The Higher Education Academy
UK Centre for Legal Education

Siyar (Islamic International Law)

A Teaching and Learning Manual

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Introduction

Aims and Objectives

This manual has been designed to introduce candidates to the Islamic notion of international law, known as *Siyar*, and the significant differences between it and modern international law. Islamic international law deals with body of rules that regulate the relations between the Islamic state and other non-Muslim states. One of the main functions of the course is to provide a sound understanding of how the law evolved and developed, and to critically examine the significance and application of this law in Islamic states.

This teaching and learning manual has been designed to offer support to both teachers and students who have an interest in Islamic law and particularly, Islamic international law. The content of this manual serves a valuable purpose in both Muslim and non-Muslim jurisdictions and is equally useful at both the undergraduate and postgraduate level. In order to gain optimum benefit from this manual, it is recommended that it be used in conjunction with an *Islamic law Bibliography* and a *Glossary of Arabic and English Terms*, which are also part of a series of manuals and materials developed for the teaching and learning of Islamic law. It is also suggested that readers consult the companion manuals *Approaches to Teaching and Learning of Islamic Law: Sharing some National and International Perspectives* and *Course Manual on Sources of Islamic Law* prior to working with this document.

Teaching Islamic law can be a challenging task and one of the aims of this manual is to support and encourage teachers to embark on this challenge. At the date of writing, there are a limited number of higher education institutions in the UK that offer Islamic Law courses. Where they do exist, the courses are often short or elective and are offered as part of degrees in law or Islamic Studies. As part of a course on Islamic studies, it is considered imperative that a student has a good understanding of Islamic civilisation, encompassing as it

does history, theology, political thought and sociology. For students who read law, the study of Islamic law is beneficial in numerous ways. It equips the student with the skill of comparative analysis. For prospective 21st century practitioners, a working knowledge of the legal norms of the Muslim population is helpful in contextualising their engagement with any area of law.

Teaching Methods

It should be noted from the outset that some concepts of modern international law differ significantly from the concepts of Islamic international law. However, as this course will examine, there are a number of themes and compatibilities within the two systems that overlap. Accordingly, the teaching of Islamic international law is not entirely the same as teaching modern international law and in some aspects, differs significantly. Islamic international law, is closely tied with the notions of religion and spirituality. Modern international law has been inspired by and is based upon Judeo-Christian traditions and values and in this regard, the involvement of Islamic International law has been minimal.

In order to understand the evolution of relevant concepts and the legal institution as a whole, is recommended that the student be encouraged to familiarize himself with the major aspects of Islamic history. This includes the history of the evolution of the first Islamic community in Medina and the development of relations with other tribes of the contemporary Arabian Peninsula. Familiarization with the history of the *Umayyad* and *Abbasid caliphates* is a must since without proper knowledge of the relations of these states with their Christian contemporaries, it is difficult to perceive why certain legal rules which related to interstate diplomacy, emerged in Islamic law.

Notwithstanding the complexities in formulating precise legal principles, it remains clear that *Sharia* and *Siyar* have been intimately involved in the growth of international law. Significant legal norms, as this manual examines, have had their origins in the Islamic world. Many contemporary laws establishing *inter alia* commercial, contractual and humanitarian norms are informed by *Sharia*. There is both concern and disappointment with

‘eurocentricism’ which has meant a negation of the contributions which other civilizations have made in shaping the law of Nations. In stereotypical negative images, Islam is exclusively and invariably associated with destruction and violence. Insights into the profound spiritual and jurisprudential richness of the Muslim traditions are required to overcome the existing preconceptions and prejudices towards Islam and Muslim States.

A further defect in the western understanding of Islamic International law which needs urgent rectification is the stereotypical representation of the Islamic concepts of *Jihad*, freedom of religion and minority rights. There is much adverse publicity that Islamic International law advocates violence and terrorism. There are tensions from within the Muslim community and jurists differ as to the precise scope of the application of *Jihad*. Having taken account of these strains and stresses, as this manual explores, it would still be erroneous to assume that terrorism and aggression forms an inherent part of Islamic State practices. The concept of *Jihad*, as Islam’s *bellum justum*, it is contended, has been firmly absorbed in the United Nations prohibition on the use of force. The implementation of the norms of religious tolerance and minority rights, have arguably been more controversial. As this manual explores, different approaches have characterized the practices of modern Islamic States.

Course outline

This manual is suggestive by nature and although it recommends that the course be taught over a period of 10 weeks, this can be altered at the discretion of the lecturer. The areas contained within this manual are as follows:

1. General introduction to Islamic international law (*Siyar*)
2. Basic concepts of Islamic international law
3. Islamic Law and *Jus in Bello* (Islamic humanitarian law)
4. Application of Islamic law in contemporary State practice (Blasphemy laws in Pakistan)

Assessment Methods

This manual suggests that the most appropriate form of assessment is to require the candidates to sit a three four university examination and submit one assessment essay. The university examination may comprise of both essay questions and problem questions. The lecturer may consider it appropriate for the examination to contribute towards 75% of the final mark awarded to the candidate. Should it be permissible for unannotated material to be taken into the examination, the following is recommended:

Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, The Johns Hopkins University Press (November 28, 2001)

and:

Islamic International Law and Jihad (War) Law Handbook, USA International Business Publications, Intl Business Pubs USA; 6 edition (7 Feb 2007)

The remaining 25% of the course may be examined by means of a compulsory assessment essay. There may be the option of titles for the assessment essay being forwarded by the candidate, but this should be submitted for prior approval to the candidate's tutor. In this instance, there would be no need for the candidate to submit his essay title for approval.

It is suggested that the word length for the assessment essay should not exceed the prescribed limit of 3500 words. This is a matter for the lecturer and may be amended as considered appropriate.

Tutorial Essays

It is recommended that all candidates be required to submit one tutorial essay. The following list may be considered a useful guide for this purpose and more details in respect of the same can be found in the tutorial section at the end of each relevant chapter.

Essay titles:

1. Consider the extent to which Islamic International Law (*Siyar*) is comparable to Public International Law

2. Examine and critically evaluate the role of the Organisation of Islamic Conference (OIC) in advancing the role and position of Islamic States within the United Nations and related international and regional organisations

3. How far would you agree with the view that the concept of *Jihad* as Islam's *bellum Justum* has been fully absorbed in the United Nations prohibition on the use of force?

The purpose of these essays is to ensure a good degree of understanding of the relevant subject by a student. They usefully assess analytical skills with regards to an examination of the sources of Islamic international law. The students should be able to provide a critical examination of the issues contained. It is anticipated that such assessments will enable an understanding of not only the central concepts in Islamic international law, but also the process of evolution, development of the sources and disagreement between Islamic jurists whilst articulating the principle of *Siyar*.

Course Material

In addition to the books contained within the list below, a more detailed bibliography of Islamic international law can be found in the companion *Islamic law Bibliography*.

Required purchase

Primary sources and materials

Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar,* The Johns Hopkins University Press (November 28, 2001)

Abu Ubayd Al-Qasim Ibn Sallam, *The Book of Revenue: Kitab Al-Amwal* (Great Books of Islamic Civilization), ed. by Ibrahim M. Oweiss, trans. by Imran Ahsan Khan Nyazee, Garnet Publishing Ltd; New Ed edition (1 Jun 2005)

Textbooks

Labeeb Ahmed Bsoul, International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) According to Orthodox Schools, University Press of America (15 Dec 2007)

Islamic International Law and Jihad (War) Law Handbook, USA International Business Publications, Intl Business Pubns USA; 6 edition (7 Feb 2007)

Recommended Purchase

G.H.A. Juynboll, *Encyclopaedia of the Canonical Hadith,* Brill, Leiden, 2007,

Nizam al- Mulk, The Book of Government or Rules for Kings: The Siyar Al Muluk or Siyasat-nama of Nizam Al-Mulk , ed. and trans. by Hubert Darke, Routledge Curzon (21 Dec 2001)

Michael Lecker, *The "Constitution Of Medina": Muhammad's First Legal Document* (Studies in Late Antiquity and Early Islam), Darwin Pr (30 Jul 2005)

Contemporary Cases Involving Islamic Law and State Practices

767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations (1993) 988 F. 2d 295

Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) [1989] ICJ Reports 132

Abbasi (R on application of) v Secretary of State for Foreign and Commonwealth Office [2002] EWCA Civ 1316

Aden and Others v Council and Commission T–306/01 R_1

Al-Megrahi v HM Advocate, Opinion in Appeal against Conviction, 14 March 2002 (Appeal No; c104/01)

Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) case [1990] ICJ Rep 64

Barcelona Traction, Light and Power Co. Case (Belgium v. Spain) [1970] ICJ Rep 1970, 3

Case concerning the Aerial Incident of 3 July 1988, Islamic Republic of Iran v. United States of America, 22 February 1996, General List No 79 <http://212.153.43.18/icjwww/icases/iirus/iirus_iorders/irus_iorder_19960222.pdf.>

Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) Request for the Indication of Provisional Measures [1979] ICJ Rep 7

East Timor Case (Portugal v. Australia) [1995] ICJ Rep 90

Frontier Dispute Case (Burkina Faso v. Republic of Mali) [1986] ICJ Rep 554

Her Majesty's Advocate v Megrahi, No 1475/99, slip.op. (High Ct. Judiciary at Camp Zeist Jan. 31, 2001) reprinted in 40 ILM 582 (2001).

Land, Islands and Maritime Frontier Case: El Salvador v. Honduras (Nicaragua Intervening) [1992] ICJ Rep 351

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 [1971] ICJ Rep 16.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) <http://www.icj-cij.org/icjwww/idecisions.htm>

Libya v UK; Libya v US Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Order of 14 April 1992 [1992] ICJ Reports 3.

