The Nature of Treaties in Islamic Jurisprudence and International Law

Prof. Dr. Hasan Taisir Shammout, Jarash University,
E-mail:h_shammout@hotmail.com

Legal scholarship has confirmed that international Islamic law and international law are considered as influential systems of reference rules. Recent studies neglect several individual fields of Islamic law, particularly the area of foreign relations. These studies overlook specific features of treaty-conduct in Islamic jurisprudence. Therefore, this study aims at exploring the nature of treaties in Islamic jurisprudence and international law by explaining the relation between Islamic jurisprudence and international law in terms of the nature of treaties. The findings revealed that treaties based on international law are consistent with Islamic law. Further studies may be conducted on treaties relevant to the contemporary world. Conclusions will be presented accordingly.

1. Introduction

The legal system can be best recognised in the society from which it is created. Both international Islamic law and international law are regarded as influential systems of reference rules. This means that norms and rules are formed and constituted by the cultural, economic, political, historical environment (Samour, 2012).

Islamic international law represents a set of rules allowing international agreements instead of imposing a collection of compulsory international rules (Fadel, 2010). Traditionally, Islamic international law is used to provide Muslims with rules of behaviour rather than as a way of administering the relationship between nations and states. Hence, its regulations are considered as the most critical reference point for Muslims (Ali, 2012). A number of Muslim jurists regarded international associations as a branch of global jurisprudential in the fields of war, peace, and treaties (Al-Zuhili, 2005).

In this respect, traditional Islamic law differentiated the field of Islam and the field of war. As for the Islamic domain, Islamic rule is governed, and political power is decided by the Muslim

community. It is important to note that there is another field involving the treaty category. This category was utilised at times of peace between states (Samour, 2012). This can be applied through truce agreements and peace treaties for the creation of mutual acceptance and hostility prevention. Such treaties based on Islamic international law allow any Islamic state to admit peaceful relations with other states that were not included with Islamic states. The two world division stressed this particular jurisdiction, and improved Islamic and non-Islamic states relations on the basis of treaty (Fadel, 2010; Samour, 2012).

It should be noted that some Muslim legal scholars offered close similar definitions regarding treaties. For example, Al-Kasani (1986) defined it as the conciliation on leaving the fight. Another scholar defined it as peace and conciliation due to a truce that prevents fighting and incitement over a specific period of time (Al-Mawardi, 1994). Thus, the treaty can be best explained as a binding contract between two teams on leaving the fight for a specific period of time under conditions both parties are committed to.

As for the concept of treaties in public international law, it is worth mentioning that a treaty has been defined in Article 2(1) (a) of the Vienna Convention (1969) as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Sinclair & Sinclair, 1984, p.6). In addition, one critical definition of treaties was offered by Oppenheim (1952). He pointed out that, "International treaties are agreements of a contractual character between States or Organisations of states creating legal rights and obligations between the parties" (p. 877). Thus, treaties in international law do not only stop fighting as is the definition of Muslim jurists, but they also include contractual conventions between two states.

It is crucial to notice that recent research in Islamic studies concentrates on Qur'anic, philosophical, and theological dimensions. However, it ignores several individual fields of Islamic law, particularly the area of foreign relations (Bsoul, 2011; Hallaq, 1997; Powers, 1992). Such studies neglect specific features of treaty-conduct in Islamic jurisprudence (Bsoul, 2010, 2011). Therefore, this study aims to explore the nature of treaties in Islamic jurisprudence and international law by explaining the relation between Islamic jurisprudence and international law in terms of the nature of treaties.

2. Literature Review

2.1 The Legality of Treaties in Islam

Most Muslim jurists believe that violence and aggression are the main cause of warfare. This means that those who are not involved in warfare will not be killed or attacked. The killing of children, women, and priests is prohibited by an order from Prophet Mohammed (peace be upon him). Thus, if non-Muslims probably want conciliation and peace, they can voluntarily have it by their own choice (Al-Zuhili, 2005). According to Al-Zuhili (2005), in Islam, three conditions legitimise warfare. The first type includes aggressive attacks on every individual Muslim or waging war on Muslims. The second involves providing help for victims of injustice. The third type includes self-defence by preventing any potential attacks on individuals' homeland.

