

# The Islamic View on International Criminal Law

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## INTRODUCTION

This paper examines some aspects of Islamic legal doctrine in the field of International Criminal and Humanitarian Law. I shall also consider the historical contributions made by Islamic law to contemporary international humanitarian law. My aim is to present both the classical and modern aspects of Islamic International Law denoting the new challenges facing it in today's world.

The following main questions are considered: Is there historically an Islamic International Law? What is the nature of this Islamic International Law? What is the Islamic perspective on war crimes? What protections does Islamic law offer to civilians, prisoners of war and others in time of war? Also, does it restrict the conduct of hostilities in some way? What is the Islamic perspective on the crime of genocide? Is Islamic law consistent with modern criminal law? Finally what is the position of Islamic law concerning

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the disposition of the International Criminal Court (I.C.C.), especially on the matter of punishment?

For these purposes, in the first section we study the Islamic contribution to the public international law, then in the second section, we will present Islamic view on the matter of International crimes especially war crimes and crime of genocide. Finally in the last section we discuss the new challenges facing Islamic law.

## I. ISLAMIC INTERNATIONAL LAW

Before developing some aspects of Islamic international criminal law, it seems to be necessary to answer to a fundamental question: Is there historically any Islamic conception on International law. The existence of other Islamic subject matters as Islamic International Criminal Law and Islamic Humanitarian Law depends widely on the affirmation of our above basic question.

In fact, the Islamic law – Sharia’ – is the basis for every rules and regulations of Islam. For centuries, Islamic jurists have developed some conception on International Law. Islamic International Law is indeed an **old conception** and an **internationally unknown theory**.

### 1. ISLAMIC INTERNATIONAL LAW AS AN OLD CONCEPTION

The rise of Islam, with its universal appeal to mankind, necessarily raised the problem for the Islamic State as to how to conduct its relations with non-Islamic States as well as with the tolerated religious communities within its own territory. The special branch of the sacred law – the *Siyar* – developed by the Muslim jurists to meet the need may aptly be called the Islamic law of nations. The experiences of Islam, like those of earlier nations, provided a system of law designed to maintain order and justice throughout the world. The Islamic law of nations, the product of centuries of stored experiences, reveals Islam’s efforts to cope with the problem of constructing a stable and

an ordered world society. Every mature system of law reflects the ways by which nations endeavored to achieve such an end. The experiences of Islam, like those of other nations, are worthy of a closed examination, if the process of the development of the modern law of nations is to be meaningful.

The concept of the *Siyar*, or the Islamic law of nations, was necessarily broadened to include peaceful as well as hostile relationships with other nations. Rules and practices governing the termination or suspension of hostilities, the making of treatise, and the movement of individual from one territory to another for commercial and other peaceful purposes developed from necessity.<sup>(1)</sup>

The conduct of the ruler, not only in time of war but also in peace, was referred to by the term *Sharia'* as early as the time of the Holy Prophet Mohammad.<sup>(2)</sup> Codes or Compendia of Law seem to have come into existence in Islam in the very first century of Hijrah.

The development and the collection of the rules, provisions, regulations and other cases of the system of Islamic international law has greatly depended on the most significant and valuable labor of Al-Shaybani, Abu Abdallah Muhammad b. al-Hassan b. Farqad (749/750-805). His classical work is called al-Siyar al-Kabir (the Great Siyar) which can be translated into the following terms: The Law of nations, the Universal Law, International Law or to be precise, Muslim Law of Nations, Muslim International Law and Islamic International Law. In any event, the overwhelming majority of Islamic writers are of the view that Al – Shaybani is without doubt the Father of Islamic International Law.<sup>(3)</sup>

This was in the 8<sup>th</sup> century of the Christian era. It is, therefore, obvious that international law was the subject matter of Islamic writing under various titles – Jihad, Ghanimah (spoil), Aman, Maghazis, Ridda and Siyar – almost three centuries before the first codification of the Western Law of War, if we

are to apply this pompous term to the Causa XXIII of the Second Part of Decretum of Gratien.<sup>(4)</sup>

It should be noted that Muslim international law was not a complete innovation in the domain of legal studies and international relations. Nevertheless, it was a great advance on both the Greek and the Roman systems of international law, since it attached much more importance to ethical values; for though the study of international law evolved into an independent branch of law, yet it continued to be subservient to religion. Further, in Muslim international law one finds, for the first time in recorded history, a full-fledged notion of recognized rights for the enemy, in peace as much as in war. Moreover, as noted earlier, Muslim jurists were the first to develop the science of international law and distinct from political science.