Libyan Arab Jimahuriya v. USA, [1988] ICJ Rep 115

Nicaragua Case (Merits) [1986] ICJ Rep 14

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jimahuriya v. United Kingdom Judgment, [1998] ICJ Rep 9

Rann of Kutch Arbitration (1968) 50 ILR 2

South West Africa Cases (Second Phase) [1966] ICJ Rep 6

Sovereignty over Certain Frontiers (Belgium v. the Netherlands) [1959] ICJ Rep 209

State Bank of India v. The Custodian of Evacuee Property, West Pakistan, (1969) PLD, Lahore, 1050

Taba Award (Egypt v. Israel) (1989) 80 ILR 224

Temple of Peach Vihear Case (Merits) (Cambodia v. Thailand) [1962] ICJ Rep 6

The Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jimahuriya v. United States of America) 2003, 10 September General List No. 89 <http://212.153.43.18/icjwww/idocket/ilus/ilusorder/ilus_iorder_20030910.PDF.>

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), [1980] ICJ Rep 3

Western Sahara Case [1975] ICJ Rep 12

Chapter One

Overview of Islamic International Law (*Siyar*)

Sessions One and Two

The aims and objectives of this session are to:

- Consider the historical foundations of Islamic international law
- Analyse the fundamentals of Islamic international law
- Evaluate the legal scholarship on Islamic law
- Examine the sources of Islamic international law

It is recommended that this chapter be taught over two lectures and one seminar. A suggested guide for each seminar is located towards the end of each chapter. It may be that some students have had the opportunity to develop Islamic thought more than others. The sessions should however be tailored so as to accommodate all students, irrespective of their level of exposure to Islam. The lecturer should be prepared for the fact that although some students may be familiar with the implementation of 'Islamic' laws in Muslim jurisdictions, these laws may not in fact correspond with the spirit of the religion.

Historical Foundations of Islamic International Law

In order for the students to benefit from a good understanding of *Siyar*, as it stands today, it is essential that the history behind the law be examined. An interesting point to bring to the attention of the students is that amongst the primarily Christian led impressions which led to the formulation of the principles of international law, Islamic law, the *Sharia* and *Siyar* provided a principal exception.

The students may be asked to consider whether *Sharia* and *Siyar* have had inter-action with International law and the reasons behind their conclusions. This manual, and the teaching emanating from it advance the position that such inter-action has transpired, the extent of which has been significant. It would also appear that *Siyar* has in many ways been instrumental in developing the law of nations. The *Qur'an* and the *Sunna* have in fact confirmed the sanctity of treaties and devised legal principles on the treatment of aliens, freedom of the high seas, diplomatic protection and the expropriation of property. Cockayne has expressed the view that *Sharia* and *Siyar* have made invaluable contributions towards modern environmental laws and to the establishment of modern regimes of human rights law and international humanitarian laws. (J Cockayne, 'Islam and International humanitarian law: From a Clash to a Conservation between Civilizations' (2002) 84 *International Review of the Red Cross* 597). In order to engage the thought processes of the students, they may be asked to provide examples as to where this has been demonstrated – this subject will be analysed later during the course.

A further exercise the class could be involved in is to identify any similarities that exist between treaties within Islamic law and contractual obligations in non-Muslim jurisdictions. In this regard, Schacht may be referred to (J Schacht, 'Islamic law in Contemporary States' (1959) 8 American Journal of Comparative Law 133, at 139) and he writes that within Islamic law, treaties

are akin to contractual obligations governed by the following fundamental principles:

1. The freedom to enter into treaties is subject to the proscription that the treaty must not contain provisions contrary to Islam.

2. All treaty obligations must be respected and be followed in good faith, representing the modern international legal norm of *pacta sunt servanda.*

Relevant chapters from the *Qur'an* may be referred to. Specifically, *Qur'an* at 16:91 ordains Muslims 'to fulfill the covenant of God when you have a covenant and break not oaths after their confirmation'.

A question to put to the students is whether the law of respecting international obligations could be so strong as to override the traditional principles of *Jihad*. It would seem so. *Qur'an* at 8:72 commands '. . . but if they seek your aid in religion it is your duty to help them, except against a people with whom ye have a treaty of mutual alliance'.

In order to illustrate this point further, the tradition derived from the Prophet Muhammad which confirms the sanctity and observance of treaty obligations may be referred to. As the founder and head of the first Islamic State, the Prophet Muhammad entered into a range of international agreements and emphasized their compliance. The sanctity of treaties now forms part of the established code of the State Practices of the international community, including all the Muslim States.

3. Islamic law ordains that there must be genuine consent by the parties entering into a treaty arrangement and that its provisions must not be coercive, unjust or oppressive towards one party.

The practices of the Prophet Muhammad as head of the State again provide the primary example. To demonstrate this point, the work of Saeed could be cited. (A Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation* (Leiden, Brill, 1999) 30). He notes that in his treaty with the Christians of the town of *Najarn* in Arabia, the Prophet cancelled the *riba* (usury) accrued to their debts that had accumulated from pre-Islamic times.

Legal Scholarship on Islamic International Law

In order for the students to gain a solid and well rounded view of Islamic international law, it is recommended that they are encouraged to develop their thinking within this area. The following topics are recommended for the purposes of dialogue and discussion.

1. International Trade and Commerce

Students may be asked to consider how the significance of international trade and commerce forms an essential feature of *Siyar*. The general consensus is that *Siyar* confirms and develops international trade and commerce and has a particular bias towards *laissez-faire.* Macgoliouth may be referred to (DS Macgoliouth, *Muhammad and the Rise of Islam* (London and New York, G.P Putnam Sons, 1905) 69). In this regard, he states:

> [a] dissertation has been written on the commercial language of the *Koran*, showing that the tradesman Prophet could not keep free of metaphors taken from his business. 'God' he repeatedly says, 'is good at accounts'. The Believers are doing a good business, the unbelievers a losing trade. Those who buy error for guidance make a bad bargain. . . .[e]ven when he was sovereign at Medinah he did not disdain to buy goods wholesale and make a profit by selling them retail; while occasionally he consented to act as auctioneer.

From the *Sunna* of Muhammad, the interest of the Prophet in international trade and commerce becomes self-evident. It is well established that he had travelled and conducted business as a merchant in various countries. He chose his first wife *Khadija*, the wealthy businesswoman and financier, and established his reputation as an honest and committed trader. Subsequent Islamic practices reinforced these principles of international trade.

There is no doubt that International Commerce and trade acted as important tools for the expansion of the frontiers of Islam. Islamic ideals of commerce as well as commodities were exported from Arabia to the West to China and the Far East. According to Udovitch, (AL Udovitch 'Commercial Techniques in Early Medieval Islamic Trade' in DS Richards (eds), *Islam and the Trade of Asia: A Colloquium* (Oxford, Bruno Cassirer, 1970) 37–66 at 38), the ports of Basra and Baghdad emerged:

> [a]s the hub of a flourishing international trade with goods as prosaic as paper and ink and as exotic as panther skin and ostriches streaming into Mesopotamia from the four corners of the globe. Here they were either sold, or transhipped by caravan to the Mediterranean coast or by caravan or ship on to further East. Sustaining long distance trade . . . regardless of its absolute volume, implies a fairly advanced degree of commercial techniques available to those engaged in this trade. Conversely, a clear understanding of the framework within which commerce was, or could have been carried out would offer us a valuable indicator of the level of this aspect of economic life.

The advanced commercial techniques, as referred to by Udovitch, were based on laws and regulations, some of which had a substantial imprint on subsequent developments within international and national commercial norms.

2. Interaction with the West

Discussions as to how the interaction of Islamic commercial law with the West has left a substantial imprint is important and Badr's position provides a helpful insight. In this regard, he notes that financial transactions in the nature of bills of exchange and assignments of debts, also referred to as the *hawalah,* were practiced by Islamic States as early as the eighth century A.D. (GM Badr, 'Islamic Law: Its Relations to Other Legal Systems' (1978) 26 *American Journal of Comparative Law* 188, at 196). The concepts and mechanisms derived from *hawalah* were introduced to the European continent during the twelfth century A.D.

Another scholar Mahmassani may also be usefully cited. He states that the *Sharia* also developed the system of partnership laws, including the *mufawada* (unlimited, universal partnership) and *inân* (limited investment partnerships). (S Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 271-272).

Islam influenced the development of trade and economic laws, as well as the commercial codes of domestic legal systems of several European countries. Mahmassani points to the example of French business transactions, known in France as *aval*, as having originated from *hawalah*. The Islamic regulations of *inân* appear to have influenced the development of English commercial laws regarding 'occasional partnership'. (S Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 265-266). Furthermore, according to Badr, the doctrine of 'trust' has arguably derived from the *Sharia* principles of *waqf*. (GM Badr, 'Islamic Law: Its Relations to Other Legal Systems' (1978) 26 *American Journal of Comparative Law* 188, at 196).

3. Influence of Jurisprudence

Students may be reminded that the principles of *Siyar* were further elaborated and expanded into a distinct legal discipline by the great Muslim jurist and philosopher Abu Hanifa. Abu Hanifa inspired his disciples to engage into a jurisprudential understanding of *Siyar*. The lecturer may choose examples at his discretion and expand on those examples. Although for much of the preceding centuries, *Siyar* as an independent legal discipline was not promoted, Islamic States practices nevertheless had to formulate a series of laws in respect of their relations with the outside world.

4. Expansion of the Muslim Empire

A useful area to discuss is the expansion of the Muslim empire which subsequently led to the expansion and blossoming of Islamic trade. It should be noted that during the second millennium, there emerged a network of commercial relations between the Islamic world and the non-Islamic nations of southern and central Europe. In order to encourage international trade and commercial transactions, Muslim rulers provided substantial privileges.

