

A Comparative Analysis of Modern Customary International Law and Islamic Urf (custom)

*Dr. Dawood Adesola Hamzah**¹

Abstract

Custom, as a critical expression of people's value, plays an important role in the history and growth of nations and in their social and legal systems. It is thus an important source of law in various civilizations. It is an important source of law under international law and Islamic law. And, as a source of law under the two systems, its importance reflects the decentralized nature of the international system and the potential dynamism in the Islamic law. Under international law, it is a primary source and a secondary source under Islamic law. In response to challenges under both legal systems, it is capable of modification. However, under Islamic law such modification has to conform to the fundamental Grundnorm. This fundamental law is a priori transcendental and immutable. The grundnorm of the modern international law on the other hand, is secular in nature and capable of change at any point in time. This article is driven by a notion that modern international law can hold the allegiance of the world at large only by establishing its claim to continuing acceptance as a synthesis of the legal thought of widely varying traditions and cultures including Islamic law. It is therefore an attempt to answer hypothesis: to what extent is there a possibility of communality and convergence of value in the concept of custom under the two legal systems? An attempt will be made to examine some points in this regard by an interpretive methodology within relevant theoretical framework.

Keywords: Custom, Usage, *Opinio Juris*, Treaties, *Jus Cogens*, 'Urf, 'Adah, 'Ijma, and, *Siyar*

Introduction

Custom is held to be a factual assertion of need and values of people of a given community at any point in time. Common human social order dictates presumably that certain practices which had developed become instrument of regulating everyday relationships among people. Slowly and of course, irresistibly, they become norms of that particular community. Thus, 'the way things have

¹ * Teaches Law of Banking and Insurance at University of Ilorin, Ilorin, Nigeria.

always been done becomes the way things *must be done*.² Under international legal system, it is a source of law in consonance with the attributes and characteristics of the international system, perhaps for its dearth of centralized government organs. Customary international law rules are derived from a general and consistent practice of states followed by them from a sense of legal obligation³ and considered by the International Court of Justice, jurist, the UN, and its member states to be among the primary sources of international law.⁴ Jurists and writers of international law try to draw a distinction between 'custom' and 'usage'. They argue that the terms 'custom' and 'usage' are sometimes used synonymously. They are terms of art with different meanings.⁵ A usage is known to be a general practice which may not necessarily attract any legal commitment or obligation.⁶ Whereas 'custom' carries both social and legal significance. 'Urf and/or 'Adah in Arabic lexicology connote 'custom'. The two terms are also used interchangeably. However, in literal and technical senses they differ. The difference lies in the scope and technicality of usage. It is noted that the scope of the former is wider and greater (in technical sense) than the latter.⁷ The latter appears to be more general and less technical. For example, David C. Buxbaum argues that the customary law of Malay was described as 'Adat, saying that it is an Arabic word which generally means right conduct; and in common usage, it stands for a variety of things all connected with proper social behavior.⁸ Adat therefore, could be said to be traditionally generic and morally characterized. 'Urf on the other hand, is technically known as a value recognized in an Islamic society that must be compatible with the rules of the *Shari'ah*.⁹

Under international legal regime, for a rule to exist and recognized as a source of customary international law, it must be manifested in the general practice of states. Article 38.1(b) of the ICJ statute refers to "International custom" as a source of international law, specifically, emphasizing

² Evans, M. D., *International Law*, (4th ed.), Oxford University Press, (2014), p. 97.

³ American Law Institute, *Restatement of the Law, Third, the Foreign Relations Law of the United States*. St. Paul, Minn.: American Law Institute Publishers, (1987) §102(2).

⁴ Thirlway, H., *International Customary Law and its Codification* (A. W. Sijthoff: Leiden, 1972) at 58; see also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Reports 14.

⁵ Crawford, J., *Brownlie's Principles of Public International Law* (8th ed.), Oxford University Press, p. 23.

⁶ Ibid.

⁷ Abdul Ghani, H., 'Urf-o-'Adah (Custom and Usage) as a Source of Islamic Law, *American International Journal of Contemporary Research*, Vol. 1, No. 2, (2011). p. 178.

⁸ Buxbaum, D.C., *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*, Kluwer Academic Publishers, (1968), p. ix.

⁹ Glenn, H.P., *Legal Traditions of the World*. Oxford University Press, (2007), p. 201.

the two requirements of state practice plus acceptance of the practice as obligatory. Hence, the challenge is how can one tell when a particular line of action adopted by a state reflects a legal rule or is merely prompted by courtesy?

The goal of the two systems is the attainment, at both micro-local and macro-international levels, of order in the world and the entrenchment of universal goals of advancing peace, prosperity, human rights, environmental protection and preservation of societal values. However, the two differ in that the customary international law essentially relies on the recognition and adoption of the International Court of Justice, jurists, the United Nations, and its member states to be among the primary sources of international law and thus, formulate its *modus operandi* which are, perhaps, based on natural law and of course, secular in nature. *'Urf*, on the other hand relies on the values and principles of the *Shari'ah*, which basically, is transcendental, but, expanded and elaborated through the mechanism of *Ijtihad* (human reasoning).

Custom and Customary International Law

In the early times, certain rules of behavior and conduct developed and were accepted as permissible and/or prohibited as the case may be by the community. Such rules were intuitively observed by people due to social pressures with some degree of informal and traditional enforcement mechanism.¹⁰ Though unwritten and un-codified but, they enjoyed what is described as 'aura of historical legitimacy.'¹¹ In the emergence of modern judicial system, this customary trend was reflected in form of legislation and adjudication. Roberto Mangabeira Unger observes in this regard that customary law is like 'any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgment by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied.'¹² Much as this customary trend is viewed in the contemporary legal norms particularly among the technologically advanced nations as somehow awkward, inherently emotional and sentimental, it is accepted in the international legal regime as a dynamic source of law due to structural deficiency in terms of centralized governmental system of this regime.¹³

¹⁰ Shaw, M.N., *International Laws*, (6th ed.), Cambridge University Press, (2008), p. 72.

¹¹ Ibid.

¹² Unger, R.M., *Law in Modern Society*, London, Macmillan, (1976), p. 49 as quoted by Shaw, M.N., *ibid*.

¹³ Shaw, M.N. *supra* at p. 73.

Customary international law is fundamentally known as the international obligations emerging from established state practice, as opposed to those obligations emanating from formal written international treaties. Article 38(1)(b) of the ICJ Statute provides, *inter alia*, that customary international law is one of the sources of international law. It is a legal regime that can be authenticated through the mechanism of (1) state practice and (2) *opinio juris*. In other words, it is a corpus or collection of rules that develops from a general and consistent practice of states that they follow from a sense of legal obligation.¹⁴

As could be seen from the above, customary international law is rooted in the practice and behavior of States. This is the beginning of controversy that characterized this branch of law. It raises a number of questions. For example, if it is agreed that rules of customary international law is by an inference from the practice of States, what constitutes State practice? How frequent, prolonged and widespread must the practice be? Does it need to be contextualized within the framework of *opinion juris*, and if, so, what exactly is the definition of *opinion juris*? In other words, there are three elements of Custom, namely, duration and consistency or practice; generality of practice; and ‘acceptance as law’: *opinio iuris sive necessitates*, simply referred to as ‘*opinion juris*’. There is also the issue of relationship between treaties and custom.

Custom as Practice of States - Duration and Consistency

Customary international law is corpus of rules arising from a general and consistent practice of States accepted by them from a sense of legal obligation.¹⁵ It is noted from this simplistic description that there is no universally acceptable definition of this branch of the law. Secondly, an international custom goes beyond a mere habit or usage. It carries with it special and peculiar obligations and that explains why it is referred to as international law if participating States are conscious of such obligations and the probable sanctions that can be incurred if such rules are infringed or infringed.¹⁶ However, uniformity and consistency as characteristics of custom is a

¹⁴ Cushman, T., *Handbook of Human Rights*, (2012), Routledge, p. 584. Also, see generally Shaw, M.N., *International Law* 80 (2003), (5th ed.), Cambridge. See also American Law Institute. *Restatement of the Law, Third, the Foreign Relations Law of the United States*. St. Paul, Minn.: American Law Institute Publishers, 1987. §102(2).

¹⁵ Abass, A., *International Law, Text, Cases, and Materials*, Oxford University Press, (2012), p. 34 quoting the Restatement of the Law (Third), Foreign Relations Law of the United States, published by the American Law Institute in 1987.

¹⁶ *Ibid*.

matter of appreciation as a customary rule requires no particular duration.¹⁷ This point underlines the argument of the International Court of Justice in the case of *Anglo Norwegian Fisheries* where it refused to accept the existence of a 10-mile rule for the closing line of bays.¹⁸ Thus, as long as consistency and generality of a practice are established, the formation of a customary rule requires no particular duration.¹⁹ It is noted that on the basis of purely conventional rule, short period of time is not a barrier to the formation of a new rule of customary international law. The essential requirement is that within that short period of time, and no matter short it might be, State practice, including that of the States whose interests are specially affected, should have been both extensive and virtually uniform. It should also be in the sense of the provision asserted and should have specifically occurred in such a way as to show a general acceptance and recognition of necessary implication of legal obligation or responsibility in that regard.²⁰ The International Court of Justice was conscious of this realities in the celebrated *Asylum Case* which will be full discussed shortly. The court observed that custom as a “constant and uniform usage, accepted as law” has long been quoted as a convenient and accurate formula. The Court further noted that State Practice, by “usage” the Court means a usage that is to be found in the practice of states.²¹

In the **Columbia v Peru** (The *Asylum Case*)²² a coup was launched against the legitimate Peruvian government in 1948. The coup which was led by Mr Haya de la Torre failed. In an attempt to escape trial, the coup leader sought an asylum in the Columbia Embassy in Lima, the Peruvian capital. The asylum was granted. In an attempt to fly out the rebel leader out of Peru by the Columbian Embassy, the government refused him a passage. The case went before the International Court of Justice. The Columbia government argued that as the asylum-granting nation, it was entitled, under a regional accepted custom in Latin America, to qualify the offence for the purpose of the asylum. The Court held that the parties which rely on a custom of this kind must prove that this custom is established in such a way that has been accepted as binding on the other party. Therefore, the onus of proof was on the Columbian Government to show that the rule

¹⁷ Crawford, J., supra at p. 24.

