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Religious Influence on International Law: Myth or Reality

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ABSTRACT

The connection between religion and international law is close but surprisingly little studied or described, at least by international lawyers. The Functions of Religion in the International Legal System In modern times, religious inspiration and religious institutions have performed at least five functions in the international legal system. These functions may be described as creative, apparitional, didactic, custodial, and meditative. Modern international law is generally professed as a secular international legal system but the question about its relationship with religion is an aged and ongoing one. The current global flow of religion and its interaction with different aspects of international law have made the debate more relevant than ever. Religion has never been entirely exiled from international law, but has always been part of the international law endeavor. Indeed, Religion has played, and continues to play, a significant role in the evolution of international law even though the relationship is often perceived to be complex and controversial for different reasons. From antiquity to present modernity amid diverse historical transformations, some of which have been revolutionary, law and religion have never been entirely alienated. They have never been so self-determining as to achieve complete independence from each other. It is fact that still Bible is used in USA at presidential inauguration while in Bangladesh where majorly of people are sensitive about their religious believes, constitutional oath is used instead of Quran. As a monist country the domestic law of USA becomes operative after the signing ceremony of a international convention. Religious belief is not fact while a dualistic country like Bangladesh often face trouble to ratify the international convention like ICCPR for religious ground.

Key words: Bible, International law, Quran, Religion, Secular

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1. INTRODUCTION

The connection between religion and international law is close but surprisingly little studied or described, at least by international lawyers (Janis, 1993). Our discipline tells a very specific story about its historic relationship to religion, a story that reveals more about our self image than about religion or international legal history (Janis & Evans,1999).

The Functions of Religion in the International Legal System In modern times, religious inspiration and religious institutions have performed at least five functions in the international legal system. These functions may be described as creative, apparitional, didactic, custodial, and meditative

(Janis & Evans,1999). In reality, we evident the presence of religious norms or values in our legal principles. This presence is also factual in the sphere of international law, in a broader spectrum. Religion and international law often emerge to be harmonious. They share essentials of ritual, tradition, authority and universality that "connect the legal order of any given legal society with that society's beliefs in an ultimate transcendent reality". Modern international law is generally professed as a secular international legal system but the question about its relationship with religion is an aged and ongoing one. The current global flow of religion and its interaction with different aspects of international law have made the debate more relevant than ever (Baderin, 2010). In his 43rd hobhouse memorial lecture entitled ''The Return of the Sacred? The Argument on the Future of Religion'' published in 1977, the renowned Harvard Professor of Sociology, Daniel Bell, observed that ''At the end of the eighteenth to the middle of the nineteenth century, almost every Enlightened thinker expected religion to disappear in the twentieth century. From the end of the nineteenth century to the middle twentieth century, almost every sociological thinker expected religion to disappear by the onset of the twenty-first century '' (Bell, 1977).

Religion has never been entirely exiled from international law, but has always been part of the international law endeavor. Indeed. Religion has played, and continues to play, a significant role in the evolution of international law even though the relationship is often perceived to be complex and controversial for different reasons (Armstrong, 2009). On the one hand, the controversy surrounding the relationship may be attributed to the apparent differences in the nature of religion (sacred) and that of international law (secular). Carolyn Evans has noted that ''the place of religion in the international legal system, or indeed any legal system that purports to be secular, is likely to be controversial and complex'' (Evans, 2005). Generally, both religion and law are important social phenomena that relate respectively to fundamental social issues in human society, which have often stimulated ''passionate disagreement about their proper content and functions'' (Jamar, 2001). Both can be seen as systems of social ordering, as ethical or normative regimes, or semiautonomous social fields. Also, both religion and international law can be politicized and manipulated by elites, which adds further to the complexity of their relationship (Baderin, 2010).

Modern law and religion are fundamentally sociopolitical facts that have in general some veiled elements. Both aspire to constitute, or at least to frame, human consciousness and behavior in all field of private and public life. Consequently, modern law and religion are complementary, contradictory and simultaneous sources of rule-making, adjudication and execution. Both embed obedience and obligations, leadership, institutions and legal ideology as fundamentals of their maintenance and prevalence, based on a firm arrangement of commands.

From antiquity to present modernity amid diverse historical transformations, some of which have been revolutionary, law and religion have never been entirely alienated. They have never been so self-determining as to achieve complete independence from each other. Religion has effectively been incarnate in modern legal systems, even in those that have aspired to privatize religion. Religions are rooted in daily practices in various regions, from the Middle East through Africa to Europe, from Latin America to North America and Asia, in Western regimes and post-communist regimes alike.

If our reading of international law is one in which the space between law and politics is blurred, then law cannot be read as either 'divine' or unmediated but must be understood 'as an aspect of hegemonic contestation, a technique of articulating political claims in terms of legal rights and duties'(Koskenniemi, 2004). The dialectic between the textualist and contextualist readings of the primary sources of international law illuminates a hegemonic contest; a performance of sorts where law is mediated, or narrated. That law 'performs' is to argue that its function is to 'disguise the true realities of power, [whilst], at the same time [appear to] curb that power and check its intrusions' (Peluso, 2017). It is fact that still Bible is used in USA at presidential inauguration while in Bangladesh where majority of people are sensitive about their religious believes, constitutional oath is used instead of Quran. As a monist country the domestic law of USA becomes operative after the signing ceremony of an international convention. Religious belief is not fact while a dualistic country like Bangladesh often face trouble to ratify the international convention like ICCPR for religious ground. In our existing political and cultural epoch, an age marked by suspicion and misconstruction in the enormous majority of argue about religion and the role of religious ritual, both the international law and Municipal law. Owing to this complexity, the relationship between religion and international law can be analyzed from different perspectives depending on one's objective.