The work of Hurewitz is relevant as he states that the *Ottoman* rulers were renowned for initiating commercial privileges and special concessions to European nations. (JC Hurewitz, (ed), *The Middle East and North Africa in World Politics: A Documentary Record–European Expansion* 1535–1914 (New Haven, Yale University Press, 1975). Once trade routes to India and the Far East were developed by the Europeans, resulting in, a reduction in trade with the *Ottoman* Empire, the *Ottoman Sultans* provided liberal terms in their treaties to revive international trade and commerce. Thus the Treaty of Alliance between *Sultan* Sulayman the Magnificent and Francis I, King of France, signed in 1535, not only granted the French subjects in the *Ottoman* territories the right to practise their religion but also accorded them

exemptions from poll tax along with the right of trial in their consulates, in accordance with their own laws. The lecturer might consider it useful to discuss article 2 of the treaty in some detail. This stated that the King of France had the right to:

> . . . send to Constantinople or Pera or other places of the Empire a bailiff . . . The said bailiff and consul shall be received and maintained in proper authority so that each one of them may in his locality, and without being hindered by any judge, *qadi*, *soubashi* or other according to his faith and law, hear, judge and determine all causes, suits and differences both civil and criminal, which might arise between merchants and other subjects of the King (of France) . . .The *qadi* or other officers of the Grand Signior may not try any differences between the merchants and subjects of the King, even if the said merchants should request it, and if perchance the said qadis should hear a case their judgment shall be null and void.

The network of these contacts and commercial relations was so strong that it lead Moinuddin to argue that 'centuries of peaceful contacts and commercial relations between Islamic and non-Islamic States prior to the admittance of the *Ottoman* Empire to the European concert in 1856 had led to the emergence of a body of "regional or Islamic" customary rules which provided the underlying basis of such relations'. (H Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Cooperation Among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the OIC* (Oxford, Clarendon Press, 1987) at 39).

5. Diplomatic Missions and Immunities

One of the major contributions by *Siyar* to modern day international law is the treatment of diplomats and towards establishing diplomatic immunities for foreign missions. The course should analyse this subject in some detail.

It can be seen that within the traditional *Sharia,* diplomats enjoy immunities not dissimilar to the ones provided for in modern international law. Furthermore, in its initial phase, classical Islamic law granted widespread concessions to foreign diplomats and emissaries and their arrival was often a ceremonious occasion. The lecturer may consider it appropriate to expand upon this citing relevant authorities such as Mahmassani and Bassiouni.

According to Mahmassani, '[within] Islamic practice, diplomatic agents were generally received with gorgeous ceremony. Similar ceremonies were observed on their departure. These ceremonies were often accompanied by great hospitality and the display of extravagant pomp and lavish processions, in order to give the emissaries the impression of the grandeur and power of the State'. (S Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117(1) *Recueil des Cours de l'Académie de Droit International* 265-266).

1. Bassiouni (in his seminal article in the *American Journal of International Law* (1980) at 609), makes the following observations:

The *Quran* (*Koran*) and the *Sunnah* (*Sunna*), the two principal sources of Islamic law, and the consistent practice of Muslim heads of state *(Khalifas),* a secondary source, clearly establish the privileges and immunities of diplomats in Islamic law and practice. The *Koran* and the *Sunna* contain numerous references to the protection and immunity of diplomats (referred to in these sources, as well as in the writings of scholars, as emissaries, envoys, deputations, delegations, and embassies) their staff, and accompanying

persons. Throughout these sources of Islamic law diplomats are entitled to immunity from prosecution, freedom from arbitrary arrest and detention, and proper care and treatment. In addition, Islamic law permits the head of state (the *Khalifa* or *Imam*) to enter into treaties binding the Islamic state. In this context, the 1961 Vienna Convention on Diplomatic Relations4 and the 1963 Vienna Convention on Consular Relations extend to diplomats absolute immunity from arrest, detention, and prosecution.

There is therefore a dual *Koranic* mandate that no Muslim state may transgress: protection must be granted to envoys, and expulsion is the only sanction to be taken against them. These mandates also are clearly expressed in the *Sunna*, which will be discussed below. The Treaty of *Hudaibiya* was signed between Prophet Muhammad and the *Quraish* tribe of Mecca in A.D. 628. In the course of the negotiations, the Prophet used two emissaries who went to Mecca on successive occasions to establish a basis for the treaty. One of them was Othman ibn Affan, who later became the third *Khalifa* (after the Prophet), succeeding Omar ibn al-Khattab. When word reached the Prophet that Othman had been killed, notwithstanding the fact that as an emissary he should have been secure in all respects, the negotiations were deemed broken and the Islamic forces readied to attack. It was deemed a *casus belli.* The *Quraishis* made it known that Othman was safe and that his person as an emissary was inviolate. This news resulted in the reopening of the negotiations. The *Quraishis* then sent to the Prophet their negotiator, Suhayl, who was treated as an inviolate ambassador. The Treaty of *Hudaibiya* was signed by the Prophet and Suhayl. It is noteworthy that Ali ibn Abi-Taleb, who was the scrivener of the treaty, also signed it as a witness. Ali became the fourth *Khalifa* after the Prophet and is the person the *Shiite* Muslims (who predominate in Iran) most revere and believe to be the legitimate heir to the Prophet. The Treaty of *Hudaibiya* and its negotiating history demonstrate the sanctity of emissaries, that a violation of an ambassador's immunity is a *casus belli,* and that no ambassador may be detained or harmed. That these events were witnessed by Ali ibn Abi-Taleb

makes them of greater significance to the *Shias*. The treaty and its negotiated history also establish that in Islam the principle of *pacta sunt servanda* is recognized and has been faithfully adhered to in practice. Subsequent to the Treaty of *Hudaibiya*, when the Prophet went to war against the *Quraishis* in Mecca, the Islamic precedent of sanctuary, similar to that of modern embassies, was established. Before attacking Mecca, the Prophet announced:

> 0 *Quraish*! This is Muhammad, who has come to you with a force you cannot resist. He who enters Abu-Sufyan's house is safe and he who locks himself up is safe and he who enters the Mosque is safe.

(The Prophet then declared amnesty for all Meccans who had fought and opposed him.)

After the taking of Mecca, many emissaries and deputations went to the city, and others were sent by the Prophet and his successors to non-Muslim rulers. The deputations received by the Prophet between A.D. 630 and 631 enjoyed not only immunity but preferred treatment, which applied to the envoys and to their staff and servants. They were not to be molested, mistreated, imprisoned, or killed. Envoys also enjoyed freedom of religion, as is demonstrated by the delegation of Christians of Najran who held their services in a mosque. Tabari, in his encyclopedic *study History (Tarikh),* recounts that only under extraordinary circumstances may envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind. The case in point is the Prophet's detention, but without physical harm, of the envoys of Mecca during the negotiations on the Treaty of *Hudaibiya* because the Meccans had detained his emissaries. He did so only to secure the release of the detained emissaries, and when they were released, the Meccans were, too.

An interesting point the lecturer may wish to discuss in detail is the extent of the Prophet's belief in the immunity of envoys. In this regard it will be useful to discuss the work of MC Bassiouni (‘Protection of Diplomats under Islamic Law’ 79 *American Journal of International Law* (1980) 609, pp. 609–613). The following is a useful extract which notes that during the relevant period, when Abu-Ra'fi, the emissary of *Quraish*, wanted to convert to Islam, the Prophet admonished him:

> I do not go back on my word and I do not detain envoys [you are an ambassador]. You must, therefore, go back, and if you still feel in your heart as strongly about Islam as you do now, come back [as a Muslim].

These practices were followed by the Prophet at a time when inviolability of envoys was ill recognized in the Arabian Peninsula. The Prophet also followed these practices in the case of Wahshi, the Abyssinian ambassador who had previously killed one of the Prophet’s uncles.

When Wahshi presented his credentials, the Prophet made it known that non-ould judge Islam by its treatment of foreign envoys, and consequently foreign envoys should be accorded the same treatment as Muslim envoys. Diplomatic immunity also is exemplified by the Prophet's reception and treatment of the *Taif* delegation in A.D. 631. In earlier times, when he had gone there to propagate Islam, the Prophet had been ill treated. by the people of *Taif*, but his treatment of their delegation was a further affirmation that envoys were to be received in accordance with their privileged status. Irrespective of the sending country or past relations with its people, envoys remained inviolate, even in the case of a people and its leaders who had earlier wronged Islam and the Prophet himself. Other examples are the delegations from *Bani-Saad*, *Bani-Tayyi*, and *Bani-Tamim*. The latter, notwithstanding their paganism and frivolity during the negotiations, were treated with deference and courtesy, and remained inviolate. The deputation from Bani-Hanifa is another landmark case. Its leader was Musailima bin Habib, a notorious liar nicknamed *al-*

Kadhab (the Liar), but the Prophet ordered that he be treated as an equal. During the negotiations, Musailima sent the Prophet a message through two emissaries to the effect that he, Musailima, and not Muhammad, was the true Prophet of God.

Upon its receipt, the Prophet asked the emissaries whether they agreed with the content. They replied that they did and the Prophet responded:

> By God, were it not that messengers are not to be killed, I would behead the both of you.

This response clearly establishes the inviolability of even those envoys who commit transgressions. Two more deputations deserve note, that of the Kings of Himyar, who were polytheists, and that of Kinda, which is reported to have come with 80 armed riders to the Prophet while he was in the mosque in Mecca; they were treated with regard despite having come in such an offensive manner. The Prophet's sayings and practices clearly establish the principle of diplomatic immunity and do not in any way place a limit on it, which is in keeping with the *Koran*. Probably the most telling statement of the Prophet on the importance attached by Islamic law to the immunity of diplomats is one in which he characterized the seizure of a diplomat as a *casus belli.* In that *Hadith,* which contains the Prophet's message to the people of *Asqof Aylah*, he said:

> If you want the land and the sea to believe, then obey God and His Prophets, *and if you reject them* [the emissaries sent] *but do not return them, I will not accept anything from you until I fight you* [emphasis added].

The writings of many noted scholars indicate that envoys, ambassadors, deputations, delegations, and emissaries to and from the world of Islam have been numerous throughout its history. These diplomats enjoyed immunity for

themselves, and for their families, staff, and servants. M. Hamidullah states: “Envoys, along with those who are in their company, enjoy full personal immunity: they must never be killed, nor be in any way molested or maltreated.” That practice has been continued by Muslim states in their contemporary international relations and certainly without exception since their acceptance of the two Vienna Conventions of 1961 and 1963 on diplomatic and consular relations.