¹⁸ ICJ Reports (1951), p. 116 at 131.

¹⁹ Crawford, J., supra at p. 24.

²⁰ Ibid.

²¹ Harris, D., and Sivakumaran, S., *Cases and Materials on International Law* (8th ed.), Sweet & Maxwell, (2015), pp. 18-19.

²² (1950) ICJ Report 266.

invoked by it is in accordance with a constant and uniform usage practiced by States in question in such a way that it has become binding on the other Party.²³

This point was further enunciated by the same court in the **Federal Republic of Germany v. Denmark** (The North Sea Continental Shelf Cases).²⁴ The point of contention in this case concerned the delineation of the North Sea continental-shelf involving the Netherlands, the Federal Republic of Germany, and Denmark. Two bilateral pacts were concluded in 1964 by both Netherland and Germany while in 1965, Denmark and Germany signed two agreements. The question before the court was whether some rules of 1958 Geneva Convention on the Continental Shelf was applicable to non-parties to that convention. Netherland and Denmark maintained that Article 6 of the Convention, dealing with equidistance, applied to non-parties to that Convention by virtue of that provision having a rules of customary international law. In a majority decision, the court rejected that argument and held that this Convention did not apply to non-parties.²⁵

Generality of Practice

It is not a requirement that a particular customary practice be completely consistent. The essential thing is how to ascertain and differentiate mere abstention from protest by a number of states vis-à-vis a practice followed by others.²⁶ Silence of some States might mean tacit agreement, rejection or lack of interest in such a practice or issue. The decision of the International Court of Justice in *Fisheries Jurisdiction (UK v Iceland)* has turned to become a rule of general acceptance and practice.²⁷ In this case, the court made a reference to the extension of a fishery zone up to a 12 nautical limit. This position has enjoined a general acceptance and has been held to lead to ‘an increasing and widespread acceptance of the concept of preferential rights for coastal states’ in a situation of special dependence on coastal fisheries.²⁸

²³ Abass, A., supra at p. 35.

²⁴ (1969) ICJ Report 3.

²⁵ Abass, A., supra at p. 32.

²⁶ Ibid at p. 25.

²⁷ Ibid.

²⁸ ICJ Reports (1974) p. 3, at 23-6.

ICJ further noted in **Federal Republic of Germany v. Denmark** (The North Sea Continental Shelf Cases)²⁹ that not only the act concerned amount to a settled practice, but they must also be such, or be carried out in such a manner, as to establish a belief this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is inherent in the very notion of the *opinion juris sive necessitatis*.³⁰ In a nutshell State practice and *opinion juris* are two important elements of customary international law that must be proved in order to corroborate the argument that a custom really exists in international law. But what constitutes *opinion juris*?

Before examining the nature of *opinion juris*, it must be noted that to advance State practice as a proof of customary international law, reference must be made to official documents and other necessary indications of governmental action.³¹ Documents and government act as evidence of State practice are multi-faceted and diverse. However, Ian Brownlie and a number of other writers have identified and listed some of them which include, *inter alia*, diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manual of military law, executive decisions and practices, order to naval forces, international and national judicial decisions, recitals in treaties and other international instruments, and resolutions relating to legal questions in the United Nations (UN) General Assembly.³²

It is also noted that no consensus on how widespread and uniform state practice must be. Theoretically, it is assumed to be “general” in the sense that all or almost all of the nations of the world engage in it.³³ However, in practice, it is difficult if not impossible to establish that 190 or so nations of the world engage in a particular practice.³⁴ Therefore, customary international law is usually adjudged mostly on selective survey of state practice that includes major powers.³⁵

***Opinio Juris* as Proof of Customary International Law**

²⁹ (1969) ICJ Report 3 *supra*.

³⁰ *Ibid* at p. 35.

³¹ *Ibid* at p. 37.

³² Brownlie, I., *Principle of Public International Law*, Oxford University Press, (2003), p. 6.

³³ Brownlie, I., *Principles of Public International Law* 7-9, (4th ed.), (1990), pp. 5-6.

³⁴ Goldsmith, J.L. & Posner, E.A., *A Theory of Customary International Law*, *Chicago (John M. Olin Law & Economics Working Paper No. 63) (2D Series)*, The Law School, The University of Chicago, (n.d.) p. 6.

³⁵ *Ibid*.

Like in the rudimentary theory of custom, States will act, function and behave a certain pattern on account of their conviction that it is obligatory on them to do so.³⁶ Thus, *opinio juris*, or notion, principle or belief that a state activity is legally binding, is the factor that shapes the practice into custom and renders it part of the rules of international law.³⁷ It is a subjective element used to judge whether the practice of a state is due to a belief that it is legally obliged to do a particular act.³⁸ Usually, customary international law emerges where *opinion juris* exists and is consistent with nearly all state practice. In other words, it essentially means that states must act in compliance with the norm not merely out of convenience, habit, coincidence, or political expediency, but rather out of a sense of legal obligation.³⁹ It denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question.⁴⁰ It was first formulated by French writer Francois Geny⁴¹ with a view to differentiate legal custom from mere social usage.⁴² It is argued that it is a psychological element that deals with how States feel about a practice so as to give insight into not only what States do in relation to one another, but also to attempt to understand why they do it.⁴³ As it is subjective in nature, it is always difficult to determine its true purport in most instances.⁴⁴

In attempt to determine the existence or otherwise of *opinio juris* from a general practice, the International Court usually explore scholarly consensus or from its own or other tribunals' previous decisions.⁴⁵ Peter Malanczuk observes that:

“There is something artificial about trying to analyze the psychology of collective entities such as states. Indeed, the modern tendency is not to look for direct evidence of a state’s psychological convictions, but to infer *opinio juris* indirectly from the actual behavior of states. Thus, official statements are not required, *opinio juris* may be gathered from acts or omission.”⁴⁶

Judge Sorensen observes in *United Kingdom v. Iceland (The Fisheries Jurisdiction Case)*⁴⁷ that:

³⁶ Shaw, M., supra at p. 84.

³⁷ Ibid.

³⁸ Bederman, D. J., *International Law Frameworks* (New York, New York: Foundation Press, 2001) at pp. 15-16

³⁹ Ibid

⁴⁰ ICJ Statute, Article 38(1)(b) (the custom to be applied must be "accepted as law").

⁴¹ Abass, A., *International Law, Text, Cases, and Materials*, Oxford University Press, (2012), p. 40.

⁴² Shaw, M.N., *International Law*, (6th ed.), Cambridge University Press, (2008), p. 71.

⁴³ Abass, A., supra at p. 40.

⁴⁴ Ibid.

⁴⁵ Crawford, J., supra at p. 26.

⁴⁶ Malanczuk, P., *Akehurst's Modern Introduction to International Law*, (7th ed.), Routledge, (1997), p. 44.

⁴⁷ ICJ Report (1973) p. 3 at p. 128.

“I do not find it necessary to go into the question of the *opinio juris*. This is a problem of legal doctrine which may cause great difficulties in international adjudication. In view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments.”

Peter Malanczuk also observes that:

“There is something artificial about trying to analyze the psychology of collective entities such as states. Indeed, the modern tendency is not to look for direct evidence of a state’s psychological convictions, but to infer *opinio juris* indirectly from the actual behavior of states. Thus, official statements are not required, *opinio juris* may be gathered from acts or omission.”

Similar observation was made by Judge Tanaka while delivering a dissenting judgment in **Federal Republic of Germany v. Denmark (The North Sea Continental Shelf Case)**.⁴⁸

The fluid and objective nature of this principle was demonstrated in the case of **France v Turkey (The SS Lotus Case)**.⁴⁹ Here collision occurred between the French and Turkey merchant ships on the high seas resulting in the death of several people on the Turkish ship. Turkey contended that the collision was as a result of Lieutenant Demons, the French officer negligence. The two parties in this case argued that they had jurisdiction to try the offender. France jurisdiction to try its accused national in the case was not in contention. But the main issue before the Court was whether Turkey had the right to try the French officer. As Turkey argued that there was a permissive rule of general international law giving it jurisdiction to try the accused officer, and France argued otherwise, the question before the Court was whether there existed a rule of international law which prohibits a state from exercising criminal jurisdiction over foreign national who commit acts outside the state’s national jurisdiction. The Court held that Turkey had jurisdiction. Asserting the point, the Court stated that:

‘... although there are very few instances in which States in the position that Turkey found itself had prosecuted foreign nationals, other States had not opposed or objected to such prosecution.’ Second, ‘... even though most States in Turkey’s position had refrained from prosecuting foreign nationals in these

⁴⁸ ICJ Report (1969), p. 3.

⁴⁹ Permanent Court of Int’l Justice PCIJ (ser. A) No. 10 (1927) p. 10.

circumstances, there was no evidence that they have done so out of legal obligation.⁵⁰

Treaties

The interaction between treaty and custom within the framework of international law is of necessity in view of rapid development in the legal mechanism that regulate the contemporary international relations.⁵¹ Thus, it is necessary to bring into focus some basic theories of treaties. Treaties now occupy top position among sources of international law is evidenced by the sheer size of the United Nations Treaty Series.⁵² It is also said that the UN Charter which is arguably the most important source of modern international law, is itself a treaty, whose provisions consider treaties as the main source of international law.⁵³ For this reason, it is pertinent, on one hand, to discuss some basic principle and also for the purpose of a comparative analysis on the subject, on other hand.

