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Treaty-Making Under the *Siyar*: Early Islamic Reconciliation of Doctrine with Reality

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Abstract

Modern conceptions of international law base its legitimacy on the idea of universal principles and customs derived from Western scholarship and consensus. This often overlooks older systems of international law which may be based on different principles or which derive legitimacy from other sources. Early Islamic international law (*siyar*) developed in the mid-7th century CE and approached international issues as a tool to help achieve the religion's universalist objectives. Islamic doctrine was both a religion and political structure which sought to bring the entire world under the control of the Islamic state.

Originally created as a temporary institution, the *siyar* addressed a variety of subjects, including holy war (*jihad)*, campaigns (*maghazi*), spoils (*ghanima*), apostasy (*ridda*), and safe-conduct (*aman*). As the Islamic state developed and conquered surrounding lands, it became evident that worldwide hegemony was, at best, an extremely lengthy process. The practical need for interaction with other nations forced jurists to distill from Islamic doctrine an internally consistent jurisprudence to govern these relations. Nowhere is this reconciliation of practical considerations and theology more evident than in the process of treaty-making. This article explores the sources and methods of interpretation that informed early Islamic laws on treaties. It analyzes various methods which

resulted in a creative and sophisticated field of jurisprudence. The article notes that although these interpretations were not always consistent among jurists and schools, doctrinal reconciliation with practice reveals the influence of jurists under the Islamic legal system and the sophistication of international law centuries before modern international scholarship.

Introduction

Western scholarship has thoroughly developed historical interpretations of international law and, as a result, has significantly influenced the perspective of those writing on the subject. Despite the tendency to trace international law back to the writings of its "father", Hugo Grotius, in the seventeenth century,[1] a wide variety of international legal structures and scholarship pre-existed Grotius and extended far beyond the borders of Europe.[2] Western conceptions of sovereign-ty and the idea of the nation-state heavily influenced the rhetoric of conversations on international law. However, forms and mechanisms of international legal relations stretch back to the Graeco-Roman era and perhaps beyond.[3] At its heart, international law is a set of rules and principles established in order to govern interactions between distinct groups of people. These rules and principles are based on a variety of sources, including cultural and religious ideals, philosophical doctrines, and practical needs. Such systems have existed throughout history, arising whenever societies have required a means by which to facilitate their relations with one another. One such system, Islamic international law, arose during the mid-seventh century in order to manage relations between followers of the

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1   Mautner, T. (2005), "Grotius and the Skeptics", *Journal of the History of Ideas*, No. 4(66), p. 577.

2   Akhtar, S. (1970), "An Inquiry into the Nature, Origin and Course of Islamic Law of Nations", *Karachi Law Journal*, No. 63, p. 71. The *siyar* developed "elaborate rules of war, peace, treaty and neutrality governing the relationship of Muslim and non-Muslim states some eight centuries before Grotius and others wrote their treatises on the Modern Law of Nations". Ibid.

3   Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 2.

newly established Islamic State and its neighbors.[4]

Beginning in the seventh century CE, the geopolitical landscape of the Middle East, and eventually Europe and Asia, permanently changed to accommodate the nascent religion of Islam. According to Islamic tradition, in 610 CE the Prophet Muhammad received a series of religious visions, revelations from God conveyed by an angelic messenger.[5] After an initial period of fear and hesitation, Muhammad embraced the experiences, understanding himself to be the divine messenger of God on earth.[6] These revelations, the literal word of God (or Allah in Islam), constitute the basis of the holy book of what is now known as the religion of Islam.[7] The revelations outlined a new spiritual framework, prescribed a righteous way of living, and revealed the possibility of salvation in the afterlife. The new religion "emphasized the oneness and omnipotence of God, Creator of the world and of everything in it, including humankind".[8]

As the number of Muhammad's followers in Mecca grew, opposition and abuse from the city's controlling tribe, the Quraysh, did as well.[9] Islam threatened the economic and social significance of the tribe, resulting in hostilities that pushed the Muslims out of the city.[10] The migration, known as the *hijra*, led Muhammad and his followers to an oasis town 250 miles north of Mecca, later renamed Medina or "the Prophet's city".[11] It was in Medina that the Muslims first encountered a need for "international" relations. Although they were merely a migrant religious group at the time, their interactions with the inhabitants of Medina established a distinctly Islamic method for dealing with non-Muslim groups.[12] This method of interaction would eventually become the basis for Islamic international law.

In the following centuries, Islam, both as a religion and a State, would ex-

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4   Ibid. Pp. 3-5.

5   Esposito, J.L. (1999), *The Oxford History of Islam*, Oxford University Press, Oxford, p. 6.

6   Ibid.

7   Armstrong, K. (2002), *Islam: A Short History*, The Modern Library, New York, p. 4.

8   Esposito, J.L. (1999), *The Oxford History of Islam*, Oxford University Press, Oxford, p. 7.

9   Armstrong, K. (2002), *Islam: A Short History*, The Modern Library, New York, pp. 11-13.

10   Esposito, J.L. (1999), *The Oxford History of Islam*, Oxford University Press, Oxford, pp. 8-9.

11   Ibid. P. 9.

12   Emon, A. (2002), "Reflections on the "Constitution of Medina": An Essay on Methodology and Ideology in Islamic Legal History", *UCLA Journal of Islamic and Near Eastern Law*, No. 1, p. 103.

pand throughout the Middle East, Africa, and parts of Asia.[13] In order to maintain its territorial holdings and further the objectives of the religion, the Islamic State, via its legal scholars, developed a comprehensive system of international law. This system, the *siyar*, was characterized by religious obligation, monism, and natural law as derived from the holy teachings of Islam.[14] The *siyar* greatly affected Islam's expansion, informing its political and economic actions in the global arena.

One area of international relations most affected by the principles of the *siyar* was treaty-making.[15] Despite its meteoric rise to power and vast territorial control, the Islamic Empire was unable to achieve world-wide hegemony, necessitating the creation of limited, formalized relationships with foreign entities.[16] The resulting treaties were circumscribed by the rules set out in the *siyar.* An analysis of treaty-making in the early Islamic

State sheds light on jurisprudential reconciliation of religion and practice. The tensions between religious obligations and practical considerations resulted in a creative and theoretically sophisticated body of law.

Below we discuss the foundations of the *siyar*, analyzing its place in Islamic law as a whole, as well as describing its sources and theoretical underpinnings. Then we turn to treaty-making as a subsection of Islamic international law followed by a comparative analysis of two early Islamic treaties, the Treaty of Hudaybiyya and the *Baqt* Treaty, in order to examine the theoretical reconciliations of different treaties with Islamic doctrine. We conclude with observations on the Islamic *siyar* and treaty-making.

