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

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Abstract:

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

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

**Introduction:**

In recent decades there has been a growing interest in global histories in many parts of the world. Exploring a ‘global history of international law’ is comparatively a recent phenomenon that has drawn the attention of international lawyers and historians.[[1]](#footnote-1) However most scholarly contributions that deal with the history of international law end-up in perpetuating Western Self-centrism and Euro-centrism. International law is often presented in the writings of international law scholars as a product of Western Christian states and applicable only between them. These scholars insist that the origins of modern international law were conceived in the state practice of the European nations of the sixteenthand seventeenth century.[[2]](#footnote-2) This approach that considers only old Christian states of Western Europe to be the original international community is exclusionary, since it fails to recognize and engage with other legal systems including the Islamic legal traditions. Islamic international law is best portrayed as a ‘regionalized’ system, and at worst portrayed as one of the ‘others’ of international law. [[3]](#footnote-3) The exclusion of other civilizations and traditions in Syatauw’s words amounts to a ‘colossal distortion’ of history. [[4]](#footnote-4) This distortion of history has been challenged from time to time since the beginning of the 20th century.[[5]](#footnote-5) More recently it has been criticised by the Third World Approaches to International Law (TWAIL) scholarship which has expanded as a decentralized and critical scholarly network around the world. [[6]](#footnote-6) It is in this background that this chapter addresses the question, whether modern international law is a mere product of a monolithic source of law or does its origins lie in some of the most ancient religions and legal traditions including the Islamic legal tradition? To what extent has modern **i**nternational law been influenced by the plurality of norms operating in different regions and territories and whether the principles of *As-Siyar* or Islamic international law resonate in modern international law? What are the characteristics and parameters of Islamic international law? How has it been defined by classical and contemporary Islamic scholars using different perspectives? Whether Islamic international law has been adopted in the state practice of present day Muslim states? Instead of arguing that principles of modern international law have always existed in its present formulation in the past, this chapter attempts to explore the ‘contextual equivalents and indicative parallels’[[7]](#footnote-7), principles and norms of Islamic international law to find out whether there had been any influence of the Islamic legal traditions on modern international law? This chapter further attempts to demonstrate that what constitutes as the principles of peaceful co-existence in international law today were practiced by the Muslim rulers and developed by Muslim jurists as part of *As-Siyar*. However, the global history project of international law does not take into account those principles and practices of Muslim rulers. As in the words of De La Rasilla Del Moral *“the Eurocentric and state-centric paradigm, which dominated the study of the history of international law throughout most of the twentieth century, has left behind a double exclusionary bias regarding time and pace in the history of international law”*.[[8]](#footnote-8) In this chapter it is argued that similar rules of the conduct of war and peace were in existence in the Islamic legal tradition much earlier than the development of modern international law. Muslim jurists developed laws and codes of conduct to govern not only inter-personal relations, but also communal and inter-civilizational relations. Finally the chapter proposes an inclusive and accommodative methodological approach to fully understand and appreciate the global history of international law.

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

This section examines the meaning, scope, and definitions of the term *As-Siyar* as given by classical and contemporary Islamic scholars in order to understand how *As-Siyar* gradually developed as a distinctive international legal system within the Islamic legal tradition that laid down the foundations of the rules regulating the relations between the Muslims with non-Muslims during war and peace. *As-Siyar* is the plural of the noun *sira,* which means literally a ‘path, way of life, conduct, practice, attitude, or behaviour’. *Sira* has been used in the chronicles in a singular form in the sense of life or biography, i.e., the conduct of an individual. In its plural form it has been used by jurists to denote the conduct of a state in its relations with other communities. [[9]](#footnote-9) According to Zimahshari (d 1144), *Sira* is from *As-Siyar* … (*sara fulanan siratan hasanatan*) which means someone behaved well. Following this, it was extended and modified to mean conduct and practice.[[10]](#footnote-10) *As-Siyar al-awwaleen* and *Shari‛ah As-Siyar* are the two other terms where *As-Siyar* has been used in relation to the conduct of the people of the past and the issues relating to the laws of war.[[11]](#footnote-11)

The earlier use of the term *As-Siyar* shows that it was often used to denote the conduct of the Prophet Muhammad and was sometimes used interchangeably for *Al-Maghazi* (military campaigns of the Prophet) for instance Ibn Hisham **(d. 218/833)** used the term in his *al-Sira al-Nabawiyya* a biography of Prophet Muhammad’s life, which also included accounts of the battles that took place during the life time of the Prophet.[[12]](#footnote-12) Another prominent work is of Muhammad Ibn Ishaq (d.768), whose *Sira* of the Prophet is the culmination of the historical trends that existed in his era. These scholars studied the military expeditions and campaigns carried out by the Prophet and his companions to find out the legal norms underlying those military operations. The term *Sira* was also used in the context of the biographies of scholars and caliphs for instance Ahmad ibn Yusuf al-Misri (d. 951) became the first writer to employ it for the biography of another individual in his work, entitled *Sirat Ibn Tulun*. Similarly *Sirat* was used by Ibn al-Jawzi’s (d. 1201) in his treatise *Sirat 'Umar ibn al-Khattab* and *Sirat‘Umar ibn ‘Abd al-'Aziz*, and al-Razi’s (d. 1261) also used in his treatise, *Sirat al Shafi'i*, and *Manaqib al-Shafi'i*.[[13]](#footnote-13)This shows that during the early classic period the term *Siyar* did not refer as much to the concept of international interstate relations.It was only during the medieval period of Islam that *As-Siyar* developed as a set of rules to govern the conduct of war and regulate the conduct of the Muslim community or Muslim rulers in their relations with other non-Muslim communities.

*As-Siyar* derives its legal basis and general principles from the four main sources of the Islamic legal tradition i.e. the *Quran,* the *Sunnah* of the Prophet Muhammad, *Ijma* i.e. consensus or agreement and *Qiyas* or reasoning by analogy. The jurists of various schools of law also employed other juristic techniques including *Ijtihad* (many established jurists place it in the category of sources of law) *Iikhtilaf*, *Takhayyur*, *Talfiq*, *Maslaha*, *Darura,* *Istishab Istihsan,* *Saddal-Dhara* to develop the corpus of Islamic international law.[[14]](#footnote-14) Bassiouni argues that analyzed in terms of the modern international law, the sources of the *As-Siyar* conform to the same categories as defined by modern jurists and by the statute of the International Court of Justice, namely, authority, custom, agreement, and reason.[[15]](#footnote-15) The *Qu'ran* and the *Sunnah* represent authority; the *Sunnah*, embodying the Arabian *jus gentium* is equivalent to custom; whereas rules expressed in treaties with non-Muslims fall into the category of agreement; and the juristic commentaries of Islamic scholars as well as the utterances and opinions of the Muslim rulers in the interpretation and the application of the law, based on analogy are said to form reason.[[16]](#footnote-16)

