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# The role of Islamic law in settling contemporary international disputes

# المعاصرة دور الشريعة الإسلامية في تسوية النزاعات الدولية

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**Abstract :**

The actual influence of a civilization in the formulation and application of the provisions of international law depends not only on the recognition of the possibility but on its actual ability to reflect it on the ground. This is what we are trying to examine through the capacity of the Arab-Islamic civilization to resolve international conflict, In view of the vast human population and the number of States belonging to it.

**Keywords:** Islamic law; settlement of international disputes; international law.

**ملخص:**

التأثير الفعلي لحضارة ما في صياغة وتطبيق أحكام القانون الدولي لا يتوقف على مجرد الإقرار بإمكانية ذلك، بل يتعداه إلى قدرتها الفعلية على تجسيده في أرض الواقع، وهو ما نحاول بحثه من خلال قدرة الحضارة العربية الإسلامية على ذلك من منظور تسوية المنازعات الدولية المعاصرة بالنظر إلى التعداد البشري الهائل للمنتسبين إليها وعدد الدول المنتمية إليها.

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# Introduction*:

The history of mankind has known a succession of different civilizations, which controlled or dominated international relations according to the definition and nature of international relations in the time of its establishment, and one of the main features of this establishment is the fact that civilizations share rules that govern their relations with other nations, until they weaken and collapse by a rival (rising) civilization or the emergence of a new civilization. The historian "Arnold Toynbee" estimated that there are more than 20 civilizations which has either disappeared forever or on the way to disappear by the conflict and wars and the caste system, considering this as inevitable fate by saying: "We have awakened to the fact that our civilization is not immune to this fate, and I do not understand how can we get blind from this truth"[1].

There is no doubt that what has been produced by previous civilizations, including the events of international relations at different times, has been a fundamental material or an important reference in the writings and opinions of intellectuals to find a rightful perception of the nature of relations that should be between peoples from different cultural affiliations. Most of those intellectuals believe that the main character of those relations is communication and civilizational dialogue, which respects the specificity of each civilization and respects the values and principles of other civilizations. It is a sound approach that is consistent with the revelation of the Qur'an, saying: "*O people, we have created you from male and female, and we have made you peoples and tribes, so that you get to*

* This is an intervention presented (in Arabic language) at the workshop on "Contemporary judiciary and religious courts in the Muslim-majority countries"; 16-17 October 2018, at the research center in social and cultural anthropology, Oran-Algeria. Translated in English by Fouzia KACI, Ph.D in International Relations, University of Oran 2/Algeria (kaci.fouzia@yahoo.fr ).

[1] Quoted from the blog of Sheikh Saleh bin Abdul Rahman Al-Husayn. Available at the following link: http://iswy.co/evfbj accessed on: 25/09/2018.

*know each other*"[1]. Which is contrary to some of the abnormal views promoted by the media and some circles of politics, explaining the dynamics of international relations on the basis of the logic of conflict and clash between different civilizations[2].

As much as the first and second world wars were a source of destruction and many tragedies, they were a powerful catalyst for strengthening the resolve of decision-makers at the time to find ways and mechanisms to build international relations on sound foundations, as the preamble of the United Nations 'charter stipulate: " We the peoples of the United Nations have resolved in the preamble of the Charter to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. " This reflects the tendency of the United Nations system in principle to recognize the contribution of different civilizations and to avoid exclusion in order to promote the values of dialogue and peace.

However, good will is not enough to cover historical facts that may constitute an obstacle or impediment to an actual civilized consensus - at least in terms of the legal aspect of international relations - the origin of the establishment of contemporary international law was within a very narrow circle of homogenous states, that belongs to the European continent and the religion of Christianity, colonial-oriented, in order to submit the rest of the peoples in that time and to dominate those countries. This means that the influence of the other civilizations on the development of the rules and foundations governing international relations is very weak, if not nearly non-existent, compared to that of the European Christian countries[3].