Background

Defining Al-Siyar

The Islamic law of nations, or *al-siyar*, governed relations between the Islamic State[17] and all other

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13 Esposito, J.L. (1999), *The Oxford History of Islam*, Oxford University Press, Oxford, p. 20.

14 *Infra,* discussing the qualities and characteristics of the *siyar.*

15 *Infra,* discussing Islamic treaty-making.

16 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 684.

17 Majid Khadduri described the evolution of Islam as a State:
"The Islamic state passed through various stages of evolution until it acquired universal attributes. It began as a city-state in Madina (A.D. 622) and expanded later to incorporate Arabia and the neighboring countries as well as a vast area in southern Asia and northern Africa. It culminated in

entities.[18] The *siyar* described rules governing war, peace, diplomacy, and treaty-making between Muslim and non-Muslim nations and people.[19] Although the *siyar* existed as a distinct body of law that specifically outlining the rules, principles, and practices governing international relations, it was ultimately a branch of the greater Islamic national law (*sharia*).[20] The Islamic State derived *sharia* from Islamic religious principles,[21] resulting in a body of almost entirely religious law.[22] The *siyar*, therefore, was based on the same basic religious principles, obligations, and motivations as *sharia*.[23] However, not all Islamic jurists writing on issues involving Muslim interaction with the non-Muslim world use the term *siyar*. Instead, jurists often discussed relations between the Islamic State and others under the subjects of *jihad*, campaigns (*maghazi*), spoils (*ghanima*), apostasy (*ridda*), and safe-conduct (*aman*).[24] For example, certain scholars viewed *jihad*,[25] or Islamic holy war, as a wholly separate area of jurisprudence from the *siyar*, whereas others analyzed it as a subsection of the greater body of international law. The most significant jurist to write systematically on the *siyar*, Muhammad al-Shaybani,[26] solidified the

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a gold age of ascendancy with the establishment of the 'Abbasid dynasty (A.D. 750) . . . and then began to be subdivided into political entities which accommodated themselves to surrounding conditions, until these entities were finally integrated as sovereign states in the modern community of nations".
Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 22. We use the term "Islamic State" herein to refer to the period between 622 and 900 CE, encompassing the periods Khadduri describes as city-State, imperial, and universal.

18 Ford, C.A. (1995), "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, No. 30, pp. 500-501.

19 Ibid. Pp. 500-502.

20 Ibid. Pp. 500-01.

21 See *infra* for a discussion on the effects of Islamic religious doctrine on the State and national laws.

22 Hallaq, W.B. (1997), *A History of Islamic Legal Theories*, Cambridge University Press, Cambridge, pp. 3-4. Although "the Quran is primarily a book of religious and moral prescriptions, there is no doubt that it encompasses pieces of legislation, strictly speaking". Ibid.

23 Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 22.

24 Ibid. P. 39.

25 *See infra* (discussing the place of *jihad* within the greater Islamic conception of the world and its effects on the *siyar).*

26 Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 22. Shaybani studied under two of the leading jurists of his time, Abu Hanifa, founder of the Hanafi school of jurisprudence, and Malik ibn Ana, founder of the Maliki school. Ibid. P. 30.

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use of the term in the mid-eighth century to encompass a wide range of international legal issues.[27] His two treatises on *al-siyar* involved extensive discussion of the appropriate application of Islamic law to a variety of international issues, including treaty-making; battlefield conduct; the treatment of diplomats, hostages, refugees, and prisoners of war; the right of asylum; and the use of poisonous weapons.[28] For the purposes of this article, we will defer to Shaybani and discuss all subjects affecting international relations in the early Islamic Empire under the heading of *siyar.*

Sources of Siyar

Because both *sharia* and the *siyar* derived ideological justification and practical legitimacy from Islam, it is necessary to understand the tangible and intangible sources from which such authority came. As the international branch of a larger system of religious law, the *siyar* shared most of its sources with *sharia*.[29] Jurists supplemented the core doctrine with sources unique to the *siyar's*

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27   Ibid. Pp. 36-39.

28   Ibid. Pp. 12, 38-41.

29   Ibid. P. 8. Islamic international law "is to be formulated on the basis of the Quranic verses that bear on the relationship between Muslims and non-Muslims." Hallaq, W.B. (1997), *A History of Islamic Legal Theories*, Cambridge University Press, Cambridge, p. 236.

international purpose.[30] *Sharia* derived its mandates from four main sources: the Quran, the *sunnah*, judicial reasoning and interpretation, and judicial consensus.[31] The two most significant sources were the Quran, or the holy book of Islam, whose verses are said to have been conveyed to Muhammad by the Angel Gibreel, and the *sunnah*, or the teachings and practices of Muhammad based on his words, habits and silent approvals.[32] The teachings and mandates of the Quran and *sunnah* were interpreted by Islamic jurists, who developed a field of Islamic jurisprudence known as *fiqh*.[33] *Fiqh* laid

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30   Ford, C.A. (1995), "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, No. 30, pp. 3, 24-25.

31   Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, pp. 8-9.

32   Movsesian, M.L. (2010), "Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence"*, Seton Hall Law Review*, No. 3(40), p. 868.

33   Ibid. P. 862. Several schools of *fiqh* evolved in the Islamic State, each named after the jurist who founded the particular school of thought (*madhab*). Ibid. Both the majority Sunni and minority Shia denominations developed schools, which provided controlling jurisprudence and methods of interpretation for a specific geographic region. Ibid. Pp. 870, 865. The primary Sunni *madhabib* were the Hanafi, Shafi'i, Maliki and Hanbali schools. Ibid. This article will focus on the primary Sunni schools of thought.

out law and guidance on the universe of human actions, including *wajib*, what is required; *haraam*, what is sinful, *mandub*; what is recommended; *makruh*, what is disapproved; and *mubah*, what is neutral.[34] The cumulative interpretations of jurists created a large and detailed body of law, somewhat similar to modern conceptions of common law interpretation and precedent.

Because the *siyar* required application of Islamic law to relations with non-Muslims, discrepancies between theory and practice often necessitated legal justification beyond the traditional sources. Thus, jurists often relied on additional sources of law as supplements, incorporating principles and rules derived from treatises and peace agreements, rules and practices derived from experience, and public pronouncements and official instructions of caliphs.[35] This combination of traditional religious sources and sanctioned historical sources allowed jurists to adapt the *siyar* to meet the practical needs of the state while remaining faithful to Islamic tenets.

