

Islamic Human Rights and International Law

by

Glenn L. Roberts

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AND
INTERNATIONAL LAW**

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Preface.

This paper was written in the autumn of 2003 in the wake of the U.S. invasions of Afghanistan and Iraq. At a time of unbridled optimism about American plans to export Western ideas and culture to traditional societies in the Middle East, it was the opinion of the writer in 2003 that such optimism was unfounded and that the American project would run aground on the shoals of custom, tribalism, and an entrenched framework of traditional legal and political values that differ profoundly from the milieu espoused by Western, and especially American, proponents of rapid societal transformation.

Traditional Islamic law, or the Sharia (*al-shari'a*), is the chief embodiment of these traditional values among Muslims, known for centuries as simply The Holy Law. In the following monograph, the author argues that the Sharia, though long ignored or scorned by Westerners, has relevance not merely as a medieval survival in the family law regimes of a few Muslim societies, but that its influence has in fact been growing both domestically and internationally, such that it has attained the status of a quasi-regional customary international law. The international component of the Sharia is not only capable of competing with prevailing customary international commercial law, as demonstrated in the LIAMCO case and the growing international network of Islamic banks, but also brings its own international agenda of “Islamic human rights” that compete with and seek to displace the prevailing international legal regime of “Western human rights.”

Rather than acknowledging this emergence—or more accurately, re-emergence—of the rights of Muslims *qua* Muslims, both locally and internationally, an aggressive “American customary-law-of-human-rights school” employed a doctrine of “instant customary law” formulated during the Soviet era as part of America’s Cold War effort, to aid American policy makers in the wake of the World Trade Center attacks. The purpose of this Orwellian-named “instant customary law,” as newly employed, was to halt, roll back, and eliminate wherever possible Islamic principles and all manifestations of the Islamic Sharia in the international arena, as part of a larger pre-existing campaign by Western NGO’s to eliminate Sharia elements domestically within Muslim countries. Thus, the American “war on terror” was rapidly transformed during 2003 and thereafter into a global “war on Islam.”

The thesis presented in this monograph has proved highly controversial. This has been due, in the author’s view, to the Western media and power elites’ persistent refusal to acknowledge the existence of a world-view that differs radically from their own. The Islamic view, however, has been steadily growing in capability and influence, while remaining fundamentally and unalterably opposed to many of the most cherished values of the current Western international political and economic order, and the existence of this world-view cannot be dismissed through blunt censorship, wishful thinking, or by threatening to bomb Islamic societies “back to the Stone-Age.”

The world is in the throes of a resurgent traditional Islam, in both its Sunni and Shi’i varieties, which is in the process of transforming localized revolts

against client-police-states and pseudo-democracies imposed by Western powers into a two-fold (Sunni and Shi'i) global offensive that seeks to re-establish the political, economic, cultural, and military independence of the Islamic world, an independence that was enjoyed for many centuries before the advent of Western "naval gun diplomacy" and its oil concessions. This revolt against centuries of domination and hegemony by the West shows no indication of slowing or compromising its goals.

As two generations of Soviet occupation of Central Asia failed to eradicate or transform the essentially Islamic nature of those regions, as detailed in Commissar and Mullah: Soviet-Muslim Policy from 1917 to 1924 (Universal-Publishers), the American Oil Empire in the Middle East is similarly fading—an Empire that enjoys infinitely more resources and cultural penetration than the Soviets ever possessed. Far from being transformed by the American "human rights" offensive, the gravitas of the conflict has moved beyond local arenas in the Middle East and Africa to the wider world of international law, and has become a domestic issue within Europe and the Americas, where the attacks on the World Trade Center were only the first—and unfortunately and tragically violent—installment of what promises to be an increasingly intense global struggle. Only coming generations will know when and where the gravitas of this conflict will ultimately settle.

Glenn L Roberts

ISLAMIC HUMAN RIGHTS AND INTERNATIONAL LAW

by Glenn L Roberts, Esq.¹

Introduction.