In addition, Ibn Taymiyya's speech clarified that due to Prophet Mohammed's (peace be upon him) conduct, he did not wage a war on any disbelievers who made a truce with him (Al-Zuhili, 2005). For example, in the era of the Prophet's companions, may God be pleased with them, and in view of the widening of the Islamic conquests, more treaties were formalised compared to the era of the Prophet, reaching nearly thirty-five treaties, most of which were temporary covenants (Al-Isawi, 2000).

2.2 The Nature of Treaties in International Law and Islam

International law does not have fixed sources. This indicates that many legislators deliberate on the nature of the laws they have. However, the matter is completely different in Islamic Sharia or law; the sources of Sharia are authentic, fixed and original, namely the Holy Qur'an, the Prophet's Sunnah and consensus among Islamic scholars (Mughal, 2000).

2.2.1 The Nature of Treaties in International Law

On the basis of three views, Abu-Alnasr (2008) argued that the jurists of international law differed regarding whether a treaty is a contract like other contracts, or if it is considered as international legislation. The first view considered the treaty as legislation. Treaties are international legislation since they are issued by the legitimate will of its parties. The treaty also contains written or codified rules.

As for the second view, it is believed that treaties have two forms. The first form can be described as legitimised; they are concluded between large groups of states in that they agree to establish legal rules or abstract systems of concern to all states. The other form can be described as

contractual; they are self-described contracts that include the undertaking of the states that are signatories to such treaties to mutually different obligations. In terms of commitment, their impact does not extend to states to which they are not a party. The third view goes with idea that scholars shall not differentiate between legal treaties and contractual treaties (Abu-Alnasr, 2008).

It is important to note that the basis of the distinction involves the fact that contract treaties are concluded between a relatively small number of parties, and thus this creates special legal rules that apply to the signatories to the treaty. Treaties that have multiple signatories are essentially lawful; nevertheless, all international treaties include contractual obligations adopted by its parties, and therefore it is considered a law for all parties that have agreed to the terms of the treaty (Al-Isawi, 2000). Bilateral treaties do not create legal provisions that are less valuable than those contained in multilateral treaties. As for the legal treaties, the scope of their application is expanded and accordingly it is considered as legislation. This is due not only to the large number of signatories to the treaty, but also to the fact that the provision contained in the multilateral treaty is at the same time considered as an international customary legal basis (Al-Isawi, 2000).

2.2.2 The Nature of Treaties in Islamic Legislation

As mentioned earlier, it is worth mentioning that the source of legislation in Islam is clear and disciplined. Most contemporary scholars who were interested in the treaties were affected by the divisions of international law. For example, Al-Ghunaimi (1979) and Al-Isawi (2000) divided the treaties into two main parts. The first part included the treaties that took place during the era of the Prophet Mohammed, peace be upon him. These treaties can be given the character of legislation as the treaty is not considered as a source of legislation; it has the character of the rule of the Sunnah of the Prophet. It took its rule from the legitimacy of the Prophet's Sunnah since it is not considered as an independent source.

The second division involved treaties that occurred after the time of the Prophet Mohammed, peace be upon him. Such treaties cannot be given legislative character unless they are based on Islamic law in its provisions. In a word, treaties are viewed as contracts, involving legislation that is derived from one of the legislation sources on which it is based (Al-Ghunaimi, 1979; Al-Isawi, 2000).