[1] Verse 13 of Sourat El-houjourate.
[2] Amer Abdel Zaid, Civilizations: Conflict or Dialogue, available at the following link: http://www.m.ahewar.org/s.asp?aid=295021&r=0 accessed on: 26/09/2018
[3] Dupuy Pierre-Marie. Le droit international dans un monde pluriculturel. In: Revue internationale de droit comparé. Vol. 38 N°2, Avril-juin 1986. Études de droit contemporain. Contributions françaises au 12e Congrès international de droit comparé (Sydney-Melbourne, 18-26 août 1986) pp. 583-599;

A fact that cannot be excluded from the Islamic Arab civilization despite its shining centuries-old history, which ruled large parts of the world in accordance with the perspective of Islamic law in the management of international relations (as reviewed on the first day of this workshop) just like the role of the rest of the civilizations that have been marginalized. This was expressed explicitly by the revolution of their politicians and thinkers against the term "civilized countries" in article 38 of the Statute of the International Court of Justice (albeit it was at the behest of the Soviet Union at that time), considering it an insult to the peoples of Africa and Asia, that have been colonialized, and that the meaning of this expression is primarily Christian Western civilization[1].

Although some professors support such proposition, such as Professor “Mohammed BOUSOLTANE” and “Pierre-Marie DUPUY” on the basis of the reality of international relations in that time, they see in contrast that the current international community has become more diverse, open and global than ever before, and that the interpretation of the article according to contemporary circumstances takes into consideration the representation of different civilizations that contributed to enriching the history of mankind.

However, it can be said that the actual influence of a civilization in the formulation and application of the provisions of international law depends not only on the recognition of the possibility but on its actual ability to reflect it on the ground. This is what we are trying to examine through the capacity of the Arab-Islamic civilization to resolve international conflict, In view of the vast human population and the number of States belonging to it.

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https://www.persee.fr/doc/ridc_0035-3337_1986_num_38_2_2434. consulter le; 27/09/2018.

[1] Mohamed Bousoltane, Principles of Public International Law, Vol. I, University Press Office. Algeria, 1994;. P. 72.

This study will be divided into three main points, that are common to each international dispute subject to peaceful settlement, in terms of the authority or institution that considers the international conflict (first), as well as the applicable law for the resolution of the dispute (second) In addition to the mechanism adopted in the settlement of the international conflict (third).

**First: The competent authority to adjudicate upon the dispute**

The provisions of Islamic law (Sharia) have preceded the efforts of the contemporary international community, to reject violence and resort to war in the settlement of international disputes. Islam has forbidden aggression by its definitive provisions, and authorized the use of force only in the framework of self-defense in order to repel aggression, the Almighty said "and fight for the sake of Allah those who fight you and do not abuse, for that Allah does not love the aggressors,"[1] and he also said, "And if they chose peace then turn to it and trust in Allah"[2]. The relationship of the Muslims with other peoples is peace and security, and the exception is war[3]. Which is in line with the Charter of the United Nations calls for the peaceful settlement of disputes, and prohibit resorting to war through international law.

Focusing on the United Nations model in the settlement of international disputes as a global organization of all civilizations and prevailing legal systems, which adopts a set of mechanisms recognized by international law, foremost among which is the judiciary, represented by the International Court of Justice. The Statute of the Court recognizes in its article IX the requirement to represent the world's major civil and legal systems in the process of electing the 15 judges of the Court. It is no secret

[1] Verse 190 of Sourat El-bakara.
[2] Verse 61 of Sourat Al-anfal.
[3] Mohamed Shah jalal, "The Call of Islam to Peace", International Islamic University Studies Chittagong, Volume III. December 2006. p. 126.
See also: Wahba Zuhaili, Islam and International Law, International Review of the Red Cross, p. 119.

that the purpose of this diverse cultural and legal representation is to take advantage of the values and principles upon which these civilizations and legal systems are based in settling the dispute in the name of international law. In addition to the right granted by article 31 of the Statute of the Court to each State party to the dispute which does not have a judge of its nationality in the composition of the Court may elect a judge in accordance with the procedure provided. Which in practice means that there is at least one judge who belongs to the Arab-Islamic civilization in the permanent formation of the court, with the possibility that this number may increase to two or three if one or both parties of the dispute belong to the Arab Islamic civilization[1].

