

## TOWARDS A UNITED ISLAMIC IDENTITY IN THE MAKING OF INTERNATIONAL LAW

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### ABSTRACT

*Can the Muslim Ummah contribute to the international community? Muslims all around the world take part to contribute to the world in many ways as display of the great character and value of Islam. However, the international world is a world of state politics and international law. It is a reality that the ummah barely exists on this plane except the recent military alliances and diplomatic tensions. Despite the necessities behind all this, is this really all there is to the Islamic world? This paper examines how role of the Islamic world is minimum (conflict-response at best), while the United Nations in maintaining international peace and security would also facilitate the law making a platform from which to conduct peaceful international relations. An overwhelming part of international law is consistent with Islamic law –albeit some friction—, Muslim nations individually ratify international conventions because ‘they are compatible with Islam’ leaving no trace of Islamic identity in their participation in this largely secularized making of international law. It may seem that Islamic identity only becomes a highlight when Muslim nations make reservations to certain provisions against the Shari’a which triggers negative reaction from other nations (see the CEDAW declarations and reservations). Is this the best that the ummah can do? This paper proposes to promote an Islamic version of International Law through ‘Soft Law’ like the Cairo Declaration of Human Rights in Islam, optimizing the role of the Organization of Islamic Conference (OIC). Being more practical, soft laws are preferred over treaties. While binding rules are already there in existing international conventions, it is argued that this proposal will help unite, distinguish and emphasize Islam’s role and position in the making of international law.*

**Keywords:** International law making, Islamic law, Islamic identity

### INTRODUCTION

In the Holy Qur’an, Allah says the following:

وَأَعْتَصِمُوا بِحَبْلِ اللَّهِ جَمِيعًا وَلَا تَفَرُّوا أَوْ ذُكِّرُوا أَوْ أُنذِرُوا أَلَمْ يَجْعَلْ لَكُمْ آيَاتٍ أَنْ تَتَّقُوا مَا بَيْنَ يَدَيْهِ وَأَنْتُمْ لَا تَعْتَدُونَ

“And hold firmly to the rope of Allah all together and do not become divided. And remember the favor of Allah upon you - when you were enemies and He brought your hearts together and you became, by His favor, brothers. And you were on the edge of a pit of the Fire, and He saved you from it. Thus does Allah make clear to you His verses that you may be guided.” (Surah Al Imraan, 3: 103)

The Muslim *Ummah* should be united and should not be dispersed. It was also narrated (albeit with disputed authenticity) that Prophet Muhammad condemned *ashobiyah* or group fanaticism (Sunan Abu Dawud, 5102). However, it is a reality that the Muslims are spread out in the world and split in various nations.

The brotherhood in the *umma* may seem very strong, especially when responding to certain threats or disasters. The extent of unity that the religion brings compared to the division as result of nationality may be subject to a separate research, but it is not a secret that the high politics among the Muslim nations seem more disappointing or, to some, depressing.

While the *umma* on the grass root are doing their best to do what they can to serve their religion, the play of Islam does not seem visible in the international world among nations. This problem is of course multidimensional and has various aspects to it. However, this paper will discuss about the role of Islam in the making of International law and how the Muslim world can participate better in it.

This paper starts by explaining how the role of Muslim nations, with their Islamic identity, is minimal. It will also be shown how, from an Islamic perspective, it should not be so. The paper will continue by explaining about 'soft law' and the making of international law and how the Cairo Declaration of Human Rights in Islam 1990 (hereinafter the Cairo Declaration) can serve as a good example on how through soft law the Islamic world can have a separate and distinct human rights regime while also having a footing in international law. Finally this paper will recommend a number of areas in which an 'Islamic version' of international laws can be explored. It is hoped that this research will be a new direction towards the Islamization of international law making by scholars and the leaders of Muslim nations.

## MUSLIM NATIONS: CURRENT ROLE AND IDENTITY

It is not *per se* wrong for Muslim nations to join numerous international conventions and organizations as much of international law and Islamic law are compatible. However, nobody can deny that the foundation of international law's construction is largely secularized. The Muslim nations are just among so many other nations who participate in the making of the international conventions. It has become irrelevant whether or not the nations are Muslim nations or not. The relevance of Islam in general therefore seems to fade.

