The Origin and Rise of International Law and the Islamic Model

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Abstract

Islamic law, within half a century of its birth, began to operate as international law. The Islamic empire came to be divided into many states extending from the Mediterranean up to the Far East with independent rulers usually called sultans. For the most part, they were all under the authority of a central caliphate or owed allegiance to it. It is this model that appears to have inspired modern international law. Even the concepts of "civilized" and "uncivilized" states show remarkable similarity with the dar al-Islam and dar al-harb. The international role of Islamic law has been dormant for many centuries due to colonization, but the time has come for the revival of this role. The growth of Muslim civilization, which will reach fifty percent of the world population within a hundred years, as well as the non-recognition of its principles by the body of international norms, will compel the reemergence of this law on the international scene.

Key words: *Islamic Law, International Law, Caliphate, Dar al-Islam, Dar al-Harb, Civilization, Colonization*

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Introduction

> A people is first conquered when it acquiesces to a foreign vocabulary, a foreign conception of what is law, especially international law.
>
> Carl Schmitt

The meaning of international law is based entirely on the European model that emerged after the Treaty of Westphalia in 1648 and the rise of modern states. Just before the emergence of the European model of states, the Islamic model based on a large number of Islamic lands and sultanates had worked on the basis of a uniform law that applied in different variations through the schools of law that represented different facets of the same legal system.

It is very difficult to believe that the European model had not been influenced by the then prevailing Islamic model. The Europeans using colonization and brutal force gradually imposed their own model on the rest of the world, especially the colonies that were given independence later. In this model, the legal principles followed by the present international law are those of Western civilization, in particular those of the civil law prevailing in Europe.

Islamic law that had once operated as international law in a large part of the then known world was systematically and intentionally kept out. Consequently, not a single principle of this vibrant law has been included in the prevailing international law. Although Muslims represent almost one-third of the entire world population today, lawmaking at the United Nations has been designed in such a way that Muslim nations cannot insist on the inclusion of their laws within the multilateral agreements and international conventions.

In this article, an explanation of the two models though an elaboration of the meaning of "international law" is explained the meaning of international law is well known, but it is essential to elaborate it for the Muslims once again, in our own way.

2. Defining International Law

Our purpose here is not to study international, but some detail becomes unavoidable. The study of international law begins by facing a variety of terms with related meanings. Some of these terms represent ideas or concepts that are no longer current or have become obsolete. The terms are: "international law," "law of nations," "public international law," "private international law," "universal international law," "general international law," "regional international law," "particular international law," "international morality," "international comity," "regimes," and "civilized states." All these terms help in understanding and refining the meaning of modern international law, but in some ways they hinder such understanding. It is, therefore, essential to shed some of these terms before an attempt is made to define international law in earnest. We will begin by clarifying a few of these terms, while others will be dealt with through the definitions presented.

2.1 International Law as the Law of Nations

Today, the term "law of nations" and "international law" are not synonymous, but at some stage in history, they were. "Law of nations" is the older term for the rules governing relations between the people of different lands. In French it is called "*droit de gens*," while in German, Dutch, Scandinavian and Slavic languages the older terminology is still in use: "*Völkerrecht*," "*Volkenrecht*," and so on.[1] It can be traced back to the Roman concept of *jus gentium* (law for other nations) as distinguished from the *jus civile* (law for Romans), and is to be found in the writings of Cicero.[2] The word "nations" in this term

does not mean "states," because states that are entities with a legal personality had not come into existence as yet; they came into existence in the sixteenth or seventeenth century. With the rise of the states, the terminology started shifting meanings, and jurists like Bentham maintained that *jus gentium* was no more than "the mutual transactions between sovereigns,"[3] in other words a narrow concept. In contrast, the term *jus inter gentes* was considered much wider and conveyed the meaning of "law between the peoples" or the body of treaty law. It was this term that Bentham translated to mean "international law." The terms "*Völkerrecht*" and "*Volkenrecht*," mentioned above, apparently identify this wider meaning.

As compared to this, in Islamic law, the term *siyar* (relations with non-Muslims) is defined by al-Sarakhsi as "the strategy of Muslims in dealing with the polytheists of the dar al-harb (enemy territory), those among them with whom there is a truce, those seeking safe custody, those who are the *ahl al-dhimmah* (those under Muslim authority on the basis of a contract) and those who are apostates."[4] The focus in this meaning is on individuals and their faith, that is, "peoples," and not on sovereigns. A study of *siyar* shows that it is a law based on treaties concluded right from the birth of Islam.

