Islamic International Law (Siyar): An Introduction

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**1.1 Introduction**

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

The questions that are discussed in this chapter are: what is meant by *Siyar*; who was the first jurist to treat *Siyar* as a separate legal science; what was the role of Imam Abu Hanifa and his disciples, especially Shaybani; who were the first jurists to write on *Siyar*; who was the first
jurist to write a separate book on Siyar; what is the role of Siyar today in the domestic law of a Muslim state, such as Pakistan; is there a change in the contents of Siyar since its’ rules were first formulated; what was the role of Ottoman Turkey in the development of international law, especially international humanitarian law (IHL); should the participation of Muslim states in international law making be called their ‘subjugation’; what is the attitude of Muslim states towards international law in cases when its provisions are against Islamic law? These are some of the questions that are explained in this chapter.

1.2 Meaning and Definition of Siyar

Literally Siyar is the plural of Sira which means conduct, practice, comportment, behavior, way of life, attitude, or acceptable behavior. An alternative meaning in its plural form is campaigns.

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

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1 The Qur’an 20: 21.
Sira is used by some historians and traditionists as synonym to the term Maghazi (wars). For example Ibn Kathir (d. 775/1373), while referring to Sirat Ibn Ishaq,\(^4\) mentions that, “Ibn Ishaq (d. 153/770) says in his Al-Maghazi.”\(^5\) The compilers of ahadith of the Prophet (Peace be upon him) have the titles of Kitab al-Siyar, kitab al-Jihad, and Kitab al-Maghazi to describe rules governing the conduct of war, the protection of civilians, the protection of POWs, cessation of hostility, signing and breach of peace treaties, territorial jurisdiction, and even the various rules for conducting business between Muslim and the non-Muslim states, and so on. Today these are always the core topics of a standard book on international law although Muslim jurists never used the expression Muslim international law to describe Siyar. Historians used the term Sira to describe the conduct of the Prophet (PBUH) or his successors in their dealings in the above matters. Such books were written very early in Islam such as Al-Sira al-Nabawiya of Ibn Hisham (d. 218/833).\(^6\) This may well be called as the biography of the Prophet (PBUH) because it describes every event from his childhood till his death in minute detail, the life of his companions, their achievements, migration to Madina, dealings with envoys, revelation, the spreading of Islam, as well as all the wars of the Prophet (PBUH) and his successors. Later on the term Sira was used to describe the biography of other persons too. Thus at the end of the third century after hijrah (migration), ṬAbdullah Ibn Ahmad Al-Blawi wrote a book titled Sira Ahmad Ibn Tuloon.\(^7\) In the fifth and sixth centuries after hijrah many biographers used the term Sira to write biographies. For instance, Ibn Jawzi (d. 597/1201) wrote Sira ʿUmar Ibn al-Khattab and Sira ʿUmar Ibn ʿAbdul ʿAziz. Imam Fakhruddin al-Razi (d. 606/1210) wrote Sira al-Imam al-Shafiʿi and so on.

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\(^4\) Muhammad Ibn Ishaq, Sira Ibn Ishaq, ed., M. Hamidullah, Al-Maghrib, 1401 A. H.
\(^7\) ṬAbdullah Ahmad al-Balawi, Sira Ahmad Ibn Tuloon, ed., Muhammad kurd Ali, Matbat al-Taraqi, Dimascus, 1385.
As already explained the term *Sira* was used by Muslim jurists to designate the conduct of the Prophet (PBUH) relating to the laws of war, dealing with rebels, apostates, and non-Muslim citizens of Muslim state. The meaning of *Sira* as conduct and behaviour of the Prophet (PBUH) is evident from his sayings. Ibn Hisham reports that, “Then the Prophet (PBUH) ordered Bilal to hand over the banner to him (‘Abdur Rahman Ibn ’Awf). He did so. Then the Prophet (PBUH) eulogized Allah and asked for His mercy upon himself, then he said:

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

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

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

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

Ibn Sa’ad (d. 230/845) in his *Tabaqat* quotes a letter sent in by the Prophet (PBUH) to Akbar Ibn ’Abdul Qays in which he stated, *inter alia*, that, “… the Muslim garrison shall concede to them a share in the booty, skillfulness in government and moderation in *behaviour*. This is a decision which neither of the contracting parties may change.”