2. THE VEILED OR OVERT ALLIANCE: LAW AND RELIGION

Generally Hugo Grotius has credited as the founder of modern international law .it had been argued that his though about international law has predominately influence by Christian theology. Wheaton in his Elements of International law opines as follows;

[His] age was peculiarly fruitful in great men, but produced no one more remarkable for genius and for variety of talents and knowledge, or for the important influence his labors exercise upon the subsequent opinions and conduct of mankind. Almost equally…patriotic statesman, and learned theologian. His one of those powerful minds which has paid the tribute of their assent to the truth of Christianity (Wheaton, 1836).

Close relations between the legal philosopher and religious believe have been form and persistently transformed throughout history. According to natural religious law – a law come from a belief in God or in divine forces – morality and legality are rooted in religion. Holy law formulates a liberty for human preferences and judicial prudence in the expression of a celestial godly order. This types of natural religious prism of law – was well-known in the writings of theological theorist in different religions such as St Augustine, Thomas Aquinas and Maimonides – has not only been a normative pointer of a good faith and a righteous activities, but also the total standard for obedience and disobedience to human-made law. Therefore, St Augustine has been a very dominant religious theorist over Western attention. His religious idea of *De Civitate Dei* has produced a religious normative mold for the excellence of human society and expectations that political power in the 'City of God' should be legitimated throughout a religious faith. His form has influenced a variety of philosophers and scholars, including Enlightenment and present-day philosophers.

Impelled by post-medieval science and the explanation of law as science, natural law, as distinct from what has continued as religious natural law, and has been secularized, principally since the fourteenth century Ad. In a regular process, which was embossed, inter alia, by the sixteenth-century Copernican revolution, followed by such rationalizations of belief as in seventeenth-century Descartes and Kant's philosophies of the eighteenth century, religious ethics and religious law were reproduced based on human consciousness and rationality(Barzilai, 2007). While the significance of religious belief was regenerated as part of human practice; questions rotating around the existence of God were marked as unique and separated from the routinely rational endeavors of humanity. Thus, human law and religion were differentiating from one another. Whichever human legal sorting we construct, they are extensively a substance of our own morality, consciousness and shaped by our own conceived religious knowledge. The fractional split of law from religious dicta and its building as an 'autonomous' professional field have outlined law as a ruling setting. Consequently, a notion of celestial sovereignty, and material sacred religious ruling authority, was substitute by a notion of the secular state's sovereignty. Particularly during the seventeenth century and onwards, the latter was anticipated as an aggregation of individual wills rooted in contractual metaphorical relations.

3. HISTORICAL ROOTS OF INTERNATIONAL LAW AND RELIGION

Francis Boyle has noted that ''the truth of international relations [and of international law] could be found only in the details of history'' (Boyle, 1999). The history of international law is usually demarcated by the Peace of Westphalia, which is often portraying as the beginning of modern international law and international relations, and thus conventionally divided into the pre-Westphalian and post-Westphalian periods. This traditional division is essentially Euro-Christian in nature and has been described as being ''to a certain extent, old fashioned'' (Steiger, 2001). Before the Peace of Westphalia in 1648, religion constituted a fundamental basis for the normative rules regulating the relationship between the political powers of that period in different parts of the world (Bantekas, 2007). For example, the earlier writings on rules of the law of nations by jurists in Europe relied heavily on Judeo-Christian religious sources, and similar writings by the early jurists in the Muslim world relied mainly on Islamic religious sources (Khadduri, 1966).

Although some 19th century international law jurists such as James Lorimer (Lorimer, 1883) and Henry Wheaton(Wheaton, 1866) held the view that the earlier practices of non-European and non-Christian peoples did not form part of the heritage of international law, this author is of the view, with other scholars, that the universal history of international law is short-served without reference to earlier relevant practices of other civilizations other than the Euro-Christian civilization (Orakhelashvili, 2006). After Westphalia, international law materialized as an essentially secular and European construct but remained very much influenced by Christian religious dictates (Peace Treaty of Westphalia.). Heinhard Steiger has observed in that regard that the epoch of international law from the 13th to the 18th century was an epoch of ''international law of Christianity'' (Steiger, 2001) with the law deeply rooted in religious principles.

He noted that ''Christianity formed the major intellectual foundation of legal order for the entire epoch'', which, inter alia, ''brought Europe together, not only into an intellectual-religious unit, but also under the political idea of res publica Christiana'', a term he identified as still ''used in treaties as late as the 18th Century''(Steiger, 2001) Writing from an Islamic perspective, Muhammad Hamidullah had earlier made a similar observation in 1941, stating that what passed as international law in Europe up to the mid-19th century was ''a mere public law of Christian nations'' and noted that it was ''in 1856 that for the first time a non-Christian nation, Turkey, Was considered fit to benefit from the European Public Law of Nations, and this was the true beginning in internationalizing the public law of Christian nations''(Hamidullah, 1977). relation to this, Carolyn Evans refers to Mark Janis' observation that,' by 1905, when Oppenheim published his classic International Law, religion no longer played the important role that it had in earlier texts: rather religion was part of the history of international law, something that once had mattered''(Evans, 2005).

To highlight however that the concept of international law was not limited to the Euro-Christian civilization in those times, Hamidullah further observed that international law existed long before then within Islamic law, based principally on Islamic religious sources (Hamidullah, 1977). There have also been observations by other scholars highlighting the existence in other religions, such as Judaism, Hinduism and Jainism, of relevant rules for the regulation of the ''inter-state'' relationships between

political powers in the form of law of nations prior to the Peace of Westphalia in 1648 (Rosenne, 2004).

Over time after Westphalia, emphasis on the substantive role and influence of religion in international law declined gradually in Europe, until modern international law became perceived strictly as a secular positivist legal system with its foundation regarded as lying ‘‘firmly in the development of Western culture and political organization’’(Shaw, 2003). It must be noted however that it was religious pluralism rather than secularism per se that was initially at the centre of the new order after Westphalia. The Peace of Westphalia really constituted the triumph of denominationalism against the dominance of the Holy Roman Empire.