The definition given by al-Sarakhsi focuses only on those regions that are at war with the Muslim lands. It talks about: how war is to be waged and truce concluded; how visas are to be granted and trade carried out with the enemy; and how the lands and other matters of governance are to be carried out in these areas. Scholars have considered this to be all that Islamic law has to say about international law. This definition does not talk about, for example, how Egypt would deal with the Centrals Asian states or with Syria and Iraq for that matter, and how all these regions will deal and trade with Indonesia and Malaysia in the distant east. The definition does not talk about wars within Muslim lands and regions or trade between them. It also

does not talk about matters of personal law or the rights of the children and the poor of these regions. What we are implying here is that to understand the internal law of Islam, one has to examine the laws that deal with and manage the dar al-harb, and those that manage matters within the dar al-Islam (Muslim territory).

Accordingly, the term *jus inter gentes* comes much closer to the meaning of *siyar*, as used in Islamic law. The term *siyar* does not carry within it the meaning of states rather it conveys the meaning of treaties between peoples. Further, *siyar* was a law that dealt not only with peoples, but also with individuals in certain cases, as in the case of apostates and those seeking visas.

Today, however, "law of nations" is defined as "the body of legal rules binding on states in their international dealings with other states."[5] The word "states" when it was incorporated into the definition of international law also brought with it the concept of "civilized states." Thus, Oppenheim, a highly respected authority in international law, defined international law as, "Law of Nations or International Law is the name for the body of customary and treaty rules which are considered legally binding by civilized States in their intercourse with each other."[6] If we replace the term "civilized states" by the term "Muslim lands," it will become obvious what we mean by Islamic law as international law: "civilized states" means exactly what we mean by "dar al-Islam." The powerful caliphate of the Ottoman times that flourished a few centuries preceding the Treaty of Westphalia, a caliphate that was acknowledged by many as "civilized Muslim lands" extending up to Indonesia must have exerted a powerful influence over the Western model of international law.

The term civilized has been criticized by writers as being demeaning, and pertaining to the days of colonization. Article 38 of the ICJ uses the term, as do all writers and courts. It has been maintained by others that "civilized should not be seen as a

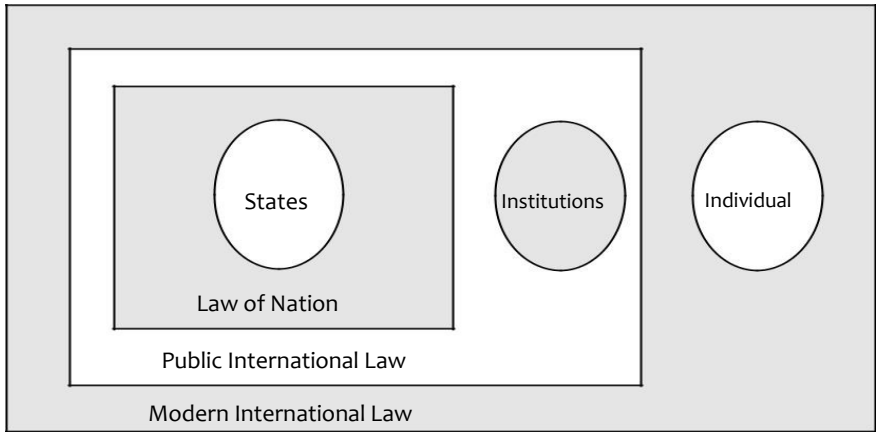
demeaning term; the Statute is merely referring to states that have reached an advanced state of legal development."[7] It appears that "civilized" meant that those who were not civilized could be conquered, brutalized and deprived of their resources without bothering about "civilized" morality. In any case, this definition treats states as the only subjects of international law. In this context, states that are "not civilized" may be referred to as the "dar al-harb" if we compare early Western international states law with Islamic law as international law.

International law today is considered to regulate the relations between states, institutions and individuals as well in certain cases. The change took place gradually; however, certain writers argue that the core meaning of the term international law still applies to states. Bentham first used the term "international law," when he translated the Latin term *jus inter gentes* (literally "the law governing relations between peoples"), and since then the term has been confined to this core meaning. Writers like Akehurst have argued that international law still applies, in reality, to states. "The prevailing positivist doctrine of the nineteenth century and first half of the twentieth century held that only states could be subjects of international law, in the sense of enjoying international legal personality and being capable of possessing international rights and duties, including the right to bring international claims."[8] This approach was adopted consistently even though with time certain institutions were recognized as having rights under international law. Later on, many intergovernmental organizations were recognized. Nevertheless, such recognition comes through treaties between states and these institutions are really based in the territories of such states. The learned writer acknowledges that while definitions of international law have started including subjects other than states in the meaning, international law is primarily law that governs the relationship of states.