This goes along with how current scholarship makes much less reference towards Islamic law despite its big role in the history of international law. As evidence of this, Nahed Samour (2014) observes how the Oxford Handbook of the History of International Law gives Islamic law "...a compartmentalized, isolated role, almost the role of the 'other' in international law – the legal order that does not fit the prevailing legal architecture." Despite the history of Islamic legal scholarship spreading and developing throughout Africa, South Asia and Europe and as far as China and South East Asia, this Oxford Handbook only discussed Islamic law as if in passing under a "Africa and Arabia" section (Samour, 2014: 314).

The Organization of Islamic Conference (OIC) charter states "*to endeavor to work for revitalizing Islam's pioneering role in the world...*" in its preamble. However, in reality, the OIC as an organization seems to be more reactive and not proactive in the world high politics especially in the making of international law.

In the international plane, they typically resort to condemnation or encouragement, such as how the OIC expressed their support towards the ceasefire agreement between the USA and Russia in context of the Syrian war (OIC, 2016). Sometimes they act upon specific urgent problems reactively, such as where they saw a great problem of Syrian refugees and some of them are dying in the process of escaping, and decided to call for a summit to talk about it (Arab News, 2015).

One of the times that Muslim nations take the center of attention due to Islam, it would be during reservations towards certain human rights convention. For example, Islam believes that men and women are equal but not the same –therefore there are different rights and obligation between the two sexes to some extent, without degrading one compared to the other. This affects, *inter alia*, family law. This approach is in contrast with some provisions of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), to which most Muslim nations make reservations on certain provisions seen to be against the Shari'ah (some details will be given later). The official declaration and reservation page of the convention (UN Doc CEDAW/SP/2006/2) shows numerous statements from other western states condemning this because they see that such a reservation is against the spirit of human rights and gender equality. So, once Islam shows up as an identity, it is subject of dispute.

Is there no active and positive role of Islam in the making of international law, except negative images?

## WHY IT MATTERS

Why does it matter that Muslim nations do not display so much of their Islamic identity, while they are participating in international law anyway while also adjusting to Islamic law –at least for some Muslim nations? Apparently there are a number of reasons.

The first has already been mentioned, how this shows how disunited the Muslim nations are while they should be united. Second, The Qur'an in Surah Ali Imran, 3: 110 recites as follows:

كُنْتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُ بِالْعَمْرِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ وَتُؤْمِنُونَ بِاللَّهِ

"You are the best nation produced [as an example] for mankind. You enjoy what is right and forbid what is wrong and believe in Allah."

Not only that this *ayat* uses the word أُمَّةٌ which is a singular noun, emphasizing that there should be just one nation. What should also be highlighted is that Muslim nations should not merely participate without being distinct (and leading).

Third, it is very essential for Muslims to be distinct from the non-Muslim world in identity. There is a general prohibition for Muslims to imitate the non-Muslims, as Prophet Muhammad instructed:

مَنْ تَشَبَّهَ بِقَوْمٍ فَهُوَ مِنْهُمْ

“He who copies any people is one of them.” (Abu Dawood, Hadith No.4020, see also Al Bukhari, 1979: IV-662)

This is shown even in the most minute detail on rulings for example the *hadeeth* on putting dye on grey hair and beard (al-Bukhari, 1979: IV-668), history of the *adzaan* (Sahih Al Bukhari, 1979: V-577), etc.

Now this does not mean that the Muslim nations should stay away from everything related to the non-Muslim world or even isolate themselves. There is no reason to be extreme, like how Abu Muhammad Al-Maqdisi (one of the biggest pro Al-Qaeda *jihadi* scholars of this time) mentions that Saudi Arabia is a *kafir* state for joining the UN and cooperating too much with the other non-Muslim nations (Al Maqdisi, 2005: 85-138). The general prohibition to imitate the non-Muslims should not be taken as an extreme generalization like this. Rather, the prohibition is only intended to apply to some kinds of imitation and not others.