The development of *As-Siyar* as a separate branch of Islamic law is attributed to a number of Muslim scholars from the 5th century onwards. Imam Al-Sha‛bi (d. 723) is considered to be the first scholar to contribute to *As-Siyar*. Al-Sha’bi was a leading authority from Kufa and his contribution to *As-Siyar* is in the form of his in-depth knowledge about the Prophet Mohammad’s military campaigns.[[17]](#footnote-17) However Al-Sha’bi’s contribution was limited to the narratives of the campaigns led by the Prophet and he did not contribute towards developing the rules of *As-Siyar*. Imam Abu Hanifa al-Nu‘man ibn Thabit is regarded as the founder of *As-Siyar*. Imam Abu Hanifa used the term *As-Siyar* for the set of rules governing relations between a Muslim state and non-Muslim states during war and peace. He introduced the notion of territoriality in the relationships between Muslims and non-Muslims. Muslims and non-Muslims were viewed as juridical personalities both as individuals and territorial groups.[[18]](#footnote-18) He developed the rules of *As-Siyar* by using individual reasoning and *qiyas* (analogical deduction) rather than the narratives of the Prophet and his companions.[[19]](#footnote-19) It was in fact through the works of Imam Abu Hanifa’s disciples that the term *As-Siyar* became so widely used in later centuries to represent this area of the law. Abu Amr Abd al-Rahman ibn Amr ibn Yuhmad al-Awza‘i the third century Syrian scholar criticized Imam Abu Hanifa’s opinions on many issues and produced a work on *As-Siyar* in response to the opinions expressed by Abu Hanifa. Later, Abu Hanifa's disciple, Abu Yusuf, wrote a refutation of al-Awza’i’s opinions in a treatise known as al-Radd ‘ala *As-Siyar* al-Awza‘i. Later, a second Hanafi jurist, Muhammad ibn Hasan al-Shaybani also responded to al-Awza‘i’s formulation of *As-Siyar* in a work entitled *al-As-Siyar al-Kabīr*. Furthermore, Imam Shafi‘i, in his large legal work, *al-Umm*, discusses Al- Awza‘i’s opinion on the subject with reference to the *Radd* of Abu Yusuf.

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

Abu Ishaq Ibrahim ibn Muhammad ibn al-Harith al-Fazari an expert on hadith literature from Kufa wrote a treatise on *As-Siyar*, in which he dealt with the subjects of *maghazi*, *As-Siyar*, *jihād* and other rulings. [[20]](#footnote-20) In addition, he analyzed the nature of the relationship between Muslims and non-Muslims, including *ahl al-dhimma* (inhabitants of territory protected by a treaty of surrender) and *muharibīn* (non-Muslims dwelling in *dār al-harb*).

Abu –al- Hasan Ali -Ibn-Muhammad Al-Mawardi (d.1058) a Shafi jurist renowned for his legal scholarship wrote several *belles lettres works.[[21]](#footnote-21) His al Hawai-al-Kabir* is the most important treatise on the topic of jihad which provides an analysis of the classical theories of military *jihad* and the necessity of undertaking it in specific circumstances.[[22]](#footnote-22) Using *Qur’anic* verses he argues that *jihad* was not mandatory until the time of Battle of Badr but subsequent *Qur’anic* verses established its mandatory nature.[[23]](#footnote-23) Muwardi considers *jihad* to be a collective duty as its purpose is to protect Islamic realms from the incursions of the enemy and to thereby ensure the safety of the lives and property of Muslims. However, in his view *jihad* becomes an individual duty of all those capable of participating in combats if the enemy attacks Muslim territory.[[24]](#footnote-24)

The medieval scholars such as Sarakhsi (d.1090), Najumuddin ibn Hafs al-Nasafi (d.1132) and Kasani (d.1191) in their writings laid down rules to regulate several kinds of relations between Muslims and non-Muslims including: *murtaddūn* (apostates), *musta’mins* (enemy aliens who have been given *aman*, (the promise of security and safe conduct, given to an enemy by Muslims) and *ahl al-dhimma* (non-Muslims subjects of the Islamic state).[[25]](#footnote-25) These scholars transformed the concept of *As-Siyar* from narrative to a normative character, especially with regard to rules concerning the resort to war (*jus ad bellum*), treaties, and the conduct of war (*jus in bello*). [[26]](#footnote-26)

 The most prolific jurist who contributed towards the development of *As-Siyar* is Mohammad Al-Shaybani(d.750) often described as the Hugo Grotius of the Muslims.[[27]](#footnote-27) Al-Shaybani wrote many books covering different aspects of Islamic jurisprudence and Islamic international law in particular.[[28]](#footnote-28) His two exclusive books are *Kitab-Al As-Siyar Al-Saghir* (The Shorter Book on International Law) and *Kitab Al As-Siyar Al Kabir* (The Longer Book on International Law). *Kitab Al Kabir* is considered to be his *magnum opus*. Al-Shaybani had the privilege of studying Islamic jurisprudence under the guidance of Imam Abu Hanifa and Imam Abu Yusuf. Khadduri describes him as the most eminent Muslim jurist who wrote on Islam's legal relationship with other nations and may well be called the father of the science of Islamic law of nations.[[29]](#footnote-29)Judge Weeramantry considers that Hugo Grotius writings on international law may have been influenced by the works of Al -Shaybani on the subject.[[30]](#footnote-30) Al-Shaybani was the first to contribute towards the systematizationof the rules of international law from Islamic perspective. In exploring the ‘global history of International law’ project one cannot simply ignore or brush aside the colossal contribution of scholars like Al-Shaybani who preceded Hugo Grotius some eight centuries ago. [[31]](#footnote-31)

Al-Shaybani provided an in-depth analysis of the lawfulness of settlements of disputes over usurped property, blood-money payment, and ownership of dwellings and slaves.[[32]](#footnote-32) In Al-Shaybani’s writings one also find references to questions related with day to day administrative matters in war such as distribution of war booty, treatment of women and children etc. [[33]](#footnote-33) He emphasized that when women and children are captured in war a certain code of conduct needs to be followed for instance transport for women and children is considered an obligation, so much so that if a means of transport is not immediately at hand, and the captives are unable to walk, the commander must hire transport for them. Moreover, he also considered how territoriality affect familial relations and argued that the marital status of captives could be altered, depending on whether and when a husband and wife are brought into Islamic territory. Granting *aman* (safe conduct or pledge of security) to non-Muslims upon entering into Muslim territory for a fixed period of time for the purposes of safe entry and residing or carrying out trade is an area that has been dealt with in detail by al-Shaybani in *As-Siyar Al- Kabir*. *Aman* was considered as a sacred promise in which the foreigner receiving it came under the full protection of the receiving state during its term and within its jurisdiction. It could be given both in times of war and peace. In times of war if a Muslim gave *aman* to a person then his life would be saved and security had to be provided even if that person was fighting. Similarly, in times of peace the objective of giving *aman* was to facilitate international trade, travel and interaction between nations through envoys. [[34]](#footnote-34) One reason for a lack of engagement with the *As Siyar* could be that it was only in 1960’s when the first English translation of Al Shaybani’s work appeared in the writing of Prof Majid Khadurri’s *The Islamic Law of Nations: Shaybani’s Siyar,* that the western scholars were introduced to the Islamic Law of Nations. Unfortunately Khadurri’s translation has not done full justice to the seminal contribution made to the development of Islamic international law by Shaybani as he focused on only one chapter of Kitab ul Asl and not on Shaybani’s *Kitab al Siyar* *As Saghir* and *Kitab Al Siyar Al Kabir* and claimed that the two treatises on *Siyar* have been lost.[[35]](#footnote-35) As compared to Khadurri’s translation a comparatively recent translation of Shaybani’s *Kitab al Siyar al Saghir* by Mahmood Ahmad Ghazi entitled *The Shorter Book of Muslim International Law* provides an in-depth coverage of Shaybani’s colossal contribution to the development of principles of war and peace including the treatment of non-Muslims, distribution of war booty, dealing with rebel forces, truce, diplomatic relations, peaceful settlements etc. [[36]](#footnote-36)

The above mentioned scholarly contributions show how Muslim jurists, over the course of time developed legal standards to govern the relationship of the Muslim states with non-Muslim states. *As-Siyar* was the result of a continuous process spread over centuries that was evolved out of the opinions of Muslim jurists who applied human mind and reasoning to interpret the divine sources of Islamic law i.e. the *Qur’an* and *Sunnah* for developing the corpus of *As-Siyar*. One can thus argue that *As-Siyar* was developed much earlier than the present modern international law. The origins of *As-Siyar* can be traced back to 5th century while modern international is a product of 16th century and onwards. As in the words of the Judge Bedjoui of the International Court of Justice

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

One can thus argue that the Eurocentric project of the history of international law fails to recognize and engage with other legal systems including the Islamic legal tradition.