The International Convention on the Law of Treaties which came into force in 1980 was earlier signed into law in 1969,⁵⁴ while the Convention on Treaties between States and International Organizations was signed in 1986. For a treaty to enjoy recognition by the international law, it does not need to follow specific formalities, as long as there is essentially intention to create legal relations between parties involved by virtue of their agreement.⁵⁵ The question as to whether a particular agreement is intended to create legal relations, all the facts of the surrounding circumstances have to be carefully considered. For instance, registration of the agreement with the United Nations under Article 102 of the UN Charter is one useful indication to that effect. However, as the International Court had pointed out, non-registration does not affect the actual validity of an international agreement nor its binding quality.⁵⁶ It should be observed that the International Court of Justice (ICJ) takes into account a mandate agreement as having the character of a treaty, it is however doubtful whether a concession agreement between private company and a

⁵⁰ Ibid at p. 18.

⁵¹ Jia., B.B., The Relation between Treaties and Custom, *9 Chinese Journal of International Law*, (2010), p. 81.

⁵² Oyebode, A., *International Law and Politics: An African Perspective*, Bolabay Publications, Lagos, (2003), p. 71.

⁵³ See the "Preamble to the Charter"; Art. 38 Statute of the International Court of Justice; Oyebode, A.B., *ibid*.

⁵⁴ Shaw, M. N., *International Law*, (5th ed.), Cambridge University Press, (2005), p. 810.

⁵⁵ *Ibid*. See also Third US Restatement of Foreign Relations Law, Washington, (1987), vol. I, p. 149.

⁵⁶ *Qatar v. Bahrain*, ICJ Reports, 1994, pp. 319, 330; 37 ILR, pp. 183, 196.

state constituted an international agreement in the sense of a treaty. This appears to be the position of the international court in the case of *Anglo-Iranian Oil Co. Case*.⁵⁷

Classification of Treaties

Treaties had been classified into various forms. Some French writers for instance, argue that treaties can be classified into two, namely, *traites - lois* and *traites – contracts*.

Traits – lois is a law-making treaty which prescribes legal framework or legal regime for relationship which are intended to have universal or general relevance. It is a law-making treaty which is constantly subjected to review. They are those agreements whereby states elaborate their perception of international law upon any given topic or establish new rules which are to guide them for the future in their international conduct. This kind of treaty constitutes normative treaty or agreement that prescribes rules of conduct to be followed. Examples of these types of treaties include, the Genocide Convention, and the Antarctica Treaty.

Treaties – contracts on the other hand, are not law-making treaties in themselves since they are between two or a small number of States, and on a limited subject-matter. It came to a conclusion with the performance of the obligation agreed upon by the stakeholders in the treaty.

Treaty can also be classified into bilateral and multilateral treaties. Bilateral treaties are those that are concluded between two States while multilateral treaties are those concluded by a large number of States. Multilateral treaties usually lay down general rules of conduct to be followed by the parties to them. Examples of multilateral treaties include: The Vienna Convention of Diplomatic Relation concluded in 1961; The Convention on the Rights of the Child concluded in 1989 which has 191 parties. The Red Cross (Geneva) Convention which has 190 parties and the UN Charter which also has 191 State parties.

Interaction of Custom and Treaty

Some existing customary norms and rules sometimes crystallize to treaties. Examples of these include laws that regulate international, supranational, and global resource domains in

⁵⁷ ICJ Reports, 1952, pp. 93; 112; 19 ILR, pp. 507, 517.

which common-pool resources are found known as 'global commons'. They include the earth's shared natural resources, such as the high oceans, the atmosphere, outer space and particularly the Antarctic.⁵⁸ It is also a significant phenomenon in an international agreement limiting the justifiable reasons for a country to declare war against another known as *jus ad bellum*. Some multilateral international instruments are relevant in this regard. The three most common include the Kellogg-Briand Pact which bans war as instrument of national policy. The London Charter otherwise known as the Nuremberg Charter is another one. It defines "crimes against peace" as one of three major class of international crime to be prosecuted following World War II. The third instrument is, of course, the United Nations Charters which make it mandatory on nations to endeavor to resolve disputes by peaceful means. It makes UN authorization a pre-requisite before any nation could use force against another beyond the intrinsic right of self-defense against an armed aggression or incursion.⁵⁹

In most instances, these categories of multi-lateral treaties fail to achieve the much anticipated global formal adoption and acceptance. Thus, they end up being dependent on their clauses being regarded as expressions of customary international rules and regulations and, indirectly, as having binding force of application on non-signatories to such treaties.⁶⁰

It is argued in the light of the above that treaties, on one hand, have been advocated as the customary process and its results are generalized, slow, imprecise, and indeterminate. However, treaties can be made relatively spontaneously in particular terms.⁶¹ The making of multilateral treaty on the other hand, is recognized as a cumbersome process that may well outlast the formation of a custom outside its basic structure.⁶² It is noted that the interaction between the two sources of international law is a constant phenomenon. However, it is strongly appreciated that they are inherently independent.⁶³ The argument as to which treaty rules, together with their attendant elemental factors for application, may affect the customary rules of identical content, and

⁵⁸ See generally Elinor, O., *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge, UK: Cambridge University Press (1990).

⁵⁹ See "Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.

⁶⁰ See generally D'Amato, A., *The Concept of Custom in International Law*, Cornell University Press: Ithaca, New York, (1971).

⁶¹ Legal Mind, *Customs and Treaties as a Source of International Law*, (2011), <http://mkonchellah.blogspot.co.uk/2011/03/customs-and-treaties-as-source-of.html> (accessed 14 June, 2016)

⁶² Ibid.

⁶³ Ibid

vice versa, is still in need of a coherent and compatible line of bench-mark, while taking into cognizance the circumstances of each concrete case.⁶⁴

***Jus Cogens* and Customary International Law**

If at the time of concluding a treaty, it conflicts with peremptory norm of general international law, such treaty is void to the extent of that conflict. Article 53 of the Convention makes this declaration in its provisions. It further defines what it means by a peremptory norm. According to that Article, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified by a subsequent norm of general international law having the same character. Article 64 of the same Convention further provides that '[i]f a new peremptory norm of general international law emerges, any existing treaty which in conflict with that norm becomes void and terminates'.⁶⁵

In a report of the International Law Commission, it was stated that:

'when a rule of *jus cogens* is shown to be in conflict with a treaty or a single treaty provision, the treaty or the single provision – if separable from the remainder of the treaty – shall be considered void. Secondly, when a rule of *jus cogens* is shown to be in conflict with a rule of ordinary customary international law or a resolution of an international organization, the customary rule or resolution shall be considered *void*. Thirdly, when a rule of *jus cogens* is shown to be in conflict with a rule of ordinary international law relative to some specific case or state of affairs, the former shall prevail.'⁶⁶

Whether a distinction can be drawn between Customary International Law and *Jus Cogen* principle has been a subject of debate among jurists and writers. Two important elements are discernible from the definition of customary international law under Article 38 of the Statute of ICJ, namely, uniform practice; and, interstates (state practice) accompanied by a sense of legal obligation (*opinion juris*). *Jus Cogens* on the other hand, are obligations owed by a state to the international community as a whole by virtue of Article 5 of the Vienna Convention on the Law of Treaties, 1969.

⁶⁴ Jia., B.B., supra.

⁶⁵ See also Article 71; Shaw, M.N., supra at p. 850.

⁶⁶ Linderfalk, U., 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?' *The Europeans Journal of International Law* (EJIL), Vol. 18, No. 5, (2008), p. 854.

To draw a distinction from the two in the light of their respective definition, is arguably blurred. However, Fletcher J of the U.S. 9th Circuit Court of Appeal

'Urf in the Framework of Usul al-Fiqh

'Urf simply means 'custom' or 'that which is known'.⁶⁷ It is a derivative of an Arabic verb '*arafa*' which means 'to know' as opposed to "what is unknown".⁶⁸ It refers to customs and common practices of a people whether positive or negative. '*Urf* and *ma'ruf* are synonymous and are mentioned in the *Qur'an*.⁶⁹ However, the latter's occurrence is frequent than the former. '*Ma'ruf* literally means 'known' is technically equated with good while '*Munkar*' which is literally translated to mean 'strange' is equated with evil.⁷⁰

Scholars and jurists provide some definitions. For example, Khallaf defines '*Urf* as "What is established and practiced by people from their saying and doing, or not doing."⁷¹ Badran defines it as "what is established and common in a group of people (*jumhur*) from their saying and doing, and is consistently repeated until it influences them and is therefore accepted by their reason"⁷² Al-Zarqa says that '*Urf* is: "The behavior of a group of people in their sayings or doings", or recurring practices that are acceptable to people of sound nature."⁷³ From those definitions, '*Urf* can be logically described as Al-Siyyid al-Jurjani puts it: 'as referring exclusively to the common practice which has been established as good by the testimony of reason and has become acceptable to people's disposition' (*ma istaqarrat al-nufus 'alayhi bi-shahadat al-'uqul watalaqqathu altaba'iu'bi al- qabul*).⁷⁴ Khallaf also defines '*Urf* as "a matter well known by the majority of the people whether it is words, some practice or some abandonment. But it does not negate any of the Book of Allāh or the *Sunna* of the Prophet."⁷⁵

⁶⁷ Kamali, M.H., *Principles of Islamic Jurisprudence*, (2003), The Islamic Texts Society, Cambridge, p. 369.

⁶⁸ AkramLaldin, M., *Introduction to Shari'ah and Islamic Jurisprudence*, Kuala Lumpur: CERT, (2006), p.117.

⁶⁹ Ibn Manzur, M. B. K., *Lisan al-'Arab*, Beirut: Dar as-Sadir, (1955), vol. 9, at 236-243. See also, Al-Zubaydi M. Bin Mohammad Bin 'Abdu Al-Rozak, (M.H., ED) *Taj al-'Arus min fawdhir al-Qamus*, al-Kuwait: Wizarat al-'I'lam, (1987), vol. 16, p. 135.

⁷⁰ Kamali, M.H., *supra* at p. 369.