In 1996, the political scientist Samuel P. Huntington published “Clash of Civilizations,” in which he asserted that the post-Cold War world would be dominated by seven or eight competing political entities, defined not by ideology but by religion, language, and culture.² His work caused a stir, not merely due to the eminence of Professor Huntington, one of the foremost political scientists in the United States, but due to the novel nature of his claim. In keeping with the geographically limited³ and ahistorical⁴ outlook of American society, constituting the military, scientific, and economic spearhead of the modern West, the sudden realization in elite circles that history had not ended with the fall of the Kremlin,⁵ and that most of the world was not only *not* like America, but would not *become* like America in the foreseeable future, was a shock. The notion that political

¹ B.A. University of Texas; M.A., Rice University; J.D. University of Houston Law Center. This paper is the second of a two-part thesis written in 2002-2003 in partial satisfaction of the J.D. requirements at the University of Houston Law Center, the first entitled “Sharia Law and the Arab Oil Bust: PetroCurse or Cost of Being Muslim?” The writer thanks Jordan Paust, Professor of International Human Rights Law at University of Houston Law Center; Jacqueline Lang Weaver, A.A. White Professor of Law at University of Houston Law Center; and David B. Cook, Assistant Professor of Islamic Studies at Rice University, for their comments. Stated opinions and any errors herein are entirely those of the author, attorney and translator for Pro-Lex Services.

² SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 20-29 (Simon & Schuster, 1996).

³ “...of all the books translated worldwide, only 6 percent (maybe less) are translated from other languages into English. By contrast, almost 50 percent are translated from English into those other languages.” Margo Jefferson, *The Fortress of Monoglot Nation*, NEW YORK TIMES BOOK REVIEW, Oct. 26, 2003, at 31.

⁴ See *The Decline and Fall of History Teaching*, NEW YORK TIMES MAGAZINE, Nov. 17, 1985, at 40. See also C.T. Rossi, *The United States At 226 Years: Afflicted With Historical Amnesia*, NOTABLE NEWS NOW (Free Congress Research and Education Foundation), May 23, 2003, available at www.freecongress.org.

⁵ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 2-10 (Penguin, 1992).

differences in the future might stem more from irreducibles like religion than something as malleable as political ideology raised the prospect of permanent conflict on a global scale. Although Huntington's thesis was for a time overshadowed by the economic boom of the 1990s, the World Trade Center attacks of 2001 have since lent him a prophet-like status.

His ideas, however, are not novel to historians of Islam.⁶ Huntington's thesis rested largely on his analysis of Islamic politics, and he delved into Islamic⁷ history to a degree unusual for a social scientist. Indeed, analyses of modern Islam, whether political or legal, necessarily begin with its origins, since Islam is consciously historical and traditionally looks to a prior Golden Age for guidance and virtue. In its essence geographically unlimited, Islam recognizes no borders and no limits to its reach, but applies to international relations, politics, and domestic affairs equally.⁸

The modern Law of Nations⁹ is today usually presumed to be universal, inexorable, and a vehicle for a regime of morality and human rights that varies

⁶ See DANIEL PIPES, *IN THE PATH OF GOD: ISLAM AND POLITICAL POWER* (Basic Books, 1983) (detailing the persistence of the Islamic impetus for political control), and BERNARD LEWIS, *WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* (Oxford Univ. Press, 2002) (exploring role of Islam on flexibility and intellectual inquiry in Islamic world). For documentation of Muslims' efforts to reconcile traditional Islam with modern thought, see HAMID ENAYAT, *MODERN ISLAMIC POLITICAL THOUGHT* (University of Texas Press, 1982); ALBERT HOURANI, *ARABIC THOUGHT IN THE LIBERAL AGE: 1798-1939* (Cambridge University Press, 1983) (1962); and WAEEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH* (Cambridge Univ. Press, 1997).

⁷ By convention, I use the term "Islamic" to indicate those societies and governments that are within the broader civilization of Islam, and "Muslim" for those that formally recognize Islam as a source of state authority. Thus modern Turkey and Albania are Islamic, but Egypt and Saudi Arabia are Muslim.

⁸ See PHILLIP K. HITT, *ISLAM, A WAY OF LIFE* 42 (Regnery/Gateway, 1970). See also HOURANI *supra* note 6, at 4. And see Joseph Schacht, *Law and the State*, in *THE LEGACY OF ISLAM* 392, 392-395 (Joseph Schacht & C.E. Bosworth, eds., Oxford University Press, 1979).

⁹ The modern law of nations is usually acknowledged to have begun with Hugo Grotius' work *De Jure Belli ac Pacis* in 1688. For a brief history of the development of modern international law, see Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 *DUQ. L. REV.* 655, 655-7 (2002).

little, or should vary little, throughout the world.¹⁰ Global institutions such as the World Bank and the International Monetary Fund (IMF), and numerous Non-Governmental Organizations take this regime for granted, branding it “modernization.”¹¹ The United Nations has promulgated numerous resolutions seeking to implement human rights globally.¹² Women’s equality, in particular, is a new customary international legal human right that is rapidly approaching the status of *jus cogens*, on a par with slavery, genocide, child labor, and piracy,¹³ even though the United States itself still applies only intermediate scrutiny to gender legislation.¹⁴ Devout Muslims, however, are increasingly applying what they perceive as Islamic principles to international law and institutions. Thus the supposed universality of today’s international regime of human rights is being

¹⁰ For several views pro and con, see Gunther F. Handl, W. Michael Reisman, Bruno Simma, Pierre Marie Dupuy, Christine Chinkin, Rachel De La Vega & Jordan Paust, *A Hard Look at Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 371 (April 20-23, 1988).