By reviewing the series of decisions of the International Court of Justice on the contentious cases brought before it over more than 70 years since its establishment (in addition to the past experience of the Permanent International Court of Justice between the two world wars), it is difficult to examine judicial decisions that have had a significant impact on rules derived from Islamic law for the resolution of the dispute, whether it is about issues that involve two or more parties belonging to the Arab Islamic civilization, or issues that involve countries belonging to different civilizations and legal systems. A question that can be traced back to a number of reasons, including:

A- The limited number of judges 1 or 2 out of 15 is not, in principle, sufficient to influence the dominance of judges of Christian Western civilization, given that the decisions of the Court are adopted by a majority vote of the judges present. In addition to the right granted to States parties to the conflict to choose a special judge, which was not used by the States belonging to the Arab Islamic civilization, the statistics of the Court indicate

[1] The current composition of the Court includes Judge Abdelkawi Ahmed Youssef (Somalia) and Judge Mohamed Bennouna (Morocco).

that in nearly 23 times when a special judge was employed, Mr. Mohamed Bedjaoui was appointed 3 times by the state of Marshall Islands[1].

B - the lack of recourse of the countries belonging to the Arab Islamic civilization to the international judiciary to resolve their disputes with other countries or even between them, as the cases which the court has adjudicated can be counted with the fingers of a hand, whereas the disputes among them are very few about maritime or land borders, such as conflict Between Libya and Tunisia or Libya against Chad or Qatar against Bahrain[2], issues where we do not see the impact of the provisions of Islamic law.

C- The process of selecting judges for membership of the Court, while taking into account the diverse civilizational representation, but this is done on the basis of nationality within the framework of civil States. And that this does not necessarily mean defending the values and principles of the civilization to which they belong, especially for countries that rely on the formation of their frameworks in universities belonging to a completely different environment (Western universities in particular) and the consequent impact on the composition of the person concerned.

From the other hand, the Charter of the United Nations, in its article 52, encourages the use of regional organizations and agencies for the settlement of disputes when the work within them is valid and appropriate and as long as such regional organizations or agencies and their activities are compatible with the purposes and principles of the United Nations. This means that the Organization of Islamic Cooperation (OIC) has the right to consider the international disputes of its members, especially since it is the second largest international organization after the United Nations, with 57 countries spread across the four continents.

[1] Report of the International Court of Justice (A / 72/4) United Nations, New York 2017. ISSN 0251-8481
[2] Liste des affaires contentieuses. https://www.icj-cij.org/fr/affaires-par-pays

In this context, the OIC Charter was amended in 1987 on the proposal of Kuwait to establish the Islamic International Court of Justice as one of the main organs of the Organization[1], and enter into force after its ratification by two thirds of the Member States[2]. Which has not been achieved despite nearly 40 years since the date of approval of its establishment, which clearly means the existence of the idea and desire without the will to embody this project, which is supposed to establish the concretization of the provisions of Islamic law in the management contemporary international relations At least among Member States, and a space for the enrichment of international law through future decisions and practice of the Court.

The Statute of the court expressly stipulates that the Court shall apply Islamic law in the cases brought before it[3]. It also expressly requires that a judge of the Court be a Muslim in origin. He shall be an expert in Islamic law and has experience in international law, in addition to other conditions specified in Article 4 of the statute[4].

The Islamic International Court of Justice is also unique in the performance of certain diplomatic functions, which are not seen in international judicial bodies. They may "through a committee of eminent personalities or through senior officials of their organs, mediate, conciliate and arbitrate disputes between two members Or more members of the Organization of the Islamic Conference if the parties to the dispute expressed their desire to do so or if requested by the Islamic Summit Conference or the Islamic Conference of Foreign Ministers by consensus[5]. "

[1] Ahmed Mohamed Refaat, International Islamic Court of Justice - An analytical study of the latest applications of qualitative international judiciary, Dar Al-Nahda Al-Arabiya, Cairo, p. 07.
[2] Article 49 of the Statute of the International Islamic Court of Justice.
[3] Article 01 of the Statute of the International Islamic Court of Justice.
[4] Article 04 of the Statute of the International Islamic Court of Justice.
[5] Article 46 of the Statute of the International Islamic Court of Justice.

All in accordance with the provisions of the Islamic Sharia as required by the provisions of Article 1 of the Statute.