6. Non-Muslims

It may be considered constructive to discuss this topic, particularly where this manual is being utilized in non-~Muslim jurisdictions. In order to facilitate international relations, and to provide adequate securities to foreign diplomats and emissaries, the *Sharia* also devised the concept of *amân.* The pledge of *amân* allowed non-Muslims safety of their person and property whilst resident within the territory of Islam, the *Dar-ul-Islam*. The rights under *amân* were extensive in nature, including the right to life and property, and remained enforceable by the heirs and legal guardians of non-Muslim residents.

The concept of *amân* presents a remarkable example of an egalitarian principle, a principle which continues to be invoked by modern judicial systems to protect the rights of the aliens. In order to illustrate the application of this doctrine, case law may be referred to. This manual recommends the *State Bank of India v. The Custodian of Evacuee Property, West Pakistan* (1969) PLD, Lahore, 1050, as an appropriate case to cite. The Pakistan High Court had to place reliance on the *amân* doctrine to accord legal capacity to the successor of *enemy aliens* to successfully challenge the confiscation of their property.

The Court specifically noted its inability to find similar principles within the statutory provisions and within the common law. Whilst elaborating upon the *amân* doctrine, the Court stated that ‘amân is a pledge of security by virtue of

which an enemy alien would be entitled to protection, while he is in the dar-ul-Islam [and] no procedural technicality can take away [these] rights'.

The *amân* concept is further strengthened by the *Sharia* principles on expropriation of foreign property. Whilst the *Sharia per se* does not prohibit expropriation of property, there remains the essential prerequisites of establishing the compulsion of necessity, non-discrimination in acquisition and an obligation to pay compensation – points which are dealt with by the sole arbitrator Mahmassani in the LIAMCO award ((1981) 20 ILM, 37 at 201). It would be useful to examine the LIAMCO award during the teaching sessions.

7. Dispute Resolution

The concept of arbitration, *tahkím* and mediation was developed by the Prophet Muhammad and regulated by *Sharia* as an important mechanism for dispute resolution. Both the *Qur'an* and the *Sunna* project mechanisms of dispute resolution, including arbitration and mediation.

Prophet Muhammad himself acted as arbitrator when resolving disputes on numerous occasions. Arbitration was known in early Arabia among the various tribes. It was the chief form of justice among individuals in a society where right often depended on might. Islamic law recognised the legality of arbitration as a peaceful means of settling disputes in both civil and public law. A good example the lecturer may wish to cite is that Prophet Muhammad was appointed as the arbitrator by the tribal chiefs of Mecca to settle disputes which arose between them about the sacred Black Stone. There was also arbitration taking place during the reign of the fourth *Caliph* Alī Ibn Abī Tālib. Zawati notes that according to an agreement, signed in year 37 H. between Alī Ibn Abī Tālib and Muaiyah, the Governor of Syria, *Caliph* Alī appointed Abu Mua al-Ash'ari and Muawiyah appointed 'Amr Ibn al-'Ass as arbitrators in order to resolve a political dispute. (HM Zawati, *Is Jihād a Just War? War,*

Peace, and Human Rights Under Islamic and Public International Law (Lewiston, NY, Edwin Mellen Press, 2001) at 70).

In expanding on the procedures of *tahkím* within Islamic law, it is worth noting that Zawati states (as above at 70):

> [a]ccording to Islamic law, *al-tahkim* procedure can be characterized as follows: first, the free selection of arbitrators; second arbitrators must respect the rules of Islamic law; third parties who agree to submit their dispute to arbitration must respect its ruling, and comply with its provisions; fourth, no arbitration in *al-hudūd* and *al-Qisās* (punishments stipulated in the *Qurān*); fifth, the award is considered null and void in two cases: if the arbitrator is not chosen freely by the parties, and if he is a close relative to one of the litigants; and finally, the arbitrator must be wise and just believer.

An interesting exercise in which to engage the students would be for them to identify the similarities and differences that exist between the above and the application of the arbitration procedure in their jurisdiction. Arbitration is now a key mechanism for dispute resolution both in the international law arena and within the domestic legal systems of modern States, including Islamic countries.

Seminars

This topic is such that the teaching of it can be covered in either one or two seminars and this may be left at the discretion of the course organisers. The students should be encouraged to critically assess the information provided in both the lectures and reading list. Below is a suggested seminar structure and similar structures have been situated towards the end of each chapter.

Seminar One: General Introductions

1. Describe the extent to which *Sharia* and *Siyar* have influenced international law and the reasons for the same.
2. Discuss the extent to which the historical interaction of Islamic law with the West has made a considerable impact in some areas of law.
3. Evaluate the contributions Muslim jurists and philosophers have made towards the jurisprudential understating of *Siyar*.
4. What role did the expansion of the Muslim empire have to play in the development of Islamic international law?
5. What are the similarities and differences between the traditional *Sharia* and modern international law in respect of diplomatic missions and immunities?
6. To what extent has the concept of *amân* been incorporated into the modern judicial system?
7. How do the *Qur'an* and *Sunna* advocate for the concept of dispute resolution and what significance has this had in the formation of arbitration procedures in the West?

Assessment: Essay Question

1. Consider the extent to which Islamic International Law (*Siyar*) is comparable to Public International Law

Reading

Core Reading

M Khadduri, 'Islam and the Modern Law of Nations' (1956) 50 *AJIL*

GM Badr, 'Islamic Law: Its Relations to Other Legal Systems' (1978) 26 *American Journal of Comparative Law*

MC Bassiouni, 'Protection of Diplomats under Islamic Law' (1980) 74 *AJIL*

S Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117(1) *Recueil des Cours de l'Académie de Droit International*

Supplementary Reading

M Khadduri, *The Islamic Law of Nations – Shaybānī's Siyar: Translated with an Introduction, Notes and Appendices by M. Khadduri* (Baltimore, Maryland, The John Hopkins Press, 1966)

M Khadduri, 'The Islamic System: Its Competition and Co-existence with Western Systems' (1959) *Proceedings of the American Society of International Law*

Chapter Two

Basic Concepts of Islamic International Law (*Siyar*)

Sessions Three and Four

The aims and objectives of this session are to:

- Discuss the concept of *Jihad*, violence, international terrorism and an articulation of legal principles.
- Contexualise *Jihad* and the use of force and interemporal law and compatibilities with modern norms of international law
- Consider the use of force and religious tolerance
- Discuss the ideology of tolerance of modern state practices
- Evaluate modern Islamic states and the issues of Islamic identity

Jihad, Violence and International Terrorism: Articulation of Legal Principles

There is considerable debate as to the extent to which *Sharia* and *Siyar* sanctions aggression, violence and terrorism. As indicated in the introductory sections of this work, critics of Islam regard it as promoting violence and aggression.

Within the legal framework, debate often centres around the concept of *Jihad*. The terminology of *Jihad* is often erroneously applied as being synonymous to terrorism or violence. A useful exercise to engage the students in, would be to ask them to consider the concept of *Jihad* and what it means to them. Once this area has been taught, the lecturer may consider asking them the same question in order to identify whether their understanding of this concept has altered in any way.

A discussion on this area may be initiated with the meaning of Jihad. Students need to understand the meaning of this concept: The term *Jihad* is adopted from the Arabic verb *Jahada*, which connotes exerting oneself, labour or toil. According to Zawati *Jihad* is essentially an expression of endeavour and struggle in the cause of Allah. (HM Zawati, *Is Jihād a Just War? War, Peace, and Human Rights Under Islamic and Public International Law* (Lewiston, NY, Edwin Mellen Press, 2001) at 13-14).

It is important to emphasize during the session that this exertion and struggle is designed primarily through passive means; the word of God is to spread through non-violent means with persuasion as the principal avenue. The lecturer also needs to exemplify this through the *Hadiths* of the Prophet Mohammad, including the *Hadith* where Prophet Muhammad observed that the strongest form of *Jihad* is through persuasion. Therefore it should be made clear that although forming an integral part of *Jihad*, the use of force represents only one aspect of *Jihad*.

In elaborating upon *Jihad*, the lecturer needs to cite the *Qur'an* 61: 11-13, according to which:

> O Ye who believe! Shall I guide you to a commerce that will save you from painful chastisement? It is that you believe in Allah and His Messenger, and strive in the cause of Allah with your belongings and your persons. That is better for you. If ye have knowledge, He will forgive your sins, and will admit you to Gardens beneath which rivers flow, and to pure and pleasant dwellings in Gardens of Eternity. That is the supreme triumph.

The lecturer may consider discussing the contributions made to the above broad vision of *Jihad* by Islamic jurists. Majid Khudduri and his leading work, the *Law of War and Peace*, may be referred to. (M Khadduri, *War and Peace in the Law of Islam* (Baltimore and London, The John Hopkins Press, 1955) 55–56). In particular, his following statement in respect of *Jihad* is useful for this purpose:

> [t]he term *Jihād* is derived from the verb jāhada (abstract noun, juhd) which means 'exerted'. Its juridical-theological meaning is exertion of one's power in Allah's path, that is, the spread of the belief in Allah and in making His word supreme over this world. The individual's recompense would be the achievement of salvation, since the *Jihād* is Allah's direct way to paradise . . . *The Jihād, in the broad sense of exertion, does not necessarily mean war or fight, since exertion in Allah's path may be achieved by peaceful means as well as violent means. The Jihād may be regarded as a form of religious propaganda that can be carried on by persuasion or by sword*.

Another influential Islamic jurist the lecturer may chose to rely upon is Dr Hilmi M. Zawati, (HM Zawati, *Is Jihād a Just War? War, Peace, and Human Rights Under Islamic and Public International Law* (Lewiston, NY, Edwin Mellen Press, 2001) at 13–14), who writes as follows:

> 'Linguistically speaking, the term jihad is a verbal noun derived from the verb *jahada*, the abstract noun *juhd*, which means to exert oneself, and to strive in doing things to one's best capabilities. Its meaning is, in fact, extended to comprise all that is in one's power or capacity. Technically, however, *jihad* denotes the exertion of one's power in Allah's path, encompassing the struggle against evil in whatever form or shape it arises'. Furthermore, Zawati notes that the Oxford Encyclopedia of Modern Islamic World states that '*Jihad* in Arabic simply means "struggle" and it came to denote in Islamic history and classical jurisprudence the struggle on behalf of the cause of Islam'.