The forbidden type of imitation is called *tashabbuh bil kuffaar*, and scholars have explained this together with where the limit lies with allowed imitation. Nash Al-Aql (1416 H: 15-16) mentions that the prohibition to imitate the non-Muslims is limited to creed, worship, behavior, conduct, and morality. Shalih Al Munajjid (1436 H: 6) also mentions that it is not prohibited to enjoin non-Muslims in matters that are not necessarily within due religious teachings (or, even if so, if they are general values taught also in Islam then it should be fine). Further, Shalih al-Fawzan (nd: 170-172) notes that international cooperation with non-Muslim nations is allowed. After all, Prophet Muhammad also entered into an agreement with the non-Muslims such as the Treaty of Medina and Hudaibiyah (Salahi, 1995: 203). In fact, it has been narrated that the strategy used by the Muslims to make a trench in the Battle of Khandaq was an adaptation of Persian (believers of the *Majoos* religion) military strategy (Al-Mubarakfuri, 2005: 445).

Rather, this may mean at least two things. First, that the Muslim nations should unite and display greater participation. Second, which is the emphasis in this article, in doing so they should be distinct in their characteristic, since the virtue of the prohibition to imitate the non-Muslims includes the necessity for the Muslims to be distinguishable from the non-Muslims (Al-Qahtani, 1402 H: 51).

This is not yet to mention that the Islamic law has already made its mark in the history of international law as source of many important principles, although, as mentioned earlier, this fact may seem to have been to some extent forgotten. With such a potential foundation to work with, a strong history as a legacy to continue, and the religious obligation to contribute internationally, certainly more should be done by the Muslim nations.

## SOFT LAW AND INTERNATIONAL LAW MAKING

The term ‘Soft laws’ refers to non-legally binding instruments (Gardner, 2009: 1519), which may include UN General Assembly Resolutions, codes of conduct issued by international organizations, etc.

While they are formally non-binding, they can in effect be just as good as binding sources of law just like international treaties. International treaties and soft law can complement and reinforce each other. An example to this would be how treaty bodies can issue commentaries or resolutions (which are formally *soft laws*) as authoritative interpretation of treaties (Boyle and Chinkin, 2007: 217). The Committee on Economic, Social, and Cultural Rights, as evidence of the aforementioned, issued a General Comment No. 15 (CESCR, 2002) stating that ‘rights to access water’ is part of the rights to an adequate standard of living conditions mentioned in Articles 11 and 12 of the International Covenant on the Economic, Social, and Cultural Rights 1966.

Therefore, international law making can require a strategic interplay between soft law and international treaties.

The highlight of this section is how soft law can also align the practice of state under one framework and then reflect or direct a more uniform customary international law.

For example, the Judges at the *Nicaragua Case* declared the USA in breach of customary international law. Traditionally, customary international law should have at least two elements: consistent and uniform state practice, and *opinio juris*. Yet, in this case, the Judges of the ICJ simply cited UN General Assembly resolutions as evidence of customary international law (ICJ, 1986: paras 188, 191-195). This is because such resolutions were passed due to the commitments and beliefs of those who voted in favor, which may represent *opinio juris*.

States would then typically practice what they have agreed to, such as how the Universal Declaration of Human Rights (hereinafter, the UDHR) snowballed into numerous international conventions. This serves as an example of how soft law may be a good alternative to start making international law. Under this one vision seeking a universal concept of human rights, there

seems to be a general movement of states following the same trend under the same framework of the UDHR which then gave birth to numerous other international conventions.

International treaties are also used as means to make international law (Boyle and Chinkin, 2007: 181). However, from a practical point of view, soft law may seem more preferable than international treaties as an instrument to facilitate international law making. It is simple for a forum of states or international organizations to issue a declaration to show their commitment. Compare this to an international treaty that would require ratification, transformation (for dualist states, which requires legislation processes, see: Shaw, 2008: 131), waiting for entry into force, *etc*(See the general process of treaty making in the Vienna Convention on the Law of Treaties between States 1969, and also Boyle and Chinkin, 2007: 181-182). Although, of course, international treaties will have their own advantage in other respects such as having self-executing effects and clearly as well as directly requiring implementation mechanisms in domestic legislations, which provides more legal certainty (Shaffer and Pollack, 2010: 718).