10 Ibn Jarir al-Tabari (d. 310/923) reports a letter sent by ’Umar – the second Caliph, who wrote to one of his commanders and said, “Thereafter Allah has prescribed excuses in everything in some circumstances except in two things: fairness in *conduct* … .”

11 Similarly, Tabari also reports a letter of ’Usman Ibn ’Affan – the third Caliph, who wrote to his deputies and said, *inter alia*, that “… the best *conduct* [for you] is to look into the problems that the Muslims face … .”

12 Thus the term *Sira* was used for the conduct of a Muslim ruler during times of both war and peace.

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

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

12 *Ibid.*, vol. 4, pp. 244-245.
Some important areas that are also discussed in *Siyar* by Muslim jurists including Sarkhasi that are not mentioned in this poetic definition are peaceful relations with non-Muslim state(s), the law of treaties (especially peace treaties between Muslim and non-Muslim states, although he mentions treaties with non-Muslim aliens/citizens), territorial jurisdiction, protection of envoys, and rules of business dealings between the former and the latter(s). Sarkhasi himself discusses all the above issues as well as those he has described in his definition in his books, *Kitab al-Mabsut* and *Sharh Kitab al-Siyar al-Kabir.*\(^\text{15}\)

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

Badruddin Al-‘Ai’ni, (d. 855/1451) of the Hanafi school of thought has used the extended meaning of *Siyar* when he explains the term. “And *Siyar* is the name given to the conduct of the

\(^\text{15}\) *Ibid.*, pp. 5-135; and his *Sharh Kitab Al-Siyar Al-Kabir*, Dar Al-Kotob Al-‘Ilmiyah, Beirut, 1997, 5 volumes.
Prophet (PBUH) during war and the conduct of his companions and whatever is reported from them in this regard”¹⁹ says ‘Ai’ni. In his commentary on the famous Hanafi book Al-Hidayah (The Guidance) he further extends the meaning of the term and opines, while analyzing the title Kitab al-Siyar, “Because it describes the conduct of the Prophet (PBUH), his companions (May Allah be pleased with them) and the Muslims. And it may be given the meaning: [their] conduct in ma’amalat (in social life or business).”²⁰ This is indeed an extended meaning of the term ‘siyar’ which has never been. It is this meaning attached to Siyar by Al-’Ai’ni that is reflected in some later works.²¹

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

²² See, his L’Islam et le droit international, thesis, Paris, 1929. The same was published in Arabic with certain additions, as Al-Shar’ Al-Duwali fi Al-Islam, Math’at Ibn Zaydun, Demascus, 1930.
²³ Ibid., p. 44.
observes in its dealings with other *de facto* or *de jure* States.”  

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

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

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

However, some of these definitions talk about the past rather than the present. Moreover, the definition given by ‘Usman Jum’ah covers relations with non-Muslim individuals within and outside the Muslim state rather than with non-Muslim states only. It must be difficult to give a good definition of *Siyar* if public international law is ignored. Today Muslim states deal with their non-Muslim citizens according to their constitutions and not according to *Siyar*.

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


We, therefore, need to explain Siyar in the present day circumstances and not as an abstract object that does not fit and is irrelevant. This is why there is need for a fresh start that would give a definition of Siyar suitable and relevant in the present day circumstances.

According to Majid Khudori, Muslim international law is an extension of Islamic law “designed to govern relations of the Muslims, whether inside or outside the world of Islam.”

According to ’Abdul Karim Zaydan, “it is that set of norms and rules of Islamic law that are binding for the Muslim state in its relations with other states.” This definition seems to be much better than the rest of definitions as it seems to be in accord with the present day scenario. Those rules and principles of Islamic law that regulate relations between the Muslim state and other states are designated as Muslim International law. These rules are binding on the Muslim state because of Shari’ah. However, there are more than 50 Muslim states today rather than one Muslim state because of the absence of Caliphate. This is why the focus should be on the obligations of these states under Islamic law as well as treaties regulating the same. The old definition of Sarkhasi has to be modified to be relevant to the present environment. New concepts have arisen while others have become obsolete. Today the subject matter of international law has changed. There are new things in and others out. For example, the rights of non-Muslims citizens are not regulated by Muslim international law but by constitutional law – the supreme domestic law of every state although individuals do remain the subjects of international law.

