

# **The Classical Conceptions Of Treaty, Alliance And Neutrality In Sunni Islam**

*by*  
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**Department of Politics  
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## ABSTRACT

The purpose of this thesis is to examine a major segment of Islamic international relations theory as expounded by *Sunni* jurists of the classical period of the Islamic *Fiqh* (661-1258 AD). It consists of that portion which is concerned with peaceful relations as distinct from that other major segment which is about *Jihad* or Islamic warfare. The thought of Muslim scholars on this topic provides a major part of an ideal model for political life under Islam, and its appeal has continued to exert a strong influence on the lives and thoughts of all Muslims throughout the centuries. Within this segment of Islamic international relations theory attention is focused on the key concepts of treaties, including alliance, and neutral status. One part of this is, however, omitted. It is what in Western political philosophy would be called private (not public) relations, and which in an Islamic classical *Fiqh* context - where the private/public distinction, it will be argued, is absent - can be termed social relations.

The argument put forward will be that Islamic international relations are the totality of relations between Muslims and non-Muslims, and never relations between Muslims. Islamic law, it will be argued, governs this relationship, ensuring Islamic international relations theory is essentially normative. The thesis will further suggest that Muslim relations with non-Muslims are fundamentally pacific, not hostile, if the legitimate purposes of *Jihad* are properly assessed. The thesis will also be concerned to assess the extent to which peaceable Muslim relations with non-Muslims can be organised through the different forms of treaty which are recognised in classical *Sunni Fiqh*. It will be argued that the anti-Iraq coalition alliance of 1990-91 fulfilled the conditions of a genuine Islamic alliance treaty, contrary to the view of numerous contemporary Muslim scholars and publicists. Finally, it will be argued that neutrality, as well as neutralisation, were possible during the period of classical *Sunni Fiqh*.

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## INTERPRETATION OF THE ARABIC LETTERS

| Arabic Letter | Translation |
|---------------|-------------|
| أ             | a           |
| ب             | b           |
| ت             | ta          |
| ث             | th          |
| ج             | g           |
| ح             | ha          |
| خ             | kh          |
| د             | da          |
| ذ             | th          |
| ر             | r           |
| ز             | z           |
| س             | s           |
| ش             | sh          |
| ص             | sa          |
| ض             | dh          |
| ط             | ta          |
| ظ             | dh          |
| ع             | 'a          |
| غ             | gh          |
| ف             | fa          |
| ق             | q           |
| ك             | ka          |
| ل             | l           |
| م             | m           |
| ن             | n           |
| هـ            | ha          |
| و             | wa          |
| ي             | y           |

## **GLOSSARY OF ARABIC TERMS**

|                       |  |
|-----------------------|--|
| 'Aqd                  | Contract                                 |
| Ahl al-Hal wa al-'Aqd | Electors                                 |
| Amir al-Mu'minin      | Commander of the faithful                |
| 'Aushour              | The commercial tax                       |
| Bait al-Mal           | State treasury                           |
| Bay'ah                | Pledge of allegiance                     |
| Dar al-Islam          | Abode of Islam                           |
| Dar al-Harb           | Abode of war                             |
| Dar al-'Ahd           | Abode of covenant                        |
| Dawla                 | State                                    |
| Dean (Din)            | Religion                                 |
| Dhimmi                | Non-Muslim citizens of the Islamic State |
| Fay'                  | booty                                    |
| Faqih                 | Muslim Jurist                            |
| Fiqh                  | Islamic Jurisprudence                    |
| Fitna                 | riot                                     |
| Fotohat               | Conquests                                |
| Harbi                 | Individual belongs to the abode of war   |
| Hukm                  | Sovereignty                              |
| Ijma'                 | Consensus                                |
| Ijtihad               | Creative interpretation                  |
| Imam                  | The head of the Islamic State            |
| Kharaj                | Land tax                                 |
| Mathhab               | Rite                                     |
| Maslaha               | Interest                                 |
| Mulk                  | Kingship                                 |
| Qadi                  | Muslim judge                             |
| Qiyas                 | Analogy                                  |
| Ulama                 | Muslim scholars                          |
| Ra'i                  | Opinion                                  |
| Sultan                | Supreme                                  |
| Shurah                | Consultation                             |
| Towhead               | God's unity                              |
| Ummah                 | The Muslim Community                     |

## **LIST OF ABBREVIATIONS**

|         |   |
|---------|---|
| ACC     | Arab Co-operation Council                           |
| AD      | Anno Domini   |
| AH      | Anno Hegira   |
| AL      | Arab League, or the League of Arab States           |
| AIOC    | Anglo-Iranian Oil Company                           |
| ANZUS   | Australia-New Zealand-United States Security Treaty |
| CENTO   | Central Treaty Organisation                         |
| CIA     | Central Intelligence Agency                         |
| COMECON | Council for Mutual Economic Assistance, or          |
| GCC     | Gulf Co-operation Council                           |
| GNP     | Gross National Product                              |
| IGO     | Inter Governmental Organisation                     |
| IJC     | Islamic Jurisprudence Council                       |
| I I L   | Islamic International Law                           |
| IIOIT   | International Institute Of Islamic Thought          |
| KNOC    | Kuwait National Oil Company                         |
| ME      | Middle East   |
| MWL     | Muslim World League                                 |
| NAS     | No author submitted                                 |
| NATO    | North Atlantic Treaty Organisation                  |
| NDS     | No date submitted                                   |
| NGO     | Non-Governmental Organisation                       |
| NPS     | No publisher submitted                              |
| OAS     | Organisation of American States                     |
| OAU     | Organisation of African Unity                       |
| OIA     | Organisation of Islamic Conference                  |
| OPEC    | Organisation of Petroleum Exporting Countries       |
| PIL     | Public International law                            |
| PLO     | Palestine Liberation Organisation                   |
| SEATO   | South-East Asia Treaty Organisation                 |
| UAE     | United Arab Emirates                                |
| UAR     | United Arab Republic                                |
| UK      | United Kingdom                                      |
| Ulama   | Traditional Scholars of Islam                       |
| UN      | United Nations                                      |
| USA     | United States of America                            |
| USSR    | Union of Soviet Socialist Republics                 |
| WTO     | Warsaw Treaty Organisation (Warsaw Pact)            |
| WWI     | World war one                                       |
| WWII    | World war two                                       |

# CHAPTER I

## INTRODUCTION

## **Chapter I: Introduction**

- 1.0) Presentation
- 1.1) Aims and Purpose
- 1.2) Period of study
- 1.3) The Problem
- 1.4) Scope and limitation of the inquiry
- 1.5) The literature review
- 1.6) The significance of the thesis
- 1.7) Orientation and methodology of the thesis
- 1.8) Hypotheses
  - 1.8.1) Hypotheses related to Islamic international relations theory
  - 1.8.2) Hypothesis relating to treaties
- 1.9) Contents



**1.0)** This chapter presents a statement of the aims and purposes of this thesis. It also indicates the significance of the research and reviews the literature relevant to the subject.

### **1.1) Aims and Purpose**

The aim of this thesis is to examine a major segment of Islamic international relations theory as expounded by *Sunni* jurists. It consists of that portion which is concerned with peaceful relations as distinct from that other major segment which is about *Jihad* or Islamic warfare. The thought of Muslim scholars on this topic provides a major part of an ideal model for political life under Islam, and its appeal has continued to exert a strong influence on the lives and thoughts of all Muslims throughout the centuries. Within this segment of Islamic international relations theory attention is focused on the key concepts of treaties, including alliance, and neutral status. One part of this segment is, however, omitted. This concerns what in Western political philosophy would be called private relations and which in an Islamic context can be termed social relations. (See, for example, Badran A. Badran *Al-‘Alaqat al-Ijtima’ayah bayn al-Muslimean wa Ghayr al-Muslimean fi al-Shari’ah* (*The social relations between Muslims and non-Muslims in the Shari’ah Law*).<sup>1</sup> They cover such matters as marriage between Muslims and non-Muslims, the children of such marriages and inheritance.

The purposes of this examination is first, to clarify the fundamental differences between Islamic international relations theory and the several varieties of Western international relations theory. Second, its purpose is to show the relevance of Islamic international relations theory in the present day and to explore the kind of difficulties which can occur in applying it to contemporary circumstances.

### **1.2) Period of study**

Islamic international relations theory was developed in the juristic writings (*Fiqh*) of Muslim scholars during the Umayyad and ‘Abbaside Caliphates between 661-1258 AD, from the

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<sup>1</sup> Badran, Badran Abu al-‘Aynayn, *Al-‘Alaqat al-Ijtima’ayah byn al-Muslimean wa Ghayr al-Muslimean fi al-Shari’ah*, Dar al-Nahdha, Beirut, 1984.

sources of the *Holy Qur'an* and the *Sunnah* of the Prophet and the four Orthodox Caliphs from 611 AD (the date of the first revelation to the Prophet Muhammad) to 660 AD. This period may be labelled classical or classic, not because it has any reference to the standard Greek and Latin literature, but because it applies to individuals, their deeds and sayings, and to scholarly works which are of the first rank or standard and of the highest authority. It is these old, established, standard juristic principles in major scholars such as the founders of the four *Sunni* School of *Fiqh* and other distinguished jurists, including al-Shaybani, al-Mawardi and later important jurists like Ibn Taymiyyah and Ibn al-Qayyim. During the 'Abbaside period, the *Holy Qur'an* and *Sunnah* were transposed into the formal rules of the *Shari'ah*, the four Schools of *Fiqh* were established and developed, and the gates of interpretation (*Ijtihad*) were closed approximately at the end of this dynasty. In principle no new interpretation of Islamic Law can be made after 1258 AD, and all that is possible is, in theory, imitation (*Tagleed*). This thesis therefore takes a broader view of the period of the classical Islamic theory than AbuSulayman who restricts it to

*. . . the juridical speculations made at the height of Muslim civilization during the High Caliphate, primarily the 'Abbasi period (750-1100 AC). . .*<sup>2</sup>

The second period of this study is the early 1990's AD and the second Gulf war. This period is chosen in order to examine the application of the key part of classical Islamic international relations theory, namely, the doctrine of alliances in this contemporary crisis and the vigorous debate among Muslim jurists and others over the legitimacy of the coalition against Iraq.

### 1.3) The Problem

Islamic political concepts are characterised by the fact that their foundation rests upon the juridical bases of Islamic Law (*Shari'ah*). These concepts are based on Islamic ideas and principles. Since Islam is considered to be a polity as well as a religion, there is no separation between these two aspects. Islam is a total religion; it is a complete way of life with a comprehensive and detailed system of law. It has two elements: to organise the relations between Muslims and God, and to organise the

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<sup>2</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, 2<sup>nd</sup> Edit., International Institute of Islamic Thought, Herndon, 1994, p. 55.

relations between humans, both inside the Islamic community and between it and non-Muslims.

The Islamic Law covers all aspects of the Muslim concern and activity such as social welfare, equality and justice, individual and collective rights and obligations, taxation, properties regulation, punishments, inheritance, equity, laws of war and peace, judicial administration, and political leadership. Other aspects govern spiritual, physical and other social and political dimensions of human life. Given its comprehensive character, the *Shari'ah* also enshrines Islam's international law and from the Prophet's emigration to Madinah (*Hijrah*) it has regulated the conduct of the Muslim community in war and peace. Islamic international relations theory is essentially the juristic interpretation of this part of Islamic law by expert religious scholars.

The Divine law of Islam (*Shari'ah*) has been provided in the ordinance of the Holy Book the *Qur'an* and supplemented by the sayings and deeds of the Prophet Muhammad the *Sunnah*. Taken together, the *Qur'an* and the *Sunnah*, are considered the basic source of all-human interpretation and the legislators for the welfare of the Muslim community. This is because the *Shari'ah* is derived from the *Qur'anic* injunctions, designed to deal with all aspects of Muslim's life, and from the *Sunnah*, which is the authoritative explanation and exemplary practise of these Divine injunctions by the Prophet Muhammad.

The *Shari'ah* can become effective and binding only through a conscious and deliberate co-ordination of the members of the *Ummah* (the Islamic community) through an Islamic State. A state which is inhabited predominantly, or even entirely, by Muslims is not necessarily an Islamic State. It can become a true Islamic State only by virtue of a conscious application of the socio-political tenets of Islam to the life of the nation and by an incorporation of these tenets into the basic constitution of the country. It is on this "enjoining of lawful and forbidding of prohibited" that the ethical value of the Muslim community and of Muslim brotherhood depends. Muhammad Asad said,

*It is with this ideal of justice -justice toward Muslims and non - Muslims alike - that the concept of an Islamic state (which is but the political instrument of that ideal) stands and falls.<sup>3</sup>*

However, some Western historians incorrectly understood the main aim, mission and duty of Islam and its state which is to spread the call for God (*Da'wa*). They alleged that in order to propagate its mission Islam is based on subduing and achieving supremacy over non-Muslims. To achieve this supremacy, it is claimed, Muslims declare war against all communities and nationalities and continue it until Islam rules over the whole world. On this misinterpretation, war is the origin of relations between the Muslims and other communities and determines their continuing, fundamentally hostile nature. Joseph Schacht, for instance, argues that,

*The basis of the Islamic attitude towards unbelievers is the law of war; they must be either converted or subjugated or killed (excepting women, children, and slaves); the third alternative, in general, occurs only if the first two are refused.<sup>4</sup>*

#### **1.4) The Islamic State and its relations**

The period will include the initial creation of the new social and political order based on the revealed message of Islam and the formation of the spiritual bond of Muslim brotherhood under the leadership of Prophet Muhammad (610-632 AD); the establishment of the authority of the infant state, and the restoration of Islamic unity in the state under the first Caliph Abu Bakr (632-634 AD); and the institutionalisation of the Islamic State and its administration under the second Orthodox Caliph Umar (634-644 AD).

The historical development of the Islamic State was continued under the four Orthodox Caliphs who succeeded the Prophet Muhammad, following his example closely in their religious and political leadership. However, their practice underwent certain alterations and changes in the concept of authority, the administrative

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<sup>3</sup> Asad, Muhammad, *The Principles of State and Government in Islam*, University of California Press, Berkeley, 1961, pp. 3-4 & 33.

<sup>4</sup> Schacht, Joseph, *An Introduction to Islamic Law*, Oxford University Press, London, 1975, p. 130.

procedure of the State, and the general policy of the government under the succeeding Ummayyads, 'Abbaside dynasties.

The statesmanship of the Prophet Muhammad and the reign of the second Orthodox Caliph Umar are of vital importance to this thesis. Their political style left an enduring mark on the character of Islamic political institutions then and now. The examples set by the Prophet Muhammad and Caliph Umar I, remain an ideal political guide and have commanded great respect and admiration from succeeding Muslim societies. Throughout history, most Muslim societies have kept alive the memory of this Ideal State, hoping to emulate their beloved leader, the Prophet Muhammad, as an example for their lives.

Modern international law has in common with the *Shari'ah* that it determines what is legal and what is not in international relations. However, they differ fundamentally in that the former was originally restricted in its jurisdictional application to Christendom and only later widened to include all states in the world. In the works of European scholars of the Early Modern Age, like Grotius and Puffendorf, one also notices that they intentionally excluded Muslims from all community of interest with the Christian Nations of Europe. Their re-formulation of international law originated in the necessity of regulating the relations of the new sovereign states in Europe arising from the disunity of Christendom.<sup>5</sup> Later European scholars thought that international law was limited to Christendom but enunciated broad principles to include others as well. From a Muslim scholar's point of view these European principles were just echoes their time. Moreover, the modifications they made for civilisation came only after they intensively borrowed Islamic principles from Muslim Spain, from Syria and Palestine during the Crusades and from the early Ottoman Empire.<sup>6</sup>

Later still international law recognised new legal personalities, groups such as non-governmental organisations and individual persons. By contrast, the *Shari'ah* regulates the relations between Muslim and non-Muslim subjects within the Islamic State as well as between the Islamic states and non-Muslim states, groups (organisations with

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<sup>5</sup> Qadri, Anwar Ahmad, *Islamic Jurisprudence in the Modern World*, Lahore, 1973, pp. 277-278.

<sup>6</sup> Ibid.

government such as tribes or religious communities) and individual/s. Among the objects of the *Shari'ah*, there is the aim of enlarging the concepts of Islamic international law to encompass all functions conducted by the State or its Muslim citizens (what would be called public and private functions in modern international law) in any intercourse with non-Muslims. Originally, as Hamidullah notes, this body of law was termed *Siyar*,

*When Islam came and founded a State of its own, the earliest name given by Muslim writers to the special branch of law dealing with war, peace and neutrality seems to have been Siyar, the plural form of Sirat, meaning conduct and behaviour.*<sup>7</sup>

The term *Siyar* was used originally by historians and in linguistic to designate the life of the Prophet Muhammad. Later it was used in a more restricted way according to al-Sarkhasi. The word *Sirat* he observed, when it is used without adjectives, it means the conduct of the Prophet, more specially in his wars. Later still, it came to be used for the conduct of Muslim rulers in international affairs and specifically in their dealings with non-Muslims.<sup>8</sup> This thesis will be concerned with the analysis by jurists of that part of *Siyar* concerned with peaceful relations between the Islamic State and non-Muslims.

### 1.5) The literature review

The essential sources of this thesis, which it will rely on, will be the *Holy Qur'an* and the *Prophetic Sunnah* because they considered as the main body of the Islamic Law. Nothing further will be said on the subject of the sources of *Shari'ah* in this section except to note that a special problem arises in the translation of the *Holy Qur'an* from Arabic into another language. In the thesis only one translation is used, that of Abdullah Yusuf Ali. However, this translation does not always provide a fully accurate rendering into English of the Arabic meaning of the word/s used in the text. Where this happens, Abdullah's translation is amended by the insertion of the correct meaning in square brackets.

<sup>7</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, p. 9.

<sup>8</sup> Al-Sarkhasi, AbuBakr Muhammad, *Al-Muheat*, Vol. I, Dar Ehya' Al-Kotoub Al Arabiah, Cairo, 1957, p. 567.

The rest of it is divided into three parts: (i) some of the more important jurists whose treatises formed classical Muslim *Fiqh* of which Islamic international relations theory is a part; (ii) contemporary scholars who have analysed and elucidated this theory; (iii) some of the contemporary scholars whose works are relevant to the understanding of some of the parts of Islamic international relations theory. Of the available material, which specialises in the Islamic legislation, political thought and institutions many of the works of contemporary scholars are often descriptive at best and therefore not considered here. Not all classical jurists or contemporary scholars have been included in this section because they are too many to be discussed and they are all considered in various later part of the thesis.\* Those which are included here are the more important and representative of them.

**1.5.1)** Of all the Muslim jurists whose *Fiqh* is relevant to this thesis, Muhammad Ibn al-Hassan al-Shibani treatise entitled *al-Siyar* is the work which is probably the most central. It was the first book written in the Islamic history to deal directly with the theme of the foreign relations of the Islamic State as a single aspect and so it provides a systematic Islamic account of a major part of Islamic international relations theory. Al-Shibani wrote from a Hanafi perspective.

The other important Muslim jurists did not attempt a comprehensive and systematic exposition of Islamic international relations like al-Shibani. Instead, they contributed to the analysis and exposition of major parts of this theory.

- Abd Almalik Ibn Hisham the author of the great essay *Al-Syrah al-Nabawyah* narrates in detail the biography of the Prophet Muhammad. This thesis relies heavily on this book when quoting from the Sunnah of the Prophet to support any debate.<sup>9</sup>

- AbdulRahman Ibn Khaldoun, a Maliki scholar, was considered as one of the greatest political and social philosophers in analysing, not only merely, the political, but all aspects of human societies. Ibn Khaldoun regarded history neither as a mere catalogue of facts, nor as a mere narrative of what happened in days gone by, but

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\* For full list see the bibliography of this thesis.

<sup>9</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Matba'at al-Halabi, Cairo, 1955.

science to be studied for the purpose of understanding the cause of the rise and fall of states. His argument in his book *Al-Moqademah* is central to the concern of this thesis because it provides a systematic account and analysis of a major part the nature and formation of states from an Islamic perspective.<sup>10</sup>

- Abu Hamid al-Ghazali the Shafei'i theologian and religious philosopher presents the classical theory of the Caliphate based on the ideal legislator from the political reality of the 'Abbasid Caliphate dominated by the Suljuq Sultanate. In his great work, *Al-Iqtisad fi al-I'atiqad*, he provided an exposition of the nature of the *Imama*. His investigation of the *Imama* was a matter for jurisprudence, not of political nor for metaphysical affairs. The significance of this book to this thesis is to support the debate about the nature and the authority of the Islamic State, and the methods of selecting the Caliph.