#### LESSON OF THE CAIRO DECLARATION OF HUMAN RIGHTS IN ISLAM 1990

The practice of Muslim nations making reservations towards IHRL treaties are criticized by many states, as mentioned much earlier.

The CEDAW mentions in Article 16(1)(a) “*The same right to enter into marriage.*” and in Article 16(1)(c) “*The same rights and responsibilities during marriage and at its dissolution.*”, although one may highlight the use of the term ‘*same*’ in this provision and compare it with the preamble as well as Articles 1 and 2 which uses the word ‘*equal*’ to describe the relation between men and women rights. Islam in general does teach that men and women are equal, as mentioned in Surah Al Hujaraat, 49: 13:

يٰۤاَيُّهَا النَّاسُ اِنَّا خَلَقْنٰكُمْ مِّنْ ذَكَرٍ وَّاُنثٰى جَعَلْنٰكُمْ شُعُوْبًا وَّقَبَاۤىِٕلَ لِتَعَارَفُوْا اِنَّ اَكْرَمَكُمْ عِنْدَ اللّٰهِ اَتْقٰىكُمْ اِنَّا اَللّٰهُ عَلِيْمٌ خَبِيْرٌ

“*O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.*”

This spirit of equality, however, does not always mean that men and women have absolutely the same rights because Islam seems to hold an ‘equal but not the same’ stance. Polygamy is a good example to this. The Qur’an itself gives rights for men to marry up to four wives, in Surah An-Nisa, 4: 3:

فَاَنكِحُوْا مَا طَابَ لَكُمْ مِنَ النِّسَاۗءِ مِمَّنْ تَوْفَّقُوْا رُبْعٌ

“...then marry those that please you of [other] women, two or three or four.”

Although there are of course regulations and restrictions towards polygamy for men, women in turn cannot marry more than one man as may be implied in Surah An-Nisa, 4: 24. To understand the equality in Islamic marital laws one must observe the entire body of law holistically, which deserves its own paper to discuss. However, at the very least, one cannot deny that these laws on polygamy does not provide the ‘*same*’ rights between man and women.

Therefore, while one may argue that gender equality exist in Islamic law so that it is consistent with the general spirit of CEDAW, it is undeniable that such polygamy laws are in direct contravention with Articles 16(1)(a) and 16(1)(c) of CEDAW. This is why most Muslim states make reservations to exclude the provisions of CEDAW, and among those who ratify but don’t make reservations we have Indonesia who interestingly allows polygamy anyways in Article 3(2) of Law No. 1 of 1974 concerning Marriage.

The existence of these practices makes it difficult to conclude that ‘*equal* must also mean *same*’ is a general norm. And even if it were to be argued that the CEDAW is a general norm, the consistent practice of Muslim nations since the promulgation of the norms of IHRL can be classified as ‘persistent objection to customary international law’ which would exclude the said persistent objectors from the general rule (Shaw, 2008: 91). Such a process may –to some extent—be similar to ‘regional customary laws’ (PCA, 1996: para 92, ICJ, 1950: 276-278, and Shaw, 2008: 92-93). This shows how certain items in IHRL are not universal after all.

While the said practices by Muslim nations are done individually, the Cairo Declaration of Human Rights in Islam 1990 (hereinafter, the Cairo Declaration) unites all these practices in one declaration. It clarifies the concept of human rights in Islam as one unique regime of international human rights law in form of soft law. Aspects that are unquestionably compatible to IHRL are emphasized of its Islamic identity, and contentious items can be pointed out as a clear persistent objection.

This will not require a legally binding treaty. This is because there are already IHRL treaties which the Muslim nations are party to, and the Shari’ah-based reservations have already been implemented and practiced anyways. Backed up by consistent practices

by Muslim nations, Islamic human rights can be seen as a special legal regime recognizable in international law under which the Muslim nations are united.