 ***As- Siyar* in the Eyes of Early 20th Century and Contemporary Scholars**

The concept of a nation state as we understand and experience today did not exist in the Seventh century Arabia and for a long time thereafter. Modern nation states, including Muslim jurisdictions have visibly different governance structures to that of the Seventh century State of Medina.[[37]](#footnote-37) The use of the term *As-Siyar* as the ‘Islamic Law of Nations’, is a much later development that became prominent among scholars during the early 20th century.[[38]](#footnote-38) Al-Ghunaymi provided a definition of *As-Siyar* as ‘collection of rulings observed or arrived at by Muslims in the early period that represent Islamic teachings and are acceptable in the field of international relations’.[[39]](#footnote-39) Khadurri was of the view that “*As-Siyar*, if taken to mean the Islamic law of nations, is but a chapter in the Islamic *corpus juris*, binding upon all who believed in Islam as well as upon those who sought to protect their interests in accordance with Islamic justice”.[[40]](#footnote-40) Whereas Hamidullah defined it as: “that part of the law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* State observes in its dealings with other *de facto* or *de jure* States”.[[41]](#footnote-41) Hamidullah uses the term Muslim international law to describe Islam’s system of Public international law and argues that Muslim International Law depends wholly and solely upon the will of the Muslim State, which in its turn is controlled by the Muslim Law (*Shar'iah*). [[42]](#footnote-42)It derives its authority just as any other Muslim Law of the land.  Muslim International Law is only that which is observed by a state which acknowledges Muslim law as the law of its land in its dealings with Muslim and non-Muslim states. In other words Hamidullah considers that Muslim international law though part of *Fiqh,* “derives its authority not from any foreign source, but from the sovereign will of the Muslim state itself, which will is subject to the Divine law of the Qur'an”.[[43]](#footnote-43)  Hamidullah argues that as the Quran and Sunnah provide only guiding principles it was the Muslim jurists who after the death of the Prophet, expanded those guiding principles and developed “a complete system of law which served all the purposes of the Imperial Muslims, even at the height of their widest expansion from the Atlantic to the Pacific Oceans.” [[44]](#footnote-44)Hamidullah’s definition highlights the fact that though Islamic international law principles are derived from the Quran and Sunnah, the state practice varies amongst states. He also considers that “even the obligations imposed by bilateral or multilateral (international) treaties .... unless they are ratified and executed by the contracting Muslim party, they are not binding; and their non-observance does not create any liability against the Muslim State. Of course it does not matter whether the acceptance is express or tacit”[[45]](#footnote-45). Here it is relevant to distinguish between Islamic international law and Muslim state practice as the two are not necessarily synonymous. Muslim majority states such as Iran and Iraq have not always subscribed to similar norms of Islamic law and been at war with each other. Likewise, Iraq and Kuwait have been at war in disregard of norms of as-siyar.

However contemporary scholars such as Bouzenica and An-Naim do not accept equating *As-Siyar* with the term “Islamic Law of Nations”, “Muslim international law” or “Islamic international law”. Bouzenica considers that as *As-Siyar* lacks the concept and definition of a territorial state which constitutes one of the basic elements of modern international law’ therefore it cannot be equated with modern international law[[46]](#footnote-46). An-Naim argues that considering *As-Siyar* as international law is a mis-nomer as there can only be one international law, “but it has to be truly international by incorporating relevant principles from different legal traditions, instead of the exclusive Eurocentric concept, principles and institutions of international law as commonly known today. When the essential nature and purpose of international law are clarified in the present global context, I will argue, one will find that Islamic law can be fully supportive of the *possibility* of international law”.[[47]](#footnote-47) An-Naim proposes that the relationship between Islamic law and international law should be seen in terms of a more inclusive approach to the latter, rather than conflict or competition between the two.[[48]](#footnote-48) This could only be possible if the relationship between these two legal systems is founded on a clear understanding of differences in their nature and development, as well as appreciation of the political and sociological context in which they operate. An-Naim is not in favour of using compatibility/incompatibility frame of reference for generating a positive debate.[[49]](#footnote-49) Here An-Naim raises an important point when he calls for taking into account the political and social context which is pertinent in relation to the *Qur’anic* verses relating to *jihad* (holy war) and killing of infidels that are often misinterpreted without considering the context in which those verses were revealed.

Shaheen Ali on the other hand proposes a more balanced approach by suggesting that it would be useful to compare the substantive content and contours of *As-Siyar* with international law while accepting differences in terminology and divergent theoretical understandings of the two systems. [[50]](#footnote-50) She emphasizes that the “overlaps between the two offer a common discursive space and engagement with a view to some mutually useful transformative processes”. [[51]](#footnote-51) Using Shaheen Ali’s methodological approach in this chapter could offer a space to search for the probable influence of *As-Siyar* on international law.

A number of examples can be found of common principles in the substantive content of the *As Siyar* and modern international law which show that there might have been an influence of *As-Siyar* on the development of modern international law. The principles that today form the basis of *jus in bello* and *jus in bellum* in modern international law were developed much earlier within the Islamic legal tradition for instance *As-Siyar* sets the rules which now form part of the principle of granting immunity under modern international law by providing protection to envoys and diplomats, foreigners, especially businessmen from non-Muslim nations who visited the Muslim entity for business or requested asylum from Muslim individuals or state. At the same time *As-Siyar* recognised and extended protection to individuals from the very initial stage as compared to modern international law which granted protection to individuals at a much later stage of its development. Sexual violence in war was considered a war crime since the early days of Islam whereas in modern international law rape and sexual violence were not recognized as a crime until the adoption of the 1993 statute of the International Criminal Tribunal of the Former Yugoslavia. The treatment of non-combatants during war also suggests that Islamic law of war formulated centuries ago, respected rules which today form part of the modern humanitarian law. It corresponds to the international humanitarian law conventions ranging from the 1856 Convention establishing the International Committee for the Red Cross, The Hague Conventions of 1899 and 1907and the four 1949 Geneva Conventions and their 1977 Additional Protocols. Hans Kruse asserts that “*the positive international law of Europe had more than eight centuries later not yet reached the high degree of humanitarianization with which the Islamic law of war was imbued*.”[[52]](#footnote-52)

Present day Muslim states have also taken important steps to reconcile the norms of modern international law with the norms of Islamic international law. Such examples offer a space for mutual dialogue and constructive engagement with Islamic international law. The insistence on prohibition on the use of force in international relations by Muslim states under the United Nations Charter and endorsement of principles of international humanitarian law point towards an overlap of the fundamental principle of international law with Islamic law and *As-Siyar*.

