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ABSTRACTS

The *Siyar* Laws: Juridical Re-interpretations of Qur'anic Jihad and Their Contemporary Implications for International Law

Asma Afsaruddin

Jurists, usually in contradistinction to exegetes and other religious scholars, primarily dealt with *jihad* as one of the obligations of the Muslim ruler and of his Muslim subjects in the context of external relations with non-Muslim polities and groups of people. The law of nations (*siyar*) as an integral part of Islamic law developed early due to this pragmatic juridical concern for the intricacies of political relations with the broader non-Muslim world. Within legal-administrative contexts, *jihad* is primarily military in nature. Political realism understandably colored legal treatments of *jihad* and allowed for distinctive – and contested – juridical perspectives to emerge on this topic, shaped by the historical and political contingencies in which they were progressively formulated. This contribution will sketch some of the significant exegetical and legal transformations effected in the pre-modern period by jurists and other scholars, who, in response to specific historical circumstances, reformulated Qur'anic conceptualizations of *jihad* and undermined some of the Qur'anic restrictions placed on conducting warfare. The contribution will end by reflecting on the ramifications of such a historical investigation for revisiting the *siyar* laws and for comparing this body of legal literature with international law today.

The Ottoman Empire and the Institutionalization of Diplomacy in Early Modern Europe, 1500-1700

Harriet Rudolph

In the past most historians have pointed over and over again to the impact of the concept of two dominions on Ottoman foreign policy in early modern times. According to that concept Islamic rulers were allegedly not allowed to conclude treaties with non-Islamic rulers or to initiate official diplomatic relations. But looking at the historical record we notice from the very beginning various diplomatic encounters between the Ottoman Empire and Christian states resulting in an increasing number of agreements (truces, capitulations, treaties of alliance). In my contribution I am going to analyse the impact of the Ottoman Empire on the institutionalization of European diplomacy in the 16th and 17th centuries. That is before any so called westernization of the Ottoman Empire had begun and before she became a part of the European state system in a legal sense. I am going to argue that nowadays established diplomatic institutions like customs exemption or diplomatic immunity existed at least partly in the Ottoman Empire at that period of time. In that case their implementation by Ottoman sultans cannot be interpreted solely as a submission to European standards. I am going to illustrate my theses by addressing two developments, which are usually considered as important moves to the emergence of modern diplomacy: the establishment of resident envoys, and the formation of a diplomatic corps at Constantinople.

Islam and Post-Conflict Justice

Hamid M. Khan

Post-conflict justice refers to the complete set of responses to mass crimes and human rights violations occurring during periods of armed conflict and authoritarian rule, including prosecutions, truth commissions, reparations, reconciliation, memorialization and legal and policy reforms. These mechanisms have been well-established through a variety of international instruments and have been applied to post-conflict peacebuilding processes in countries throughout the developing world. However, there has been little experience with postconflict justice mechanisms in Muslim-majority nations, particularly those committed to elements of the Shari'a. Given a number of recent examples of atrocities committed against Muslims in nations that apply some degree of Islamic law—including Iraq, Afghanistan and Sudan—it bears questioning why justice for victims of these conflicts has been so elusive. The United States Institute of Peace, the Italian Institute Institute of Higher Criminal Sciences and the Institute of National Security at Syracuse University have begun an exploration with Islamic scholars and leading jurists of whether there is, in fact, a divergence between Islamic legal principles—many embodied in the Shari'a— and the post-conflict justice mechanisms and standards which have become part and parcel of the international human rights norms and laws. Moreover, our institutions have sought to understand whether Islamic law has critical lessons to teach the international community with respect to justice, peace and stability processes more generally that have not been incorporated into typical post-conflict justice mechanisms.

Meaning and Method of Interpretation of Sunnah in the Field of Siyar

Mohd Hisham Modh Kamal

Sunnah means the sayings, deeds and approvals of Prophet Muhammad. It is, after the Qur'an, the second of the two primary and divine sources of Islamic law and its branch of *siyar* (Islamic international law). However, in interpretation practice, mere literal meanings of the sayings of the Prophet, especially regarding *jihad* and fighting, have been given, without considering the context in which the Prophet delivered such sayings, resulting in the misunderstanding of the concept and meaning of *jihad*. The relations between the state of Medina and other states must be taken into consideration in order to understand the true meaning of the Prophet's sayings and deeds. Hence, I will argue that the Sunnah must be applied by understanding the context in which it was said, acted or approved by the Prophet. As the Prophet's conduct is exemplary, modern international law can benefit from his Sunnah.

