CHAPTER ONE

THE NATURE OF ISLAMIC INTERNATIONAL LAW

1. Introduction

This chapter deals with some of the basic principles of Islamic international law and analyses them with the principles of public international law which have long been recognised in international relations of states. The nature of both systems of international law is discussed side by side to present both laws simultaneously and also to emphasize that even though their sources have different bases and methods of application, their aims, more or less, coincide with each other for the peaceful implementation of the rules of the international legal community and the peaceful settlement of international disputes. The chapter is also devoted into some

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1 It may be relevant to mention here that there has, historically, been a strong connection between Islamic international law and public international law. The classical writers of the latter have benefited in one way or another from the principles of the former. Francisco de Victoria (1480–1546) and Suarez (16–17th centuries) were both Spanish nationals and were educated in the same county where Islamic theories had a potential influence on culture, jurisdiction and politics. Their work on the law of nations therefore benefited from the principles of Islamic international law, especially on the law of war. Similarly, the classical writer of international law Hugo Grotius (1563–1645) who is recognised by some European writers as the father of the law of nations in Europe, was a theologian and also studied Islamic law thereby benefited from the principles of Islam, especially concerning the law of war. In this respect one may easily compare the provisions of Islamic international criminal law governing prisoners of war and the law of armed conflict with similar provisions stated in Grotius work on the law of war namely De Juri Belli ac Pacis Libri Tres: Classics of International Law, translated by Francis W. Kelsey (1925). See also Louis M. Holscher and Mahmoud Rizwana, Borrowing from the Shariah: The Potential Uses of Procedural Islamic Law in the West, in Delbert Rounds (ed.), International Criminal Justice: Issues in a Global Perspective (1999), at pp. 82–96. See also Montesquieu, The Spirit of the Law, edited by Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone (1989).

2 The revelation of Islamic law including Islamic international law must be examined and seen in conjunction with the times in which the law was introduced. The social circumstances of the Arab life, through culture, habits and economy were effective in Islamic law which primarily aimed, at the first stage, to meet Arab requirements. Mohammad Talaat Al-Ghunaimi, The Muslim Conception of International Law and Western Approach (1968), pp. 3–4. According to one writer, the most important aspects
of Arab life at the time included ‘the widespread disintegration among the Arabs with every clan or tribe, as the case may be, claiming complete independence and fully independent status vis-à-vis the other clans or tribes, and ... war as the ultimate resort for settling disputes. In other words, the clannish spirit was overwhelming international relations among the Arabs, if we may use the term international in this context. From this point of view we could say that the chief purpose of Muslim international law was to mitigate, if not to banish, egoistical feelings and preach—as a substitute—fraternity, peace and security. This inference might suggest that both Muslim and Western international law have common ends.’ Id., p. 4. It must nevertheless be emphasised that ‘Muslim history and though were not always or necessarily identical with Arab history and thought, because when the Arabs, through their conquests, came into direct contact with the Greeks and the Persians they were influenced by both ... culture, and Islamic civilization reflected that influence.’ Id., p. 5.

3 These principles must be regarded as some of the most important principles in the creation of international peace, justice and security.
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.⁴

### 2. The Discipline of Islamic International Law

#### 2.1. Siyar

The system of Islamic international law originally evolved from *Siyar*, constituting the early system of Islamic international law governing the conduct of sovereigns. *Siyar* was a separate branch of law which was exercised in the early relations of Islamic states with other states and also between Islamic states.⁵ However, to some writers, *Siyar* is exclusively confined to the intercourse between Islamic states and other states and not to the relations between Islamic states themselves. This is not however accurate. Some reasons are that certain provisions of *Siyar* arise from the basic principles of Islamic law and its sources, especially the Qurʾān, as were exercised in the relations of Islamic states. The sources of *Siyar* or Islamic international law and those of Islamic law do not generally differ from one another and both are the two sides of the same coin. Both concepts of laws are developed from the Islamic concept of law and extended from the concept of universality of jurisdiction of divine law and are therefore basically the presentation of the same ideology. This is what we call the evolution of the Islamic system by different methods and presentations including national and international law. The same is true in the case of public international law. This is because the original concept of public international law has been developed from the concept of national law and it is indeed very difficult to underline which concept of law is the master guide of the other one.⁶ The same argument is also true

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⁴ See the Preamble of the Charter of the United Nations.
in the case of the evolution of the concept of international criminal law. This is because the original sources and principles of international criminal law are fundamentally taken from the concept of national criminal law which not only includes the methodological approach but also the procedural one.\(^7\)

2.2. **Universality**

While it cannot be denied that during the formation of the earlier Islamic states, there were some forms of divisions of territories, one of the chief principles of Islamic law is not to separate Islamic states from other states of our international legal and political communities. Earlier divisions\(^8\) of territories into different categories were surely political and were not rooted in the system of Islamic international law which definitely encourages the universality principle. There were also many reasons for the earlier divisions of the world into several classes.\(^9\) None of these divisions is valid under Islamic principles. This is because, if the Islamic system of law and Islamic international law speak of the universality principle of divine jurisdiction, such a division is theoretically invalid. Islamic and other states are a part of a universal union. Consequently, *Siyar* in the old system also meant universality. It covered the most important subjects of its time. These were the law of war, the law of peace and the law of neutrality, all of which were an integral part of *Siyar*.\(^10\)

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\(^7\) Examine the Statute of International Criminal Court and compare with national criminal legislations.