As late as 1927, the Permanent Court of International Justice upheld the same concept, when it was called upon to decide a dispute between France and Turkey. The court tried to lay down the parameters of international law in the following words:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[9]

Fig.1: The evolution of International Law



Source: Inspired by Ray August

Even more recent writings exhibit the same emphasis on states being the real subjects of international law:

> "International law" is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another. As states have formed organizations of themselves, it has come also to be concerned with international organizations and an increasing concern

> with them must follow from the trend which we are now witnessing towards the integration of the community of states. And because states are composed of individuals and exist primarily to serve the needs of individuals, international law has always had a certain concern with the relations of the individual, if not to his own state, at least to other states … even the relations between the individual and his own state have come to involve questions of international law ….

Nevertheless, international law is and remains essentially a law for states and thus stands in contrast to what international lawyers are accustomed to call municipal law.[10]

2.2 Modern International Law

Consequently, the matter of the definition of international law really rests on who are the true subjects of international law: states alone or institutions and individuals as well. A change in thinking really began with the Nuremberg War Crimes Tribunal in 1946 when it raised questions about the international obligations of individuals.[11] This could be one reason why the Universal Declaration of Human Rights, 1948 suggested the possibility of individual international rights.

Once the United Nations was established, it was followed by the creation of a number of other supra-national organizations. The determination of their status within the community of nation states became extremely important. In 1949, the International Court of Justice was asked by the General Assembly of the United Nations for its opinion on matters arising out of the assassination of a UN representative in Jerusalem. In its judgment, the court declared that the United Nations Organisation had a legal personality and was a subject of international law. Thus, it was capable of possessing international rights and duties, and had the legal capacity to maintain its rights by bringing international claims.[12] It was gradually

acknowledged that modern international law has a wider role to play and its subjects include states, intergovernmental institutions and even individuals in some cases. The definition of international law began to change in the writings of specialists or publicists as they are called. The famous Hersch Lauterpacht defined it as follows:

> International law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not exclusively, upon sovereign states and which owe their validity both to the consent of states as expressed in custom and treaties and to the fact of the existence of an international community of states and individuals. In that sense international law may be defined more briefly (though perhaps less usefully), as the law of the international community.[13]

Ray August, defining international law, says: "International Law is the body of rules and norms that regulates activities carried on outside the legal boundaries of nations. In particular, it regulates three international relationships: (1) those between states and states, (2) those between states and persons, and (3) those between persons and persons."[14] This definition is quite adequate when the subjects of modern international law are taken into account. The figure above, inspired by Ray August, distinguishes the meaning of modern law from other meanings.

Starke defines it as follows: "International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:

(a) the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and

(b) Certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community."[15]

Conway Henderson provides a precise definition with which we will end the discussion of the definition of international law. He says: "International law is the collection of rules and norms that states and other actors feel an obligation to obey in their mutual relations and commonly do obey."[16] The words "other actors" obviously include intergovernmental bodies and individuals.

2.3 Can Islamic Law Recognize States and Institutions as Subjects

A state is a legal person that owns a particular territory. This gives this legal person exclusive control over everything that exists within that territory, and it also gives it the right to deal with whatever exists outside this territory. The Muslim concept of the "*ummah*" does not have these features, as that is a mere community, or an association of persons that does not have legal personality. It is more like a large number of partners who jointly own a particular territory and whatever has come under its authority.

As the modern state owns its territory and everything within it, anything that is done within its territory has to be done with the permission of this legal person, even acts of worship. This inserts a wedge between the individual and his Creator. In other words, the individual can communicate with his Creator (at least when speaking out loud) only with the permission of the state. Only those things can be done that are permitted by the state. Thus, if the Qur'an says, "Verily, the *hukm* (command or law) belongs to Allah, and no one but

Allah," it cannot be applied directly. We leave the reader to ponder over this. The reason that this concept of legal person or state cannot be compatible with Islamic law is that this law revolves around an *ahd* or covenant that a human being has with the Creator; a fictitious legal person cannot have such a covenant with the Creator of human beings.[17] The only way that the legal person, state or a corporation can be accepted by Islamic law is when such a legal person is legally assumed to be the "agent" of the group behind it, whether this is the *ummah*, the shareholders or even an individual. In other words, the state cannot own the property; it belongs to the *ummah* and is owned by it. The corporation cannot exclusively own its assets, they belong to the shareholders as if it were a very large partnership.[18]