¹¹ See John King Gamble & Charlotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs?* 31 LAW & POL’Y INT’L BUS. 221 (2000).

¹² The most important are: United Nations Universal Declaration of Human Rights (UDHR) U.N. GAOR, 3rd Sess., pt.1, at 71, U.N. Doc. A/810 (1948); the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). A fourth document, the International Bill of Human Rights includes the UDHR, the ICCPR, and the ICESCR. See Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights--Towards a Communitarian Revision*, 25 CUMB. L. REV. 651, 656, (1994-1995), citing 1 UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 1-50 (1993), and citing Laura Reanda, *Human Rights and Women’s Rights: The United Nations Approach*, Vol. 3, no. 2 HUM RTS. Q. 11 (1981). Also, the U.N. Charter states in the preamble that its purpose includes “promot[ing] and encourage[ing] respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. CHARTER, art. 1(3). See Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT’L L. & POL’Y 297, 326-329 (Spring, 1995), for a comparable list of documents. The U.N. also has a Commission on Human Rights, which periodically announces new “human rights” without any prior discussion by the U.N. General Assembly. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 A.J.I.L. 607, 613 (1984).

¹³ *Jus cogens* in Article 53 of the Vienna Convention on the Law of Treaties is “[a] peremptory norm of general international law [that is] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969). Also see Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

¹⁴ Paralleling its reservation on strict equality for women, the United States, when it endorsed the ICCPR, reserved Article 20, which prohibits hate speech against religion. Schooley, *supra* note 12, at 656, discussing the Convention on the Elimination of Discrimination Against Women (CEDAW).

subjected to increasing efforts to “Islamize” international law, which is perceived in the Islamic world as a product of American domination of international institutions since 1945.¹⁵

This thesis evaluates the feasibility of these efforts, which have been strongly resisted in theory and practice by those with interests in the prevailing order. First, I show that Islamic law has an international law component that is inseparable from Islamic law, and no different in character, principles, and morality from its main body. Second, I discuss the viability of this component, and demonstrate its relevance to today’s public international law. Third, I show how Islamic law has its own vision of “human rights,” which, by virtue of the overall unity of Islamic law, must inevitably be asserted by Muslims in their international relations, rights that are by definition different from and in conflict with prevailing notions of human rights, especially the rights of women. Therefore, we should expect today’s quasi-regional Islamic international law to receive increasing acknowledgment and acceptance in international arbitrations and in the International Court of Justice (ICJ), together with successful assertions of “Islamic human rights” in non-Islamic countries.

¹⁵ “While the U.N. Universal Declaration of Human Rights and succeeding documents built up an important body of universal doctrine, there has been a mounting volume of criticism of these norms on the basis that they incorporate Western-oriented ideas and that, especially at the time of the Universal Declaration, sufficient note was not taken of other traditions, especially the Islamic. In the contemporary world, when the Islamic influence is so powerful, there is a danger that if sufficient heed be not paid to Islamic attitudes and modes of thought, the Universal Declaration and human rights doctrine in general may run into rough weather.” C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 168 (St. Martin’s Press: 1988). Also see ABUL ALA MAUDUDI, *HUMAN RIGHTS IN ISLAM* 13 (1976).

Lastly, I discuss recent proposed changes in customary law doctrine in the context of these trends and how these proposals threaten to transform the “war on terror” into a global “war on Islam.”

Chapter 1

AL-SHARIA: ISLAMIC LAW.

Unlike Christianity and Judaism, Islam is not a religion *with* law, but a religion *of* law. Islamic law, usually termed *al-Sharia*, or “the Path,” is not merely an integral part of Islam, but is its *raison d’être*. That is, Islam was communicated to Muhammad for the purpose of revealing the Sharia, which is the vehicle of a Muslim’s salvation.¹⁶ The Sharia is not a legal code in the Western sense and should not be confused with Western notions of limited government. Islam is intended to be comprehensive, and the Sharia, in theory, regulates all aspects of a Muslim’s life, including both rights and duties, not only as regards Allah, and other Muslims, but also as regards non-Muslims.