2.3 The Role of Treaties in Organising International Relations in Islam

In Islam, treaties are a means of organising international relations between the Islamic state and other states, and these treaties fell under various names such as truce, covenant, and security. Islamic action was not limited to concluding treaties related to organising war. Rather, it concluded

treaties related to organising neighbouring states and friendly relations in addition to organising some commercial and economic aspects (Al-Isawi, 2000; Al-Qaddomi, 1987). It is worth mentioning that a number of treaties existed in the period of Islam (Al-Qaddomi, 1987). Three of these treaties are explained in this paper.

a. Treaty for Good Neighbourliness

The first treaty for good neighbourliness was the one that the Prophet, peace be upon him, concluded between Muslims and Jews when he arrived in Medina (Al-Omari, 1994), then there was the Muslims' treaty concluded with Christians of Najran (Al-Bayhaqi, 1991).

It is important to notice that these treaties are closer to agreements rather than treaties, as they were concluded between Muslims and parties that do not constitute a state with an independent entity at that time.

b. Conciliation Treaties

This type of treaty occur either after the end of the war, during the course of the war, or before the beginning of war to prevent its happening as is the case with the Hudaybiya conciliation (Al-Halabi, 1996). The purpose of this type of treaty is that the two states along with the individuals that have signed the treaty shall live in safety without being attacked.

c. Trade Treaties

The aim of this type of treaty is to regulate trade exchanges. Some of the terms of the Hudaybiya conciliation (Al-Bayhaqi, 1988) treaty are exemplarily of such treaty. Also, these treaties are considered as agreements concluded by states.

2.4 Treaties in International Law

As for treaties in international law, they constitute the core of most sections of modern international law. States started to adopt treaties as a means to organise essential domains of international relations rather than having concluded treaties on particular lawful transactions (Dörr, 2018).

Regarding the deployment of treaties as international legislation tools, legal doctrine started to differentiate between treaties on law-making and certain legal transactions represented by contracts (Triepel, 1899; Dörr, 2018). It is critical to consider that technical innovations go with

the tool of collective treaties, involving reservations, common participation clauses and open treaties (Grewe, 2000).

Additionally, bilateral agreements dramatically witnessed an increase in number because of the interdependent growth of states. This was due to the economic and technical cultivation in the industrial revolution period (Ziegler, 2007). It is worth mentioning that in 1917 there were nearly ten thousand treaties in force. This indicates that the nineteenth century can be characterised as the noticeable era of the remarkable increase of written law (Nussbaum, 1954).

It should be noted that these treaties are not inconsistent with Islamic law, and they may be adopted. In public international law, the obligatory basis for fulfilling treaties is the principle of fulfillment of the covenant, which is a well- established and stable principle in international law. It is governed by the rule of sanctity of the agreement as well as the rule that is about "Consent makes the law". Therefore, treaties must be respected and adhered to until it rightly expires (Al-Isawi, 2000). For example, the Covenant of the League of Nations Preamble emphasised the sincere respect for the obligations of the treaty that tackles organised individuals with each other (Dörr, 2018).

2.5 Objective Conditions for the Validity of Treaties

This section shows the conditions set by Islamic jurists and scholars of international law concerning the validity of treaties.

2.5.1 The Contracting Eligibility in Islamic Law

Islamic scholars stipulated that the principle of the conclusion of the treaties is that they shall be from the ruler of the state, i.e. the king or president, or whoever is chosen by the ruler. No person has the right to perform treaties in his personal capacity (Alsherbini, 1994) due to the fact that when individuals conclude treaties, the interests of Muslims may not be satisfied (Alshirazi, 1992). Also, individuals in general are not qualified to deal with such political issues (Ibn-Mufleh, 1997). There is another opinion that permits the general public to conclude treaties with non-Muslims if this treaty represents the interest of the nation of Muslims (Al-Kasani, 1986).

2.5.2 The Contracting Eligibility in International Law

Both parties shall be obliged to offer their identification data. Given that the parties need a legal contract, McKendrick (2014) argued that they shall investigate the eligibility provided through any existing means. In addition to contracting eligibility, it is required that full consent of the

contracting parties shall be available in order that the two parties shall adhere to the treaty (Tayyar, 2000).

