

# Fiqh al-Siyar and Modern International Law (Applications and Challenges)

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## **ABSTRACT**

Islam being a complete code of life emphasizes equality, peace, harmony, righteousness, and justice. To safeguard the society from disruptive elements Islam enforced punishments with their philosophical approach. According to Shariah, criminal behavior in an Islamic society cannot be tolerated and the offender gets punished according to Islamic criminal laws. The reason behind imposing strict punishments under Shariah is to put the people in mindfulness that criminal behavior must be punished. These punishments are perfectly justified as Islam not only takes every possible measure to prevent violations but also indoctrinates commendable moral scruples in the offenders. For the reforms of criminals and in order to uphold harmony and peace in the society Islamic Criminal law has approved many offenses with providing deterrent, reformative, retaliate and other kinds of penalties. This paper deals with Islamic criminal law and find out its philosophical approach and wisdom.

**KEYWORDS:** *Fiqh al-Siyar, Islamic International Law, Modern Challenges, International law.*

## **Introduction**

Siyar is the plural of *Sira* which means path, way, conduct or behavior. Siyar basically regulates the rules or laws during the war or in case of peace. The word Siyar also refers to the core and conduct of Prophet Muhammad (PBUH) or companions in their dealings between the Muslims and non-Muslims states<sup>1</sup>. Ibn Hashim has discussed in “Al- Sira Al Nabawiya” the life of Prophet Muhammad (PBUH) and all the events from his early life till death, achievements, migration to Madina, meeting with foreigners, envoys and revelation, as well as preaching of Islam. <sup>2</sup> Fiqh al-Siyar and the Modern International Law are the laws that deal with the principles and rules with the conduct of the States with each other. In this assignment, firstly both Fiqh al-Siyar and modern international laws have been defined. Then their Status and the challenges that are faced during their application has been discussed in the

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detail. Fiqh al-Siyar is also called as Islamic international law. Imam Abu Zahra has defined it 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.”<sup>3</sup>

Modern International Law consists of the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies.”<sup>4</sup> There are many of the Muslim states that are in the nation’s form as a state model but some of them only resembles the proper nation of Islam in terms of legal system as well as structure, for example Saudi Arabia and Brunei Darussalam. The participation of such states in international law in reality would not be regarded as Fiqh al-Siyar.<sup>5</sup>

### **Modern International Law and United Nations**

Modern International law is also known as Contemporary International law. This law is developed by the European civilization. The theory of the nation states which are the main area and focus of the modern International law. This law was developed and initiated by Westphalia treaty in 1648 after the announcement of the death of Roman Catholic Empire and after this a new phase started in the world history politics.<sup>6</sup> Although the roots of International law developed with the Greeks and Romans, the base of modern International law was made by Francisco Victoria (1480-1546), Alberico Gentili (1552-1608). They are called the father or pioneer of modern International law, and belonged from Europe.<sup>7</sup> Dr. Muhammad Hamidullah remarks that: the law which was developed by the European scholars named as ‘International law’ was not ‘International’ because in 19<sup>th</sup> century it was applicable only on Christians Europe countries. In 1856 it was first time applied on non-Christians of Europe countries.<sup>8</sup>

After the World War II, under the United Nations, the world has become to be recognized as the global village. It is not exactly as government as many of the states are there that still retains the sovereignty and UN itself does not claim to be ‘World Government’. United Nations basically holds a dominant role as it functions similar to the government in the conduct of international relations. For example, treaty facilitation, policy, security enforcement and dispute resolution, all are conducted by United Nations. Therefore, it could be

said to some of the extent that the world is being shaped by UN is similar to global village as UN like a ruler.<sup>9</sup>

Universal international law was one of the medieval law trends that is preserved by the combination of the positivist and constructivist trends of the making of international law. Many different types of international treaties are still made with the purpose to bind the states as many as possible. Some of the laws which are not being bind formally, but possibly they can be effective for the making of customary international law in shaping the uniformity of practices of the state. From the past few decades, the regionalization has also been a trend but has no role in making the trend of international law in general.<sup>10</sup>

Previously international law only regulated the international relation but now it has evolved in regulating the states to handle their internal affairs as well. International law and constitutional law intersect each other and International laws regardless of the national law, are binding upon the states. But the states or the governments are also responsible and accountable for the constitutions as well as public. That is the reason due to which there are the discourses within the system of national law on the position of the treaties.<sup>11</sup>