The adoption of the United Nations Charter in 1945 can be described as the climax in the formal substantive secularization and positivisation of modern international law, as none of its provisions refer directly to religion as a legal or normative source of international law, except for its provisions on prohibition of religious discrimination (Arts 1(3), 13(1)(b), 55(c) and 76(c) UN Charter). Christoph Stumpf notes that this creates a source of ‘‘potential conflict in the relationship between secularized legal cultures which are customarily labeled ‘Western’, and other legal cultures that wish to uphold their religious root’’(Stumpf, 2005).

Stumpf’s observation is reflective of the fact that the world is today constituted of states that operate different legal cultures, with religion still playing a very visible role in the public sphere and legal culture of many states, particularly Muslim ones. In the words of Ilias Bantekas,‘‘[t]o be certain, the world is divided into secular and non-secular countries’’(Bantekas, 2007). Thus, despite the substantive secularization of modern international law, the discourse on the relationship between religion and international law is no longer merely historically relevant, i.e. ‘‘something that once had mattered’’, but has, from the late 20th into the 21st century, become more substantively relevant, i.e. something that still matters (Petito & Hatzopoulos, 2003). This is particularly true in the aftermath of the 1979 Islamic Revolution in Iran and the Al-Qaeda terrorist attack of September 11, 2001, both of which invoked Islamic religious sources as their basis of action and both of which have had important impacts on international law (Baderin,2010).

While this has placed Islam in the forefront of the contemporary discourse on the relationship between religion and international law, it is by no means the only religion relevant in this discourse. For example, Richard Falk has referred to the Fulan Gong movement in China and the political leverage of the religious-right in the United States of America(Falk, 2002) as relevant examples of the religious dynamics in different parts of the world impacting on modern international relations and international law (Baderin, 2010). Recently, in the face of diverse contemporary international challenges, especially in respect of issues relating to peace and security, some international law scholars and jurists have proposed a recourse to relevant principles of natural law as well as religious and cultural values to find ways of expanding the scope of modern international law principles to meet those challenges (Falk, 2001). Other commentators have, especially from an Islamic perspective, specifically challenged what they consider to be the continued Euro-Christian underpinnings and influences on modern international law and called for an appreciation of the inputs that other religions, especially Islam, can offer to the development of modern international law (Falk, 2001).

4. RELIGION AND INTERNATIONAL LAW: DIVERGENCE OR CONVERGENCE

The main academic question in the debate rotates around whether or not religion should to have a normative role in modern international law at all. The multifarious aspect of the debate is that there are varied perspectives based on different world views and academic arguments. Richard Falk has noted in that regard that:

‘‘There are those who view religion as disposed towards extremism, even terrorism, as soon as it abandons its modernist role as a matter of private faith and belief that should not intrude upon governance . . . [and their] opponents argue the opposite thesis, which contends that without rooting governance in the dictates of religious doctrine, the result is decadence and impotence (Falk, 2001).’

One pone point of view reveals a secular positivist vision of international law, which advocates a firm severance between religion and law and argues that religion should have no normative role in international law at all. It draws primarily from the Western, particularly American, liberal concept of the separation of church and state, which asserts that religion should be a personal matter limited to the private sphere of individuals. In his letter to the Danbury Baptists on January 1, 1802, the third US President Thomas Jefferson expressed this viewpoint by stating that ‘‘religion is a matter solely between Man & his God’’ and not allowed into the public sphere of governance generally and of law particularly, by ‘‘building a wall between Church and State’’ (Jefferson, 2009). Scott Thomas calls this the ‘‘Westphalian presumption’’ in international relations, ‘‘which says religious and cultural pluralism cannot be accommodated in a global multicultural international society, and so must be privatized or nationalized if there is going to be domestic or international order’’ (Jefferson, 2009).

It advocates a ‘‘pure theory’’ of international law intended at ensuring neutrality of the law and devoid of religious and cultural reductionism or influence. Thus, the main logic of the separationist theory is the ‘‘neutrality argument’’, which affirms that a secular positivist international law is essential to ensure impartiality in the operation and application of international law in a method that ensures equality and non-discrimination in a multi-cultural and multi-religious global arrangement.

Today, most scholars of international law, principally from the Western world, approve the separationist theory and advocate a secular positivist international law that is

alienated from any religious influence. For example, in his critique of the arbitration tribunal's reference to Islamic law in the Eritrea v Yemen (Phase Two: Maritime Delimitation) case(*Eritrea v Yemen,* I.L.R. 417), Michael Reisman argued, inter alia, that ''[t]he essential function of general international law, as a secular corpus juris, is to provide a common standard and to play a mediating role between states with different cultures, legal systems, and belief systems'' and thus international tribunals ''would be well advised to stick to international law''(Reisman, 2000) in that secular form. A similar point, but in a different context, was made by Antonio Cassese in his criticism of the Israeli Commission of Inquiry's reference to Rabbinic law in the Sabra and Shatila Inquiry of 1982 and its complete shunning of international law in the process (Cassese, 1988).

Also in his comments on the observation by the International Court of Justice (ICJ) in the Case Concerning United States Diplomatic and Consular Staff in Tehran(*United States Diplomatic and Consular Staff in Tehran* [1980] I.C.J. Rep. 41) that the traditions of Islam have made a substantial contribution to the principle of the inviolability of the persons of diplomatic agents and premises, Ilias Bantekas has argued that there was no need for the court to have made a reference to Islam on this point as there was sufficient substantive principles of international law that the court could have relied upon on that issue (Bantekas, 2007).