\(^8\) Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 156.

\(^9\) Firstly, misinterpretations which were made in the definitions and scope of the legal terminology of *jihad* caused a considerable number of classes of territories. These were *dar al-Islam* meaning the world of Islam, *dar al harb* emphasizing the world of war, *dar al-sulh* denoting the world of peace and *dar al muwad’ah* or *dar al’ ahd* implying the covenant world. Secondly, under the old systems of laws, there was much controversy concerning the division of the world into different stages; Like Rome and Greece who did not respect other states and recognised them as wholly uncivilized. These divisions have, even, continued during other centuries between some nations who claimed to have privileges over other nations. Even, in the twenty century, one of the authoritative writers of international law had divided the world into civilized and uncivilized nations. Oppenheim, *International Law* (1927). Thirdly, the early divisions of states into different worlds by Islamic states were to underline that there are Muslims and Non-Muslims. It may be relevant to state that the Charter of the United Nations in Chapter VII divides states of the world into at least two categories, those which are its permanent members and those which are its non-permanent members. The reason for this is to draw a clear line between two types of memberships and their jurisdictional and political powers.

\(^10\) Historically, "Although the pre-Islamic Arabs had their own international usages,
One should, however, emphasise that with the principle of universality, we do not mean here the concept of universality which applies in the case of certain international crimes such as piracy or certain rules and provisions under public international law governing the abolition of slavery and slave trade. But, we mean that the system of Islamic international law was not defined under the principle of sovereignty and territoriality but under a single concept of one territory in the world. This meant a universal application of the theory of jurisdiction and peace as well as justice for all nations regardless of their political, juridical, cultural and religion including language and economic abilities in their social and international relations.\(^{11}\)

Under Islamic international law, human activities believed to be within one jurisdiction and one universal society, even the world is in practice divided into many states. This is because the legal provisions in Islamic law have basically emerged from one constitution and there should not accordingly be any difference in the application of the law between different nations. Through the Islamic principles, all nations should be treated with equal arms, without any type of discrimination because of race, colour, language, religion, culture and political as well as military strength. The 2004 Arab Charter on Human Rights reads that:

1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.

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\(^{11}\) According to the Qur'an 2:213 “Mankind was but one nation, then God sent prophets as bearers of glad tidings and warners, and He sent with them the truth to judge thereby between men when they differ, and none differed therein but those very people to whom it was given even after clear signs had come to them, through revolt among themselves, whereupon God guided those who believed, by His Will, to the truth about which people differed, and God guides whomsoever He wills to the Right Path.”
2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph.\textsuperscript{12}

The principle of universality embodied in Islamic international law therefore opens a door to what is needed in international relations and what is not requested by the majority of states as a whole. In other words, the principle of universality solves confrontation between various legal systems and invites one exclusive legal system which should be accepted by all nations and respected within their jurisdiction.\textsuperscript{13} This theory may be compared with the globalization of law which is a broader aspect of the internationalization of international law with certain reservations. It may also be evaluated with the theory of international village.\textsuperscript{14}

\subsection*{2.3. Equal System}

The principle of universality in Islamic international law, does not mean to empower the Islamic system in international relations of states, it rather means that states should search to achieve the implementation of one legal system, the subjects and objects of which are recognised and accepted by the great majority of states because of their given consent. This can be named a public or global international law treating all states, nations and individuals under one equal system and jurisdiction which is acceptable to all nations for the purpose of the cultivation of justice. Thus, justice in the true Islamic system of international law, does not necessarily limit international rules and principles to the Islamic concept of legislation, but to the rules, norms and provisions that are concluded with free consent between various nations of the world for the purpose of peaceful implementation of international rules applicable to all states regardless of their juridical, political, economic and military strength. In other words, justice is not imposed, but it is the circumstances of freeborn consent.\textsuperscript{15}

\begin{thebibliography}{9}
\bibitem{12} Article 3.
\bibitem{13} It must, however, be mentioned here that the principle of universality in Islamic international law is not, wholly, respected in the practice of Islamic states.
\bibitem{14} en.wikipedia.org/wiki/Global_village_(Internet)—27k, visited on 2008-02-25.
\end{thebibliography}
Public international law also has similar basic theories. Its aims are the manifestation and application of the principles of equality by different means including humanitarian, human rights and other principles of equality within conventional international law such as conventions applicable to the high seas or conventions concerning the implementation of the law of armed conflicts. The most illustrative examples are, the Geneva Conventions, which are the consequences of the development of customary rules of international criminal law applicable in the time of armed conflicts. The provisions of the Geneva Conventions constitute an integral part of positive international law and a significant part of the international law of *jus cogens*. But, one problem with public international law is that its principles and rules for justice and fairness have mostly been born at a time of armed conflicts. They are the principles of the victorious states. This can be seen in the provisions of a large number of bilateral and multilateral conventions that have been signed after the end of a war such as the Versailles Treaty. Both, the League of Nations and the United Nations, are the two clear examples of this victorious justice. An examination of the Charter of the United Nations proves this unfortunate fact. The rule and provisions of Chapter seven of the Charter clearly emphasise the principles of inequalities and injustices. Although, one can scarcely reject the relevant provisions in the Preamble of the United Nations concerning the maintenance of peace, equality, justice and human rights, the concept of equal value between all nations of the world is indeed very uncertain. This is especially true, when one examines the nature of veto right that has been given to a few states in the heart of the United Nations.