The Sharia is based on the doctrines of four main schools, or *madahib*, “legal rites,” (sing: *madhab*) stemming from four principal sources. The first source is *al-Qur’an*. Dictated by the angel *Jibril* (Gabriel) to the Prophet Muhammad between 610 and 632 AD, the Quran deals primarily with metaphysical salvation, containing only about 500 legal passages, and is the one infallible source of Islamic law.¹⁷ Muslims are discouraged from translating the Quran. Translation is pointless because much of the attraction of the Quran lies in the poetic structure of its surahs, which even non-Arabic speakers find appealing and even hypnotic. It is also improper to alter the literal word of God. Among Muslims it is an article of faith that the Quran was “uncreated,” that is, pre-existed the creation of the

¹⁶ In Christianity, canon law is sometimes considered to be a later accretion. In Islam, “canon law” is part of the revelation itself, and inseparable from the message of salvation.

¹⁷ Out of 6,219 total. Only about 80 of these 500 are legalistic in the Western sense; the rest deal with ritual detail. MERVYN K. LEWIS & LATIF M. ALGAOUOD, *ISLAMIC BANKING* 21 (Edward Elgar: 2001), citing ABDUR RAHMAN I DOI, *SHARIAH: THE ISLAMIC LAW* (Kuala Lumpur: AS Noordeen: 1989).

world. Although translation is not prohibited to Muslims, the result is not said to be the Quran, and pious Muslims are expected to learn Arabic so they can eventually read the true Quran.

Second is the Sunna, or the words and deeds of the Prophet as related by his companions, and preserved through chains, or *isnad*, of reporters. Of the four legal rites, the Maliki rite was the first to emphasize the hadiths of the Sunna as a necessary complement to the guidance of the Quran. There are today six collections of hadith to which all Sunni Muslims must adhere, whatever their rite.¹⁸

The Hanafi rite flourished in the late 8th century. Following Abu Hanifah, Hanafi jurists applied the principle of *ra'y*, or “opinion,” to Quran and Sunna, including *Ijma*, “consensus,” and *Qiyas*, “analogy.” Arab jurists thereby gained some measure of flexibility in interpreting Quran and Sunna.¹⁹

The third major rite, of Shafii, rejected many suspect hadith, and closed the door on the Sunna as Muhammad had closed the door on revelation. Shafii emphasized *usul al-fiqh*, the process of discovering divine rules for implementation among Muslims as law. Liberalizing trends evident in the use of *qiyas* by Hanafis were reversed under Shafii, who emphasized that all legal rules must stem from Allah, and not be of human origin, humans being inherently

¹⁸ These are al-Bukhari, Imam Muslim, Nasai, Abu Daud, Ibn Majah, and Tirmidhi. See MAZHAR U. KAZI, A TREASURY OF HADITH AND SUNNAH (551 HADITH) 29 (Alminar Publications: Claymont, Delaware, 1997).

¹⁹ HITT, *supra* note 8, at 44.

fallible. Under Shafii, it became established that adherence to the Sharia was both necessary and sufficient for the eternal salvation described in the Quran.²⁰

The last of the four major rites, the Hanbalis, followed in the late ninth century. More literalist and conservative than the others, the Hanbalis are chiefly represented in the modern world by their sectarian descendants, the Wahhabis of Saudi Arabia.²¹

There are other important sources of Islamic law, however. Arab custom, or *urf*, is downplayed by Muslim jurists since it derives from what modern jurisprudents would call Arab common law rather than from the revered Quran and Sunna, and thus predates Islam. Under the principle that Allah could and would have proscribed what He did not wish to be included in the Sharia, custom early acquired the same legal force as the primary sources of Islamic law.²² Custom includes *‘asabiyah*, or “tribal loyalty,” and also prescribes the precise dress that Muslim women may wear.

Another source, *ijtihad*, or “independent reasoning,” has enjoyed a renaissance in modern times. But formally the door to *ijtihad* was closed circa 1000 AD, when the *ahkam*, “divine rules,” of the Sharia had supposedly been fully discovered. *Istislah*, or “public interest,” and *istihsan*, or “equity,” have

²⁰ BERNARD WEISS, THE SEARCH FOR GOD’S LAW 1-11 (Univ. of Utah Press, 1992).

²¹ HITT, *supra* note 8, at 46.