The only subjects that Islamic law will recognize then are individuals and groups, even when such groups are called peoples and nations. Institutions, organisations and associations will be seen as true agents of these peoples or groups and not independent persons in their own right. Muslims will, of course, agree or disagree with the statements made under this section, but that is the whole idea. At least, they should think about the problem. If they do not see a problem here without discussion or arguments, then there is a problem with their status as Muslims. What we are saying here is that if, for example, the United States of America drops atomic bombs over Hiroshima and Nagasaki, the American people cannot turn around and say that it was the "state" that is guilty of such an attrocity, and we as a people are innocent or that we too are victims of this "state." Islamic law will tell you that the "state" has no real existence, it is merely your agent, and you as a people are directly responsible and accountable for the acts of your agent the "state." For an understanding of the meaning of international law, from the perspective of Islamic law, there are many other topics like the subject matter and scope of international law, whether international law is really law, what

functions it performs and so on. It is not our purpose to pursue those ideas here. We may, therefore, move straight to the origins of international law.

3. The Origins of International Law

The idea of international law is usually linked with the term *jus gentium*, which was first used by Marcus Tullius Cicero (106–43 B.C.).[19] Cicero did not clearly define *jus gentium*, but he did refer "to lesser societies made up of *gentes*, or those formed into cities."[20] He pointed out the ancients desired two kinds of law: "the law of nations and civil law—the former ideally being a part of the latter."[21] In other words, *jus gentitum* or the law meant for lesser societies was actually a part of the *jus civilie* or the law of civilized people. The idea of "civilized societies," thus, appears to have emerged from here, and is found in legal documents even today.[22] There are others who link the idea of international law to the rules of the ancient civilizations of China, the Greek city-states, the Indian states, and Persia in the dealings of these entities with outsiders. A favorite point of other writers is that the Mesopotamian communities concluded treaties as early as 3100 B.C.[23] We have, however, given our own suggestion of "civilized states" being the equivalent of dar al-Islam.

3.1 Early Developments Summarized

The development of international law is traced as follows:

1. **Collapse of the Roman Empire and the Rise of Christendom:** With the disappearance of Roman rule, and the rise of the Islamic Empire, Europe lost its unity under an effective central authority. The Medieval Age (476–1350 CE) overtook Europe, bringing in its wake a mishmash of entities, including manor estates, duchies, walled cities, monasteries, and fiefdoms ruled by kings. As for unity, there existed only a loose order of overlapping authorities.

This authority was vested in the Roman Catholic Church and the Holy Roman Empire. Together, these overlapping authorities headed a ramshackle society in Western Europe known as Christendom.[24] At this time, the Muslim lands existed as a highly inter-linked and well-knit body of territories and peoples following an international law called Islamic law.

2. **The Legacy of Rome:** Rome left behind the important legacy of the Justinian Code, the apex of Roman law compiled between 528 and 534 CE. It is said that law was rediscovered by Europeans centuries later, and it set the basis for the code laws of European states, other than that of England. It also imparted the idea that if Rome could have a special law governing relations with the peoples living on the periphery of their empire, then Europeans might have law among independent kings. *Jus gentium* no longer applied to the inferior barbarians outside the boundaries of the Roman Empire but to the rudimentary "civilized" states of Europe. Here we may recall that the Justinian Code had been lost and was rediscovered at a time when the Islamic civilization was at its zenith. Is it possible that the glosses written on this code were influenced by the all-powerful Islamic law that dominated the world scene at that time? Research from this perspective may turn up new facts.
3. **The Dream of a Christian Kingdom in Europe:** The early efforts to establish a Christian empire were made by Charlemagne (742–814 CE). About 150 years after Charlemagne's death, the Holy Roman Empire tried to pull his empire back together. Usually governed by a German emperor, with the approval of a Roman Catholic Church. This in itself shows the tremendous influence the dominant Islamic empire must have exerted. The Holy Roman Empire existed from 962 until 1806. Napoleon Bonaparte dissolved it in 1806 after the Empire had been considerably diminished. Voltaire (1694–1778), the famous French philosopher, denouncing the

Empire in an artifice, reportedly said that it was "neither Holy, Roman, nor an Empire."

4. **Reformation, Renaissance and the Rise of States:** The Reformation devastated the Catholic religious monopoly over Europe. This period started in 1517. Martin Luther, a Professor of Theology, began the reform movement by initiating a debate over the corruption and doctrine of the Roman Catholic Church. Many sects of the Protestant faith were created, which in turn led to the division of Europe into Catholic and Protestant states. It led ultimately to the Thirty Year War (1618–48).

   The Renaissance also contributed to the making of strong kings and countries by promoting commerce, art, science, and a new work ethic. A new merchant class, or bourgeoisie, arose that could now offer taxes and loans to kings enabling them to develop professional armies equipped with latest military equipment. The kings brought the nobles under their control and on gaining strength stopped acknowledging the authority of the Holy Roman Empire. Private business law, known as merchant law, was also developed. We need not mention here the role that the Islamic civilization had to play not only in the Renaissance and Reformation but also in the development of the law merchant, the *lex mercatoria*.