- Abu Hassan, Ali al-Mawardi (of the *Sunni* Shafei'i school of jurisprudence) is regarded as one of the greatest and most learned jurists of his time. He was not only a distinguished judge but also an author of great repute. Al-Mawardi has left a number of great books of which those dealing with the science of politics and administration and the most famous. His book Ordinances of Government (*al-Ahkam al-Sultaniyah*) was the first in the Muslim history to analyse systematically the responsibility of the Caliph, his *Amirs* (local rulers), his *Wazirs* (ministers) and deputies. The rights and duties of these persons are expounded in details ties as a guide to those who are new to such office.<sup>11</sup>

- Abu Yusuf, Y'aqub Ibn Ibrahim (of the Hanafites) wrote his pioneer book, *Al-Kharaj* to the 'Abbasid Caliph al-Rashead. It is considered as the first and most famous book on its theme. This book does not deal with the financial sources of the Islamic State. It does deal with various aspects of its affairs regarded as parts of international relations, such as the relations with the *Harbis*. The importance of this book to this thesis is the legislative side of the commercial and financial relations between the Islamic State and people of domain of war (*Dar al-Harb*).

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<sup>10</sup> Ibn Khaldoun, AbdulRahman Muhammed, *Al-Moqademah*, Al-Maktabah al-'Asryyah, Beirut, 1995.

<sup>11</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990.



- Mohamad Ibn Jarear al-Tabari book (Shafei'i School) wrote different works in various sciences. However, his book *Tareikh al-Umam wa al-Muluk* considered as the first full detailed book which narrated the history of the globe prior to Adam. The other great book, entitled *Jami' Al-Bayan 'An Ta'weal Al-Qur'an*, is the greatest work in the science of interpretation the *Holy Qur'an*.<sup>12</sup>

- TaqulDean Ibn Taymiyyah (of the *Sunni* Hanbali School) lived during the last days of the 'Abbaside Empire. His essays concentrated on the state with a study of the ideal one set up by the *Qur'an*, the Prophet and his Companions, coming directly to the problem of the *Ummah* and finally grappling with the great problem of the contemporary 'Abbaside State. He dealt with the great with this great issue in his own characteristic way and brought about a consideration of the state as such in contradiction to the particular form of the *Imamat*. The problem of the nature, forms and attributes of the state are dealt with in his book *Al-Sysasah al-Shar'iyah*.<sup>13</sup>

**1.5.2)** Two important modern scholars have addressed the problem of classical Islamic international theory in two quite different ways.

- Majid Khadduri's pioneering study *War and Peace in the Law of Islam* (1941), remains to this day as the only important scholarly work in the English or the Arabic languages on Islamic international relations, the classical legal theory of which he reconstructs. His book analyses the principles and rules governing the relations of the Islamic State with non-Muslims countries and also discusses the fundamental changes that the Muslim law of nations underwent and how it adapted itself to peaceful coexistence with a rival legal system. However, his study was not a completely comprehensive analysis of Islamic international relations theory as it omitted any discussion of social relations and downplayed the diplomatic/political (especially economic) aspects of Islamic international relations theory. Although much can be learned from Khadduri's work, and while it must be the point of departure for an academic analysis of Islamic international relations theory, it must be admitted that it

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<sup>12</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Dar al-Ma'arif, Cairo, 1962 & *Jami' Al-Bayan 'An Ta'weal Al-Qur'an*, Matba'at al-Halabi, Cairo, 1968.

<sup>13</sup> Ibn Taymiyyah, TaqulDean Ahmed, *Al-Sysasah al-Shar'iyah*, Dar al-M'arifah, Beirut, 1969.

has many flaws in interpretation (which will be criticised in this thesis) and its central thesis that *Jihad* (war) is the normal condition of relations between the Islamic State and non-Muslim countries is, it will be argued, fundamentally mistaken.<sup>14</sup>

- AbdulHamid AbuSulayman's book *Towards an Islamic Theory of International Relations* (1987) is the only other significant scholarly work, apart from Khadduri, on the subject of Islamic international relations. Much of it is a learned study of the origins of jurisprudence (*Usul al-Fiqh*) and its reform which is undertaken in order to allow him to reinterpret Islamic international relations theory in the contemporary context. Although there are some references to the classical Islamic theory of international relations in his book, particularly, his conceptualising of *Siyar* in terms of *Jihad*, *Dar al-Islam*, *Dar al-'Ahd*, *Dar al-Harb*, the main thrust of his work is a modernist concern to revise and adapt Islamic theory to modern conditions. Because of this feature, AbuSulayman's treatise has limited value for this thesis on the classical Islamic theory of international relations. Its importance for this thesis is that it draws attention to the misleading interpretation of *Jihad* and its place in Islamic international relations theory. He writes that the reader of Khadduri,

. . . could be left with the impression that Muslim jurists reached consensus on jihad, and all-out, virtually permanent state of war, through which Islam could be forced on most of humanity . . .<sup>15</sup>

**1.5.3)** Other modern scholars have not aimed at producing comprehensive accounts of Islamic international theory, like Khadduri and AbuSulayman, but have instead contributed to our understanding of various parts of that theory.

- AbdulQadir Audah's book *Al-Tashri' al-Jinai' al-Islami* is considered as a reference for all researchers of the Islamic international relations. It is a comparative study between the criminal Islamic Law in *Shari'ah* and its counterpart in secular law, covers all principles, ideas and legal theories related to this subject. It concentrates on the work of the four Sunni Schools of *Fiqh*: the Hanafite, the Malikite, the Shafei'ite, and the Hanbalite. *Al-Tashri' al-Jinai' al-Islami* provides a systematic Islamic account

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<sup>14</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979.

<sup>15</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, 2<sup>nd</sup> Edit., International Institute of Islamic Thought, Herndon, 1994, pp. 21-22.

of a major part of criminal law in Islam. Much can be learned from Audah's book and it gives clear illustration of the status of *Dhimmi* and *Musta'min* under the Islamic criminal law.<sup>16</sup>

- AbdulRahman Kurdi's book, *The Islamic State*, is a standard exegesis of the Islamic State which is one of the key elements of Islamic international relations theory.<sup>17</sup>

- Abu Al 'Ala al-Maududi, with his pioneer works which covers the nature and duties of the Islamic State, such as: *Political Theory of Islam*; *First Principles of the Islamic State*; *The Islamic Law and Constitution*. The book which deals with the relations between the Islamic State and its non-Muslims subjects is *Rights of Non-Muslims in Islamic State*. The works of Maududi are very important because they offer vital data for researchers of the Islamic international relations theory. These books used in this thesis to compare the Islamic theory of state with the ones in international theories.<sup>18</sup>

- Ann K. Lambton in *State and Government In Medieval Islam* attempts to set out the ideas on which the state rested and the ideas underlying the practice of government as put forward by the Muslim jurists such as Abu Yusuf, al-Baqillani, al-Mawardi, al-Ghazali etc. and some non-jurist writers such as Ibn al-Muqaffa' and al-Jahiz. These book, moreover, covers the period from the 2<sup>nd</sup> to the 11<sup>th</sup> century AH, the 8<sup>th</sup> to the 17<sup>th</sup> century AD and is continued to the central lands of the caliphate, including Persia and North Africa. The main concern of this book is with political ideas not with the political institutions. It presents examinations to these ideas and ideals of the jurists in a chronological framework.<sup>19</sup>

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<sup>16</sup> Audah, AbdulQadir, *Al-Tashri' al-Jinai' al-Islami*, Mu'asasat al-Risalah, Cairo, 1994.

<sup>17</sup> Kurdi, Abdulrahman, *The Islamic State*, Mensell Publication Limited, London, 1984.

<sup>18</sup> Maududi, Abul A'la, *Political Theory of Islam*, Islamic Publications, Lahore, 1980. *First Principles of the Islamic State*, Islamic Publications, Lahore, 1978. *The Islamic Law and Constitution*, Islamic Publications, Lahore, 1977. *Rights of Non-Muslims in Islamic State*, Islamic Publications, Lahore, 1976. *Towards Understanding Islam*, Nairobi, 1973.

<sup>19</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985.

- Erwin Rosenthal, *Political Thought in Medieval Islam*. A large part of this book is devoted to an exposition of the political thought of the Muslim Philosophers al-Farabi, Ibn Sina, Ibn Bajja, Ibn Rushd, al-Dawwani and Ib Khaldoun regarding the Islamic Law *Shari'ah* as the ideal constitution of the ideal state. It observes the character of Islam in relation to politics, or in other words the relation between the religion and the state.<sup>20</sup>

- Muhammad Hamidullah who considered as one of the most famous recent Muslim jurist. Among his great books is *The Muslim Conduct of State* which is the main concern of this thesis. It is a comparative study of the Muslim jurisprudence on the Islamic international law. The important parts of this book to the thesis are the discussion of such relations between the Muslims and non-Muslims as the safeguard (*Aman*) and neutrality.<sup>21</sup>

- W. Montgomery Watt's book, *Islamic Political Thought* is considered among the pioneering works which deals with the Islamic political ideas as they have been operative in the historical process. It attempts to preserve the neutrality proper to the social scientist which neither affirms nor denies the metaphysical truth of the ideas which influencing the life of the Islamic society during the classical period of the Islamic Caliphate.<sup>22</sup>

- Wahba al-Zohaily in his book, *Athar al-Harb fi al-Fiqh al-Islami*, wrote a pioneering and authoritative study of the impact of war on the origins of Islamic *Fiqh* and its wider impact upon *Aman*, treaties and peace relations.<sup>23</sup>

- Yusuf al-Qaradawi is perhaps the most authoritative and widely respected living jurist. Of his many important works his interpretation of *Dhimmi* status in *Ghayr Al-Muslimoun fi Mujtama' Al-Islam*, and his famous treatise entitled *The Lawful and the Prohibited in Islam* are of greatest relevant to this thesis. Through his T.V. programme

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<sup>20</sup> Rosenthal, Erwin I. J., *Political Thought in Medieval Islam*, Cambridge University Press, Cambridge, 1962.

<sup>21</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977.

<sup>22</sup> W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968.

<sup>23</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981 & *Al-'Alaqat al-Dowalyah fi al-Islam*, Mu'asasat al-Risalah, Beirut, 1981.

on the al-Jazeera Satellite Channel (www. Aljazeera.net) , Dr. al-Qaradawi has provided regular advice to Muslims, who permanently reside in non-Muslim states, on various problems related to the daily life of a Muslim outside *Dar al-Islam*. This advice, and his scholarly treatise on Muslims permanently resident in the West, deals with an important element of Islamic international relations theory. However, this element is not discussed in the thesis because it was unknown in classical *Fiqh* due to the fact that any Muslims resident in *Dar al-Harb* were so on a temporary basis. The mass migration of Muslims out of different countries in *Dar al-Islam* to the West is an entirely new situation in the twentieth century and Islamic *Fiqh* which is related to it is correspondingly modern, not classical.<sup>24</sup>

### 1.6) The significance of the thesis

Although, Islamic political thought forms a link in the chain of human political thought, it has received little scholarly attention. Islam's contributions to world civilisation during the Middle Ages and its preservation of classical Greek achievements deserve more attention and appreciation than have been given. It is in the point of view of various scholars that Islam was the intermediate civilisation.<sup>25</sup> Galal Mazhar, for instance, states that,

*The zenith of the Arabs activity may be placed in ninth and tenth centuries AD, but that it continued down to the fifteenth century. During the twelfth and thirteenth centuries, and especially through the College of Translators founded by Archbishop Raymond of Toledo (1130-1150 AD), almost all the philosophical writings of Aristotle and commentaries on them by Arabian philosophers as well as the writings of Avicenna, Averos, al-Kindi, Costa ben Luca, al-Farabi, and al-Ghazali were translated from Arabic into Latin and thus being made available to the Western world.*<sup>26</sup>

One of the major reasons for Western neglect of Islamic political thought and institutions was the lack of knowledge of the Arabic language. Another was the

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<sup>24</sup> Al-Qaradawi, Yusuf, *Ghayr Al-Muslimoun fi Muijama' Al-Islam*, Cairo, 1977 & *The Lawful and the Prohibited in Islam*, International Islamic Federation of Student Organization, Kuwait, 1989.

<sup>25</sup> Golten, S. D. "Between Hellenism and Renaissance: Islam, the Intermediate Civilization," *Islamic Culture*, Vol. II, No. 2. 1963, p. 217.

primary preoccupation of most Western writers with their own systems of government. This preoccupation with everything Western overshadowed their interest and academic studies of non-Western societies were sadly lacking.

Fortunately, however, Western and non-Western writers appeared on the scene after World War II with a new outlook and new attitudes toward the Third World societies. The impact of the post-war de-colonisation process and the emergence into statehood of a multitude of independent non-Western States accelerated this shift in Western interest and attitude toward the study of contemporary non-Western societies.

The fact remained, however, that the newly independent nations, of which the Muslims are members, were faced with the task of reconstructing their societies and restoring their identities. Upon achieving their independence from colonial rule, the leaders of the emerging nations utilised Western as well as traditional institutions and ideologies to achieve their national objectives of nation building and modernisation.

In the Muslim world, there are hundreds of millions adherents of Islam. Far from being a dying faith, Islam is expanding. Its tenets and traditions enjoy a strong hold on the structures of government, law, and social behaviour of these Muslim societies. Islam and nationalism are the two foremost ideological forces in the area today.

The intellectual dialogue between religious and secular forces centres on the extent of religion in the life of the state. Muslim traditionalists maintain that Islam is the guiding principle in the social, economic, and political life of the nation and that Islam-based institutions and public policy are best suited for the welfare and progress of the Muslim society. Consequently they contend that an Islamic state, guided by Islamic principles, provides the best answer for nation building and modernisation.

This thesis of *The Classical Conception of Treaty, Alliance, and Neutrality in Sunni Islam* is an attempt to examine a political phenomenon within the framework of Islamic political thought. The author of this thesis is of the opinion that the scholars from the Muslim world in particular need to create and nurture intellectual centres of

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<sup>26</sup> Mazhar, Galal, *Arab Contribution to European Civilization*, The Arab Research Centre, (N.D.S.)pp. 60-61.

their own where research on contemporary problems and issues can be carried out meaningfully. The greatest difficulty that a modern social scientist encounters in comprehending certain political and social concepts of classical and medieval Islam is the fact that these concepts are grounded in a particular religious doctrine. These are different from Western political concepts, which are permeated by Judaic, Christian, Roman, and Greek political ideas. Islamic concepts have their origin in the context of an entirely different social, economic, political, and historical setting. This in effect creates problems of definition and semantics. Hence, it may be said that one of the main reasons for the confusion regarding the idea of Islam, is the indiscriminate application of Western political terms and definitions to an entirely different concept of the Islamic polity.

Muslim scholars have to consider this basic distinction and search their societies in their own native settings. In connected with this, Professor A. W. Singham urges the scholars of the Third World nations to be objective and discriminate. He cautions them against evaluating their own societies through Western concepts and through the eyes of their Western mentors.<sup>27</sup>

It is clear that in contemporary world of conflicting ideas and ideologies it is misleading to apply non-Islamic concepts to Islamic institutions. The ideology of Islam has a social orientation peculiar to itself, different from non-Islamic settings and concepts. The Islamic concept of treaty can be studied and interpreted fully only within its own context and by its own terminology. Taking this into consideration, the thesis of *The Classical Conception of Treaty, Alliance, and Neutrality in Sunni Islam* may shed new light and provide valuable knowledge on this aspect of Islamic political thought and institutions.

The treaty which lead to the Declaration of the State-City of Madinah and other treaties which the Prophet Muhammad concluded over fourteen hundred years ago, could be the principle and the ideal of which Muslim traditionalists admire and Muslim reformers advocate in their movements and intellectual dialogues. These same treaties

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<sup>27</sup> Singham, A. W., *The Hero and the Crowd in a Colonial Society*, Yale University Press, New Haven 1968, pp. 8-9.

will be covered among the subject of this thesis. The intent of this thesis, furthermore, is to discover and examine that treaty's concepts, values, and relevancy for our time.

### 1.7) Orientation and methodology of the thesis

The procedures and methods employed to accomplish the objectives of this thesis will utilise three approaches: the narrative, the analytical, and the comparative. The thesis will identify the socio-political setting within which the Prophet Muhammad operated. Historical data collected from early Muslim writings and Islamic religious records of the primary sources the *Holy Qur'an* and the Prophetic *Sunnah* are considered. In reviewing this data in the historical setting of 7<sup>th</sup> Century AD, the author hopes to scope the light on the processes and policies used by the Prophet Muhammad to establish and maintain the new political order within the Islamic State in Madinah. The classic example of political leader for the Muslims to emulate is the religious authority of the Prophet reflected in his charismatic personality that was the primary factor for his success in establishing the first Islamic State.

Most of this thesis employs a systematic analysis in relation to key components of Islamic international relations theory like the Islamic State, treaties and alliances and the status of *Dhimmis*. This analysis is not intended to be, nor is it Islamic *Fiqh*. *Fiqh* uses the sources of the *Holy Qur'an* and *Sunnah* in conjunction with the treatises of earlier jurists to arrive at authoritative judgements on the *Shari'ah*. Furthermore, as will be shown in chapter II, *Fiqh* is always expounded within one of the four *Sunni* Schools of law. The tradition of each law School shapes in a profound way all jurists who exercise judgement within it. Although this thesis makes use of the Islamic sources and juristic writings in order to analyse the classical Islamic theory of international relations its methodology differs from *Fiqh* in two ways: it is written not from a religious *Sunni* Law School perspective, but from the standpoint of international academic scholarship. Second, unlike *Fiqh* which is an explanatory argument from premises of authority (i.e. authoritative sources and authoritative judgements by religious scholars/jurists) to an authoritative conclusion or judgement, this thesis will support its conclusions- which are not authoritative judgements- from textual evidence in the normal scholarly way.



In some parts of this thesis, the comparative approach will be used to compare and examine the Islamic theory of international relations with various Western theories of international relations and to focus on a comparison of the Islamic system of treaties with its counterpart in international law. Most of the classical Muslim works on this theme will be used to compare and contrast with their counterparts in modern Western scholarship of international law and relations, such as by Oppenheim, Holsti and Morgenthau. The aim of that is to distinguish the differences and similarities between the two systems.

## **1.8) Hypotheses**

Having stated the purpose and the significance of this thesis and having explained the orientation and the methodology to be followed, the principal hypotheses to be investigated in this thesis will now be delineated. These hypotheses fall naturally into one of two groups: they are either concerned with the nature of Islamic international relations theory or they are concerned with the subject of treaties in the classical *Fiqh* of *Sunni* Islam.

### **1.8.1) Hypotheses related to Islamic international relations theory**

- 1) That there is a separate Islamic theory of international relations which differs fundamentally from Western theory of international relations in three main respects:
  - (a) it consist of relations between Muslims and no-Muslims. All relations between Muslims (within the *Ummah*) are internal or non-international, even though they could be relations between independent Islamic heads of government.
  - (b) it is normative, but unlike normative Western international relations theories. They are moral theories: it is a theory framed on Divine Law (*Shari'ah*).

- (c) The Islamic theory unlike most Western theories, recognises no distinction between public and private affairs at the international level.
- 2) That all peaceful international relations (i.e. except *Jihad*) are contractual in form.
- 3) Relations between the Islamic State (not states) and non-Muslim states are fundamentally pacific, not hostile. Peace not war is the normal state of affairs. War, hostility and *Jihad* exist or are employed for certain specific purposes, such as self-defence. This hostility ends when that purpose has been achieved.
- 4) That the Muslim juridical division of the world into two domains, *Dar al-Islam* and *Dar al-Harb*, or three domains with the addition of *Dar al-'Ahd* (*Sulh*), was not based on legal-religious grounds. At least one other domain existed during the lifetime of the Prophet *Dar al-Da'wa*. This *Dar* may have some relevance to contemporary conditions.
- 5) That the basis of the Islamic theory of international relations is Islamic Law. This law, it will be argued, is treated in Islamic international relations theory as binding upon both Muslims and non-Muslims alike; international relations should be conducted in practice in accordance with the *Shari'ah*. It is further hypothesised that this law is dynamic, progressive, and flexible enough to meet the changing circumstances of time and place.

### 1.8.2) Hypothesis relating to treaties

- 1) It is hypothesised that legal persons involved in contracts or treaties can be either individuals, various groups like tribes or religious communities, non-Muslim states and the Islamic State (not-states).
- 2) Military alliance between the Islamic State and non-Muslim countries is legitimate in Islamic international relations theory under certain conditions.
- 3) In addition to treaties of truce, friendship, commercial, alliance, and safeguard *Aman* there is a further kind of treaty hitherto unrecognised in juristic or other scholarly commentaries; conciliation treaties.

- 4) That neutrality as well as neutralisation is permissible in Islam to meet the necessity of the Islamic State.

### **1.9) Contents of the thesis**

This thesis consists of eight chapters after the present one, each dealing with a specific issue related to the Islamic theory of international relations.

#### **Chapter Two: Islamic Law and Fiqh**

It examines the foundation of the Islamic theory of international relations as a normative theory in Islamic Law (*Shari'ah*). It focuses on the origins of Islam, the sources of Islamic law and the place of *Fiqh* in Islam, including giving consideration to the four *Sunni* Schools of Law and differences among them. Attention will also be given to facility with which Islamic Law can evaluate and develop to meet modern circumstances.