Furthermore, the leading scholar Al-kāsāani, makes the observation that 'according to Islamic law (al-Shar'al-Islami), *jihad* is used in expending ability and power in struggling in the path of Allah by means of life, property, words and more'. (Alẵ al-Dỉn al-kāsāani, *Kitāb Badai' al-Sana'i fi Tartib al Shar'ia* vol 7 (Cario, al-Mtaba 'a al-Jamaliyya, 1910) at 97).

Contextualising *Jihad* and the Use of Force: Intertemporal Law and Compatibilities with Modern Norms of International Law

It is recommended that the lecturer aims to answer two key questions which have been the source of much confusion:

(a) The first is the identification of primary components of *Jihad*.
(b) The second is the debate surrounding the compatibility of *Jihad* with modern norms of international law, particularly the prohibition on the use of force, as is prohibited in the United Nations Charter.

Prior to initiating an enquiry to determine the answers to the above, it is suggested that the lecture address a number of factors. First any analysis has to take account of the context in which Islam was revealed and was able to preserve its existence. According to Glubb, Islam was proclaimed in the Seventh Century AD in Arabia amidst an extremely hostile and intolerant environment. (JB Glubb, *War in the Desert: R.A.F Frontier Campaign* (New York, WW Norton, 1961) at 31). Violence was the norm; the Arabs being particularly intolerant when challenged upon religious and ideological positions. There were little constraints on the manner and usages of forces in the international relations that existed at that particular time. Within this context, Islam, provided grounds for restricting the use of force, and regulated the conduct of hostilities with humanitarian value such as the ban on the killing of non-combatants, women, children and the elderly. This needs to be emphasized by the lecturer to the students for them to have a proper understanding of the context and difficulties that were faced by the newly formed Islamic State.

Thus, having regard to the prevalent violence and terrorism, Islam, in its formative phases had to undergo a difficult and uncertain future. Prophet Muhammad and his followers represented a community that faced extermination. Indeed, Muhammad himself was forced to migrate to Medina to

avoid persecution and assassination; his migration marking the beginning of the Muslim calendar. It was this betrayal, attempted humiliation, disregard for kinship and obligations on the part of the *Quresh* of Mecca that disillusioned Muhammad and the beleaguered Muslim community. The *Qur'an* makes the observations at 9: 7-11

> How could there be a guarantee for the idolaters on the part of Allah and His Messenger, except in favour of those with whom you entered into an express treaty at the Sacred Mosque? So long as they carry out their obligations there-under, you must carry out your obligations. Surely Allah loves those who are mindful of their obligations. How can there be a guarantee for the others, who, if they were to prevail against you, would have no regard for any tie of kinship or pact in respect of you. They seek to please you with words, while their hearts repudiate them; most of them are perfidious. They have bartered the Signs of Allah for small gains and hindered people from His way. Evil indeed is that which they have done. They show no regard for any tie of kinship or any pact in respect of a believer. If they repent and observe Prayer and pay the Zakat, then they are your brethren in faith. We expound Our commandments for a people who know.

In this backdrop of vulnerability and of uncertainty future, it is commendable to note that Islam adopted a balanced approach towards the use of force. In the context of current international humanitarian laws, some of the early principles might be questioned, though again it is important to consistently highlight the context, in which Islam emerged.

A number of jurists and scholars have interpreted some *Qur'anic* verses to advance the position that the classical *Siyar* advocates the necessity of the use of force to spread Islam as the primary expression of *Jihad*. The cited verses includes the following at 2: 191-194:

> Fight in the cause of Allah against those who fight against you, but transgress not. Surely, Allah loves not the transgressors. Once they start fighting, kill them wherever you meet them, and drive them out from where they have driven you out; for aggression is more heinous than killing. But fight them not in the proximity of the Sacred Mosque unless they fight you there-in; should they fight you even there, then fight them; such is the requital of these disbeliveers. Then if they desist, surely Allah is most Forgiving, Ever Merciful. Fight them until all aggression ceases and religion is professed for the pleasure of Allah alone. If they desist, then be mindful that no retaliation is permissible except against the aggressors.

and 9: 3-6:

> Warn the disbelievers of a painful chastisement, excepting those of them with who you have a pact and who have not defaulted in any respect, nor supported anyone against you. Carry out the obligations you have assumed towards them till the end of their terms. Surely Allah loves those who are mindful of their obligations. When the period of four months during which hostilities are suspended expires, without the idolaters having settled the terms of peace with you, resume fighting with them and kill them wherever you find them and make them prisoners and beleaguer them, and lie in wait for them at every place of ambush. Then if they repent and observe Prayer and pay the Zakat, leave them alone. Surely Allah is Most Forgiving, Ever Merciful. If any one of the idolaters seeks asylum with thee, grant him asylum so that he may hear the Word of Allah; then convey him to a place of security for him, for they are a people who lack knowledge.

The students may be asked to consider the above two verses and what the content means to them. They may also be asked to examine points and questions which emerge from these verses:

- The use of force is permitted against aggressors and in self-defense.
- Muslims are obliged to continue *Jihad* with the usage of force until the cessation of aggression or the vindication of their rights as the case may be.
- Does vindication of rights incorporate an eventual supremacy of Islam over other religions?
- Is it justified to use force in order to enforce the word of God?

Some leading scholars take the position that classical *Siyar* sanctions the use of force to spread Islam and implement the *Sharia*. The lecturer may cite Majid Khadduri, who for instance, makes reference to *Dar-ul-Harb* (the enemy territory) and *Dar-ul-Islam* (the territory of Islam) pointing to an eventual objective of classical *Siyar* to continue the *Jihad* until all the *Dar-ul-Harb* came under Islamic jurisdiction. Khadduri, who opines that there is evidence that in the jurisdictional expansion of Islam force was deployed, although aggression was not the sole motivating factor. (M Khadduri, *War and Peace in the Law of Islam* (Baltimore and London, The John Hopkins Press, 1955) 63). Indeed the religious zeal blended with a desire for egalitarianism and reform. Rom Landau's characterisation of the conquest of Damascus by Khalid-ibn-al-walid exemplifies the earlier phase of Islamic expansion. Landau notes '[I]n an age when "sack and pillage" was usual procedure followed by a victorious army on entering a conquered city, Khalid-ibn-al-walid's terms to Damascus were humane and very modest. In fact, it seems obvious that the Arab legions considered themselves as liberators of oppressed peoples as well as carriers of Islam' (R Landau, *Islam and the Arabs* (London, George Allen and Unwin Ltd, 1958) at 41).

Whilst acknowledging the extraordinary nature of the religious-reformist zeal, differing academic interpretations have been advanced. Analysing the rationale for the use of force in this early period, Khadduri makes the point that (M Khadduri, *War and Peace in the Law of Islam* (Baltimore and London, The John Hopkins Press, 1955) 63):

> The *Jihād* as such was not a casual phenomenon of violence; it was rather a product of complex factors which Islam worked out its jural-doctrinal character. Some writers have emphasised the economic changes within Arabia which produced dissatisfaction and unrest and inevitably led the Arabs to seek more fertile lands outside of Arabia. Yet this theory–plausible as it is in explaining the outburst of Arabs from within their peninsula–is not enough to interpret the character of a war permanently declared against the unbelievers even after the Muslims had established themselves outside Arabia. There were other factors which created in the minds of Muslims a politico-religious mission and conditioned their attitude as a conquering nation.

Elsewhere he has noted (M Khadduri, 'Islam and the Modern Law of Nations' (1956) 50 *AJIL* 358, at 359):

> In theory the *dar al-Islam* was always at war with *dar al-harb*. The Muslims were under a legal obligation to reduce the latter to Muslim rule in order to achieve Islam's ultimate objective, namely, the enforcement of God's Law (the *Shari'a*) over the entire world. The instrument by which the Islamic States were to carryout that objective was *Jihād* (popularly know as holy war), which was always justifiably waged against the infidels and the enemies of the faith. Thus the jihad was the Islam's *bellum justum*.

In his examination, Professor An-Na'im acknowledges that the concept of *Jihad* could be used for a variety of activities in order to further the 'will of God'. The primary meaning of *Jihad*, according to An-Na'im is '"self-control" including checking any temptation to harm others'. However his concern is that 'the term can also refer to religiously sanctioned aggressive war to propagate or "defend" the faith. What is problematic about this latter sense of jihad is that it involves direct and unregulated violent action in pursuit of political objectives, or self-help in redressing perceived injustice, at the risk of harm to innocent bystanders. . . ' (AA An-Na'im 'Upholding International Legality Against Islamic and American Jihad' in K Booth and T Dunne (eds), Worlds in Collision: Terror and the Future of Global Order (London, Palgrave, 2002) 162–172, at 163). Notwithstanding the consistent reminders that *Jihad* does not necessarily mean use of force, some scholars (principally from the western world) have insisted that on adopting this narrow, rigid interpretation. Thus, for example, Roda Mushkat (R Mushkat 'Is War Ever Justifiable? A Comparative Survey' (1987) 9 *Loyola of Los Angeles International and Comparative Law Journal* 227) notes asserting that:

> Islamic law enjoins Moslems to maintain a State of permanent belligerence with all non-believers, collectively encompassed in the *dar al-harb*, the domain of war. The Muslims are, therefore, under a legal obligation to reduce non-Muslim communities to Islamic rule in order to achieve Islam's ultimate objective, namely the enforcement of God's law (the *Sharia*) over the entire world. The instrument by which the Islamic state is to carry out that objective is called the *jihad* (popularly known as the 'holy war') and is always just, if waged against the infidels and the enemies of the faith

This image of *Jihad* as an instrument of aggressive war is relished by those who claim fundamentally divergent positions between the Islamic legal order and the non-Muslim world. Such a hypothesis forms the basis of apprehension, tensions and ultimately the so-called 'clash of civilizations'.