The Rule of Law in the Islamic Legal System

Irmgard Marboe

The concept of the 'rule of law' has its origin in ancient Greek philosophy, and is therefore often regarded as a "Western" concept. In recent years, however, it has seen a considerable revival, and many attempts have been made to point out its relevance across different cultures and legal traditions. It is increasingly regarded as an important tool for fostering social and economic development. The United Nations has put particular emphasis on it by even creating a *Rule of Law Unit* in 2006 which aims at promoting the rule of law at the national and international levels. On the basis of a Report of the Secretary General of 2004, the United Nations defines 'the rule of law' as 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights

norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' The presentation will examine if and how the elements contained in this definition are present in the Islamic legal system. The bases for the analysis will include 'The Project for an Islamic Constitution' as elaborated by the Distinguished al-Azhar Academy for Islamic Research in 1977 and the "Cairo Declaration on Human Rights in Islam" of 1990. Furthermore, scholarly opinions about the compatibility of several elements of the rule of law with the Islamic legal system shall be presented and discussed.

Islamic Law Concepts in International Trade Law
Related to Intellectual Property Rights Issues in Indonesia
Edy Santoso

Intellectual Property (IP) plays an important role as a competitive advantage in international trade. International trade competition today puts more emphasis on intellectual works as intangible asset. Every country has therefore developed IPRs regimes reflecting their national needs and priorities to face global free trade. Nowadays, IP protection and enforcement have come to the forefront as a key international trade issue for many countries including in Indonesia. This is notably so after signing the agreement establishing the World Trade Organization (WTO). In terms of the use of the concept of IPRs, it is currently debated whether the concept of IPRs has any basis in Islam or not. It is therefore necessary to examine to what extent the shari'a concept contrasts with the IPRs concept.

New Muslim Perspectives in the Human Rights Debate
Abdulmumini A. Oba

Western scholars generally divide Muslim voices in the human rights debate into 'conservatives' who privilege Islam over human rights and 'progressives' who want Islam to conform to human rights norms. This presentation argues that the 'conservative' Muslim voice is much stronger than its western representations. Islam offers a comprehensive way of life that amounts to a distinct civilization. Muslims and non-Muslims now accept that there are many fundamental conceptual and normative human rights differences between Islam and the West. On that basis, many Muslims argue a) that western human rights norms are largely irrelevant, confusing, and meaningless when applied to Islam and its laws. They therefore urge Muslims and Islamic nations to ignore 'western human rights' and to look to Islam for solutions to all their human rights challenges. b) Other Muslim voices arguing within the confines of western human rights accuse of the West ignoring the many contributions Islam could make in developing a truly global consensus on human rights. c) Also, Muslims are increasingly questioning the sincerity and commitment of the West to human rights. They accuse the West of using human rights as mere foreign policies tools. This presentation discusses these three new Muslim perspectives in the Islam and human rights debate.

Apostasy as a Subject Matter of Islamic International Law
Necmettin Kizilkaya

The basic Islamic sciences are divided into three main categories that investigate creed, action and ethic. *Kalām* deals with subjects related to creed, *fiqh* investigates the subjects related to actions,

and *tasawwuf* examines the subject matters of ethics. While the science of kalām talks about the subjects related to creed, it uses philosophical language and emphasizes the consequences of their deeds for the hereafter. As it is defined, fiqh as the science of legal acts deals with the actions such as prayer, fasting, transactions, rent, and marriage which people are accountable for. Therefore, as a science, fiqh does not deal with any subject if it is not related to deeds. In this instance, we face the question of why a subject related to the Islamic creed is dealt with in the legal texts? Apostasy is studied in legal texts under different chapters of legal subjects. Some schools investigate it under the chapters of criminal law while some investigate it under different chapters of legal matters such as inheritance law, family law, and transactions law. The Hanafī School diverges from the rest by dealing with the apostasy as a subtitle of the Islamic international law (*Kitāb al-Siyar*). This presentation aims to examine apostasy, its punishment, and reasons of the penalty as a subject matter of the Islamic international law based on the Hanafī legal texts. It argues that apostasy was not dealt with in the classical legal texts as a subject matter of Islamic creed; rather it is investigated as a topic related to legal actions alone. Finally it asserts that debating apostasy on the ground of human rights and freedom of religion is an anachronistic approach to the subject.