### **Modern Applications and Challenges**

Fiqh-al Siyar (Islamic International law) and Modern International law the development and foundation of both are different historical developments and their main purpose of both legal regimes are contradicting and not compatible with each other.<sup>12</sup> There are many relevant issues, in which the western principles and the Islamic rulings may not be parallel to each other. Another issue is that the analysis done about the Siyar can fall prey to the Orientalists trap of overpowering Islamic law to Western power, especially when the Siyar has been excluded totally and the modern international law claims to be based on Western practices from which Siyar has been totally excluded.<sup>13</sup>

Siyar is basically the branch of Islamic jurisprudence or fiqh. The modern literature related to siyar is very scarce. While describing the Islamic laws of the nations, one has to look to the basis of Shariah that is Holy Quran, Narrations (Hadith), Consensus (Ijma) and Analogy (Qiyas). These sources are not enough or comprehensive, that is why the writers such as Dr. Hamidullah included for the basis of Siyar, State practices and evidentiary sources for the international law.<sup>14</sup> This is basically the indication, that the reason is very important for the understanding of the Siyar. Reason has already been used in the application of the text of Quran and hadith by the jurists under different circumstances. The connection between reason and the revelation is complex in comparison with the branches of fiqh.<sup>15</sup>

### **Use of Reasoning**

The Jurist in regard to Siyar mentioned the rulings on some of its topic, as can be seen in the work of Al-Shaybani. While the behavior as well as the conduct of the Islamic State which were determined by the rulers of Muslim

or by their advisors. It can be contradicted and questioned that whether these rulings that is behavior and conduct are the part of Siyar or not. It may be negatively concluded that the Siyar was entirely been practiced by the Islamic caliphs which were pious. This argument can further lead to the debate that is Siyar compatible with the modern international law. Its legitimacy is characterized by the consent of state which is expressed by the means of treaties or in the international custom form. The rule of international law with the consent, on all the State becomes binding. Whereas the Islamic State can be source to both the main party of international law, and basically the thing that make Shariah unique is the revelation and it requires a deeper thought so that the reason could be used to understand the conditions of the laws of Shariah.<sup>16</sup>

*Siyaasah Shariah* is a method of the governance where there is a divine prescription under the Shariah law for the divine implementation of rule are absent as not been subjected to present situation. In such cases, implementation may be suspended or relaxed by State of a rule that suits the particular place and time. With the greater flexibility the concept of *Siyaasah Shariah* can be applied in respect to the external relation of an Islamic State as there is more space in it to make political decisions creatively. Some of the strategic and political decisions made by the Prophet Muhammad (ﷺ) were not merely considered revelation. Such cases can be found when to enhance the general welfare practices of Romans and Persians were being taken in consideration by Prophet Muhammad (ﷺ) and his pious successors for the betterment of Muslim Ummah.<sup>17</sup>

The subject of the law is the receiver of law who will enjoy its legal right and tolerate the obligations which are legal. The same is the application of the international law and it is clear the main actor in it will be the National State. But in the concept of Siyar the subject is not restricted to the state entity. Siyar includes the laws that are applicable on both the individuals and their groups as well that are the religious and tribal communities. Examples are Aus and Quresh etc. There are Muslims and non-Muslims subjects which can be seen in its reference to Islamic State. For example, dhimmis were its subjects. Some of the territories, are been spell out form Siyar in which non-subjects (harbi) people live and they have been classified these territories as either the territory of Islam or the rest of the world which is called territory of war (dar al-harb). Except from these categorizations, ‘ummah’ is the concept that refers to Muslim’s community coming from every portion of the world that includes dar-al-Islam, dar as-sulh and dar-al-harb.<sup>18</sup> So, it can be concluded that the approach of the Siyar for determining the subject of law shows in a very thin line that is between the territorial and personal assumptions of the rights that are legal and are obligatory. The example can be taken that Siyar addresses and take in consideration the both, obligations and rights, of the dar-al-harb territory and its residences as well. But in the modern international law, the separation between the private and public aspects are unclear as in Siyar. For

example, the marriages that are of cross-border or the ones that are occurring in the place that is been defined as dar-al-harb (territory of war). These can be found in treaties of Al-Shaybani on Siyar.<sup>19</sup>