Theoretical Foundations of the Siyar

In order to contextualize the *siyar* within the greater framework of Islam as a whole, it is necessary to examine the theoretical-theological underpinnings of the law. Because the *siyar* is derived overwhelmingly from religious precepts, the objectives, and consequently the laws created to satisfy those objectives, are shaped by Islamic doctrine. The theoretical foundations of the *siyar* can be divided into three broad categories: the objectives of Islam, the Islamic conception of the world, and the resultant foundational principles of the *siyar*. The interaction between concepts within these categories created a unique religious framework for international law and relations.

1. Objectives of Islam

Islamic doctrine provided two main goals for the religion as a whole.[36] First, Islam required the establishment of peace and order within the area brought under its control.[37] Order was to be established in accordance with Islamic justice through *sharia*. This was only proper, as Islamic legal theory viewed its own law as a form of natural law, hav-

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34 Ibid. P. 876; Hallaq, W.B. (1997), *A History of Islamic Legal Theories*, Cambridge University Press, Cambridge, p. 40.

35 Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 8.

36 Khadduri, M. (1956), "Islam and the Modern Law of Nations", *American Journal of International Law*, No. 50, pp. 358-359.

37 Ibid.

ing proceeded from a divine source, perfect, eternal and universally applicable. Islam's second but equally important objective was to expand the area under Islamic control to include the entirety of the world.[38] The second objective follows from the first, as Islam's monist world view necessitated the subjugation of the world to its universal legal theory. These ambitions were to be achieved by the people individually and in aggregate via the state. Thus Islam positioned itself as an expansionist, proselytizing religion which "used the state as an instrument for achieving a doctrinal or an ultimate religious objective."[39]

2. Islamic Conception of the World

The expansionary objective of Islam informed its understanding of the world and the relations of entities within it. At its most basic, Islam divided the world into two parts: *dar al-Islam* and *dar al-harb*.[40] *Dar al-Islam*, or the abode

of Islam, included those lands and nations that had been brought under the control of the Islamic Empire and consequently followed *sharia*.[41] This half of the world conformed to the ways of Allah and therefore embodied the ultimate and perfect version of society.[42] *Dar al-harb*, or the abode of war, accounted for the remainder of the world.[43] Because Islam required the eventual conversion of the known world, it necessitated the incorporation of the *dar al-harb* by the *dar al Islam*.[44] Thus, the two regions were theoretically in a constant state of war and could not countenance a lasting peace.[45]

Islam required an instrument through which it could achieve its ultimate objectives of a global *dar al-Islam* and found this instrument in the concept

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38 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 684.

39 Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 5.

40 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 683.

41 Ibid.

42 Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 12.

43 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 53.

44 Ibid.

45 Ibid. War "is not characterized in terms of rival heads of states competing for military power but rather by non-recognition of any enemy 'state' and an attempt to engulf territory into an Islamic empire". Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), pp. 683-684.

of *jihad*.[46] The term *jihad* means "struggle" or "exertion" but is more commonly defined as holy war.[47] Although *jihad* does encompass war and violence in the pursuit of religious objective, it does not require physical force. *Jihad* is a duty to "fight" unbelievers, to struggle or exert oneself in the name of Islam and for the cause of Islam. Such fighting may be metaphorical and accomplished by persuasion as well as warfare.[48] However, the term typically referred to military exertion, and the *siyar's* treatment of the subject was generally confined to *jihad* as war against unbelievers. *Jihad* is often conceptualized as both the instrument and the constant state of war itself.

Islam required both the State and individuals to use the mechanism of *jihad* to pursue hegemony.[49] The requirement of expansion was not merely a State duty but an individual one as well.[50] Conversion, whether by force or otherwise, constituted a duty for each Muslim.[51] It is significant to note that Islam prohibited warfare unless it furthered or fulfilled Islam's ultimate purpose.[52] Thus, *jihad* is the only permissible type of war, a form of just war.

The conflict between *dar al-Islam* and *dar al-harb* and the duty of *jihad* did not, however, require conversion of all conquered peoples to Islam. Once the Islamic State gained territorial control over an area and imposed upon it Islamic order through law, that area became part of *dar al-Islam*.[53] Newly conquered individuals finding themselves within the *dar al-Islam* were free to practice their own religion.[54] The Islamic State divided its citizens into two groups. Muslims within the *dar al-Islam* were members of the community of believers, or *umma*.[55] Christians, Jews, and

46 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 51.

47 Al-Saidat, E.M., Al-Khawalda, M.I. (2012), "Jihad: A Victim of Policy and Misinterpretation", *Asian Social Science*, No. 7(8), pp. 202, 204.

48 Khadduri, M. (1985), *The Islamic Conception of Justice*, John Hopkins University Press, Baltimore, p. 164-165.

49 Ibid.

50 Ibid.

51 Ibid.

52 Ford, C.A. (1995), "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, No. 30, pp. 502-503.

53 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 681-684.

54 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, pp. 175-176.

55 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Per-

other religious believers known to have possessed scripture collectively formed a separate and distinct community and were known as *dhimmis*.[56] For the price of a poll tax, these individuals could retain their religion while living within the *dar al-Islam*.[57] *Dhimmis* received only partial rights of citizenship as compared with their Muslim neighbors.[58] However, members of both communities enjoyed full status as subjects of the caliph, which granted them a claim to internal security and protection from foreign attack.[59] *Dhimmis* were permitted access to Islamic courts and justice upon request and agreements issued under Islamic law governed relations between *dhimmis* and Muslims.[60] Thus, Islamic universalism

desired that the world be subject to Islamic justice, but did not seek to convert all individuals in the world to the religion itself.

Despite the theoretical state of perpetual conflict, Islamic leaders and jurists recognized the need for non-hostile interaction between *dar al-Islam* and *dar-al harb*.[61] The Islamic State could not engage in war on every border simultaneously in single-minded pursuit of Islam's ultimate goal.[62] In order to conserve and apportion resources for the maintenance of the empire, Islamic leaders accepted the practical necessity of engaging in at least temporarily peaceful relationships with non-Muslim nations.[63] A need for some method of principled interaction with non-Muslim nations emerged. The *siyar* developed as a response, a gap-filling body of law providing rules governing war, "peace," and everything in between.[64]

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manent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 683.

56 Khadduri, M. (1956), "Islam and the Modern Law of Nations", *American Journal of International Law*, No. 50, p. 359.

57 Abdel Haleem, M.A.S. (2012), "The Jizya Verse (Q. 9:29): Tax Enforcement on non-Muslims in the First Muslim State", *Journal of Qur'anic Studies*, No. 2(14), p. 85.

58 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 195-99.

59 Ibid.

60 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 683.

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61 Ibid.