The Islamic law of nations, however, is not a system separate from Islamic law. It is merely an extension of the sacred law, the Sharia', designed to govern the relations of Muslims with non-Muslims, whether inside or outside the territory of Islam. In a word, an Islamic law of nations does not exist as a separate system in the sense that modern municipal (national) law and international law, based on different sources and maintained by different sanctions, are distinct from one another. The Siyar, if taken to mean the Islamic law of nations, is a chapter in the Islamic corpus juris, binding upon all who believed in Islam as well as upon those who sought to project their interests in accordance with Islamic justice. But just as the *jus gentium*, an extension of *jus civil*, was designed by Romans to regulate their relations with non-Romans, so was the Siyar, an extension of the Sharia', designed to govern the relationships of Muslims with non-Muslims at a time when Islam came into contact with them.<sup>(5)</sup> Finally, the Islamic law of nations was binding on territorial groups as well as individuals. Like all ancient laws, the law of Islam was inherently personal

rather than territorial for if Islam were intended for all mankind, the territorial basis of law would be irrelevant. However, since many non-Islamic lands remained outside the pale of Islamic law, the Siyar was bound to grant consideration to the territorial basis and to regulate the relationships among Muslim and non-Muslims, both on the personal and territorial levels.<sup>(6)</sup>

## 2. ISLAMIC INTERNATIONAL LAW AS A INTERNATIONALLY UNKNOWN CONCEPTION

According to the opinion of judge Christopher G. Weeramatry, former vice-President of International Court of Justice: Any study of Western international law proceeds upon the tacit assumption that it was the West which triggered off the development of international law and that international law as we know it was a Western creation. It is submitted that such a conclusion is untenable for the following reasons:

**First**, the prior existence of a mature body of international law worked out by accomplished Islamic jurists in texts books upon the subject is an incontrovertible fact.

**Secondly**, the flow of knowledge in all departments of science and philosophy from the Islamic to the Western world, commencing from the eleventh century, is likewise an indisputable fact.

**Thirdly**, the fundamental rule of Western international law, *pacta sunt servanda*, worked out by Grotius in the seventeenth century is also the fundamental rule of Islamic international law, where it is based upon Qur'anic injunctions and Sunna (Tradition) of the Prophet.

**Fourthly**, there had been contact between Christian and Islamic civilizations both in war and peace for many centuries dating back to the Crusades. The crusaders, encountering such monarchs as Saladin, saw the observance by them of principles of international law, including even met at

convivial social gatherings. Peaceful contact through trade likewise exposed the West to Islamic concepts of international trade, and influenced Western commercial law. Against this background it seems unrealistic to suggest that the West remained unaware of the body of international law worked out by the Islamic jurists.

**Fifth**, although there is no doubt that a great deal of original Western thought went into the elaboration of the current principles of international law, some at least of the original impetus both in regard to the general concept and in regard to a number of specific ideas must clearly have come from the world of Islam – the only power and cultural bloc comparable to that of the world of Christianity. The philosopher looking for universals in the realm of international relations could not possibly neglect this source.

**Sixth**, Western scholars were not insular in their attitudes when they set off the brilliant cultural and intellectual resurgence which led Europe to world supremacy. They built their humanistic, literary and legal traditions on whatever foundations they could draw from the ancient classical civilizations of Greece and Rome. In relation to the vital discipline of international law there was no literature from Greece and Rome comparable to their literature in private law. We do not have treatises dealing with such questions as the binding force and interpretation of treatise, the duties of combatants, the rights of non-combatants or the disposal of enemy property. The only body of literature in this discipline was the Islamic.

**Seventh**, knowledge of Arabic was part of the literary equipment of the accomplished fifteenth – and sixteenth-century scholar, particularly in Spain and Italy. Arabic literature was hence not an unknown in the days when the first seeds were being sown of what was to become Western international law.

This brief survey will be seen in a practical context when we note that Article 38 (1) (b) of the Statute of International Court Justice, requires the ICJ to apply “the general principles of law recognized by civilized nations”. Having regard to the large number of Islamic nations now members of United Nations, the international law of Islam is a body of knowledge which the world Court cannot afford to ignore. Indeed it must necessarily make an impact upon the content of contemporary international law.<sup>(7)</sup>

In dealing with the history of modern international law, Oppenheim and the number of other Western scholars have speculated on the inexplicable gap of more than 1000 years between the Roman period and the publication in 1625 of the Treatise ‘*De Jure Belli ac Pacis*’ (The Law of War and Peace) by Grotius, the Dutch jurist, whom they regard as the father of international law. Had such scholars referred to the Islamic contribution to international law they would have perceived that the gap is bridged by the influence of Islamic legal concepts which predate later European codification of international law by many centuries, and provide the “missing link” in its development. It was precisely in this period that Islam reached its zeniths in East and West (...). This was the period which saw the beginning of European civilization. Early European writers on international law, such as Pierre Bello, Ayala, Vittoria, Gentilis and others, came from Spain or Italy, and owed much to renaissance provoked by the impact of Islam. It is these writers who provide the missing link between the Roman and the modern period and serve to give a clue to the far reaching changes brought about by Islam in the concept of international law. Grotius himself drew heavily on Arabic works as is witnessed in Chapter X (Article 3) of his Treatise, where he discusses the concept of postliminium (the return of things captured by the enemy). This, he notes, was known in Muslim Law.<sup>(8)</sup> However, the impact of Islamic law on International law is undeniable. According to

Marcel Boisard<sup>(9)</sup> the innovative influence of Islam on European laws and customs of war stretches back at least as far as the Crusades. Also Baron de Taube<sup>(10)</sup> delivering a course at the Hague Academy of International Law in 1926 speculated that the modern public international law of declarations of war was a direct descendant of Islamic doctrine, having passed into chivalric codes during the Crusades, through the Christian church and on into the modern law of war. Christopher Weeramantry<sup>(11)</sup> has offered evidence of the influence of Islamic doctrine of Hugo Grotius on the law of combat and James Cockayne<sup>(12)</sup> has analyzed the role of Islam in shaping the modern European law of war and its progeny – international humanitarian law. There are of course scholars who recognize the influence of Islam on modern International law, but in general it has attracted little attention.