⁷¹ Khallaf, 'A. W., *IlmUsul al-Fiqh*, Kuwait: Dar al-Qalam, (1978), p. 89.

⁷² Badran, *Usul al-Fiqh al-Islami*, Alexandri: MuasasaShabab al-Jami'ah, (1984), p.224.

⁷³ Al-Zarqa, *al-Madkhal al-Fiqhi al-'Amm*, Damascus: Matabi'AlifBa', (1967), vol.1, p. 131.

⁷⁴ Al-Siyyid al-Jurjani 'Ali Bin Mahammad, *Kitab al-Ta'rifat*, Cairo: Dar al-Kutub al-'Ilmiyah, (1978), p. 152.

⁷⁵ Khallaf, A.W., *supra* at p. 90.

'*Urf* is a derivative of '*Ma'ruf*' both of which occur in the *Qur'an*; however, the latter's occurrence is frequent than the former.⁷⁶ '*Ma'ruf*' literally means 'known' is technically equated with good while '*Munkar*' which its opposite is equated with evil. It is mainly in this sense that '*urf* and *ma'ruf*' seem to have been used in the *Qur'an*.

Adah

'*Adah* is derived from the Arabic word "*al-'Aodah*" which can be translated to mean "return" or "repetition"; literally, it means repetition or recurrent practice.⁷⁷ It is generally known as a synonym of '*Urf*'; some scholars however, draw a distinction between them⁷⁸ contending that while '*Urf*' is used in reference to only groups, '*adah*' on the other hand can be used in reference to both individuals and groups.⁷⁹ For example, habits of some individuals can be said to be 'their '*adah*'. It cannot be said to be their '*Urf*'.⁸⁰ This is, because in technical and legal connotations, '*Urf*' can be defined as 'recurring practices that are acceptable to people of sound nature'.⁸¹

Jurist of Islamic Schools of Thought attach varied degrees of importance to '*Urf*'. For example, jurists of Hanafi School are known to hold '*Urf*' with high significance and thus most often apply its principles. The *Hanbali* jurists on the other hands make the least application of '*Urf*'. *Maliki* and the *Shafi'i* jurists maintain a position between the two.⁸² *Imam* Ash-Shafi'i was reported to have changed his view on issues of Islamic law according to the new '*Urf*' (custom) prevailing among the people in Egypt while he moved there.⁸³ Generally, as the case with other secondary source of law, '*Urf*' must not contradict a definitive text (*nass*) of the two primary sources of law -

⁷⁶ Kamali, M.H., *Principles of Islamic Jurisprudence*, (2003), The Islamic Texts Society, Cambridge, p.248.

⁷⁷ Kamali, M.H., *Principles of Islamic Jurisprudence*, (2003), The Islamic Texts Society, Cambridge, p. 369.

⁷⁸ Ibn 'Abidin Muhammad Amin Bin 'Umar "*Nashr al-'Arf fi bina' Ba'di al-Ahkdm'ala al-'urf* in *Majmu'ahrasa'il ibn 'Abidin*, (Riyad:MaktabahAramayni,1980), at 112

⁷⁹ Kamali, M.H., *supra*.

⁸⁰ Badran, A.A.B., *Usul al-Fiqh al-Islami*, Alexandria: Mu'assash Shabab al-Jami'ah, (1984), p, 224, see also, Zuhaili, Wahabah, *al-'urf wa al-'Adah*, (1997), at 9-10.

⁸¹ *Supra* Kamali, M.H.,.

⁸² Al-Rodiman, A.S., *The Application of Shari'ah and International Human Rights Law in Saudi Arabia*, (Unpublished Doctoral Thesis), School of Law, Brunel University, (2013). p. 19.

⁸³ *Ibid*.

the *Qur'an* and the *Sunnah* or an existing principles of Islamic law.⁸⁴ That explains why validity of any prevailing '*Urf*' is subject to its conformity with these two basic sources; and to that extent, '*Urf*' are accepted as legal norms so far such does not contradict these two basic sources of law.⁸⁵

Distinction Between '*Urf*' and '*Ijma*' (consensus of jurists)

Though, there are substantial differences between '*Urf*' and '*Ijma*', however, there are some elements of semblance between the two principles. '*Ijma*', for example, has been defined as: "the consensus of the *Mujtahidun* of the Muslim community of any period following the demise of the Prophet Muhammad on any matter".⁸⁶ Summing up various definitions of '*Ijma*', Al-Amidi in his *al-Ihkam fi 'Usul Al-Ahkam* said that '*Ijma*' is:

(1) "Agreement of '*Ahl Hil Wal Aqd*' (i.e. to say people invested with power to have final say in the affairs of the community) in a certain period of time, on a rule about a certain incidence."

(2) "Agreement of all those who are legally responsible and belong to the community of Muhammad in a certain age, on a rule about a certain incidence."⁸⁷

In order not to confuse the two principles on account of these elements, it is imperative to draw a distinction between them.

1) '*Urf*' becomes applicable rule by the agreement of all or the dominant majority of the people and its validity is not diminished by the exception or disagreement of some few individuals. '*Ijma*' on the other hand, becomes valid by the consensus of all the *mujtahidun* of the period or the generation in which it materializes. '*Ijma*' gives no room for disagreement or dissension, thus, any degree of disagreement among the *mujtahidin* renders *ijma*' invalid.⁸⁸

⁸⁴ Al-Ghazali. A., *Muqaddimat ash-Shariah Al-Islamiyah (Introduction to Islamic Law)*, Cairo: Dar An-Nahdah Al-Arabia, (2007), pp. 215-216.

⁸⁵ 'Abdur Rahim, *The Principles of Islamic Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali schools*, New Delhi: Kitab Bhavan, (1994), pp. 131-2.

⁸⁶ Hasaba-Allah, A., *Usul Al-Tashrihi Islam*, Dar Al-Maarif, (1985), p. 109.

⁸⁷ Ahmad, H., *The Doctrine of Ijma' in Islam, IRII (Pakistan)*, (1984), p. 73.

⁸⁸ Matlub, A. M. M., *Usul al-Fiqh al-Islami*, Cairo: al-Muktara, (2005), p. 196

- 2) Validity of 'Urf is not dependent on the agreement of the *mujtahidin*, but must enjoin acceptance of the majority of the people, including the *mujtahidin* themselves.⁸⁹
- 3) The rules of 'Urf may in course of time change and give way to another emerging 'Urf or may simply disappear with a change of circumstances. However, this is not the case with *ijma'*. Once an *ijma'* is concluded, it precludes fresh *Ijtihad* on the same issue and it is not open to abrogation or amendments.⁹⁰
- 4) Lastly, 'Urf requires an element of continuity in that it can only become valid if it exists over a period. *Ijma'* can, on the other hand, come into existence whenever the *mujtahidin* reach a unanimous agreement, which, in principle, requires no continuity for its conclusion.⁹¹

It should be noted and interestingly too that, in the era of post-Islamic custom of Arabian society, Imam Malik was known to have equated the *'amal ahl al-madinah*, that is to say the customary practice of the people of Medina with *Ijma'*.⁹²

Textual Proof of 'Urf

Jurists find proof in both the primary and secondary sources of Islamic law to authenticate 'Urf as a source of law in Islamic jurisprudence.

Qur'an

The *Qur'anic* verse usually quoted in support of 'Urf is where it is stated that: "Keep to forgiveness, enjoin 'urf and turn away from the ignorant"⁹³ Qur'an exegetes hold that the 'urf in this verse is synonymous to *'maruf* which means anything that is good and which in its various forms, has been mentioned in more than forty places in the Holy Qur'an.⁹⁴ Shihab al-Din al-Qarafi, contended that this ayah is a clear proof of 'Urf confirming it as an integral part of the *Shari'ah*.⁹⁵ Mustafa al-Zarqa argued that the word 'urf in this verse can be a proof of the validity of 'Urf as a

⁸⁹ Ibid

⁹⁰ Zuhaili, W., *Al-'urf wa al-'Adah*, (1997), p. 15.

⁹¹ Badran, *Usul al-Fiqh*, at 225. See also, Isma'il 'Ali Ahmad, *al-Adillah al-Mukhtalaffihi Atharuhu fi al-Fiqh al-Islami*, (Cairo: Dar al-Muslim, note dated), p. 291.

⁹² Kamali, M.H., *supra* note no. 75 at p. 372.

⁹³ Qur'an 7:199 also, Ibn Kathir, Imam Ad-Din Islama'il, bin Umar, al-Qurash, *Tafsir Ibn Kathir*, Riyadh: Dar as-Salam, (2000), Vol. 4, at p. 240.

⁹⁴ Abdul Ghani, H., 'Urf-O-Adah (Custom and Usage) as a Source of Islamic Law', *American International Journal of Contemporary Research*, Vol. 1, No. 2, (2011), p. 181.

⁹⁵ Qarafi, S. D., *Kitab al-Furuq*, Vol. II, Cairo: Dar al-Kutub al-'Arabiyyah, (1346 AH), p. 226.

sources of law in both literal and technical senses.⁹⁶ According to him, literally it means "the good deed which is acceptable" which *albeit* can be said to be narrow and thus, different from its technical meaning. However, in technical sense, he further argues, the customary practice of people, whether in their doings or their transactions, is normally the practice that is good to them and acceptable by reason.⁹⁷

Perhaps this explains why Muslim scholars generally had been noted for accepting '*Urf*' as a valid criterion for interpreting the *Qur'an* as has been done in determining the precise amount of maintenance a husband must provide for his wife as stipulated in the *Qur'anic* chapter of *Talaq* (divorce).⁹⁸ It is stated in this Chapter that: "Let those who possess means pay according to their means."⁹⁹ It is argued that it is not specified in this *Ayah* the exact amount of maintenance, but left to be determined by reference to the prevailing custom. Similar line of argument is found in the interpretation of another *Qur'anic* regulation on the maintenance of the children.¹⁰⁰ Here it is only specified that this maintenance is the duty of the father, but the quantum of such is left to be determined by reference to the custom - (*bi'l ma'ruf*).¹⁰¹

Perhaps this reality underlines a maxim postulated by al-Suyuti in his *al-Ashbah wa al-Naza'ir* which runs thus: 'what is proven by '*urf*' is like that which is proven by a *shar'i* proof.' This same maxim was recognized and recorded by the Hanafi jurist al-Sharakhsi and was later adopted in the Ottoman *Majallah*.¹⁰² In this state legislation the maxim specified that custom whether general or specific, is enforceable and constitutes a basis for judicial decision.¹⁰³ Thus, Article 37 of the *Majallah* provides that: "the usage of people is a proof that must be acted upon."¹⁰⁴

There are several other *Qur'anic* excerpts usually quoted in support of the validity of '*Urf*' as a source of Islamic law.