#### **Chapter Three: Islamic International Relations In Classical Fiqh**

Aims, first, to determine the main features of classical *Sunni* Islamic international relations, including the elucidation of key concepts of the Islamic theory such as *Ummah*, the Islamic State and the role of its head, *Dar al-Islam*, *Dar al-Harb* and *Dar al-'Ahd*. Reference will be made to two parts of Islamic international relations which are not part of the subject matter of this thesis, namely, *Jihad* and social relations between Muslims and non-Muslims, such as marriage. The second theme of this chapter is a comparison between Western theory of international relations and that of classical Islamic *Fiqh*.

#### **Chapter Four: Dhimmis And Musta'min In The Islamic State**

It is an analysis of the juristic principles relating to non-Muslims resident in the Islamic State either on a permanent basis (*Dhimmis*) or temporarily (*Must'amins*), focusing on their rights and obligations. This includes an examination of scholarly views that such theories were grounded neither on the *Holy Qur'an* nor on the *Sunnah*.

## **Chapter Five: Classical Conception Of Treaty In Sunni Islam**

The purpose of this chapter is to analyse the *Shari'ah's* rules regarding treaties, including when they are lawful and when they are forbidden, who has the authority to make treaties, and how treaties are formed, revoked or abrogated. Where it is relevant and illuminating, comparisons will be made with the counterpart provision or rule in international law. In this chapter four kinds of treaties will be analysed: treaties of friendship, trade, reconciliation, extradition. Two important kinds of treaty are omitted from this chapter because of the extensive literature involved and their fundamental importance in the context of this thesis. These are treaties of neutrality and alliance, and they will be analysed in the two following chapters.

## **Chapter Six Legitimacy Of Neutrality In Sunni Islam**

This chapter interrupts the analysis of the different kinds of Islamic treaty in order to examine whether the status of neutrality is possible under *Shari'ah* or if only neutralisation is permitted. The distinction between neutrality and neutralisation is drawn, and is used to refute Khadduri's thesis on neutrality. The chapter is located in this position since it pre-supposes not only chapter III, but also the discussion of truce treaties and *Jihad* in the previous chapter.

## **Chapter Seven: Classical Conception Of Alliances In Sunni Islam**

The basic interest of this chapter is in focusing on military alliances and those in which military components were involved during the early time of the Islamic State and particularly during the time of Prophet Muhammad and the four Orthodox Caliphs. This chapter will review and analyse the Muslim Scholars views regarding the military alliances in terms of a number of important elements, such as aims, methods, structures and system. However, due to the lack of any systematic or scientific Islamic theory of alliance in classical *Fiqh*, this chapter tries to discover and systematise the most important elements required in an alliance between the Islamic State and a non-Islamic entity. It will be concerned in particular to support the claim that treaties with non-Muslims are legitimate in Islam, provided certain conditions are fulfilled, but that there

can be no alliances in Islam, that is, within the Muslim *Ummah* where brotherhood prevails.

### **Chapter Eight: Case Study, The Military Alliance Of 1990-91**

This chapter will implement the findings of the previous chapter to the military alliance of 1990-91 which was formalised as a result of the Iraqi invasion of Kuwait. It examines the legitimacy (or lack of it) of that invasion from the Islamic perspective, its affect on the regional balance of power, and the Islamic legitimacy of the alliance between Muslim and non-Muslim state/s.

### **Chapter Nine: The Conclusion**

This chapter draws together conclusions from the previous chapters, it summaries the most important findings of this thesis in relations to the hypotheses formulated in sections 1.81 and 1.82.

## CHAPTER II

### ISLAMIC LAW AND FIQH

## **Chapter II: The Origins Of The Islamic Law**

- 2.1) Introduction
- 2.2) The origins of Islamic Law *Usul al-Shari'ah* and *Usul al-Fiqh*
  - 2.2.1) The primary sources
    - a. The Holy *Qur'an*
    - b. The prophetic tradition *Sunnah*
  - 2.2.2) The secondary sources
    - a. The exercise of judgement *Ijtihad*
    - b. Consensus of juristic opinion *Ijma'*
    - c. Analogical deduction *Qiyas*
- 2.3) The schools of rationalists *Ahl al-Ra'i* and the traditionalists *Ahl al-Hadith*
- 2.4) The four *Sunni* Schools of Jurisprudence
  - 2.4.1) The Hanafite School
  - 2.4.2) The Malikite School
  - 2.4.3) The Shafei'ite School
  - 2.4.4) The Hanbalite School
- 2.5) Disagreement among the four Sunni Schools of Thought
- 2.6) The impact of the main origins *Usul* on Muslim thought
- 2.7) Islamic Law *Shari'ah* and contemporary issues
- 2.8) Public interest and welfare *Maslaha*
- 2.9) Islamic Law *Shari'ah* and modern International Law
- 2.10) Summary and conclusion:

## 2.1) Introduction

The Islamic Law (*Shari'ah*) has always occupied an important part in the Muslim life. In *Shari'ah*, Muslims have a law that deals with all constitutional and legal issues, and as such is treated, in *Sunni* Islamic theory, as the only legally acceptable code. Consequently, to the devout Muslim, there can be only one legitimate rule, that is through Islam, and there can be no disjunction between political and religious discourse.<sup>1</sup>

*Shari'ah*, moreover, is a sacred law created by God throughout a rational method of interpretation, and the religious standards and moral rules which were introduced into the legal subject-matter provided the framework for its structural order. Islamic Law represents an extreme case of a *Jurists Law*; it was created and developed by private specialists; legal science, and not the state, which plays the part of a legislator, and scholarly handbooks have the force of law. This became possible because Islamic Law successfully claimed to be based on divine authority, and because Islamic legal science guaranteed its stability and continuity.

The sacred law of Islam is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects. It comprises on an equal footing ordinance regarding worship and ritual, as well as political and legal rules. *Shari'ah* is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.

Islamic Law is particularly instructive example of a sacred law, it is a phenomenon so different from all other forms of law - notwithstanding, of course, a considerable and inevitable number of coincidences with one or the other of them as far as subject-matter and positive enactments are concerned - that its study is indispensable to appreciate adequately the full range of possible legal phenomena.<sup>2</sup> According to Muhammad Hamidullah,

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<sup>1</sup> Dawisha, Adeed, *Islam and Foreign Policy*, Cambridge University Press, Cambridge, 1983, p. 3.

<sup>2</sup> *Ibid.*, pp. 1-2.



*Islamic law is the provision or power given to man in order to interpret and expand Divine commandment, by means of analogical deductions and through other processes.<sup>3</sup>*

*Fiqh* is a part of the methods and attitudes of the Islamic legislation, and it is as such that they should be considered major sources of Islamic Law, but not the law itself. Nevertheless, by the end of the second century AH, Muslims had reduced the number of recognised Schools of jurisprudence (*Fiqh*) to four: the Hanafite, the Malikite, the Shafei'ite and the Hanbalite. These are called the four *Sunni* Schools of jurisprudence (*Fiqh*).

This chapter aims to examine the structure of the *Shari'ah*, focusing on its origins, giving consideration about the four *Sunni* Schools of jurisprudence as well as differences between them. Attention will also be given in assessing the ability of the Islamic Law for evaluation and development in meeting recent issues.

## **2.2) The origin of Islamic law *al-Shari'ah* and Islamic jurisprudence *Fiqh***

It is difficult to attempt a study in any field of Islamic Law and its development without considering the history of its practical precepts which have been gleaned from detailed source-evidence. In order to understand the origins of the Islamic Law and its legislation, there is the need to have a brief summary of its background.

Initially, some writers when analysing and discussing works in the field of Islamic Law, wrongly emphasise the idea that Islamic jurisprudence *Fiqh* is law in itself and not a secondary source of Islamic Law. Therefore, it is very important, in the modern context, to identify both *Shari'ah* and *Fiqh*. Thus, there is a difference in meaning between *Shari'ah* and *Fiqh* which must be clarified. *Shari'ah*, on the one hand, has been defined as: the Divine Will revealed to the Prophet pertaining to the conduct of

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<sup>3</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, p. 6.

human life in this world. *Fiqh*, on the other hand, is the science of deducing and extrapolating rules and injunctions from their sources in the data of revelation.<sup>4</sup>

In the earliest period after the death of the Prophet, two sources or methods, the *Qur'an* and the *Sunnah* were recognised as the sources of the *Shari'ah*. However, these were the traditional sources, the authoritative 'given'. Since the 'given' could obviously not suffice for the developing needs of succeeding generations, the second principle of human intelligence and understanding was recognised almost from the outset. The first principle was called "learning" (*'Ilm*, not "knowledge" as it has been sometimes interpreted). The second was called understanding or comprehension *Fiqh*. With the establishment of Islamic studies, a radical change took place in the nature of *Fiqh*, which passed from being a personal activity to mean a structured discipline and its resultant body of knowledge. This body of knowledge was thus standardised and established as an objective system; therefore, *Fiqh* became an *'Ilm*. Whereas in the first stage, one used to say one should exercise *Fiqh* "understanding", the proper thing to say now was 'one should "learn" or "study" *Fiqh*.<sup>5</sup>

Moreover, *Fiqh* developed a methodology of its own to interpret and make deductions in line with the *Shari'ah*. The source material coupled with the methodology is the so-called *al-Usul* the methods of jurisprudence. The basic sources of *Usul* are *Qur'an*, *Sunnah*, *Ijma'* and *Qiyas*. *Fiqh* was an integral part of classical Muslim thought at the height of Islamic civilisation; it was the most unifying and articulate element of the traditional way of life, serving to develop and regulate a highly successful society and civilisation in terms of Economic, Political, Social, and Legal needs.<sup>6</sup>

*Fiqh* is considered as the body of rules and injunctions, deduced from the *Qur'an* and the *Sunnah*. Consequently, some defined *Fiqh* as the aggregate, considered *per se*, of legal proofs and evidence that, when studied properly, will lead either to certain

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<sup>4</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, International Institute of Islamic Thought, Herndon, 1994, p. 5.

<sup>5</sup> Fazlur Rahman, *Islam*, University Chicago Press, Chicago, 1979, pp. 101-103.

<sup>6</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, International Institute of Islamic Thought, Herndon, 1994, pp. 4-13.

knowledge of a *Shari'ah* ruling or to, at least, a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer.<sup>7</sup>

Establishing *Shari'ah*, prescribing law, laying down rules and regulations, and defining system is a function which is specific to God alone. He has provided articulate proofs and clean source-evidence in order to find His legislation, and ever since the time of Adam, God has promulgated His law on Earth from time to time through His Messengers and Prophets. This succession of revelations was partly necessitated by changes in the needs and affairs of human beings, a concomitant of all created things, calling for the repeal or modification of previous laws.<sup>8</sup>

The history of the legal science of the Islamic Law is divisible into four periods. The first called: the legislative period of Islam, it commenced with the migrant *Hijrah* of Prophet Muhammad to Madinah 622 AD, and ended with his death in 632 AD. All legal rules *Ahkam* inclusive of all its classifications, such as principal and derived rulings, teaching on the fundamentals of the Faith, and regulations in connection with personal practice and legalities were derived from the *Holy Qur'an* or from the precepts *Hadiths* of the Prophet. The second period covers the time of the Companions of the Prophet *Sahabah* and their successors *Tabi'un*, and extended to the foundation of different Islamic Schools of jurisprudence 632-717 AD, it has been observed mainly in the collection, interpretation and extension of laws by collective deliberations.<sup>9</sup>

The third period started in the early second century and ended in the third century of the *Hijrah* 722-822 AD. It was marked by a theoretical and scientific study of the law and religion, and it was then that the four *Sunni* Schools of jurisprudence were established. Since then, there has been no independent exposition of the Islamic Law, and jurists have been engaged within the limits of each School to develop the work of

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<sup>7</sup> Al-Razi Fakhr al Din, *Al Mahsul Fi 'Ilm Usul al Fiqh*, Matba'at AbdulRahman Muhammad, Cairo, p.94.

<sup>8</sup> Al-Alwani, Taha Jabir, *Source Methodology in Islamic Jurisprudence*, The International Institute of Islamic Thought, Virginia, 1990, pp. 4-5.

<sup>9</sup> M. A. Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, Hyperion Press Inc. Westport, 1981, pp. 16-17.

its founders. This is the fourth period of the Islamic Law and has yet to come to an end.<sup>10</sup>

The *Shari'ah*, moreover, came into being and developed against a varied political and administrative background. The rule of the Umayyads, the first Islamic dynasty 661-750 AD represented, in many respects, the consummation of tendencies which were inherent in the nature of the Muslims community under the Prophet. During their rule, the framework of a new Arab Muslim society was created, and in this society a new administration of justice, an Islamic jurisprudence, and, through it, Islamic law came into being.<sup>11</sup> Most notably, it is during this time when the Islamic empire grew to its largest size, where new societies, with their methods of thought, melted in the new Islam community and effected from one side or another on the Islamic legislation. In the words of Abdullah al-Turki,

*With the growth of the Islamic empire fresh facts and new circumstances often arose for which no provision had been made, especially as the affairs of the community became more complex.*<sup>12</sup>

With the fall of the Umayyads and the accession of the 'Abbasids to power, a new impetus was given to the study of jurisprudence. The Caliphs of this era appointed as *Qadis* (judges) who were persons noted for their learning and legal acumen. During the 'Abbasids era, the Islamic Law came into contact with the practical concerns of life, and the study of Greek and Roman literatures and sciences also came into considerable vogue about this time.<sup>13</sup>

The principles of the Islamic Law contained in the *Qur'an* were explained and amplified in the Prophetic *Hadith* and *Sunnah*, which together constitute the second basic source of the law. These in turn were understood with the aid of the consensus of the Islamic community *Ijma'*. Lastly, analogical human reasoning or Analogy (*Qiyas*) complemented these sources of Law on occasions of necessity. According to the

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<sup>10</sup> Ibid.

<sup>11</sup> Bosworth, C. E. & Schacht, Joseph, *The Legacy of Islam*, Oxford University Press, Oxford, 1971, p. 394.

<sup>12</sup> Al-Turki, Abdullah Ibn AbdulMuhsin, *Asbab Ikhtilaf al-Foqaha'a*, Matba'at al-Sa'adah, Riyadh, 1974, p. 23.

traditional Islamic view, the sources of the *Shari'ah* are: the *Holy Qur'an*, the Prophetic *Hadith*, the jurist consensus *Ijma'* and analogy *Qiyas*. Out of that, the first two are accepted by all Schools of *Fiqh* while the latter two are either considered of lesser importance or rejected by some of the Schools.<sup>14</sup> In connection with this, there is discussion over whether there are more than two sources and if so, whether these are three, four, five or even more. With this view has gone the further idea that *Ijtihad* is, or has been, or may (again), become a fifth source of law, a method of determining what Islamic Law shall be. A major question in modern Muslim life, a question of social, political, economical and even psychological significance, is whether and how far and by whom *Ijtihad* may be exercised in changing the Islamic Law or modifying it or adapting it to new conditions.<sup>15</sup>

### 2.2.1) The primary sources

It has been mentioned earlier that the *Holy Qur'an* and the Prophetic *Sunnah* are the two main primary sources, which the Islamic Law derived from. Therefore, it may be said that all Muslim Scholars had and have to refer to them in their writings.

#### a. The *Holy Qur'an*

Koran or *Qur'an*; basically the name is derived from the Arabic root *qara'a*, meaning "he read" or "he recited", and it is applied in the text of the book itself either to a single "reading" or "passage", or to a collection of several. It was revealed to the Prophet Muhammad at irregular intervals as necessity demanded and as dictated from an original code, "the Mother of the Book", which is preserved in Heaven. The intermediary which brought the revelation to earth was "a faithful spirit", later identified with the angel Gabriel.<sup>16</sup> It is well known that *Qur'an* is the *Holy* book of Islam, but how does this book related to Islamic legislation. More specifically, what was the message of the *Qur'an* itself? Jacques Jomier remarks,

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<sup>13</sup> M. A. Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, Hyperion Press Inc. Westport, 1981, pp. 22-23.

<sup>14</sup> Nasr, Sayyed Hossein, *Ideals And Realities Of Islam*, Mandala, London, 1991, p. 99.

<sup>15</sup> Smith, Wilfred Cantwell, *On Understanding Islam*, Mouton Publisher, The Netherlands, 1981, p. 79.

<sup>16</sup> Levy, Reuben, *The Social Structure of Islam*, 5<sup>th</sup> Edit., Cambridge University Press, Cambridge, 1979, p. 150.

*The message of the Qur'an was very simple: the announcement of the Last Judgement and threats against those 'who deserved eternal fire on that day, along with happiness for the elect. The earliest declarations stress social justice; it is the wicked rich who are condemned most vigorously. Little by little the sphere of these condemnations extends to those who reject the oneness of God or say that Muhammad was a liar and that the Qur'an was an utter forgery. When the corpus of the messages of the Qur'an began to be formed, it contained the essentials of any monotheistic faith, with a moral code . . . and deep concern for mutual aid.*<sup>17</sup>

To achieve its goal of reformation, Islamic legislation has enacted a series of legal commandments and prohibitions, which makes up rules of conduct governing the social system of Islam. Therefore, in the formation of laws, the *Qur'anic* revelations have to be taken into consideration in conjunction with the saying and deeds of the Prophet.<sup>18</sup>

a) *The removal of difficulty*, throughout the *Holy Qur'an* there are various examples which support the removal of difficulty from man's benefit by Islamic Law.

لا يكلف الله نفساً إلا وسعها . (البقرة: ٢٨٦)

Allah does not burden a soul with more than it can bear. (2: 286)

يريد الله بكم اليسر ولا يريد بكم العسر . (البقرة: ١٨٥)

Allah wishes for you ease and He does not wish you difficulty for you. (2: 185)

يريد الله أن يخفف عنكم وخلق الإنسان ضعيفاً . (النساء: ٢٨)

Allah wishes to lighten the burden for you, for man was created weak. (4: 28)

b) *The reductions of religious obligation*, the prohibited acts and substances in Islamic legislation are quite few by comparison to those which are allowed by direct command or by the absence of any command or prohibition. On one hand, foods forbidden categories are listed in detail:

<sup>17</sup> Jomier, Jacques, *How to Understand Islam*, 2<sup>nd</sup> Edit., SCM Press Ltd., London, 1993, p.10.

<sup>18</sup> Phillips, Abu Ameenah Bilal, *The Evaluation of Fiqh*, International Islamic Publication House, Riyadh, 1995, pp. 12-37.

حرمت عليكم الميتة والدم ولحم الخنزير وما أهل لغير الله به والمنخنقة والموقوذة والمتردية والنطيحة . (النساء: ٢٤)

**Forbidden to you (for food) are: animals which die of themselves, blood, pork, animals slaughtered in the name of others besides Allah, animals killed by strangulation, or a blow, or fall, or by being gored. (4: 24)**

On the other hand, regarding the permissible foods:

اليوم أحل لكم الطيبات من الطعام وطعام الذين أوتوا الكتاب حل لكم وطعامكم حل لهم .  
(المائدة: ٥)

**On this day all good things are made lawful for you. The food of the people of the Book is lawful to you and your food is lawful to them. (5: 5)**

As for the treatment of business transactions, the laws have not at all been detailed. Instead, general precepts suitable for all circumstances have been legislated. In this regard:

يا أيها الذين آمنوا أوفوا بالعقود . ( المائدة: ١ )  
**Oh you who believe, fulfil your contracts. (5: 1)**

وأحل الله البيع وحرم الربا . (البقرة: ٢٧٥)  
**Allah has made trade lawful and prohibited interest. (2: 275)**

يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض بينكم .  
(النساء: ٢٩)

**Oh you who believe, do not eat up your properties amongst yourselves unfairly. But there should be trade by mutual goodwill. (4:29)**

c) *The realisation of public welfare.* According to Mohammed Khidari Bek,<sup>19</sup> the body of information contained in the *Qur'an*, as a whole, may be grounded under three headings with regards to the field of study to which they are related:

- a. Information related to belief in God, His Angels, His scriptures, His prophets, and the affairs of the next life. These topics are known in the Islamic studies as Theology.
- b. Information related to deeds of the heart and soul, and moral principles and rules of conduct aimed at the

<sup>19</sup> Bek, Mohammed, Al-Khidari, *Tareikh Al Tashre'a Al Islami*, Al-Maktabah Al-Tijariyyah, Cairo, 1960, pp. 17-18.

development of nobility of character, which represent the field of moral science.

c. Lastly, the information which represents the field of law, this group related to deeds of the limbs and contained within a body of commandments, prohibition and choices.

Along with that assumption, Bek sees that Islamic legislation in the *Qur'an* is comprised of a variety of acts which may be grouped in two basic categories as follows:<sup>20</sup>

1) *Dealings between human beings and God*. These are the religious rites, which are not valid without correct intention, and considered as the foundation of Islam after Faith *Eman*. Some of these dealings are purely religious forms of worship, such as praying and fasting; while others are socio-economic forms of worship, such as compulsory charity *Zakat*; and yet others are socio-physical forms of worship, such as pilgrimage *Hajj*.