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29 In the case of Pakistan the Constitutional provisions regarding the protection of minorities are: paragraphs no. six and nine of the Preamble to the Constitution and Article 20 and Article 36 of the Constitution of the Islamic Republic of Pakistan of 1973.
1.3. *Siyar* as a separate legal science

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

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

Imam Awza’i (d. 157) of Syria criticized Imam Abu Hanifa’s opinions on many issues after he came across either his Kitab al-Siyar or its edited copy Al-Siyar Al-Sagheer by Shaybani. Imam Abu Yusuf responded with a rejoinder called Al-Radd ’Ala Siyar Al-Awza’i and defended the opinions of his teacher (Imam Abu Hanifa). Imam Shaybani has responded with his Kitab Al-Siyar Al-Kabir. This is the magnum opus study of Siyar and is simply unmatchable. There are many editions of this latter book. Imam Shafi’i (d.204/820) has recorded both books, i.e. Siyar Al-Awza’i and Al-Radd ’Ala Siyar Al-Awza’i in his treatise

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35 For details of the life, work and views on Islamic jus in bello, see, Ameur Zemalli, “Al-Imam Al-Awza’i wa Ba’dh Ara’uha Al-Insaniya”, in Maqalat fi Al-Qanoon Al-Duwali Al-Insani wa Al-Islam, (Arabic) ed., Ameur Zamalli, ICRC, 2nd edition, 2007, pp. 57-63. It is said that when Imam Awza’i was given either the book of Abu Hanifa or Shaybani he asked ‘who wrote this book’? and was told that it is by Shaybani of Iraq. He is reported to have said that ‘how could the Iraqis write about this science because they do not know Siyar’. He added that the campaigns of the Prophet (PBUH) were towards Syria and Hijaz and not towards Iraq which is conquered only recently. Ibid, p. 59.
36 The book is only available along with its commentary by Imam Sarkhasi and has been published many times by many different publishers. It was first published in Hyderabad (India) in 1971 but has been printed many times elsewhere.
The book cites text from Awza’i’s as well as Abu Yusuf’s books which are followed by the saying, “Imam Shafi’i said” and contains criticism of both of them and the opinion of Shafi’i regarding the same issue. Hamidullah argues that, “henceforth the word [siyar] seems to have become a technical term commonly used by jurists of all times.”

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

However, there are two problems with this work: first, Abu Khalid cannot be accepted as the narrator of Majmu’ because he is accused by the Sunni scholars of fabricating ahadith, whereas he is trustworthy for the Zaydiya (the followers of Imam Zayd Ibn ‘Ali); and secondly, the way this book was compiled is also questionable. Is it compiled by Imam Zayd and Abu Khalid simply recorded and compiled it from him? Or did he (Imam Zayd) dictate it to his pupils

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41 See, Imam Abu Zahrah, Tareek Al-Mazahib Al-Fiqhiyya, pp. 274, 675.
and one of them edited and arranged it later on? However, recent research shows that Abu Khalid’s narration cannot be accepted because he has been known to tell lies and fabricate ahadith. Moreover, the book gives special coverage to Shi’a jurists of that time but does not mention contemporary great Sunni jurists, and this is why it is simply a narrative. After looking at the subject matter of the book and its comparison with Mu’atta of Imam Malik and Asar of Shaybani it seems that it has better in contents than Mu’atta and is like the books of Shaybani and Abu Yusuf. In addition, the book is influenced by the Iraqi fiqah (of Abu Hanifa, Abu Yusuf and especially Shaybani). This is why a researcher has concluded that:

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

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

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1.4. Shaybani and Siyar

It is important to remember that the original book of Abu Hanifa has not come down to us and this is why much attention is paid to *al-Siyar al-Sagheer* of Shaybani discussed above and his *al-Siyar al-Kabir*. The latter book is only found with its commentary by the Hanafi jurist M. Ibn Ahmad Ibn Abi Sahal al-Sarkhasi (d. 1090/483). It is undoubtedly the most significant *Siyar* work of the juridical literature of Islam of all times. The Turkish translation of this latter book was published in Istanbul in 1825. The Arabic edition was first published in 1917 in Hyderabad, Deccan. Hans Kruse considers Shaybani as the father of the legal formation of *Siyar*. In 1827 Joseph Hammer von Purgstall – a German scholar, who reviewed the Turkish translation of the book *Sharh Kitab al-Siyar al-Kabir*), called Shaybani the Hugo Grotius of the Muslims (a considerable understatement). However, it is unfair to give Shaybani this low status; instead, Hugo could be considered as the Shaybani of Europeans. Historically, however, Hugo cannot be considered as the father of European international law, while Vitoria, and especially Gentili deserve more credit than Hugo for being the first European to separate international law from theology. Vitoria seems to be familiar with *Siyar*: he suggested that it

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47 Ibid., p. 238.
49 Perhaps the earliest writers on international law in Europe were Spanish Churchmen of the fifteenth and sixteenth centuries who wrote about ethical problems during warfare. Francisco de Vitoria, Professor of Theology at Salamanca from 1526 to 1546, whose *Relectiones theologicae*, published after his death, talks about the expansion of international law to the New World (Spanish colonies in Americas). Weeramantry argues that some of these Spanish writers were very much influenced by Islamic law. See C. G. Weeramantry, *Islamic Jurisprudence*, Macmillan, London, & St. Martin Press, New York, 1988, reprinted Sarvodaya Vishva Lekha, 1999, p. 158. Alberico Gentili commonly known as Gentilis, an Italian Protestant who fled to England to avoid persecution and became professor of Civil Law at Oxford was perhaps the first European writer to separate international law from theology and ethics and to treat it as a branch of jurisprudence. His most important work was *De jure belli* published in 1598. Hugo himself was greatly indebted to this book. See, J. L. Brierly, *The Law of Nations*, ed., Sir Humphrey Waldo, Clarendon Press, Oxford, 1963, reprinted, 1981, pp. 25-27. Also see, Lord McNair, “The Practitioners’ Contribution to International Law” III, *Ind JIL*, 1963, pp. 272-273. Brierly argues that when Hugo wrote *De jure
was unlawful to kill Muslim children (who are innocent) and women (who are presumed innocent). Justice Weeramantry gives 16 reasons to prove that Hugo was possibly influenced by Siyar (Muslim international law). There is more evidence of this in the literature of Hugo. For example, one of the principles emphasized by Hugo is that a treaty must be honoured or what is called ‘pacta sunt servanda’. “Between enemies those laws which nature dictates or the consent of nations’ institutes are binding” stated Hugo. Sticking to the terms of a treaty is a core principle of Islamic international law from the time of the Prophet (PBUH) as is explained elsewhere. Moreover, according to Hugo it is necessary for the legality of war that it should be waged under the authority of one who holds supreme power in the state. This principle is asserted by the famous Hanafi jurist Imam Abu Yusuf (the first Muslim Chief Justice) when he asserted that “No expedition shall be sent without the permission of the head of state or his deputy.” To Hugo a state may wage war in self-defense. This is the unavoidable conclusion according to Islamic international law. Hugo tried to make war more humane, which is the core area of Islamic jus in bello. Some of the many temperamenta of war that he suggested have been incorporated into current international law. It is interesting to note that the law of interstate relations was not called international law by the European writers; it was known as

\[ \textit{belli ac pacis, published in 1625, he was already so eminent that anything from his pen would have attracted attention. Ibid, p. 28. Thus Hugo cannot be equated to Shaybani.} \]

‘European public law’ (*ius publicum europaeum; *driot public de l’Europe)*.\(^{58}\) In 1856, the Paris Peace Treaty admitted Turkey (as the first non-Christian nation) to the Concert of Europe.\(^{59}\)