In contrast with this, it may be submitted that such complementary references to religious law by international tribunals in relevant cases reflect an accommodationist approach, which can contribute positively to the development of customary international law. However, this should not extend to the total avoidance of international law as appears to have been the approach taken by the Israeli Commission in the Sabra and Shatila Inquiry as analyzed by Cassese in his observation that the Commission set aside both Israeli military law and international law ''and referred exclusively to moral and religious imperatives'' on that occasion(Cassese, ''Sabra and Shatila'' (1988). Rather, the argument here is that relevant religious law can be persuasively cited to complement international law for the purpose of establishing the existence of customary international law in relevant cases, especially where such religious law is a formal part of national law.

There is no rule of international law that prohibits doing so. Actually, it is recognized under international law that states' municipal laws may in certain circumstances form the basis of customary rules (Shaw, 2003). Carolyn Evans has observed in that regard that ''even if religion is often distinguished from law in Western legal and political philosophy, and largely ignored in legal writing, no such division can be neatly maintained in the real world. This is particularly the case in many parts of the world . . . where the law and religion are often deeply intertwined and religion may play a more meaningful and significant role in influencing behavior than does law(Shaw,2003).''

For example, Christopher Weeramantry, a former judge of the ICJ, is a foremost advocate of this view. He has observed notably that:

''Given the strength in the modern world of religious traditions, such as the Buddhist, Christian, Hindu and Islamic, and that they command the allegiance of over three billion of the world's population, there cannot be any doubt that future thinking on international law can benefit deeply from the teachings contained in these traditions (Weeramantry, 2004).''

Similarly, in answering the question of whether religion has served as a catalyst or impediment to international law, Mark Janis has identified three important facilitative roles that religion could play in international law:

''First, religion traditionally has been one of the most fertile sources of the rules of international law. It may well be that all religious traditions have norms that are applicable to the relations of states and their peoples . . . One of the major tasks confronting international lawyers in the modern era is to draw on the many different religious, political, economic and social traditions to find values common to the many nations, which may be adopted as norms in customary law. This should be a mission, not only for scholars of international law, but also for scholars of all the world's religious faiths.

Secondly, religious belief has been one of the chief motivations for enthusiasts of international law. Religious principle and dedication were, for example, at the heart of the movement in the nineteenth century for the promotion of international arbitration and adjudication. Many twentieth-century achievements of international law and international organization stem from the nineteenth century religious enthusiasts of international law. That such religiously based enthusiasm for international law still exists is easily seen by an observation of the record religious groups surrounding such international causes as human rights law, disarmament and environmental law.

Thirdly, the morality of religion has provided some of the glue that has made international law stick. The binding force of any law, international law included, cannot rest solely on force. The legitimacy of international law and international organizations ultimately is a function of widespread individual beliefs that the law and its authorities are right and appropriate. International lawyers have long recognized the potential of religious and moral belief for building a sense of international community whereby the peoples of the globe will be concerned with the fate of all the nations, not just their own(Janis, 1993).'

The late Ibrahim Shihata, a former Secretary General of the International Center for Settlement of International Disputes and General Counsel for the World Bank, reflected this view in an early proposition about the need to study the possible contributions that Islamic law could bring to the development of modern international law,

''In order to eliminate a major excuse for the violation of international law, there should be greater participation by other legal systems in the formation and development of

international law. For by reflecting to a greater extent on the principles of non-European legal systems in the rules of international law, the validity and fairness of international law will be more widely recognized andmore strongly supported through this approach, contemporary international law will probably prove to be a more readily accepted system to the vast part of the international community vaguely referred to as the 'Muslim world' (Shihata, 1962). Carolyn Evans observed that ''some writers focus only on the positive aspects of a particular religious tradition and dismiss any negative role played by that religion as a misinterpretation of its true meaning'', while ''[o]ther writers choose only to focus on the more dangerous and divisive aspects of religion (Evans, 2005)''without acknowledging the positive aspects (Baderin, 2010).

In addressing the relevance of religion to modern global governance, Richard Falk not only acknowledges the double-edged theory but also points out the effect of each of its two edges and proposes how to deal with each of them: ''all great religions have two broad tendencies within their traditions: the first is to be universalistic and tolerant toward those who hold other convictions and identities; the second is to be exclusivist and insistent that there is only one true path to salvation, which if not taken, results in evil. From such a standpoint, the first orientation of religion is constructive, useful, and essential if the world is to find its way to humane global governance in the decades ahead, while the second is regressive and carries with it a genuine danger of a new cycle of religious warfare carried out on a civilization scale. The hope of the future is to give prominence and support to this universalizing influence of religion and, at the same time, to marginalize religious extremism based on an alleged dualism between good and evil" (Falk, 2002).

With regard to customary international law, it was argued earlier that the willingness of international tribunals to refer to relevant religious principles in the Eritrea v Yemen and the United States Diplomatic and Consular Staff in Tehran cases can contribute to the development of customary international law, especially by identifying particular local practices accepted as law between specific groups of states. For example, in the Eritrea v Yemen case the tribunal had referred, inter alia, to Islamic principles to establish that ''the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen'', which must be preserved for their benefit. It is an award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen reported in 1999.

Similarly, in the Saudi Arabia v Aramco case, the Arbitrator referred to relevant principles of Islamic law and a quotation from the Koran to support the customary nature and the universal recognition of the principle of pacta sunt servanda in international law. He observed that Islamic law recognises that agreements and pacts must be fulfilled in good faith ''as expressed in the Koran: 'Be faithful to your pledge, when you enter into a pact'' reported by Saudi Arabia v Aramco in 1963. Another significant example is the Dissenting Opinion of Judge Weeramantry (as he then was) in the case concerning the Legality of the Threat or Use of Nuclear Weapons reported by Legality of the Threat or Use of Nuclear Weapons in 1996, which referred to different religious traditions in the following terms:

''It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture. The concept is of ancient origin, with a lineage stretching back at least three millennia. As already observed, it is deep-rooted in many cultures such as Hindu, Buddhist, Chinese, Christian, Islamic and traditional African. These cultures have all given expression to a variety of limitations on the extent to which any means can be used for the purposes of fighting one's enemy.