2) *Dealings among people*. The laws governing these dealings may themselves be divided into four sub-sections:

- a. Laws ensuring and defending the propagation of Islam. These are embodied in the codes of armed or unarmed struggle *Jihad*.
- b. Family laws for the development and protection of the family structure. These include laws concerning marriage, divorce, and inheritance.
- c. Criminal laws specifying punishments and/or compensations for different crimes.
- d. Trade laws governing business transactions, rental contracts, and other aspects of the commercial affairs.

Here, it must be observed that Islam did not erase all pre-Islamic customs and practices. Instead, it removed every facet of corruption and cancelled all customs,

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<sup>20</sup> *Ibid.*, pp. 34-35.



which were harmful to the society. That is one of the basic elements of legislation in the *Qur'an*. The Prophet tradition, the *Sunnahs*, put forward these customs to deal with and organise them in a new Islamic way to be agreeable to the new Islamic society.

### **b. The Prophetic Tradition *Sunnah***

Literally, the term *Sunnah* means “way of behave either good or bad”.<sup>21</sup> It is, moreover “custom”, “wont”, “usage” as well as a general term that can be applied to the usages and customs of nations.<sup>22</sup> In the *Holy Qur'an* the term *Sunnah* mentioned in various verses under two meanings, either: the practice of Allah.

سنة الله التي قد خلت من قبل ولن تجد لسنة الله تبديلا . (الفتح: ٢٣)

**The practice of Allah already in the past: no change wilt thou find in the practice of Allah. (48: 23)**

Or: the way of old nations

يريد الله ليبين لكم وليهديكم سنن الذين من قبلكم . . . (النساء: ٢٦)

**Allah both wish to make clear to you and to guide you into the ways of those before you . . . (4: 26)**

Prophet Muhammad has mentioned, in various occasions, the term *Sunnah* as a precedent. It has been narrated that the Prophet is reported to have said,

***He who sets a good precedent (Sunnah) in Islam, there is a reward for him for this (Sunnah) and reward of that also to who acted according to its subsequence, without any deduction from their rewards; and he who sets is Islam an evil precedent (Sunnah), there is upon him the burden of that, and the burden of him also who acted upon it subsequence, without deduction from their burden.***<sup>23</sup>

In another occasion, the Prophet said,

***Verily ye shall imitate the way (Sunnah) of those who were before you [i.e. of the Jahiliyyah] inch for inch, ell for ell, span for span;***

<sup>21</sup> Ibn Mandhore, Muhammad Ibn Makram, *Lisan al-Arab*, Vol. XIII, Dar Beirut, Beirut, 1956, p. 225.

<sup>22</sup> Glassé, Cyril, *The Concise Encyclopedia Of Islam*, Stacy International, London, 1989, p. 381.

<sup>23</sup> Matraji, Mahmoud, *Translation of Saheh Muslim*, Vol. II B, Dar Al-Fikr, Beirut, 1993, p. 199.

***if they were to crawl into a lizard's hole, you should follow after them.***<sup>24</sup>

Muslim jurists used the term *Sunnah* as synonymous with the religious commands of Prophet Muhammad.<sup>25</sup> This was later defined as “the way or practice of the Prophet, inclusive of sayings and actions, as recorded in the *Hadith*.”<sup>26</sup> It includes what the Prophet approved, allowed, or condoned when, under prevailing circumstances, he might well have taken issue with others’ actions, decisions or practices; and what he himself refrained from and disapproved of.<sup>27</sup> In this connection, Abul A’la Maududi clarified the basic duty of *Sunnah* when he says,

*. . . to translate the ideology of Islam in the light of Qur’anic guidance into practical shape, developed it into a positive social order.*<sup>28</sup>

However, the Prophet had set a precedent for the religious-secular relationship when he said,

***You know better [than I do] in your civil [non-religious] matters.***<sup>29</sup>

For Muslims, it is quite evident that the *Qur’an* is, and must be, the essential basis of the Islamic Law: where the *Qur’an* expresses a precept clearly, the obligation is absolute. However, the *Qur’an*, composed in a very concise style, does not go into details, or does so only rarely. Therefore, the words, the practices, and the examples of the Prophet Muhammad in the first place, and sometimes those of his Companions, have served to illuminate the legislation. These examples and these words have been systematically collected in a stereotyped form, that of the traditions, *Sunnah* or the sayings *Hadith*, which have played a very major role in the Islamic Law, as in the spirituality of Islam itself. In the *Holy Qur’an* there are verses which are referenced to the importance of the Prophet’s *Sunnah*,

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<sup>24</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. II, Dar al-Ma’aref, Cairo, 1980, p. 327.

<sup>25</sup> Ibn Mandhore, Muhammad Ibn Makram, *Lisan al-Arab*, Vol. XIII, Dar Beirut, Beirut, 1956, p. 225.

<sup>26</sup> Bannerman, Patrick, *Islam in Perspective*, Routledge, London, 1988, p. 258.

<sup>27</sup> Glassé, Cyril, *The Concise Encyclopedia Of Islam*, Stacy International, London, 1989, p. 381.

<sup>28</sup> Maududi, Abul A’la, *First Principles of the Islamic State*, Islamic Publications, Lahore, 1978, p. 3.

<sup>29</sup> Matraji, Mahmoud, *Translation of Saheh Muslim*, Vol. IV, Dar El Fikr, Beirut, 1993, p. 108.

فَأْمَنُوا بِاللَّهِ وَرَسُولِهِ النَّبِيِّ الْأُمِّيِّ الَّذِي يُؤْمِنُ بِاللَّهِ وَكَلِمَاتِهِ وَاتَّبَعُوهُ لَعَلَّكُمْ تَهْتَدُونَ .  
(الأعراف: ١٥٧)

So believe in Allah and His Messenger the unlettered Prophet, who believeth in Allah and His Words: follow him that (so) ye may be guided. (7: 158)

Al-Tabari in his work *Jami' al-Bayan* says,

*In this verse God commands people to follow the Prophet's commands [Sunnah] to worship Allah in order to drive them to the path of guidance.*<sup>30</sup>

Imam al-Shafei'i in his book *Al-Risalah* explains the relationship between the *Qur'an* and the *Sunnah*. Al-Shafei'i mentioned,

*The Sunnah's relation to the Qur'an may be of three kinds: (1) in entire agreement with the Qur'an; (2) an explanation of the sacred text; (3) not directly connected with the sacred text.*<sup>31</sup>

Out of that, *Sunnah* is divided according to its category, into three types: the sayings; the behaviour; and the ratification. The first depends on every single word (*Hadith*) narrated on the Prophet in different circumstances\* such as:

***Start observing Saum (fasts) on seeing the crescent-moon of Ramadan, and stop (fasts) on seeing the crescent-moon of Shawwal.***<sup>32</sup>

The second category is the behaviours of the Prophet, such as his performance of prayer, in the Prophet's *Hadith*: ***Pray as you have seen me praying.***<sup>33</sup>

Lastly, the category of *Sunnah* is where the Prophet approves or rejects the acts of his Companions, either in his saying or by his attitudes, in connection with religious issues, which he ratified by his silent, approval, or showing an acceptance.<sup>34</sup>

<sup>30</sup> Al-Tabari, Mohamad Ibn Jarear, *Jami' Al-Bayan 'An Ta'weal Al-Qur'an*, Vol. VI, Matba'at al-Halabi, Cairo, 1968, pp. 115-116.

<sup>31</sup> Al-Shafei'i, Muhammad A., *Al-Risalah*, Matba'at al-Halabi, Cairo, 1958, p. 16.

\* The since of *Hadith* is the documentation of this *Sunnahs*.

<sup>32</sup> Khan, Muhammad Muhsin, *Summarised Sahih Al-Bukhari*, Maktabat Dar Al-Salam, Riyadh, 1994, p. 440.

<sup>33</sup> Martaji, Mahmoud, *Sahih Al-Bukhari*, Vol. I, Dar Alfikr, Beirut, 1993, p. 425.

Most notably, the *Sunnah* of the Prophet became the characteristic term for the theory and practice of the *Sunni* Muslim community *Ahl al-Sunnah wa al-Jama'a*. Therefore, this found the *Sunnis*, those who refrain from deviating from dogma and practice. The expression is particularly used in this sense in opposition to *Shi'ites*.<sup>35</sup> The Prophet, in his efforts to correct the way of Muslim's lives, insisted Muslims must follow his *Sunnah* and threatened,

***He, who turns away from my Sunnah, does not belong to me.***<sup>36</sup>

In the second century AH, the incidence of an increased circulation of *Hadith* and the appearance of *Hadiths* that had never been circulated at all, led, in some cases, to legal rulings and positions quite different from those held by *Sahabah*. Consequently, in order to document the Prophetic Tradition, therefore they both: the science of *Hadith* and the science of *Fiqh* were improved. The collections of traditions were presented as a series of texts juxtaposed and classified according to their subject matter. These texts differ in content; they range from the brief two- or three - line sentences to the account, which takes up several pages.

In the science of *Hadith*, there is the so-called the individual *Hadith*, which consists firstly of the chain of authorities *Isnad* who have transmitted the report; secondly, the text or substance of the report, the *Matn*. The usual form taken by the *Hadith* is that the Relator says: "It was told by *A*, who had it from *B*, who had it from *C*, who had it from *D*, that the Prophet - upon whom be peace- said [or did] . . . [here follows the *Matn*]. In relation to this, Afeaf Tabarah has given clear explanation to the classification of *Hadith*, which according to its *Isnad*, *Hadith* is divided into four different types:

- 1) The Continuous, which divided into two groups:
  - (a) The verbal and meaning continuous;

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<sup>34</sup> Abu Atalah, Khadeijah A., *Al Islam wa Al 'Alaqat Al dwaliyah*, Dar Al Ma'arif, Cairo, 1983., p. 21.

<sup>35</sup> Houtsma, Martijn Theodor, *The Encyclopedia of Islam*, Vol. IV, E. J. Brill Ltd., Leyden 1913, p. 555.

<sup>36</sup> Martaji, Mahmoud, *Sahih Al-Bukhari*, Vol. VII, Dar Alfikr, Beirut, 1993, p. 1.

- (b) Continuous in meaning, for example, numbers of prayer unit *Rak'a* in each prayers;
- 2) The Well-known, which was narrated by three Transmitters or more;
- 3) Two Narrators should narrate the strong, this type of *Hadith*;
- 4) The Isolated, which was narrated by one Transmitter.<sup>37</sup>

*Hadiths* according to its *Matn* can be divided into four types:

- 1) The Genuine Sound, which contains no mistakes and is narrated by accurate narrators.
- 2) The Fair *Hadith*. Its transmitted chain does not contain a narrator accused of mendacity, but a weakness occurred in the narrator's memory;
- 3) The Infirm, which has doubts either in its transmitted chain or in its text. For this reason, Muslim scholars do not build on this type of *Hadith* when they pass legal judgements;
- 4) The Forged, the invented or fabricated, which is not a genuine *Hadith*.<sup>38</sup>

Since the *Hadiths* were not written down until more than a century had gone by, the *Isnads* were needed to weed out those falsely attributed to Muhammad. What if the *Isnad*, too, were fabrications? To weed out *Hadiths* with false *Isnads*, the early 'Ulama became quite expert on the lives of the Prophet, his family, and his Companions. If it could be proved that one link in the chain of transmitters was weak because the person in question was a liar or could not have known the previous transmitter, then the *Hadith* was suspect. After a century of dedicated labour by many scholars, there emerged several authoritative collections of *Hadiths*, the collections of *Hadiths*, became the greatest authority. The standard canonical collections called the nine books, they were still being used by Muslims until recent time. Those are:

- 1) *Saheeh Al Bukhari* of Muhammad Ibn Ismael Al-Bukhari, which contains only the genuine *Hadiths*. Ibn Khaldoun in his work *Al-Muqademah* noted,

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<sup>37</sup> Tabarah, Afeaf AbdulFatah, *Roah al-Dean al-Islamy*, Dar Al 'Ilm, Beirut, 1988, pp. 465-470.

<sup>38</sup> Doi, 'Abdur Rahman I., *Shari'ah The Islamic Law*, Ta Ha Publisher, London, 1984, pp. 56-57.

*The collection of Bukhari is the most excellent book of Islam after the Qur'an.*<sup>39</sup>

- 2) *Saheeh Muslim* of Muslim Ibn Al-Hajaj Al-Naysaburi;
- 3) *Sunan Abu Dawud* of Abu Dawud Sulayman Ibn Al-Ash'ath Al-Azadi;
- 4) *Sunan Al Nasa'i* of Ahmad Ibn Shu'ayb Ibn Ali Al-Nasa'i;
- 5) *Al Muwatta'* of Imam Malik Ibn Anas;
- 6) *Sunan Al Termidhi* of Muhammad Ibn Easa Al-Termidhi;
- 7) *Sunan Ibn Majah* of Muhammad Ibn Yazyeed Ibn Majah;
- 8) *Sunan Al Imam Ahmad* of Ahmad Ibn Muhammad Ibn Hanbal Ibn Asad;
- 9) *Sunan Al Darmi* of Abdullah Ibn AbdulRahman Ibn Fadhl.

Furthermore, it must be observed that the deeds of the Prophet, as well as the legislative side of the *Hadith* divided into three categories based on the *Hadiths* narrated by the companions of the Prophet under his following duties.

- a) What the Prophet said and practised under his prophetic character. These *Hadiths* illustrate the structure and the themes of dogma and worship, such as what is forbidden and what is lawful, praying, fasting, they way of life, treatment of Muslims and others. Such *Hadiths* are obligatory for all Muslims who have to practice and follow all the commands mentioned in these *Hadiths*. In this way, the *Hadith* are a legislative source of the *Shari'ah* in addition to the *Holy Qur'an*.
- b) The *Hadiths* narrated about or stated by the Prophet when he was practising his duties as the political and military leader of the Islamic *Ummah* contain his commands as well as his financial practice, the ratification of treaties, the appointment of judges and so on. These Prophetic *Hadiths* contain commands which are legally binding. They cannot be practised by an individual without permission from the high authority of the Islamic State such as the Caliph, the Imam, or the head of the State.
- c) The third category of *Hadiths* are the sayings of the Prophet when acting as the supreme judge of the *Ummah*. In his prophetic capacity the Prophet

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<sup>39</sup> Ibn Khaldoun, AbdulRahman, *Al Muqadenmah*, Almaktabah Alasryah, Beirut, 1995, p. 413.

Muhammad informed and instructed them about the judgements of Islam. In his capacity as supreme judge he implemented those judgements when adjudicating between them in legal proceedings. As in the two previous cases, these Hadiths are legislative sources of the *Shari'ah*. No individual Muslim is entitled to implement these judgements: they can only be implemented by the Islamic authority.<sup>40</sup>

## 2.2.2) The secondary sources

### a. The exercise of judgement *Ijtihad*

Adjacent to the two primary sources, *Ijtihad* (exercise of judgement) is the first of the secondary sources. It was practised by the Prophet and by those of his Companion with legal proclivities (*Ahl al-Nazar*). The Prophet's *Ijtihad*, if it was in religious affairs, confirmed by a *Qur'anic* text, and is connected with the civil purposes some times, not confirmed by *Qur'anic* text; in which case, it was explained that the better solution was other than that which he had adopted. The following *Hadith* gives clear vision to this concern,

***You know better [than I do] in your civil [non-religious] matters.***<sup>41</sup>

In the *Sunnah* there are examples which confirm this assumption, among the famous events come the battle of Badr as a clear illustration to the Prophetic *Ijtihad* which was not supported by a *Qur'anic* text. It was related that the Prophet, in his preparation for the battle of Badr marched with the Muslims and encamped on the farthest bank of the valley the so-called *al-'Audwa al-Quswa* at the nearest spring of Badr. Al-Habab Ibn al-Mundhir, a Muslim companion, asked the Prophet: "O the Messenger of Allah, has Allah inspired you to choose this very spot, so we cannot go onward or backward? Or is it the stratagem of war and the product of consultation?" The Prophet replied "it is the stratagem of war and the product of consultation." Al-Habab said: "This place is no good; let us go and encamp on the nearest water to seize the water-supply, and build a basin full of water, then destroy all the other wells, then we fight the people, so

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<sup>40</sup> Tabarah, Afeaf AbdulFatah, *Roah al-Dean al-Islamy*, Dar Al-'Ilm, Beirut, 1988, pp. 465-470.

<sup>41</sup> Matraji, Mahmoud, *Translation of Saheh Muslim*, Vol. IV, Dar Al-Fikr, Beirut, 1993, p. 108.

that they will be deprived of the water.” The Prophet said: “You have given the exact advice.” The Prophet approved of his plan and agreed to carry it out.<sup>42</sup>

During the time of the Prophet some of his Companions performed *Ijtihad* in response to situations, which occurred to them, and when they met the Prophet they explain what happened and tell him their judgements. Under such circumstances the Prophet’s approval or disapproval - after he explains the correct procedure - of their *Ijtihad* became a part of the Prophetic *Sunnah*. The Prophet *Ijtihad*, moreover, set a precedent for his Companions and later Muslims, that clearly proved the legitimacy of *Ijtihad*, so that when they could not find an express legal ruling in the two main sources, they were to perform *Ijtihad* in order to find a judgement of their own. Moreover, probably to reinforce and establish this concept, the Prophet used to order certain of his companions to make *Ijtihad* concerning certain matters in his presence, then he would tell them if they were correct or mistaken.<sup>43</sup>

The indications that *Ijtihad* is valid and relevant in recent context are many. In the story of Mu’ath Ibn Jabal when the Prophet sent him to Yemen as a Judge *Qadi* and asked him:

***What will you do if a matter is referred to you for judgement?  
Mu’ath’s replied “I will judge according to the Book of Allah ... or  
by the Sunnah of the Prophet ... then I will make Ijtihad to  
formulate my own judgement.”<sup>44</sup>***

In the present day, according to some jurists, the practice of Mu’ath Ibn Jabal is to be followed.

The extent of the Prophet’s concern with encouraging his Companions to make *Ijtihad* and training them in its use can be seen in his *Hadith*:

***When a Judge gives a decision, having tried his best (Ijtihad) to  
and reaches a correct conclusion, he receives a double reward;***

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<sup>42</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. II, Matba’at al-Halabi, Cairo, 1955, p. 223.

<sup>43</sup> Al-Alwani, Taha Jabir, *Source Methodology in Islamic Jurisprudence*, The International Institute of Islamic Thought, Virginia, 1990, pp. 4-6.

<sup>44</sup> Abu Dawud, Sulayman Ibn Al-Ash’ath Al-Azadi, *Sunan Abu Dawud*, Al Matba’a Al Taziyah, Cairo, p. 303.



**and if he gives a judgement after having tried his best (Ijtihad) but erred, there is one reward for him.** <sup>45</sup>

It is also possible for this encouragement to apply to present day *Qadis*.

The roles of *Ijtihad* were organised during the time of the 'Abbaside Empire, at that time the scholars wrote the basics for the fulfilment of *Ijtihad*. It may be said that: by the time of the death of the last of the four founders of the four *Sunni* Schools of *Fiqh*, *Ijtihad* was gradually abandoned in favour of the imitation *Taqlid*, or submission to the canons of the four Schools, and the gate of *Ijtihad* was closed.<sup>46</sup> Taj al-Dean al-Subki, defines *Taqlid* as,

*Taqlid is the following the opinion of another person without knowledge of authority for such opinion, and in jurisprudence, it means following the opinion of a jurist in matters which have not been dealt with by an express Qur'anic or Hadith text or by Ijma', for in matters which have been so dealt with there is no room for juristic opinion and all persons whether jurists or not would be equally bound to accept such laws.*<sup>47</sup>

Since then Muslim thought, with few exceptions, has become rigid and imitation (*Taqlid*) has been the dominant approach. In the 19<sup>th</sup> century AD, modernists introduced the concept of "piecing together" (*Talfiq*), Muslim jurisprudence and legislation as the dominant force of the so-called modern *Ijtihad*. As N. Coulson put it,

*The so-called modern Ijtihad amounts to little more than forcing from the divine texts that particular interpretation which agrees with preconceived standards . . . In sum, it appears that modern (Muslim) Jurisprudence has not yet evolved any systematic approach . . . Lacking any consistency of principle of methodology, it has tackled the process of reform as a whole in a spirit of juristic opportunism. Furthermore, many of the substantive reforms must appear, on long term view, as temporary expedients and piecemeal accommodations.*<sup>48</sup>

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<sup>45</sup> Al-Naysaburi, Muslim Ibn al-Hajaj, *Saheh Muslim*, Vol. 3, Dar Al Fikr, Beirut, 1995, p. 153.

<sup>46</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, pp. 36-37.

<sup>47</sup> Ibn Al Subki, Taj al-Dean Ibn Taqi Al-Dean, *Jam' Al-Jawami'*, Matba'at B0ulaq, Cairo, 1282 AH, p. 276.

<sup>48</sup> Coulson N.J., A History of Islamic Law, in AbdulHamid AbuSulayman *Towards an Islamic Theory of International Relations*, International Institute of Islamic Thought, Herndon, 1994, p. 3.