## **II. INTERNATIONAL CRIMES FROM THE ISLAMIC PERSPECTIVE**

### **1. WAR CRIMES**

#### **– THE NOTION OF WAR OR CONFLICT IN ISLAMIC AND CLASSICAL VIEWS**

The Islamic concept of humanitarian law differs in two ways from the classic theory of the law of war which long prevailed within positive international law.

First, the Islamic concept does not postulate as a condition the existence of war in the traditional sense of the term, i.e., implying, apart from the actual use of weapons, the obligation of a declaration of war between two or more parties. According to the Professor Salah Amer<sup>(13)</sup>, the classic theory of the law would be able to recognize the existence of a state of war even though none of the parties had had recourse to arms. By contrast, the Islamic conception considers that humanitarian rules as soon as weapons have been

used and forces deployed, without a state of war in its proper legal sense having been declared.<sup>(14)</sup>

There is another difference between the Islamic concept of humanitarian law and the classic theory of the law of war. The former makes no distinction between the various forms of armed conflict, while, under the latter application of the rules pertaining to the law of war was subject to the existence of an international conflict, the parties to which were two or more member states of the international community. In the conflict within a single State, these rules could not apply unless the nature of the conflict was that of civil war, and on condition that the insurgent party had been recognized as having the status of belligerent.

This conception changed with the adoption of the four Geneva Conventions of 1949, the rules of which became applicable to all armed conflicts, namely, “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” (Art. 2 of the four Geneva Conventions) and “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” (Art. 3 common to the Geneva Conventions).

It is at this point that international humanitarian law, some thirteen centuries later, aligned itself with the Islamic concept, the rules of which cover all armed conflicts of whatever nature.

The reason that the Islamic concept does not differentiate between international and non-international armed conflicts may well be that, when Islam came into being, the very notion of a state was unknown, or at least was insufficiently defined. Consequently, the Islamic concept of humanitarian law, based as it is on an unlimited belief in divine Authority,

can be applied everywhere and in all circumstances: the scope of application of its rules extends through time and space to all armed conflicts.<sup>(15)</sup>

#### – PROHIBITION OF CERTAIN MEANS AND METHODS OF COMBAT BY ISLAMIC LAW: PROHIBITION OF PERFIDY

According to the paragraph 1 of Article 35 of Geneva Conventions, “in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”.

Comparison of the Islamic concept of international humanitarian law and the rules of positive law with regard to the means of warfare make the latter appear passive, to the extent that they contain no explicit requirement, nor do they prohibit any specific method of warfare or mention beyond which the belligerents must not go. In contrast, the fundamental rules of the Islamic concept adopt a clear and definite position on the subject.<sup>(16)</sup>

The Prophet Mohammad, for example, taught his troops the conduct of Muslim warriors: “Treat them (the enemy) with patient benevolence and do not attack them as long as you have not invited them to become believers; for, on his earth, all men are equal, whether they are city-dwellers or nomads. I prefer you to bring them to me when they have submitted, rather than that you take their women and children captive or kill their men”.

The general principle enunciated by Article 37 of Protocol I is the prohibition of perfidy: “It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy”.

The Article 37 of Protocol I also mentions some cases of acts and behavior considered as perfidy:

(a) The feigning of an intent to negotiate under a flag of truce or of a surrender;

(b) The feigning of an incapacitation by wounds or sickness;

(c) The feigning of civilian, non-combatant status; and

(d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or neutral or other States not Parties to the conflict.

Dating from long before the provision quoted, the general principle of Islamic Law relating to treachery stipulates, in substance: “If thou fearest treachery from any group, throw back (their covenant to them so as to be) on equal terms: for Allah loveth not the treacherous” (Sura VIII, Verse 58).

Moreover, Islam forbids the killing of anyone who deserts the enemy army. Nor does it allow an adversary to be outwitted by a promise of sparing his life, only to be killed afterwards. The rules of Islamic Law relating to fair treatment stipulate, in effect, that if an enemy warrior or group of soldiers surrenders, the Muslim must undertake, if necessary, to guarantee the safety of those who have surrendered and, consequently, to eschew the resort to perfidy for the purpose of killing. Any Muslim who breaks this law therefore becomes an assassin liable to punishment.<sup>(17)</sup>

Nevertheless, the ruses of war are not forbidden in Islamic law and in positive international law.