One can thus argue that commonalities between *As-Siyar* and modern international law exit and these examples invite researchers and scholars to re-explore the history of international law by adopting an inclusive approach which recognizes the influence of Islamic legal principles on international law and as such international law cannot be claimed as purely a western concept, rather rules of international law have been in existence much earlier than the birth of modern international law. As Stephen Neff has remarked, “*No area of international law has been so little explored by scholars as the history of the subject. . . . [W]e are still only in the earliest stages of the serious study of international legal history. Many blank spots exist.”* [[53]](#footnote-53)Although in the present day context *As-Siyar* in its conventional sense has ceased to exist as Muslim states today deal with their non-Muslim citizens according to the respective Constitution of the state and Muslim states also adhere to the principle of state sovereignty and self determination, yet the membership of Muslim states of the United Nations Organization and acceptance of the United Nations Charter and its rules on the prohibition of the use of force, active participation of Muslim states in the formulation of various human rights and other treaties, their accession to these treaties (albeit with reservations in the name of (Islam) as well as the formation of the Organisation of Islamic Cooperation by Muslim states in 1969 are examples which show that as modern international law principles are not against the principles laid down under Islamic international law therefore Muslim states are not hesitant to adhere to the modern international law.

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

The most fundamental concept found in the writings of early Islamic jurists is the categorization of the world into two dominions; *dar-al*-*Islam* (abode of the *Ummah*, the Muslim community or territory of Islam) and *dar-al-harb* (abode of the unbelievers or enemy territory). [[54]](#footnote-54) In theory the *dar-al-Islam* was always at war with the *dar-al-harb* and peace between the two could only be achieved for a limited period. Within *dar-ul-Islam*, everyone regardless of his or her religion is subject to the rules of Islamic law; these rules apply to the Muslims in *dar-al-Islam* themselves as well as to their dealings with non-Muslims. A non-Muslim could obtain inviolability under Islamic law by entering into a relationship of ‘protection’ *aman* with the Islamic state. Such a person was called a *dhimmi*, or a ‘protected person’. An Islamic state could also negotiate a treaty of *dhimma* with a non-Muslim ruler, but in so doing, it could not accept terms that were repugnant to Islamic law. The *Ahli-kitab* (people of the book i.e. Jews and Christians) had the alternative to pay *jiziya* (poll tax). It is however interesting to note that in the *Quran* and *Sunnah*, one does not find any reference or sound argument for this division of the world. This division was the creation of the scholars of legal schools of thought who gave varying interpretations to the *Qur’anic* text that deals with the concept of war or *jihad* in Islam.

Nevertheless in this permanent state of warfare certain rules had to be observed under *As-Siyar*.[[55]](#footnote-55) Rules were laid down to determine who should not be killed during the course of war, distinction between combatants and non-combatants, protection of properties, rights of prisoners of war (POWs), termination of their captivity, and the effects of war. It also had a binding set of rules to deal with rebels and apostates. Similarly, it had rules regarding the immunity of envoys and territorial jurisdiction, protection of non-Muslim citizens in a Muslim state, foreigners, especially businessmen from non-Muslim nations who visited the Muslim entity for business or requested asylum from Muslim individuals or state. Hans Kruse asserts that ‘the positive international law of Europe had more than eight centuries later not yet reached the high degree of humanitarianization with which the Islamic law of war was imbued.’[[56]](#footnote-56) The treatment of non-combatants during war thus suggests that Islamic law of war formulated centuries ago respected rules which today form part of the modern humanitarian law.

Besides, there is a third category of *dar-ul-sulh* whichalso suggests peaceful co-existence with non-Muslims. Imam Sha’afi the founder of the Sha’afi school of thought introduced this third division of d*ar-ul-sulh* (territory of peaceful arrangement) or *dar-ul-ahd* (territory of covenant) consisting of those territories of peace or states that did not recognize Islamic rule over them but were not hostile towards Muslim states and made peace treaties with them. In simple words *dar- ul- sulh* could be equated with the territory of friendly nations. [[57]](#footnote-57)

The categorization of the world into *dar-ul-harb* and *dar-ul-Islam* has been rendered as obsolete by Islamic scholars of the early 20th century.[[58]](#footnote-58) They considered the territorial division by classical scholars a legal and political construct. This group of Muslim jurists held that the *dar-al-harb* category did not have any normative significance, rather it was an empirical category and *jihad* in their view was only authorized against hostile non-Muslims. [[59]](#footnote-59)

Such division has lost its relevance in the present day context as Muslim states are now part of the international community as being members of the United Nations. The recognition of the right to self determination, acceptance of the principle of state sovereignty that purported to guarantee the independence of all states, and protection of human rights under the UN declarations and treaties has radically changed the political environment in which Muslims found themselves today. This change in the international environment means that international relations have changed from one in which war and conquest was the default rule to one in which peace and friendship is the default rule. Al-Zuhiyli, an eminent Syrian jurist and member of the Islamic law committee of the Organization of the Islamic Conference argues that any State that committed itself to providing Muslims freedom of religion and permitted Islam to be taught freely could not be considered part of *dar al-harb* (Al-Zuhayli 17–18, 21, 26–27).[[60]](#footnote-60)This division of states is only of academic interest today as the Muslim states have accepted the rules of both public and private international law.

 The state of permanent warfare has also been challenged by Badr who argues that this tripartite notion of the world i.e. the *dar-al-Islam*, *dar-al-sulh* and *dar-al-harb* in its historical perspective represents the three stages of Islam i.e. stage of expansion, stage of interaction, and stage of coexistence. [[61]](#footnote-61) During the stage of expansion *jihad* was the rationale for waging war against non-Muslims. [[62]](#footnote-62)In this expansionist phase the lines between violence and pure and simple *jihad* were blurred. Opposing interpretations of the religious text by Islamic scholars as well as the political aspirations and practice of the Muslim rulers to rule the world impacted on the meaning, scope and application of *jihad* and Muslim perspectives on international law.[[63]](#footnote-63) The age of expansion lasted over a century, however after the age of expansion it became evident that the objective of carrying Islam to the four corners of the world was unattainable.

The ‘age of interaction’ saw the main change in legal thought in the rationale for waging war against non-Muslims. During this age of interaction the dichotomy of *dar-al-Islam*/*dar-al-harb* was replaced by a tripartite division of the world into *dar-al-Islam*, *dar-al-harb* and *dar-al-sulh*, i.e. the ‘abode or territory of peace’. [[64]](#footnote-64) Ali and Rehman argue that “the realities of interaction with non-Muslim powers imposed new juridical formulations, although some jurists carried over to the age of interaction the norms and thinking of the previous age”.[[65]](#footnote-65)

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

It should be noted, however, that on the one hand majority of contemporary Muslim jurists, consider *dar-ul-harb* to be obsolete but on the other hand they reaffirm the continuing vitality of the *dar al-islam* as a collective defence mechanism.[[66]](#footnote-66) This is clearly reflected in Al Zuhayli’s writings who is of the view that Muslims;

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

Al-Zuhayli’s analysis differs from classic and medieval scholars in the sense that he refers to *Dar ul Islam* as a well defined and fixed territory and he considers *jihad* to be a self- defense mechanism which becomes obligatory in terms of foreign occupation. In other words he justifies jihad to achieve the right to self determination as recognized under modern international law. One can thus argue that the state of permanent warfare between *dar ul harb* and *darul Islam* has ceased to exist but Zuhayli’s interpretation does provide a strong justification for resistance movements in the Muslim world against foreign occupation. This form of interpretation is reflected in the language of Islamist resistance groups in Palestine, Lebanon, and Indian occupied Kashmir, all of which use the modern nationalist term *muqawama*, meaning ‘resistance’, to describe their activities.[[68]](#footnote-68) However in recent years the terminology of *jihad* as an aggressive war, and division of states into *dar-ul-harb* and *dar- ul-Islam* categories has once again being used by militant and terrorist groups like Al Qaida, Taliban and ISIS. This highlights the challenge of employing contextual methodologies for evolving an inclusive international law as groups, states and a variety of constituencies can appropriate the interpretative spac4e and revive the dar-al-Islam/dar-al-harb dichotomy.