Nevertheless, despite the Prophet's concern or the subsequent followers, *Ijtihad* has met with many permanent difficulties, which has affected the role of Islam not only in the non-Muslim culture inside the Muslim State but world-wide. In connection with this Sheikh Zaki Yamani mentioned,

*The Islamic role in human society had lost its influence and started shrinking because of the closing of the gate of investigation (Ijtihad) many centuries ago. Hence, the legislative and cultural demonstrations, despite their greatness, have been restrictive and do not improve or acclimatise with time and its changes. The Islamic influence in the fields of Economics, Legislation, and Social, became very weak. Consequently, indications of weakness started to infiltrate even into the faith itself, therefore, stagnancy, going astray, and paganism predominated with in many Muslim countries.*<sup>49</sup>

However, some recent scholars argue that the *Sunni* view is incorrect as the concept has been misinterpreted. Throughout the centuries *Mujtahids* -that is, those who can practice *Ijtihad* or exercise their opinion in questions of Law- have contributed to the further development of positive law and legal theory, they claim since most leaders of reformist or renewalist movements necessarily claim the right to practise *Ijtihad*. The stream of *Fatwas*\* issued over the centuries presents a more incorporated (into the state system, that is), and tacitly approved continuation of the use of *Ijtihad*.<sup>50</sup> It has been argued that,

*Legal activity, whether in theory or in practice, continued unceasingly. The vast bulk of Fatwas (legal opinions) that appeared and continued to grow rapidly from the fourteenth century onwards is a telling example of the importance of Fatwas as legal decisions and precedents. It is in this large body of material that one may look for positive legal developments.*<sup>51</sup>

Great diversity of opinion exists about the persons who may be considered as *Mujtahids* and over the time in which they are to be found. Some are of opinion that

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<sup>49</sup> Yamani, Ahmed Zaki, *Islamic Law and Contemporary Issues*, Arabic Edit., The Saudi Publishing House, Jeddah, 1388 AH, p. 52.

\* *Fatwa*, is a decision or an opinion of a jurist on a point of law or legal problem. A *Fatwa* may deal with a weighty point of law, but may also deal with social issues, for example, the legality or otherwise of abortion and birth control; with ritual matters, an example of that is the permissibility of using stunning devices before the ritual slaughter of cattle; and political issues, such as the legitimacy of a ruler.

<sup>50</sup> Hallaq, Wael, B., Was the Gate of *Ijtihad* Closed? *International Journal of Middle East Studies*. 16, 1984, p. 3-41.

only the Companions of the Prophet can be considered as men of such high authority, others add to these the *Ansar*, that is, the Supporters of the Prophet; others again include the *Muhagiroun*, the people of Makkah who fled with the Prophet to Madinah. Some consider the authority of the people of Madinah to be the higher, as they had had the best opportunities of hearing the sayings and observing the practices of the Prophet. The majority of Muslim theologians, however, are of the opinion that there may be true *Mujtahids* in any age and in any place, and that their unanimous agreement is to be accepted.<sup>52</sup> In the method of *Ijtihad*, Muslim scholars discussed and classified three classes of *Mujtahids*:

1. The absolute *Mujtahid*, which is of general and absolute authority, whose specialist expertise embraces the whole of the Islamic Law.
2. The *Mujtahid* of a special School of theology, who is an authority within the sphere of one of the special theological systems, as, for example, of the system of Abu Hanifah, of Shafe'i and of others.
3. The *Mujtahid* of special questions, and cases, which have not been decided by the founders of the four great *Sunni* Schools of *Fiqh*.<sup>53</sup>

Lastly, Muslim jurists have stipulated various characteristics and qualifications that *Mujtahid* has to possess. Among the important conditions: wisdom, adulthood, full knowledge of the texts and meaning of the *Holy Qur'an*, the Prophetic *Sunnah*, the Consensus of juristic *Ijma'*, the Abrogation and Abrogated (*al-Nasikh wa al-Mansoukh*), the science of Arabic Language and finally the rules of the Islamic jurisprudence (*Fiqh*).<sup>54</sup>

#### **b. Consensus of juristic opinion *Ijma'***

The word *Ijma'* is derived from *Jama'a*, which means: collecting or gathering together. *Ijma'* carries the double significance of composing and settling a thing which

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<sup>51</sup> Ibid., p. 18.

<sup>52</sup> Klein, F. A., *The Religion Of Islam*, Kitab Bhavan, New Delhi, 1977, pp. 30-31.

<sup>53</sup> Ibid., p. 31.

<sup>54</sup> Al-Shawkani, Muhammad Ali, *Irshad al-Fohoul*, Al-Maktaba Al-Islamy, Beirut, 1982, p. 250.

has been unsettled and, hence, determining and resolving an affair and agreeing or uniting in opinion.<sup>55</sup> The famous jurist Ibn Hazm defined *Ijma'* as,

*. . . an agreement of the jurists among the Companions in a particular age on a question of law.*<sup>56</sup>

Its authority as a source of laws is founded on certain *Qur'anic* text,

إنما المؤمنون الذين آمنوا بالله ورسوله وإذا كانوا معه على أمر جامع لم يذهبوا حتى يستأذنه إن الذين يستأذنونك أولئك الذين يؤمنون بالله ورسوله . (النور: ٦٢)

Only those are Believers, who believe in Allah and His Messenger: when they are with him on a matter requiring collective action, they do not depart until they have asked for his leave; those who ask for the leave are those who believe in Allah and His Messenger. (24: 62)

And in the Prophetical *Hadith*

***My followers will never agree upon what is wrong.***<sup>57</sup>

In his efforts to elucidate this *Hadith*, F. A. Klein remarks,

*This agreement is to be arrived at by Ijtihad or exertion, or conscientious examination and meditation on the subject under consideration. The chief men among the company of the Mujtahidin are the Companions of the Prophet, and the four Kalifs [Caliphs].*<sup>58</sup>

Klein further contends what can lead to division within the *Ummah* and that its acceptance is by no means universal,

*It has been very properly remarked that the setting up of this agreement of the learned doctors of Islam as a foundation of the Faith and practice must be a source of religious dissension and sectarian strife. Though it is now accepted by the Sunni Muslims, there have not been wanting learned doctors who have altogether rejected it, as they said it was a matter of impossibility to collect*

<sup>55</sup> Hassan, Farooq, *The Concept of State and Law in Islam*, University Press of America, London, 1981, p. 38.

<sup>56</sup> Ibn Hazm, Ali Ibn Ahmad, *Al-Ijma'*, Dar Al Itihad Al Arabi li Al Teba'a, Cairo, 1969, p. 6.

<sup>57</sup> Ibn Majah, Muhammad Ibn Yazeed, *Sunan Ibn Majah*, Dar Ehya'a Al-Kotoub Al-Arabiyyah, Cairo, 1987, Kitab al-Fitan.

<sup>58</sup> Klein, F. A., *The Religion Of Islam*, Kitab Bhavan, New Delhi, 1977, p. 30.

*the opinions of all the persons, even in the same generation who would have the right to vote on the subject.*<sup>59</sup>

However, Klein's interpretation is not accepted within the *Sunni* Islam. *Ijma'*, moreover, has been held to be a valid source of law not only upon the authority of the above texts, but also on the unanimity of opinion to that effect among the Companions. It is, moreover, an essential and characteristic principle of *Sunni* jurisprudence, upon which the Islamic community acted as soon as they were left to their own resources and were called upon to solve the first and most important constitutional problem that arose on the Prophet's death by selecting their first Caliphate according to the principle of *Ijma'*.

The consensus of *Ijma'*, moreover, is of several grades in point of authority; the absolute one ensures certainty of belief, so that anyone not believing in the validity of a rule based on such *Ijma'* becomes chargeable with unbelief. An *Ijma'* is said to belong to this category if it is in strict conformity with the requirements of law and proved by infallible testimony. The second sort of *Ijma'* imparts binding authority to the rulings founded upon them, but do not ensure certainty of belief. These are *Ijma'*s are either not constituted in strict accordance with the law or not proved by universal testimony.

### **c. Analogical deduction *Qiyas***

Muslim jurists have thoroughly discussed the secondary sources of *Shari'ah* and there is almost a unanimous agreement that Analogy (*Qiyas*) is one of the most important methods for deriving new principles. *Qiyas* is an intelligent deduction from analogous situations based on study, thoughtful interpretation and individual insight. They reasoned that God, the Prime Legislator, in revealing judgements, had specified aims and purpose. Thus, if there is two similar situations and the efficient cause of the matter under consideration that gives rise to a judgement was the same. If one situation was governed by a provision and the other was not, the same provision can be used to govern both situations. A mechanical application of *Qiyas* in this sense, however, might result in judgements, which are unjust, or against public interest. Faced with this

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<sup>59</sup> Ibid.

possibility, Muslims jurists decided to employ *Qiyas* only as guiding principle, in their derivation of new judgements, customs, welfare or benefits, and the elimination of hardship. In the Hanafite School of *Fiqh*, this is referred to Preference *Istihsan*.<sup>60</sup>

Most notably, *Istihsan* (literally, preferring or considering a thing to be good) identified as the doctrine by which the jurists derive new judgements and principles from the *Qur'an* and the *Sunnah* (though not by *Qiyas*) to meet the needs of the *Ummah*. *Istihsan* is used when the exercise of *Ra'y* reflected the personal choice of the scholar guided by his idea of what was appropriate. It came to signify a breach of strict analogy for reasons of public interests, convenience or similar considerations.<sup>61</sup> Thus, to take an illustration, it may happen that a rule of law deduced by the application of analogy to a text is in conflict with what has been expressly laid down by some other text, or by the unanimous opinion of the learned, or similarly, it may happen that the law analogically deduced fails to commend itself to the jurist, owing to its narrowness and in-adaptability to the habits and usages of the people and could possibly cause hardships and inconveniences. In that event, according to the Hanafite School, a jurist is at liberty to refuse to adopt the law to which analogy points and instead to accept a rule which in his opinion would better advance the welfare of human beings and the interests of justice.<sup>62</sup>

Connected to the analogical deduction, it could be said that it is based on very strict, logical and systematic principles and is not to be misconstrued as the mere fancies and imaginations of humanity. *Qiyas* is either: (i) Evident, clear and apparent. For example, wine is forbidden in the *Qur'an*. By analogy, this now means anything intoxicating. It is clear, therefore, that opium and any intoxicating drugs are also forbidden; (ii) Or *Qiyas* may be hidden or concealed. An example of that is the alms, the poor rate *Zakat*. By Tradition, it is established that one goat in forty must be given

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<sup>60</sup> Al-Kashani, Abu Bakr Ibn Mas'aud, *Bada'ea Al Sanay'a fi Tarteab Al Sharay'a*, Vol. IV, Sharekat Al Matbou'at Al 'Alamiyyah, 1327 AH, p. 211.

<sup>61</sup> Doi, 'Abdur Rahman I., *Shari'ah The Islamic Law*, Ta Ha Publisher, London, 1984, pp. 81-82.

<sup>62</sup> Al-Sarkhasi, Muhammad Ibn Ahmad, *Al-Mabsut*, Vol. X, Hyderabad, 1335 AH, p. 145.

to God as alms, so it may be concluded by concealed *Qiyas* that the value of the goat may be given instead of the goat itself.<sup>63</sup>

In the *Qiyas*, four points are to be considered: (i) What is to be compared with; (ii) What is compared; (iii) The point of similarity between the two, these are the common elements between both subjects; (iv) The decision resulting from the comparison of both. On the other hand, *Qiyas* comes under four conditions: (i) The precept or practice upon which it is founded must be of general and not of special application; (ii) The cause of the injunction must be known and understood.; (iii) The decision must be based upon either the *Qur'an* or the *Hadith* or the *Ijma'*; (iv) The decision arrived at must not be contrary to anything declared elsewhere, in the *Qur'an* or the *Hadith*.<sup>64</sup>

However, it is important to concentrate on two important informal Schools: the Rationalists *Ahl al-Ra'i* and the Traditionists *Ahl al-Hadith*. The influence of these Schools affected all Muslim scholars who had to belong to one of them. Alongside these sources, only the Schools of the Hanbalite, the Hanafite, the Shafei'ite, and the Malikite were recognised as the main *Sunni* Schools. Here it must be observed that questions can be asked: what were the differences and disagreement among them? And what are their affections at the current time? Consequently, the next work will answer these questions by focusing on the *Ahl al-Ra'i* and *Ahl al-Hadith* Schools and later the four *Sunni* Schools, presenting an explanation of the differences among them.

### 2.3) The Schools of Rationalists *Ahl al-Ra'i* and the Traditionalists *Ahl al-Hadith*

It was in the tenth century AD when sects such as *Shi'is*, *Kharijis*, *Mu'tazila*, *Sufis* and other groups appeared in Iraq, that conflicts arose and the fabrication of *Hadith* became widespread. Each sect strove to outdo the other and gain converts from mainstream Islam. They took to distorting the meanings of the Prophet's words as recorded in the *Hadith*, and to manufacturing and then ascribing to the Prophet, words and meanings designed to suit their own purposes. Consequently, the scholars of Iraq

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<sup>63</sup> Klein, F. A., *The Religion Of Islam*, Kitab Bhavan, New Delhi, 1977, pp. 32-33.

<sup>64</sup> *Ibid.*

were forced to lay down conditions for the acceptance of *Hadith*, according to which only a few of the reports given by the Companions living in Iraq were acceptable.<sup>65</sup>

*Sunni* scholars and jurists who had not become involved with any groups, such as *Kharijis* and *Shi'is*, were either *Ahl al-Ra'i* or *Ahl al-Hadith*, since that time and up to recent times this division remained. The appearance of differences between those two Schools concerned the sources, methodology, and issues of case law. While it is true that both had their roots in the approaches of the preceding generation of the Prophet's companions and in those of the following generation, it was in the second century AH when their differences in matters of *Fiqh* became clear. It was at this time when people began grouping themselves on the basis of their differences in deriving legal points from the sources.<sup>66</sup>

The *Ahl al-Hadith* School is a continuation of the School of the Prophet's Companions. They are recognised as the greatest group of Muslims who were present when the Prophet stated his *Hadiths*. Their narrations of his *Hadiths* have been therefore treated as accurate, reliable and completely trustworthy. They are persons such as Abdullah Ibn al-'Abbas, the Prophet's cousin and one of his Companions, Abdullah Ibn Umar Ibn al-Khatib 'A'isha, the Prophet's widow and daughter of Adu Bakr (his first successor), and Abu Hurayrah, a friend of the Prophet. This School became widespread in the Hijaz for various reasons, of which the most important was the fact that the region was more stable after the Caliphate had been moved, and most of the political activities had been transferred, first to Damascus and later to Baghdad. The Imam of Madinah Sa'eed Ibn Al-Mu'ayyid, noted that the people of Makkah and Madinah had not lost much of the *Hadith* and *Fiqh*, because they were familiar with the *Fatwa* and reports of the four Orthodox Caliphs and others such as Abu Hurayrah, 'A'ishah, and Abdullah Ibn Umar. Thus they did not need to use *Ra'i* in order to derive law.

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<sup>65</sup> Al-Turki, Abdullah A., *Asbab Ikhtilaf al-Fiqhah*, 1974, pp. 23-24.

<sup>66</sup> Al-Rayis, Muhammad Dhay' al-Dean, *Al-Kharaj fi al-Dawlah al-Islamiyyah*, 1<sup>st</sup> Edit., Matba'at Nahdhat Masr, Cairo, 1957, pp. 81-82.



The *Ahl al-Ra'i* school (it originated in Iraq) thought that the legal interpretation of the *Shari'ah* should have a basis in reason and also should take into account the best interests of the people, and be backed by discernible wisdom. The members of this group adopt the view that it was their duty to uncover these meanings and the wisdom behind the laws and to make the connection between them. If the reasons for any law were to lose relevance with the passing of time and the changing of circumstances, the law would no longer be valid. If they found the reasons behind the law, they would often prefer to cite arguments based on an analytical treatment of those reasons. Thus in many cases, reason would be accorded legalistic preference when such reasoning conflicted with the evidence of certain categories of *Hadith*.<sup>67</sup>

The scholars of *Ahl al-Ra'i*, moreover, agreed with all Muslims that once a person has clearly understood the *Sunnah*, he may not reject it in favour of what is no more than someone's opinion. Their excuse in all those cases in which they were criticised for contradicting the *Sunnah* is simply that they did not know any *Hadith* concerning the matter in dispute, or that they did know a *Hadith*, but did not consider it sound enough owing, to some weakness in the narrators or some other fault they found in it (a fault which perhaps others did not consider to be damaging). Alternatively, they claimed that they knew of another *Hadith*, which they considered sound and which contradicted the legal purport of the *Hadith* accepted by others.<sup>68</sup>

*Ahl al-Ra'i*, moreover, criticises *Ahl al-Hadith* for having little intelligence and less *Fiqh* understanding. *Ahl al-Hadith* claimed that the opinions of *Ahl al-Ra'i* were based on no more than conjecture, and that they had distanced themselves from necessary circumspection in those matters of religious significance which could only be ascertained through recourse to the source-text. However, both Schools agreed of the necessity of having recourse to reason whenever a matter occurs for which there is no specific ruling in the source text. Moreover, before the differences in the methods of interpreting and expanding the law had crystallised into codes, each, with its School of adherents, no hard and fast distinction was made between those who relied mainly on

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<sup>67</sup> Al-Alwani, Taha Jabir, *Source Methodology in Islamic Jurisprudence*, The International Institute of Islamic Thought, Virginia, 1990, p. 29 o.w.

<sup>68</sup> Ibid.

*Ra'i* and those who put *Hadith* immediately after the *Qur'an* as a main root of the *Fiqh*.<sup>69</sup>

#### 2.4) The four *Sunni* Schools of jurisprudence *Fiqh*

It has been noted earlier that the *Holy Qur'an* and *Sunnah* provide ample material for legislation. However, not everything has been provided for decisions to be taken on new issues in the interest of the Muslim community. Some scholars, putting forward different principles, became the origins of different legal Schools. Among these principles it should be noted: the universal accord of scholars living at a given period on a given question *Ijma'*, common interest *Maslaha*, personal interpretation *Ra'i*, and reasoning by analogy *Qiyas*. The different positions taken over these principles were the origin of various Schools and everything was discussed, explained and argued over vigorously.<sup>70</sup> There was unbounded work both in the sphere of the legal principles (*Usul al-Fiqh*) and in that of casuistry which recalls that of the spiritual leaders: it was exercised on numerous questions, some of which were vital for both themes.

In this connection, Madinah and Koufah were the most important cities in the development of the Islamic Law. The former was an Arab city where some of the old tribal and family bonds still survived, whereas the latter had come into being during the Islamic period comprising of Arabs, Persians, and local Aramaic people who had come together to form a new society held together by the common ideals of Islam. Yet, both cities had been sites of early Muslim rule and provided the required background for anyone who wanted to study the practices of the early Muslim community. From these two cities, in fact, arose the first two founders of *Sunni* law, Malik Ibn Anas from Madinah and Abu Hanifah from Koufah. These individuals established Schools of *Fiqh* by making a careful study of the *Qur'an* and *Hadith* and the practices of the earlier generations. Based on meticulous study, they composed Compendia of Law in which

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<sup>69</sup> Levy, Reuben, *The Social Structure of Islam*, 5<sup>th</sup> Edit., Cambridge University Press, Cambridge, 1979, p. 175.

<sup>70</sup> Ibraheam, Mohammed Ismael, *A'emat Al-Madaheb Al-Arba'ah*, Dar Al-Fiker Al-Arabi, 1978, p. 29.

the teachings of the *Shari'ah* as they pertain to all aspects of life were delineated and systematised.<sup>71</sup>

At this point there was still a need to have the principles and methods of jurisprudence systematised and a final form given to the process of, promulgating the Law. Such a need was fulfilled by Imam al-Shafei'i whose particular genius in this domain gave to *Sunni* Islam the most satisfying, and one might say beautiful method of jurisprudence. In the tradition of al-Shafei'i, who founded the third School of *Sunni Fiqh*, there were students, each of whom emphasised a certain aspect of the sources of the *Shari'ah*. One was Ahmad Ibn Hanbal, whose School became the fourth accepted School of *Sunni Fiqh* with its characteristic disdain of rationalist methods and complete reliance upon *Hadith* literature.<sup>72</sup>

Of the four Schools of *Sunni Fiqh*, the one with the least number of followers is the Hanbalite School. For a long time it had its centre in Egypt and Syria. It has been given its supreme expression by the celebrated doctor and theologian Ibn Taymiyyah. From this background the Wahabism\* movement began. The Shafei'ite School has always been strong in Egypt and to a certain extent in Syria. The Malikite School is completely dominant in North Africa and its followers constitute the most homogeneous body in the realm of *Sunni* Law. As for the Hanafite School, it was the official School of the Ottomans and is widespread in Turkey, the eastern part of the Arab world and the Indo-Pakistani sub-continent.<sup>73</sup>

There has been occasion to notice that the law-books of the four Schools became the standard textbooks and any attempt to depart from them was denounced as

<sup>71</sup> Nasr, Seyyed Hossein, *Ideals And Realities Of Islam*, Mandala, London, 1991, pp. 103-105.