Defamation of Religions – Substituting Religious Commands for Human Rights?

Lorenz Langer

Western critics of Sharia law argue that its provisions are incompatible with international law and human rights norms in particular; proponents of Islamic law, on the other hand, sometimes denounce human rights as a culturally biased Western imposition that must not trump divine revelation. From both perspectives, the spheres of international law and religion remain separate: international law is seen as a norm-body that is based on non-religious considerations. Religious doctrine does not inform international legal provisions; if religion is protected under international law, it is protected as a *human* right, not in deference to a divine command. Historically, this view of international law as secular law is hardly accurate. But in modern times, the disparity between international law and religion is taken for granted by legal scholars, as is the authority of the former to curtail the latter where necessary. In my contribution, I argue that in the future this hierarchy may be increasingly questioned. In fact, we have recently witnessed a protracted attempt to re-introduce a religious perspective to the legislative process and the application of international legal norms. The concept of 'defamation of religions' emerged in the late 1990s in the U.N. Commission on Human Rights; it rose to considerable prominence in the wake of the Danish cartoons. But the significance of the discussions over religious defamation transcends the specific context of the cartoons. Instead, the initiative can be seen as an effort to re-introduce a religious element to the rationale of international law. This does not necessarily imply wholesale rejection of international law; yet it presupposes that international norms have to be compatible with religious precepts.

International Human Rights Law and Invocation of the Sharī'a Clause by Islamic States: A Convenient Stalemate or a Viable Opportunity?

Siraj Khan

Modern Islamic states and republics have actively entered into treaty relations with other states regarding international human rights. Since the authorship of the Universal Declaration of Human Rights (UDHR) in 1945 and other international human rights instruments such as the ICCPR, ICESCR, ICERD, CAT, CEDAW, and the CRC, many Islamic States have acceded but with some reservations, either by way of qualified ratification or by entering explicit reservation clauses,

known as Reservations, Understandings and Declarations ('RUDs'), on the basis of the treaty's conflict with principles of Islamic Law and the *Sharī'a*. My contribution presents some examples of states that have partially ratified such treaties or entered exclusion clauses on grounds of incompatibility with the *Sharī'a*, and the specific articles of those treaties with which the *Sharī'a* conflicts. Thus far, international human rights bodies have openly criticized detracting states on the basis of such non-compliance, however, little research has been carried out as to whether these exclusions significantly contravene aspects of the *Sharī'a*, or whether they are merely a convenient smokescreen. I shall also investigate the degrees of flexibility that the *Sharī'a* offers in such conflicts and whether Islamic states can use inbuilt Islamic Legal methods to conform to such international human rights treaties.

Muslim States and the Implementation of the Convention on the Rights of the Child: A Special Reference to Malaysia

Abdul Ghafur Hamid @ Khin Maung Sein

The Convention on the Rights of the Child (CRC) is the only human rights treaty to which all Muslim states are parties. The main objective of this paper is to look into the difficulties that Muslim states are facing with in the implementation of the Convention and a special reference is given to the Malaysian experience. The primary sources of reference are country reports by states parties and concluding observations of the CRC Committee. First of all, the paper takes on the issue of whether Islamic law is a major stumbling block to the implementation of the Convention. The presentation argues that as a religion of mercy, Islam is very much concerned about vulnerable people and that despite an unavoidable tension between Islamic law and certain provisions of the CRC, the two are not irreconcilable. The contribution then assesses the validity of Malaysia's reservations to the CRC and concludes with suggestions for changes in the domestic laws and policies of Malaysia to be in compliance with the CRC.

The Challenge of Islam and Women Human Rights Today

Zoran Filipovski, Jana Ilieva

Although human rights are embodied in the UN Conventions the debates on whether or not their universal applicability is based on universal ethical and moral beliefs continue. The idea that all people have inalienable and universal rights that derive from the Universal Declaration on human rights (UDHR) and other pertinent human rights instruments today is even criticized by many Muslim countries mainly due to its "western" origin and the objections that it is the sole product of the European enlightenment and its cultural development. Therefore, we can hardly deny today that the relationship between Islam and human rights is complicated and raises many issues. Women rights in Islam are one of the most disputable questions in this debate because of the contradiction between the defined standards in international law and the practice of certain states. In the meantime, the development processes in the 21st century started transforming the relationship between religion, law and the family in the Muslim world. Will the Islamic law adapt to these changes? Are the dynamism and diversity compatible with the genuine nature of Islamic law?

