

BOOK REVIEW OF 'ISLAMIC SOURCES AND INTERNATIONAL LAW'

Reviewers

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Book Review

This brief review examines the new book, *Islamic Sources and International Law*, published in 2023 by Nova Science Publishers in New York, in the United States of America. The book, 'Islamic Sources and International Law' (Nehaluddin Ahmad & Gary I. Lilienthal, 2023), conducts a critical investigation of whether people are bound by international treaties, in either or both Islamic and liberal democratic traditions. It considers those countries, that identified as liberal democracies, as being the primary adherents of western-derived international law.

The book's first chapter discusses the 'Source Scholarship' (Ahmad & Lilienthal, 2023). Armed conflicts create new barriers for people with disabilities, increasing the risk of harm or death. The Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on Equality and Non-Discrimination ('CRPD') Article 11 provides that the Convention applies to international humanitarian law (IHL) in times of armed conflict. The meshing between IHL and the CRPD during armed conflict is

established by Article 11 of the CRPD and referred to by the International Committee of the Red Cross (ICRC). Islamic law had already developed rules regulating the rights and duties of members of society, the relationship between the Islamic state and the citizens, and relationships with other states. The fulfillment of Islamic obligations is conditioned upon states' ability to fulfill them. Islamic law thus reflects all kinds of disabilities. Early Islamic sources have discussed the topic of disability in a range of scholarly disciplines. The overall research objective of this chapter is therefore to critically investigate the character of the source scholarship in International Islamic Law. It asked how International Islamic Law might relate to today's public international law. Argument sets out to sustain the proposition that Islamic International Law is prior to the world's public international law, with a common overlap in the principle of *pacta sunt servanda*. Muslim jurists played a key role in developing international law. Islamic international law is, in principle, as stated, the global rules, norms, and principles that 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. However, Islamic law and modern international law form two separate and different legal systems. Although there are overlaps between the two systems, some principles like *pacta sunt servanda*, core rules of the International Humanitarian Law and basic principles of diplomatic law are recognized by both (Ahmad & Lilienthal, 2023).

The book's second chapter discusses 'State and Sovereignty' (Ahmad, Lilienthal, & Mustafa, 2023), as follows. The nation-states of the Anglo-sphere and Europe are currently entangled in multiple forms of flux, at odds with national forms of sovereignty. The move towards supra-national sovereignty has captured the desires of many national elites, intending to use whatever state power they can to abolish the nation-state itself and replace it with world governance, but not with any form of global government. Opposing this supra-national development is the multiplication of sub-national sovereigns, identifiable as

territorially dispersed group 'identities'. These again have captured the imagination of national elites, who intend to generate an enlarging array of 'innocent victims'. In the light of this statement of significance, this research sets out to analyze critically the nation-state and its sovereignty in an Islamic critical context. Grotius defined States as 'the complete union of freemen who join themselves together for the purpose of enjoying law and for the sake of public welfare'. Oppenheim said 'A State proper in contradiction to colonies and dominions are in existence when a people is settled in a country under its own sovereign Government'. Starke pointed out that an ideal definition of the term 'State' is not possible, but in the modern period, it is finally settled as to what are the essential elements of a State. President Woodrow Wilson's definition of the state was 'a people organised for law within a definite territory. Harold J. Laski defined the state as 'a territorial society divided into government and subjects claiming, within its allotted physical area, supremacy over all other institutions'. With this abundance of attempts at defining sovereignty and state, the research asks how the western view converges or diverges from the Islamic view. Argument has sought to sustain the view that the inherent contradictions in the western views of state and sovereignty are resolved in the Muslim formulation of them. The western view is that the state is formed to prevent war and for the administration of justice, by means of the physical force of the State. The main piece of political literature inherited from the Prophet's period is *al-sahifah*, the document often known as the *Constitution of Medina*, the text of which is attributed mostly to the *hijrah* period of 622 AD. This constitution speaks of the believers as forming one *ummah* (community), rather than a sovereign, and which also included the Jews of Medina. Muslim writers are of the view that the existence of States is the combination of three main elements: (i) population; (ii) territory; and (iii) government. *Shari'a* expresses a democratic tendency, or at least an opposition to despotism, simply because *shari'a* rule implies restrictions on the exercise of political power over and above the mere will of rulers. While Austin says that sovereignty is the power of affecting others with evil or pain and of enforcing them, through fear of that

evil, or to fashion their conduct to one's wishes, Muslim scholarship views no human being or human organization as having any claim title to it. When sovereignty is forced upon human beings, it results in general confusion. The notion of an independent sovereign state is, on the international side, fatal to the well-being of humanity. According to Rousseau's reasoning, the vast majority living in today's liberal democracies are denied their rightful freedom and are therefore 'slaves' (Ahmad, Lilienthal, & Mustafa, 2023).