 **Concept of Jihad in As Siyar**

The literal meaning of the term *jihad* derivedfrom the root word *juhd* is “to strive for”, “exert” or “struggle”. In the *Qur’an*, the term is regularly linked to the phrase “in the path of God”. *Jihad* in the *Qur’an* includes, but is not limited to, war or armed struggle *per se* but a righteous cause before God. Offensive *jihad* was never supported as a general principle and an aggressive act in the *Qur’an*. The *Qur’an* states:

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

These verses show that permission for fighting was granted in a particular context when newly converted Muslims were oppressed and unjustly expelled by their enemies from their homes. Secondly, the permission was only given as a defensive measure against the atrocities of the non-Muslim Meccans. It was also restrictive and limited as destruction of churches, synagogues, and mosques was strictly prohibited. In other words, the sanctity of places of worship was upheld. Thirdly, the verse demonstrates that the goal of victory in Islam is to establish freedom of religion, to establish prayer, to give charity and to command the good and forbid evil. This last justification also means that as long as the preaching and practice of Islam are not circumscribed, the Muslims cannot fight a *jihad* against a country in which Muslims freely practice their religion and teach Islam. War and military action was thus allowed only in self-defence and as a non-aggressive principle. A certain criterion was also laid down for what could constitute a *jihad* for instance *jihad* had to be declared by a person in legitimate authority over the community of Muslims, it had to aim for a just cause (to ward off the threat to Islam posed by the enemy), with a right intention (in the pursuit of God’s order), and with a sound hope of success (as stated in 2:195). A review of the various *Qur’anic* verses also shows that *jihad* as an armed struggle was allowed only as a self-defence mechanism. The *Qur’an states;*

 ‘Fight in the path of God. Those who are fighting you; But do not exceed the bounds. God does not approve transgressors.’ (2:190).

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

However the subsequent *Qur’anic* verse ‘Slay them where you find them and expel them from where they expelled you, for persecution is worse than killing’ (191) is often used as a justification for offensive *jihad*. Varying interpretations have been given by the early and late commentators of this verse. From 9th century onwards jurists like *Abu Amr Abd al-Rahman ibn Amr Al-Awza*‘*i* (d. 773 C. E.), Al Mawardi and Al Tabari started advocating for “offensive jihad” to the extent that Al Awazi claimed that offensive jihad could be an individual’s obligation as well. Al-Mawardi(d.1058) and Al-Tabari(d.839) went on to endorse the principle of offensive *jihad* by invoking the theory of *Naskh* or abrogation.[[69]](#footnote-69) They were of the view that this verse abrogated the previous verses of the *Qur’an*. This verse according to Al-Mawardi, encode divine permission to fight equally those who fight and those who detest from fighting. Interpreting this verse as a justification of offensive *jihad* resulted in allowing Muslim rulers to launch pre-emptive wars against non-Muslim polities.[[70]](#footnote-70)

Al-Mawardi while applying the theory of *Naskh* did not consider the context in which this verse was revealed. The verse referred to a particular group of Arabs, the Meccan ‘idolaters’, who were accused of oath breaking and instigating warfare against Muslims. In comparison to the interpretations of Al-Mawardi and Al Awazi an early scholar Maqatil b Suleman considered this verse to be a denunciation of the Makkans who had commenced hostilities at Hudaibyia and who began fighting during the sacred months in the sacred sanctuary which led to a repeal of the prohibition imposed upon Muslims against fighting near Kabah and was clearly an act of aggression. This verse according to him abrogated the earlier complete prohibition against fighting especially in the sanctuary. These early juridical and exegetical works reflect adherence to the *Qur’anic* principle of unqualified non-aggression. These earlier scholars such as Al Tawhri drawing upon the literal meaning of the word jihad (to struggle or strive for) and on the basis of *Ahadith* of Prophet Muhammad who stated that “exertion of force in battle is a minor *jihad*, whereas ‘self-exertion in peaceful and personal compliance with the dictates of Islam (constitutes) the major or superior *jihad*  and the ‘best form of *jihad* is to speak the truth in the face of an oppressive ruler” contended that, the *jihad* ideology is exclusively one of self-exertion and peaceful co-existence.

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

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

Mawardi’s interpretation of offensive nature of *jihad* was challenged by the 14th century jurist Taqi-ud-din Ibn-i-Tamiyya(d.1328) who redefined *jihad* as a defensive war against unbelievers and against all adversaries including Mongols and others.[[71]](#footnote-71) Ibn Taymiyya called for *jihad*  against disbelief and hypocrisy and alternative Islamic systems. For Ibn Taymiyya the defensive *jihad* placed a higher obligation than the *haj*(holy pilgrimage), *salat*(prayers) or even fasting in the holy month of Ramadan.[[72]](#footnote-72)

 Justifying military *jihad* has also been criticized by contemporary Islamic scholars who after a close reading of the *Qur’an* argue that the early juridical and exegetical works and the other very early sources reflect adherence to the *Qur’anic* principle of unqualified non-aggression.[[73]](#footnote-73) Mahmssaniemphasizes the need for reading the *Qur’an* holistically, and in the light of social and political circumstances and events of that age and time.[[74]](#footnote-74) The verses which forbid the initiation of war by Muslims and which uphold the principle of non-coercion are in sharp contrast with this later conception of waging an offensive *jihad* and permission to launch pre-emptive war against non-Muslim states. Afsaruddin is of the view that such position of the later jurists is reflective of their political affiliations and serving the interest of the Muslim Empire. The concept of offensive *jihad* emerged during the Ummayad dynasty when Ummayad rulers were engaged in wars with the Byzantine Empire*.* The Ummayad rulers at that time needed a religious and legal basis for justification of wars. These imperial aspirations cannot be ignored as these were a major factor behind promoting the offensive *jihad*. Many jurists enjoyed royal patronage during the Muslim conquest and, in return, provided Muslim authorities religious justifications to help legitimize the expansion of the empire.[[75]](#footnote-75) Ali and Rehman argue that this version of *jihad* ideology reflects the expansionist phase of Islam during which, there were instances where the lines between violence and pure and simple *jihad* are blurred. Similarly political conflicts soon after the death of the Prophet that resulted in the assassination of the first three caliphs of Islam, the territorial dispute based around a sectarian divide and the tragedies of inter-Muslim conflicts such as the incident of Karbala have led to the perception of Islam in the West as ‘a religion of the sword…glorify[ing] military virtues’.[[76]](#footnote-76) One can thus argue that opposing interpretations of the religious text by early and medieval Islamic scholars as well as the historical processes that reflected the political aspirations and practice of the Muslim rulers impacted on the meaning, scope and application of *jihad.* Ali argues that since the *Qur’anic* verses lend themselves to multiple readings and extrapolations, the controversy over the concept and what it means for Muslims today continues. [[77]](#footnote-77) By setting aside the historical antecedents we need to explore how far do the primary sources of Islamic law inform the concept of *jihad* and what are the legal implications of these *Qur’anic* formulations of *jihad* on the development of Islamic international law or Muslim state practice?. The contemporary scholars believe that the categorization of the world into *darul harb* and *darul* Islam and interpretation of *jihad* as an offensive act has ceased to exist. However in the present day context, there has been a re-emergence of these concepts in the war ideology of militant groups and non state actors such as the ISIS and other non-state actors who are using this terminology to restore “Islamic caliphate”. This version of *jihadi* ideology does not represent the official positions of Muslim states vis-à-vis the international system. The Charter of the Organisation of Islamic Co-operation (OIC), among other statements, contains pronouncements implying agreement to conduct their relations with other states on the basis of equality and reciprocity. Objectives of the OIC do not allude to the international community of states as being divided along the *dar-ul-harb*/*dar-ul-Islam* categorisation and include ‘taking all necessary measures to support international peace and security founded on justice’. [[78]](#footnote-78) Similarly Muslim states condemnation of the Charlie Hebdu killings as well as terrorist attacks carried out in the name of *jihad* either by theISIS, *Al-Qaida* and *Taliban* point towards the fact that any misinterpretation of religion and misuse of the principle of *jihad* is not acceptable to the Muslim states and Muslims in general and is categorically rejected and not endorsed by Muslim states. The military action against Al Qaida and various factions of *Taliban* in Pakistan and air strikes by Turkey and Saudi Arabia on ISIS occupied areas in Syria and Iraq are examples of non-acceptance of offensive *jihadi* ideology of these militant groups by the Muslim states.