The problem under consideration is a universal problem, and this Court is a universal Court, whose composition is required by its Statute to reflect the world's principal cultural traditions. The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread by Dissenting Opinion of Judge Weeramantry at accessed on August 25, 2009).''

Other cases in which the ICJ has referred to Islamic law, religious principles, or norms in its decisions include the Western Sahara case (Advisory Opinion on Western Sahara, October 16, 1975) in which the court's consideration of sovereignty in international law noted, inter alia, that ''even the Dar al-Islam [under classical Islamic political theory]'' recognised ''separate States within the common religious bond of Islam''. This helped establish its finding that Western Sahara was a state of a special character at the time of the Spanish colonization (Advisory Opinion on Western Sahara, October 16, 1975).

Another example is the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case(Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004) in which the Court, to complement its reference to the general guarantees of freedom of movement under art.12 ICCPR, noted that ''account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places'' and that ''the status of the Christian Holy Places in the Ottoman Empire dates far back in time''(Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004). In a memorandum presented by delegates of Muslim states to the League of Nations in September 1939 and to the UN Conference in San Francisco in April 1945, it was submitted that Islam constituted one of the main forms of civilization and Islamic law one of the principal legal systems of the world referred to in art.38 of the Statute of the

Permanent Court of International Justice under the League of Nations, which was subsequently adopted as art. 38 of the ICJ Statute (Mahmassani, 1968).

5. RELIGION AS A SOURCE OF INTERNATIONAL LAW

For many centuries, prior to the Peace Treaty of Westphalia, State-like entities invoked rules and entitlements under the laws of God, even though this corpus of rights and obligations was incoherent, inconsistent and most frequently flouted (Javaid & Susan, 2007). Some obligations, having a foundation also in morality were stronger and found their way into positive law in afterward centuries, at a time when the unity of a single Christian faith had dissolved. Post-Westphalian international law was euro-centric, and while it was infused with biblical policy dictates as evinced in the works of the early international lawyers, it is doubtful whether in its present expression any such elements survive with the same potency (Javaid & Susan, 2007).

The fundamental starting point for this work is to what degree religion constitutes a source of obligation for any particular State or group of States. The situation is compounded by the fact that international law is no more a euro-centric exercise, with Muslim and other nations exerting significant influence in international relations. In addressing the question regarding the existence of obligations through religion we examine the possibility of a historical continuity of norms borne out of religious tradition and thereafter tracing their journey into the realm of natural and positive international law.

In this regard, we examine a proposition holding some contemporary Muslim scholars that Islamic law constitutes a distinctive international legal framework that is different from the euro-centric model. Is there a single international law or in fact multiple legal regimes that are not subject to a single hierarchical structure? This matter is also closely connected to the debate on human rights recognized under international treaties and customary law but prohibited under particular Islamic schemes, fuelling the cultural relativist agenda.

In order to address the question of whether a religious norm has found its way into contemporary positive international law, and whether such norm/s is independent from its parallel treaty or customary prescription, we evaluate two norms under their respective religious and international law perspective: the jus ad bellum and that of diplomatic protection. In this regard we examine what is the role of obligation and estoppels in the case of religious inferences. Moreover, we take a look into the significance of religious constitutions and their capacity in acknowledging a particular State's obligations on the basis of religious texts and traditions. Finally, of significant concern is the role of organized religious institutions in dictating or lobbying the foreign policy of like-minded States, expressed most typically through voting in international organizations and policy positions during treaty negotiations.

Nonetheless, the extent to which religion informs the domestic and external relations of non-secular countries varies significantly. Pakistan, for example, whose domestic legal system is predominantly based on the Shariah (Islamic law), adheres to secular standards in its international relations with other States. The same is true of other Muslim-majority countries, including Egypt and Turkey although the latter has resisted the application of *shariah* at the domestic level, as have the newly emergent Central Asian republics, preferring instead secular constitutions. Yet, other more traditional Muslim majority countries, such as Saudi Arabia, while implementing Islamic law internally and generally voicing a secular external policy, do not hesitate to oppose the universality of secular concepts, particularly in the field of human rights and democratic governance. Similarly, in the United States and Europe, while Christianity is the dominant religion among their citizens and inevitably religious institutions influence a variety of policies (Art. (40)(3)(3) of the Irish Constitution), foreign policy is drawn essentially under secular procedures and substantive rules.

To answer the question whether international norms are divorced from religious norms requires an initial overarching assumption in the following terms. A positivist would have no problem asserting that contemporary international law is and ought to be devoid of religious propositions, since the contractarian nature of this legal system has excluded reference to religious postulates as sources of law. Natural law theory, on the other hand, would refute the argument that the consensual (contractarian) nature of the international legal system excludes divine rules pertaining to human morality. Despite the erosion of naturalist theory in favor of positivism, particularly in the twentieth century, important positivist instruments such as the preamble to the UN Charter and the Universal Declaration of Human Rights, posit strong naturalist statements (McCoubrey, 1999) Indeed, in the work of Grotius, a large number of sources and citations used to support his legal arguments are predicated on Christian religious texts (Janis, 2003).

By the time of Vattel, in the mid-eighteenth century, the relationship between direct religious sources and international law had been replaced by natural law (Janis, 2003).

In his 1836 work, entitled Elements of International Law with a Sketch of the History of the Subject, Henry Wheaton suggested that the usage and acquiescence that makes up a rule of positive international law"can only spring up among nations of the same class or family, united by the ties of similar origin, manners and religion" (Wheaton, 2001). Janis criticizes the foundations of this assertion, but points out that Wheaton was inspired by Austin's command theory, i.e. that international law is not law properly so called because it does not involve sanctions imposed by a higher authority, such as would be applicable under domestic law. For Wheaton, these "sanctions" could be substituted by "international morality, but these could be enforced only as long as the nations that consented to them

subscribed to the same moral order, which is not the case with non-Christian States in their relations with Christian States (Janis, 2003).