²² Ruttley & Mallat citing the medieval *alim* Abu Yusuf: “What matters in all things is *urf* [custom]” See HILARY LEWIS RUTTLEY & CHIBLI MALLAT, COMMERCIAL LAW IN THE MIDDLE EAST 25 (Hilary Lewis Ruttley & Chibli Mallat, eds., Graham & Trotman, 1995). Also, Lewis & Algaoud state “The continuation of a custom of a particular place or community is allowable under Islamic law, and may in fact be assimilated into the law, as were many of the customs of the Arabs.” Lewis & Algaoud, *supra* note 17, at 25.

similarly enjoyed renewed life in recent times, having been eclipsed for centuries by the principle of *taqlid*, or “imitation.”²³

Whatever the rite, all Muslims see themselves as belonging to a single entity called the *Ummah*, which, since the time of the Prophet, has aspired to a single political, religious, and social theocratic state encompassing all Muslims everywhere, recognizing no distinction between religion and politics, although this has rarely been achieved in Islamic history.²⁴

One educated in Islamic law is commonly referred to as a *‘alim* (plural: *‘ulama*), or “legal scholar.” One who has attained a very high level of knowledge in *‘ilm*, or the “science” of Islamic law, is usually termed a *faqih* (plural: *fuqaha*), while the most learned *fuqaha* are called *muftis*. Since Islam aspires to put the individual into a direct relationship with God, there are no priests, or formal clerical ranks, or other intermediaries in Sunni Islam, just as traditionally there was no formal accreditation in Islamic law, although today there are many Islamic law schools with and without state licensing and accreditation of graduates in the Muslim world, the most famous and oldest being al-Azhar in Cairo.²⁵

According to Muslims, the Sharia is fixed and eternal, the right to which every Muslim is entitled by the will of Allah, and is applicable to all humanity for all time. The priority of significance of various sources of the Sharia is in effect reversed when compared to modern positive law. That is, the older the source, the more

²³ Hitti, *supra* note 8, at 48-49. For an in-depth treatment of *ijtihad* and *taqlid*, see JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 69-75 (Clarendon Press, 1964). Formally, Hanbalis do not adhere to the doctrine of *taqlid*. But this is not due to any liberal tendency on their part; rather their literal reading of Quran and Sunna make *taqlid* redundant and unnecessary.

²⁴ See Salah Sultan, *Islam: A Comprehensive Way of Life*, THE AMERICAN MUSLIM 13 (January, 2000).

²⁵ C.G. WEERAMANTRY, *supra* note 15, at 54.

relevant it is. As believers in a revelatory religion, therefore, traditional Muslims look to the time of the Prophet for guidance, and trust those sources closest in time and proximity to Muhammad as the most authentic and legitimate. Thus the pre-eminence of the Sunna compared to later writings of *qadis* (judges), and '*ulama*'.

An important aspect of the Sharia, often overlooked due to their technical nature, are the Quranic prohibitions on *riba*, *gharar*, *maysir*, and *bida'*. In brief, *riba* can be thought of as the sin of attaining wealth without risk or effort. Its most common application is the blanket prohibition on any bank or individual collecting or giving money interest on loans. *Gharar* can be thought of as the sin of losing money via risky contracts or financial speculation. Its most common manifestations are the detailed regulating of contracts and the related ancient ban on insurance. *Maysir* is the explicit ban on gambling, and is a variety of either *riba* or *gharar*. *Bida'* is the sin of innovation in religion, which prohibition has long blocked the exercise of individual conscience in Islam, and promoted adherence to literal interpretations of Quran and Sunna, making the identification of abstract principles such as those just presented to explain *riba* and *gharar* less certain than one might wish. Used inconsistently in Quran and Sunna, these moral prohibitions are nevertheless absolute in the Sharia, and even the most "modern" or "liberal" of Muslims thinks twice before ignoring these prohibitions.²⁶

²⁶ The rules on these prohibitions are quite complex and differ among the schools, leading to substantial debate on their precise application. For an extended discussion, see NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 20 (Cambridge University Press, 1986). For an argument that *riba* should be identified only with Ricardian rent, and not with money interest, see M. UMER CHAPRA, ISLAM AND THE ECONOMIC CHALLENGE (The Islamic Foundation and The International Institute of Islamic Thought, 1992). For a brief description of the ban on *bida'*, see *A Survey of the Gulf*, THE ECONOMIST 14 (March 23, 2002).