**Second: The law applicable to the adjudication upon the dispute**

The main reference to the question of law applied by the judicial body that adjudicates the dispute is article 38 of the Statute of the International Court of Justice, in addition to the recognized freedom of the parties to choose the applicable law if the arbitration is settled.

According to the text of Article 38 of the Statute of the International Court of Justice, the Court adjudicates the disputes to which it is referred. The same article applies to advisory jurisdiction (advisory opinion) - through treaties, custom and general principles of law, jurisprudence and equality, without a hierarchy between the sources referred to[1]. It is also not exhaustive, as the Court may also draw upon the legal acts taken by States unilaterally, and the decisions of international organizations[2].

However, international treaties, together with international custom, remain among the most widely applied sources by the International Court of Justice. International treaties have assumed a prominent role and are the preferred means of legal inter-State relations, because they are so precise and clear that they are codified and express the clear will of their parties. Most international disputes are also related to the provisions on the implementation of international conventions[3].

It was customary for international treaties to contain explicit text specifying the dispute settlement mechanism agreed upon by the parties, which could be by presenting the dispute to international jurisdiction, thereby adhering to the content of the treaty and the relevant texts. The right of States parties to this choice is guaranteed by the text of article 65 of the

[1] Mohamed Bousoltane, Op.Cit., p.55.
[2] Antonio Augusto Cansado Trinidad, Statute of the International Court of Justice, United Nations, p. 07. 2017. www.un.org/law/avl
[3] Mohamed Bousoltane, Op.Cit., p.56.

Vienna Convention on the Law of Treaties of 1969, which in its fourth paragraph recognizes the freedom of parties to be bound by an agreed mechanism for settling a dispute related to the interpretation or application of the treaty in force. The meaning of this is that the application of provisions derived from Islamic law by the international judiciary depends on the existence of a dispute concerning an international convention derived from Islamic law, an issue that has not previously been presented to the International Court of Justice. (It is logical that most disputes belong to countries that do not belong to the Arab-Islamic civilization, and the small number of cases to which a state belonged to the Arab Islamic civilization was adjudicated upon in accordance with the provisions of contemporary international law).

Moreover, following a review of a sample of international treaties signed within the framework of the Organization of Islamic Cooperation to determine the nature of the practice of the States concerned with this framework, it is clear that the States concerned do not choose to resort to the judiciary to adjudicate disputes concerning the interpretation or application of the treaty but prefer other methods such as amicable settlement. Such as the Agreement on the Trade Preferential System[1], and the Framework Agreement on the System of Trade Preferences among Member[2] States or the Convention on Immunities and Privileges of the Organization of the Islamic Conference, which adopted the creation of a special body for dispute resolution[3]. It is a stable practice even after the decision to establish the Islamic International Court of Justice (although not in force), which expressly stipulates the application of the provisions of Islamic law to settle disputes.

As for the international custom, it is difficult to imagine the existence of international norms that have arisen based on a frequent

[1] Article 28 of the treaty.
[2] Article 15 of the treaty.
[3] Article 29 of the treaty.

practice derived from the provisions of the Islamic Sharia, that can be applied by the bodies that adjudicate the dispute before it, especially in light of contemporary international relations (characterized by the weak ability of Islamic countries to influence International relations). The custom itself is a secondary source of international relations in relation to Islamic law, and it remains confined to matters where there is no text and does not contain in its content anything contrary to the purposes of Islamic law[1].

It may be easier to theoretically expect the emergence of a local customary rule derived from Islamic law than to be international, on the basis that a group of even a few countries belonging to the Arab-Islamic civilization will practice a certain process and agree that it is binding[1]. Whether this practice is carried out within the framework of an organization such as the OIC, the Gulf Cooperation Council GCC or other regional organizations, or in the framework of bilateral and collective relations of States outside the frame of any international organization.

Accordingly, the role of Islamic law in the settlement of international disputes in view of the applicable law depends on the ability of the States concerned to influence the provisions of international law through its various sources as referred to in article 38 of the Statute of the International Court of Justice.