62 Ibid. "Even at the height of Islam's expansion and regional domination, it was simply a logistical impossibility to deny the existence of non-Islamic states and the reality of distinct states in general". Ibid.

63 Ibid. Agreements between the Islamic state and non-Muslims "were thought to be limited in duration, expiring when all territory was incorporated into the dar al-Islam". Ibid.

64 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation",

3. Foundational Principles of the Siyar

Because the *siyar* was grounded in Islamic doctrine, the expansionary objective and resultant binary conception of the world circumscribed the *siyar's* jurisprudence. Several key principles derived from this framework establish the theoretical foundation of the *siyar*.

The first principle is that Islam is both religion and State.[65] This is a reflection of the Islamic view of its own natural law as a self-evident basis for government. Thus, as discussed previously, Islamic doctrine must guide and inform the *siyar*. The second principle is that only the community of believers (*umma*) is the subject of the Islamic legal and ethical system, whereas all other communities are the object of that system.[66] Essentially, Islam viewed the *dar al-harb* as existing in a state of nature or chaos. While authorities emerged to organize that chaos (non-Muslim States and empires), they did not conform to Islamic law and therefore could not be dealt with as equals by the Islamic State.[67] Indeed, there could be no equal to the Islamic State; the monist nature of Islam allowed for only one valid authority under Allah.

The final principle underlying the *siyar*, and one particularly significant to its development, is the idea that the *siyar* is a temporary institution.[68] This principle follows from the expansionist objective of Islam. If the borders of *dar al-Islam* will eventually and inevitably coincide with those of the whole world, creating a borderless society under the order of Islamic justice, then a body of law determining Islamic relations with other nations is unnecessary. If there are no other nations, then there is no need for international law. Thus, the *siyar* would be rendered obsolete when Islam achieved complete hegemony.[69] The *siyar* was only necessary insofar as Islam remained in the process of attaining its universalist goal. However, as it became evident that Islam would not be able to achieve its ultimate objective, the *siyar* became a permanent branch of *sharia*.[70]

Indiana Journal of Global Legal Studies, No. 2(16), p. 693-694.

65 Ibid. P. 506.

66 Khadduri, M. (1966), *The Islamic Law of Nations: Shaybani's Siyar*, John Hopkins Press, Baltimore, p. 10.

67 Ibid. P. 14. Islamic doctrine held that negotiations with the *dar al-harb* "did not

imply equality between the two parties nor did they possess a permanent character". Ibid.

68 Ford, C.A. (1995), "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, No. 30, p. 501.

69 Ibid.

70 Ibid. P. 502.

Much of the development and many of the rules of the *siyar* are informed by its original provisional nature as well as its gradual ossification. This article will primarily discuss the classical 'temporary' *siyar* of early Islamic history of the seventh to ninth centuries.

Treaty-Making under the Classical *Siyar*

In General

Despite the perpetual state of hostility between Muslims and non-Muslims, treaties played a significant role in Islamic history, from the days of Muhammad through the present day. The laws of the *siyar* include restrictions on Muslim treaty-making but do not prohibit it. Indeed, treaties are "not considered inconsistent with Islam's ultimate objective if a peace treaty is concluded with the enemy, whether for purposes of expediency or because Islam suffered a setback."[71]

Treaty-making between Muslims and non-Muslims is permitted by the Quran: "How can there be for the polytheists a treaty with Allah and with His Apostle, save those with whom ye have made a treaty at the Sacred Mosque! So, as long as they act uprightly by you, do ye act uprightly by them; verily, Allah loves those who fear".[72] This acknowledgment of treaty-making with non-Muslims is supported by the historical example of two early Islamic treaties negotiated for and entered into by Muhammad himself. The Prophet executed the first Islamic treaty, known as the Constitution of Medina, shortly after the migration of Muhammad and his followers from Mecca to Medina in 622 CE.[73] The agreement set forth provisions concerning the relations of all of the significant groups of Medina, including Christians, Jews, Arab tribes, and the newly arrived Muslims.[74] It created different rights and responsibilities within the different groups and placed the power and responsibility to dictate disputes in Muhammad.[75]

71 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 202.

72 Khan, M.Z. (1997), *The Qur'an, The Eternal Revelation Vouchsafed to Muhammad, The Seal of the Prophets, transl.*, Interlink Publishing Group, Northampton, p. 173, verse 9:7.

73 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 142.

74 Emon, A. (2002), "Reflections on the "Constitution of Medina": An Essay on Methodology and Ideology in Islamic Legal History", *UCLA Journal of Islamic and Near Eastern Law*, No. 1, p. 105.

75 Ibid. Pp. 105-106.

Muhammad entered into another treaty in the early days of Islam, the Treaty of Hudaybiyya, which is discussed below. This treaty provided a great amount of precedent for jurists in terms of treaty provisions, duration, negotiations with non-Muslims, and Muslim response upon breach by the other party. Taken together, the two treaties support the proposition of Islamic recognition of treaties with non-Muslims.

Upon the execution of a treaty, the Islamic State is bound by its terms until the treaty expires or is dissolved as a result of a breach on the part of the non-Muslim.[76] This duty to fulfill the obligation also finds its roots in the Quran, which enjoins the Muslim to "... fulfill the covenant of Allah when you have made a covenant, and do not break oaths after making them ... be not like her who unravels her yarn, disintegrating it into pieces after she has spun it strongly".[77] An ancient Arab proverb goes so far as to state that "the contract is the *sharia* of the parties".[78] Under Islamic law, treaties

required the same level of adherence to obligation as contracts.[79]

The Quran also provides the right for the dissolution of a treaty upon breach of its provisions: "[s]houldest thou apprehend treachery from a people who have made a pact with thee, terminate the pact in a manner that should occasion no prejudice to either side."[80] The *sunnah* also supports this injunction, referring to the breach of the Treaty of Hudaybiyya by the Quraysh tribe, which resulted in the dissolution of the treaty and the Conquest of Mecca by the Muslims.[81]

Treaty-making with non-Muslims typically fell into one of two categories: treaties with non-Muslim entities of the *dar al-harb* and treaties with *dhimmi* communities, non-Muslims living in the *dar al-Islam*. The most significant difference between the two treaties is duration. While treaties with non-Muslims in the *dar al-harb* were limited in duration, treaties with *dhimmis* could be perpetual

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76 Ibid. P. 106.

77 Khan, M.Z. (1997), *The Qur'an, The Eternal Revelation Vouchsafed to Muhammad, The Seal of the Prophets, transl.*, Interlink Publishing Group, Northampton, p. 250, verse 16:92.

78 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diploma-

cy", *Florida Journal of International Law*, No. 18, p. 140.