### **Application of Siyar and International Law**

The development or progress in the modern times creates a rapid need of development of fiqh al Siyar. Many Muslim nations are in the form that posses a proper Islamic legal systems and Islamic structure (Indonesia, Pakistan, Saudi Arabia), typically their contribution in their Islamic law but typically not attention of fiqh- Al Siyar. After the World War II, the world was arranged as “global village”. United Nations play a major role and conduct many of matters or International relations. For Example: UN conducts peace settlement, resolving the Quarrel, or Dispute policy etc<sup>20</sup>

### **Role of Fiqh al-Siyar in Development of Modern International Law**

Islamic world can play active role in the development of the International law. The international law expands the modern or contemporary law. The Islamic law can never be changed because these principles are rooted from Quran. Islamic states with their power could made possible progress in International law.

The western world ignores the contributions and participations of Islam. A lot of books which were written from Western scholars and Muslim and Islamic International law contribution were neglected. For giving the position and values to the Islamabad c International law it is incumbent upon the scholars to write the books, articles, arrange workshops and seminars, on the different points of Islamic International law.<sup>21</sup>

### **Attitude of International Community and diversity with Regards to Humanity**

The International society of Islamic International law show great willingness and agree with the cultural and with great religious respect. The view is that international law is applicable in all countries in equal relations with all equal terms with one another. Muslim jurists said that in International law all the rulings and laws are legally binding with the nations in interacting with another states. They also discussed that International law apply on any nations without any geographical, cultural and religious differences.

### **Contradiction of Al-Siyar and Modern International Law**

The controversies arise related to the idea of *dar-al-harb* between the non-Muslims and Muslims. This idea may contradict with the modern principles of international law, because the sovereignty of the States will be equal and the use of force will be prohibited. It is clearly rejected by the contemporary writers as well; for example Talat Al-Ghunayemi rejects idea on the basis, that Holy Quran and Hadith do not mention it. Partition of the world into *dar-al-harb* and *dar al-Islam*, according to the Al-Ghunayemi, was only an

innovation done by the Abbasid jurists. But it is however being recognized by Al-Ghunayemi that when a non-Muslim and Muslim States are in the situation of War then the importance of such a division can be related.<sup>22</sup>

### **Charter of United Nations**

The rejection of Al-Ghunayemi becomes understandable regarding *Dar-as-Sulh* if one cuts the historical context from international relation's conduct. It has been thousands of years that the States are been in the situation of war with one another but no laws in the international law has prohibited such a conduct. There were within the State a presumption of the mind's state of continuous hostile relationship between one another as a State that is why their borders are being shifted due to the expansion of territory or its loss. When the United Nations charter was made all of that changed. As the UN charter had some objectives that included bringing the peace to this world and ultimately objecting to end the war. The use of force is also prohibited clearly, by that Charter. It can be said that the *dar-ul-Sulh* is still present in the form of UN charter as modern correspondent of the peaceful treaty.<sup>23</sup>

### **Siyar and UN Charter**

In the present world, all the Muslim Nation States are the members of UN and that charter restricts the members of the States from the use of force except if there is the situation where one state has to do self-defense. This is not in the conflict to the obligation that is given in Jihad, which is also completely defensive. However, another important principle is derived from the Charter of Madina, where the Constitution of Madina's Article 17 offers the peace which is undividable for the believers that is when in the path of Allah believers are fighting would not be in the separate peace. Conditions must be equitable and fair at the same time for all. If a State that is non-Muslim attacks or aggresses a State that is Muslim, then this attack must be measured as the attack against the all the States that are Muslim States irrespective of where they are located. The Muslim States are obliged not to ally the aggressor's side and to assist the distressed Muslim State while in state of defense.<sup>24</sup>

### **Institutionalization of the Siyar**

Institutionalization of the Siyar via the principles of law that are general may also be recognized by the nations that are civilized. General principles of law that are present in the Article 38 can be interpreted as major legal system's principles of the world. For more comprehensive approach for interpreting, it significantly means that the civilized nation recognized it but here arose a question that if only it is confined to nations that are westerns. The interpretation that is taken in general, that is inclusive in the approach, hence as a result, the general principles law has included the Islamic law into domain. The Islamic law's role in the international law has been embarked on the program named the International Law association. For the tolerance of the different religious and intellectual traditions on the international relations and law such a program would be a broader initiative for understanding it.<sup>25</sup>