The problem of both systems is not solely juridical or political, but, the manner in which the regulations of both systems are interpreted and applied by political and even juridical authorities of states or governments. In other words, Islam declares the principle of universality of international territory or the power of one legal system over one global territory which should bear equality between the subjects of the law. This is also the function of public international law which struggles for the implementation of international law under a global justice and principles including certain important rules of the United Nations. The fact is

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that the Charter of the United Nations strongly calls on states to respect the principle of equality. In the eyes of the Charter, the principle of equality constitutes the first principle for achieving international peace, justice and human rights.\(^\text{18}\) One cannot either ignore the fact that the Charter, simultaneously violates its own principles due to the provisions of Chapter VII. This creates a serious contradiction between its purposes. It freezes the value of equality principles within its Charter and eventually decreases its real significance between most states of the world including the Islamic nations.

3. The Origin of Both Systems

Islamic international law is, in principle, as asserted, the development of Siyar or the global rules, norms and principles which have come into force through the conclusions of international treaties and agreements based on Islamic sources. The same is true in the case of public international law which was originally developed from the conclusions of international treaties. The latter has also developed from the provisions of the Indian law of nations, the Persian law of nations, the Roman and Greek law of nations, the Scandinavian law of nations, the Islamic rules, the European law of nations and also the rules of communist countries based originally on the practices of the Union of Soviet Socialist Republics. Public international law was practised by the European states in their external conducts with one another.

There were no special differences, from the point of development, between the Siyar and the European Law of Nations. Both systems were extended from the law of war and the law of peace with the difference that one relied originally on the concept of divine law, and the other, was a combination of the law of man and the law of Christianity. The European Law of Nations and Siyar, have basically dealt with three main subjects. These are the law of war, the law of peace and the law of neutrality. This means that both systems of international law have, in their early stages

\(^{18}\) The United Nations has in its preamble stated that the people of the United Nations will ‘to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.’
of development, dealt with the same three main subjects of the time governing the most significant provisions of international laws.

It is important to mention here that by the system of Islamic international law or Siyar we do not necessarily mean that the principle of Islamic international law must prevail over or be given superiority to the system of international law. On the contrary, the purpose is to strengthen the system of international law on an equal footing by all states including Muslim nations. Again, ‘In the sphere of international relations, . . . the re-assertion of Islamic values does not necessarily mean the reintroduction of classical doctrines of Siyar; it is, rather, the reinforcement of general principles of law with ethical content.’ Thus, when we assert that the system of Islamic international law is the development of the principles of Siyar, our purpose is to examine the relevant system of international law in a contemporary mode and to draw a clear line between that part of Islamic law which exclusively deals with theological concepts, and that part which concerns the philosophy of international jurisprudence as a whole. This investigation does not suggest the implementation of the system of Islamic international law at all, but, a root for solving many international conflicts between Islamic and other states of the world. This is one of the ways to find out the origin of both systems of the law, in order to become conscious concerning the contemporary international conflicts. In other words, to assert that both systems have had different origins for their development may be true, but, it would obviously be wrong to assert that they have not historical and conceptual common values.

3.1. Juridical Structure

The terminology of Islamic international law consists of Shari‘ah and figh. This means that Islamic international law constitutes a substantive part of Islamic law or Shari‘ah, and from a procedural aspect, this makes the substance of Islamic law accessible. In other words, Shari‘ah is not figh but figh is the interpretation of Shari‘ah. One cannot, however, deny the fact that different views have been expressed concerning the meaning of

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Shari’ah and figh.20 Some are of the view that Shari’ah consists of both substantive and procedural parts of Islamic law, whilst others separate them in the end.21 Whatever the result of this analysis may be, Islamic international law comprises of both parts of Islamic law i.e. substantive and procedural parts. Both of these parts are, necessary and essential, in the definition and development of Islamic international law. Owing to this consideration, the juridical structure of Islamic law has essentially developed from various types of interpretations, presented by Islamic jurists.

However, one must not put aside the fact that any type of ideology in Islamic system, must be based on the principles of Islamic law and one should under no conditions ignore certain fundamental principles. These include the principle of equality, the principle of justice, the principle of presentation of ideology, the principle of universality, and the principle of integrity of oral or written agreements, i.e. *pacta sunt servanda*.

### 3.2. Speciality of the System

Islamic international law means rules, obligations, duties and liabilities governing international or inter-conduct of individuals, entities and states.22 Accordingly, it is due to these principles that diplomatic inter-
The nature of Islamic international law has long existed between a number of states including Muslim and Non-Muslim and which has certain significant functions in the development and consolidation of public international law.

Islamic international law does not aim to develop its provisions into the global legal community nor suggest that the international legal order must take into recognition its provisions. One important point in introducing Islamic law is the presentation of its legal norms, levels and degrees of application in order to solve many issues relating to international conflicts. Public international law could never develop, as it does today, without considerations of the rules of civilisations. The system of public international law must be studied side by side with other legal systems if it is assumed to been forced and respected by all nations. In principle, the law of Islam speaks of equality, justice and peace. These are the core principles, but not, exclusive principles of Islamic law. Although, we cannot deny the fact that the basic principles of Islamic law are violated in the practices of many Islamic states, this does not mean that the Islamic law permits such violations. Islamic law has, like many other laws, been disregarded in the practice of Muslim governments and presented, partly or entirely, by obscure interpretations which are not only not accepted in international legal community, but are also, abuse of its principles. This is a common fault with the pragmatic enforcement of a legal system and should not be confused with the basic principles of the same system. A clear example is the Marx and Engels principles and their misuse and misinterpretation by the communist authorities.