If this argument were sustained for the entirety of international relations it is not unreasonable to expect that the rubric of international law be dissolved. Let us note a few examples, past and present, where this line of thinking was indeed practiced by States, some of which on religious, others on political or cultural grounds. The division of East and West during the Cold War culminated in the adoption of a Soviet perception of international law, one which, inter alia, disapproved of custom as a source of law binding upon Warsaw Pact and Western States and recognised a right of forceful intervention to avert the overthrow of communist regimes (brezhnev doctrine) (Moore, 1987).

Similarly, following the process of decolonization in the the newly emergent African States argued vehemently that although international law demanded the payment of adequate compensation for nationalized foreign property, this was generally inapplicable in the decolonization context because the colonizers had for too long exploited the resources of their colonies to the detriment of their people *Nyerere doctrine* (Bello, 1980)

A settlement was finally reached in the matter, but as a result of that dispute new countries generally joined the community of nations under the express understanding that they accept the rules of international law as they find them on the day of independence. Nonetheless, this case exemplifies the existence of two parallel systems of international expropriation law in a particular time and place. The most significant theatre, however, where two juxtaposing and competing– to some degree – international legal regimes exist is that regulating the relations of Muslim nations among themselves and another regime encompassing general international law entertaining all other matters of foreign policy. Although religion is the dominant source of this divergence, it's very essence on the international plane is more akin to political theology.

There are two explanations for this separate Islamic international law regime; a historical and a legal/cultural. Under the historical component, during the first eras of expansion and interaction of Islam, war against unbelievers was justified merely by the fact of disbelief, thus bringing about the dichotomy of '*dar-al-Islam/dar-al-harb*' (territory of Islam and territory of war respectively). The dar-al-Islam was subject to a particular set of rules common to the Muslim brethren living therein, whereas the dar-alharbwas not. By the thirteenth century, at a time when both the Christian and Muslim nations realised that one could not fully subjugate the other, the aforementioned dichotomy was expanded to include a third category, the 'dar-al-sulh', which means the territory of peace. This corresponds to the modern state of affairs, comprising relations with non-Muslim States that were not hostile to Muslim nations and which moreover entered into treaty relations with them (Khadduri, 1956).

All major religions have to a lesser or larger degree prescribed rules by which their followers, or communities of followers, may validly use force to defend themselves or help others in need. These prescriptions have appeared either in the principal religious texts or have developed through the philosophical or theological tradition of such religions. Most influential among these has been the formulation of the "just war doctrine" by the early fathers of the then united Christian church (but essentially those of the Latin part of the Church), and particularly St. Augustine of Hippo (354–430), and later refined by Thomas Aquinas (1225–74).

Although one can trace the origins of the doctrine back to Cicero, it was St. Augustine who set out the parameters for waging legitimate war under God as follows:

a) The cause must be just;
b) It must originate from legitimate authority;
c) Action must be accompanied by right intention;
d) There must be a probability of success;
e) War must be a means of last resort;
f) The action must be proportional, and;
g) Non-combatant immunity must be recognized in all cases (Augustine,1994).

The doctrine was in time further refined by the renowned Spanish theologians of the Catholic Church during the thirteenth to the sixteenth century, such as Francisco Suarez (Suarez, 1621), reflecting natural law that was in harmony with the Christian Faith.

6. BIBLE AND INTERNATIONAL LAW

In the field of the laws of war (jus in bello), what probably started out in the mid-nineteenth century as Christian philanthropy with the establishment of the Red Cross, very quickly re-discovered the contribution of non-Christian civilizations (Cockayne, 2002).

International law as a law between sovereign and equal states based on the common consent of those states is a product of modern Christian's civilsation, and may said to be about four Hundred years old (Oppenheim ,1905). Such ancestries are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations.i.e *Dar ul Harb* .

The formulation of international law as we perceived today is not the same to the ancient time. But from the time immemorial religion always contributes to the state contact with the other. No nation could avoid coming into contact with others. Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly consistent rules and usages to be observed with regard to external relations. These rules and usages were considered to be under the protection of the gods; their violation called for religious ex piation. it will be

of interest to take a glance at the respective rules and usages of the jews, Greeks and romans (Oppenheim,1905).

7. JEWS AND INTERNATIONAL LAW

This concentration upon what may be regarded as the central elements of the modern system of international law must not induce the error of ignoring other aspects of international law which appear in the Jewish sources, or in underestimating the possible influence of the various institutes of the Jewish civil law upon developments in the sphere of international law (Janis & Evans, 1999).

Again in connection with the territory of a state, attention may be drawn to the important distinction made by the Talmud, and later legal texts, between what is called 'conquest of an individual' and 'conquest of the king or Prophet', only the later being competent to exercise the sovereign right of annexation. This forecasts the modern legal theory of act of state in relation to the problem of acquisition of territory (Talmud & Zara, 1979).

The whole concept of innocent passage, which plays so important a part in the modern jus communications, is in the classic literature of international law, traced to the negotiations between Moses and the Kings of Moab, recorded in Number XX (Decretum Gratinum,).

As regard the possible influence of Jewish civil law on our topic, perhaps the most fascinating aspect in the theory that the system of arbitration common in international practice, by which each litigant selects an arbitrator, the two jointly selecting the third arbitrator, is of Jewish origin (Robert, 2013).

In another sphere altogether, there is much evidence in favor of the view that the international rule that sovereignty skywards extends usque ad coelum is of Talmudic origin (Robert, 2013).