## **Fiqh al-Siyar and Challenges**

There is a thing lacking that the contemporary Islamic jurists have not deal in the detail with the arising questions about the development of modern warfare. In the most contemporary literature that is related to the Islamic Humanitarian Law and Islam, the contentment of the scholars who teach about the Islam related to the humaneness because of the saying of the Prophet (peace be upon him) in which he has prohibited to kill the women and the children and the one decrepit in war. This idea is correct but there are a lot of other details that are not addressed by the Islamic legal scholarship who are currently present.<sup>26</sup>

### **Prevention from the Siyar's Application**

The expansion that is jurisprudential can be determined by the international law as the domestic law exerts its formative influence based on the practice of State, as its sources also includes the domestic law. When there is the prevention of the application of the Islamic State's constitution by the legal system, then the Muslim Nation State related to the domestic law can be secular completely. Then in this type of situation, minimization or even the elimination of the institutionalization of the Islamic law (Siyar) by the general principles of the law, that is Article 38 can occur. However, the constitutional framework that is secular for the Muslim Nation State may not prevent the administrative branch to do negotiation when there is an arrangement of the dispute settlement of that State which includes the Siyar as portion of the law's choice to another party that may be the State or non-State unit.<sup>27</sup>

### **Siyar and Article 38**

Institutionalization of the Siyar can be done by the way of charter that has been mentioned as a source in Article 38 of international law. In the international law the legitimacy is basically based on the consent, and the Muslim Nation States are at the freedom to enter a treaty that includes the principles of Siyar, but as long as there is no unconditional norm in the charter of the general international law. But there can be resistance from the ruling leaders that are having the strong secular tradition. Then it is possible for the charters in these kinds of situation that include the principles of Siyar to be concluded as well as negotiated in the areas are less sensitive for example international environmental law and economic law.<sup>28</sup>

### **Fiqh al-Siyar and Modern Application**

Islamic source could not be find discussing about the idea of the participation in hostilities and also about how the Islamic law and Islamic Humanitarian law are similar. In the notes of Al-Dawoody (2011), in the Holy Quran and the Sunnah of Holy Prophet Muhammad (Peace be upon him) there are many categories in which the protected persons are not been specified and mentioned in both of the above sources, for example, the persons who are severely ill. However, they are included in the persons that are protected according to the classical jurists. These persons are not included because of

prohibition that is generally on those, who in the hostilities does not participate. It may conclude that not only the general principle is enough, and a ruling that is in detailed is needed.<sup>29</sup>

There are on the other hand some Islamic Jurist for example, Shaikh Yousaf Al-Qaradhwy, they do the argument that the weapons may use only in the offensive warfare and not in the defensive warfare. The advance weapons which are not only the factors that determinants to win the war but if these kinds of weapons are prohibited when the person is facing the enemy and not using them, then it will be considered as suicide. So, these kinds of rulings cannot be realistic. But in a warfare that is defensive, to use the missiles and bombs are permitted by Al-Qaradhawy but he has not mentioned the need for avoiding the damage that is collateral.<sup>30</sup>

Islamic law has prohibited the death of a person who is non-combatants and has to tolerate when it becomes unavoidable and the prohibition of transgressing the limits is also mentioned in the Quran during the war. But still if there would be no detailed rulings, then in Islamic law the general principles can be performed well.<sup>31</sup>

### **Application of the Siyar by Arbitrator**

By the general principle of law Siyar can be implemented and put into practice by the Muslim Nation States. The dispute can be settled by such States among or between themselves or the corporations that are multinational through the arbitration. And such States order in the referring term that Islamic Law of Nations that is Siyar will be applied among other. The “Permanent Court of Arbitration Optional Rules for Arbitrating Disputes” in the Article 33 provides both the party to choose that the arbitral tribunal shall apply the law that has been decided by both the parties between whom the arbitration is taking place.<sup>32</sup>