5. **The Thirty Year War and the Treaty of Westphalia:** Religious and political causes led to the Thirty Year War. Ultimately, the 1648 Peace of Westphalia ended the Thirty Year War. Underlying it was the thinking of Jean Bodin (1530–1596) *that kings and their states should enjoy their sovereignty as legal equals and be able to act independently of each other. A critical rule that emerged was that states could not interfere with one another in internal matters for religious or other reasons.* Without the guidance of the Emperor's authority, sovereign kings accepted new rules on how to deal with

one another.[25] The rules based on the customary practices of European states and the writings of philosophers led to the creation of the new European society, a society that had been forming before 1648 and continues to develop today, but now on a global scale.[26] Research must be undertaken to determine the extent to which this new European society owes its development to the Islamic civilization and to Islamic international law.

Malanczuk has recorded certain important events that show the development of international law after the Treaty of Westphalia:[27]

- **The French Revolution of 1789** challenged the basis of the existing system by advocating the ideas of freedom and self-determination of people.
- **The Vienna Congress of 1815** made the second attempt in history to create a collective security system and was somewhat more successful as compared to the earlier efforts.
- **Paris Peace Treaty of 1856.** The Crimean War, in which Russia was defeated by the alliance of France and Great Britain, supported by Piedmont-Sardinia and Turkey, ended with the Paris Peace Treaty of 1856.
- **The Balkan Wars of 1912/13.** The Berlin Congress of 1878, failed to solve the Balkan problems and the struggle of European powers over the distribution of spoils emerging in the Orient from the disintegration of the Ottoman Empire culminated in the Balkan Wars of 1912/13, bringing the Concert of Europe to its end.
- **Colonization began in certain lands.** European expansion abroad in the interest of trade and commerce was promoted in England, the Netherlands and France by ruthless profit-making companies, such as the British East India Company, enjoying privileges which permitted them to perform state functions in overseas territories.

- **European nations recognized certain empires.** The Europeans recognized the Mogul Empire in India, the Ottoman Empire, Persia, China, Japan, Burma, Siam (renamed Thailand in 1939) and Ethiopia as established political entities, but they were aware that these states did not play a major role in global affairs. By the Paris Peace Treaty of 1856 Turkey was even expressly admitted (as the first non-Christian nation) to the Concert of Europe.
- **Some nations resisted colonization, but others could not.** The Ottoman Empire found it difficult to accept the Christian nations it was confronted with at its borders in Europe as equal and insisted on its superiority. Similarly, China, "the empire in the center of the earth," preferred isolation to contact with foreigners, from whom nothing more than tribute was expected to be due.[28] The Moghul Empire did not display such wisdom.
- **Belief in the superiority of the "white man."** By about 1880 Europeans had subdued most of the non-European states, which was interpreted in Europe as conclusive proof of the inherent superiority of the white man, and the international legal system became a white man's club, to which non-European states would be admitted only if they produced evidence that they were "civilized."
- **The Monroe Doctrine and American international law**. The Monroe Doctrine, which stated that further efforts by European nations to colonize land or interfere with states in North or South America would be viewed as acts of aggression, requiring U.S. intervention, led to independent developments. South American states attempted to protect themselves against foreign intervention and European dominance by formulating a new regional American international law.
- **Resistance by Japan finally put an end to the invincibility of the "white man."** Japan had modernized by adopting Western technology and ways. Finally, the end of white rule and the

complex process of decolonization in Asia was then brought forward by Japanese aggression and initial victories in the Second World War, which helped to destroy the myth of the invincibility of the European colonial masters.

The crux of the matter is that the modern system of international law is a product of the last four hundred years, and coincides with the emergence of modern states having legal personality.[29] It is said that it grew out of the usages and practices of modern European states in their commercial intercourse and communications. It was influenced to some extent by the writers and jurists of the sixteenth, seventeenth, and eighteenth centuries, who first formulated some of its most fundamental tenets.[30] The law remains tinged with concepts such as national and territorial sovereignty, and the perfect equality and independence of states, that owe their force to political theories underlying the modern European state system. Weaker states were compelled to join this system, after decolonization, due to economic or other pressures, because they had nowhere else to turn to.