As a tribute to Shaybani, scholars created Shaybani’s Society of International Law, in Gottingen, Germany. Professor ‘Abdul Hameed Badawi was the first President and professor Salahuddin al-Munjid was its Vice President. In 1970 the University of Paris celebrated, as a tribute to Shaybani, his 1200\(^{th}\) death anniversary.\(^{60}\)

In 1966 Majid Khadduri of John Hopkins University, in the search for *al-Siyar al-Sagheer* of Shaybani, translated chapters on *siyar* from another book of Shaybani known as *Kitab al-Asal* or *Kitab al-Mabsut*; wrote a lengthy introduction to it and renamed it *The Islamic Law of Nations*.\(^{61}\) This was not the original book. The text of the original book was preserved by Hakim Shaheed al-Marwazi – a Hanafi scholar, in his book *al-Kafi fi Furu’ al-Hanafia*, which was never published till late Professor Mahmood Ahmad Ghazi translated, edited and annotated this original in 1998 under the title ‘*The Shorter Book of Muslim International Law*’.\(^{62}\) Although the first book of Shaybani has attained much attention but perhaps it is because of his second book *Kitab al-Siyar al-Kabir*, which is the best book in this science ever written, that scholars have developed so much interest in his first work. Whatever the case it is this great Iraqi jurist of the Hanafi school of thought that is undoubtedly the father of *Siyar* (international law).

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1.5. The Sources of *Siyar*

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

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

Hamidullah has mentioned other sources as well, such as, (1) the practice of other Muslim rulers not repudiated by the jurists\(^63\), (2) official instructions to commanders, admirals, ambassadors and other State officials; (3) reciprocity; and (4) internal legislation of international nature and unilateral declarations.\(^64\) However, the last four are already implied in the conduct of the Caliphs, whereas the first cannot be something different from the conduct of the Caliphs as well.

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\(^63\) In this category he mentions the precedent left behind by Muslim rulers such as the Umayyads, ’Abasids, and Awrangzeb Alamghir in India. See Hamidullah, *The Conduct*, p. 23.

\(^64\) Hamidullah, *The Conduct*, p. 18. Perhaps there is a mistake in the book because on page 18, he talks of internal legislation for conduct regarding foreigners and foreign relations but on page 33, he talks of international legislation and unilateral declarations. Moreover, originally he has given ten sources of *Siyar* but in his explanation he has added another one, making a total of 11 sources.
1.6. *Siyar* as the Source of Law

1.6.1 *Siyar* as a source of domestic law

It is interesting to enquire about the status of *Siyar* itself as a source of law, especially in domestic cases involving inter-state relations as well as in law formulation at the international level. At the national level there is one decision of the Pakistani Supreme Court in which Justice Afzal Zullah mentioned Islamic international law specifically. In *A. M. Qureshi v. Union of Soviet Socialist Republics*, a Pakistani party to a contract claimed damages for breach of contract against the former Soviet Union and its trade representative. The contract involved the sale of military equipment from the former USSR to Pakistan. The USSR claimed state immunity under general international law as well as provisions of the Code of Civil Procedure of Pakistan. The case is interesting for more than one reason since four separate decisions were given stating that the former USSR could be sued under contract law in Pakistan. Karam Elahee Chuhan and Nasim Hasan Shah, JJ., (as they then were) reasoned that there was no implied bar to sue the USSR. Both judges relied on ‘Western’ jurisprudence and case law, Justice Afzal Zullah reached the same conclusion while relying on Islamic international law. Justice Zullah