  **Conclusion**

This chapter has sought to capture a brief and schematic history of *As-Siyar* to show that within the Islamic legal tradition a distinctive system of Islamic international law was developed as an integral part of the Islamic legal tradition which regulated the relations between the Muslim and non-Muslim states for centuries. As part of Islamic legal tradition *As-Siyar* evolved over the centuries through the works of jurists who drew inspiration from the primary sources of law. It covered a number of modern international law topics, including the law for the treatment of diplomats, hostages, refugees and prisoners of war; the right of asylum; conduct on the battlefield; protection of women, children and protection of the non-combatant [civilians](http://en.wikipedia.org/wiki/Civilian). To understand Islamic international law rules, contextual and not literal equivalents need to be identified through a historical lens. Engaging with Islamic international law will thus give legitimacy and validation to the ‘global history of international law’ project.

Finally this chapter has demonstrated that international law cannot be labelled as exclusively Western and perhaps this could be a new challenge for international law scholars and researchers to explore the history of international law from an Islamic perspective. As in the words of Judge Philip Jessup of the International Court of Justice “*the effectiveness of public international law […] would be seriously impaired if there were no tolerance of certain differences stemming from various legal systems”*. If the purpose of international law is to serve the interests of a wide and diverse international community of states then the global history project has to look beyond the euro-centric origin of international law and by adopting an inclusive and accommodative approach to explore the principles and rules of conduct during war and peace developed by the other legal traditions while searching for the global history of international law.

1. A. Kemmerer, ‘Towards a Global History Of International Law? A Review Symposium of Bardo Fassbender and Anne Peters, (eds) *The Handbook of the History of International Law,’European Journal of International Law*  25 (2014) :1 [↑](#footnote-ref-1)
2. Hugo Grotius often known as the father of international law, propounded the idea of Eurocentric origins of international law in his writings. Later, Francois Laurent in his *Histoire de droit des gens et des relations internationales* discussed international relations of Greek city- states, Romans and Old Christianity. In his writings he also referred to *jus fetiale* and *jus gentium* in Roman law. Ernest Nys, the Belgian international lawyer and student of Francios Laurent affirmed the European origins of international law in his publication *origins du droit international*. Another promenient name is of Spanish scholar Francisco de Vitoria, whose scholarly writings depict the Eurocentric narrative of the origin and evolution of international law. Similar views were echoed by later scholars and historians such as Saxon Samuel Pufendorf, and Johann Jacob Schmauss to name a few along with other natural law scholars who presented a Eurocentric vision of international law and traced the origins of international law in Christian tradition and Greek and Roman civilizations. Later Oppenheim in his classical work on International law claimed that it was the ‘*old Christian states of Western Europe that constituted the original international community within which international law grew up gradually through custom and treaty. S*imilarly Western lawyers like Carl Schmitt and JHW Verzijl not only defended the Western origins of international law but also considered that there has not been any substantive contribution by the non-Western legal traditions to the development of modern international law. For details see H. Grotii, *De Jure Belli ac Pacis, libri tres* (1625).F Laurent, *Historie du droit des gens et des relations internationals. Tôme Premier: L’Orient* 1(Paris: Durad, 1851,);E. Nys, *Les origins du droit international* (Bruxelle: Castaigne 1894); S. Pufendorf *De jure naturae et gentium, libri octo* (trans as *On the Law of Nature and Nations, in eight books)* (W Oldfather trans) (Oxford Clarendon Press 1934); JJ Schmauss *Einleitung zu der Staats-Wissenschaft I: Die Historie der Balance von Europa, der Barriere der Niederlande* (Göttingen 1751).

 [↑](#footnote-ref-2)
3. A. Martineau, ‘Overcoming Euro-Centrism? Global History in the Oxford Handbook of the History of International Law’, (2014) 25 EJIL 1, at 334 [↑](#footnote-ref-3)
4. J.J.G. Syatauw, “Some Newly Established Asian States and the Development of International Law” (1961), 29-30 [↑](#footnote-ref-4)
5. [↑](#footnote-ref-5)
6. International lawyers belonging to the Third World Approaches to International Law (TWAIL) abandoned regionalism and started re-exploring a ‘universal’ history of international law beyond the West. RP Anand while accepting international law as a universal phenomenon, rejected the Eurocentric perspective and argued that rules of interstate conduct could be traced back to some of the most ancient civilizations like China, India, Egypt and Assyria and considers that the European inter-state system was itself a regional order that interacted and coexisted with other regional orders before the Western colonization of the world. During the 1970’s and 1980’s while Anand’s scholarly contributions focused on the influence of Asian Maritime and trade law other TWAIL international lawyers like Elias, Mesah-Brown explored the history of International law in the African context. Chako, Singh and Rajvera focused on the history of international law in Ancient India and Wang talked about international law and Chinese civilization. Later in the 1990’s, the second generation of TWAIL scholars generated a vibrant ongoing debate around questions of colonial history, power, identity, and difference and what these mean for international law. Influenced by the Critical Legal Studies (CLS) and post-modernism approaches, TWAIL scholars with common commitments and concerns attempted to establish a link between international law and colonialism. By doing so TWAIL scholarship has also brought the colonial encounter between Europeans and non-Europeans to the centre of historical re-examination of international law and have pushed the agenda of the Third World in International law beyond examining the Third World participation in the making of international law and international institutions. For further details see, M. Mutua, ‘What is TWAIL?’ *Proceedings of the Annual Meeting -American Society of International Law,* 2000-94. Also D. Fidler, ‘Revolt Against or From Within the West? TWAIL, the Developing World and the Future Direction of International Law’, *Chinese Journal of International Law* 2003-1, pp. 29-76. ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW, 2005 (hereinafter ANGHIE); James Gathii, *Imperialism, Colonialism, and International Law,* 54 BUFF. L. REV. 1013 (2007), B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMMUNITY L. REV 3 (2006). Obiora Chinedu Okafor*, Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 176 (2005ANGHIE, A.; CHIMNI, B.S.

*Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77 (2003). ANGHIE, A.; CHIMNI, B.S.; MICKELSON, K.; OKAFUR, O EDS. THE THIRD WORLD AND INTERNATIONAL LEGAL ORDER: LAW, POLITICS AND GLOBALIZATION (Brill Publishers 2003). James Thuo Gathii (2011) “TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography *Trade Law and Development, Vol. 3, No. 1, p. 26.* [↑](#footnote-ref-6)
7. The two terms have been used by Prof Shaheen Sardar Ali in her forthcoming monograph *Modern Challenges to Islamic Law*, Cambridge University Press, 2016. [↑](#footnote-ref-7)
8. I.De La Rasilla Del Moral,International Legal Theory: The Shifting Origins of International Law*.Leiden Journal of International Law* (2015), 28, pp. 419–440 [↑](#footnote-ref-8)
9. L. Bsoul, ‘Historical Evolution of Islamic Law of Nations/*As-Siyar*: Between Memory and Desire’, (2008) 17 DMES 48, at 50 [↑](#footnote-ref-9)
10. A. J. Zamakhshari, *Al-Kashf ‛ ul Haqaiq al-Tanzeel*, Dar al-M‛arifah,vol. 2, at 431 [↑](#footnote-ref-10)
11. A. F. N. Mutrrazi, ‘*Al-Mugrib fi Tartib al-Mu‛rib’*, in M. Fakhori, M. U. I. Zayd, A. Halab, ( eds.), Vol. 1, at 227 [↑](#footnote-ref-11)
12. L.Bsoul, *supra* note 7 p51 [↑](#footnote-ref-12)
13. L. Bsoul, *supra* note 7, at 52 [↑](#footnote-ref-13)
14. For detailed discussion on sources see A. Rahim, *Muhammadan Jurisprudence* (Mansoor Book House, Lahore 1995)44-145, N. J.

 N.J.Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh 1994) 80–81as cited in S. S.Ali, ‘Resurrecting *Siyar* through *Fatwas*? (Re) Constructing ‘Islamic International Law’ in a Post–(Iraq) Invasion World’ (2009) *Journal of Conflict & Security Law.* [↑](#footnote-ref-14)
15. C. Bassiouni.. *The Shari'a and Islamic Criminal Justice in Time of War and Peace* Cambridge University Press, NewYork 2013)p15 [↑](#footnote-ref-15)
16. Ibid., p 15 [↑](#footnote-ref-16)
17. Abdullah Ibn ‛Umar had heard Al-Sha‛bi talking about these campaigns and was so impressed by his knowledge and description of campaigns that he remarked ‘*it seems as if Al-Shabi’i has participated with us in those campaigns.*’ [↑](#footnote-ref-17)
18. L. Bsoul, *supra* note 7, at 58 [↑](#footnote-ref-18)
19. Ibid., at 58 [↑](#footnote-ref-19)
20. A. I. al-Fazari, ‘Kitab Al-Siyar’*,* F. Hamada (ed.), (1408/1987),62 at 78. [↑](#footnote-ref-20)
21. Al-Mawardi, *al-Hawi al-kabir fi fiqh maddhab al-imam al-shafi’i radi allahu ‘anhu wa-huwa sharh mukhtasar al-muzani,* (1994)vol.14ed. ‘Ali Muhammad Mu’awwad and ‘Adil Ahmad ‘Abd al-Mawjud: Daral-kutub al-‘arabiyya, 102. [↑](#footnote-ref-21)
22. See al-Mawardi *supra* note 13, at 120 [↑](#footnote-ref-22)
23. (9: 73);(22:78);( 22:183) ;(2:216);(9:36) and( 9:5). [↑](#footnote-ref-23)
24. See Al-Mawardi, *supra* note 13, at 120 [↑](#footnote-ref-24)
25. A. Sarakhsi, Kitab al-Mabsut. 10 at 2. H. A. Nasafi, Tilbat al-Talaba fi al-Isitlahāt al-Fiqhiyya, (ed.), K. A. Mays, (1985) at 165. Kasani, Badā’i' al-Sanā’i'. 9 at 429 [↑](#footnote-ref-25)
26. K. Bennoune, ‘As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence’, (1994) 15 MJIL 4, at 30 [↑](#footnote-ref-26)
27. Joseph Freiherr von hammer-Purgstall, a 18th/19th century Austrian diplomat and pioneer orientalist was the first to compared Al Shaybani to Hugo Grotius. [↑](#footnote-ref-27)
28. For instance one of his earliest works on Islamic jurisprudence was *Kitab-ul- Asl* also known as *Kitab al Mabsut*. It was a compilation of a dialogue between Imam Abu Yusuf and Al Shaybani commenting upon the legal doctrines and opinions of Imam Abu Hanifa. [↑](#footnote-ref-28)
29. M. Khadurri, *The Islamic Law of Nations: Shaybani’s Siyar.* p18 [↑](#footnote-ref-29)
30. See Weeramantry, *supra* note 29 ,at132 [↑](#footnote-ref-30)
31. M. Baderin, ‘Muhammad Al -Shaybani (749/50-805)’, in B. Fasbender and A. Peters (eds.), *The Handbook of the History of International Law* (2014) at 1082 [↑](#footnote-ref-31)
32. M. Ibn Al-Hasan Al-Shaybani, *Kitab al-Siyar Al-Kabir* (1997), 250 [↑](#footnote-ref-32)
33. Ibid ., at 252-53 [↑](#footnote-ref-33)
34. For further details see K.R. Bashir, ‘Treatment of Foreigners in the Classical Islamic state with special focus on Diplomatic Envoys: Al-Shaybani and Aman’ in M.Frick and A. Muller *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (2013) 149. [↑](#footnote-ref-34)
35. For a comparative analysis of the two translations see in this edited collection a chapter by Jean Ellain **Khadduri as Gatekeeper of the Islamic Law of Nations**