<sup>72</sup> Ibid.

\* The founder of this sect was Muhammad Ibn Abdul Wahhab who was born at 'Ayyaynah in Najd. After having received careful instruction in the doctrines of Islam according to the Hanbalite School. He was convinced by what he had observed on his journeys to Makkah, Basrah, and Baghdad of the laxities and superstitions of the Muslims that they had widely departed from the strict principles of Islam, and that a return to the primitive teaching of their religion was required. Abdul Wahhab then determined to become the reformer of this corrupt Islam and to restore it to its early purity in conformity with the teachings of the original sources of Islam. His teaching met with the acceptance of many, but it also raised the enmity of others, especially the ruler of the district, and compelled him to flee to Der'aiyyh, where he obtained the protection of Muhammad Ibn Sa'ud- the founder of the first Saudi State- a chief of = considerable influence, who himself embraced Wahhabism, and who, by marrying the daughter of Muhammad Ibn Abdul Wahhab, still further united the interests of his own family with that of the reformer and became the founder of the Wahhabite dynasty, which to this day rules in Saudi Arabia. For more details see Stoddard, Lothrop, *The New World Of Islam*, Chapman and Hall Ltd., London, 1921, pp. 20-25.

<sup>73</sup> Gibb, H. A. R., *Mohammedanism, A History Survey*, 2<sup>nd</sup> Edit., Oxford University Press, New York, 1970, p. 70-71.

innovation (*Bid'a*). By *Ijma'*, the principles of the four *Sunni* Schools are substantially the same. They differ from each other merely in matter of details. They are classed together in contradistinction to the only other important existing School of *Fiqh*, namely, the *Shi'i*.

#### 2.4.1) The Hanafite School

This School derives its name from its founder Imam Abu Hanifah. His name is al-No'aman Ibn Thabit Ibn Zoti al-Tamimi (702-772 AD) and born at Koufah in Iraq. During his lifetime Abu Hanifah gathered about him a band of disciples who were to become the nucleus of the earliest School of Muslim jurisprudence, which was known after him as the Hanafite School of *Fiqh*. His writing was influenced by the Rationalists group *Ahl al-Ra'i*. The followers of the Hanafite School are famous in the way they derive the accurate meanings of the *Qur'anic* texts, and recheck the unclear and unlogical findings of other scholars and re-examine it logically before accepting it. This School recognises only the continuous *Hadith* with well-known sources. They use Analogy (*Qiyas*) and juristic Preference (*Istihsan*) therefore they elaborate judgement (*Ijtihad*) and using hypotheses to find solutions for difficulties.<sup>74</sup>

In applying the principle of *Qiyas*, they are not content to seek verbal resemblances between the written provisions of the *Qur'an* and those they desired to evolve, but they endeavoured to penetrate behind the wording of the text to the '*Illa* or motive, of the provisions made. In the new application of the text, or in the law derived from it, there must be the same '*Illa* as in the *Qur'anic* revelation or traditional usage.<sup>75</sup>

Imam Abu Hanifah was the first to use the lawful artifice, which was a result of the wish to merge the needs of life with the religion. This procedure was familiar to the Iraqi scholars who attached importance to the social and working life.<sup>76</sup> He was, moreover, the first to give prominence to the doctrine of analogy (*Qiyas*), though, as a principle of law, it was undoubtedly in practical operation before his time. Imam Abu

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<sup>74</sup> Ibraheem, Mohammed Ismael, *A'emat Al-Madaheb Al-Arba'ah*, Dar Al-Fiker Al-Arabi, 1978, pp. 57-63.

<sup>75</sup> Ibn Al-Subki, Taj al-Dean Ibn Taqi Al-Dean, *Jam' Al-Jawami'*, Vol. II, Matba'at Bulaq, Cairo, 1282 AH, p. 180.

<sup>76</sup> Ibid.

Hanifah extended the doctrine of *Ijma'* beyond what many of the contemporaries were willing to concede; and recognised the authority of local customs and usage ('*Urf*') as guiding the application of law.<sup>77</sup>

It is worth mentioning that the most well known students of Abu Hanifah are Abu Yusuf, Muhammad Ibn Hasan, Zafar Ibn Hadheal, and al-Hasan Ibn Ziyadah. Additionally, of the four, Muhammad Ibn al-Hasan al-Shaybani is the author of *The Siyar of the Prophet* which is considered as the first book written in Islamic history regarding Islamic International relations. Abu Yusuf is well known as the first jurist who wrote in Islamic literature on the connection of the Islamic State's internal and financial policies.

#### 2.4.2) The Malikite School

Malik Ibn Anas Ibn 'Aamer (717-801 AD) is the founder of this School. He was born at Madinah where he studied, taught, and did all his work. Imam Malik's aims were similar to those of Abu Hanifah, and the results differ in details only. Throughout this time, the study of the *Hadith* was the special feature of the Madinite scholars, though it is not to be supposed that other jurists in any way overlooked or minimised the importance of this subject which is one of the fundamental sources of the Islamic Law. He is known as one of the leaders in the School of Rationalists, as teacher Rabe'ah Ibn AbdulRahman. In his time, Imam Malik was looked upon as the highest authority in *Hadith* and his fame in this respect has not suffered by the lapse of time.<sup>78</sup>

The methods are shown in Imam Malik's *Al-Muwatta'*, a collection of *Hadiths*, which is known as the first book written regarding both the science of *Hadith* and the science of *Fiqh*. *Al-Muwatta'* contains about three thousand *Hadiths*, local traditions and customs organised under headings as a guide to legal decision. In his book Imam Malik as usual states the case at issue, quotes the passage of the *Qur'an* that applies, and then cites the pertinent *Hadiths*. The latter may be omitted where the *Qur'an* provides a clear, comprehensive and authoritative rule which covers the case. In this

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<sup>77</sup> M. A. Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, Hyperion Press Inc. Westport, 1981, pp. 24-26.

situation the *Qur'an* does not require Prophetic *Hadith* for its content to be completely explicit and its practical application certain. In the Maliki *Fiqh*, local traditions and customs have played an important part when a *Hadith* was lacking. However, they have persisted even when a *Hadith* on the point did exist and was apparently decisive.<sup>79</sup>

The Malikite School is recognised for giving a great importance to *Ijtihad* based on public welfare, as a basis of deduction. In the process they have elaborated their well-known theory the so-called “The Unrestricted Interests and Welfare” (*al-Maslaha al-Mursalah*)\* and denote of a utility or benefit which was not revealed or provided for in any explicit text and has been arrived at by derivation.<sup>80</sup> Moreover, *al-Maslaha al-Mursalah* is a very strong link with the so-called “legal policy” *al-Siyasa al-Shar'aiyyah*, which has been identified by the Muslim jurists such as Ibn 'Aqeal and Ibn Nojim as,

*An attitude done by the Imam for the benefit of the Ummah which does not have a legal decision neither in the Holy Qur'an nor in the Sunnah. The decision is connected with the civil life of the Muslims and is not applicable for all times, but changes from era to era according to time and place.*<sup>81</sup>

Similar to Imam Abu Hanifah, Imam Malik had students who were very famous in this School of *Fiqh*. Among them were AbdulRahman Ibn Qasim, Abdullah Ibn Wahb Ibn Maslam, Ashhab Ibn Abdulaziz al-Qaysi, Abdullah Ibn al-Hakam al-Masri, Asbagh Ibn al-Faraj al-Amawi, Muhammad Ibn Abdullah Ibn al-Hakam, and Muhammad Ibn Ibrahim Ibn Ziyad.

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<sup>78</sup> Ibraheam, Mohammed Ismael, *A'emat Al-Madaheb Al-Arba'ah*, Dar Al-Fiker Al-Arabi, 1978, pp. 67-94.

<sup>79</sup> Ibid., pp. 86-87.

\* It is the same meaning of which used as *al-Masaleh al-Mursalah* المصالح المرسله.

<sup>80</sup> Ibraheam, Mohammed Ismael, *A'emat Al-Madaheb Al-Arba'ah*, Dar Al-Fiker Al-Arabi, 1978, pp. 67-94.

<sup>81</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *A'alam al-Mawaqqean an Rabb al-Alamean*, Vol. IV, Sharikat al-Teba'ah al-Fanyah, Cairo, 1968, p. 372 & Ibn Najeem, Zain Al-Dean Ibn Ibrahim, *Al-Bahr al-Ra'iq*, Vol. V, Dar al-Ma'rifah, Beirut, p. 76.

### 2.4.3) The Shafei'ite School

Muhammad Ibn Idris al-Shafei'i (772-826 AD) was born in Gaza in Palestine and the Shafei'ite School of jurisprudence is associated with his name. Imam al-Shafei'i began his studies with Imam Malik at Madinah and followed his studies by learning the methods of Abu Hanifah from his disciple and younger colleague al-Shaybani. Consideration of their systems led him to be dissatisfied with both; with Malik's for its rigid adherence to tradition and with Abu Hanifah's for what he considered the excessive scope for personal prejudices which *Ijtihad* allowed to the arbitrary decisions of individual jurists. In his work *Al-Risalah*, the roots of jurisprudence were the *Qur'an*, the *Sunnah*, and *Ijma'*. Because they were insufficient for all the requirements of the law, al-Shafei'i found a fourth root in *Qiyas*, unlike the other Schools.<sup>82</sup>

Imam al-Shafei'i attained greater eminence as a jurist than the master himself. He was noted for his balance of judgement and moderation of view. Though reckoned among the upholders of tradition, he examined the tradition more critically, putting a more liberal and workable interpretation on the well-known dictum of the Prophet saying "***My People will never agree on an error***".

Comparing Imam al-Shafei'i with his master Malik Ibn Anas, Imam al-Shafei'i admits the needs to examine the different views of the Companions and to prefer the one which suited the *Qur'an*, the *Sunnah*, which made more use of *Qiyas* and allowed greater scope to *Ijma'*. However, he agrees with Malik in adopting *Istedlal* as a fifth source of the Islamic Law.<sup>83</sup> *Istedlal*, moreover, means the inferring from a thing another thing, but with Shafei'ite School it used as a distinct method of juristic ratiocination, not falling within the scope of interpretation or analogy. *Istedlal* is of three kinds: (1) The expression of the connection existing between one proposition and another without any specific effective cause. This kind of *Istedlal* is of four varieties: (a) when the connection is between two affirmative propositions; (b) when the connection is between two negative oppositions; (c) when connection is between an

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<sup>82</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Risalah*, Matba'at Al Halabi, Cairo, 1958 AH, p. 66.

<sup>83</sup> Al-Ghazali, Muhammad, *Al-Mankhoul*, Matba'at Al Halabi, Cairo, 1386 AH, pp. 213-215, 229.

affirmative and a negative proposition; (iv) when connection is between a negative proposition and affirmative proposition. (2) A presumption that a state of things, which is not proved to have eased, still continues. (3) The authority of revealed laws prior to Islam.

The basics elements and the roots of the Imam al-Shafei'ite *Fiqh* were set out in his famous work *Al-Risalah*, and applied clearly in his book *Al-Umm*. Among the students of Imam al-Shafei'i were, Yusuf Ibn Yahya, Ismael Ibn Yahya al-Mizni, and Al-Rabe'a Ibn Sulayman Al-Maradi. Imam al-Ghazali is considered as one of the famous disciples of the Shafei'ite School of *Fiqh*.

#### 2.4.4) The Hanbalite School

This School was founded by Imam Ahmad Ibn Hanbal (782-859 AD). He was born in Baghdad and studied under different masters, including Imam al-Shafei'i. He is more learned in the tradition than in the science of law. As a theologian, his reputation stands very high, and in the number of traditions that he recollected no one, even in that age, could approach him.<sup>84</sup> In law, he adhered rigidly to the traditions, a much larger number of which he felt himself at liberty to act upon than any other subject. His interpretation of them was literal and unbending and according to some he allowed a very narrow margin to the doctrines of agreement and analogy.<sup>85</sup> Ibn Hanbal's teaching was systematised after him by his disciples. Therefore, a widespread following was commanded by this school up to the 8<sup>th</sup> century AD. The numbers suffered a continuous decline although a series of brilliant and sensational representatives of the School of *Fiqh* appeared across the centuries.

The School of the Hanbalite relies for its thoughts, and legal opinions (*Fatwas*) on five sequential principles.<sup>86</sup> These are:

1) A text from the *Holy Qur'an* or the *Sunnah*;

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<sup>84</sup> Ibid. p. 189.

<sup>85</sup> Badran, AbdulQader Ahmed Mustafa, *Madkhal ila Madhab al-Imam Ahmed Ibn Hanbal*, Damascus, Chapter III, pp. 1-3.

<sup>86</sup> Musa, Mohamed Yusuf Dr., *Al-Amwal wa Nadhariyah al-'Aqd fi al-Fiqh al-Islami*, Dar al-Fikr al-Arabi, Cairo, 1996, pp. 86-87.



- 2) A legal opinion of a Companion;
- 3) If the Companions legal opinions were various, it takes the nearest to the *Qur'an* and the *Sunnah*;
- 4) It relies on the 'weak' unreliable *Hadiths* in preference to the Analogy (*Qiyas*), where there is no other evidence to contradict it;
- 5) Analogy (*Qiyas*) is the final principle, which could be followed if the previous form could not serve to produce a judgement.

Lastly, the work of Imam Ahmed Ibn Hanbal can be found in his book *Al-Musnad*, which contains more than 40,000 *Hadiths* and is considered as one of the greatest treatises in the science of *Hadith*. Among the most famous students of Imam Ibn Hanbal were Abu Bakr Al-Kharasani, Ibrahim Abu Ishaq, and Umar Ibn Abe Ali Al-Kharki. Among the famous disciples of this School of thought are Imam Ibn Taymiyyah and his student Ibn al-Qayyim the author of the pioneer work *A'alam al-Mawaqqean an Rabb al-Alamean*.

## 2.5) Disagreement among the four *Sunni* Schools of *Fiqh*

Islamic legal historians have assumed that the extension of the Islamic Empire led to the various circumstances, such as issues of personal and social concern, which had not been known to happen during the time of the Prophet and thus there were no indications for them neither in the *Qur'an* nor in the *Sunnah*. That encouraged Muslim jurists to search, investigate, and issue their judgement.<sup>87</sup> Consequently, differences arose among them, i.e. the Muslim jurists, in their efforts to explain and deal with the new situations.\* This disagreement was only in minor details and not related to the major doctrines and dogma upon which they remained unanimously agreed upon.

Thus, there was no variance for the main issues Unification *Towhead*, Praying *Sala* and numbers or times of it, Fasting *Sawm* and its mode and duration, Religious Purity *Taharah*, Poor Tax *Zaka* and its rate, Pilgrimage *Hajj* and its ordinances, the Lawful *Halal* and Forbidden *Haram* as mentioned in the *Qur'an* and the *Sunnah*. Differences arose, only, in the highly detailed descriptions of Worship *Ibadat*, Transactions

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<sup>87</sup> Al-Turki, Abdulah, *Asbab Ikhtilaf al-Fuqaha*, Matba'at al-Sa'adah, Riyadh, 1974, p. 11.

*Mu'amalat*, Fixed penalties *Hudud* and Punishments *Uqubat*.<sup>88</sup> In this connection, A. AbuSulayman noticed,

*... although these Schools may be unified on the basic principles of Islam (for instance, that the pillars of Islam are five, not four or six) and may also be unified on basic philosophical and theological issues, they do not take a unified position on all legal opinions.*<sup>89</sup>

F. A. Klein drew an analogy with differences within Protestant Christianity,

*There is between them about the same difference between the Lutheran, Calvinistic and Zwinglian Schools in the Protestant Church. Such differences are not, however, considered as defects to be regretted or injurious to the system; but, on the contrary, as advantages and mercies, as they leave more liberty to people to follow their personal opinions and inclinations in matters of duty and discipline.*<sup>90</sup>

Difference in matters related to legal decisions was based on sincerity and were not due to any bias, hatred, or prejudice. Disagreement only paved the way for exchanging views, mutual consultation in order to attain truth, unravel real meaning, and derive laws and decisions from the *Qur'anic* verses and the *Sunnah*.<sup>91</sup>

However, a question can be raised here about the basic of difference between the four Scholars? Jurists see that the following *Qur'anic* verse and the two Prophetic *Hadiths* are the fundamental grounds of any differences among scholars:

يريد الله بكم اليسر ولا يريد بكم العسر (البقرة : ١٨٥)

Allah desireth for you ease; He desireth not hardship for you.  
(2:185)

And the Prophetic *Hadiths*

\* For more discussion see the early works on this subject which hold the same title "*Ikhtilaf al-Fuqaha*" such as Ibn Jarear Al Tabari, Abu J'afar Ahmad Al-Tahawi, Ahmad Ibn Nasr Al-Marwazi; others such as "*Kitab Al-Ijma'a wa Al-Ikhtilaf*" by Abu AbdulRahman Al-Shafi'i, and "*Kitab Al-Ikhtilaf*" by Ibn Jabir Al-Dawudi.

<sup>88</sup> Ma'sumi, Muhammad Saghir, *Disagreement of the Jurists*, Islamic Research Institute, Islamabad, 1971, p. 3.

<sup>89</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, International Institute of Islamic Thought, Herndon, 1994, p. 8.

<sup>90</sup> Klein, F. A., *The Religion Of Islam*, Kitab Bhavan, New Delhi, 1977, p. 35.

<sup>91</sup> Abu Zahrah, Mohammed, *Al Milkiyyat wa Nadhariyat Al 'Aqd*, Dar Al Ketab Al Hadeeth, Kuwait, (D.N.S.) pp. 19-20.

***Smooth the way to your affairs and do not render them difficult.***

***The difference of opinion among my Ummah is a (Divine) mercy.***

In view of these differences, Umar II put an outstanding explanation to both the *Qur'anic* verse and *Hadiths*, when he opined,

*I do not like it that the companions of the Prophet should not disagree, because were there is one view only, the people would suffer hardship. Surely the companions are the leaders to be followed up. If one follows the view of any of them, one follows a desirable view. In other words, they opened the gate of making endeavour for a reasonable view and allowed disagreement in reasoning. God has enriched the Ummah with their different views in the details of laws. Thus the door of reasoning has been flung open to allow them enter into the Divine Mercy.*<sup>92</sup>

Moreover, Umar II, due to his consideration of great differences of opinion between the legal scholars on the various legal issues, and fear of the passing away of knowledge as well as of scholars, underscored two measurements: (i) the practices attributed to the Prophet Muhammad should be collected and written down. Accordingly, people of every locality wrote down in books whatever they knew to be part of the *Sunnah*; (ii) the authorised to issue verdict *Fatwa* in most district was restricted to a few named people particular *Ulama*.<sup>93</sup>

Recent scholars agree that there are various causes, which related to the basic differences among the four *Sunni* scholars. Mohammed Ibraheam summarises these cases as follow:

1. The understanding of some *Qur'anic* or *Hadiths* enunciation was different from one scholar to another, therefore, derivations of judgement differ from one another.

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<sup>92</sup> Al-Shatibi, Ibraheam Ibn Musa, *Al-I'tisam*, Vol. III, Maktabat Al Halabi, Cairo, p. 11.

<sup>93</sup> Ibn Abdalbar, Yusuf Ibn Umar, *Jami'a Bayan Al 'Alm*, Vol. I, Matba'at Al-Muniriyyah, Cairo, p. 33.

2. That the full text or part of it, of the Prophetic *Hadith* did not reach to all *Mujtahids* or (the meaning) of the *Hadith* was not clear to some of them.\*
3. Some scholars, if they have no pre-judgement, they merge both Analogy *Qiyas* and personal opinion *Fatwa*, others halt on the text of the *Qur'an* or *Hadith*, and do not exercise *Ijtihad*.<sup>94</sup>

It is worth noting that differences in environment give rise to different rules of law, and changing circumstances often necessitate a modification in a rule of law. The well-known *Shari'ah* principle states "*change of laws because of change of circumstances cannot be denied*".<sup>95</sup> The classical example of that is shown in the writing of Imam al-Shafei'i. Moving from Iraq to Egypt, Imam al-Shafei'i changed many of his legal opinions, and a new School of *Fiqh* came about different from his old one in Iraq through the jurist himself.<sup>96</sup>

Difference among the four Schools can be illustrated in the following instance. All four Schools agree that within Islamic territory neither Jews nor Christians may erect new places of worship in towns or large villages. Whether their erection is also forbidden outside such centres of population is a question on which the Schools differ. Malik, Shafei'i and Ibn Hanbal refuse to permit it anywhere; However, Abu Hanifah on this question permits the erection of churches and synagogues, though at a distance of at least a mile from the outer wall of towns and villages. On the question of the restoration of dilapidated churches and synagogues, Abu Hanifah is joined by Malik and Shafei'i in declaring it to be lawful, provided that the ground on which the building stands were in the first place granted freely by the Muslim conqueror. If the ground had originally been seized from Islam it would be against the law to permit its restoration. Of Ibn Hanbal's view of the matter there are different versions. The one best supported teaches that neither the restoration of partly dilapidated buildings used

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\* It can be argued that: due to the slowness of the transition of information, many jurists gave religious verdicts on different aspects and they abrogated later because of the advent of new testimony. Hence, it happened that some of the later verdicts were not documented, therefore, initial verdicts may be relied on by some jurists.