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23 By the phrase ‘Islamic international law’ we do not necessarily compare the system of international law with that of Islamic law. Our purpose is not to suggest which system of international law has historical or practical priority over the other. We present a system of law which has long existed between a number of states including Muslim and Non-Muslim and which has certain significant functions in the development and consolidation of public international law.
More significantly, the framework of Islamic international law has evolved and developed from the principles of the Qurʾān; constituting the main source of Islam. This means that Islamic international law has a central constitution legalizing interstate conduct in general and the social welfare of the international community in particular. These are some of the significant values of Islamic international law stated by Islamic writers and may also be understood from the chief principles of the law.24

The question whether these principles are respected in the practice of states claiming to base their constitutional values on Islamic norms, rules and obligations is another juridical and political issue and cannot easily be denied by international writers who are also familiar with the Islamic system. Thus, when we refer to Islamic international law, we do not necessarily mean that the relevant national authorities respect the purposes and obligations of Islamic or Islamic international law, rather we mean the historical existence of certain practices in certain parts of the world.25 But, the spiritual obligations of Islamic law are obviously ignored in the practice of many Islamic states. There are several reasons for these violations. Some of them are:

24 Before the creation of Islamic international law, there were other forms of international law namely Indian international law. Although, the Indian law of nations was regional, it was officially practised in inter-states relations. It was very well developed in the laws of diplomatic intercourse and the law of war. Islamic international law was not only regional, but was also international. This was because Islamic law of nations was broadly extended over the world including Europe where European classical writers became familiar with the Islamic system. Islamic international law was called Siyar, which also meant regulations and rules governing the inter-relations of various nations and states with Islamic states in accordance with the principles of equality, justice and peace commanded by the law of God. Due to this significant purpose, Islamic international law was developed and consolidated by several writers among whom one can refer to Mohammed Abn Hassen Shaybani from the eighth century. Majid Khadduri, Islamic law of Nations: Shaybani’s Siyar, translated with an introduction, notes and appendices (1966).

25 It must also be emphasised that violations of the principles of the law are not exclusively restricted to the conduct of Islamic states; the principles of public international law have frequently been violated in practice by many states, some of which are indeed very notorious such as the United States, China, the United Kingdom, and Israel. Islamic law obviously differs from its early and contemporary practices. When we speak about Islamic law, we do not mean its dogmatic position. Taking into consideration the time and circumstances under which Islamic law was presented, it contributed highly to common understanding, common values and common ends. It passed laws for both, individuals and social interests. Therefore, it simultaneously presented rules of law acceptable to the social interests of the time. While Islamic law does not change in substance and its principles are fixed, the law may adapt itself to new regulations or adapt other alien laws into its status quo.
i) Gaining political authority with those individuals who are extremely fanatical and do not wish any alteration;

ii) Those who have gained the political power of states may be highly corrupted, and use the whole machinery of the state for the satisfaction of their own interests;

iii) There exists a strong tendency in the international political community to cooperate with those individuals (i and ii), in order to have rather strong control over rich Islamic states, such as the prolonged relations between the United States and Saddam Hussein; and

iv) The imposition of Islamic law by religious authorities over certain Muslim and non-Muslim population, such as in Iran.

4. The Legal Characterization

The definitions of Islamic international law which are presented here do not necessarily represent the Islamic system practised by different existing regimes. They deal exclusively with those norms of Islamic law which simultaneously present the norms of Islamic international law adaptable to the norms of customary and positive international law. This means that although we do not limit any of these two systems of international law to one another, we do not refute that both systems have, more or less, similar definitions and purposes either; this is in order to achieve peaceful international relations and settlements of international disputes.

The concepts of fraternity, brotherhood, justice, equality, security and peace are recognised as core principles for an accurate understanding of the norms of Islamic international law. These principles constitute, the most important framework of the system, and can be examined within the content of the Qur’ān and other sources of Islamic international law.

26 See also chapter on sources of Islamic international law.
27 According to one writer “The Muslim law of nations is not a separate body of Muslim law; it is merely an extension of the law designed to govern the relations of the Muslims with non-Muslims, whether inside or outside the world of Islam. Strictly speaking, there is no Muslim law of nations in the sense of the distinction between modern municipal (national) law and international law based on different sources and maintained by different sanctions.” Khadduri, War and Peace in the Law of Islam, p. 46.
29 See infra.
Similar norms can also be found in the system of public international law, but, with the exception that they do not necessarily arise from divine jurisdiction, but are rather based on the position of public international law within the law of the United Nations.

4.1. Codification

It must be emphasised that the definitions of public international law have not always been the same and therefore they have been modified from time to time throughout the centuries. But, certain definitions in Islamic law have, from the time of its revelation, been fixed. While the law has been developed and interpreted by different theological and juridical groups, the basic principles of the law have remained unchanged since the time of creation. This means that the legal structure of the law including its purposes and functions are not a manifestation of the twentieth centuries as is the case in the system of public international law.