As a deductive system of law, the Sharia is capable of expansion by jurists by means of hypothetical examples.²⁷ Not only is the Sharia in perpetuity “awaiting discovery” through the “science” of *fiqh*, but the comprehensive scheme of dividing all human activity into required, recommended, permitted, disapproved, or forbidden categories supports its theoretical expansion.²⁸ The extraordinary detail applied to everyday life, for example, dictating which foot should first enter a house, the precise order in which to bathe each part of the body, the prayers to utter at each *rak’a*, or ritual genuflection, and which contract forms are *sahih*, or “valid,” demonstrates the potential of the Sharia in regulating all spheres of life, an intricacy symbolized by Islamic art, which, of course, is also regulated by the Sharia.²⁹ This is further illustrated by the Sharia’s lack of provision for the kind of rules that restrict the jurisdiction of Western law courts, such as standing, ripeness, mootness,³⁰ constitutional separation of powers, or *stare decisis*.³¹ These obstacles to litigation stem from the West’s inductive approach – all aspects of the Lockean preference for limited government – and have no place in the classical Islamic world-view, which seeks to enforce Islam in

²⁷ With the exception of the Hanbalis, whose literal approach disallowed the use of hypothetical examples. Christopher Melchert, *Religion and the Law*, 23 OKLA. CITY U. L. REV. 901, 902 (1998).

²⁸ The Arabic terms are *wajib*, *mandub*, *mubah*, *makruh*, and *mahzur*. Only the last is technically *haram* (forbidden); the rest are *halal* (allowed).

²⁹ Melchert, *supra* note 27, at 5. Also see IMRAN AHSAN KHAN NYAZEE, THEORIES OF ISLAMIC LAW 194 (1994), “Strictly speaking, when all human activity is to be regulated by the dictates of the shari’ah, there is no reason why even the rules of traffic should not be derived from its principles,” cited by Zainad Chaudhry, *The Myth of Misogyny: A Reanalysis of Women’s Inheritance in Islamic Law*, in 61 ALB. L. REV. 511, FN.46, (1997).

³⁰ Ali Khan, *Islam as Intellectual Property “My Lord! Increase Me in Knowledge”* 31 CUMB. L. REV., 648 (2000-2001), “Most cases reported in the Sunna are of advisory nature.”

³¹ One should not confuse *taqlid* with *stare decisis*. *Taqlid* is the doctrine that all legal thought must be traceable to a medieval source in order to conform to the Quranic principle of condemning *bida’*, or “innovation” in religion. *Stare decisis* is the doctrine that a case whose facts are not distinguishable from a prior case must be decided in the same manner as that prior case. *Taqlid* stems from a view of the Sharia as unchanging and perfect. *Stare decisis* is merely a principle of conservatism. For a discussion of *taqlid*, see HOURANI, *supra* note 6, at 83.

all circumstances. The Sharia is the practical result of the ancient phrase *Islam din wa dawla*, or “Islam is both religion and state,” and aspires to a comprehensiveness far beyond that of any merely political ideology, although it is fair to say that this has never been achieved in history, and perhaps cannot be achieved.

Chapter 2

AL-SIYAR: ISLAMIC INTERNATIONAL LAW.

There are two principal sources of Islamic international law. Shaybani used the term *al-Siyar* (sing: *sira*, or “way of acting”) in the late-8th century in Iraq, and adhered largely to the views of Abu Hanifa. Three hundred years later, Sarakhsi defined the term, and wrote a commentary on Shaybani’s works from memory, and his work reflected the more ideological and aggressive outlook of his later period.³²

Formally, al-Siyar refers to the relations of Muslims with non-Muslims. Given the universal applicability of Islam and the unitary nature of the Sharia, however, it is meaningless to speak of the Siyar as distinct from the Sharia, and therefore a misnomer to speak of an “Islamic international law.” Incompatible with the modern notion of nationhood, Islamic doctrine recognizes only the Ummah on the one hand, and all non-Muslims on the other. Shaybani is often cited for his description of this doctrine as *dar al-islam* versus *dar al-harb*, or “abode of peace” versus “abode of war.” Dar al-islam consists of those geographical areas where Muslims rule. Dar al-harb is those areas where Muslims do not yet rule, but eventually will. Since Allah sent His message to all Mankind, through most of the medieval period it was presumed – and still is today by many – that the entire world would eventually become dar al-islam, one way or another. Some later sources refer to a *dar al-sulh*, or “abode of peaceful arrangement,” but this was

³² MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR 12 (Johns Hopkins Press, 1966). Shaybani’s principal work was *Kitab al-Siyar al-Kabir*.

legally permissible only if the non-Muslims paid tribute. Since this was the equivalent of submitting to dar al-islam, most jurists rejected this as a category.³³