⁹⁶ Al-Zarqa, M., *Al-Madkhal*, Vol. 1., p. 133.

⁹⁷ Ibid.

⁹⁸ Kamali, M.H., *supra* at p. 371.

⁹⁹ *Qur'an* 65:7.

¹⁰⁰ See *Qur'an* 2:233.

¹⁰¹ Kamali, M.H., *supra* at p. 371.

¹⁰² Ibid.

¹⁰³ See Article 36 of the *Majallah* (Tyser's translation).

¹⁰⁴ Kamali, M.H., *supra* at p. 371.

Sunnah

It is noted that many of pre-Islam Arab customs that were prevalent during the lifetime of the Prophet were retained while others that were oppressive and corrupt were overruled. Some others were amended and reformed to conform with the rules of Islamic *Shari'ah*.¹⁰⁵ An indirect proof of '*Urf*' is the saying related to 'Abdallah b. Mas'ood a prominent Companion of the Prophet that "what the Muslim deem to be good is good in the sight of Allah."¹⁰⁶

Ijma'

Scholars of the early and contemporary history of Islam recognized and attached importance to '*Urf*' as a source of law. Many modern writers and legists have carried out an elaborate analysis on this subject. It is argued that majority appeared to have agreed that '*Urf*' is a source of law on condition that it conform with the basic sources of Islamic law and fulfill other requirements in this regard.¹⁰⁷

Classification of '*Urf*'

'*Urf*' has been classified into different categories and varieties. The classifications are essentially based on theory and practice of the concept. These include:

1. Verbal and Practical '*Urf*' ('*Urf al-Qawli* and '*Urf al-Fi'li* respectively). The former consists of the general agreement of the people on the usage and meaning of words used for reasons or objectives other than their literal meaning. Consequently the customary meaning adopted became widely acknowledged and enjoyed general acceptance while the literal meaning is reduced to mere exception.¹⁰⁸ Examples include words such as *Salah*, *Zakah*, and *Hajj* known as three of the five pillars of Islam. Their use in the *Qur'an* goes beyond their literal meaning, and the *Qur'anic* use of these words have become prevalent such that the literal meaning have become obsolete.¹⁰⁹ As to practical '*Urf*' there is example of customary practice of part payment of dower at the time of

¹⁰⁵ Kamali, M.H., supra at 372.

¹⁰⁶ It was related by Ahmad bin Hanbal in his Musnad and is considered as mawqaf as the chains (sanad) stopped at Abdallah b. Mas'ood.

¹⁰⁷ See Badran, *Usul*, at p. 226; Zaydan, *al-Wajid*, at p. 254, and Mohammad, AkramLaldin, *Introduction to Shari'ah & Islamic Jurisprudence*, (2006), p. 124.

¹⁰⁸ Kamali, M.H., supra at 376.

¹⁰⁹ Al-Razi, M. A.B., *Mukhtarr al-Sihah*, 1st Edn., Dar al-Hadith Cairo, (2000), p. 368; see also Kamali, M.H., ibid.

marriage contract, and paying the balance at a later date. It is argued that this conform with a legal maxim that *al-Ma'ruf 'Urfan Ka'l-Mashrut Shartan* which is translated to mean that 'what is accepted by 'Urf is tantamount to a stipulated agreement. This is a practical 'Urf which must be observed especially where there is no express agreement contradicting this legal maxim.¹¹⁰

2. 'Urf is also divided into two namely, *al-Urf al-'amm* and *al-'Urf al-Khass*; general and specific or special 'Urf respectively. The former is that custom which is widely acknowledged and widely spread. Here passage of time is of no essence. An example of this is a contract of *Istisnaa* (in the production of basic necessities of life such as food items, clothing, furniture etc) which is an order for the manufacture of such at an agreed price and which ordinarily can be taken to fall within the prohibited sale as contained in a *Hadith* of Prophet Muhammad in which he declared sale of non-existing objects as prohibited but he permitted *salam*. The general prohibition in this *Hadith* would equally apply to *istisna'*, but since it was commonly practiced among people of all ages, the jurists have validated it on the grounds of general 'Urf. Specific or particular 'Urf on the other hand, is such that is accepted exclusively by the people of a particular locality, profession or trade. It is not a requirement that such 'Urf must be accepted by people everywhere and also does not qualify the general provisions of the basic sources of law - *Qur'an* and *Sunnah*. However, some Hanafi jurists hold a contrary view in this regard and thus, this class of 'Urf according to them is entirely ignored when they are found to contradict the nass of the basic sources of law.¹¹¹

3. 'Urf is also divided into two from the viewpoint of concordance with the *Shari'ah*, namely, *al-'Urf al-Sahih* and *al-'Urf al-Fasid* (Approved and Disapproved Customs respectively). The former is that which enjoys general acceptance and observance of the people at large without being found contradicting or conflicting with rules of the *Shari'ah*.¹¹² The latter 'Urf is a disapproved custom, which though practiced by the people, but there are abundant proofs and indications that such custom is diametrically repugnant to the principles of the *Shari'ah* or it stands against the interest of the people, or it promotes corruption in the society. Examples of this kind of custom include inheritance based on local customs that depart from the approved methods in the *Qur'an* and *Sunnah*, traditional custom that tends to deprive widows of their rights and dignity after death of

¹¹⁰ Kamali, M.H., supra at 377.

¹¹¹ Ibid.

¹¹² Ibid at p. 378.

their husbands in some communities or commercial practices that have some elements of riba (usury).¹¹³

Criteria for Validity of 'Urf

For 'Urf to be valid it must meet the following criteria:

1. It must be characteristically common and recurrent. In other words, it must be consistent and dominant. 'A custom practiced by a few individuals or a limited number of people within a larger community will not be authoritative and will not be upheld as the basis of a judicial decision in *Shari'ah* court.'¹¹⁴ For example, in real estate transactions, the common practices among practitioners in this sector will be accorded legal weight such as acceptable currency. It follows that if more than one currency is accepted as a means of payment in transacting business in this sector, the currency that is commonly acceptable shall only be accepted in the absence of any written agreements to the contrary.¹¹⁵
2. It must be "acceptable to people of sound nature." It follows that "it must be reasonable, and compatible with good sense and public sentiment."¹¹⁶
3. It must be in force prior to or at the time of a transaction. A custom that emerged after an agreement in a transaction has been concluded and ratified will not be considered valid in relation to that particular transaction. It follows that a customary rule will not be applicable to the interpretation of a commercial agreement if that custom was not in practice at the time of its conclusion, rather developed later and became relevant at the time of interpretation because "it is generally assumed that documents which are not self-evident and require clarification can only convey concepts that were common at the time they were written."¹¹⁷
4. It must not contradict or violate the clear terms of an agreement as the general rule is that the terms of a contractual agreement prevail over custom and where the latter contradict the former, the former prevails to the extent of the latter's inconsistency.¹¹⁸ However, in a contract agreement

¹¹³ Badran, A.B., *Usul al-Fiqh al-Islami*, Mu'assash Shabab al-Jami'ah, Alexandria, (1404/1984), p. 231; Isma'il, A.H.M., *al-Adillah al-Mukhtalaf Fiha wa Athatuha fi al-Fiqh al-Islami*, Dar al-Muslim, Cairo, (n.d.), p. 393.

¹¹⁴ Kamali, M.H., *supra* at p. 373.

¹¹⁵ *Ibid.* See also Zahid, A., & Shapiee, R., 'Considering Custom in the Making of Siyar (Islamic International Law), *Journal of East Asia and International Law*, No. 1, (2010) p.126.

¹¹⁶ Zahid, A., & Shapiee, R., *ibid.*

¹¹⁷ Kamali, M.H., *supra* at p. 373.

¹¹⁸ Al-Ashqar, U.S., *Al-'Urf Bina Ala Al-Fiqh wal Qanon, Majallat Majm' al-Fiqh al-Islami*, Kuwait, (1988), Vol. 4, at 3239.

where particular conditions are not clearly specified, customary practices are capable of filling the gaps of unwritten conditions.¹¹⁹

5. It must not contradict the *nass*; that is to say the textual rulings of the *Shari'ah*. Contradicting the *nass* may be absolute or partial. Where it is absolute, such custom must be declared null and void like where a prevailing local custom conflict with textual rulings of the *Qur'an*. For example denying a widow her right of inheriting her husband. However, where a custom violation of the *nass* is not absolute, but partially contradicts particular aspects of the text, custom is allowed to act as a limiting factor on the text.¹²⁰

'Urf in the Perspective of *Siyar* (Islamic International Law)

As Custom is an important source of the conventional modern international law, 'Urf (Custom) is also an important source of law under the concept of *Siyar*. Muhammad Hamidullah defines *Siyar* as “[T]hat part of the law and custom of the land (a Muslim State) and treaty obligations which Muslim *de facto* or *de jure* state observes in its dealings with other *de facto* or *de jure* states (Muslim or non-Muslim).”¹²¹ Al-Sharakhsi’s definition of *Siyar* is also instructive for a classical understanding of the concept of what is commonly described as “Islamic International Law” in modern times. According to him:

“*Siyar*... describes the conduct of the believers (Muslims) in their relations with the unbelievers of enemy territory as well as with people with whom the believers have made treaties, who may have been temporarily ... or permanently... in Muslim land; with apostates... and with rebels...”¹²²

There are a number of references in the *Qur'an* and *Hadith* pointing to the conduct of Muslims towards non-Muslims trans-nationally. It was from these references that a body of law known as *Siyar* was developed; this, of course, was in the formative period of Islamic Law during the 8th and 9th centuries.¹²³ There is no consensus of opinion on who originally devised the idea, but it is

¹¹⁹ Zahid, A., & Shapiee, R., supra at p. 126.