Strictly speaking, most radical and practical aspects of public international law are innovations within its system and are based on the evolution, development, codification, re-codification and acceptance of a large number of rules and obligations after the establishment of the United Nations. Therefore, the majority of the rules of public international law were created during the twentieth century, while those principal rules of Islamic international law belong to the century of its formation. For instance, the principles of human rights under Islamic international law

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30 Al-Ghunaimi, The Muslim Conception of International Law and Western Approach, pp. 4–5.
31 For example, Professor Parry states that “‘International law’ is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another. As states have formed organizations of themselves, it has come also to be concerned with international organizations and an increasing concern with them must follow from the trend which we are now witnessing towards the integration of the community of states. And, because states are composed of individuals, and exist primarily to serve the needs of individuals, international law has always had a certain concern with the relations of the individual, if not to his own state, at least to other state. Because in relatively in recent times states have accepted, in their agreements with each other, various duties towards all individuals within their respective jurisdictions, even the relations between the individual and his own state have come to involve questions of international law in a more direct fashion than that which comes in question when a state applies, as it often does, international law, or a species of reflection of it, as part of its own internal legal system. Nevertheless, international law is and remains essentially a law for states and thus stands in contrast to what international lawyers are accustomed to call municipal law—the law within the state.” Clive Parry, The Function of Law in the International Community, in Max Sorensen, Manual of Public International Law (1978), pp. 1–2.
(although these are not respected in most Islamic nations) are, in some way, similar to the principles of human rights formulated in the 1948 Declaration of Human Rights. The Islamic principles of human rights are the most significant facet of the law, declared fourteen hundred years ago.\footnote{32}

One of the chief differences between Islamic international law and public international law is that the former presents both municipal and international law within one framework, while the latter does not. The system of public international law has basically differed from the municipal laws of most states and this has created the possibility of partly rejecting or accepting the system. States are, to a large extent, free to select between the relevant rules of international law by entering or not entering into international conventions and this opens the possibility of violating the international legal system. It is important to note here that the system of public international law has, fourteen centuries after the rise of Islamic international law, developed the idea of a world legal system which is directed primarily by the United Nations, and enforcing on internal systems, the concept of international law in accordance with the provisions of declarations, conventions, agreements and treaties. A similar method to the Islamic international law is being developed in Europe by the enforcement of the European Union legal system on its members. This is a new achievement in Europe and is, largely, affecting on most European systems of internal laws. Similar ideas to Islamic thought and ideologies concerning one world under one law, of course different in character, were also developed by the former leaders of the Soviet Union. Their whole concept was based on the fact that public international law would only have temporary effects on internal laws, until it could achieve the principles of communism. T.A. Taracouzio, The Soviet Union and International Law (1935), p. 10.

The aim of Islamic international law concerning the creation of a world legal order under the provisions of one legal system of law is expressed by Khadduri. According to him “The rise of Islam, with its mission to all people, inevitably raised for the Islamic state the problem as to how it would conduct its relations with the non-Muslim countries as well as with the tolerated religious communities within its territory. The ultimate aim of Islam was, of course, to win the whole world, but its failure to convert all people left outside its frontiers non-Muslim communities with which Islam had to deal throughout its history. Thus in its origin the Muslim law of nations, in contrast to almost all other systems, was designed to be a temporary institution—until all people, except perhaps those of the tolerated religions, would become Muslims. It follows, accordingly, that if the ideal of Islam were ever achieved, the raison d'être of a Muslim law of nations, at least with regard to Islam's relations with non-Muslim countries, would be non-existent. The wave of Islamic expansion, however, could not continue indefinitely, so some law to govern the relations of Muslims with non-Muslims will remain so long as Muslims live in the world with non-Muslims.” Khadduri, War and Peace in the Law of Islam, p. 44.

It must, however, be emphasised that the division between Muslim and Non-Muslim is only linguistic and has nothing to do with their spiritual nature. All are equal before Islamic law when it is practised accurately. The origin of Islamic law fully respects other theories of law as well as religions. This is however under reciprocal conditions. It is even noted that the Islamic system was the first system in the world which gave special support to foreigners, respecting their laws and religions. Accordingly, “The basic principle of the system of international relations in Islam is, in the words of jurists, that ‘the Muslim and non-Muslims are equal (sawa’) ...’ In antiquity, the Greeks, for instance, had the
Consequently, with the term codification we mean that the Islamic system of international law, does not, as does the public international law, provide rules and norms for conduct of states in their international relations. This is because the provisions of Islamic international law are mostly for the conduct of individuals, even though individuals are controlled by states conducts. Despite this difference between these two systems of international laws, one must accept that Islamic international law may also be codified in certain situations. This may be acceptable, if the new rules of codifications are not against the fundamental principles of Islamic law. For instance, the regulations of Islamic principles of human rights into a number of human rights instruments are a form of codification of Islamic principles. This is also true in the case of the ratifications of other international conventions by Islamic states.33

Thus, new rules, provisions, norms and certain juridical formulations may be adopted within the system of Islamic international law, without any particular need for internal codifications. This means that the content of an international agreement may be ratified by Islamic nations for the purpose of establishing certain rules concerning their future international relations. An agreement should not however be against the principles of the Qur’an and the customary rules of Islamic law.