Even with this, critics and debates will continue. More researches will need to be done for the two bodies of law to reconcile or at least tolerate each other. This may be from Islamic law where there may be some items with some room for *ijtihad* to adjust to modern needs or from International law to tolerate the differences through the 'margin of appreciation' (Baderin, 2007: 36-46 and 242-243).

However, as a matter of the current state of the law, the Muslim nations have fundamental basis to practice Islamic law—despite its differences with the mainstream international human rights regime—and can do so with a strong and united basis which both reflects Islamic identity as well as having footing in international law.

#### OTHER POTENTIAL AREAS TO WORK ON

There are numerous other areas of international law where Muslim nations can portray its Islamic identity. Most of them are areas of law that are actually not new or even pioneered by Islamic law in the past. However, these items may require further research to solidify the rules in the context of the modern day.

##### *The First Area : General Participation in International Law*

A statement of general willingness to participate in international cooperation may be worth mentioning. It has been mentioned how Islam allows beneficial international cooperation for matters not against the Shari'ah. Further, Islam respects the two most important sources of international law, i.e. international treaties and customary international laws. When the Christians used to believe that breaking treaties with 'infidels' (Pictet, 1985: 16), Islam is always firm in its principle to not violate treaty obligations as commanded in Surah Al Maidah 5: 1:

يٰۤاَيُّهَا الَّذِيْنَ ءٰمَنُوْا اَوْفُوْا بِالْعُقُوْبِ

*"O you who have believed, fulfill [all] contracts."*

See also Surah At-Tawbah, 9: 4:

اِلَّا الَّذِيْنَ عٰهَدْتُمْ مِّنَ الْمُشْرِكِيْنَ مَا بَيْنَ يَدَيْكُمْ فَاَتَمُّوْا اِلَيْهِمْ عَهْدَ هُمْ اَلَمْ يَكْفُرُوْا بِاللّٰهِ حُبًّا لِّلْمُنٰفِقِيْنَ

*"Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him]."*

Not to mention, Islam also recognizes the maxim *العداوة محكمة* or 'customary laws are laws' (Dien, 2004: 60-61), possibly room to recognize customary international law which is also a binding source of international law.

Further, as sign of good faith in the participation in international relations, Islam also recognizes the sanctity of diplomatic representatives (Hamidullah, 2011: 151). These diplomatic representatives are protected and inviolable, even those belonging to an opponent state during times of war. The basis for this is the *hadeeth* where Prophet Muhammad, when receiving a blasphemous letter from Musaylamah brought by a messenger, said the following:

اَمَّا وَاللّٰهِ لَوْ لَا اَنَّ الرُّسُلَ لَا تُقْتَلُ لَضَرَبْتُ اَعْنَاقَكُمْ

*I swear by Allah that were it not that messengers are not killed, I would cut off your heads (Abu Dawud, 2008: No. 2755)*

##### *The Second Area: International Environmental Law*

Even the infamous Osama bin Laden endorses and supports the global efforts to save the environment (The Guardian, 2010). There are endless *ayats* in the Qur'an referring to the protection of the environment. Among them, see Surah Al Baqarah 2: 60:

كُلُوْا وَاَشْرَبُوْا مِمَّنْ رَزَقْنَا لَكُمْ فَالَّذِيْنَ يَلْمِزْكُمْ فَاَلَمْ يَلْمِزْكُمْ اَنْ تَكُوْنُوْا اِلٰهًا لَّا رُحْمَ سِدِّيْنَ

*"Eat and drink from the provision of Allah, and do not commit abuse on the earth, spreading corruption."*

Surah Ar-Rahman 55: 7-9 makes a heavy emphasis on how important balance is in relating with nature:

وَالسَّمَاءَ رَفَعَهَا وَوَضَعَ الْمِيزَانَ (٧) أَلَّا تَطْغَوْا فِي الْمِيزَانِ (٨) وَأَقِيمُوا الْوَزْنَ بِالْقِسْطِ وَلَا تُخْسِرُوا الْمِيزَانَ (٩)

“And the heaven He raised and imposed the balance. That you not transgress within the balance. And establish weight in justice and do not make deficient the balance.”