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66 Rule 11 (d) of Order VII and sections 86 and 87 of the Code of Civil Procedure 1908, which govern the situations under which foreign sovereign entities such as states and office holders of such states can sue and be sued in Pakistan.
67 He referred to his earlier decision in *Haji Nizam Khan v. Additional District Judge, Lyallpur*, PLD 1976 Lah 930, in which he held that the formula ‘justice, equity and good conscience’ meant Islamic law to the exclusion of all others. Thus, all areas of law not occupied by statute or binding precedent were to be decided in accordance with Islamic law. The formula ‘justice, equity and good conscience’ was imported from England and effectively used by Anglo-Indian judges to apply English law as residual law to fill any legal lacunae. See, J. D. M. Derret, “Justice, Equity, and Good Conscience”, in J. N. D. Anderson, *Changing Law in Developing Countries*, London, 1963, pp.
held that had it been found that under ‘Western’ international law, the Soviet Union enjoyed sovereign immunity and could therefore not have been sued in Pakistan, he would have applied Islamic international law:

Mr. Khalid Farooq Qureshi, the learned counsel for the respondents, tried to spell out an implied bar from the customary International Law but as shown by my learned brothers Karam Elahee Chuhan and Nasim Hasan Shah, JJ., in an elaborate treatment of the subject, the effort has not succeeded. On my part, even if any such implied bar would have been discoverable in what is called customary International Law and that too on the basis other than that of “justice”, I would have, consistently with the view taken in Haji Nizam Khan’s case (particularly when there is dissent thereto, so far, rather it is being endorsed and relied upon), applied the Islamic International Law.\(^\text{68}\)

Justice Zullah, however, did not give details of how a sovereign state would be liable under Islamic international law. Earlier, as a judge of the Lahore High Court, he has given another decision which is also relevant in our discussion of Siyar. The State Bank of India v. Custodian of Evacuee Property\(^\text{69}\) concerned the ability of the State Bank of India to pursue civil actions against the Custodian of Evacuee Property after the outbreak of war between India and Pakistan in 1965. The Defense of Pakistan Ordinance 1965 and the Defense of Pakistan Rules 1965 had prohibited enemy aliens from pursuing civil action against Pakistani citizens. Justice Afzal Zullah interpreted the above-mentioned laws in the light of U.S. case law and common law principles. However, he also discussed the Islamic law of war at length and held that the right of the enemy to pursue civil actions was merely suspended during the period of hostilities but was not completely extinguished.

\(^{68}\) At p. 432.
\(^{69}\) PLD 1969 Lah 1050.
The above two cases have not been considered noteworthy by authors of Islamic international law. It should be noted that the first decision was given at the height of the Islamization process in Pakistan during the time of General Zia-ul-haq while the second was given much earlier.

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

1.6.2 Siyar as a possible source of international law

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

It is true that Muslim nations did not play a big role in the shaping of international law in general. But the reasons are obvious: Turkey, which was the representative of Sunni Muslims at

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large, was admitted to European public law (as international law was called then) only in 1856. Turkey has played quite a role in the development of international humanitarian law since then. It did not participate in the 1863 conference which gave birth to the Red Cross Committee, but it subsequently ratified the 1864 Geneva Convention in 1865.\footnote{Turkey ratified the Convention on 5th July 1865.} Persia – the second Muslim state, followed in 1874.\footnote{On 5th December 1874.} Since then Turkey participated in every international conference and made some difference till Calaphat collapsed in 1924 and Turkey became a secular republic.\footnote{For the role of Muslim nations in general and the Ottoman Turkey and Persia in particular see James Cockayne, “Islam and international humanitarian law: From a clash to a conversation between civilizations” 84 IRRC, September 2002, 597-626.} A Majority of the remaining Muslim nations that are independent today, were colonized at that time and had no role to play in international law making. However, in the later half of the 20th century Muslim states have been playing their part in the shaping of international law. For example, when the UN Declaration on Social and Legal Principles with Reference to Foster Placement and Adoption Nationally and Internationally was under negotiation, most of the Muslim states, including Pakistan, refused to agree to the provisions on ‘adoption’ and considered them as repugnant to the principles of Islamic law. As a result, the UN General Assembly recognized the principle of ‘Kafala’ of Islamic law as an equivalent humanitarian principle that could be applied by states practicing Islamic law.\footnote{Jamshed A. Hamid, “International Law and Pakistan’s Domestic Legal Order”, 4 Asian Yearbook of International Law, (1994), 137; and his The Status of Treaties in Islam: A Comparison with Contemporary Practice, (Islamabad: Shariah Academy, 2001), 130-131. The above declaration was adopted by the 41st Session of the General Assembly on 20 November 1986 (document No. A/41/896). See in particular para 6, 7 and articles 22 and 23.} Moreover, several Muslim member states of the UN, including Pakistan, have attached reservations to their instruments of ratifications/accessions to the Covenant on Social and Political Rights 1966 as well as the Convention on the Prevention of all Forms of Discrimination Against Women of 1979. In addition, Muslim states largely ignored the