According to public international law, ratification is a process under which states have adequate time to examine different aspects of an agreement which has been negotiated and signed by their authoritative representatives. The notion of ratification is thus the notion of the re-examination, re-consideration and re-assessment of the rules of an inter-

33 See the following paragraph.
national agreement for the future conduct of the parties. This is in order to avoid any conflict between the new and the prevailing domestic provisions. The Qur’an has the function of the Islamic nation’s permanent constitution dealing with different matters of jurisdiction. When Islamic states have ratified an international convention, they are bound by its provisions and should not resort to pleading for the adoption of its provisions under their national systems. This is because, as a whole, Islamic states cannot ratify a convention which is in principle against the whole or part inspiration of the Qur’an. In other words, if an Islamic state goes against the basic principles of a ratified agreement and violates its objects or purposes, it has also violated promises arising from the original constitution of Islam. Thus, the ratification of a treaty constitutes, at the same time, codification of certain Islamic rules of conduct at international level. Those ratifications denote the codification of many provisions of Islamic international law and international criminal law.

4.2. Self-Conductive Value

The system of Islamic international law principally bases its jurisprudential value on individual contract, which does not bear the legal character of definition of international contracts under public international law. The former is self-conductive and is based on moral values and a universal legal standard based on divine law while the most central norms of public international law are based on rules governing conventional laws. By individual contract we mean obligations which are accepted

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34 It must even be added that in Islamic states, the constitutional rules should not be against the principles of the Qur’an.

35 It is important to note here that there is a difference between the concept of universality in Islamic international law and public international law. According to the latter the principle of universality cannot, widely, be employed in international legal matters—including criminal cases. This is because the principle of universality in public international law governs certain international norms which are universally accepted in the practices of states. For instance, under the provisions of the law of nations and international criminal law, piracy, war crimes and genocide are treated under the principle of universality. Those who commit these international crimes are considered enemies of mankind and therefore, all states have an international right and duty to bring the perpetrators of these international crimes under their criminal jurisdiction for prosecution and punishment. These international crimes are crimes which have consolidated character, being recognised as crimes against civilisation and jeopardizing the security of international legal and political community as a whole. The word universality in public international law is limited to certain international matters which are relatively more important than any other criminal matters. It is for this reason that under the principle of universality in public international law, all states are under
by an individual to be respected during his lifespan and are to be fulfilled in order to achieve social, political, economic and humanitarian values in a wider perspective.

A breach of an obligation within public international law constitutes a violation giving rise to the concept of civil or criminal responsibility of the violator. This is in order to protect international legislations. On the contrary, under Islamic international law, the purpose is not necessarily the protection of a legal value which is recognised by Islamic states. Accordingly, the spirit of human nature should be controlled by human beings themselves, through moral standard based on the jurisprudence

an international duty to establish jurisdiction over perpetrators of international crimes. Furthermore, states should not only arrest individuals who have committed international crimes under their own territorial jurisdiction, but, they should also arrest individuals who have committed international crimes under the jurisdiction(s) of other states and have, in one way or another, come under their territorial jurisdiction. This right of states also extends to the High Seas—formerly called Open seas. The most important point governing the principle of universality is that the principle has, basically, been limited in the case of applicability to international civil or criminal violations and therefore all norms of public international law and international criminal law cannot be treated within this principle. There is therefore a very serious conflict under the system of public international law or international criminal law when considering which norms constitute an integral part of these two legal systems.

However, the principle of universality has quite different value under Islamic international law including Islamic international criminal law. This is because, according to Islamic international law, all norms of international law should have universality character and should not be divided into different international values. The reason for this is that Islamic law has basically a universal character which means its norms and provisions are binding in all nations that have adopted Islamic principles of jurisdiction. It treats all its norms under the principle of universality and for this reason, Islamic states are tied up by its provisions. This means that all international crimes which are documented under Islamic international criminal law may be treated under the principle of universality based on the principle of reciprocity.

Islamic international law does not, in principle, impose obligatory rules on states without their given consent. But, whenever states have given their consent to its principles, they are obligatory. They should implement those principles under the concept of universality. Thus, a perpetrator of an international crime under Islamic law is treated under the principle of universality and Islamic states are under a legal duty to arrest all those who commit international crimes under their territorial jurisdiction. One may therefore assert that the principle of universality under public international law has a very limited scope while the whole system of Islamic international law is based on the universality principle of the law. By the same token, Islamic international law does not impose its principle of universality on non-Islamic nations or states. This is for two essential reasons. Firstly, Islamic law is not obligatory and its rules and obligations are based on the principle of mutual consent and reciprocal understanding. Secondly, Islamic law respects all other laws which do not impose their principles on other states. Equality between laws is the chief principle of Islamic and Islamic international law. However, this principle is frequently violated by the Islamic states, even under their own territories against different groups.
of divine law, and international relations of states should also benefit
the similar standard. This does not necessarily mean that Islamic divine
law has to get priority to other laws, but, an understanding of human
nature and the protection of their natural or universal rights must not be
superficial or documentary but practical and effective.