The Qur’an also hints consequences on those who has caused corruption on earth in Surah Ar-Ruum 30: 41:

ظَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ أَيْدِي النَّاسِ لِيُذِيقَهُمْ بَعْضَ الَّذِي عَمِلُوا لَعَلَّهُمْ يَرْجِعُونَ

“Corruption has appeared throughout the land and sea by [reason of] what the hands of people have earned so He may let them taste part of [the consequence of] what they have done that perhaps they will return [to righteousness].”

Bear in mind also that in the previous area (laws of armed conflict), the narration attributed to Abu Bakr also mentions concerns regarding the environment in times of war, i.e. not burning down trees and killing animals unnecessarily. The Islamic laws relating to the environment is its own area of study known as *fiqh al bi’ah*, and great scholars has authored books relating to this field such as Yusuf Al-Qardhawi (2001) in his book *Ri’ayah al-Bi’ah fiy Shari’ah al-Islam* and developed further in journals (Busriyanti, 2016).

### **The Third Area: Laws Regulating the Conduct of Armed Conflict**

This area is very relevant in the light of current affairs: conduct of warfare. Various rulings relating to the conduct of warfare are found in a very rich body of Islamic scholarship throughout the ages, as there are a number of *hadeeth* mentioning the commands and conduct of Prophet Muhammad during warfare, but an easy short and general summary of the rule was made in a narration attributed to the first Caliph Abu Bakr as-Shiddiq:

وَإِنَّمَا صَبَأُكُمْ بِعَشْرٍ لَأَتَقْتُنَّ أُمَّرُؤَهُمْ لَأَصِيبُوا لَأَكْبِيرُ أَهْرُمًا وَ لَأَتَقَطُّ عَشْرَ أُمَّمٍ أَوْ لَأَتَحْرَبُ بَعَامِرٍ أَوْ لَأَتَغْفِرُ نَسَاءَهُمْ لَأَجِيرُ إِلَّا لِمَا كَلَّمْتُمْ لَأَحْرَقَنَّ حُلَاوًا لَأَتَقْرَفَهُمْ لَأَتَغْلُو لَأَتَجِبُونَ

“I advise you ten things: Do not kill women or children or an aged, infirm person. Do not cut down fruit-bearing trees. Do not destroy an inhabited place. Do not slaughter sheep or camels except for food. Do not burn bees and do not scatter them. Do not steal from the booty, and do not be cowardly.” (Malik, 1992: 21/10)

The aforementioned narration essentially forms a category of ‘non-combatants’—which may not be targeted in war—as opposed to ‘combatants’—which may be targeted. This is essentially the principle of distinction known to modern international humanitarian law (IHL), today codified in Common Article 3 of the four Geneva Conventions (1949) and Article 48 of the Additional Protocol I to the Geneva Conventions (1977) or AP I.

While the principle of distinction may have a long standing history throughout customary international law, the prohibition to commit excessive environmental destruction during warfare was new to the late 20<sup>th</sup> century. It was only in 1977 when Articles 35 and 55 of AP I prohibited it. Islamic law was far ahead in this respect.

Not only that the aforementioned narration indicates a general prohibition to destroy the environment during warfare. Certainly, throughout the course of war, damaging the environment may be inevitable. Scholars have noted that environmental destruction can only be done as far as it is absolutely necessary (ibn Rushd, 2000: 461). Compared this to modern IHL in Articles 35 and 55 of AP I which only prohibits environmental damages that are severe, widespread, and long term (cumulatively).

Certainly there are numerous details in this area of law that should be subject to further research, especially those relating to new developments in warfare. An example would include the application of the principle of proportionality in the light of modern weaponry (Muhammadin, 2015: 585-592). This further presses the need to unite the Muslim nations in this area under one body of comprehensive rule (Muhammadin, 2015: 592-593, see also: Al-Dawoody, 2011, generally).