Article 37, paragraph 2, of Protocol I, stating that ruses of war are not prohibited, is in agreement on this point with the provision of Islamic law. The article also states that “ruses are acts which are intended to mislead an adversary or to induce him to an act recklessly but which are not perfidious because they don’t invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operation and misinformation”.

## – PROTECTION OF CIVILIANS

Fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah does not love those who exceed the limits. (Holy Quran, 2:190)

In modern international law as it is reflected on Protocol I (Part IV, Section I, chapter I), there is some provisions relating to the protection of civilian population and objects of a civilian character in the event of military operations. Article 50, for example defines, as a civilian any person to whom the status of combatant, as defined in the Third Geneva Convention and in Article 43 of Protocol I is inapplicable. Also, Article 51, paragraph 1, states: “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”. The same Article, in paragraph 3, specifies that “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”.

Article 51, paragraph 4, of Protocol I likewise stresses that “indiscriminate attack are prohibited”, meaning attacks that make no distinction between military objectives and civilian persons or property.

Islamic doctrine on the subject stipulates that operations of war must not exceed the limits of military necessity. The civilian population and individual civilian enjoy general protection against the dangers of hostilities and military operations, as long as they take no direct part in such operations.

In Islamic jurisprudence there are specific prohibitions on the methods of warfare.<sup>(18)</sup> These prohibitions were first elaborated in detailed instructions given by the Prophet to Muslim warriors as they were being sent into the battle. Though methods of warfare employed in the seventh and eighth centuries differ greatly from contemporary methods, the principles

established in earlier times are equally relevant today. Women, children and other non-combatants were recognized as a separate category of persons entitled to various degrees of immunity from attack, a development which may be seen as the birth of the “civilian”. Prisoners of war were not to be executed and elaborate instructions for their care were developed. The fighters who committed “war crimes” were subject to punishment. Even the environment was not subject to unlimited onslaught.<sup>(19)</sup> Islam also extended protection in the event of war to members of *religious orders* and *workmen* and all other civilian population.<sup>(20)</sup>

With regard to objects of a civilian character, Islam also forbids their destruction, and it is certainly in this sense that Prophet prohibition on the cutting or burning of fruit trees and date palms should be interpreted. As we have seen, he forbade his army commanders to do this except in a case of military necessity –for example, if the trees formed a dense cover that the enemy could use as a strong-point, or as a place to which to retreat. In such a case, the emergency would require lifting of the prohibition.

All these facts enable us to realize that the rules of positive law coincide with those of far older Islamic law and that both systems agree in recognizing the necessity, on the one hand, of distinguishing combatants from non-combatant and, on the other hand, of guaranteeing to the latter protection against danger inherent in war.<sup>(21)</sup>

In Islam, these rules are supposed to apply not merely because of reciprocity concerns, but also because they are just and because acting in conformity with them are required by Allah.<sup>(22)</sup> In the words of Khaddurri: The binding force of the *siyar* was not based essentially on reciprocity or mutual consent, unless non-Muslims desired to avail themselves of Islamic justice, but was a self-imposed system of law, the sanctions of which were

moral or religious and binding on its adherents, even though the rules might run counter to their interests.<sup>(23)</sup>

#### – PROTECTION OF THE ENEMY *HORS DE COMBAT*

The articles 40 to 42 of Protocol I include provisions concerning the prohibition of extermination of the enemy and the killing of an enemy *hors de combat*, even if he belonged to a military force before becoming *hors de combat*. Here the Protocol I corroborates with what had been provided on the subject in the Regulations respecting the Laws and Customs of War on Land, annexed to the Hague Convention of 18 October 1907(Art.23, para.d).

Indeed, in an armed conflict, the purpose of combat is to break the enemy's resistance, not annihilate it. Once the purpose has been achieved, by whatever means, it is forbidden to kill or torture adversaries.

The law of Islam contains provisions advocating kindness towards enemy warriors, whether wounded or taken captive. The Qu'ran had defined the way in which prisoners must be treated, in Sura 47, Verse 4, for example:

“Therefore when you meet the unbelievers (in fight), smite their necks at length when we have thoroughly subdued them, bind a bond firmly (on them); thereafter (is time for) either generosity or ransom until the war lay down its burdens”.

#### – THE RIGHTS OF PRISONERS OF WAR

Under Islam, prisoners of war are granted kindly treatment, which is considered comparable to an act of charity. Verse 8 of Sura 76 gives an illustration of this provision of the law in its description of pious Believers: “*And they feed, for the love Allah, the indigent, the orphan and the captive*”.

