law; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den v. Nor)*, 1993 ICJ 38, in which Judge Weeramantry once again resorted to Islamic law; *Territorial Dispute (Libya v. Chad)*, 1994 ICJ 6, in which Libya unsuccessfully argued on the basis of Islamic law; *Advisory Opinion on the Legality of the Threat or Use of Force of Nuclear Weapons*, 1996 ICJ 226; in which Judge Mohamed Shahabuddeen and Judge Weeramantry resorted to Islamic law; *Case Concerning the Gabčíkovo-Nagymaros Project (Hung v. Slov)*, 1997 ICJ 7, in which Judge Weeramantry resorted to Islamic law; *Case Concerning Aerial Incident of 10 August 1999 (Pakistan v. India)*, 2000 ICJ 12; and *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 2001 ICJ 40, in which Judge Pieter Kooijmans argued that in cases in which the ICJ is trying to apply equitable principles and interpret the actions of Muslim states, the ICJ should inquire into Muslim notions of international public law. See, *Qatar v. Bahrain*, 2001 ICJ 12 at 228.

impose Islamic law on non-Muslim nations; instead it only creates obligations for the Muslim States itself in relation to the conduct of war, the resort to war, immunity of diplomats, the regulation of trade, and so on.

Since 1945 most Muslim States have been concerned with their treaty obligations however on many occasions they have forced changes in the drafts and their objections were based on Islamic law in general. More recently their approach has affected the use of the term 'gender' in the ICC statute.⁸¹ Muslim states have at times played a big role in the international law making. This is evident especially in the formulation of Article 1 of Additional Protocol 1 to the Geneva Conventions,⁸² which extended the protections of IHL to those fighting colonial domination, foreign occupation or racist regimes. The presence of non-state actors was recognized for the very first time by IHL; this was something beyond the static model upon which it has long been asserted.

1.7 Conclusion

To sum up, according to classical Muslim jurists *Siyar* means the conduct of the Prophet (PBUH) and his successors during war and peace in their relations with non-Muslim states, rules of dealing with rebels, apostates, foreigners as well as non-Muslim citizens of a Muslim state. However, some of the contents of *Siyar* have shifted to the municipal laws of states and are no more treated under *Siyar* or Muslim international law which is confined to relations between a

⁸¹ Article 7(3) of the Rome Statute states that "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

⁸² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Geneva, 8 June 1977.

Muslim state and other states. A relevant definition of *Siyar* would be, the rules of Islamic law that regulate relations of a Muslim state with other states and that are binding on the Muslim state under *Shari'ah*; this can be appropriately stated to be Muslim or Islamic international law. This can be stated to be Muslim international law. Abu Hanifa was the first Muslim jurist who taught *Siyar* as a separate legal science. His disciple Shaybani was perhaps the first jurist whose book *al-Siyar al-Sagheer* became widely known as the first authentic book on *Siyar*. Abu Hanifa's views contained in Shaybani's works caused the generation of good and meaningful literature in this discipline and in a short span four books were written on this topic, two of them by Shaybani. Shaybani's second book (*Kitab al-Siyar al-Kabir*) is now considered the greatest book of all times. This is why he can rightly be called the father of *Siyar*. The attribution to Imam Zayd of a book having a chapter on *Siyar* is not true.

Early European writers on international law, such as Vitoria and Hugo, were acquainted with *Siyar* as their books are perhaps influenced by it. The Turkish Ottoman Empire due to its Caliphate system has played quite a role in the shaping of IHL. Muslim states have been refusing to ratify/accede to international conventions when their provisions are against Islamic law. The participation of Muslim States in public international law cannot be described as subjugation but rather a kind of accommodation of the Islamic legal system and the Islamic civilization provided for by the very nature of international law.