The legal and political developments listed above are important for understanding the development of international law, however, it is necessary to list some underlying causes. Conway quoting Martin Wight says that international law began with the sixteenth-century debate in Spain over the status of "Indians" in the Americas. Did Spain have the right to absorb much of the Americas in the western hemisphere into their empire by refusing to recognize any rights on the part of the indigenous peoples to their own lands? The Spanish and other Europeans came to view the Americas as terra nullius, that is, land belonging to no one and subject to European conquest. The interests of the indigenous peoples were simply brushed aside.[31] In reality, the same approach was adopted with respect to all "uncivilized" people whose lands were colonized. All this was done to

meet the commercial needs of European nations. The easiest way to do this was by grabbing territory belonging to other nations. International law, then, began as an understanding between the European nations on how the wealth of other lands will be shared. We have already indicated a probable basis of International law, but the following may also be kept in mind.

1. The primary need for international law is the security of transactions related to banking, commerce and international trade.
2. In fact, it was the rise of the commercial classes that led to the development of international law. The role of these classes in the wars in Europe and in the first and second world wars bears ample testimony of this fact. Most wars have been the by-product of economic domination. The East-India Company, it may be recalled, started as a commercial enterprise.
3. These classes created the modern corporation with an independent legal personality. The same model was imposed on the kingdoms of Europe, which were organized around the concept of legal personality for carving out modern states as independent entities.
4. The concept of state was then developed on the basis of territory and it was this ownership from which many legal rules emerged.

4. The Possible Influence of the Islamic System

In the above paragraphs, we have stated that modern international law was confined to Europe in the early stages, and the European states were more like an international society that carried out colonial campaigns in the rest of the world. It was only after the first World War that international law really began taking the shape of an "international" law. After the second World War, the smaller states in Asia and Africa joined for one reason or the other, and this gave this

European law a true international character. It is, therefore, natural for Western writers not to acknowledge the role played by the Islamic Empire and by Islamic law in the development of international law.

Some Western writers, or publicists as they are called, do mention the existence of the Islamic legal system, but only as a passing reference.[32] One reason for this is that Muslims have been engaged in the discussion whether Imam Muḥammad al-Shaybani, the author of *al-Siyar al-Kabir*, was the real "father" of international law or whether it was Hugo Grotius. The matter, in our view, has to be examined from a different perspective. Islamic law, the law of *siyar* in particular, had detailed rules about jus ad bellum (law to begin war, often understood as war for a just cause) and *jus in bello* (law of war), the basis for which is found in the military campaigns of the Prophet (peace be on him). Nevertheless, these rules were followed unilaterally by Muslims and not by non-Muslims. The brutality exhibited by the crusaders, in violation of all human norms, in Palestine is a matter of recorded history. Further, when the Islamic empire was at its zenith, Europe and other areas, except China, were more like "uncivilized" nations. Thus, the rules framed by Muslims for the conduct of war were not followed by the rest of the world. Consequently, Islamic law cannot be said to be international law in this sense.

Islamic law, however, was international law in another sense. The Islamic empire ultimately stretched from Spain at one end to Malaysia, and Indonesia at the other or from Africa to Sicily and certain areas of Europe. In the later centuries, this empire was not really one nation, but was composed of many sultanates, or countries, some of which were empires in their own right, like the Moghul Empire in India. The position of the Khalifah became more like the head of an international organization whose approval had to be sought for validating the rule of the sultans. In other words, there were multiple

sultanates in this huge area, and some of the sultans were extremely powerful.

The map provided shows the Islamic world at the time the Treaty of Westphalia was concluded. It shows a large number of states. Islamic law applied uniformly across this huge area in every state, with variations according to the school followed. It shows three empires, but they all recognized and owed allegiance to the Khalifah. Trade was carried out among the multiple sultanates on the basis of Islamic law, and many other types of laws were also applied uniformly. When there were wars among the sultanates, the laws of war were also followed to the extent applicable to Muslims.[33] Muslim traders spread all over the world and influenced the rules of trade and commerce. The word *aval* (endorsement) is still used in France for the Islamic *hawalah*. The rulers in Europe learned much from the Islamic legal and other systems.

Fig.2: Islamic world at the time of Treaty of Westphalia

Source: World Atlas Book

Reformation and Renaissance in Europe were also the result of Muslim works in the arts, law and the sciences. Many universities

established in England and Europe followed the model of the *madaris* established in Spain. Islamic law also had a direct impact on Europe, especially during the days of Sulayman Alishan. Acknowledging this, Joseph Schacht, the well-known Orientalist, said that this law was "the swiftest law in Europe."