The text of the Qu'ran is categorical in limiting the fate of prisoners to one of two alternatives: release without anything in exchange, or returning them for a ransom, which may consist either on release of an equivalent number of Muslim held by the enemy (corresponding to the process of

exchange of prisoners of war, as practiced today) or in the payment of a sum of money.<sup>(24)</sup>

According to Islamic law, a prisoner cannot be killed. Ibn Rushd even records a consensus of the Companion of the Prophet to the same effect. This does not preclude the trial and punishment of prisoners for crimes beyond rights of belligerency. For this we possess the high authority of the practice of the Prophet when two prisoners of the battle of Badr were beheaded by his order. Muslim jurists clearly recognize that a prisoner cannot be held responsible for mere acts of belligerency. Treatment during captivity has been the subject of liberal provisions. As regards the prisoners of Badr, the Prophet ordered: "Take heed of the recommendation to treat the prisoners fairly".<sup>(25)</sup> In Islamic view, some of the rights of prisoners of war are as follows:

1. A prisoner of war has the right to remain on his religion and cannot be compelled to give it up. Today this principle is referred to as freedom of religion. He should merely be called to Islam without any pressure being placed upon him. Allah says:

*"O Prophet! Say to those who are captives in your hands: 'If Allah finds any good in your hearts, He will give you something better than what has been taken from you and He will forgive you. For Allah is Oft Forgiving, Most Merciful.'" [Sûrah al-Anfâl: 70]*

2. He has the right to nourishment, enough to maintain his health. Allah says in the Qur'an:

*"And they feed from what they love for themselves the indigent, the orphan, and the prisoner of war, saying: 'We feed you for the sake of Allah. No reward do we desire from you nor thanks.'" [Sûrah al-Insân: 8-9].*

3. When families are taken together as prisoners of war, they have a right not to be separated. A mother should not be separated from her child, nor

should that child be separated from his father. Brothers should not be separated either. The Prophet said regarding captives: “Whoever separates a mother from her child will be separated from his own loved ones on the Day of Judgment”.

4. Prisoners of war have a right not to be subjected to any abuse or torture. They cannot be abused on account of the fact that they were fighting against the Muslims. Islamic Law does not command the Muslims to punish them for this reason. Prisoners of war were never subjected to punishments by the Muslims during the early generations of Muslims when Islam was strong and put into practice.

This follows logically from the fact that Muslims are commanded to treat prisoners of war kindly and hospitably. They must feed them, clothe them, and keep their family members together. An exception is made where it is known that a prisoner is hiding something. Then it is permissible to punish him in a restrained matter to extract information from him. Such punishment, however, should never reach the level of outright torture and must not have any affect on his health.

#### **– NO LOOTING AND DESTRUCTION IN THE ENEMY’S COUNTRY**

Muslims have also been instructed by the Prophet that if they should enter the enemy's territory, they should not indulge in pillage or plunder nor destroy the residential areas, nor touch the property of anyone except those who are fighting with them. It has been narrated in the Hadith: “The Prophet has prohibited the believers from loot and plunder”. The Caliphs used to instruct the soldiers while sending them to war, “Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.” The booty of war which is acquired from the battleground is altogether different from this. It consists of the wealth, provisions and equipment captured only from the camps and military headquarters of the combatant armies.

### – SANCTITY OF PROPERTY

The Muslims have also been prohibited from taking anything from the general public of a conquered country without paying for it. If in a war the Muslim army occupies an area of the enemy country, and is encamped there, it does not have the right to use the things belonging to the people without their consent. If they need anything, they should purchase it from the local population or should obtain permission from the owners.

### – SANCTITY OF A DEAD BODY

Islam has categorically prohibited the disgracing or mutilating of the corpses of the enemies as was practiced in Arabia before the advent of Islam. It has been said in the Habit: The prophet has prohibited to Muslim combatants to mutilate the corpses of the enemies. The occasion on which this order was given is highly instructive.<sup>(26)</sup>

In the Battle of Ahzab a very renowned and redoubtable warrior of the enemy was killed and his body fell down in the trench which the Muslims had dug for the defense of Medina. The unbelievers presented ten thousand dinars to the Prophet and requested that the dead body of their fallen warrior may be handed over to them. The Prophet replied “I do not sell dead bodies. You can take away the corpse of your fallen comrade.”

### – PROHIBITION OF BREACH OF TREATIES OF WAR

Islam has strictly prohibited treachery. One of the instructions that the Prophet used to give to the Muslim warriors while sending them to the battlefield was: “Do not be guilty of breach of faith.” This order has been repeated in the Holy Qu’ran and the Hadith again and again, that if the enemy acts treacherously let him do so, you should never go back on your promise. There is a famous incident in the peace treaty of Hdaybiyyah, when after the settlement of the terms of the treaty, Abu Jandal, the son of the emissary of the unbelievers who had negotiated this treaty with the Muslims, came, fettered and blood-stained, rushing to the Muslim camp and crying for help. The Prophet told him “Since the terms of the treaty have

been settled, we are not in a position to help you out. You should go back with your father. God will provide you with some other opportunity to escape this persecution.” The entire Muslim army was deeply touched and grieved at the sad plight of Abu Jandal and many of them were moved to tears. But when the Prophet declared that “We cannot break the agreement”, not even a single person came forward to help the unfortunate prisoner, so the unbelievers forcibly dragged him back to Makkah. This is an unparalleled example of the observance of the terms of agreement by the Muslims, and Islamic history can show many examples of a similar nature.