### **The Fourth Area: International Trade**

The World Trade Organization prohibits tariff barriers specially made to protect domestic products as per Article III of the General Agreement on Tariffs and Trade 1994 or the GATT known as the National Treatment principle. This is strikingly similar to the Islamic prohibition of *Al-Maks*. Islamic law prohibits taking *Al Meks* or the wealth of another unjustly, in Surah An Nisa ayat 29:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبِطْلِ لِأَنَّكُمْ تَتَجَارَؤُنَّ بَيْنَكُمْ

“O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent.”

The Fatwa Committee of Saudi Arabia (Da'imah, nd: Fatwa No. 4012) therefore ruled due to this ayat, together with a number of narrations, that it is forbidden to impose such kind of levies other than *zakat* (compulsory alms for Muslims). But then, the aforementioned fatwa speaks of imposition of levies towards Muslims. What of non-Muslims? Since *zakat* cannot be imposed upon them, there are non-*zakat* levies towards them. A classical one would be *jizyah*, which is the tax-like levy imposed upon the People of the Book within Muslim lands (Surah At-Tawbah, 9: 29) or an actual tax not referred to as *jizyah* at all amounting to the same or double amount as *zakat* (Al Qardhawy, 1999a: 35). However, this is a levy paid in exchange of protection, social security, *etc* so there would be a justified necessity to impose such a levy continuously. What about People of the Book coming as merchants from abroad?

There is a levy towards these merchants called *'ushr* which is valued at 10% of the merchant's earning. However, Al Qardhawy (1999b: 307) comments that this was simply based on equal treatment since Muslim merchants would also be levied the same amount when they trade in those countries ruled by the People of the Book. Therefore, it is true that the 10% number imposed towards foreign merchants may seem higher than what is imposed to local merchants –2.5 for Muslims and 5% for the People of the Book (Al Qardhawy, 1999b: 307) and is against the WTO rule of National Treatment. However, this also consequently means that agreements can be made to equally reduce the levies from each other thus bringing the levy as low as or even possibly below what is imposed to locals.

There are exceptions to the prohibition of imposing these levies, though. In event of an emergency where the state would require funds and the state treasury cannot fulfill it, then an exception is made (Sabiq, 1997: 132). However, this is not intended to be something permanent but merely temporary as far as the necessity is present as the state treasury is insufficient (Al Qardhawy, 1999b: 243-244). The WTO law also provides exceptions where States may temporarily back away in emergency situations only until such situation is resolved as per Articles XIX, XII, and XVIII:B of the GATT. Therefore, there does seem to be similarities in the general rule of international trade between Islamic law and the WTO.

#### **The Fifth Area: Law of the Sea, Air and Space**

Islamic law also has similar principles in the law of the sea and air. Islam prohibits sovereignty claims over the high seas based on the Qur'an and as interpreted by the Caliph and Scholar Umar bin Abdul Aziz (died in early 8<sup>th</sup> century AD), which is centuries before Hugo Grotius who is usually claimed to be the pioneer of the idea (Islami, 2014: 46-47). The ayats of the Qur'an as basis of this interpretation are Surah an-Nahl, 16: 14:

وَهُوَ الَّذِي سَخَّرَ الْبَحْرَ لِيَأْكُلُوا مِنْهُ حَمَاطًا يَأْتِي سَخَّرَ جُؤَامَهُ جَلِيَّةً تُنْبَسُ نَهَاوْتَرِ بِالْفَلَكَمِوَ اخِرَ فِيهِوَلْتَبْتَغُوا مِنْفَضْلِهِوَلَعَلَّكُمْ تَشْكُرُونَ

*“And it is He who subjected the sea for you to eat from it tender meat and to extract from it ornaments which you wear. And you see the ships plowing through it, and [He subjected it] that you may seek of His bounty; and perhaps you will be grateful.”*

Together with Surah Faathir, 35: 12:

وَمَا يَسْتَوِ بِالْبَحْرِ انْهَذَا عَذْبٌ فُرُّسًا يَنْسَابُ غَشَّارًا هَذَا مِلْحًا جَارِحٌ وَمِنْكَ إِنَّا كَلَّمْنَا لِحَمَاطٍ يَأْتِي سَخَّرَ جُؤَامَهُ جَلِيَّةً تُنْبَسُ نَهَاوْتَرِ بِالْفَلَكَفِيهِمُوَ اخِرَ لِيَبْتَغُوا مِنْفَضْلِهِوَلَعَلَّكُمْ تَشْكُرُونَ

*“And not alike are the two bodies of water. One is fresh and sweet, palatable for drinking, and one is salty and bitter. And from each you eat tender meat and extract ornaments which you wear, and you see the ships plowing through [them] that you might seek of His bounty; and perhaps you will be grateful.”*

Wahbah Az-Zuhayli mentions also how there can be areas which are extensions of the territorial sovereignty of a nation which other nations have some rights to pass by which are some areas of the sea and the vertical airspace by virtue of agreements entered into (Az-Zuhayli, 2011: 433-434), which engages harmonically with relevant international laws i.e. Article 17 of the United Nations Convention on the Law of the Sea (1982) and Article 3[b] of the Chicago Convention on International Civil Aviation (1944).

Even laws of outer space may find room in Islamic law too. The Qur'an has an *ayat* that may seem to encourage space exploration, which is Surah Ar-Rahmaan, 55: 33:

يَلْمَعْنَ الْجِنَّوَالْإِنْسِيَاَسْتَطَعْتُمْ أَنْتَقُدُوا مِنْأَقْطَارِ السَّمَاوَاتِوَالْأَرْضِ صِفَاتُفُدُوا الْإِنْفِدُواوَلَا يَسْطَرُونَ

*“O company of jinn and mankind, if you are able to pass beyond the regions of the heavens and the earth, then pass. You will not pass except by authority [from Allah]”*

Wahbah Az-Zuhayli mentions that Islamic law does say that the outer space and other celestial objects are also common heritage of mankind thus no nation may make claims of sovereignty over it (Az-Zuhayli, 2011: 433-434). This is based on the Qur'an in Surah Luqman, 31: 20:

الْمَنْزُورَ وَالْأَلْهَيْسَنَ لَكُمْ مَا فِي السَّمَوَاتِ وَمَا فِي الْأَرْضِ لَنْ تُبْغِضُوا عَلَيْهِمْ ذِي الْقُرْبَىٰ وَالْحَبْرَةَ

“Do you not see that Allah has made subject to you whatever is in the heavens and whatever is in the earth and amply bestowed upon you His favors, [both] apparent and unapparent?”

This similar to that of international law i.e. Articles 1 and 2 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967).

There are so many other areas to explore, such as international dispute resolution *etc.* This is a very fruitful area to identify and research on.

It is hoped that the Muslim nations could assemble in the OIC (or other forums) to then agree to draft these areas and pass them as resolution. The particular rules may have already been practiced or otherwise consented to, either by the Muslim states being parties to relevant conventions, or not objecting to the common practice. However, the resolutions passed by the OIC is hoped to emphasize and make distinguishable the Islamic identity of the actions of the Muslim states in its participation in the making of international law.

### Concluding Remarks: Future Hopes

It is not that the Islamic world does not participate in the international law making. It just does so divided, individually, and absent unity and distinction in its Islamic identity. By issuing soft laws through preexisting forums (i.e. the OIC), the Islamic world can emphasize its unity and role in the making of international law to show the rest of the world that Islam is indeed taking its part in the international world through its Shari’ah-based rules.

This will require an active role of the OIC to facilitate agendas to issue these soft laws, which has been done for the Cairo Declaration and therefore should be possible for other areas too. Afterwards, it is imperative that these instruments are followed up by cooperation in the relevant fields under the name of Islam. The extent of which can Shari’ah based soft law can be made and harmonized with international law (or tolerated within a ‘margin of appreciation), should be ‘homework’ for future research.

The willingness of the Muslim nations to participate in this effort should also be subject to research. This is because such an effort will highly require the cooperation of all the Muslim nations to put aside their differences and unite in matters that can be agreed upon for the sake of Islam.

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