<sup>94</sup> Ibraheam, Mohammed Ismael, *A'emat Al-Madaheb Al-Arba'ah*, Dar Al-Fikr Al-Arabi, 1978, p.29.

<sup>95</sup> Yamani, Ahmad Zakl, *Islamic Law and Contemporary Issues*, Elite Publishers Ltd., Karachi, 1966, p. 8.

<sup>96</sup> Ibraheam, Mohammed Ismael, *A'emat Al-Madaheb Al-Arba'ah*, Dar Al-Fikr Al-Arabi, 1978, p. 113.

for non-Muslim worship nor the rebuilding of totally ruined ones is ever permitted. Another version permits the one but not the other, while the least credible version allows both.<sup>97</sup>

The diversity of *Fiqh* judgements in the four law Schools raises the problem of how an individual Muslim is able to live in accordance with the *Shari'ah* when it is interpreted/judged differently. In *Sunni* Islam, each Muslim belongs to one of the four *Sunni* Schools and conduct himself in accordance with the *Fiqh* of that School. However, he is not tied to it for life, he must never regard its judgements as infallible and slavishly follow them.<sup>98</sup> On the contrary, he is permitted to pass from one to another and select between the *Fatwas* and views of the four Schools according to his needs. In other words, the differences between the four Schools of law are not reconciled at the level of *Fiqh*: rather, they are reconciled in practice by the lives lived by individual Muslims.

## 2.6) The impact of the main origins *Usul* on the Muslim thoughts

It is one of the boasts of Islam that it does not countenance the existence of a clergy, who might claim to intervene between God and man. True as this is, however, Islam, as it became organised into a system, did produce a clerical class, which acquired precisely the same kind of social and religious authority and prestige as the clergy in the Christian communities. This was the class of the *Ulama* the religious leaders.<sup>99</sup> Thus, they are the basis of the Islamic political structure; they are an assemblage of individuals bound to one another by ties of religion. Within the entire Muslim community *Ummah*, all are on an equal footing, there are no distinctions of rank, colour and nationality only of function. Accordingly, God alone is the head of the community, and his rules are direct and immediate; its internal organisation was defined and secured by a common acceptance, and a common submission to, the

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<sup>97</sup> Al-Dimashqi, Sadr al-Din, *Kitab Rahumat al-Umam*, quoted by Goldzisher I., *Z.D.M.G.*, xxxviii, pp. 673 o.w. in Reuben Levy, *The Social Structure of Islam*, 2<sup>nd</sup> Edit., University Press, Cambridge, 1957. pp. 184-185.

<sup>98</sup> Al-Dahlawi, WaleyAllah, *Al-Insaffi Bayan Asbab al-Ikhtilaf*, 2<sup>nd</sup> Edit., Dar I-Nafa'is, Beirut, 1978, pp. 98,100, 101.

<sup>99</sup> Gibb, H. A. R., *Mohammedanism, An History Survey*, 2<sup>nd</sup> Edit., Oxford University Press, New York, 1970, p. 65.

Divine Law and the temporal head of community.<sup>100</sup> Obedience to rulers was laid down in the *Qur'an*,

يا أيها الذين آمنوا أطيعوا الله وأطيعوا الرسول وأولي الأمر منكم . (النساء: ٥٩)  
**O ye believe! Obey Allah, and obey the Messenger, and those charged with authority among you. (4: 59)**

The meaning of the word Islam is surrender and submission. The *Holy Qur'an* explains this,

أفغير دين الله يبغون وله أسلم من في السموات والأرض طوعا وكرها وإليه يرجعون .  
 (آل عمران: ٨٣)  
**Do they seek for other than the religion of Allah? While all creatures in the heavens and on the earth have, willing or unwilling, bowed to his will (accepted Islam) and to Him shall they all be brought back. (3: 83)**

In the *Sunnah* the following *Hadith* insists that,

***A Muslim has to listen to and obey (the orders of his ruler) whether he likes it or not, as long as his orders do not involve him in disobedience (to Allah); but if an act of disobedience (to Allah) is imposed, he should not listen to it or obey it.***<sup>101</sup>

Religion in this context means practical life, behaviour and attitudes, and the way of the Divine path. For Muslim the religion of God means the way of God with his creation, with his essence of things. Here, it must be note that, the word “submits” has many meanings, including acquiescence to compulsion by the will; submission in worship is a means to the submission of servitude, because with it man removes the illusion, thereby releasing himself from imprisonment to freedom, from ignorance to knowledge, from unhappiness to happiness when he submits voluntarily to the compulsion of the will, with the intelligence, understanding, and appreciation that distinguishes him from inorganic matter.<sup>102</sup>

As was pointed out earlier, Islam is involved in all aspects of the Muslims lives; it shapes government policies and activities, the state confers with the religious leaders

<sup>100</sup> Bosworth, C. E. & Joseph Schacht, *The Legacy of Islam*, Oxford University Press, Oxford, 1971, p. 405.

<sup>101</sup> Matraji, Mahmoud, *Translation of Saheh al-Bukhari*, Vol. IV, Dar Al-Fikr, Beirut, 1993, pp. 167-168.

<sup>102</sup> Taha, Mahmoud Mohammed, *The Second Message of Islam*, Syracuse University Press, New York, 1987, p. 115.

and institutions to perpetuate Islamic polices, foreign affairs are influenced by the ideas, principles and values of the Islamic religion. What is more important is that Islam gives the Islamic government the ideological rationalisation for both its internal and external policies. In the word of Edwin Rosenthal,

*Islamic law does not differentiate between authority and power. There is no rival claim between the divine law of the church and the law of the state because Islam knows only one law, the divinely revealed Shari'ah, which holds sway over political life no less than over social, economic and cultural life. Life is one and indivisible; religion pervades and determines all its aspects. The whole of life is ordered by the religious, all-embracing divine law. The authority and validity of this law were never questioned by any effective Muslim ruler, no matter what his own practice was. He could not abrogate the religious law, though he might at times set it aside. The unchallenged exercise of political power could not clear him from offences against the Shari'ah.*<sup>103</sup>

Islam, by itself, is a diffuse and equivocal term. It is used both by outside observers and members of the Muslim community to refer to personal *Faith*, theological doctrine, cultural attitudes, and patterns of everyday behaviour (both normative and actual). These various aspects of Islam can be comprehended in a simple and analytically more adequate way by saying that Islam may influence political values (and hence political behaviour) on three levels: (i) as a religion, strictly speaking - for instance, as a system of theological belief and transcendently – which fixes ethical duties; (ii) as an ideology; (iii) as a symbol of cultural identity. It is the interaction of these three models of religion, which produces a distinctive religious- political orientation.<sup>104</sup>

## 2.7) Islamic Law *Shari'ah* and contemporary issues

From time to time, it happens that some scholars, who are concerned about the subject of *Shari'ah* fail to distinguish between what it is purely religious and the principles of secular transactions in *Shari'ah*. Though, both are derived from the same source, the latter principles have to be viewed as a system of civil law, based on public

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<sup>103</sup> Rosenthal, Erwin I. J., *Political Thought In Medieval Islam*, Greenwood Press, Westport, 1985, pp. 22-24.

<sup>104</sup> Michael, Curtis, *Religion and Politics in the Middle East*, Westview Press, Boulder, 1981, p. 288.

interest and utility, and therefore are always evolving and ideally improving. The religious element serves as a model code of ethics, the purpose of which is to strengthen secular principles, by giving them a sense of dependence on divine guidance, and creating a subconscious respect for compliance. Despite its apparent rigidity, Muslim law itself continues to develop as society changes, through the provision of *Fatwas* (legal opinions) on request by the *Ulama* and through the voluminous jurisprudential writings of many scholars.

It is well-known that in every science and sphere of life, there are issues that naturally accept development which some times require it in order to realise their full potential, although, there are other themes which are fixed and immutable. According to the logic of *Shari'ah*, the two must be integrated. *Shari'ah*, on one hand, has fixed rules which are unchangeable, such as the punishments that are laid down in the *Qur'an* and the *Sunnah* for specified major crimes such as theft, adultery, and murder. On the other hand, there are rules relying on continual development and renewal; this was clear from the discussion of *Ijtihad*, and will come into view clearly when we examine the public interest and welfare theory.

It has already been argued that the main source of the *Fiqh* is the *Holy Qur'an*, Allah has not always revealed legal issues in detail, but the basis for them have been revealed. Moreover, the actual details will vary a little from one nation to another according to time and place. *Fiqh* does not deal with these details; it is not the science of applying the *Shari'ah* to situations or in circumstances where the law lacks detail. That specification is performed by various authorities, according to the matter at issue. For example, the *Holy Qur'an* did not mention in detail the right form of government or way of organising ruling in all states (not just in the Islamic State) or how to select/elect the rulers. It only mentioned the basis of what any state has to rely upon - that the government must be just and therefore will be the same worldwide. The *Holy Qur'an* decided justice in

وإذا حكمتم بين الناس أن تحكموا بالعدل . (النساء: ٥٨)

And when ye judge between people that ye judge with justice. (4: 58)



And consultation in

وشاورهم في الأمر . (آل عمران: ١٥٩)

**And consult them in affairs . . . (2: 159)**

And Equality in

إنما المؤمنون إخوة . (الحجرات: ١٠)

**The believers are but a single Brotherhood. . . (49: 10)**

No further details are given and the decision-makers must decide the most suitable systems for their needs, though during the Abasside Empire a scholar like Al-Mawardi offered advice on the best way to organise the Islamic State. Similarly, the *Holy Qur'an* detailed specific punishments for only five kinds of crime. These are: the crimes of waging war against Allah and his Messenger; striving with might and main for mischief through the land; killing innocent people; slandering chaste, women believers; adultery; and theft. For all other crimes the *Holy Qur'an* did not determine any punishment but left it to those who are in authority, such as judges and heads of state, according to what they see is suitable to provide security and deter criminals. Naturally, this will differ at different times and in different places, except that Allah leads people to a general rule that punishment has to be equal to the crime committed

وإن عاقبتهم فعاقبوا بمثل ما عوقبتهم به . (النحل: ١٢٦)

**And if ye punish, let your punishment be proportionate to the wrong that has been done to you . . . (16: 126)**

And

فمن اعتدى عليكم فاعتدوا عليه بمثل ما اعتدى عليكم . (البقرة: ١٩٤)

**. . . there is the law of equality, if then any one transgresses the prohibition against you, transgress ye likewise against him . . . (2: 194)**

So, for example, the payment of blood money is part of the subject matter of *Fiqh*, but jurists do not determine its amount for males and for females, nor whether it is the same for believers and unbelievers, in what currency its is to be paid, and so on. All these details are settled by judges, rulers and similar officials.

In foreign relations, the *Holy Qur'an* formalised Muslim relations with others (unbelievers) under the following verse

لا ينهاكم الله عن الذين لم يقاتلوكم في الدين ولم يخرجوكم من دياركم أن تبروهم  
وتقسطوا إليهم إن الله يحب المقسطين . إنما ينهاكم الله عن الذين قاتلوكم في  
الدين وأخرجوكم من دياركم وظاهروا على إخراجكم أن تولوهم ومن يتولهم  
فأولئك هم الظالمون . (الممتحنة: ٨-٩)

Allah forbids you not, with regard to those who fight you not for your Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just. Allah only forbids you, with regard to those who fight you for your Faith, and drive you out of your homes, and support others in driving you out from turning to them (for friendship and protection), it is such as turn to them (in this circumstances), that do wrong. (60: 8-9)

The *Holy Qur'an* did not mentioned details in regarding to the public affairs, because it gives the ability to each nation to distinguish its systems according to its needs and interests, provided it never transgresses against the *Qur'anic* teachings.

Although *Fiqh* is not concerned with the details of applying the *Shari'ah*, it is concerned with formulating the legal rules of the *Shari'ah* as they apply to new situations which Islam has never previously encountered. H. Lammens has explained the dynamic quality of *Fiqh* to meet with new and modern issues which were not mentioned in the *Qur'an* or the *Sunnah* when he says,

*Sunni jurists had come to complete and explain the Qur'an, so experience compelled Muslims to recognise that the Fiqh could not dispense with the operations of logic. It was admitted that it had become lawful to settle new cases by applying to them the rules lied down to meet analogous circumstances. It is thus that Qiyas or analogy became a new route of the Islamic law. A fourth is called Ijma' or consent. In the absence of any 'nass' or text in the Ijma' the creators of the Fiqh were obliged to have recourse to the light of Ra'y or liberty of opinion. But it was tacitly understood that such recourse would be exceptional and would not render Ra'y worthy to be considered as a fifth rout.*<sup>105</sup>

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<sup>105</sup> Lammens, H., *Islam, Belief and Institutions*, 2<sup>nd</sup> Edit., Frank Cass & Co. Ltd., London, 1968, p. 83.

To meet the needs of the contemporary world and such new phenomena as organ transplants and in-vitro fertilisation, and due to the realisation that it may be difficult, at the present time, to find a scholar who is a legal authority on the interpretation of the sources in his own right able to pass the judgements on issue, the Organisation of Islamic Conference (OIA) established the Islamic Jurisprudence Council (IJC) in 1983 in Jeddah, Saudi Arabia, consisting of Muslim jurists of the highest knowledge level in both the sciences of the *Shari'ah* and the detailed source evidence in order to provide Islamic rulings on such matters as has already been noted.<sup>106</sup> Consequently, *Fiqh* has a dynamic, progressive character through IJC ruling on new phenomena, analogical reasoning *Qiyas* and juristic consensus *Ijma'*. As a result, it can be argued that the gate of *Ijtihad* (legal judgement opinion) has been reopened.

## 2.8) Public interest and welfare *Maslaha*

Public interest and welfare *Maslaha* was regarded by the Malikite School as a source of the law. It is, moreover, predicated on the premise that one purpose of the law is to serve man's best interests, and to promote his well-being and welfare in this world and in the next. Although these serious purposes remain the basis of the manner of interpretation they can accommodate some unusual rulings and the implications of unfettered recourse to *Maslaha* which have led to theoretical -and practical- limitations.<sup>107</sup> Excluding for the moment the rules governing devotional rituals, almost all judgements and principles in the *Qur'an* and *Sunnah* are based on direct interests to the community and intended as the Prime Legislator. In this sense Ibn al-Qayyim, in his way defines *Shari'ah*,

*It is a system based on the welfare of the individual in the community both in his everyday life and in his anticipation of the life thereafter. It is all justice, all compassion, all benefits, and all wisdom; thus any principles which become unjust,*

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<sup>106</sup> Publication of the Muslim World League, The Muslim World League and its Organisation, MWL Press, Makkah, 1988, pp. 25-30.

<sup>107</sup> Bannerman, Patrick, *Islam in Perspective*, Routledge, London, 1988, p. 39.

*uncompassionate, corrupt and futile is not a part of Shari'ah; however, therein by false interpretation.*<sup>108</sup>

The adoption of public interest and welfare, as a source of legislation, is almost unanimously consented to Muslim jurists. Some minority of Muslim jurists assailed this theory, such as the Shafei'ites. Nonetheless, they fully implemented it by different methods and/or under different descriptions. Imam al-Ghazali of the Shafei'ite School, for instance, defined it as,

*The furthering of the manfa'a [interests] and the averting of mafsada [evil], but in broad sense it is the ultimate purpose of the Share'a [the legislator], consisting of the maintenance of religion, life, offspring, reason and property. Anything which furthers these aims is Maslaha, and anything which runs contrary of them is mafsada.*<sup>109</sup>

In connection with this, the application of public interest to supersede a revealed provision is one of the most exciting and important matters facing *Shari'ah*. Jurists were cautious in their espousal of the proposition and only in the Hanbalite doctrine was it fully accepted.<sup>110</sup> The history of the Islamic jurisprudence *Fiqh* contains various examples of cases which were governed at one time by an explicit provision either from the *Qur'an* or the *Sunnah*, and then subsequently decided, as against the provision in accordance with the public interest considerations. There is a real conflict among Muslim jurists as to the permissibility of such a process.

Caliph Umar I, for instance, provided the first example for such conflict by deciding certain cases differently from what has been revealed, due to certain changes that took place in the Islamic community after the death of the Prophet; when he cancelled the particular share in alms. This group mentioned in the *Holy Qur'an*,

إنما الصدقات للفقراء والمساكين والعاملين عليها والمؤلفة قلوبهم وفي الرقاب  
والغارمين وفي سبيل الله وابن السبيل فريضة من الله والله عليم حكيم . ( التوبة : ٦٠ )

<sup>108</sup> Ibn Al-Qayyim Al-Jawziyah, Muhammad Ibn Abu Bakr, *A'alam al-Mawaqqean 'an Rab al-Alamean*, Vol. III, Sharekat Al Teba'ah Al-Fanyah, Cairo, 1968, p.1- o.w.

<sup>109</sup> Al-Ghazali, Muhammad Ibn Muhammad, *Al-Mustasfi*, Vol. I, Dar al-Fikr, Beirut, 1995, pp. 139-140.

<sup>110</sup> Houtsma, Martijn Theodor, *The Encyclopedia of Islam*, Vol. VI, E. J. Brill Ltd., Leyden 1913, p. 739.

**Alms are for the poor and the needy, and those employed to administer the (funds): for those whose hearts have been recently reconciled to truth. (9: 60)**

The Prophet, in the early period of Islam, wanted those whose hearts have been reconciled to truth to adhere to Islam either by weaning them from their hostility, or by buttressing their *Faith*, therefore he gave them a share in alms, and later the *Qur'an* confirmed his attitude. After his cancellation of the share of this group in alms, Caliph Umar I replied to those who appealed for these alms,

*This was something that the Messenger of God used to give you in order to bring you nearer to Islam; and now since God had brought power and dignity to Islam we need not wean you from your hostility. Either you stay in Islam or the sword is between us. We do not give for Islam anything, those who want to believe can do so and those who want to remain without faith can do so.*<sup>111</sup>

Jurists of the Maliki School adopted a moderate position in assigning priority to public interest if the significance or the authority of the provision under consideration is not certain and can be questioned. The Malikites, for instance, assume that if there was a *Qur'anic* provision which was in conflict with the particular public consideration, and the significance of that provision was not certain or could not be definitely interpreted, one can then either dispense with the text or interpret it in such a way that it coincides with the interest consideration and blends with it.<sup>112</sup>

However, Imam al-Tufi adopted the most extreme position in maintaining that public interest supersedes and takes precedence over explicit provision even if revealed by *Qur'an* and *Sunnah*. Imam al-Tufi argued,

*In case of conflict between a public interest consideration and a revealed provision, the former has priority, no matter how authoritative the provision is.*<sup>113</sup>

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<sup>111</sup> Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, p. 722.

<sup>112</sup> Al-Shatibi, Ibraheem Ibn Musa, *Al-I'tisam*, Vol II, Maktabat Al Halabi, Cairo, p. 311.

<sup>113</sup> Al-Tufi, Najm AL-Dean, *Tafseer Al-Manar*, Vol. IX, Dar Al Fikr, Beirut, 1995, p. 18.

Al-Tufi, moreover, reasoned that the public interest is the intent and the end sought by the Prime Legislator, revealed provisions and other sources are only means to achieve those ends, and ends should always supersede the means.<sup>114</sup>

In addition to those jurists who maintained that: explicit revealed provisions can be modified and sometime superseded if in conflict with public interest, there were some jurists who maintained that: if the text was based on a custom and that custom has changed then the text has to follow suit and be modified accordingly. Imam Abu Yusuf, of Hanafite School and the author of *Kitab al-Kharaj*, adopted this theory. For example, barley was once measured by volume because such was the custom at the time of the Prophet. It changed subsequently at Abu Yusuf's time when barley was measured by weight. Along with that assumption, Imam Al-Qurafi, of Hanafite School and the author of *Al-Furuq*, agreed with Abu Yusuf, and maintained that every principle in *Shari'ah* based on custom can be changed or modified when such custom is changed.<sup>115</sup>

Muslim jurists assumed that a judgement is dependent on its attribute in the matter that gives rise to the judgement, *'Illa*, that it only came into being with it and disappeared without it. Muslim jurists differentiated between *'Illa* and *Hikmah*, the act of wisdom, of principle. Al-Shawkani mentioned,

*'Illa is what can be objectively ascertained and measured, while Hikmah is the value judgement and the understanding reason for the principle.*<sup>116</sup>

According to the general principles of *Shari'ah*, and by virtue of what various jurists said as to the importance of public interest, it seems that the differentiation between the *'Illa* and the *Hikmah* is only relevant in matters of devotional rituals. In matters of secular and commercial transaction, it could be said that: a judgement is dependent on its *Hikmah*, underlying subjective reason, coming into being with it, and disappearing without it.

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<sup>114</sup> Ibid.