#### – RULES ABOUT DECLARATION OF WAR

It has been laid down in the Holy Quran: *“If you apprehended breach of treaty from a people, then openly throw the treaty at their faces”* (8:58). In this verse, Muslims have been prohibited from opening hostilities against their enemies without properly declaring war against them, unless of course, the adversary has already started aggression against them. Otherwise the Quran has clearly given the injunction to Muslims that they should intimate to their enemies that no treaty exists between them, and they are at war with them. The present day 'inter- national law' has also laid down that hostilities should not be started without declaration of war, but since it is a man-made rule, they are free to violate it whenever it is convenient. On the other hand, the laws for Muslims have been framed by God, hence they cannot be violated.

### III. GENOCIDE FROM THE ISLAMIC PERSPECTIVE

According to the Holy Qu’ran:

“Whosoever slays a person for other than manslaughter or corruption in the earth, it would be as if he had slain all mankind” (Q.5:32)

The crime of genocide is the most fundamental of all assaults on human rights.<sup>(27)</sup> Nothing is graver in a criminal sense than a deliberate policy of systematically exterminating a people based on its particular ethnic

identity.<sup>(28)</sup> According to the Article 1 of the Genocide Convention (1948) and Article 6 of Statute of International Criminal Court (1988), the following acts constitute the crime of genocide:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the groups;
- (e) Forcibly transferring children of the group to another group.

Since genocide is a denial of the right to existence of an entire human group, frequently on the basis of its particular ethnic identity, the first point that should be considered here is the situation of ethnic groups within the Islamic State. Islamic Sharia' contains explicit injunctions, hailing from the time of revelation, which declares that the principle of equality is mandatory in Islam.<sup>(29)</sup> This is expressed in the Holy Qur'an, as follows:

O mankind, we created you from a single [pair] of a male and a female, and made you into nations and tribes, that ye may know each other [not that ye may despise each other]. Verily, the most honored of you in the sight of Allah is the most righteous. (Q.49:13).

In connection with the Genocide Convention and Rome Statute, we have found that the crime of genocide is committed intentionally in order to destroy an ethnic group, either by killing the members of the group or causing serious harm thereto or persecuting them through other acts. It goes without saying that Islamic Sharia' prohibits persecution and makes criminal any genocidal acts committed against ethnic groups who are covered by the protection of the Islamic State. Accordingly, murder of the members of an ethnic group is strictly prohibited in Islam, be it committed against individuals or groups.

The scholars of Islam give different commentaries on this verse, the most appropriate in this regard being that “God regards the sin of one murder like the murder of the whole people, however, the judgment is due eventually from Him”.

The jurists of Islam are agreed that non-combatants who do not take part in fighting, such as women, children, monks and hermits, the aged, the blind and the insane, must be excluded from molestation. In this regard, it is reported from Imam Ali (Fourth Caliph of Islam) that:

“When you defeat them, do not kill their wounded, do not behead the prisoners, do not pursue those who return and retreat, do not enslave their women, do not mutilate their dead, do not uncover what is to remain covered, and do not approach their property, except for what you find in their camp [in the way] of weapons, beasts, or male or female slaves”.<sup>(30)</sup>

With regard to the believers of other religions, Christians and Jews are viewed in Islam as the recipients of previous divine revelations. They are known as the *ahl al-kitab*, or “people of the Book”, an indication of Islamic respect for their scriptures. In general, non-Muslims living in Islamic states (*dhimmis*) are protected, as their lives and properties are deemed to be as “sacred” those of Muslims. The Qu’ran and Hadith stress Muslims obligations to protect *dhimmis* from possible attack and molestation, for as long as they maintain peaceful relations with Islam. And the prophet of Islam has promised to the *dhimmis* of Jarash, Khaybar, Najran and other places the protection of their lives, property and beliefs.

Western jurists have also acknowledged the histories of merciful and just Muslim leaders. Gustave Le Bon, the French historian, cites in his book *La Civilisation des Arabes* that Salah al \_Din [Saladin] was so merciful with the Christians of Jerusalem that he even provided his enemy, King Richard (the Lion-Hearted), with medications for his war wounds. On the other hand, it

was Richard who had initiated this war slaying 3000 Muslim war prisoners in a heinous massacre after they had surrendered.<sup>(31)</sup>

From the forgoing points, we may deduce that Islam condemns the crime of genocide and that Muslims were commanded from the outset to renounce genocidal acts, even against their enemies, and were commanded to follow the merciful teaching of Islam, regardless of their enemies' conduct.

### III. ISLAMIC CRIMINAL LAW FACING NEW CHALLENGES

In my last section, I would like to emphasize the new challenges facing Islamic Law are the question of adapting its interpretations to modern times. These originate from the suitability of the punishment and the legal procedures which are relevant to the present day situation.