¹²⁰ Kamali, M.H. supra at p. 374.

¹²¹ Hamidullah, M., *Islamic World: Inter-State Relations*, Anmol Publications, (2001), p.17

¹²² Khadduri, M.’s introduction to al-Shaybani, *The Islamic Law of Nations*, p. 40, quoting Shams al-Din Muhammad Ibn Ahmad Ibn Sahl al-Sarakhsi, *Kitab al-Mabsut* (The Detailed Work of Jurisprudence), Cairo: (1980), p. 2.

¹²³ Roder, T., *Traditional Islamic Approach to Public International Law – Historic Concepts, Modern Implications*, *Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrecht*, (2012), p. 256.

assumed that the jurists of the legal school of Abu Hanifa were the first to popularize the term in its legal meaning.¹²⁴ Al-Shaybani who was a notable student of Abu Hanifa is acknowledged to have written the first extensive and systematic work on the subject of *Siyar* at the end of the 8th century.¹²⁵ It has been noted that apart from merely systemizing the rules of conduct in war and peace-time between the Muslim realm (*dar al-Islam*) and non-Muslim realm (*dar al-harb*), his works on *Siyar* also covered nevertheless issues such as the Islamic rules on treaties, territorial jurisdiction, diplomatic relations, and neutrality rules.¹²⁶ Essentially, two principal concepts underline the theme of classical *Siyar*, namely, *Jihad*, a term that has generated heated controversy in modern times,¹²⁷ and the concept of two worlds – *dar al-Islam* and *dar al-harb*. This is a concept which arguably divides the world, politically and legally, between Muslim and non-Muslim communities and could be perceived as being contrary to the concept of developing ‘friendly relations among nations’ under article 1(2) of the UN Charter.¹²⁸

Writing on the subject of *Siyar*, Christopher Ford notes that:

‘the story of the development of the *Siyar* (Islamic law of nations) is that of the collision between this uncompromising hegemonism and the impossibility of conquering or converting the whole of humanity – in short, of the relationships forced upon Islam by its encounters with powerful non-Muslim states in the world beyond its Arabian heartland.’¹²⁹

He then argues that ‘[t]o the extent that Islamic law is faithful to its classical traditions, it will remain deeply at odds with international legal norms. From this perspective, a Muslim law of nations that genuinely does conform generally to the structure of modern international law requires

¹²⁴ Khadduri, M., *The Islamic Law of Nations – Shaybani’s Siyar*, (1966), p. 38.

¹²⁵ Ibid at p. 22, and Baderin, M.A., “Muhammad Al-Shaybani (749/50-805)” in Fassbender, B, and Peters, A., (eds) *The Oxford History of International Law*, Oxford: Oxford University Press, (2012) pp1081-1085

¹²⁶ Baderin, M.A., “Muhammad Al-Shaybani (749/50-805)” in Fassbender, B, and Peters, A., (eds) *The Oxford History of International Law*, Oxford: Oxford University Press, (2012) p.1084.

¹²⁷ Ali, S.S., & Rehman, J., The Concept of *Jihad* in Islamic International Law, *Journal of Conflict and Security Law*, Vol. 10 No. 3, (2005), p. 3.

¹²⁸ Ibid at p. 9. See however Baderin, M.A., “The Evolution of Islamic Law of Nations and the Modern International Order: Universal Peace through Mutuality and Cooperation” *The American Journal of Islamic Social Sciences*, 17(2) (2000), pp. 57-80 for an analysis of what he calls the “traditional hostility view” and “non-hostility view” of the concepts of *Dar al-Islam* and *Dar al-Harb* at pp. 65-70.

¹²⁹ Ford, C.A., ‘Siyar-ization and Its Discontents: International Law and Islam’s Constitutional Crisis’, *Texas International Law Journal*, Vol. 30, pp. 499-533 at p. 501.

Islam's abandonment of much of the bedrock of theocratic principle that make the *Shari'ah* the *Shari'ah*.¹³⁰

Mohammad Al-Ghunaimi has also advanced a view in respect of the similarities and differences between *Siyar* and modern international law.¹³¹ He noted that for international law to exist there must be a combination of three ingredients which include existence of numerous political entities, mutual relations between those entities, and, of course, rules or regulatory principles to manage and control these relations. He then argued that the environment in which *Siyar* developed included these ingredients from the very beginning.¹³² Historically, at the dawn of Islam, the Muslims entered into relations, whether peaceful or hostile, with a number of independent states such as Persia, Abyssinia and Byzantium and later on with other states in Europe, Asia and Africa. In the course of history, there were principles and rules which Muslims considered as binding in its relations with other independent states.¹³³

'Urf: A Source in Siyar Conceptual Framework

Some of the rules of classical *Siyar* are based on the treaties between Muslims and non-Muslims,¹³⁴ official statements and instructions of the Caliphs to commanders in the field¹³⁵ which were later integrated into Islamic legal corpus.¹³⁶ Other sources include the opinions and interpretations of the Muslim jurists on matters of foreign relations.¹³⁷ While defining *Siyar*, Hamidullah identified three principal sources of *Siyar*, namely, law, custom and treaty, along with some additional sources at another place.¹³⁸ By 'law' he meant '*Shari'ah* whose basic sources are *Qur'an*, *Sunnah* and developed through the mechanism of *Ijma* and *Qiyas* and other secondary sources.¹³⁹ Second, custom and usage that developed in international transactions may become a

¹³⁰ Ibid pp. 50-51.

¹³¹ Al-Ghunaimi, M.T., *The Muslim Conception of International Law and the Western Approach*, Martinus Nijhoff/The Hague, (1968), p. 28.

¹³² Ibid.

¹³³ Ibid at pp. 29- 30.

¹³⁴ Khadduri, M., *War and Peace*, supra at p. 47.

¹³⁵ As contained for example, in Tabari, A.J.M.,J., *Tarikh ak-Rusul wa al-Muluk*, ed. by de Goeje, M.J., (15 vols.), Leiden, (1879-1901), as quoted by Khadduri, M., ibid at p. 102.

¹³⁶ Khadduri, M., supra at p. 47.

¹³⁷ See generally, Hamidullah, M., *The Muslim Conduct of State*, Kazi Publications Inc. (1992), particularly Chapter 15.

¹³⁸ Hamidullah, M., supra.

¹³⁹ See generally Qadri, A. A., *Islamic Jurisprudence in Modern World*, Lahore, Pakistan: Sheikh Muhammad

part of *Siyar* provided that certain requirements are met.¹⁴⁰ Finally, treaties are conclusions of Muslim or non-Muslim States. Hamidullah has not, however, laid down requirements or criteria for customs which will qualify as law.

In a comparative sense with modern international law, Khadduri observes that the sources of the Muslim law of nations conforms to the same categories defined by modern jurists and the Statute of the International Court of Justice, namely, agreements, custom, reason, and authority.¹⁴¹ For example, the *Qur'an* and the authentic *Hadiths* represent authority, the *Sunnah*, embodying the Arabian *jus gentium*, is equivalent to custom; rules expressed in treaties with non-Muslims fall into the category of agreement; and the *Fatwas* and juristic commentaries of text-writers as well as the utterances and opinions of the Caliphs in the interpretation and the application of the law, based on analogy and logical deductions from authoritative sources, may be said to form reason.¹⁴²

In summary, the ideal goals set in the traditional *Siyar*, *albeit* to unite the entire Muslim community (*ummah*) and eventually the whole of mankind under an all-encompassing polity, socio-political forces had long compelled Muslims into accommodating the universalist tendencies of Islam with, what Onder Bakircioglu describes as 'dynamic practical realities.'¹⁴³ Thus, contemporary *Siyar* has been modified to respond positively to the reality of modern nation-states, and to the 'all-encompassing and controlling' tendencies of modern international law.¹⁴⁴

Conditions for Validity of Custom as a Source of Siyar

The criteria that determine the validity of '*Urf*' as a source of Islamic law generally as earlier discussed, serve as template for determining its validity before it can be upheld as a source of *Siyar* as well. Therefore, it has been argued that by extension, '*Urf*' can be a valid source of *Siyar* if:

- (a) It is reasonable and sensible in the judgment of the Islamic State;
- (b) It is frequently and dominantly practiced in interstate relations in general;

Ashraf, 1973.

¹⁴⁰ Ibid at p. 33.

¹⁴¹ Rahim, A., *The Principles of Muhammadan Jurisprudence*, Madras, (1911), p. 68.

¹⁴² Khadduri, M., supra note no. 14 at 47.

¹⁴³ Bakircioglu, O., *Islam and Warfar, Context and Compatibility with Interntional Law*, Routledge, (2014), at p. 172.

¹⁴⁴ Ibid.