These were legal concepts, not merely metaphysical. In the early years, the relationship between dar al-islam and dar al-harb was dominated by the concept of jihad, which was more a “law of war” than like Grotius’ “law of peace.” The essence of jihad was that Muslims could wage aggressive war only on *al-kafirun*, “the unbelievers,” not on other Muslims. Jihad was defined as requiring non-Muslims to either convert, submit, or pay tribute. Conversion under this “tri-partite” formula was considered to be voluntary, thus not violating the Quranic injunction that there be “no compulsion in religion.”³⁴ Those who failed either to convert or submit could be freely attacked, and Muslims had to follow certain rules as regards division of the spoils, for example, one-fifth being reserved for the Caliph. Submission was followed by imposition of the *jizya*, a special tax demanded of all non-Muslims payable to the Muslims’ treasury, which preserved them from further attack or despoliation by the Muslims. Those who submitted became *dhimmis*, “protected ones,” and were allowed to keep their own religion and legal system as long as they wished, provided they continued to pay the *jizya*.³⁵ Under the Ottomans, *dhimmis* were formally recognized as *millets*, or “protected religious nations,” not tied to any specific territory.³⁶

³³ *Id.* at 12.

³⁴ *Quran* 2:256. Many historians now believe that in the earliest days conversion by non-Arabs was in fact discouraged, such that “submit or pay tribute” may have been more accurate.

³⁵ Initially only People of the Book were accepted as *dhimmis*, though later Buddhists and Hindus were granted similar immunity for the sake of stability of Muslim rule in India. People of the Book, or *ahl al-kitab*, included Christians, Jews, Zoroastrians, Mandeans, and Sabaeans, because each had a sacred book based on revelation.

³⁶ See, GEORGE G. ARNAKIS & WAYNE S. VUCINICH, *THE NEAR EAST IN MODERN TIMES*, VOL II, 72-80 (Jenkins Publishing, 1972).

In contrast, non-Muslims who traveled from those areas not yet subjected to the formula of convert or submit, were called *harbis*. Harbis had no formal, legal recognition within those regions governed by Muslims, the dar al-islam, unless they received a pledge of *aman*, or “security,” from a Muslim. Once receiving *aman*, a harbi was called a *musta'min*, or “pledge recipient,” and could enter dar-al-islam in safety, claiming the same right of protection from Muslim authorities as resident dhimmis. A *musta'min*'s property was similarly protected. However, such a pledge was good for only one year. After that time, it had to be renewed, or the *musta'min* would revert to harbi status, and lose his protection. The harbi could convert to Islam, but otherwise could not expect even friendship to protect his life or property – the Quran prohibits Muslims from accepting non-Muslims as *awliyah*, or “friends.”³⁷

These concepts are not just ancient history, but are law today in Saudi Arabia, where the Sharia reigns as pre-emptive common law. A non-Muslim wishing to reside or do business in Saudi Arabia must obtain a Saudi sponsor, typically his or her employer.³⁸ This sponsor's permission is required both to enter and to depart the country because visas are not issued without the consent of one's sponsor. One's sponsor is also typically one's business partner, and is

³⁷ “Believers are not to take unbelievers as friends in place of believers.” *Quran* 3:28. Author's translation. Unless otherwise specified, all translations in this thesis are those of the author. The term *awliyah* is in fact broader than mere friendship and includes “helpers, supporters, benefactors.” J.M. COWAN, ED., *THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC*, 3RD REVISED EDITION, POCKET BOOK 1100 (Spoken language Services, 1976). It would be a mistake to assume that conversion to Islam by a known non-Muslim is a simple process. Unlike modern Christianity, which accepts membership based on individual conscience, the communal nature of Islam requires active participation with attendant inspection of one's personal affairs and living arrangements, including one's marriage, with the purpose of ensuring that all aspects of one's life are consonant with the requirements of the Sharia, and will not bring disrepute on other Muslims, including, for example, not keeping a dog as a pet, which is forbidden under the Sunna. KAZI, *supra* note 18, at 183.