### **Implementation of Siyar through OIC**

If the major functions are been exercised by the OIC (Organization of the Islamic Conferences) than it would have been better. But firstly, it would be seen that is the organization can full fill the criteria and is in that position. It must be firstly determined that if the position of OIC members that their sovereignty can be surrendered to the OIC. If the OIC be a universal organization than there would be an ideal situation like the European Union. The restoration remains impossible of the Caliphate, so the Siyar should must enlarge its limit beyond the relationship regulating between the States that are Islamic and non-Islamic. But the functions that would be addressed by Siyar will be regulating between the relations of Muslim Nation States themselves that are exhausted occasionally due to the differences that occur due to ethnicity and sectarianism. Secular constitutions are been adopted by Muslim Nation States. It can be taken as that it means that the true Islamic State may no longer be a subject of the Siyar as it was been understood by the Muslim jurists that were traditional, for example, the Shariah was enforced as a

prerequisite in a community by Al-Mawardi. Asad argued that not because a State is predominately occupied by the Muslim it should be called as Islamic. Because if religion is separated from the politics and then such an act is present in life of the people of nations or the constitution of the country, then it is understandable that such a State is not actually Islamic.<sup>33</sup>

### **Modern International Law: Applications and Challenges**

Modern international law has to face different challenges while its application because the unity of the different States is missing. Every State think of its own benefit as all are in the race of gaining more power and controlling the world and because of this politics and power struggle the unilateral decisions are made and double standards of the states can be seen.

### **Politics and Power Struggle**

The role of the politics in the modern international law as well as the pursuit for power by the system that is internationally can be defined as the phenomenon that is undisputed and it cannot be eradicated if the analysis is done to know the effectiveness in the recent times related to international law. Basically, it is the differences between the ideology of States, mainly between the South-West and North-East, have somehow cease the application as well as the practice of the international law in the current times and because of it to reach towards any consensus is difficult between its five members that are permanent of the 'United Nations Security Council' for responding the emergency situation that would ultimately help in the implementation of the international law, particularly the international laws related to the humanitarian as well as laws related to human rights.<sup>34</sup>

### **Unilateral Decisions and Double Standards**

There are other challenges found in the effectiveness and application of the international law that are the unilateral decisions and double standards. The States that are powerful as well as rich occasionally breaks the international law, one or another, without being accountable to what will be its result. Whereas its consequences are faced by the poor and week States. At this point, the poor and week countries believe that the international law do not exist to serve them but only to help in developing the West as well as other powerful countries and poor and week countries are only exploited.<sup>35</sup>

### **The Problems with the Application of IHL**

Indeed, it can be seen in present situation of the world that this is increase in the warfare and prevalence of the arm-conflicts that are non-international could be seen, and also the emergence that is rapid can be seen of the non-State actors in the present political, legal and concrete reality of International humanitarian law. Because of it both non-State as well as State actors has disregard during the time of armed conflicts their obligation. Victims of the international humanitarian law for over the years are the civilians as they are being used as the human shields, are cruelly treated and murdered.<sup>36</sup>

## **Conclusion**

International Law consists of the principles and rules of general application dealing with the conduct of States with one another. There are many Muslim states that are in the nation's form as a state model but some of them only resemble the proper nation of Islam. Universal international law was one of the medieval law trends that is preserved by the combination of the positivist and constructivist trends of the making of international law. Previously international law only regulated the international relation but now it has evolved in regulating the states to handle their internal affairs as well. There are many issues in which the western principles and the Islamic rulings may not be parallel to each other. The modern literature related to Siyar is very scarce. The Jurist in regard to Siyar mentioned the rulings on some of its topics which were the behavior as well as the conduct of the Islamic State which were determined by the rulers of Muslim or by their advisors. Siyaasah Shariah is a method of the governance where there is a divine prescription under the Shariah law for the divine implementation of rule are absent as not been subjected to present situation. The controversies will arise related to the idea of dar-al-harb between the non-Muslims and Muslims as it contradicts with the modern principles of international law and the use of force is prohibited. In today's situation, all the Muslim Nation States are the members of UN and that charter restricts the members of the States from the use of force except if there is the situation where one state has to do self-defense. This is not in the conflict to the obligation that is given in Jihad, which is also completely defensive. Siyar may play a role that is preventive in contrast to the international customs. It can be taken as a factor that can prevent the formation of international law that is customary in the part of rights of the human beings. By the general principle of law Siyar can be implemented and put into practice by the Muslim Nation States. The dispute can be settled by such States among or between themselves or the organizations that are multinational through the arbitration. The role of the politics in the modern international law as well as the pursuit for power by the system that is internationally can be defined as the phenomenon that is undisputed and it cannot be eradicated if the analysis is done to know the effectiveness in the recent times related to international law. There are other challenges found in the effectiveness and application of the international law that are the unilateral decisions and double standards of the Powerful States.

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