Islamic States Reservations to Article 16 CEDAW: Equality without Sameness?
Sajid Suleman

The presentation looks into the theoretical basis on which many Muslim states made reservations to provisions contained in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) citing conflict with *shariah* law as a concern. The central theme in this contribution will be the possibility of achieving equality between men and women without granting the same rights: equality without sameness. The conflict between Islamic family law as currently practiced in Islamic states and Article 16 of CEDAW will be explored. Research is carried out into the different rights and responsibilities of men and women in Islamic family law. Islamic family law gives women certain privileges (such as the right to maintenance) which strict compliance with CEDAW would deny. This positive discrimination in favour of women will be considered in order to discover whether different treatment for different people can be justified. The notion of equality is the bedrock of international human rights law, yet this notion is notoriously elusive. I present a theory of equality that reconciles the Islamic and the secular Enlightenment theory. In order for international human rights law, and especially the rights of women, to be more effectively enforced globally, the law itself must strive for substantive equality which is practically attainable in a diverse range of societies across the world. The presentation will conclude by suggesting reforms to Islamic family law to make it more compliant with CEDAW, but also reforms to CEDAW to make it more universal in the principles it espouses.

Islamic Law and International Criminal Law
Markus Beham

For some time now, scholars have dealt with the question of how public international law may be harmonised with (classic) Islamic law. The following contribution is not going to abandon this preoccupation. On the contrary, it intends to delve into the question of possible "harmonisation" of the set of principles and provisions of law governing what is commonly referred to as international criminal law with Islamic criminal law. These considerations seem necessary in light of two recent developments: firstly, the growing influence of classic Islamic law in the national legislation and jurisprudence of Muslim states, and, secondly, a growing number of contact points between the Muslim world and international criminal law, *e.g.*, through international and hybrid criminal tribunals in Bosnia and Herzegovina, Kosovo, Lebanon, Iraq or East Timor, not to mention the work of the ICC. Additionally, the questions posed by international terrorism (also a crime before the Special Tribunal for Lebanon) further add to the relevance of the topic, even if such acts actually motivated by Islamic extremism may be statistically few. Against this background, the present contribution aims at trying to assess to what extent the two concepts of Islamic law and international criminal law are at all compatible or even indeed comparable. So far, there are only very few studies on the topic which have mostly failed to convincingly link or comparatively analyze the two subjects. Furthermore, it will be suggested that some elements of Islamic law might be incorporated aside existing elements of civil and common law while at the same time carefully drawing the line where Islamic law is incompatible with international human rights benchmarks such as the Universal Declaration Human Rights, the International Covenant on Civil and Political Rights or the Convention against Torture.

Islamic Criminal Procedure and the Principle of Complementarity of the International Criminal Court

Matthias Cernusca

Situations and cases the International Criminal Court (ICC) is confronted with originate, to a considerable extent, in countries with Islamic legal tradition. As the principle of complementarity, *i. e.* the primacy of national jurisdictions, figures as one of the core pillars of the Rome Statute, this presentation aims to analyze how different aspects of Islamic criminal procedure might potentially have impact on the ICC's decision on the admissibility or inadmissibility of a given case. It is argued that, with a view to the principle of "due process" stipulated throughout the Rome Statute, some features displayed in Islamic procedure, such as the unity of investigative and judicial officers, the missing right to appeal and a different weight of evidence according to the gender of the witness, might, if radically employed, render a case admissible for the ICC and exclude national jurisdiction. This bears tribute to the fact that the ICC, in assessing (in-)admissibility, should not, as recommended by a significant number of scholars, neglect violations of due process principles which work to the detriment of the accused. Insofar, the ICC might assume some sort of human rights observation, which cannot be qualified as unintended by the State Parties creating the Rome system. In the outcome, the presentation proposes an innovative approach on how individuals should be empowered to challenge inadmissibility decisions based on violations of due process principles, enabling them to invoke the complementarity principle and urge the ICC to assume its competent jurisdiction.