The facts stated clearly indicate a legal system that prevailed over much of the known world in its time, and operated in a much more effective way than international law does even today, must have had a very deep impact on the development of the European international society or law. The reason is that the European civilization was in direct contact with this system at the time of the birth of its international law. In fact, this influence started much earlier.[34] Hinsley, among other things, has the following to say:

> So much was this so that the possibility arose that Europe would develop into a single theocracy on the lines of Islam when it had lost the political unity which Byzantium managed to preserve. … But the Pope, like the Caliph, did not govern; and the law which he announced—the canon law—was not a law but a morality which recognized no distinction between the religious, political and social fields. … Even so, the papal theocratic argument could not come to dominate political thought and practice in Europe to the extent that it dominated in the Islamic world. … Muslims sometimes described the Pope as the Caliph of the Franks, as the Latins often confused the political status of the Caliph with the primarily ecclesiastic position of the Pope. In truth, however, the Pope could be only the Caliph of the Messiah. Nothing that he could do could prevent Emperors from regarding his claim to be more than this as what it was in fact—"a usurpation of an established imperial right to rule."[35]

The "Islamic model of international law" was thus visible for European "eyes" before they began creating their own model. It is, however, not the fault of Western publicists that this model is ignored in their writings. The fault lies with Muslim writers and countries who have yet to emerge from their "inferiority complex" acquired during colonization. Muslim scholars need to devote their energy to the discovery of the details of the Islamic model. The population of the Muslims in the world is about to touch 2 billion, which is nearly one-third of the total population. In about another 100 years or less the Muslim population will be one-half or more of the total world population. It should be considered natural that some of the principles and fundamentals of this civilization will be taken into account by international law. Not a single principle, however, has been acknowledged in the numerous documents called declarations, treaties, conventions and protocols when these instruments now cover almost every aspect of human life, even very private matters. Only lip-service was paid to these principles in an arbitration case: *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic (1977)*. Dr. Sobhi Mahmassani was the sole arbitrator so he brought in some discussion of a few principles of his own accord but without the principles having any bearing on the case.

As stated, the norms of Islamic law have not been recognized in the prevalent international law, which is based on European-Anglo-American ideas and principles. The Muslim population of the world is on the rise and will soon surpass all others. This will compel the recognition and application of the principles of Islamic law. The international community will have to recognize these principles and apply them; there is no way that this can be avoided.

5. Conclusion

Islamic law has, with the rise of the modern state and the resulting colonization, been compelled to remain dormant for the last

several centuries. The law must reemerge now in its proper role at the international level and prepare to make the contribution that Muslims require. It must recognize the transactions of the modern world and begin to pass them through the sieve of its sources, in order to see what can be "Islamized" and what cannot. The modern world with its rapid and complex means of communication now appears ready to witness the reemergence of this law. The growth of this law has remained stunted within the fold of the "state." It needs to reemerge in its free form on the world scene even if it is not acknowledged by international law and its institutions and even by the states.

Notes and references

[1] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997), 1.

[2] Akehurst citing Cicero, *De officiis*, lib. III, 17, 69. *Ibid.*

[3] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907), 327.

[4] Shams al-A'immah Sarakhsī, *Kitāb al-Mabsūṭ*, ed. Abū 'Abd Allāh Ismā'īl al Shāfi'ī, 30 vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 2001), vol. 10, 3.

[5] Ray August, *Public International Law: Text, Cases and Readings*, 1st ed. (New Jersey: Prentice Hall, 1995), 2.

[6] L. Oppenheim, *International Law*, vol. 1, 8th ed. (1970), 4–5. Earlier, in 1890, Hall had said: "International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of the country, and which they also regard as being enforceable by appropriate means in case of infringement." W. E. Hall, *A Treatise on International Law*, 3rd ed. (Oxford: Clarendon Press, 1890).

[7] Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), 8. This is worse than saying civilized.

[8] Malanczuk, *Akehurst's Introduction to International Law*, 1.

[9] *The Lotus case,* PCLJ Ser A, No 10 (1927).

[10] C. Parry and M. Sorensen (ed), *Manual of Public International Law (*London*:* Macmillan, 1968).

[11] "The Nuremberg and Tokyo Tribunals set up by the victorious Allies after the close of the Second World War were a vital part of this process. Many of those accused were found guilty of crimes against humanity and against peace and were punished accordingly. It was a recognition of individual responsibility under international law without the usual interposition of the state and has been reinforced with the establishment of the Yugoslav and Rwanda War Crimes Tribunals in the mid-1990s and the International Criminal Court in 1998." Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 46.