Although they were monotheists and although they were monotheists and although the standard of their ethics was much higher than that of their heathen neighbors, the jews did not in fact raise the standard of the international relations of their time except in so far as they affordable foreigners living on Jewish territory equality before law (Openheim. 1955). Proud of their monotheism and despising all other nation on account of their polytheism, they found it totally impossible to recognize other nations as equals. If we compared the different parts of the bible concerning the relations of the jews with other nations, we are stuck by the fact that the Jews were sworn enemies of some foreign nations, such as the Amalekites,for example with t whom they declined to have any relations whatever in peace. When they went to war with those nations, their practices was extremely cruel. They killed not only the warriors on the battlefield but also the aged , the women and the children in their homes (Openheim, 1955). With those nations, however, of which they they were not sworn enemies the jews used to have international relations (Openheim, 1955). The jews, further , allowed foreigners to live among them under the full protection of their laws.of the greatest importance ,however, for the international law of the future, are the Messianic ideals and hopes of the jews,as these Messianic ideals and hopes are not national only, but fully international (Openheim, 1955).

Thus the Greeks left to history the example that independent and sovereign states can live and are in reality compelled to live , in a community which provides a law for the international relations of the member states, provided that there exist some common interest and aims which bind these state together. It is often maintained that this kind of international law of the Greek States could in no way be compared with our modern international law, as the Greeks did not consider their international rules as legally, but only as religiously, binding (Openheim, 1955). However, that the Greeks never made the same distinction between law, religion and morality which the modern world makes. Roman had a special set of twenty priest, the so called fetiales,for the management of functions regarding their relations with foreign nations. In fulfilling their functions the fetiales did not apply a purely secular, but a divine and holy law, us sacrum, the so-called jus fetiale (Openheim, 1955).

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The modern law of nations is a product of chiristian civilization. It originally arose between the states of Christendom only and for hundreds of years was confined to these states.

With the reception of turkey in to the family of nations in 1856 international law ceased to be a law between chiristian states only. This reception took place expressly through article 7 of the peace Treaty of Paris of 1856.

8.THE ISLAMIC WORLD

The Islamic world and the Christian society both were followed their own religious values. Both religious faiths were strongly Universalist in outlook, each seeking ultimately to bring the entire world within its fold (Neff, 2014).

It has been observed that, in case of Christian Europe, an alternative Universalist vision was offered by natural-law doctrine. On this point, the Islamic world offered a very striking contrast. Natural law was one notable element of the Greek and roman classical heritage that did not have a great impact on Muslim law (Neff, 2014). The Islamic ideals were that Muslim world should comprise a single community of believers, unite in a single polity and governed by Shariah, the Islamic religious law (Neff, 2014).

The Quran, the sacred book of the Islamic faith did not itself offer much guidance. But a body of law known as siyar gradually grew up to deal with such issue. (Siyar is the plural of the Arabic word sirah, which simply means conduct or behavior) (Neff, 2014). It was a body of rules that instructed Muslim rulers on how they were to behave toward nonbelievers. In modern parlance, it would be characterized as the Muslim law of foreign relations (Neff, 2014). Since siyar was seen as part of Islamic law, it followed that it must, in principle at least, flow from the sources as Muslim law generally. In practices, however, that was not really the case, since the traditional sources of Islamic law had too little to offer in the substantive rules of conduct. Siyar was therefore ,to a large extent, separated from other branches of Muslim law, being derived largely from custom and from reason rather than from the prescription of the Quran or practices of the prophet Muhammad (which were ,and still are, the two principle sources of Islamic law) (Neff, 2014).

The earliest writing on siyar was in the middle of the eighth century by Absal Rahman Awzai, who lived in Syria but of whom otherwise nothing is known. He wrote a book – apparently the first ever – on the subject of the laws of war (Neff, 2014). It dealt with a number of discrete, specific topics of a practical nature, with the greatest attention given to the treatment of enemies and the division of the spoils of battle (Neff, 2014). The first exposition of siyar as a whole however, appears to have been accorded by the Hanafi school of Muslim jurisprudence, which grew up in Iraq in the late eight and early ninth century (Neff, 2014). One of the leading early figure of this school, a certain abu yusuf,wrote a book on taxation (kitab al kharaj), which contained a treatment of legal rules on foreign relations between states (Neff, 2014). It is said that the book was written at the request of Caliph Haroun al- Rashid (Neff, 2014).

Mush more significant was a work written few years later, just after the turn of ninth century, by abu allah Muhammad ibn al hasan ibn farqad al shaybani-usually known simply as sheikh al shaybani (Neff, 2014). Al shaybani wrote two books on siyar. It covered such topics as peace treaties and safe conducts, territorial jurisdiction, diplomatic relations, the conduct of war, neutrality and civil strife (Neff, 2014).

It would appear that ordinary diplomatic relations with infidel states posed no great problem. In 765, king Pepin of France dispatched a mission to Baghdad and receive a return embassy three years later. In 797, Charlemagne sent another mission to Baghdad. It returned with some handsome gift, if nothing else-including a white elephant. There were even (if very rarely) personal meeting between rulers of different faiths (Neff, 2014). In 1162, byzantine Emperor Manuel Commneos hosted the Turkish sultan of iconium (modern – day Konya) in his place in Constantinople resulting in the conclusion of a friendship treaty.