Islamic Perspective on Identity: A Disciplinary Characteristic of International Relations Theory and International Law"

Yasmine Zein Al-Abedine

The aim of the presentation is to explore the indicators of establishing an Islamic perspective on identity instead of a "clash of civilisations" perspective. This new perspective is necessary since identity is a disciplinary characteristic of international relations theory and international law and since current models to create coexistence between different secular and religious identities and cultures have failed. The problem of the Islamic perspective is represented in applying the methodology, while the problem of the Western perspective constitutes in the difficulty of finding the methodology and a long-term theoretical framework which allow it to assimilate and integrate the continuous development of interactions with the other. Differences in Islam allow people to understand themselves, others and their role in life; it is an integrated interactive difference which forms the cosmic unity. At the end, the presentation proposes two recommendations; the first one is to activate the Islamic perspective on identity by means of new Islamic jurisprudence and resolving the thought crisis which can also help to promote international law and to apply and respect its rules and principles. The second is the continuing scientific effort of linking international relations theory and international law in order to realize mutual benefits.

Islamic Visions of Global Order and their Impact on International Law

Gregor Novak

The contribution sets out by defining the key terms used, including: *international law* – used here in two ways, in a 'rules-based' as well as from a 'process-oriented' sense; *global order* – understood as the overarching political framework that characterizes today's globalizing society of individuals and groups, as well as particularly states; and *Islam* – used here to designate the sets of beliefs or views apparently held by various groups or individuals who consider these

beliefs or views as religiously inspired. The presentation proceeds by discussing briefly the various ways in which the impact of Islam, as a religion, philosophy or set of legal rules and principles, on international law can and has been studied. The three basic approaches that are surveyed are (1) the *historical or genealogical perspective,* (2) the *approach focusing on secondary rules as legal ports-of-entry*, and (3) *the approach focusing on primary rules as legal ports-of-entry*. In its main part, the presentation discusses the third approach by showing that what may be called Islamic visions of global order certainly exist and can be seen as forms of 'exceptionalism'. However, in present day international law, these Islamic visions of global order cannot be said to have any significant impact. Whether this will change depends only partly on the ability of Muslim majority states (some of which have recently experienced democratic uprisings) and groups espousing Islamic visions of global order to forge alliances and gain power on the international plane. What matters far more is whether such visions form part of an 'overlapping consensus' that accords with the needs of globalizing society as a whole, however it may evolve. Whether they do depends essentially on which of the many conceptions that claim to be Islamic one takes into account.

Universalism of Islamic Law and International Relations
Milena Galetin

The presentation purports to examine the impact of the underlying principles of Islamic law (*Siyar*) on public international law. While *Siyar* is primarily concerned with the relationship between the Islamic State and non-Muslim entities in the conduct of war, it also sets out rules to govern those relations in (temporary) times of peace, albeit to a lesser extent. In my contribution I will discuss to what extent the *Siyar* influenced the international law in its formative stage. While the contribution of the Muslim states to this process was modest at best, due to historic reasons, there is sufficient body of evidence to discern the impact of the *Siyar* on that process. *Siyar* is arguably the first legal regime to espouse the universal values of humanity and morality in setting out legal rules governing the conduct of war. Hence, its influence on international humanitarian law, as a branch of international law, in particular. In the concluding remarks, the major principles guiding international humanitarian law are presented. The presentation goes on to argue that it is to the credit of *Siyar* and the Islamic law, which espoused the universal principles of humanity and morality in conducting war affairs, that the *nexus* between morality and law was established – and subsequently transposed into international humanitarian law.

Islam and the Future of the International Community
Muddathir Abdel-Rahim

The late professor W.M. Watt pointed out in his remarkable book, "Islam and the Integration of Society", that "a study of the achievement of Islam may throw some light on how the integration of world society is likely to come about, and may even suggest ways in which man may consciously contribute to this process." Reaching beyond the prejudices, biases and parochialism that have unfortunately continued to mar many recent writings on Islam, I will focus on the core ethical and juridical teachings of the Qur'an and other foundational sources of Islam on the subject on the one hand, and on a critical examination of the relevant socio-cultural dynamics of Islamic Civilization as it evolved in history on the other. The presentation will then proceed to re-evaluate and hopefully refine and/or elaborate on views expressed by various scholars on the possible contributions of Islam to the future of the international community – taking into consideration major regional and global developments that have evolved in the course of the last five decades.