Crime, in western positive law, is defined as “voluntary conduct that violates a public law and for which punishment may be imposed in the name of state”.<sup>(32)</sup> In Islamic law, crime is “the commission of a prohibited act or omission of a duty that is commanded”.<sup>(33)</sup> Some major differences exist between the Western theory and application of criminal law and Islamic practice. The Islamic Criminal Law is primarily designed and used as a moralizing instrument as well as a preventive agent. This achieved by the following methods<sup>(34)</sup>:

- 1- It constantly seeks to reform the individual and purify his conscience and soul with sublim Islamic ideas and lofty morals.
- 2- It adequately warns people against committing offenses and admonishes the offender with dreadful punishment in this world and in the hereafter.
- 3- It commands Muslims to assist one another on the path of righteousness and piety by offering counsel, moral support, and the exchange of religious teaching.

4- It prevents crime by blocking the path to its commission; for example, by prohibiting the use of intoxicants.

According to complex criteria – which combine the gravity of the penalty prescribed in Islamic law for the act committed, the manner and the method used in incriminating and punishing, and the nature of the interest affected by the prohibited act – offenses in Islamic penal law are divided into three categories: *Hudud* crimes, *Qisas* Crimes (Retribution) and *Ta'zir* crimes.

According to the two first crimes, the death penalty can be applied to offenders.

These kinds of punishments are not compatible with the modern international criminal law. According to Article 77 of the statute of International Criminal Court (ICC) the applicable penalties are:

1- ... (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

The above punishments does not concur with the Islamic rules. but the question is what is the appropriate and fair punishment for the “most serious crimes” – as it is called in Rome Statute -committed by the most violent criminals.

The increase of criminal acts in most of the countries shows clearly that a limited time of imprisonment cannot suffice for treating a crime.<sup>(35)</sup>

Islamic punishment is based more on the side of the victim, that the reason that it might seem to be more severe than under modern law.

The abolition of the death penalty under modern law does not concur with Islamic law and is one of the main differences between the Islamic legal system and the current law used widely today.

Under Islamic law respect is of the utmost importance for the victim and therefore no leniency is shown meting out the relevant punishment. This does not seem to be the case under modern law. For instance, under Islamic law the killing of a person is regarded the same as killing the whole of Mankind. That is why the interests of the victim are very important in Islam.

Is it justice that someone who plans, organizes and orders the killing of hundreds or thousands of people e.g. Rwanda, Bosnia, Cambodia, Uganda etc. should only be sentenced to a few years detention in comfortable surroundings?<sup>(36)</sup>

The purpose of punishment in islam is not the vengeance against the culprit; rather than, its purpose is to protect society from the aggressions of transgressors and to purify their souls and put a stop to transgression and crime. Thus, in Islam, punishment is a mercy for man, whether he is obedient or disobedient; it is a necessary requisite of divine justice; it seeks to prevent crime before its incidence and is a warning against its repetition. It thereby has a simultaneously preventive as well as curative role.<sup>(37)</sup>

## CONCLUSION

The Islamic contribution to the International law especially on the matter of humanitarian law was great and this scientific inheritance could be used in international legislation. Indeed, the implementation of Islamic law in modern life depends entirely on its flexibility and adaptability to today's requirements. ❖

## NOTES:

1. Khadduri, Majiid, *The Islamic Law of Nations: Al-Shaybani's Siyar*, John Hopkins Press, Baltimore, 1996, p. 12.
2. See: Khaddurri, Majiid, *War and Peace in the Law of Islam*, Jhon Hopkind Press, Baltimore, 1966, p. 11.
3. Malekian, Farhad, *The Concept of Islamic International Criminal Law: A Comparative Study*, Graham & Trotman / Martinus Nijhoff, 1994, p. 1.
4. Al-Ghunaimi, Mohammad Talaat, *The Muslim Conception of International Law and the Western Approach*, Martinus Nijhoff, 1968, p. 83.
5. Khadduri, M., *op.cit.*, p. 6.
6. *Ibidem*. See also: Mahmassani, Sobhi, **The principles of International Law in the light of Islamic doctrine**, *Recueils des Cours*, 1966-1, p. 201.
7. Weeramantry, G. Christopher, *Islamic Jurisprudence: An International Perspective*, Houndmills, MacMillan, 1988, pp.149-150.
8. Pirzada, Syed Shariffuddin, *Islam and International law*, in: Essays on International Law, Asian-African Consultative Committee, New-Delhi, 1981, pp. 29-30.
9. Boisard, Marcel, **On the probable influence of Islam on Western Public and International Law**, *International Journal of Middle East Studies*, Vol. 11, 1980, pp. 429-450. See also: Ben Ashour, **Islam et droit humanitaire**, *Revue Internationale de la Croix Rouge*, No.722, March-April 1980, pp. 59-69.
10. Taube, Michel de, **Etudes sur le developpement historique du droit international dans L'Europe orientale**, *Recueil des Cours*, 1926, p. 341.
11. Weeramantry, G.C., *op.cit.*, pp. 149-158.
12. Cockayne, James, *Islam and international humanitarian law: From a clash to a conversation between civilizations*, in: RICR, September 2002, Vol. 84 No. 847, p. 599.
13. Amery, Saleh, *Definition of international humanitarian law*, First Symposium on International Humanitarian Law, Cairo, November 1983, published by the Egyptian International Law Society, p.160 (in Arabic), cited by El – Dakkak, Said, *International*

*humanitarian lies between the Islamic concept and positive international law*, in: RCIC, January-February 1990, No.274, pp. 102-103.