Some scholars consider the integration of Islamic States into the modern community of nations as a form of ‘subjugation’ i.e., “a kind of Europeanization predicated upon the reconstitution of the Islamic umma in distinct nation-state units”;\(^76\) the reality is that, it is ‘accommodation’ rather than ‘subjugation’ which is more appropriate to describe the situation. The argument of subjugation is based on the presumptions that public international law is a secular law; that Muslim States suspect its legality;\(^77\) and that Siyar was meant for imposing Islamic law on non-Muslim nations. As I have noted elsewhere\(^78\) all these presumptions are flawed because public international law is not secular in nature as it has accommodated all major civilizations and systems. Article 9 of the Statute of the Permanent Court of International Justice provided that “[A]t every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.”

Article 38(3) of the Statute, then provided that the Court should apply, *inter alia*, “[T]he general principles of law recognized by civilized nations.” First, Islam constituted precisely one of the main forms of civilization to which the Statute referred, and secondly, Islamic law is one of the principal legal systems of the world. Islamic law is subsequently one of the sources of international law. It is wrong to argue that public international law is secular in nature instead it

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would be more appropriate to conclude that it is ‘neutral’. Muslim States sign treaties when they are not against the fundamentals of Islam; are beneficial for them; can have reservation against un-Islamic provision(s); and, would be bound by their treaty obligations. Finally, Siyar does not impose Islamic law on non-Muslim nations; instead it only creates obligations for the Muslim States itself in relation to the conduct of war, the resort to war, immunity of diplomats, the regulation of trade, and so on.

Since 1945 most Muslim States have been concerned with their treaty obligations however on many occasions they have forced changes in the drafts and their objections were based on Islamic law in general. More recently their approach has affected the use of the term ‘gender’ in the ICC statute.\(^79\) Muslim states have sometimes played a big role in the international law making. This is evident especially in the formulating of Article 1 of Additional Protocol 1 to the Geneva Conventions,\(^80\) which extended the protections of IHL to those fighting colonial domination, foreign occupation or racist regimes. The presence of non-state actors was recognized for the very first time by IHL; this was something beyond the static model upon which it has long been asserted.

### 1.7 Conclusion

To sum up, according to classical Muslim jurists Siyar mean the conduct of the Prophet (PBUH) and his successors during war and peace in their relations with non-Muslim states, rules of

\(^79\) Article 7(3) of the Rome Statute states that “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”

\(^80\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Geneva, 8 June 1977.
dealing with rebels, apostates, foreigners as well as non-Muslim citizens of a Muslim state. However, some of the contents of *Siyar* are shifted to the municipal laws of states and are no more treated under *Siyar* or Muslim international law which is confined to relations between a Muslim state and other states. A relevant definition of *Siyar* would be the rules of Islamic law that regulate relations of a Muslim state with other states and that are binding on the Muslim state because of *Shari‘ah*; this can be appropriately stated to be Muslim or Islamic international law. This can be stated to be Muslim international law. Abu Hanifa was the first Muslim jurist who taught *Siyar* as a separate legal science. His disciple Shaybani was perhaps the first jurist whose book *al-Siyar al-Sagheer* became widely known as the first authentic book on *Siyar*. Abu Hanifa’s views in this book became the reason for a very good literature on *Siyar* and in a short span four books were written on this topic, two of them by Shaybani. Shaybani’s second book (*Kitab al-Siyar al-Kabir*) is now considered the greatest book of all times, and this is why Shaybani can be rightly called the father of *Siyar*. The attribution to Imam Zayd of a book having a chapter on *Siyar* is not true.

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