Payne contrasts as to what he perceives as the 'western view of what religion is and ought to be, namely, a voluntary sphere where coercion has no place' with that of Islam. In this comparison the 'emphasis on non-violence is not the pattern in the Muslim culture. To the contrary, violence has been a central, accepted element, both in Muslim teaching and in the historical conduct of the religion. For over a thousand years, the religious bias in the Middle Eastern Culture has not been to discourage the use of force, but to encourage it'. (JL Payne, *Why Nations Arm* (Oxford, Basil Blackwell, 1989) 121).

In engineering the 'clash', Huntington views Islam as 'a religion of the sword . . . glorify[ing] military virtues'. In his perceptions '[t]he *Koran* and other statements of Muslim beliefs contain few prohibitions on violence, and a concept of non-violence is absent from Muslim doctrine and practice'. (SP Huntington, *The Clash of Civilizations and the Remaking of World Order* (London, Simon & Schuster, 1996) 263). This latter position of *Jihad* however remains contested and is largely inaccurate. Such a narrow and myopic view is a reflection of the narrow mindedness of the critics who (while disregarding the overall historical contextual picture) place exclusive reliance on limited and very specific instances.

The lecturer may consider it a useful exercise to make reference to an appropriate recent article from a newspaper that contains tones of Huntington's views in respect of *Jihad*. The students may be asked to critically assess the article in light of alternative meanings of *Jihad* as put forward by scholars with differing views.

While presenting all possible interpretations of *Jihad*, it is important for the lecturer to emphasize that a literal interpretation of any of the verses as stated above of the *Qur'an* do not advocate a policy of aggressive *Jihad*. To the contrary, there are substantial restraints and restrictions placed on the use of force, and it is important to make a note of the conditions which trigger the use of force. This position is acknowledged even by scholars such as Khadduri, who have advocated a more aggressive and expansionist form of

Jihad. After having made the observation which is noted above, Khadduri acknowledges that 'the *jihād* did not always mean war since Islamic objectives might be achieved by peaceful as well as violent means. Thus the *jihād* may be regarded as intensive religious propaganda which took the form of a continuous process of warfare, psychological and political no less than strictly militarily'. (M Khadduri, '*Islam and the Modern Law of Nations'* (1956) 50 *AJIL* 358, at 359). In a separate study, Khadduri accepts that the notion of Islam replacing other religions 'is not stated in the Qurān'. (M Khadduri, *War and Peace in the Law of Islam* (Baltimore and London, The John Hopkins Press, 1955) 59).

After an extensive literature review, another Islamic scholar, Dr. Moinuddin (H Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Cooperation Among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the OIC* (Oxford, Clarendon Press, 1987) at 28), summarises his position by articulating the following four points on *Jihad* in so far as it relates to the use of force:

a. that fighting in the cause of Allah is basically sanctioned by the *Koran*;
b. that the permission to fight has been granted to the Muslims because they have been wronged or persecuted on the grounds of religion; hence warfare is permitted if Muslims are persecuted, because persecution is worse than slaughter;
c. that sanction to wage warfare is, however, given against those who fight the Muslims; it is also conditioned by the stipulation that Muslims are not to begin hostilities or commit aggression;
d. that fighting may be continued until persecution ceases or the persecutors desist.

It is also important that there is a considerable body of Muslim scholars who take the position that *Jihad* is primarily a technique of persuasion. *Jihad*, in other words, is totally opposed to violence and aggression. Thus, the concepts of *Jihad* on the one hand, and violence and terrorism on the other are described as being 'dramatically opposed to one another'. Dr Zawardi notes that according to one *Hadith* of the Prophet Muhammad, a true Muslim is one who hurts no one by word or deed. (Z Badawi, 'Are Muslims Misunderstood' *The Independent Newspaper* (London, United Kingdom 23 September 2001) 19). In providing a commentary on this *Hadith*, he makes the observation that the fundamentals of Islamic legal system:

> [a]re the protection of the community as a whole, the protection of life, property, honor and sobriety. The Muslim should commit the utmost effort towards self-improvement to be worthy and able to perform these duties. This is called *jihad*, which in the mind of many people is equated with Holy war. Acts of violence are abhorred by Islam. War, a function of the failure of human nature, is permitted only in self-defence, and regulated by strict rule to limit its application exclusively to combatants.

It is the case that within Islamic history (as has been the case with other great religions) that there are instances where the lines between violence and *Jihad* are blurred; certainly, wars and other societal conflicts of early Islamic experiences by their very nature were destructive and bloody. In its early stages, Islam, had to go through phases of considerable violence and terrorist activities. Prophet Muhammad was persecuted by the residents of Mecca prior to his *Hijrat*, with the shadow of death placed over him. Esposito notes that the rule of both Uthmān ibn 'Affān, the third rightly guided *Caliph* (644-656) and that of Alī Ibn Abī Tālib, the fourth rightly guided *Caliph* (656-661) was brought to end through their assassinations. (JL Esposito, *The Oxford Encyclopaedia of Modern Islamic World* vol III (New York, Oxford University Press, 1995) 439).

The trail of violence and terrorism has continued throughout the history of Islam. Within their domestic, internalised frameworks, many Islamic States suffer from terrorism and violence. A whole host of reasons can be ascribed to such forms of terrorism *inter alia* absence of constitutionalism and rule of law, exploitation and abuse of power, dictatorship and denials of fundamental human rights, negation of right of political and economic self-determination. However, in the above mentioned abuses, Islam does not have a role to play – Islam may have been politicised and its name misused, but this religion itself is not to be blamed for the gross violations of individual or collective rights.

A further and final argument to note is that all Islamic States have accepted the provisions of Article 2(4) of the United Nations Charter. Alongside other States there is a renunciation of violence, aggression and terrorism. They have adopted this position without renouncing their Islamic credentials. This insistence upon the prohibition on the use of force in international relations therefore points towards a compatibility of the fundamental principle of international law with *Sharia* and *Siyar*. If there were any seeds of doubt invigorated by overzealous religious *Jihadists,* modern Islamic States conduct their relations on the basis of contemporary international law with article 2(4) as their central focus.

Siyar and Freedom of Religion

Freedom of religion within the *Sharia* and the *Siyar* form significant topics of academic debate. These are subjects of contemporary interest, since many *Sharia*-complaint states place restrictions on freedom of religion.

The lecturer needs to introduce the subject from a historical overview. He needs to make the students aware of the geo-political context of the emergence of Islam, and that one of the primary reasons for the phenomenal success and expansion was the idea of religious tolerance within seventh century Arabia. Within a century of the Prophet Muhammad's death in 632 A.D, Muslim Arabs had conquered and were rulers of an area stretching from

the borders of India and China to the Atlantic Ocean. This was a huge empire which included much of North Africa, the Near East and Spain and the lecturer may consider making reference to a map to illustrate this point. Landau notes that this was 'a collection of peoples under one banner greater than any before and a domain more extensive than the Roman Empire at its height.' (R Landau, *Islam and the Arabs* (London, George Allen and Unwin Ltd, 1958) 46). This was a remarkable achievement, built upon tolerance and value of humanity. As Eaton, a historian makes the point (G Eaton, *Islam and the Destiny of Man* (Cambridge, Islamic Text Society, 1994) at 29):

> This astonishing expansion had been achieved by a people who, if they were known at all to the great world beyond the Arabian peninsula, had been dismissed as ignorant nomads. They had overrun something above four-and-a-half million square miles of territory and changed the course of history, subordinating Christianity to Islam in its homelands in the Near East and in North Africa and Spain, forcing the Roman Empire of Byzantium onto the defensive and converting the Empire of the Persians into a bulwark of Islam. Human history tells of no other achievement comparable to this. Alexander had dazzled the ancient world by his conquests, but he left behind him only legends and a few inscriptions. Where the Arabs passed they created a civilization and a whole pattern of thought and of living which endured and still endures, and they decisively determined the future history of Europe, barring the way to the rich lands of the East and thereby provoking–many centuries later–the voyages of exploration to the West and to the South which were to nurture European power.

In the light of the above historical analysis, the lecturer needs to revert to the questions already posed as to whether Islam was spread through the power of sword? Furthermore, in order to advance the position that the success of Muslim rule during the early expansionist phases of Islam was based more on the promise of religious tolerance (than the power of sword). It is recommended that the lecturer provides views of relevant scholars. One example is provided in the writings of Professor Malcolm Evans (MD Evans, *Religious Liberty and International Law in Europe* (Cambridge, Cambridge University Press, 1997) at 59). He who writes that:

> '[a]lthough, like Christianity, Islam was an aggressively universalist religion, it also displayed far more tolerance to followers of other faiths, and particularly Jews and Christians who, like followers of Islam were considered to be "Peoples of the Book". Jewish and Christian Communities were, therefore, permitted a large degree of freedom in both religious and civil affairs . . .'

Ann Mayer concedes to the point that the practices of the Prophet Muhammad and after him, Muslim rulers contradict the claim presented by:

> 'Western images of Muslim conquerors presenting the conquered peoples with the choice of conversion to Islam or the sword . . .[to the contrary] conquered Christian and Jews were allowed to persist in their beliefs because Islamic law opposes compelled conversions'.

(AE Mayer, *Islam and Human Rights: Tradition and Politics* 2nd edn (Boulder, Col, Westview Press, 1995) 126-127).

Commenting on the facts as they prevailed during the expansion of Islam, Eaton (G Eaton, *Islam and the Destiny of Man* (Cambridge, Islamic Text Society, 1994) at 29-30) makes the remark that:

> [t]he rapidity with which Islam spread across the known world of the seventh centuries was strange enough, but stranger still is the fact that no rivers flowed with blood, no fields were enriched with the corpses of the vanquished. As warriors the Arabs might have been no better than other of their kind who had ravaged and slaughtered across the peopled lands but, unlike these others, they were on a leash. There were no massacres, no rapes, no cities burned.
> These men feared God to a degree scarcely imaginable in our time and were in awe of His all-seeking presence, aware of it in the wind and the trees, behind every rock and in every valley. Even in these strange lands there was no place in which they could hide from this presence, and while vast distances beckoned them ever onwards they trod softly on the earth, as they had been commanded to do. There had never been a conquest like this.