- (c) It is in force at or before the time of an international transaction in relation to which its relevance is in question
- (d) It does not contradict an interstate agreement or treaty provisions; and
- (e) It is not, as a matter of principle, inconsistent or conflicting with *Shari'ah* or spirit of *Shari'ah*.¹⁴⁵

The above requirements can be classified into two namely, elements of a custom, and conditions for its application. Elements are the essential ingredients which make a custom together. Thus, the requirement (b) which is the frequent and dominant interstate practice stands as an element of an international custom while the other elements are the conditions which must be fulfilled before the custom is accepted as a rule by an Islamic State.¹⁴⁶ The mere presence of a practice between two or more States are not sufficient enough to make it a customary rule for any other State(s) unless the latter accedes to it subject to the presence of all the conditions especially concordance with the principles of the *Shari'ah*.¹⁴⁷ It follows that there must be an introduction of a practice that would later metamorphose into custom; that practice be accepted and thereby turning it into law. This process goes to demonstrate that there are two main elements of a custom to have the force of law under *Siyar*: (i) Frequency and dominance of a state practice at the international level, and, (ii) Acceptance of that practice as law.¹⁴⁸

Essential Ingredients of Customs in *Siyar*

Out of the above stated elements of custom in *Siyar*, two stand out as essential and germane. They are 'frequency and dominance of Practice', and, 'Acceptance of Custom as Law (*Opinion Juris*)'.¹⁴⁹

a) ***Frequency and Dominance of Practice***: From the perspective of *Siyar*, a custom should be consistently repeated in actions and practices in most of the Muslim and non-Muslim States.¹⁵⁰ It is not mandatory that all States should practice such custom as long as majority follow that same

¹⁴⁵ Zahid, A., & Shapiee, R., supra at pp. 128-129.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid at pp. 130-131

¹⁵⁰ Ibid.

practice repeatedly.¹⁵¹ This requirement is reflected in the statutory rule of Article 41 of the *Mejelle* which provides *inter alia*, that custom is only given effect to, when it is continuous or preponderant. Its preponderant characteristic is defined under Article 42 of the same piece of legislation as that is esteemed preponderant which commonly known and not that which rarely happens.

The rules under this provision imply that: a) the custom should be States' practice in general, and, b) States should usually implement the custom such that the custom becomes preponderant or commonly known as States generally and frequently practice such custom. The *Qur'an* provides a good example of such customary relation as was commonly practiced among States before Islam such as the example of bilateral commissioning of emissaries by Prophet Sulaiman (Solomon) and the Queen Bilqis of Seba.¹⁵² It had been general world customary practice for centuries to observe diplomatic sanctities by according ambassadors respect, honor and privileges even if they represented enemy nations. This practice had been based on the principle of reciprocity and which had been a significant feature of *Siyar* conceptual framework and which had enjoined cardinal observance of modern international law.¹⁵³

From the dawn of Islam and the rise of the Islamic State of Medinah, this trend of international relations were evident among Muslim nations and over time the reciprocity of treatments of parties in international relations has assumed a distinguished feature of *Siyar*. As the Islamic State of Madinah under the leadership of Prophet Muhammad (peace be upon him) Islam was increasingly spreading around the world. By the passage of time, Muslims had to encounter resistance in non-Muslim territories, which led to war. This was almost a daily affair of the Islamic State until the early Ottoman rule. The world got divided into *dar al-Islam* (Islamic territories) and *dar al-harb* (non-Islamic/war territories). Given this reality jurists of that time, especially the classical jurists, developed *Siyar* basically as a law of war, which included rules of war, cessation of war, distribution of booties, treatment of prisoners, law of revenue, etc. Of course, they also included the law of peace, such as peace treaty, diplomatic rights and privileges, and safe-conduct (*aman*)

¹⁵¹ Ibid.

¹⁵² Details are contained in Qur'an 27:20-44, Zahid, A., & Shapiee, R., *ibid*.

¹⁵³ Ibid.

toward non-Muslim visitors or traders for a temporary period of time.¹⁵⁴ Historically, the concept of reciprocal relations in foreign affairs became well established. This again was evident in the international relations practiced and maintained by Islamic State of later time, such as during the administration of Caliph Harun al-Rashid (786-809 AD) who had mutual and friendly relations with Charlemagne known as Charles the Great or Charles I.¹⁵⁵ He was King of the Franks. He united a large part of Europe during the early Middle Ages and laid the foundations for modern France, Germany and the Low Countries.¹⁵⁶

It is on record that since the 16th century *dar al-Islam* chose the “state of peace” as the permanent basis of its relations with the *dar al-harb* based on the principles of reciprocity and mutual interests. This is evident from a number of bilateral treaties between the Ottoman Empire and the European States. They include the Treaty of Carlowitz, the Russian-Ottoman Treaty for the Partition of Persia’s Northwest Provinces, 1724; the Treaty of Peace (Belgrade), 1739; the Treaty of Peace, 1774; the Treaty of Peace (Jassy), 1792; the Treaty of peace (Bucharest) 1812.¹⁵⁷ Similarly other Muslim majority States such Morocco, Tunis, Muscat, the Ottoman Empire granted numerous commercial privileges to European State. These were spelt out in details in several books of historical record.¹⁵⁸ This confirms the argument that reciprocity is an important aspect of *Siyar* from the early period and which had been a significant contribution of Islam to modern international law.¹⁵⁹

b) Acceptance of Custom as Law (Opinion Juris)

As noted earlier in this work, *opinio juris* under modern international law is the subjective element used to judge whether the practice of a state is due to a belief that it is legally obliged to do a particular act.¹⁶⁰ Usually, customary international law emerges where *opinion juris* exists and is consistent with nearly all state practice. In other words, it essentially means that states must act in compliance with the norm not merely out of convenience, habit, coincidence, or political

¹⁵⁴See generally Khadduri, M., *The Islamic Law of Nations: Shaybani’s Siyar* 6 (1966).

¹⁵⁵See generally Moinuddin, H., *The Charter of The Islamic Conference and Legal Framework of Economic Cooperation Among its Member States*, Clarendon Press, Oxford, (1987) and particularly at p. 38.

¹⁵⁶ See generally Joshua, C., *Western Civilizations*. W.W. Norton & Company, Inc (2012).

¹⁵⁷ Moinuddin, H., *supra* at p. 40

¹⁵⁸ *Ibid* at pp. 227-228

¹⁵⁹ Badr, G.M., "A Survey of Islamic International Law", 56 *Proc. of Am. Soc’y Int’l L.* 59 (1982).

¹⁶⁰ Bederman, D. J., *supra*.

expediency, but rather out of a sense of legal obligation.¹⁶¹ Under Islamic *Siyar*, a sovereign State is at liberty to accede to or decline an international customary practice.

Qur'an gives an indication on how to accept or reject a customary practice as it provides guidelines in accepting or rejecting the old *'Urf* (pre-Islam customs). For example, fasting was a ritual practice, and Islam came and explicitly prescribed this pre-Islamic command of fasting on Muslims. The *Qur'an* states that "O believers (Muslims), fasting is prescribed for you as it was prescribed for those who came before you."¹⁶² This a good example of an explicit acceptance of an old customary practice.

An implied acceptance of an old custom is demonstrated in the rule of retribution which was a common customary justice practice among the Jews. Here the *Qur'an* states that "[W]e ordained therein (*Torah*) for them life for life, eye for eye, nose for nose, tooth for tooth and wounds equal for equal."¹⁶³ In this verse, reference is made to this prevalent practice without condemning it. This implies, according to Hanafi jurists that Muslims are explicitly commanded to adopt this legal rule. In the rejection of a prevalent customary practice, *Qur'an* provides *inter alia*, an example of disapproval to a negative Arab pre-Islam custom of burying alive of female children as a sign of humiliation and misfortune. This customary practice which was considered not only barbaric but also inhuman and condemnable was disproved in a number of *Qur'anic* texts.¹⁶⁴

Method of accepting or rejecting customary practices were also found in the Sunnah of the Prophet - second primary source of law in Islam. This might be by his verbal expression, physical action or tacit approval. Through these methods, the Prophet was reported to have accepted some of the pre-Islamic customs and rejected some others, or introduced new reforms in some others.¹⁶⁵ The Prophet was known for giving approval to the customary practice of exchange of diplomatic emissaries which was a prevalent custom before Islam. Apart from the practice of exchange of ambassadors by Prophet Sulaiman and Queen Biliqis which has been evidenced in the *Qur'an* as earlier discussed, the Prophet himself sent and received ambassadors during his life-time as the

¹⁶¹ Ibid

¹⁶² Qur'an 2:183.

¹⁶³ Qur'an 5:48.

¹⁶⁴ Qur'an 16:58 and 59.; 81:8-9; and 17:31, and 6:15.

¹⁶⁵ Zahid, A., & Shapiee, R., supra at pp. 133.

Head of Islamic State of Medinah. He was reported to have sent ambassadors to Kings and Governors including Hercleus, the Byzantine Emperor; Chosroes II, the Emperor of Persia; Negus, the King of Abyssina; and Muqawqis, the Ruler of Egypt.¹⁶⁶ In other instances, the Prophet appointed Harith bin Umayer, as his diplomatic envoy to the King of Busra, Shurahbil. Harith was killed by the ruler of Muta. This was considered a flagrant breach of this long standing international customary rule, and thus, the Prophet ordered an army to advance against the King under the leadership of Zayed bin Haritha.¹⁶⁷ The Prophet was also reported to have received and accorded diplomatic recognition, respect and privileges to foreign emissaries and ambassadors sent to him from other jurisdiction of authorities.¹⁶⁸

Experts and analysts argue that the popular saying of the Prophet that: "Whatever Muslims consider good is good in God's sight" is capable of interpretation to hold that the Prophet had given verbal approval for accepting a custom. This interpretation is found in the realm of *Siyar*. According to them, this *Hadith* is in reference to Muslim States inter se or Muslim States and non-Muslim States. Thus, they argue that whatever Muslims consider to be good in this *Hadith* may imply that Muslim States may have considered a custom friendly with *Shari'ah* and that "good in the sight of God" may mean that the custom considered by Muslim State to be *Shari'ah* compliant is acceptable. It follows from this *Hadith* that if there is custom between Muslim States *inter se*, or between Muslim States and non-Muslim States, and Muslim States expressly or impliedly acknowledge that custom on account of its compliance with the *Shari'ah*, that custom could be said to be valid and acceptable to Islamic principles.¹⁶⁹ It follows also that a custom that is accepted by Muslim States in their international relations and interactions, must be respected and duly observed because their accession to such custom creates legal obligation for the States. When a custom is expressly or impliedly accepted by Muslim States as a *Shari'ah* compliant and also conforms to other relevant basic requirements earlier discussed, such acceptance creates legal obligations and becomes binding on the Muslim States. Where a custom does not meet those requirements particularly compliance with the rules of the *Shari'ah*, Muslim States are obliged to vehemently reject it and refrain from any attempt to implement such customary practice,

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Rehman, J., *Islamic State Practices, International Law and Threat From Terrorism: A Critique of the 'Clash of Civilizations' in The New World Order*, Hart Publishing, (2005), pp. 188-189.