79 Ibid.

80 Khan, M.Z. (1997), *The Qur'an, The Eternal Revelation Vouchsafed to Muhammad, The Seal of the Prophets, transl.*, Interlink Publishing Group, Northampton, p. 170, verse 8:58.

81 *Infra* discussing the Treaty of Hudaybiyya in detail.

in nature.[82] This is because treaties with *dhimmis* typically took on the characteristics of a constitutional charter, outlining the limited rights of the *dhimmis* and their responsibilities under Islamic law.[83] The following sections will focus on the first type of treaty, which falls squarely under the purview of the *siyar* because of the international nature of the agreement.

Characteristics of Early Treaty

Early Islamic treaties typically shared several characteristics. The treaties tended to be brief and general, outlining basic provisions and providing minimal detail as to the application of these provisions.[84] Treaties often included a *basmala*, an opening utterance (i.e. "in the name of Allah") and the names of all representatives of the parties as well as the names of witnesses present at the drafting.[85]

Treaties were typically required to include a durational component.[86] It is this component that allowed treaty-making to be reconciled with the Islamic concept of perpetual conflict with *dar al-*

harb. Because of the expansionist objective of Islam, peace treaties with entities in the *dar al-harb* could not be perpetual in nature.[87] To do so would be to reject the central goal of Islam. However, the *siyar* permitted treaties to be made so long as they were limited in their duration.[88] Thus, the treaty represented only a temporary suspension of *jihad* and conformed to the greater doctrine of Islamic jurisprudence and religious thought. Temporary suspensions of hostilities were supported by the *sunnah* as illustrated by the Prophet's execution of the Constitution of Medina and more explicitly, the Treaty of Hudaybiyya. In fact, the Treaty of Hudaybiyya set the classic time limit adopted by many jurists interpreting the *siyar*, ten years.[89] Certain jurists limited the duration of peace treaties even further, permitting no treaties to exceed three or four years (based on the fact that the Treaty of Hudaybiyya did not actually last ten years).[90]

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82 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 213.

83 Ibid. Pp. 213-215, 195-198.

84 Ibid. Pp. 218-219.

85 Ibid.

86 Ibid.

87 Ibid.

88 Tepas, M.E. (2009), "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", *Indiana Journal of Global Legal Studies*, No. 2(16), p. 684.

89 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 151.

90 Ibid.

Implications under the Siyar

Early Islamic treaties are recognizable to the modern student of history or international law. However, the treaties lacked several qualities necessary to the modern conception of treaty-making and international relations. These differences flowed directly from the *siyar's* basis in Islamic doctrine, specifically its world view and objectives. One such difference is the lack of mutual consent or reciprocity in treaty-making.[91] The *siyar* viewed entities in the *dar al-harb* as existing in a state of nature outside of the only valid legal system of Islam. This was supported by the principle that the *dar al-harb* was the object rather than the subject of *siyar*. As a result, the *siyar* did not recognize legal competence on the part of entities in the *dar al-harb* to enter into treaties as equals, which would require mutual consent or reciprocity.[92] The Islamic duty to fulfill treaty obligations was not based on a theory of reciprocity between the parties, but was instead based on a Muslim's obligation to abide by Islamic legal and religious precepts. This conception of entities in the *dar al-harb* also rejected the idea of

meaningful political equals.[93] Because the Islamic State was the only State recognized under Islamic law, only it had legal competency in treaties entered into under the *siyar.*[94] The *siyar* often framed treaties as practical mechanisms only to be entered into for the advantage or convenience of the Islamic State.[95]

Another quality lacking in the *siyar* is neutrality.[96] Similar to the idea of a perpetual or indefinite peace treaty, the *siyar* did not recognize a concept analogous to modern neutrality.[97] If Islam's universalist objective was diametrically opposed to peace with *dar al-harb*, then it was similarly at odds with neutrality. Thus, like a peace treaty, any neutrality that might exist was merely a temporary suspension of *jihad*, likely granted for practical reasons.

Islamic Treaties in Comparison

Although the *siyar* set a number of restrictions on Islamic treaty-making, the early Islamic period saw a prolifera-

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91 Ford, C.A. (1995), "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, No. 30, p. 504.

92 Ibid.

93 Ibid. P. 505. Under Islamic doctrine, although non-Muslims "might have 'nations' of their own ... the territories of the *dar al-harb* could not lay claim to legal legitimacy". Ibid.

94 Ibid.

95 Ibid.

96 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, pp. 251-252.

97 Ibid.

tion of treaties. These varied according to purpose and created precedent for Islamic jurists to examine and interpret. Because the supplemental sources of the *siyar* included rules and principles derived from practical experience, the terms, purposes, and outcomes of actual treaties are significant to understanding the development of the *siyar*. As a result of its temporary nature and its need to reconcile Islamic theory and universalism with the real world, the *siyar* often had a reciprocal relationship with the issues it governed. This is particularly evident in the field of treaty-making. Beginning with the Treaty of Hudaybiyya, treaties themselves affected the development of the *siyar's* rules on treaty-making. At times, treaties that were inconsistent with existing restrictions under the *siyar* prompted jurists to formulate creative methods of reconciliation between an existing treaty and Islamic doctrine. The Treaty of Hudaybiyaa and the *Baqt* Treaty provide examples of this give-and-take relationship.

1. Treaty of Hudaybiyya

Following a six year exile in Medina, Muhammad received a revelation calling for a pilgrimage (*'umra*) to Mecca.[98] The purpose of the pilgrimage was to cleanse the Kaaba, the most sacred location in Islam, of its pagan idols.[99] At the time, the Quraysh tribe controlled the city, granting and denying entrance at its discretion.[100] The tribe derived significant economic benefit from the paganism of the Arabian Peninsula in the form of pilgrimages to the Kaaba, which housed hundreds of idols dedicated to various tribal deities.[101] As a result, the already hostile Quraysh opposed the Islamic pilgrimage.[102]

In 628, Muhammad and 1,400 followers approached the city in a state of *ihram*.[103] *Ihram* is a sacred, premeditated, spiritual and physical state that acts as a prerequisite for Islamic pilgrimage.[104] A pilgrim in the state of *ihram* is restricted in his freedom of action and may not engage in fighting.[105] The Quraysh denied

98   Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 147.