³⁸ GIL FEILER, *THE MIDDLE EAST IN THE NEW MILLENNIUM: ECONOMIC DEVELOPMENT AND BUSINESS LAW* 352 (Kluwer, 2000).

entitled to a percentage of the partnership's revenue under Saudi positive law. While his Western business partner may expect the Saudi partner to "earn" his share, the Saudi is in fact entitled to it under the Sharia as *jizya* tax on a non-Muslim dhimmi in dar al-islam.³⁹

Historically, dhimmis had the option of litigating a dispute with a Muslim under Sharia law in a Sharia court, while no Muslim could be forced to litigate in any dhimmi court. Similarly, in Saudi Arabia today – where the classical Sharia is embodied in its Basic Law – a *musta'min* foreigner can sue a Saudi citizen in a Saudi court, but the Saudi may apply Sharia law.⁴⁰ A Saudi citizen can never be forced to litigate a dispute with a non-Muslim in a dhimmi court, which of course do not exist in Saudi Arabia since no dhimmi can be a Saudi citizen. Since the Sharia is incapable of division into national and international components, this right of a Muslim to be tried only in a Sharia court therefore applies internationally as well as nationally, and is not merely Saudi law, but an essential element of the Sharia, and a right of all Muslims everywhere *qua* Muslims.⁴¹

Shaybani had stressed that jihad was a duty only when actual war was being conducted. Interludes could thus be peaceful. But Shafii redefined jihad as a perpetual affirmative religious duty on all Muslims in their relations with all non-Muslims who had not yet submitted to the Ummah.⁴² Only much later, in the 13th

³⁹ See FEILER, *Id.*, at 352-3, for a discussion of Saudi tax policy concerning guest workers.

⁴⁰ SCHACHT, *supra* note 23, at 132.

⁴¹ "...if a Muslim entered [dar al-harb] or if he were domiciled therein, he should respect the authority of the rulers of that territory and obey its laws. If, of course, there was a conflict between those laws and his own, his obligation was to the latter." WEERAMANTRY, *supra* note 15, at 146.

⁴² KHADDURI, *supra* note 32, at 58. "It was Shafii who first formulated the doctrine that the jihad had for its intent the waging of war on unbelievers for their disbelief and not merely when they entered into conflict with Islam.... Sarakhsi accepted the Shafii doctrine that fighting the unbeliever was 'a duty enjoined

century, after the Caliphate had collapsed, did the conservative Ibn Taymiya attempt to redefine jihad as requiring fighting only those enemies who actually invaded Muslim territory, a more defensive posture.⁴³ This last viewpoint was not widely accepted until the twentieth century, and cannot be considered part of the traditional Siyar. The *guerra fria* described by the Spanish writer Don Juan Manuel in the thirteenth century between Muslims and Christians in Spain, remained the most typical manifestation of the Siyar.⁴⁴

It is often asserted that the Siyar introduced certain principles governing international behavior that have since become integral to today's international law. For example, Shaybani insisted that treaties with non-Muslims should not be violated, describing *pacta sunt servanda* 800 years before Grotius.⁴⁵ The Quranic injunction to "keep your promises" is often cited to buttress Islam as the originator of this principle.⁴⁶ However, under Shaybani, such agreements were merely truces, good only until the Muslims felt ready to resume aggressive activities; the only legal requirement was for the Muslims to notify the other party of

permanently until the end of time.' Jurists who came afterward, and up to the very decline of Islamic power, merely introduced refinements and elaborations of these basic principles."

⁴³ "Ibn Taymiya...understood the futility of waging a permanent war against disbelief at a time when foreign enemies were menacing at the gates of Islam. He made a concession to reality by reinterpreting the jihad to mean a defensive war against unbelievers whenever they threatened Islam. Unbelievers who made no attempt to encroach upon the dar al-Islam...would not have Islam imposed upon them for force [since] 'no compulsion is prescribed by religion.' But unbelievers who encroached upon Islam would be in a different position altogether." *Id.* at 59. Whether this view of Khadduri concerning Ibn Taymiya is correct, it should be noted that Ibn Taymiya himself undermined this retrenchment by counseling revolt against Muslim political leaders who tolerated invasion by foreigners, and jihad against Mongols despite their conversion to Sunni Islam, which ensured his reputation as a turbulent figure in history and one of the intellectual precursors of a militant Wahhabism.

⁴⁴ *Id.* at 22. For an older, but still controversial, treatment of this see HENRI PIRENNE, MOHAMMAD AND CHARLEMAGNE (W.W.Norton, 1939).

⁴⁵ KHADDURI, *supra* note 32, at 57.

⁴⁶ "*awfu bil 'aqd*" Quran 5:1. Unless otherwise specified, all translations in this paper are those of the author, but compare ABUL A'LA MAUDUDI, TRANSL., THE HOLY QUR'AN, 16TH EDITION, (Islamic Publications PVT Limited, Lahore, Pakistan, 1999); MUHAMMAD M. PICKTHALL, TRANSL., THE GLORIOUS QUR'AN (Mostazfan Foundation of New York, 1984); and ABDULLAH YUSUF ALI, TRANSL., THE MEANING OF THE HOLY QURAN (Amana Corp, 1989).