**Quis custodiet ipsos custodies? or rather** الذين سوف يشاهد مراقبو؟ [↑](#footnote-ref-35)
36. [↑](#footnote-ref-36)
37. Shaheen ,S.Ali (2016) Modern Challenges to Islamic Law, Cambridge University Press. [↑](#footnote-ref-37)
38. The other two terms used interchangeably with the term “Islamic Law of Nations” are “Muslim Law of Nations” and “Islamic International Law”. [↑](#footnote-ref-38)
39. M. al-Ghunaymi, al-Ahkām al-‘Ãmma fi Qanūn al-Umam, 37 [↑](#footnote-ref-39)
40. M. Khadurri, The Islamic Law of Nations: Shaybani's *As-Siyar* (1966), 66 [↑](#footnote-ref-40)
41. M. Hamidullah *The Muslim Conduct of State*, The Other Press 1961. Some excerpts from the book are also available online at http://muslimcanada.org/conductofstate.html [↑](#footnote-ref-41)
42. Ibid., [↑](#footnote-ref-42)
43. Ibid., [↑](#footnote-ref-43)
44. Ibid., [↑](#footnote-ref-44)
45. Ibid., [↑](#footnote-ref-45)
46. A. Bouzenita, ‘The Siyar – An Islamic Law of Nations?’, (2007) 35 *AJSS 19*, at 44 [↑](#footnote-ref-46)
47. Workshop on Islamic Law: Islamic Law and International Law, Joint AALS, American Society of Comparative Law and Law and Society Association, 2004 (Annual Meeting) [www.aals.org/am2004/islamiclaw/international.htm 2-6](http://www.aals.org/am2004/islamiclaw/international.htm%202-6) [↑](#footnote-ref-47)
48. Ibid., at 17-18 [↑](#footnote-ref-48)
49. Ibid., at 17-18. [↑](#footnote-ref-49)
50. S. S.Ali, ‘Resurrecting *Siyar* through *Fatwas*? (Re) Constructing ‘Islamic International Law’ in a Post–(Iraq) Invasion World’ (2009) *Journal of Conflict & Security Law* [↑](#footnote-ref-50)
51. Ibid at p124 [↑](#footnote-ref-51)
52. H. Kruse, ‘The Foundations of Islamic International Jurisprudence’,(1955) 3 *JPHS 1, at* 31 [↑](#footnote-ref-52)
53. S. C. Neff, “A Short History of International Law”, *in* Malcolm D. Evans *INTERNATIONAL LAW* (3rd ed), 2010, 3. [↑](#footnote-ref-53)
54. *Dar ul Islam* was the abode of Muslims whether by birth or by conversion, and the people of the tolerated religions (Jews, Christians and Zoroastrians) who preferred to remain non-Muslims by paying a poll tax to the state. The *dar al-harb* was the abode of Non-Muslims or *Harbis* i.e. people of the territory of war. A harbi did not have any rights or duties under Islamic law, a concept similar to Roman law's doctrine that the *ius civile* applied only to Roman citizens. *The* [*Encyclopaedia of Islam*](http://en.wikipedia.org/wiki/Encyclopaedia_of_Islam). New Edition. Brill, Leiden. Vol. 2, at 128 Also see M. Khadduri Islam and the Modern Law of Nations: *The American Journal of International Law,* Vol. 50, No. 2 (Apr., 1956),359 [↑](#footnote-ref-54)
55. S. Mahmassani, “The Principles of International Law in the light of Islamic Doctrine”,*Recueil des cours* 117(1966) 278 [↑](#footnote-ref-55)
56. H. Kruse, ‘The Foundations of Islamic International Jurisprudence’,(1955) 3 *JPHS 1, at* 31 [↑](#footnote-ref-56)
57. http://www.oxfordislamicstudies.com/article/opr/t125/e496 [↑](#footnote-ref-57)
58. Jurists such as Mahmud Shaltut, served as the rector of the Azhar Mosque University in Egypt in the middle of the 20th century and authored two treatises on the Islamic law of warfare, *Muhammad's Mission and Warfare in Islam* (1933) and *The Quran and Warfare* (1948) ; Muhammad Abu Zahra, a traditionally-trained, but reform-minded scholar of Islamic law and professor of law at Cairo University Faculty of Law active in the inter-war period and immediately after World War II and author of *International Relations in Islam* (1964); and Wahba al-Zuhayli, a prominent contemporary Syrian jurist of Islamic law and member of the influential Islamic law committee of the Organization of the Islamic Conference and author of *International Relations in Islam: a Comparison with Modern International Law* (1981). [↑](#footnote-ref-58)
59. Mohammad Fadel “ International Law, Regional Developments: Islam”, in: R. Wolfrum (ed.),

MPEPIL, 2010, online edition, margin number 58, available at <http://www.mpepil.com>. [↑](#footnote-ref-59)
60. W al-Zuhayli *International Relations in Islam: A Comparison with Modern International Law [al-'Alaqat al-duwaliyya fi al-islam: muqarana bi-l-qanun al-dawli al-hadith]* (Mu'assasat al-Risala Beirut 1981). *Also see a journal article by the same author W. Al-Zuhayli “*Islam and International Law”, Int’l Rev. of the Red Cross No. 858 (2005),269-278. [↑](#footnote-ref-60)
61. G.M. Badr, ‘A Survey of Islamic International Law’, (1982) 76 *Proceedings of the American Society of International Law* 56. [↑](#footnote-ref-61)
62. Ibid.,58 [↑](#footnote-ref-62)
63. Ibid., 58 [↑](#footnote-ref-63)
64. Ibid., 57 [↑](#footnote-ref-64)
65. S.S. Ali and J. Rehman supra note [↑](#footnote-ref-65)
66. Mohamad Fadel [↑](#footnote-ref-66)
67. Al Zuhayli 105 [↑](#footnote-ref-67)
68. Muhammad Fadel [↑](#footnote-ref-68)
69. Abul-Hasan Ali al-Mawardi, *Ahkamal Sultaniyyah wal-wilāyat al-Dinniyah* (Beirut: Dař al-Kutub al- ‘Illmiyyah) 1999, pp. 35–41; Imam Muhammad ibn Jareer al-Tabari *Jaami’ al-Bayaan fi Ta’weel Aayi-‘l-Qur’aan*.  [↑](#footnote-ref-69)
70. A. Afsaruddin, ‘The *As-Siyar* Law of Aggression: Juridical Reinterpretations of *Qur’an*ic Jihad and their Contemporary Implications for International Law’, in M. Frick and A. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (2013), at 45. [↑](#footnote-ref-70)
71. During Ibn-i- Tamiyya’s time Muslim Empire was facing both external and internal threats. This emerging political situation had an impact on changing the perception of *jihad* from offensive to defensive war. It was also the time when Shaafi jurists recognised the third territorial category of *Dar-ul Sul* or *Dar-ul-Aman*. [↑](#footnote-ref-71)
72. AL Silverman, ‘Just War, Jihad and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence’ 44 *Journal of Church and State* (2002) 73. [↑](#footnote-ref-72)
73. Mujahid b Jabr an early exegete of the *Qur’an* interpreted Quranic verse2:190 by saying that these verses mean one should not fight until the other side commences fighting. This verse commanded Muslims to fight only if Pagan Makkans had initiated hostilities and to refrain from combat when the Pagan Makkans refrain from fighting. However the subsequent Qur’anic verse ‘Slay them where you find them and expel them from where they expelled you, for persecution is worse than killing’ (191) is often used as a justification for offensive jihad. Varying interpretations have been given by the early and late commentators of this verse. From 9th century onwards jurists like Al-Mawardi and Al-Tabari went on to endorse the principle of offensive jihad by invoking the theory of *Naskh* or abrogation on the basis of the subsequent Qur’anic verse ‘Slay them where you find them and expel them from where they expelled you, for persecution is worse than killing’( 2:191). Al-Mawardi and Al-Tabari are of the view that this verse abrogated the previous verses of the *Qur’an*. This verse according to Al-Mawardi, encode divine permission to fight equally those who fight and those who detest from fighting. In comparison to the interpretations of Al-Mawardi an early scholar Maqatil b Suleman considered this verse to be a denunciation of the Makkans who had commenced hostilities at Hudaibyia and who began fighting during the sacred months in the sacred sanctuary which led to a repeal of the prohibition imposed upon Muslims against fighting near Kabah and was clearly an act of aggression. [↑](#footnote-ref-73)
74. S Mahmassani, ‘The Principles of International Law in the Light of Islamic Doctrine’, (1966) 117 *RCADI* 239, at 265 [↑](#footnote-ref-74)
75. Asma Afsaruddin, ‘The *As-Siyar* Law of Aggression: Juridical Reinterpretations of *Qur’an*ic Jihad and their Contemporary Implications for International Law’, in M. Frick and A. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (2013), at 45. [↑](#footnote-ref-75)
76. S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996) 263. J.L. Payne, *Why Nations Arm* (1989) 121. As cited in Ali and Rehman [↑](#footnote-ref-76)
77. Ali supra note p128 [↑](#footnote-ref-77)
78. ibid., p128 [↑](#footnote-ref-78)