Muslim could even, like the Chinese, take a broad view of 'tribute' by deeming ordinary ,customary gifts by diplomatic mission to be tribute (Neff, 2014).Strong economic ties developed between the faiths-ties that were ,in fact too strong for the liking of some. As early as 969-70, the Byzantine Empire entered into an agreement with the Muslim emir of Aleppo for the free traffic of caravans between Byzantium and the central Asian Trading cities. This agreement also provided for limitation on custom duties and guarantees of the security of the security of persons (Neff, 2014).The Lebanese lawyer Sobhi Mahmassani, arbitrator in Libyan American Oil Company by Libya (1977), better known as LIAMCO, broke ranks with the prevailing view that expropriation of foreign investment required the application of Hull Formula of prompt, adequate, and effective compensation. He accomplished this in the following way:

First, he determined that the concession agreement in dispute called for application of the principles of law of Libya common to the principles of international law. Second, he listed the usual categories of ICJ: conventions, customary international law, general principles of law, and the teachings of prominent publicists. Third, he identified Libyan laws common to these: Libyan statutes, the Sharia, local custom, and natural law and equity. Next he noted that the Libyan revolutionary council had decreed in 1971 that the principal source of Libyan legislation was henceforth to be the Sharia, which in effect elevated the Sharia above all Libyan positive law. Then, asserting that local custom and natural law and equity were in harmony with the Islamic legal system, he concluded that Libyan law was identical with the Sharia. Finally, he identified numerous legal precepts and Maxims that were common to both the Sharia and the principles of international law, including pacta sunt servanda, sanctity of property; no unjust enrichment; respect for acquired rights; and non-retroactivity of laws (Khadduri, 1956).

Formal recognition of major Muslim state with a major non-Muslim state only occurred in 1535, when Suleiman the Magnificent concluded a treat with Francis I of France, joining forces against the Hupsburgs. This treat explicitly recognizes a treat period longer than ten years, and provided that French citizens would not be automatically subjected to

Ottoman law when in Ottoman territory, the dar al-islamof the period (Khadduri, 1956).

The Ottoman sultan concluded similar treaties with the Moguls of India and the Safavids of Iran, though such treaties were rare until the nineteenth century and post-datethe 1535 treaty.

The Abbasid state, however, began to break up as nearly as the ninth century, leaving, between 900 AD and 1500 AD, at least 600 years of de facto diplomatic, commercial, and personal relations among several Muslim states, while maintaining the cold war with the Christian world. Historians have written very little of the details of these Muslim interstate relations (Bernard Lewis 1982).

9. HINDU LAW

The oldest surviving Indian text that contains material on international relations Hinduism is a way of life, a Dharma (Sastry, 1966).

Dharma does not mean religion: it is the law that governs all actions (Sastry, 1966). The Hindu religion not only consists of rules encompassing the rights and duties of kings and warriors, but also provides norms of DesaDharma that govern inter-State relations (Chacko, 1958).

The restrictions on waging of a war is the most promising feature of the Ancient Indian society as it makes it mandatory to exhaust all other remedies before resorting to war. The call for preliminary peaceful settlement is typical of the ancient Indian international law (Butkevych, 2003).

The Arthashastra is one of the greatest political works of Ancient India by Kautiliya(Alexandrowicz, 1966). He was a great advocate of the policy of state interest and yet looked upon the establishment and continuation of peace as the only means of achieving national prosperity(Kautiliya, ARTHSHASTRA, VII, 12).Kautiliya advocates political persuasion in preference to war. He states that the powerful sovereign 'should subjugate the weak by means of conciliation'(Bhaskaran, 1954).The said opinion took reference from ‘other sources of International Law’ thereby making Bhagwad Gita as a source of International Law and the principles of Hindu code on law of war as universally acceptable (Weeramantry, 2000).

10. CONCLUSION

With the demise of the Soviet Union, some believed that bipolarity would revolve around religious/cultural differences (Huntington, 1996).

As the jurisprudential debate over the nature of law 'properly so called' has shown, there can be a level of sterility or intellectual dogmatism in trying to impose rigid definitions on socially complex phenomena, such as law and religion (Janis & Evans, 1999).

We have endeavored to study to what extent religion may authentically constitute a source of international law. We have made the proposition that while international law is commonly a secular discipline; certain countries within its reach are not. What are the inferences stemming from this position? For one thing, distinct Soviet assertions during the Cold-War period that customary law did not fasten communist States, existing Islamic voices asserting that Islamic international law is a unique system of law (a modern day *dar-al-sulh*) that is binding on Muslim States and may validly be in disagreement with the international law that we know, is unfounded. Such a mythical proposition would have the effect of transforming every regional or local custom or regional multilateral agreement into an autonomous legal regime unsusceptible to other set of laws.

The reality is that religion may reliably constitute a foundation for the assumption of international obligations. Examples of this are flourish in the context of Islamic law, chiefly since it remains the source of law for the majority of Muslim countries. Although a standard of international law may well coincide with a norm emanating from Islamic sources, the position is more complicated when international law is generally unvoiced and the matter is regulated by Islamic law. In such cases, it seems clear that if the country in question has explicitly, through tacit practice, or declaration of some class, accepted the obligation enclosed in the Islamic rule, then it is bound by it in analogy with a rule of customary or treaty law, or of unilateral practice, depending on whether the rule in question is contained in a written text, religious tradition shared among a number of like-minded nations, or religious tradition accepted only by the particular State. Religious constitutions may offer evidence of State practice in this regard. Islamic constitutions – although the term does not have a sole meaning – to different degrees accept that obligations emanating from the whole amount of Islamic law (both the Qur’an and the *sunnah*) constitute sources of law of those States. In most cases there is very little or no reference to external relations in this regard, but only to State/individual and individual/individual relations. However, both the Qur’an and *sunnah* contain numerous norms regarding external relations of Muslim States, and it is only rational, since there exists no declaration to the contrary, to presume that even these obligations are assumed by Muslim States that profess to include the full domain of Islamic law. While religious concepts, in the sense illustrate above, may constitute obligations under international law, their place within the presented regime of the law of nations is subject to that regime’s procedural rules, particularly the hierarchy of norms. Even if a religious rule discovers it’s put within the international legal system, it cannot supersede existing treaties, custom and especially *jus cogens*. This is particularly important *vis-a-vis* relativist States in the fled of

human rights, not because of a vague, western conception of human rights, but on account of the procedural rules of international law that have elevated certain human rights to a *jus cogens* level.

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