In light of the above, the students could be asked whether they considered it convincing to argue that the *dhimmis*, the *ahal al-kitab* in fact enjoyed a better status under the jurisdiction of Islam in comparison to religious minorities within a Christian State?

Ideology of Tolerance and Modern State Practices

It is important for the lecturer to encourage the students to analyse the articulation of principles and practices of modern States on the delicate issues of freedom of religion and rights of religious minorities in light of the divergences of interpretation. Although the interpretations advanced are that the *Sharia* and *Siyar* in principle promote rights of religious minorities, there are clearly divergent views – this session needs to highlight the scholarly interpretations with some modern (yet unfortunate) instances which point to the contrary.

Scholarly positions:

Professor Mahmassani takes the view that state practices find modern human rights provisions compatible with the *Sharia* (thereby emphasising an egalitarian and broad interpretation of Islamic values). (S Mahmassani, *Arkan Huquq-al-Insan* (Beirut, Dar-`ilmli'-Malayin, 1979) 260–264).

The contemporary differences of the interpretations of the *Sharia*, and its compatibility with contemporary norms of international human rights, can be established through a survey of the practices of Islamic states. It is recommended that the students examine this in further detail and accordingly, it is suggested that the following provisions be referred to:

Article 18 of the Universal Declaration on Human Rights (1948)

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18 (1) of the International Covenant on Civil and Political Rights (1966)

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 27 of the International Covenant on Civil and Political Rights (1966)

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 1 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Divergent State Practices and difficulties in the Application of the Principle of Freedom of Religion (and Religious Tolerance)

The lecturer may consider it appropriate to discuss the fact that Muslim states have not been able to establish a consensual view on the meaning and content of freedom of religion within the Islamic jurisprudence. The substantial disparities and ambivalence in approach become evident through a survey of the practices and instruments adopted by Islamic states. Reservations (and Declarations) are frequently put in place which make specific human rights norms subject to their compatibility with the *Sharia*. These reservations (and Declarations) are not followed by an elaboration as to the exact position of the *Sharia* on that particular subject. Human rights obligations are also frequently drafted in an imprecise manner, which allows for a variety of interpretations. An example that may be brought to the attention of the students in this regard is The Universal Islamic Declaration on Human Rights (1981). This is a document prepared by a number of Islamic States including Egypt, Pakistan and Saudi Arabia under the auspices of the Islamic Council (a private London–based organisation, working in conjunction with the Muslim World League, an international Non-governmental organization). In its English version the article on Rights of Minorities provides that:

(a) The Quranic principle, 'There is no Compulsion in Religion' shall govern the religious rights of non-Muslim minorities'.

(b) In a Muslim country, religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic law or by their own laws.

The students may be asked to consider the above two sections in order to try and determine whether they contain ambiguity.

Ann Mayer notes that the aforementioned provisions are not explicit as to whether these principles are to be applied to all non-Muslims or are limited to the *ahalal-kitab*. (AE Mayer, *Islam and Human Rights: Tradition and Politics* 2nd edn (Boulder, Col, Westview Press, 1995) 131-133).

Neither do they articulate the substantive rights which non-Muslim minorities have within an Islamic State. There are also significant differences between the English and the Arabic versions, suggesting the possibility of the divergent views of the drafters of the Declaration.

Case-Study: Pakistan's Blasphemy Laws

The lecturer may consider it useful to introduce the students to a case study. For this purpose, it is suggested that the blasphemy laws of Pakistan be considered in detail. This is in light of the events surrounding Asia Bibi. Accordingly, the following extract may be referred to:

> 7 December 2010
>
> ### Pakistani Christian Asia Bibi 'has price on her head'
>
> By Orla Guerin BBC News, Punjab province
>
> Asia Bibi's husband, Ashiq Masih, says his family have been receiving threatening phone calls. Ashiq Masih has the look of a hunted man - gaunt, anxious and exhausted. Though he is guilty of nothing, this Pakistani labourer is on the run - with his five children. His wife, Asia Bibi, has been sentenced to death for blaspheming against Islam. That is enough to make the entire family a target.
>
> They stay hidden by day, so we met them after dark.
>
> Mr Masih told us they move constantly, trying to stay one step ahead of the anonymous callers who have been menacing them.
>
> "I ask who they are, but they refuse to tell me,
>
> In the village they tried to put a noose around my neck, so that they could kill me"
>
> "They say 'we'll deal with you if we get our hands on you'. Now everyone knows about us, so I am hiding my kids here and there. I don't allow them to go out. Anyone can harm them," he added.

Ashiq Masih says his daughters still cry for their mother and ask if she will be home in time for Christmas.

He insists that Asia Bibi is innocent and will be freed, but he worries about what will happen next.

"When she comes out, how she can live safely?" he asks.

"No one will let her live. The mullahs are saying they will kill her when she comes out."

Asia Bibi, an illiterate farm worker from rural Punjab, is the first woman sentenced to hang under Pakistan's controversial blasphemy law.

'Old score'

As well as the death penalty hanging over her, Asia Bibi now has a price on her head.

Asia Bibi's was the only Christian household in her village

A radical cleric has promised 500,000 Pakistani rupees (£3,700; $5,800) to anyone prepared to "finish her". He suggested that the Taliban might be happy to do it.

Asia Bibi's troubles began in June 2009 in her village, Ittan Wali, a patchwork of lush fields and dusty streets.

Hers was the only Christian household.

She was picking berries alongside local Muslim women, when a row developed over sharing water.

Days later, the women claimed she had insulted the Prophet Muhammad. Soon, Asia Bibi was being pursued by a mob.

"In the village they tried to put a noose around my neck, so that they could kill me," she said in a brief appearance outside her jail cell.

Anarchy threat

Asia Bibi says she was falsely accused to settle an old score. That is often the case with the blasphemy law, critics say.

“If the law punishes someone for blasphemy, and that person is pardoned, then we will also take the law in our hands” Qari Mohammed Salim Imam

At the village mosque, we found no mercy for her.

The imam, Qari Mohammed Salim, told us he cried with joy when sentence was passed on Asia Bibi.

He helped to bring the case against her and says she will be made to pay, one way or the other.

"If the law punishes someone for blasphemy, and that person is pardoned, then we will also take the law in our hands," he said.

> Her case has provoked concern abroad, with Pope Benedict XVI joining the calls for her release.
>
> In Pakistan, Islamic parties have been out on the streets, threatening anarchy if she is freed, or if there is any attempt to amend the blasphemy law.
>
> Under Pakistan's penal code, anyone who "defiles the sacred name of the Holy Prophet" can be punished by death or life imprisonment. Death sentences have always been overturned on appeal.
>
> Human right groups and Christian organisations want the law abolished.
>
> "It was designed as an instrument of persecution," says Ali Hasan Dayan, of Human Rights Watch in Pakistan. "It's discriminatory and abusive."

It is recommended that the lecturer use the above article in order to further effective discussion amongst the students. Questions such as whether there is any basis in the *Qur'an* and *Hadith* for this type of treatment of Asia Bibi ought to be asked. Is it justified for her family to be pursued in this manner? Are Islamic clerics entitled to encourage others to end the lives of those accused of such offences in return for payment? If a person were to 'side' with Asia Bibi, is it permissible in Islam for that person to be subsequently punished?

Seminars

Seminar Two: Basic Concepts of Islamic International Law

1. What approach do the primary sources take in respect of the concept of *Jihad*?
2. Does *Sharia* and *Sharia* sanction terrorism?
3. Describe the different ways in which the meaning of *Jihad* has been interpreted by Islamic scholars.
4. What is the position of the use of force in Islam and to what extend can this be justified?
5. Critically assess the work of Payne and Huntington in respect of *Jihad*.
6. Is there a connection between the principles of *Sharia* and modern day acts of terrorism?
7. What is the basis for disassociating *Jihad* from terrorism?
8. In terms of religious tolerance, how has the expansion of the Muslim empire been significant?
9. Can the interpretations of *Sharia* be considered to be compatible with international human rights?
10. Have modern Islamic states compromised their Islamic identity? If so, to what extent?

Assessment: Essay Question

1. How far would you agree with the view that the concept of *Jihad* as Islam's *bellum Justum* has been fully absorbed in the United Nations Prohibition on the use of force?

2. Consider the possibility of reform of Pakistan's Blasphemy laws in the light of the current Asia Bibi case.

Reading

Core text

M Khadduri, *War and Peace in the Law of Islam* (Baltimore and London, The John Hopkins Press, 1955)

R Landau, *Islam and the Arabs* (London, George Allen and Unwin Ltd, 1958)

J Rehman, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' (2000) 7 *International Journal on Minority and Group Rights*

G Eaton, *Islam and the Destiny of Man* (Cambridge, Islamic Text Society, 1994)

Supplementary Reading

HM Zawati, *Is Jihād a Just War? War, Peace, and Human Rights Under Islamic and Public International Law* (Lewiston, NY, Edwin Mellen Press, 2001)

S Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117(1) *Recueil des Cours de l'Académie de Droit International*

DE Azrt, 'The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Rida' (2002) 8 *Buffalo Human Rights Law Review* 15

Chapter Three

Islamic Law and *Jus in Bello* (Islamic humanitarian law)

Sessions Five and Six

The aims and objectives of this session are to:

- Consider the fundamental principles of Islamic humanitarian Law
- Analyse these principles in light of modern International humanitarian principles
- Reflect upon the similarities and dissimilarities between *Siyar* and general International law

Fundamental Principles of Islamic Humanitarian Law

As was considered in the previous sessions, alongside the laws relating to the use of force (*jus ad bellum*), *Siyar* has also established regulations for the conduct of hostilities (*jus in bello*). Although *Siyar* attempted to provide strong humanitarian precepts in warfare, the *jus in bello* principles are often closely inter-linked with those of *jus ad bellum.* Thus, for example, the regulations relating to the legality or otherwise of the use of force could have a substantial linkage with the mechanism in which force is used. The session should highlight this linkage.