In Islamic law, Al-Ghunaimi (1979) pointed out that the treaty is based on consent between the two parties, and this requires the integrity of the complacency of defects. Thus, Islamic law does not only consider the existence of consent between the contracting parties but also that consent must be valid in a manner that is not covered by error, fraud, coercion or injustice. As for international law, it is argued that the defects of consent are error, fraud, injustice and coercion, and invalidate the treaty (El-Ahdab, 2011; Al-Jundi, 1988). However, Al-Isawi (2000) noted that error and injustice cannot take place in treaties since the conclusion of the treaty requires long stages of preparation, negotiation, editing, ratification, as well as its submission to decision-makers.

Additionally, it should be noted that international law stipulated that the treaty shall not contradict the peremptory norms in international law. The peremptory rule as defined by Article (53) of the Vienna Convention on Treaties is the rule accepted and recognised by the international community as a whole. It is the rule that cannot be violated and modified unless it is followed by a subsequent rule of general rules of international law that has a relevant nature (Al-Jundi, 1988).

2.5.3 Duration of the Treaty

Treaties between Muslims and non-Muslims in the past were either permanent or interim according to the nature of the relationship between the two parties. Permanent treaties include the contract concluded with the People of the Book (Christian or Jewish People) in which they were subject to the rule of Islam as well as the protection fees paid to Muslims. On the other hand, interim treaties were treaties that were formalised in the time of war (Abu-Eid, 2004). Thus, duration is based on the interests of a ruler in a specific period of time. It is also critical to note that the treaty should not be absolutely permanent. As for international law, it did not determine a specific period of the treaty; it may be limited by a specific time or it may be absolute (Al-Isawi, 2000).

Conclusion

This paper began by exploring the theoretical backgrounds of treaties in both Islamic law and international law. Muslim and non-Muslim scholars pave the way for later scholars, providing the terms and conditions required to conclude any kind of treaty. For example, the Hudaybiya treaty represented the direct model identified by a consensus of Muslim scholars for the following treaties (Bsoul, 2011). In order for a treaty to be finalised, some crucial conditions such as validity and contractual eligibility in both Islamic and international law are necessary. According to Islamic

legislation, it is allowed to make treaties with non- Muslims. Thus, this research attempts to provide a new understanding of the nature of treaties from the point of view of Islamic jurisprudence and international law. It may also shed more light on the nature of treaties between nations and states in general. This may lead to deeper reflection on the ongoing hostilities and disputes in various regions in the world. Further studies may be conducted on treaties relevant to the contemporary world.

REFERENCES

Abu-Alnasr, A. (2008). The legal nature of international treaties and conventions on Palestinian track. *Al-Azhar University Journal, 10*(2), 231-278.

Abu-Eid, A. K. (2004). *Foreign Relations in the State of the Caliphate*. Dar Al-Nafees, Amman

Ali, S. S. (2009). Resurrecting Siyar through fatwas? (Re) Constructing 'Islamic International Law' in a post – (Iraq) invasion world. *Journal of Conflict & Security Law, 14*(1), 115-144.

Al-Bayhaqi, A. A. (1988). *Evidence of Prophethood and Knowledge of the Status of the One Who Sharia Law Belongs*. Edited by Abdul-Moati Qalaji, 1st ed. Science Books House, Beirut. Lebanon.

Al-Bayhaqi, A. A. (1991) *Knowledge of the Sunnah and Consequences*. Edited by Abdul-Moati Qalaji, 1st ed. Dar Al-Wafa, Cairo.

.Al-Ghunaimi, M. T. (1979). *Treaty provisions in Islamic law*. Munshaat Al-Maarif, Egypt.

Al-Halabi, A. O. (1996). *Trace from the biography of Mustafa (Al Mqtafa min siratu almustafa).*. Edited by Mustafa Muhammad Al-Thahabi, 1st ed. Dar Al-Hadith, Cairo.

Al-Isawi, I. K. (2000) *Treaty provisions in Islamic jurisprudence*. 1st ed. Dar Ammar, Amman. Jordan.