This is because Islamic international law is, mostly, based on individ-
ual protection and the way in which activities of individuals are extended
or limited. Every individual has, a great responsibility, to fulfil his/her
duties and not violate them. Thus, the provisions of the law must be
respected fully in order to maintain the purposes of the law and achieve
its self-conductive value in national and international relations. The prin-
ciple of self-conductivity can, for example, be seen within the provisions
concerning the duties to pay taxation and norms of human rights. How-
ever, in public international law, human rights provisions have mostly
the character of law creating norms. They have first to be formulated,
accepted, adopted, and later to be implemented by the states parties. This
means that rules of human rights in public international law are not nec-
essarily self-conductive. Their real nature has to be propagated by state
authorities. For instance, states are under international legal duties to
adopt the provisions of their international treaties into their national legal
systems, but they are, unfortunately, very sluggish regarding this matter
and sometimes even conservative. A clear example is the Convention on
the Rights of the Child and its purposes of protection of children. The
treaty and its Protocols have long been ratified by the Swedish demo-
cratic government; however it is not yet entered into its internal law. The
bureaucracy is very complicated and crippled. That is why the accep-
tance of norms of international human rights law and its implementa-
tion varies from state to state. In other words, Islamic international law
has, largely, normative self-conductive values, but, public international
law bases its values, on legal legislative mechanism. The examples are
many. The Nuremberg Tribunal, the International Criminal Tribunal for
the Former Yugoslavia, the International Criminal Tribunal for Rwanda
and Sierra Leona Court are some of the recognised courts which have
tried to bring the violators of the principles of human rights law and

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36 As it is stated ‘Islam is a religion of unity and action which safeguards individual
rights and liberties and provides at the same time for collective welfare . . . And as its call
was not meant, from its very inception, for an particular country, it was an advance over
what had hitherto been done to internationalise human society.’ Hamidullah, *The Muslim
Conduct of State*, pp. 40–41.
humanitarian law of armed conflicts under international criminal trials and justice. Thus, the function of international human rights law is, to put a certain limit, and restrict the unlimited international legal personality of states. This is in order that the principles of natural and positive law to be respected by the authorities of states.

The individuals under public international law are invited by legal forums to respect the provisions of international human rights, of course, depending on the nature of the provisions. This means that the system of international law has scarcely any enforceable machinery regarding the prevention of the violation of international human rights law. Concerning those very serious provisions of international human rights and humanitarian law, the system has often been violated. That is why we have created a number of international criminal courts for the prosecution of those who have seriously infringed the legal body of international human rights law.

But, one serious problem with the self-conductive value of Islamic law is that its enforcement is not necessarily required by law. Many individuals violate the Islamic human rights and go without punishment. Of course, if one believes in the theory of punishment as a method of enforcement. Moreover, Islamic states seriously violate the provisions of Islamic human rights law. They even violate those provisions which have been adopted in their own international conferences. The problem is that certain Islamic states such as the Iranian regime do not have any respect for human rights values and their implementation in national, regional or international courts. 37 Certain Islamic states have even compared, their own violations, with the serious violations of human rights law by western states within the territories of other states, and therefore, excusing different argumentations, their own human rights’ violations under their own territories. 38

4.3. Moral Values of the System

The system of public international law is, principally, a law for states, the duties and obligations of states and the way in which they must be fulfilled. Duties and obligations under Islamic international law belong, in contrast to public international law, to individuals. If states are recognised

38 A clear example of this is the Iranian authorities.
as subjects of Islamic international law, this only has a temporary nature for the purpose of the implementation of the law. Otherwise, the basic rules of Islamic law are, exclusively, based on individual values, and any entity under the law has to be motivated by individual wills and interests, with due regard to common values.  

One of the most specific values of Islamic international law is that all norms, rules and obligations should be implemented with due regard to the moral values of the law. This means that even in the case of war and defensive war, one must maintain humanitarian values and no rule of

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Although, Islam places a high value on individual rights and duties it expresses significant values for common ends or effective welfare simultaneously. This is the basic virtue of Islam which treats **common values as an integral part of individual values, and individual values, as the most fundamental element of common values.** Both values are, therefore, inter-related and cannot be treated in isolation. This is because, on the one hand, Islam encourages individual benefit regarding various trades, but it places, on the other hand, a heavy legal, religious and moral responsibility on individuals to fulfil their duties towards common ends for the purpose of social welfare. Social interests are, therefore, an integral part of individual duties.

For the above reasons, Islam has established two significant institutions, without which the whole theory of individual rights and duties is meaningless. These are Zakat as well as Baitul-Mal. They lay down the most practical and invaluable system of taxation under the principles of Islamic law. The institutions of Zakat encourage by way of legal, moral and religious duties, the individuals who have a good economic income to pay taxes. Individuals may, therefore, pay particular regular taxation to social authorities. The Zakat is also called *ibadat maliyah* by Islamic jurists—constituting a worship of God by means of property. *Zakat* is the social income of a community contributed by all Muslims to institutions of taxation without which the social or common values of Islam may lose, their spiritual effect. It is for this reason that *Zakat* constitutes one of the four basic rites of Islamic religion or divine prescription. *Zakat* was therefore raised by the Prophet, as a dignity of faith to divine jurisprudence. In his time, there was therefore no tax apart from that of *Zakat* paid to Muslim States. The institution of *Zakat* circulates national wealth and is therefore necessary and essential for all Muslims who have the relevant conditions for the payment of taxation. They should not therefore avoid their duties in this matter.

Non-payment of *Zakat*, not only violates the social standards of a relevant community, but is also, against the jurisprudence of divine law. Obviously, the poor are exempt from taxation, and have no basic responsibility to this Islamic taxation system. In contrast, they are protected by *Sadaqat* which is not only for the poor, but also for the poor among non-Muslims recognised as protected persons within Islamic territories. It must be noted here that *Sadaqat* is an integral part of *zakat*.