The book's third chapter discusses 'The Status of Treaties in Islam and their Practices' (Ahmad & Lilienthal, 2023). The overall objective of this research is a critical examination of the confluence of the Muslim, and the modern international laws, of treaties. Treaties may have different names, such as: Convention, Agreement, Protocol, Pact, or Charter. Schwarzenberger writes that: 'a treaty may be defined as a consensual engagement which subjects of international law have undertaken towards one another with the intent to create legal obligations under international law'. According to Oppenheim, 'International treaties are agreements, of a contractual character, between states, or organizations of states, creating legal rights and obligations between the parties. The word *mu'ahadah* is derived from the Arabic word '*ahd*', which means a pledge or commitment. *Mu'ahadah* is the verbal noun of the verb '*ahada*', which denotes the conclusion of a covenant between two parties. '*Ahd*' is an oath, pact, treaty, or agreement when concluded and executed needs commitment and fulfillment. It also represents a firm promise to follow through with an agreed-upon arrangement. *Ahd* also includes the concepts of *aman* or pledge of security, and *dhimmah*, or protection. The *ahl al-'ahd* are the individuals or groups interested in the conclusion of a covenant ('*ahd*'). A *mu'ahadah* is a contract between two or more states that seeks to normalize their relations. In light of these explanations, the question arises as to how similar Islamic treaty law and the modern international law of treaties really are. The argument seeks to sustain the proposition that they are similar because the Islamic treaty law appears to pre-date and generate the modern international law of treaties. Treaty law is a written law, a *jus*

scriptum, that possesses the merit of considerable precision so that States that are not parties to it are also bound by the obligations because they are rooted in customary law. The Qur'an forbids battling those with whom a *muwada'ah* has been concluded or their associated groups. This also validates and legitimizes the status of associated parties to the *muwada'ah* as members covered by the agreement. The consent of the two parties concerned must be expressed for the *mu'ahadah* to be valid. The *Vienna Convention on the Law of Treaties 1986* expanded the concept of 'treaty' to include treaties signed between states and international organizations, as well as agreements between international organizations. According to Islamic law, international legal obligations are binding on both Muslim states and other actors as treaty obligations, just as in the modern international legal norm of *pacta sunt servanda* (Ahamd & Lilienthal, 2023).

The book's fourth chapter discusses the 'Islamic Law of the Sea' (Ahmad, Lilienthal, & Ariffin, 2023). The *Treaty of Laussane* of 1923 was a punitive treaty framed as a peace treaty. It forced Turkey to cede territories and confirmed its borders and political stance, and this treaty hobbled the country on several fronts. Thus, this research will have as its overall objective a critical investigation into the various Islamic sources of freedom in the laws of the sea. Those regulations governing access to the sea, freedom of navigation, and maritime trade on the Great Sea, as expressed in the Bible, find far greater documentation in Roman codices. From the beginning of the second century BCE, the Romans, succeeded by the Byzantines, absorbed the independent states of the two Mediterranean basins. They claimed maritime dominion, enforced control with their naval power, which they exercised freely and fully, and came to view the Mediterranean Sea chiefly as their own, their *mare nostrum*. In the light of these issues, the question arises as to whether Islamic Law restricts movement upon the high seas. Argument seeks to demonstrate that the ancient Islamic Law continues long-held traditions, and ensures freedom for all to move on the high seas. Legal experts viewed Roman vessels sailing out of sight of the coast as an extension of the land.

Since all human beings on the Earth are born free and equal in dignity and rights, all of them, according to Islam, including slaves, are supposed to enjoy free access to the boundless seas and vast oceans. The *Qur'an* does not contain even a single verse excluding members of any particular nation from navigating the seas or from traveling by land for any purpose. The Muslim jurists forbade cargo salvage found on the water surface if such an act would overload and endanger their vessel. However, aiding persons in distress at sea was considered a moral as well as a legal duty. Freedom of the high seas, as in the *United Nations Convention on the Law of the Sea*, aligns with *Qur'anic* principles and with the Islamic Law of Nations (Ahmad, Lilienthal, & Ariffin, 2023).

The book's fifth chapter discusses 'Diplomatic Immunity under Islamic Tradition and Practices' (Ahmad, Lilienthal, & Ali, 2023). As the Sixth Committee resumed discussing agenda item "Crimes against humanity", United Nations delegates discussed whether drafting a new convention on crimes against humanity would close gaps in the current international law and if draft articles by the International Law Commission should be grounded in existing texts, such as the Rome Statute of the International Criminal Court and international conventions addressing genocide and torture. In the light of this example of the significance of public diplomacy, the overall research objective of this chapter will be a critical investigation of the historiography of old sources in diplomatic law. In Islamic perspectives, a diplomatic agent or envoy originally derived from the Arabic terms *saafir* which are still often used by commentators on Islamic law when referring to a diplomatic agent or envoy. It has become customary that a diplomatic agent is guaranteed immunity and privileges. The research question asks to how Diplomatic principles in Islamic Law might relate to western-based public international law. The argument seeks to resolve this question by a demonstration of the historiography of diplomatic law principles, implying both have arisen from the same ancient customary sources. The *Vienna Convention on Diplomatic Relations* now codifies the old rules for the exchange of embassies among sovereign States and has been recognized as a cornerstone of the modern international legal order.