99   Ibid. Pp. 147-148.

100 Emerick, Y. (2002), *The Life and Work of Muhammad*, Alpha Publishing, Filey, p. 233.

101 Esposito, J.L. (1999), *The Oxford History of Islam*, Oxford University Press, Oxford, p. 691.

102 Ibid. P. 10.

103 Andrae, T. (2000), *Mohammed: The Man and His Faith*, Courier Dover Publications, New York, p. 156.

104 Glassé, C. (2008), *The New Encyclopedia of Islam, 3rd ed.*, Rowman & Littlefield, Lanham, p. 237.

105 Ibid.

the pilgrims entrance, and the group camped outside of the city, where Muhammad met with Meccan emissaries sent by the tribe.[106] Because the pilgrimage is by nature a peaceful pursuit and because the pilgrims could not engage in *jihad* as a result of *ihram*,[107] Muhammad sought to resolve the issue through diplomacy:

We have not come to fight anyone, but to perform the 'umra. No doubt, the war has weakened the Quraysh and they have suffered great losses, so if they wish, I will conclude a truce with them, during which they should refrain from interfering between me and the people ... But if they do not accept the truce, by Allah in Whose hands my life is, I will fight with them defending my Cause till I get killed, but (I am sure) Allah will definitely make His Cause victorious.[108]

This pronouncement began a series of negotiations, resulting in the Treaty of Hudaybiyya, which set the

precedent for Islamic diplomacy and treaty-making.[109] The text of the treaty reads, as follows:

With thy name, O God! This is what was agreed upon between Muhammad, son of 'Abdullah, and Suhayl, son of 'Amr.

They both agreed to put down fighting on the part of people for ten years, during which period the people were to enjoy peace and refrain from fighting with each other.

And whereas whoever of the companions of Muhammad comes to Mecca in Hajj or 'Umra pilgrimage, or in quest of the bounty of God (i.e. commerce. . .), enroute to Yemen or Ta'if, such shall be in security regarding his person or property. And whoever comes to Medina, from among the Quraysh, enroute to Syria or Iraq. . . seeking the bounty of God, such shall be in security regarding his person and property.

And whereas whoever comes to Muhammad from among the Qurayshites without the permission of his guardian (*maula*), he will hand him over to them; and whoever comes to the Quraysh from among those who are with Muhammad, they will not hand him over to him.

And that between us is a tied-up breast . . .and that there shall be no secret

106 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 148.

107 Andrae, T. (2000), *Mohammed: The Man and His Faith*, Courier Dover Publications, New York, p. 156.

108 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 148.

109 Ibid.

help violating neutrality, and no acting unfaithfully.

And that whosoever likes to enter the league of Muhammad and his alliance may enter into it; and whosoever likes to enter the league of the Quraysh and their alliance may enter it.

And that thou (Muhammad) shalt return from us (Quraysh) in this year and enter not in our midst; and that when it is the coming year, we shall go out from thee and thou shalt enter with thy companions and stay there three nights, with thee being the weapon of the rider: having swords at the side; thou shalt not enter with what is other than them (swords).

And that the animals of sacrifice (brought by thee) will be slaughtered where we found them, and thou shalt not conduct them to us (in Mecca). [110]

The parties abided by the terms of the treaty for two years. Immediately after the execution of the treaty, Muhammad and his followers, returned to Medina in order to return the following year, per the treaty's provisions.[111] In 629, they returned to Medina and completed the "umra" without interference.[112] However

hostilities arose between the Quraysh and Muslims within two years.[113] In 630, the Banu Bakr, a clan allied with the Quraysh, attacked the Khuza'a, a Bedouin tribe allied with Muhammad.[114] Although not a direct attack, Muhammad and his followers interpreted the act as a breach of the treaty.[115] The two parties conducted negotiations to restore peaceful relations, but these proved unsuccessful.[116] Muhammad rejected the customary Arabic recompense for homicide as offered by the Quraysh delegation.[117] Shortly thereafter, Muhammad and his followers marched on Mecca, resulting in the historic Conquest of Mecca.[118]

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cy", *Florida Journal of International Law*, No. 18, p. 152.

110 Ibid. Pp. 150-151.

111 Esposito, J.L. (1999), *The Oxford History of Islam*, Oxford University Press, Oxford, p. 10.

112 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy",

113 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 212.

114 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 153.

115 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 213.

116 Ibid.

117 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 153.

118 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 213. Khadduri noted that the Meccan conquest "ended the rivalry between the two city states (of Mecca and

The Treaty of Hudaybiyya is significant for several reasons and is perhaps the single most important treaty in terms of its effect on the development of the *siyar*. Significantly, it confirmed Islamic recognition of treaties with non-Muslims by supporting the verses of the Quran with acts of the Prophet.[119] By grounding the affirmation in both of the seminal sources of *siyar*, Islamic leaders were free to engage in a critically important aspect of international relations. However, the most important contribution of the Treaty of Hudaybiyya is its provision on the duration of the treaty. The second paragraph of the treaty explicitly provides a ten-year time limit on peace between the Muslims and the Quraysh. Ten years thus became the default limitation for Islamic treaties.[120] Certain jurists allowed for a period of renewal, which was typically limited to an additional, single ten-year period.[121]

Thus, jurists viewed the time limit in the treaty as strongly persuasive, if not binding precedent, because it had been the result of negotiations by the Prophet Muhammad himself. The durational limit allowed jurists to reconcile the idea of peace with non-Muslims, forbidden by the universalist objective of the religion, with the need to occasionally cease hostilities with foreign states.

The events following its execution also supported the Islamic obligation to fulfill treaties. Muhammad and his followers did not complete the *'umra* that year, but instead returned to Medina in order to perform the pilgrimage the following year.[122] That *'umra* occurred peacefully, with all parties abiding by the terms of the treaty. However, once an act occurred which was interpreted as a breach of the peace, Muslims were no longer obligated to act in accordance. This confirmed the duty to fulfill as religious obligation rather than reciprocity.

One last aspect of the treaty, or rather the conditions under which it was entered into, likely provided jurists with further justification for treaty-making with non-Muslims. At the time Muhammad negotiated the terms of the treaty, he and his followers existed in the state of *ihram*, which forbade them from us-

Medina) and established Islam's supremacy (over the region)". Ibid.

119 Ibid. The treaty "established the precedent that Muslim authorities might come to terms with polytheists, provided it was only for a temporary period". Ibid.

120 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 212.

121 Smith, P.S. (2006), "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy", *Florida Journal of International Law*, No. 18, p. 151.

122 *See supra*.

ing non-peaceful means to complete the pilgrimage. Had this not been the case, it is entirely possible that war, rather than diplomacy, would have resulted. Indeed, only two years after the treaty, Muhammad returned to Mecca with an army large and powerful enough to conquer the city and establish Muslim control. The circumstances of the treaty reveal that Muslims did not enter into treaties for the sake of peace itself, indeed, they are forbidden to do so by Islamic doctrine. Instead, the Islamic State enters into treaties with non-Muslims primarily in the interest of expediency and perhaps, though not necessarily, where there are no other options.[123] This inference supported the Islamic rejection of any meaningful recognition of equal political authority and reaffirms the purpose of treaty-making (and the *siyar)* as a temporary means to achieving an ultimate universalist objective.