14. Shaybani, A.H., *El Seyar Al-kabir*, Vol.1, The achievement of Salah El-Din El Mongued, 1958, p. 115 (in Arabic), cited by El-Dakkak, *op.cit.*, p. 103.

15. El-Dakkak, Said, *op.cit.*, p. 103.

16. Sultan, Hamid, **The Islamic concept of international humanitarian law**, *Egyptian Review of International Law*, Vol. 34, 1978, pp. 6-7 (in Arabic), cited by El-Dakkak, S., *ibidem*.

17. Mansour, Aly, *The Islamic Sharia' and public international law*, published by the Supreme Council of Islamic Affairs, Book 1, 1965, p. 325 (in Arabic), cited by El-Dakkak, *op.cit.*, p. 107.

18. See: Algase, **Protection of civilian lives in warfare: A comparison between Islamic law and modern international law concerning the conduct of hostilities**, in *Military Law and Law of War Review*, 1977, p. 246.

19. Benoune, Karima, **As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence**, *Michigan Journal of International Law*, Vol. 15, No. 2, p. 623.

20. Islam in effect forbids the killing of *children, women and old people* as long as they take part in war. The Tradition of the Prophet, moreover, is eloquent on the subject. One day, for instance, Prophet Mohammad was looking at the dead on the battlefield after a fight, and found a woman's body among them. He became angry and said: "She should not have been involved in the fighting". He added: "Do not kill old people or children either".

21. Khadduri, *op.cit.* note 5, at 6.

22. For more information, See: Kelsay, John, Islam and the distinction between combatants and noncombatants, in: Tunner Johnson, James and Kelsay, John (ed), *Cross, Crescent, and Sword: Justification and limitation of war in Western and Islamic Tradition*, Greenwood Press, 1990, pp. 197-219.

23. For more information, See: Conrad, Gerhard, **Combatant and prisoner of war in classical Islamic law, concepts formulated by Hanafi jurists of the 12 th century**, in *Revue de Droit Penal Militaire et de Droit de la Guerre*, Vol. XX, 3-4, 1981, pp. 271-304.

24. Alghunaimi, M. T., *op.cit.*, p. 46.

25. Hamidullah, M., *op.cit.*, p. 206.

26. In the Battle of Uhud the disbelievers mutilated the bodies of the Muslims, who had fallen on the battlefield and sacrificed their lives for the sake of Islam, by cutting off their ears and noses, and threading them together to put round their necks as trophies of war. The abdomen of Hamzah, the uncle of the Prophet, was ripped open by Quraysh, his liver was

taken out and chewed by Hind, the wife of Abu Sufyan, the leader of the Meccan army. The Muslims were naturally enraged by this horrible sight. But the Prophet asked his followers not to mete out similar treatment to the dead bodies of the enemies.

27. Raphael Lemkin, a Polish jurist, coined the word 'Genocide' in his *Axis Rule in Occupied Europe* (Washington, 1944). He derived the term from a combination of the Greek word *genos* which means "race" or "tribe", and the Latin word *cide*, which means "killing". See Lawrence J. Leblanc, **The United States and The Genocide Convention**, Durban and London, 1991, p. 17.

28. Graven, Jean, *Les Crimes contre l'Humanite*, 1950, pp. 48-55.

29. El-Dakkak, Shokry, **Genocide from the Perspective of International and Islamic Law**, in *Criminal Justice in Islam*, p. 137.

30. cited by El-Dakkak, S., *op.cit.*, p. 140.

31. Michel de Taube, **Le Monde d'Islam et son influence sue l'Europe orientale**, in *Recueil des Cours*, ed. Academie de Droit International, 1962, XI, pp. 393-5.

32. David, A, Jones, *Crime and Criminal Responsibility*, Chicago, 1978, p. 3.

33. Abu-Zahra, M., **Crime and punishment in Islamic Jurisprudence**, Cairo, 1950, cited by Nagaty Sanad, *The Theory of Crime and Criminal responsibility in Islamic Law: Shari'a*, Chicago, 1991, p. 49.

34. Nagaty, S., *op.cit.*, p. 50.

35. A recent research in April 2003 shows that the majority of Irish people want public floggings to curb soaring crime figures. Almost 86 per cent of the 1000 people in Dublin who responded to the phone study said they wanted corporal punishment introduced. in *The Mirror*, London, 5 April 2003.

36. For example, Mrs. Plavsic has been found guilty of war crimes and is serving her 11 year sentence in the luxury of a Swedish prison and yet complains that the air-conditioning is too loud – what about her dead victims, can they complain?

37. Ibrahim, said hasan, *Basic Principles of Criminal Procedure under Islamic Shari'a*, in Abel Haleem M., Sherif, A.O. (eds), *Criminal Justice in Islam*, I.B.Tauris, London, 2003, p. 31.