Islamic international law recognizes both the functional necessity and representative character theories. Scholars of Islamic jurisprudence are of the view that the *Treaty of Hudaybiyyah*, of 628 CE, established the legal basis for its application. In Islamic jurisprudence, every act is considered lawful, meaning that there is no impermissible act, except those that are specifically expressed by the *Qur'an* or the Prophet's tradition in a sound and explicit *nass* (Ahmad, Lilienthal, & Ali, 2023).

The book's sixth chapter discusses 'Refugees under International and Islamic Traditions' (Ahmad, Lilienthal, & Mustafa, 2023). The overall objective of this research is a critical examination of refugees under international and Islamic traditions. The roots of international refugee law can be traced back to ancient times, when Greek and Roman cities offered sanctuary to anyone in need of a safe place to hide. Today, this right has become part of the fundamental rights and freedoms to which all humans are entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Prior to instruments adopted in 1951, the origins of the modern concept of refugee were rooted in the reaction of king Friedrich Wilhelm I of Prussia. He issued his 1685 *Edict of Potsdam* and granted the Huguenots the right to reside in his Prussian territories. The most significant developments in refugee law, however, were closely tied to the two World Wars. The research question asks whether international and Islamic laws still differ in refugee matters, and if so, how. The argument seeks to sustain the view that international and Islamic refugee laws are similar, but the Islamic system is broader and contains more private rights. The concept of persecution is not as such defined in the Refugee Convention but is considered to include, for example, all serious violations of human rights. The Refugee Convention only addresses displaced individuals, who have crossed an international border. However, in Islam, all motives for asylum are equal. The Prophet established a golden rule for the treatment of refugees when he decreed the broad principle of fraternization. While the Refugee Convention simply

obliges contracting parties not to refool, and parties often find ways to ignore this principle, there is a positive obligation on a Muslim to flee from his home as a result of persecution, and modern international law lacks any stipulation that gives asylum seekers any full right to asylum (Ahmad, Lilienthal, & Mustafa, 2023).

The book's seventh chapter discusses the 'Protection of Women and Children during War' (Ahmad, Lilienthal, & Zulkiffl, 2023). The overall research objective of this chapter will be to investigate the parallels between the Islamic laws applying to women in times of war, and those international laws applying in the same circumstances. Islam had made a clear distinction between combatants and non-combatants. Whereas women and children as non-combatants are protected during war, most Muslim scholars are of the view that women and children lose their immunity if they participate in combat. Women and children cannot be killed during war or captivity, because it had been prohibited by the Prophet Muhammad, as long as it was possible to distinguish them from the combatants. They lose their immunity when they become combatants or when they cannot be differentiated from combatants. The research question asks whether there are parallels between Islamic laws applying to women in times of war, and those international laws relevant in the same contexts. Argument seeks to sustain the view that the two are generally parallel. In modern international law, the same rules as in Islamic law apply during times of war. Article 27 of the 1949 Fourth Geneva Convention provides that 'women shall be especially protected against any attack on their honour'. In cases where women are separated from their family members, humanitarian law provides families with the right to know the fate of their missing relatives and obliges the parties to armed conflicts to take all feasible measures to account for persons reported missing. In what appears to be a contrary situation, whereas in Islam, suicide is strictly prohibited, however under the international humanitarian law, there is no legal rule that explicitly states that suicide attack is illegal (Ahmad, Lilienthal, & Zulkiffl, 2023).

Thus, the research has identified these operative principles. Both systems recognize the doctrine of *pacta sunt servanda*. In international law, the notion of an independent sovereign state is fatal to the well-being of humanity, Rousseau having reasoned that liberal democracies generate slaves. According to the Islamic law, international legal obligations are binding on both Muslim states and on all other actors as treaty obligations. Freedom of the high seas, as it is stated in the *United Nations Convention on the Law of the Sea*, aligns with the Islamic Law of Nations. In Islamic jurisprudence, every act is considered lawful, unless prohibited either by the *Qur'an* or by *Sunnah*. While parties to international law often find ways to ignore the prohibition on refoulement, there is a positive obligation on a Muslim to flee from his home as a result of persecution. Modern international law lacks any full right to asylum. In modern international law, the same rules for women and children as in Islamic law apply during times of war. Thus the liberal democracies' adherence to the international law coincides both with violations of the prohibition of refoulement and with Rousseau's reasoning of their generation of slaves, suggesting that the liberal democracies diverge from Muslim principles by simply not recognizing people as being legally bound by treaties (Ahmad & Lilienthal, 2023).

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