Al-Jundi, G. (1988) *International Treaty Law*. Library of University of Jordan. Amman Jordan

Al-Kasani, A. A. (1986). *Creativity of creatures in arranging the law* (Bada'i Al-sanayi 'fi tartib Sharia). 2nd ed. Arab Book House, Beirut. Lebanon.

Al-Mawardi, A. M. (1994). *Al-hawi al-kabeer*. Edited by Ali Moawwad and others. Dar Al-Fikr, Beirut. Lebanon.

Al-Omari, A. D. (1994). *The true biography of the Prophet: An attempt to apply the rules of the modernists in criticizing the narrations of the Prophet's biography*. 6th ed. Library of Science and Wisdom, Medina. Saudi Arabia.

Al-Qaddomi, M. (1987). *International relations in Islam*. University Library, Nablus.

Al-Zuhili, S. W. (2005). Islam and international law. *International Review of the Red Cross, 87*(858), 269-283.

Alsherbini, M. A. (1994). *The Full need in knowing the meanings curricula words (Mugni almuhtaj lemaarefet maani alfaz almenhaj)*.1st ed. Scientific Books House, Beirut. Lebanon

Alshirazi, I. A. (1992). *Almuhathab in the jurisprudence of Imam Al-Shafi'i*. 1st ed. Edited by Mohammad Zuhaili. Al- Qalm House. Damascus.

Bsoul, L. A. (2010). The concept of treaty in Islamic jurisprudence: A comparative view of the classical jurists. *Journal of Islam in Asia, 7*(1), 55-86.

Bsoul, L. A. (2011). The process of drafting treaties in Islamic jurisprudence: A Comparison of the views of classical jurists. *The Journal of Rotterdam Islamic and Social Sciences, 2*(1).

Dörr, O. (2018). *Introduction: On the Role of Treaties in the Development of International Law*. In Vienna Convention on the Law of Treaties. Springer, Berlin, Heidelberg.

El-Ahdab, J. (2011). *Arbitration with the Arab countries*. Kluwer Law International BV.

Fadel, M. (2010). International law, regional developments: Islam. *Max Planck Encyclopedia of Public International Law*, 1-60.

Grewe W. (2000) *The epochs of international law*. De Gruyter, Berlin.

Hallaq, W. B. (1997). *A history of Islamic legal theories: An introduction to Sunni Usul al-Fiqh*. Cambridge University Press.

Ibn Muflih, I. M. (1997). *The creative in Explaining the convincing (Almubdi' fi sharh al muqni')*. 1st ed. Scientific Books House, Beirut. Lebanon

McKendrick, E. (2014). *Contract law: text, cases, and materials.* Oxford University Press UK.

Mughal, M. A. (2000). *Islamic Jurisprudence*. Available online at https://ssrn.com/abstract=1903980

Nussbaum, A. (1954). *A concise history of the law of nations*. Macmillan.NY

Oppenheim, L. (1952). *International Law: a treatise*. 8th Ed. Longmans, Green and Co. Ltd.

Powers, D. S. (1992). On judicial review in Islamic law. *Law and Society Review, 26* (2), 315-342. DOI: 10.2307/3053900.

Samour, N. (2012). Modernized Islamic international law concepts as a Third World approach to international law. *Heidelberg Journal of International Law, 72*, 543-77.

Sinclair, I. M., & Sinclair, I. R. (1984). *The Vienna Convention on the law of treaties*. Manchester University Press.

Tayyar, I. H. (2000). *International Treaties, their terms and provisions in Sharia and Law (al-Muʿāhadah al-dawlīyah shurūṭuhā wa-aḥkāmuhā fī al-sharīʿah wa-al-qānūn)*. Dar Al-Hafiz, Damascus.

Triepel, H. (1899). *Volkerrecht und Landesrecht [People's Law and State Law].* Leipzig. Vrlg. von CL Hirschfeld.

Ziegler K.H. (2007) *Volkerrechtsgeschichte,* 2nd ed. Beck, Munchen.