¹⁶⁹ Zahid, A., & Shapiee, R., *supra* at pp. 133-134.

otherwise, they may inadvertently be acquiesced to it and thus, create an implied liability for them.¹⁷⁰

A Comparative Appraisal

From the above analysis a number of issues stand out as comparative points of convergence and divergence between the international customary law and the Islamic '*Urf* (custom). These issues include the following:

Convergence

1. As noted by Al-Ghunaim, for international law to exist there must be a combination of three elements which include existence of numerous political entities, mutual relations between those entities, and, of course, rules or regulatory principles to manage and control these relations. The environment in which *Siyar* developed, according to him, included these ingredients from the very beginning.
2. As jurists of international law try to draw a distinction between 'custom' and 'usage' arguing that though the two terms are used synonymously, they are terms of art with different meanings. Accordingly, 'custom' carries both social and legal significance, a usage is known to be a general practice which may not necessarily attract any legal commitment or obligation.¹⁷¹ Muslim jurists also draw a distinction between '*Urf* and '*Adah*. They argued that the two terms are used interchangeably to connote custom, but, they differ in literal and technical senses. The difference lies in the scope and technicality of usage - the scope of the former is wider and greater (in technical sense) than the latter.¹⁷² *Adah* could be said to be traditionally generic and morally characterized. '*Urf* on the other hand, is technically known as a value recognized in an Islamic society that must be compatible with the rules of the *Shari'ah*.¹⁷³
3. Under modern international law, generality of customary practice was given judicial approval in the decision of the International Court of Justice in *Fisheries Jurisdiction (UK v Iceland)* which had turned to become a rule of general acceptance and practice. Similarly, frequency and dominance of practice from the perspective of *Siyar*, a custom should be consistently repeated in actions and practices in most of the Muslim and non-Muslim States. However, it is noted that

¹⁷⁰ Ibid.

¹⁷¹ Crawford, J., *supra* note no.

¹⁷² Abdul Ghani, H., '*Urf-o-'Adah* (Custom and Usage) as a Source of Islamic Law, *American International Journal of Contemporary Research*, Vol. 1, No. 2, (2011). p. 178.

¹⁷³ Glenn, H.P., *supra*.

under the *Siyar's* guideline, it is not mandatory that all States should practice such custom as long as majority follow that same practice repeatedly.

4. Under modern international law, the acceptance of custom as law (*opinio juris*) dictates that states must act in compliance with the norm not merely out of convenience, habit, coincidence, or political expediency, but rather out of a sense of legal obligation. Similarly, under Islamic *Siyar*, a sovereign State is at liberty to accede to or decline an international customary practice. However, as soon as a custom is expressly or impliedly accepted by Muslim States as a *Shari'ah* compliant and also as conforming to other relevant basic requirements such acceptance creates legal obligations and becomes binding on the Muslim States. It is only where a custom does not meet those requirements particularly compliance with the rules of the *Shari'ah* that Muslim States are obliged to reject it and refrain from any attempt to implement such customary practice.

5. Under modern international law, customary norms and rules crystallize to treaties in some international legislation such as laws that regulate international, supranational, and global resource domains. It is also the case in an international agreement limiting the justifiable reasons for a country to declare war against another known as *jus ad bellum*. Examples of these include the Kellogg-Briand Pact which bans war as instrument of national policy. The London Charter otherwise known as the Nuremberg Charter is another one. Under the Islamic *Siyar*, customary practices also crystallize to treaties on similar subjects of international concerns. For example, there were a number of bilateral treaties between the Ottoman Empire and the European States such as the Treaty of Carlowitz, the Russian-Ottoman Treaty for the Partition of Persia's Northwest Provinces, 1724; the Treaty of Peace (Belgrade), 1739; the Treaty of Peace, 1774; the Treaty of Peace (Jassy), 1792; the Treaty of peace (Bucharest) 1812.

6. Under the principle of *jus cogens* of modern customary international law, if at the time of concluding a treaty, it conflicts with peremptory norm of general international law, such treaty is void to the extent of that conflict. Similarly, under the Islamic *Siyar*, customary norms or treaties that emanate from such norms must not be in conflict with the terms of agreement between two state parties to the agreement. Most importantly, and as a matter of principle, such customary norms or treaties must not be inconsistent or conflicting with *Shari'ah* or spirit of *Shari'ah*.

Divergence

1. The basic sources of customary international law are Article 38(1)(b) of the ICJ Statute which provides, *inter alia*, that customary international law is one of the sources of international law. It can be authenticated through the mechanism of (1) state practice and (2) *opinio juris*. It is a corpus or collection of rules that develops from a general and consistent practice of states that they follow from a sense of legal obligation. After undergoing the required legal processes, the customary international law can be reviewed or modified. The basic sources of Islamic '*Urf*' on the other hand, are the *Qur'an* and *Sunnah* which are transcendental and immutable. Though, '*Urf*' can also be reviewed or modified through the mechanism of '*Ijtihad*', however, this mechanism are guided by the dictates of the basic sources which cannot be reviewed by human intelligence.

2. Western culture and political organization were the foundation of modern international law based on political relationship in the classical Europe.¹⁷⁴ The 1648 Peace of Treaty of Westphalia to the 1815 Congress of Vienna marked a new beginning in the history of international law. It is noted that international law in its modern version begins with the break-up of the feudal State system and the formation of society into free nation States, which is commonly traced back to the period leading up to the 1648 Peace Treaty of Westphalia and which brought to an end the Thirty Years War in Europe.¹⁷⁵ The main aim of the Congress was to establish a new balance of powers of political forces in Europe which would ensure lasting peace and maintain the status quo in Europe by repressing political revolution. Thus, from the 1815 Congress of Vienna to WW1, international law was based on a number of principles, namely, sovereignty, balance of power, legitimacy and equality between nations.¹⁷⁶ It was around the time when international law was developing in Europe that the early Muslim jurist were also writing on a similar concept of transnational law and relations called *Siyar*. Abu Hanifa al-Nu'man ibn Thabit (d. 150/767) was the first Muslim jurist to compile treatise on *Siyar*.¹⁷⁷ However, right from its inception, modern international law has continued to grow without any significant interruption and with the emergence of a number of international organizations such as the United Nation Organization, the

¹⁷⁴ Shaw, M.N., *International Law*, (6th ed.), Cambridge University Press, (2008), p. 13.

¹⁷⁵ Alina, K., *Public International Law*, (4th ed.), Routledge, (2010), p. 11.

¹⁷⁶ Ibid.

¹⁷⁷ Abu al-Wafa al-Afghani, *Introduction to Abu Yusuf, al-Radd 'ala Siyar al-Awza 'i.*, (edited and translated by Ghazi, M.A.) IJU Pakistan, (n.d.), p.1 as quoted by Labeeb, A.B., *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law)*, Institute of Islamic Studies, McGill University, Montreal, (2003), p. 27.

European Union etc., modern international law had got unprecedented impetus and thus, became a global applicable law. The opposite was the case of the Islamic *Siyar*.

Dynastic struggles led to the decline of Caliphate. Its power and authority were challenged by the Mongol destruction of Baghdad in 1258, Islamic culture and law began to decline. Gradually between the 11th and 13th century the Islamic spirit of confident exploration declined, and the idea that the doors of interpretation (*Ijtihad*) are closed, took hold.¹⁷⁸ Eventually, the Islamic caliphate collapsed in 1924, following the dissolution of the Ottoman Empire and the rise of the Turkish Republic.¹⁷⁹ This unfortunate fate of history began to bring adverse effect on the development of Islamic law generally and Islamic *'Siyar* in particular up till the present moment.

Conclusion

It can be conclude from the analysis of this work that *Siyar* generally and *'Urf* particularly, despite their Islamic religious foundation, and modern international law generally and customary international law in particular, despite their Christian and later Western secular foundations, are not necessarily incompatible as both focus on the integration of humanity and rules regulating human co-existence. Both the founding fathers of *Siyar* and modern international law were theologians.¹⁸⁰ Like early Christianity, Islam aspires to being a universal faith, thus, the early law relating to dealings with non-Islamic states was thought of as being a passing phase.¹⁸¹ From the early period of Islam, obligations arising from terms of treaties towards non-Islamic states were not only accorded full recognition,¹⁸² but also, observed as religious obligations.¹⁸³ In a comparative sense with modern international law as Khadduri observes, the sources of the Muslim law of nations conforms to the same categories defined by modern jurists and the Statute of the International Court of Justice, namely, agreements, custom, reason, and authority.¹⁸⁴

¹⁷⁸ Beg, M.A., 'Decline Of Islamic Civilizations - Causes - Time For A New Paradigm' (2006), <https://www.countercurrents.org/beg-250706.htm> (accessed 12/01/2017)

¹⁷⁹ See generally Encyclopedia Britannica, <https://www.britannica.com/>

¹⁸⁰ See e.g. Baderin, M.A., "Religion and International Law: Friends or Foes" *European Human Rights Law Review*, 5 (2009) pp.637-658.

¹⁸¹ Weeramantry, C.G., *Islamic Jurisprudence – an International Perspective*, Macmillan Press, (1988), p. 130.

¹⁸² Ibid.

¹⁸³ See Qur'an 16:91-92.

¹⁸⁴ Rahim, A., *The Principles of Muhammadan Jurisprudence*, Madras, (1911), p. 68.

To be Published soon in:

1 - Chicago Journal of International Law, and,

2 - Unilorin Shari'ah Journal