[12] *Reparation for Injuries Suffered in the Service of the United Nations case*, ICJ 1949, at p. 174 of Report. See also Shaw, *International Law*, 47: "International organisations have now been accepted as possessing rights and duties of their own and a distinctive legal personality. The International Court of Justice in 1949 delivered an Advisory Opinion in which it stated that the United Nations was a subject of international law and could enforce its rights by bringing international claims, in this case against Israel following the assassination of Count Bernadotte, a United Nations official. Such a ruling can be applied to embrace other international institutions, like the International Labour Organisation and the Food and Agriculture Organisation, which each have a judicial character of their own. Thus, while states remain the primary subjects of international law, they are now joined by other non-state entities, whose importance is likely to grow even further in the future."

[13] Hersch Lauterpacht, *Collected Papers,* vol. 1 (Cambridge: Cambridge University Press, 1970).

[14] August, *Public International Law*, 1.

[15] He then adds that this definition goes beyond the traditional definition of international law as a system composed solely of rules governing the relations between states only. I. A. Shearer, *Starke's International Law*, 11*th* ed. (London: Butterworths, 1995), 3.

[16] Conway W. Henderson, *Understanding International Law,* 1st ed. (West Sussex: John Wiley & Sons, 2010), 5.

[17] For the details, see Imran Ahsan Khan Nyazee, *Islamic Legal Maxims* (Islamabad: Federal Law House, 2013).

[18] For a very detailed discussion, see Imran Ahsan Khan Nyazee, *Corporations in Islam* (Islamabad: Federal Law House, 2007).

[19] Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2010), 6.

[20] *Ibid., 7.* Wolff called *gentes* "the set of people who live in association in a city. These people are to be thought of as singular, free persons living in a state of nature. Under the influence of Hobbes, he takes as his point of departure a state of nature that he applies as much to persons as to *civitates*. Departing from that English philosopher, however, he considers it a nature of moral character." *Ibid.,* 27.

[21] *Ibid., 7.*

[22] Gaius spoke of *jus gentium* at the beginning of his *Institutes* and contrasted it with *jus civile*. He said that civilized peoples—that is, those organized according to law and custom—govern themselves partly by their own law and partly by the law common to all people. *Ibid*, 9.

[23] Henderson, *Understanding International Law,* 9; see also Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Cheltenham, UK: Edward Elgar Publishing Limited, 2012), 6–7.

[24] Henderson, *Understanding International Law,* 10.

[25] Malanczuk, *Akehurst's Introduction to International Law,* 10.

[26] Henderson, *Understanding International Law,* 11.

[27] Malanczuk, *Akehurst's Introduction to International Law,* 11-15.

[28] When Britain requested in 1793 that China accept a British envoy, the Emperor responded as follows: "As to your entreaty to send one of your nationals to be accredited to my Celestial Court and to be in control of your country's trade with China, this request is contrary to all usage of my dynasty and cannot possibly be entertained …. Our ceremonies and code of laws differ so completely from your own that, even if your Envoy were able to acquire the rudiments of our civilization, you could not possibly

transplant our manners and customs to your alien soil.... Swaying the wide world, I have but one aim in view, namely, to maintain a perfect governance and to fulfill the duties of the state.... I set no value on objects strange or ingenious, and have no use for your country's manufactures." As quoted in Malanczuk, *Akehurst's Introduction to International Law,* 12-13.

[29] According to Gideon Boas, "This development of the concept of the nation state increasingly caused states to be seen as 'permanently existing, corporate entities in their own right, separate from the rulers who governed them at any given time.' One of the key concepts to come out of the development of the nation state was that the law of nations only governed inter-state relations, and that rulers were free to 'govern as they please' within their state. This can be seen as the beginnings of the concept of state sovereignty. This exciting development in international law, reflecting a significant evolution in the rights of states within the sphere of international law, has soured increasingly over the past two centuries. The idea of the complete equality of states (no matter how large or small) in international law became lost during the nineteenth century 'under the influence of the diametrically opposed idea of the hegemony of the great Powers.' The same sentiment is reflected in the twentieth century revolt against massive human rights violations committed by the leadership of states against their own citizens. Nonetheless, the principle of state sovereignty was and remains the fundamental principle upon which modern international law is based, reflected in the UN Charter, representing the now paramount importance of the principle of sovereignty in international law." Boas, *Public International Law*, 9-10 (footnotes omitted).

[30] *Cf. Malanczuk's view below.*

[31] Henderson, *Understanding International Law,* 9-10. "The territory of Europe would thus become a theater of war (*theatrum belli*), whereas non-European territory would be called res nullius and therefore open to unrestricted occupation by European states." Domingo, *the New Global Law*, 25.

[32] See, e.g. Shaw, *International Law,* Malanczuk, *Akehurst's Introduction to International Law*, and more recently Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2010).

[33] For the details of this structure and the role of the Khalifah and sultans, see Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Federal Law House, 2007), 323-31.

[34] F. H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1986), 54–56.

[35] *Ibid.*