2. *Baqt* Treaty

The *Baqt* Treaty, entered into by the Islamic state (through the governor of Egypt) and the Nubian Kingdom of Makuria, offers a different perspective on Islam-

ic treaty making.[124] Though close in time to the Treaty of Hudaybiyya, the *Baqt* Treaty departed from many of the key principles of treaty-making in the early days of Islam.[125] Following the 641 CE conquest and occupation of Egypt, the Islamic State sought to expand its territory into Nubia.[126] In 652, the Governor of Egypt, 'Abd-Allah ibn Abi Sarh, concluded a treaty with the Nubians on behalf of the Caliph Uthman.[127]

There is some historical uncertainty as to the catalyst for diplomatic negotiation, creating two alternative explanations for the making of the treaty.[128] One version describes an unsuccessful Islamic attempt at annexation which was warded off by Nubia.[129] The difficulties

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123 Ford, C.A. (1995), "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, No. 30, p. 502. Reprieves from the perpetual state of war were "granted only *ex gracia* by Islam for reasons of expediency". Ibid.

124 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, pp. 259-61.

125 Ibid. P. 260.

126 Ibid. P. 259.

127 Ibid.

128 Spaulding, J. (1995), "Medieval Christian Nubia and the Islamic World: A Reconsideration of the Baqt Treaty", *International Journal of African Historical Studies*, No. 3(28), pp. 583-584. Spaulding suggests that both versions "are 'correct' in the sense that version two conveys the original intention of the Makurian authorities and version one the prevailing interpretation of the Islamic theorists of the early Abbasid period". Ibid. P. 584.

129 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 259.

faced by the Muslims in battle eventually forced the Islamic State to respect Nubian independence and instead engage in more peaceful negotiation.[130] The other version of the story portrays a rather different set of historical circumstances as the motivation for treaty-making.[131] These scholars describe an Islamic siege of the Makurian capital of Old Dongola.[132] Despite sizable resistance, the Nubians eventually sued for peace, fearing the strength of the Islamic army.[133] Instead of occupying Nubia, "which they regarded as a poor and worthless place", the Muslims decided to impose certain terms on the kingdom while allowing it to remain autonomous.[134]

The discrepancies in the historical record are the result of the lack of a contemporaneous record.[135] Interpretations of the events of 652 developed in the following centuries, altered by the memory and motivations of the storyteller. Whatever the reason for entering

into diplomatic negotiations, the two parties eventually executed what is now referred to as the *Baqt* Treaty.[136] *Baqt* refers to the annual tribute of 360 slaves to be paid by the Nubians as per the terms of the agreement.[137] The text of the treaty is as follows:

This is the treaty granted by the Commander 'Abd-Allah ibn Sa'd ibn Abi Sarh to the Chief of Nubia and to all the people of his territory, a covenant binding upon the people of Nubia, great and small, from the frontier of Aswan to that of 'Alwa.

'Abd Allah ibn Sa'd ensures security and peace among them and the neighboring Muslims in Egypt, together with other Muslims and dhimmis.

You people of the Nubian race shall be secure under the safeguard of Allah and His Apostle, Muhammad the Prophet. We shall neither attack you, nor wage war against you, nor make raids upon you so long as you observe the conditions between us and you. You may enter our land as travellers, not as settlers. We may enter your land as travellers not settlers. It is your duty to protect those Muslims or their allies who put in your

130 Spaulding, J. (1995), "Medieval Christian Nubia and the Islamic World: A Reconsideration of the Baqt Treaty", *International Journal of African Historical Studies*, No. 3(28), pp. 579-580, 583.

131 Ibid. P. 579.

132 Ibid. P. 580.

133 Ibid. P. 578.

134 Ibid. P. 580.

135 Ibid. Pp. 581-584.

136 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p. 259-260.

137 Ibid. P. 260.

land or travel there until they depart. You shall restore to Muslim territory every run-away slave of the Muslims who will have fled to you. You must not take possession of him, nor prevent or thwart a Muslim who comes to take him and must help him until he goes. You shall take care of the mosque which the Muslims have built in the square of your city and not prevent any from praying there. You shall keep it swept and illuminate it and respect it.

Every year you shall pay three hundred and sixty head of slaves to the Chief of the Muslims. They shall be of the medium type of slaves of your land, free from bodily defects, both male and female, neither extremely old men or old women, nor children under age. These you shall hand over to the Governor of Aswan.

No Muslim shall be obliged to repel an enemy who attacks you or defend you against him from the frontier of 'Alwa to that of Aswan. If you give refuge to a slave of a Muslim, or kill a Muslim or ally, or attempt to ruin the mosque which the Muslims have built in your city, or withhold any of the three hundred and sixty head of slaves, then this peace and security shall be cancelled and we and you shall return to hostility

until Allah judges between us, for He is the best of all judges.

Upon these conditions we are bound by the covenant of Allah and His pledge and that of His Apostle the Prophet Muhammad; and you stand pledged to us by those you hold most holy in your faith, by the Messiah, the Apostles and all those you venerate in your religion and community. Allah be the witness between us and you.[138]

The parties abided by the terms of the treaty for over six hundred years.[139] In 1276, the Egyptians conquered the Kingdom of Makuria, ending the *Baqt* Treaty.[140]

The *Baqt* Treaty differs from the Treaty of Hudaybiyya and the dominant paradigm of Islamic treaty-making in several ways. It is considered an "unprecedented" treaty and is often described as a trade agreement rather than a peace treaty. However, the explicit references to peace in the third paragraph cannot be ignored, making its six hundred year duration difficult to reconcile with the

138 Ibid. Pp. 259-260.

139 Hasan, Y.F. (1967), "Main Aspects of the Arab Migration to the Sudan", *Arabica*, No. 1(14), p. 17.

140 Spaulding, J. (1995), "Medieval Christian Nubia and the Islamic World: A Reconsideration of the Baqt Treaty", *International Journal of African Historical Studies*, No. 3(28), p. 580.

siyar's requirements. The *Baqt* Treaty's departures from treaty-making rules under the *siyar* create a great deal of difficulty in terms of theoretical consistency. However, moments of tension between religion and practice often reveal more about Islamic jurisprudence and international law than situations in which the application of the law easily adheres to its principles.