*Baitul-Mal* constitutes another Islamic institution which helps the poor and social services. This institution belongs to all Muslims. As a whole, the Qur'an constantly supports, by various means, both institutions of taxes. For example see the Qur'an 9:69. The Qur'an is, in general, silent concerning items and rates of taxation. The Prophet of Islam increased, on occasion, the rate of the taxation in extraordinary situations such as in the defence of the Islamic state. This means that in special situations, an increase in taxation is permitted for the purpose of common values.

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war should be violated. Furthermore, giving mercy to the vanquished should be a basic principle of the victor.\(^\text{40}\) Thus, Islamic international law promotes and extends the principles of human morality, even in the circumstances such as war, where human integrity may easily be violated. It is for this reason that Islamic international law bases its legal values, on moral standards of the law and not exclusively on strict juridical consideration. Therefore, according to Islamic international law, there must be a harmony between juridical norms and the moral standard of an international community of nations as a whole. This means the law ought to be of two natures i.e. moral and legal.

Now, what the definition of these terms is, is also another philosophical question in the system of Islam. Juridical norms within Islamic international law are of various characters. These can be, for example, i) norms arising from the main source of Islam i.e. the Quran; ii) norms arising from other sources of Islamic law such as \textit{sunnah}; and iii) norms arising from conventional provisions concluded between two or several states. The moral standard of international community refers to prevailing attitude and the way of understanding of social relations between men and men and his universal formation. It is the unconditional respect allocated to every human being. The term ‘moral standard of international community’ also refers to the degree and level of mutual and multilateral cooperation between nations for the solving of international issues and conflicts, but not only with the terms of law, but also, with the terms of love to the nature of mankind. The same is true in the case of certain provisions of international law dealing with the questions of human rights law. For instance, the 2000 United Nations Millennium Declaration has double characteristics. Firstly, it is an integral part of international human rights law. Secondly, it simultaneously presents the moral attitudes of international community as a whole.\(^\text{41}\)

\(^{40}\) Humanitarian law constitutes one of the most important parts of Islamic international law. For this reason, during a war, certain regulations have to be respected by conflicting parties. Soldiers were not allowed to violate the provisions of the law and were therefore prohibited to use certain methods during a conflict which was against the moral value of human nature such as attacking old and handicapped, targeting hospitals, refugees’ shelters or killing children and raping women.

\(^{41}\) General Assembly Resolution 55/2 of 8 September 2000. The Millennium states that “We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and
4.4. Integration of Values

Islamic international law is supposed to be a combination of universal law with the moral standard of international community as a whole. Both of which have important values for the development of the community and for a better understanding of the international problems arising from the misinterpretation of different systems. Due to this basic discipline, legal order constitutes also moral order and these cannot, principally, be isolated from one another. They serve as human values and are the necessity for the understanding of each other. Based on this principal reason Islamic international law, contrary to that of classical public international law, does not necessarily separate legal values from those of moral values and treats them with the same basic values, within the philosophy of the system.

However, public international law has, due to the circumstances of its development and evolution, treated legal and moral values differently. There has always been a discussion between natural law and positive law and the way in which they express their argumentations. The positivism did not put especial value to the naturalism point of views. They argued that legal order must be the consequence of legislation authorized under the power of state. For them, natural law could not create legal order, since it stemmed from the theological concepts or rules which came from the natural existence of man having hypothetical foundations.42

The newest development in international law is to combine these two values and not separate them from one another. Clear examples may be found in the system of humanitarian law of armed conflicts. The system has, essentially, been based on the moral value of humankind and not exclusively on the legal value of relevant norms. The system in international law has most effectively been developed since the establishment of the United Nations and is basically the consequence of the brutality during the Second World War. Legal and moral values are treated equally and together have presented one of the most recognised standards of international community of nations regarding certain matter of international interests.

equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs."

The purpose of humanitarian law in public international law has been, as far as possible, to prevent inhuman suffering during a war and to encourage humanitarian conduct between those who are involved in an armed conflict. Here, humanitarian conduct in another word can be interpreted as moral value during the war and of the law which has privileged any other material interests.\(^{43}\) Thus, it is the legal and moral values of the system of international humanitarian law of armed conflict which gives it international standard, or, as we have spoken in the case of Islamic international law, the moral standard of international community, as it is accepted, formulated and recognised within the relevant international conventions.

4.5. Similar Weight

An investigation into juridical and moral value in the relevant areas of both systems of international law demonstrate that they put a similar weight on the respect of law and man but based on different sources. The Islamic international law relies on the inspiration of divine jurisdiction and therefore concentrates on human substance and the moral standard of the given community. Public international law relays heavily on treaty laws which combine, in especial areas, with the questions of human rights or the moral standard of the provisions of the relevant convention. Both systems, obviously assimilates to one another in certain basic questions such as the moral value of a given regulation or the moral standard of a community of nations. In other words, public international law speaks of civilisation in the meaning of jurisdiction by man for man. Islamic international law speaks of the divine fixed universal jurisdiction in the form of morality, humanity, brotherhood, equality, mercy, compassion and the democratization of international relations of states on equal footings. Unfortunately, it is, in practice, a fact that none of the above systems creates equality between its subjects and the question of equality varies in accordance with international economic, military and political strength.

\(^{43}\) “Who spend (for the sake of man) in both prosperity and strain, and who restrain their anger and forgive the faults of men; God loves those who do good (to others)” “This is a clear statement for mankind, a guidance and admonition for the pious.” “Do not lose heart, and do not grieve, for you shall gain the upper hand if only you truly believe.” The Qur’ān, 3:134, 138 and 139.