Within the Islamic legal tradition, substantial limitations are placed in conducting warfare. As has been considered in the earlier sessions, war is permissible and is regarded as an integral part of human existence. *Siyar* has, however, from the outset, endeavored to develop regulatory norms for the conduct of wars and conflicts. Although not entirely synonymous, the Islamic humanitarian laws are in line with rules of modern international humanitarian law.

Within S*iyar,* there exist clear rules relating *inter alia* to, notice of commencement of hostilities, unless it is a defensive war, effects of war, methods of warfare, organisation of the army and navy, modes of fighting, time of fighting, preparation, discipline and regulation of the army. The lecturer should firstly explain these rules and then allow a discussion on the compatibility of these rules with modern humanitarian laws.

The *jihad* manifested in war is to be conducted under certain rules, which though originating in the seventh and eighth century, are still relevant today. Rules for the conduct of warfare created a category of protected persons. A distinction is made between combatants and enemy non-combatants. Those non-combatants who are unable to participate in hostilities are classed as protected persons and cannot be attacked, killed or otherwise molested. The students may be asked to consider the term ‘protected persons’. Jurists differ

on many details concerning protected persons, but there is general agreement that they include children, women, the very old, blind, crippled, disabled (mentally and physically disabled) and sick. In addition to these, 'monks and hermits who retire to a life of solitude in monasteries or cloisters, and other priests who do not associate with other people' are also to be categorised as protected persons. Professor Mahmassani provides the examples of an incident where the Caliph Abu Bakr forbade his commander from harming any religious person. These instructions are in line with rules regarding inviolability of places of worship stated in the *Quran* in the following terms:

And had it not been for God's repelling some men by means of others, cloisters, churches, oratories and mosques, wherein God's Name is oft mentioned, would have been demolished. (The *Quran* 22:40)

This verse of the *Quran* is also cited in support of freedom of religion in Islam and against forced conversion to Islam.

In addition to rules regarding protected persons during armed conflict, rules exist in the Islamic tradition aiming at humane conduct of warfare. Treachery and mutilation are prohibited, except in case of reprisals. A saying of the Prophet Muhammad is cited: 'Do not steal from the spoils, do not commit treachery, and do not mutilate'. Another *Hadith* declares that 'if anyone of you fights, let him avert the face'. It is also forbidden to burn enemy warriors alive. On the basis of the various sources regarding the conduct of armed conflict, Kasani laid down a general rule regarding the protected persons in Islam. He is of the opinion that 'any person capable of fighting may be killed, whether he actually fights or not, and any person unable to fight may not be killed unless he actually participates in the fighting physically or mentally by way of tendering advice and provocation'.

Treatment of Prisoners of War and the Treatment of Property Under Occupation

This session should highlight the contemporary difference of opinion among Muslim jurists regarding treatment of prisoners of war as regards 'spoils of war'. This difference is based on two sets of *Quranic* verses, each enjoining a different course of action in the treatment of prisoners of war. The first verse declares that there are only two options available for prisoners who do not embrace Islam or enter into a pledge of safeguard or pact of *dhimmah.* They are to be either killed or enslaved. The majority of jurists however prefer to base their rules on a later *Quranic* verse that provides for redemption or release of prisoners of war. According to this interpretation of *siyar,* prisoners or hostages are never to be killed or enslaved. Muhammad Hamidullah in a detailed examination has listed nineteen practices expressly prohibited by Islamic law - these include a ban on the abuse and maltreatment of prisoners and hostages.

Amidst this controversy, a few general rules may be identified that leave the Head of State with one of the following five courses of action:

1. Adult male captives are to be enslaved if this is necessary for weakening the enemy. Women and children cannot be killed;

2. Enslavement of captives and their treatment as spoils of war;

3. Redemption by exchange for Muslim prisoners;

4. Redemption by payment of ransom (in money or property);

5. Benevolent release (*mann*) of prisoners of war.

In addition to the abovementioned general rules, some mention must be made of captives who have embraced Islam, either before or after being captured. Such persons cannot be treated as prisoners of war because they enjoy immunity for their life, property and young children. Special immunity is also granted as a result of a pledge of safeguard (*aman*) or a *dhimmah* pact.

Another important set of rules in Islamic laws of war relates to destruction likely to be caused in the course of battle. Since in Islam, the objective of war is neither the achievement of victory nor the acquisition of the enemy's property, participants of *jihad* are meant to refrain from unnecessary bloodshed and destruction of property when waging war. There are, however, three differing views on this issue. The first, held by several jurists (including the *Hanafis*) proceeds from the premise that inviolability of property is a corollary of the inviolability of its owner. Hence, where life of the owner is not immune, his property cannot possess this quality. This view therefore permits the destruction of enemy property including all fortresses, houses, water supplies, palms and other fruit trees and all other plants and crops. Jurists subscribing to this view cite a *Quranic* verse in support of their contention which states that:

> Whatever palm you cut down or left standing on its roots, it was by God's leave… (The Quran 59:5)

It also allows the slaughter of any animals belonging to the enemy, including horses, cows, sheep and cattle, poultry of any kind, bees and beehives. Transferring animals and weapons from the enemy back to Islamic territory is also allowed, but if this course of action is not feasible, animals may be slaughtered and burnt, whereas weapons may be destroyed to prevent the enemy from using them.

The second view on the subject is held by a growing number of jurists who agree partly with the first view but disagree with killing animals, except those

required for food or slaughtered by necessity, as in killing the horse of an enemy in battle. A third view in this regard which is the most respected was held by the first *Caliph*, Abu Bakr, which he explained in a celebrated address to the first Syrian expedition stating thus:

> Stop, O people, that I may give you ten rules to keep by heart! Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm-tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives. You are likely, likewise, to find people who will present to you meals of many kinds. You may eat; but do not forget to mention the name of Allah.

Rules Relating to Spoils of War

One last element in the laws of war in Islam needs to be highlighted during this session. This relates to the rules relating to spoils of war (*ghanimah*), which is defined as any property seized by force from non-Believers in the course of war. It includes, not only property (movable and immovable), but also persons, whether in the form of *asra* (prisoners of war) or *sabi* (women and children). The spoils belong to those who participated in war and must be divided after, not before, winning the war. Although there is a difference of opinion among jurists regarding details of distribution of the *ghanimah,* the general rule on the subject is that one fifth is reserved for the state to be used in certain public works, and the remainder is to be distributed among the participants (soldiers).

> The one fifth laid aside as the public share is further divided according to a verse of the *Quran* which states thus:
> And know that whenever you have taken as booty, a fifth thereof is for God and for the Messenger, and for the kinsmen and orphans and the needy and the wayfarer.

(The *Quran* 8: 41)

On the basis of the *Quranic* verse, this one-fifth share must be further divided as follows:

1. The share of God and the Prophet Muhammad;

2. The share of the Prophet Muhammad's kinsmen;

3. The share of orphans;

4. The share of the needy;

5. The share of the wayfarer.

Seminars

Seminar Three: Islamic Humanitarian law

1. Critically assess the contribution of *Siyar* to International humanitarian law
2. To what extent is treatment of prisoners of war within classical *Siyar* compatible to modern norms of international humanitarian laws?
3. Consider the reforms within Siyar to deal within internal armed conflicts.

Assessment: Essay Question

1. Examine and critically evaluate the *Siyar* principles on humanitarian law. What (if any) reforms are needed within *Siyar*, for it to be fully compliant with modern international humanitarian laws dealing with internal armed conflicts?

Reading

Core Reading

M Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with precedents from Orthodox Practices and Precedent by a Historical and General Introduction* (Lahore, Sh Muhammad Ashraf, 1977)

S. S. Ali & J. Rehman, "The Concept of *Jihad* in Islamic International Law" (2005) Vol. 10(3) *Journal of Peace and Security Law* (Oxford University Press Publication) pp. 321-343.

Supplementary Reading

S Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117(1) *Recueil des Cours de l'Académie de Droit International* 201–328.

Conclusions

This manual has highlighted the significant contributions of the *Sharia* and the *Siyar* in developing law of Nations – these contributions often are overlooked amidst the 'Eurocentric' vision of international law. It is remarkable to note the contributions of the *Sharia* and *Siyar* in developing the norms of international commerce, business and trade. Similarly, Islamic practices reflect considerable attention towards forging inter-State relationships. Dispute resolutions mechanisms were advanced through such techniques as *tahkím* and mediation. Furthermore, Islamic States actively encouraged diplomatic contacts and liaison. Having assessed the extraordinary foresight and vision of political leaders and jurists in the early Islamic period, it is significantly disappointing to note the current state of stagnation prevalent in the contemporary Muslim world. The initial historic vision of *ijtihad* appears to be absent from current Muslim leadership.

This learning and teaching guide has also examined the scope and meaning of controversial concepts. The discussion should reveal that the term *Jihad* has attracted a range of differing interpretations. It is therefore incorrect to assume or to argue that *Jihad* is patently a weapon of aggression. To the contrary, the discussion and analyses during the course of this module should provide ample exemplification of the non-violent and peaceful interpretations of *Jihad*.

In so far as the subject of freedom of religion and rights of religious minorities is concerned, there remain significant inconsistencies in the practices of Islamic States. During the module, discussion aims to have advanced the argument that these inconsistencies and divisions are only partly a result of differing interpretations of classical Islamic laws. Other, 'extra-legal factors' such as cultural, traditional and customary norms have a significant role in the adoption of rules regarding minority rights. The contemporary case of Asia Bibi in Pakistan (woman charged with Blasphemy) has been used as an

example to highlight the political and arbitrary nature of laws that currently exist.

The final sessions of the manual focus on Islamic humanitarian laws. A detailed consideration of these laws should reveal (a) the significant contribution which Siyar has made towards the development of international humanitarian law and (b) the compatibility between Siyar principles on humanitarian laws and international humanitarian law.

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