There are two difficult problems posed by the provisions of the *Baqt* Treaty. The first is the complete lack of a durational component. Although there was some disagreement between jurists as to the exact limit, as discussed above, all treaties were required to include a time limit. Without the time limit, it is difficult to justify peace with non-Muslims while simultaneously accepting the basic Islamic objective of universalism. The durational requirement was the mechanism by which treaties were legitimized; without it, treaties lacked doctrinal justification. Khadduri postulated that the treaty "obviously could not last more than ten years; but since the payment of the *baqt* was annual, the two parties must have tacitly or overtly renewed the treaty from time to time".[141]

This is perhaps why some scholars, including Khadduri, have interpreted the treaty as a trade agreement.[142] However, the characterization of the *Baqt* Treaty as a reciprocal trade agreement poses its own doctrinal conflict. The treaty called for an annual Nubian tribute of 360 slaves to the Islamic State. Following the signing of the treaty, the Nubians exchanged forty additional slaves and other presents for wheat, barley, wine, and horses from the Muslims.[143] Additionally, the treaty called for free travel in each other's territory. These reciprocal duties and responsibilities seem to conflict with Islamic rejection of mutual consent, reciprocity, and recognition of political equality.

The treaty did adhere to traditional principles by including a dissolution clause based only on a potential Nubian breach. No similar provision governs Muslim breach, reflecting the immutable Islamic duty to fulfill. The only reference to Islamic obligation refers to the binding authority of the treaty based, not on principles of reciprocity, but on "the covenant of Allah and His pledge and that of His Apostle the Prophet Muhammad".

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141 Khadduri, M. (1955), *War and Peace in the Law of Islam*, The Lawbook Exchange, New Jersey, p.261.

142 Ibid. Khadduri refers several times to the treaty as a "reciprocal trade agreement". Ibid. Pp. 260-261.

143 Ibid. P. 260.

One possible explanation for the *Baqt* Treaty's departure from the traditional requirements of the *siyar* is that the treaty was made for the sake of expediency, much as Muhammad entered into the Treaty of Hudaybiyya because he could not engage in *ihram*. Such an interpretation could be valid under either origin story. If the reason for the agreement was the Muslim inability to overcome Nubian forces, the treaty was a concession to a temporary setback in its global expansion. Thus, the circumstances surrounding the execution of the treaty could be analogized to Muhammad's recognition of his temporary physical inability to defeat the Quraysh when in *ihram*, and the *Baqt* could be reconciled with the requirement of temporariness. This interpretation still does not explain the lack of a durational provision. However, if the reason for the agreement was the Islamic distaste for the poverty of the area, the explanation of expediency could still perhaps apply. Here, in order to properly administer its part of the Islamic state, the Governor of Egypt chose not to pursue conquest and governance. Islam does not require immediate, only eventual expansion, and perhaps a logistical decision to maintain the state rather than add poor areas to its holdings falls under the principle of Islamic treaty-making as a mechanism for convenience.

There is a suggestion that jurists believed that the treaty created something referred to as the *dar al-'ahd*, a third division of the world under Islam.[144] The *dar al-'ahd* was the name given to the division of the world in which nations with whom the Islamic State had treaties resided.[145] Because such treaties were always understood to be temporary (whether they included a durational component or not), this division was by its very nature temporary.[146] Thus, the *Baqt* Treaty placed Nubia within the *dar al-'ahd,* a necessarily temporary state of being which forgave the treaty its lack of durational limit. The Shafi'i school of jurisprudence postulated the existence of this division, however, other schools, like the Hanafi, refused to recognize this state as valid.[147] Indeed, whatever the interpretation, the Islamic State did achieve its directive of incorporating the Nubian kingdom, if 590 years later than would have been assumed.

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144 Ibid. P. 261.

145 Har-El, S. (1995), *Struggle for Domination in the Middle East: The Ottoman-Mamluk War, 1885-91*, Brill Academic Pub, Leiden, p. 9.

146 Ibid.

147 Ibid.

Conclusion

International law as a mode of relations between different groups is heavily influenced by sources from which it is derived. Although modern conceptions of the subject base its legitimacy on the idea of universal principles and customs, older systems of international law were based on decidedly different principles. The *siyar*, as the branch of Islamic jurisprudence addressing international issues, was circumscribed by the religious doctrine of which it was merely an instrumentality. As an (originally) temporary institution, the *siyar* addressed a variety of Islamic needs regarding the state's relations with the *dar al-harb*, which surrounded it on every side. Although not ideal under the expansionist objective of Islam, the practical need for international interaction forced jurists to distill from the principles of the religion an internally consistent jurisprudence to govern these relations. Consequently, such considerations informed Islamic treaty-making.

However, a closer look at actual treaties made under the early *siyar* reveals certain practical inconsistencies. A variety of methods with which to deal with these inconsistencies were developed by jurists, resulting in a creative and sophisticated field of early Islamic jurisprudence. These interpretations and reconciliations were not always consistent among jurists and schools, and at certain times, jurisprudence seems to simply have ignored glaring inconsistencies. However, the actual methods of interpretation and doctrinal reconciliation are telling of the influence of jurists under the Islamic legal system, as well as the sophisticated area of law in which they practiced centuries before modern international law.

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Заключение международных договоров в рамках Сийар: раннеисламское сопоставление доктрины с действительностью

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Аннотация

В данной статье рассматриваются вопросы составления международных договоров в рамках раннеисламского международного права (Сийар). Сийар

характеризовался религиозными обязательствами, монизмом и естественным правом, проистекавшими из святых учений ислама и сформировавшими политическую и экономическую экспансию исламского государства. Несмотря на стремительный взлет к власти и обширный территориальный контроль, Исламская империя была не в состоянии достичь всемирного господства, повлекшего за собой необходимость создания узких, формальных отношений с иностранными организациями. Анализ заключения договоров в начале развития исламского государства проливает свет на юридические аспекты примирения религии и практики, что стало результатом формирования созидательной и принципиально сложной нормативно-правовой базы. В первой части статьи обсуждается развитие ислама как религии. Вторая часть рассматривает основы Сийар, анализируя его место в исламском праве в целом, а также характеризуя его источники и теоретические основы. В третьей части статьи рассмотрено заключение международных договоров как подраздел Сийар, а также проведено теоретическое сопоставление с практическими потребностями двух раннеисламских договоров: договор о примирении Худайбийя и египетско-нубийский договор «Бакт». Четвертая часть статьи кратко завершает обсуждение темы Исламского Сийар и более ранних договоров.

Ключевые слова

Сийар, заключение договоров, Ислам, договор о примирении Худайбийя, джихад, египетско-нубийский договор «Бакт».

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