**Third: The mechanism adopted in the settlement of international conflict**

The mechanisms adopted in the settlement of international disputes, mean the various peaceful mechanisms recognized by international law in accordance with Chapter VI of the Charter of the United Nations, whether diplomatic, such as negotiation, investigation, mediation, conciliation or

[1] Qasim bin Musaed bin Qasim al-Faleh, international custom comparative study between Islamic jurisprudence and public international law. Imam Mohamed bin Saud Islamic University Higher Institute of the Judiciary Department of Legal Policy - the academic year 1425 - 1426. , p. 05.

judicial settlement before international tribunals or through arbitration, as provided for in Article 33 of the Charter.

It should be recalled here that everything related to the peaceful settlement of international disputes is subject to the principle of voluntary settlement, that is, no State can be compelled to adopt a peaceful solution without its consent and agreement with the other party in the most appropriate manner as decided by the Permanent Court of International Justice in the Eastern Carélie case In 1923 it was established in international law that no State could be compelled to present its differences with another State to mediation, arbitration or other peaceful means without its consent or agreement. Such consent could be expressed in respect of all disputes and could only be expressed in a particular case[2]. It should also be emphasized that the consent of the two States depends not only on the method used for the settlement of the dispute, but also on the procedures followed in the settlement process through negotiation or investigation, and the composition of the body responsible for the settlement process and the law applied by it, to the acceptance of the findings. In principle, there is no objection to the agreement of both parties to abide by the provisions of the Islamic Sharia in settling the dispute between them, considering that the Islamic Sharia recognizes the mechanisms mentioned, such as negotiations or arbitration.

The mechanism agreed upon by the parties, whether prior or subsequent to the conflict, is not an end in itself but rather a mean of settling or limiting the conflict, pending a peaceful settlement. And that the attempts by some States during the League of Nations time to break the principle of compromise were unsuccessful through the Additional Geneva Protocol of 1924, which required Member States to submit their dispute mandatorily to a judicial settlement[3], before the permanent International Court of Justice, or

[1] Mohamed Bousoltane, Op.Cit., p.69.
[2] Affaire du Statut de la Carélie Orientale, 23 juillet 1923, CPJI, Série B, n°5.
[3] Article 03 of the Geneva Additional Protocol adopted by the Fifth Assembly of the League of Nations, signed on 02 October 1924.

arbitration, otherwise it will be considered an aggressor State in the event of war[1].

A principle that the international community maintained in the wake of a devastating second world war, in accordance with the ratification of the Charter of the United Nations, that included in its Article 2, paragraph 3, the Basic Principles of International Law, which is that States must abide by the principle of the peaceful settlement of international disputes without imposing a mechanism per se, In accordance with Chapter VI of the same Charter.

The United Nations General Assembly adopted the Declaration of Manila on the peaceful settlement of disputes on 15 November 1982, which was clear in recalling the obligation of States to resolve their differences by peaceful means in accordance with the purposes and principles of the Charter of the United Nations[2]. While recalling at the same time, that the peaceful settlement occurs on the basis of the equality of States in their sovereignty and in accordance with the principle of free choice of means in accordance with the obligations under the Charter of the United Nations in accordance with the principles of justice and international law. And any resort or acceptance of a settlement method to which States freely agree on current or future conflicts to which they are parties is not considered incompatible with the equality of States in their sovereignty. "[3]

**Conclusion:**

It is clear from the foregoing that the principles that establish the contemporary international law, especially those relating to the settlement of international disputes, have been developed in a manner that respects the specificity and nature of the international community by its horizontal nature, as a result of equal legal status (at least theoretically) and respect for

[1] The Protocol has not entered into force due to non-ratification by signatory States.
[2] The second item of the first point of the declaration.
[3] The third item of the first point of the declaration.

the sovereignty of States. At the same time, it takes into consideration its fundamental non-conformity, with all the variation and diversity of the composition of its actors, on the basis of which the principle of compromise occupies an important place in international relations, which is an important factor in favor of activating the role of the principles of Islamic law within the framework of international relations.

The background of contemporary international law (European-Christian), which has made its provisions exclusive to a particular civilization, no longer impedes the contribution and influence of other civilizations, including the Arab-Islamic civilization, when the countries of the latter have the actual will to do so, Is one of the mechanisms available for the settlement of international disputes on the basis of mutual consent or within a regional frame through the Organization of Islamic Cooperation or inter-State relations, which remain far from the provisions of Islamic law, even in their relations, in view of the reality of practice.