<sup>115</sup> Mahmasani, Subhi, *Philosophy of Jurisprudence in Islam*, Beirut Publication House, Beirut, 1965, p. 212.

<sup>116</sup> Al-Shawkani, Muhammad Ali, *Nayl al-Awtar*, Vol. VI, Al-Maktaba Al-Islamy, Beirut, 1982, p. 73.

## 2.9) Islamic Law *Shari'ah* and modern International Law

As it has been noted earlier, Islamic Law (*Shari'ah*) is derived from the *Qur'anic* injunctions, therefore, it deals with all aspects of Muslims life, for example: marriage and all of its various modes of dissolution, contracts, loans, punishments for crime wills, inheritance, equity, fundamental human rights, laws of war and peace, judicial administration. A part of his duty, the Prophet, through his *Sunnah*, explained and translated into practice all these injunctions. The *Shari'ah*, moreover, has enshrined in itself the principles of Islamic international law right from its inception after the Prophet migration *Hijrah*, it regulated the conduct and behaviour of the Muslim community in war, peace, and neutrality.

The general concept of international law restricts its jurisdictional application to nations only (recently, international law has been extended to NGO's and since the Bernadotte case in Palestine, 1948, to individuals).<sup>117</sup> But the concepts of Islamic international law in the *Shari'ah* regulated not only the conduct of the Muslim State with other states, but also its relationship to non-Muslim states, groups like tribes and religious communities, and to non-Muslim subjects living in the Muslim state. The object was to enlarge the concepts of Islamic international law to encompass all public functions conducted by the state or its citizens in any intercourse not necessarily subject to private resolutions in the performance of the public needs or functions. In the words of M. Hamidullah,

*When Islam came and founded a State of its own, the earliest name given by Muslim writers to the special branch of law dealing with war, peace and neutrality seems to have been Siyar, the plural form of Sirat, meaning conduct and behaviour.*<sup>118</sup>

According to al-Sarkhasi, the word *Sirat* when it is used without adjective means the conduct of the Prophet more especially in his wars, and later it came to be used for the conduct of Muslim rulers in international affairs.<sup>119</sup> Comparing the Science of *Al-*

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<sup>117</sup> Sultan, Hammed, *Ahkam al-Qanoun al-Dowali fi al-Shari'ah al-Islamiyyah*, Dar al-Nahdha, Cairo, 1970, p. 178.

<sup>118</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, p. 9.

<sup>119</sup> Al-Sarkhasi, AbuBakr Muhammad, *Al-Muheat*, Vol. I, Dar Ehya' Al-Kotoub Al Arabiah, Cairo, 1957, p. 567.

*Siyar* with the works of European jurists of the Early Modern Age like Grotius and Puffendorf one can notice that they intentionally excluded the Muslims from all community of interest in the Christian Nations of Europe. Their law originated in the necessity of regulating the relations of the new sovereign states, which arose because of the urgent need of temporal unity of Christendom.<sup>120</sup>

The later European jurists, out of necessity, thought that international law was limited to Christendom only, and then enunciated its broad principles to include others as well. It is from the point of view of some Muslim scholars that these European principles were just echoes of the time. Moreover, their human modifications for civilisation came only after they intensively borrowed Islamic principles by the impact of Muslim Spain, the Crusades and earlier Ottomans.<sup>121</sup>

Consequently, it has to be pointed out that, on one hand, the term *Siyar* was used by both historians and linguists to designate the life of the Prophet Muhammad. The term itself acquired later the restricted sense of the conduct of the Prophet in his wars, and later still the conduct of Muslim rulers in international affairs, and specifically in their dealings with non-Muslims. When formulated as a body of legal rules, *Siyar* is a branch of the *Shari'ah* to organise the relationships between the Muslims and non-Muslims. It is part of the *Shari'ah* which rules relationships between human beings as distinct from that part which governs relationships between believers and Allah. Its foundation is the *Qur'anic* distinction between Muslims and non-Muslims. Allah has said

كنتم خير أمة أخرجت للناس تأمرون بالمعروف وتنهون عن المنكر وتؤمنون  
بالله ولو آمن أهل الكتاب لكان خيرا لهم منهم المؤمنون وأكثرهم الفاسقون . (آل  
عمران: ١١٠)

**Ye are the best of People, evolved for mankind. Enjoining what is right and forbidding what is wrong, and believing in Allah. If only the People of the Book had faith, it were best for them: among them are some who have faith, but most of them are perverted transgressors. (3: 110)**

<sup>120</sup> Qadri, Anwar Ahmad, *Islamic Jurisprudence in the Modern World*, Lahore, 1973, pp. 277-278.

<sup>121</sup> Ibid.



In this single verse is contained the basis of Islamic international law and Islamic international relations theory, namely, the religious distinction between the Islamic *Ummah*, based on belief in Allah (وتؤمنون بالله) and implementation of His law (تأمرون بالمعروف وتنهون عن المنكر), on the one hand, and unbelievers who do not adhere to Islamic law, on the other hand.<sup>122</sup> Since every part of the *Qur'an* is a source of *Shari'ah*, it follows that *Siyar* and the fundamental conception of Islamic international relations theory is this element of the *Shari'ah*.

## 2.10) Summary and conclusion

The single most important finding in this chapter is the comprehensive nature of Islamic law (*Shari'ah*). It is concluded that it covers all relations between human beings in addition to all human relations with Allah. Part of this body of law governs relations between Muslims and non-Muslims and this is the subject matter of Islamic international law and of Islamic international relations. The foundation of both was this religious distinction drawn in several places in the *Holy Qur'an*. The Islamic international law is frequently term *Siyar*. It governs Muslim/non-Muslim relationships between states, individuals and groups in contrast with Western international law which is largely concerned with inter-state relations and, more recently and to a much smaller extent, relations between the state and NGO's and between the state and individuals.

A second major conclusion is the distinction made between the *Shari'ah* and *Fiqh*. *Shari'ah* is the Divine Will revealed to the Prophet Muhammad pertaining to the conduct of human life in this world (i.e. human relations with Allah and with each other). *Fiqh* is the science of deducing and extrapolating rules and injunctions from their sources in the data of revelation. The *Holy Qur'an*, the Prophetic *Sunnah*, are recognised as the sources of the *Shari'ah*. Together with consensus (*Ijma'*) and analogy (*Qiyas*) they constitute the main sources of *Fiqh*, the body of rules and injunctions deduced from the *Qur'an* and the *Sunnah*. All remaining conclusions are related to either the *Shari'ah* or *Fiqh* and will be discussed accordingly.

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<sup>122</sup> Khalif, AbdulWahab, *Al-Siyasyah al-Shar'iyah*, Al-Matba'ah al-Salafiyah, Cairo, 1350 AH, pp. 64-67.

Taking the *Shari'ah* conclusion first, the crucial finding was that the history of the *Shari'ah* law divided into four periods. Between 622-632 AD all legal rules *Ahkam* inclusive of all its classifications were constituted. After this legislative period came the collection period from 632-717 AD. In this period interpretation and extension of the laws are made and the sciences of *Hadith* and *Fiqh* were improved by the *Sunni* jurists. In the next, theoretical, period from 722-822 AD the four *Sunni* Schools of jurisprudence were established. Finally, from 822 AD onwards Muslim jurists have been engaged within the limits of each law School to develop the work of its founders.

The remaining conclusions all relate to *Fiqh*. During the second period of the history of the *Shari'ah*, the Islamic Empire extended to its largest level which resulted in new, unprecedented problems arising which had never occurred at the time of the Prophet and therefore for which no indications existed in the *Qur'an* and *Sunnah*. In the absence of these sources Muslim jurists nevertheless issued their judgements and consequently differences arose among them. In the third period, these differences were consolidated as the four *Sunni* Schools of *Fiqh*: the Hanafite, the Malikite the Shafei'ite, and the Hanbalite which were recognised as the main Schools in the *Sunni Fiqh*. Their differences were only on doubtful points and concerned (often minute) details Worship *Ibadat*, Transactions *Mu'amalat*, Fixed penalties *Hudud* and Punishments *Uqubat*. Apart from differences over these four matters, there were differences in style between these Schools of law. The Hanafite School is marked by broad-mindedness without being lax, it likes to appeal to reason (personal judgement, quest for the better, and so on). The Malikite School stresses a broad appeal to the principle of general utility, evoking among some people the idea of the common good. The Shafei'ite School attempts to combine tradition and the consensus of the Muslim community (rather than the consensus of individual scholars) and results in a broad recourse to reasoning by analogy. Lastly, the Hanbalite School is marked by a return to a strict traditionalism.

One of the significant later differences between the Schools of law discussed in this chapter was whether there are other secondary sources of the *Shari'ah*, notably *Ijtihad* and the public interest. However, by the time of the death of the last of the four founders of the four *Sunni* Schools of *Fiqh*, *Ijtihad* was gradually abandoned in favour

of imitation *Taqlid*, or submission to the canons of the four Schools: the gate of *Ijtihad* was closed. This led to permanent difficulties, which has affected the role of Islam not only in the non-Muslim culture inside the Muslim State but worldwide.

The other major difference that was examined was whether public interest and welfare are a secondary source of legislation. Muslim jurists almost unanimously consented to public interest and welfare as such sources. A minority of them assailed this theory, notably the Shafei'ites. Nonetheless, they fully implemented it by different methods and/or under different descriptions. Jurists of the Malikite School adopted a moderate position in assigning priority to public interest if the significance or the authority of the provision under consideration is not certain and can be questioned. The Malikites assumed that if there was a *Qur'anic* provision which was in conflict with the particular public consideration, and the significance of that provision was not certain or could not be definitely interpreted, then either the text could be dispensed with or it could be interpreted in such a way as to coincide with the public interest and blend with it. In accordance with the general principles of *Shari'ah*, and by virtue of what jurists have said concerning the importance of public interest, it has been concluded that in matters of secular and commercial transaction, a judgement is dependent on its *Hikmah* (underlying subjective reason). It comes into being with a *Hikmah* and disappears without one.

While the four Schools of law were in fundamental agreement their differences in *Fiqh* were never resolved by them. Instead, it was concluded, the individual Muslim reconciles them in practice by choosing which rulings to follow in his life.

The final conclusion relates to the dynamic character of *Fiqh*. Through the use of analogy *Qiyas*, in particular, a juristic consensus *Ijma'* was able to arise over how the *Shari'ah* applied to new situations or phenomena, such as organ transplants. A recent development has been the Islamic Jurisprudence Council consisting of expert Muslim jurists of the highest level of knowledge in both the sciences of *Shari'ah* and detailed source evidence in place of the judgements of a single jurist. These new juristic rulings are evidence of the dynamic and progressive character of *Fiqh*, for *Fiqh* changes by

way of expansion in applying the *Shari'ah* to what is new. As a result, it can be argued that the gate of *Ijtihad* (legal judgement/opinion) has been reopened.

Following on from these conclusions, in the next chapter the nature of Islamic international relations will be examined, both in its juristic formulation in terms of the domains of Islam, war and truce treaty, and as a normative theory based upon the *Qur'anic* distinction between Muslims and non-Muslims.

## CHAPTER III

# ISLAMIC INTERNATIONAL RELATIONS IN CLASSICAL FIQH

### **Chapter III: Islamic International Relations In Classical Fiqh**

- 3.1) Introduction
- 3.2) Monotheism *al-Towhead*
- 3.3) Islamic concept of International relations *al-Siyar*
  - 3.3.1) The normality of war and peace
  - 3.3.2) The Domain of Peace *Dar al-Islam*
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  - F. The Apostates
- 3.7) Summary and conclusion

### 3.1) Introduction

In the previous chapter, it has been concluded that the religion of Islam is not simply a system of beliefs, but also a way of life. It is an ideology, which governs the behaviour of people and their institutions. The implementation of the Islamic teachings is best illustrated by the manner in which the first Muslim community was established and governed by the Prophet. Islam, moreover, contains diverse elements all bound together in a certain unity of outlook by the common belief in God and his Prophet. The *Holy Qur'an*, combined with the exemplary life of the Prophet and his authentic traditions, served as the main sources of the *Shari'ah*, from which is derived group roles and regulations. The *Shari'ah*, it was argued, provided a comprehensive guide to human action on earth; nothing is omitted from the Divine law. For example, Islam, unlike other religions, does not prescribe the separation of religion from politics. Ann Lambton, for instance, writes:

*In Islam, the antithesis between the individual and the state or the government is not recognised, and no need is therefore felt to reconcile and abolish this antithesis. Islam knows no distinction between state and church.*<sup>1</sup>

Within the Islamic Law, Muslims have rules that deal with all constitutional and legal issues. As such, it is treated as the only legally acceptable code. Consequently to the devout Muslim, there can be only one legitimate rule that is Islam, and there can be no disjunction between political and religious discourse. Indeed, devout Muslims argue that Islam is a complete social, political, legal and cultural system which means that the Islamic international relations is a part of this body of law.

The major characteristic of Islamic international relations, it will be argued, is that they cover all relations between Muslims and non-Muslims.<sup>2</sup> The *Shari'ah* law applicable to these relations bound and united all Muslims in their attitude and behaviour towards non-Muslims. In other words, not only does it cover the relations between the Islamic State (a single Islamic State being the postulate of classical *Fiqh*)

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<sup>1</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. XV.

<sup>2</sup> Khalif, AbdulWahab, *Al-Siyasyah al-Shar'iyah*, Al-Matba'ah al-Salafiyah, Cairo, 1350 AH, p. 64. Khalif suggests this idea that the distinction of religion is the basis of Islamic international relations, but in his book the idea is neither developed fully nor systemised. Both are attempted in this thesis.

and non-Islamic states, but also it governs relations between the Islamic State and infidel non-state groups and individuals. Even this does not exhaust the content of the Islamic international relations, for it also includes the laws relating to transactions between Muslims and non-Muslims at the individual and group levels.<sup>3</sup>

This interpretation of Islamic international relations theory differs from the version that is found in classical *Fiqh* which is organised around the concepts of the domain of Islam or peace (*Dar al-Islam*) and the domain of hostility or war (*Dar al-Harb*), with a third domain being added later, the domain of pledge (*Dar al-Sulh*). An exposition of this juristic theory will be given in this chapter, but it will be argued that it cannot adequately account for treaty relations with both permanent and temporary residents of *Dar al-Islam* and is not founded on the *Holy Qur'an* and *Sunnah*. Only on the view that Islamic international relations are external to the Muslim *Ummah* and between Muslims and non-Muslims are such treaties fully intelligible since in one of the two cases the treaty is with non-Muslim citizens of the Islamic State.

This approach to international relations differs considerably from Western international relations theory. As in the case of (Western origin) international law, the various forms of Western international relations theory have been traditionally based upon nation states as the unit of analysis with their inter-relations as the subject matter of this theory. In its earlier formulation, it is true that Western international relations theory and international law were applicable in full only to the Christian nation states. As the scholar James Lorimer<sup>4</sup> argued the human race divided into three spheres,

- 1) That of civilised humanity;
- 2) That of barbarous humanity;
- 3) That of savage humanity.

Lorimer argued each sphere was entitled respectively to plenary political recognition, partial political recognition, and natural or more human recognition.

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<sup>3</sup> Badran, Badran Abu al-'Aynayn, *Al-'Alaqa al-Ijtima'ayah byn al-Muslemeen wa Ghayr al-Muslemeen fi al-Share'ah*, Dar al-Nahdha, Beirut, 1984. *passim*.

<sup>4</sup> Lorimer, James, *Institutes of the Law of Nations*, in Majid Khadduri, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, pp. 282-283.



Islamic countries were in the second sphere and consequently entitled to partial recognition.

*The sphere of partial political recognition extends to Turkey in Europe and in Asia, and to the old historical states of Asia which have not become European dependencies-viz., to Persia and the other separate states of Central Asia, to China, Siam, and Japan.*<sup>5</sup>

Only human beings in the first sphere of full political recognition were part of the international order, or, as Lorimer stated, have attained the nobleness of affiliation of the family of nations, and are subject to international law because they enjoy rights which conserve its rules. However, over the past three centuries Islamic states have been fully accepted into the system of international law and are equally subjects of international relations theory. In recent years, Western international relations theory has been widened to include not just relations between nation states but also between them and certain groups, such as multi-national corporations, and in a few cases with individual persons. Therefore, there is nothing which corresponds to Islam's fundamental division between Muslims and non-Muslims in Western international law and international relations theory.

Two further key arguments will be put forward in this chapter. Firstly, the argument that Islam is based on a system of supremacy and subjection and that in order to propagate its mission Muslims have declared war on all communities and nationalities until Islam rules over the entire world, will be challenged. Joseph Schacht, for instance, argues that,

*The basis of the Islamic attitude towards unbelievers is the law of war; they must be either converted or subjugated or killed (excepting women, children, and slaves); the third alternative, in general, occurs only if the first two are refused.*<sup>6</sup>

It will be shown that the relationship between the Muslims and non-Muslims is not always conceived as a hostile one as Schacht suggested.

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<sup>5</sup> Ibid., p. 282.

<sup>6</sup> Schacht, Joseph, *An Introduction to Islamic Law*, Oxford University Press, London, 1975, p. 130.

Secondly, this chapter questions the viewpoint advanced by Majeed Khadduri, who argues that,

*The Islamic theory of international relations is to be found neither in the Holy Qur'an nor in the Prophet Muhammad's utterances.*<sup>7</sup>

Against Khaduri, it will be argued that the Islamic International relations is part of the *Shari'ah* which is derived primarily from the *Qur'an* and *Sunnah* and is formulated in terms of a fundamental dichotomy between Muslims and non-Muslims. However, this dichotomy itself pre-supposes the fundamental Islamic belief in *Towhead* or the unity of God, the unity of humanity, and the unity of Divine laws.

### 3.2) Monotheism *al-Towhead*

The three unities – of God, of humanity, and of Divine laws – are the very essence of Islam. It is, therefore, of fundamental importance to examine these in order to gain an understanding of *Towhead* and its relevance to the Islamic conception of international relations.

*a. The unity of God.* Islam declares that there is no god but God. It is the fundamental principle of the monotheistic religion and the font of the Message of the Prophet Muhammad.<sup>8</sup> According to the tradition of Islam, moreover, God is not only the Creator but also the Sustainer of human beings.

إن ربكم الله الذي خلق السماوات والأرض في ستة أيام ثم استوى على العرش يغشي الليل النهار يطلبه حثيثاً والشمس والقمر والنجوم مسخرات بأمره ألا له الخلق والأمر تبارك الله رب العالمين . (الأعراف: ٥٤)

Your Guardian Lord is Allah, Who created the Heavens and the Earth in six Days, then He settled Himself on the Throne: He draweth the night as a veil O'er the day, each seeking the other in rapid succession: and the Sun, the Moon, and the Stars, all are subservient by His Command, verily, His are the Creation and the Command Blessed be Allah, the Cherisher and Sustainer of the Worlds. (7: 54)

<sup>7</sup> Khadduri, Majid, *The Islamic Theory of International Relations*, J. Harris Proctor, *Islam and International Relations*, Pall Mall Press, London, 1965.

<sup>8</sup> Azzam, Abd-al-Rahman, *The Eternal Message Of Muhammad*, The Devin-Adair Company, New York, 1964, p. 35.

And,

قل من رب السموات والأرض قل الله قل أفأخذتم من دونه أولياء لا يملكون نفعا ولا  
ضرا قل هل يستوي الأعمى والبصير أم هل تستوي الظلمات والنور أم جعلوا لله شركاء  
خلقوا كخلقه فتشابه الخلق عليهم قل الله خالق كل شيء وهو الواحد القهار . (الرعد:

(١٦)

Say: "Who is the Lord and Sustainer of the Heavens and the Earth?" Say: "It is Allah." Say: "Do ye then take (for worship) protectors other than Him, such as have no power either for good or for harm to themselves?" Say: "Are the blind equal with those who see?" Or the depths of Darkness equal with Light?" Or do they assign to Allah partners who have created (anything) as He has created, so that the creation seemed to them similar? Say: "Allah is the Creator of all things: He is the One, the Supreme and Irresistible." (13: 16)

Therefore, those who do not accept the unity of God are unbelievers as the *Holy Qur'an* confirms in the case of Christians,

لقد كفر الذين قالوا إن الله ثالث ثلاثة وما من إله إلا إله واحد وإن لم ينتهوا عما  
يقولون ليمسن الذين كفروا منهم عذاب أليم. (المائدة: ٧٣)

They disbelieve who say: Allah is one of three (In a Trinity) for there is no god except One God, if they desist not from their word (of blasphemy), verily a grievous chastisement will befall the disbelievers, among them. (5: 73)

God is the absolute authority and the only sovereign in all aspects of human life. Therefore, Islam makes a sharp distinction between sovereignty as an absolute divine power over all human beings and their actions, and the general political authority. In practical terms, this means the sovereignty of the Islamic law *Shari'ah*, on the one hand, and the ruler of the *Ummah* and the Islamic State, on the other hand. Muslims are forbidden to render obedience to another mortal unless it is in the spirit of obedience to the *Shari'ah*. No human being is entitled to legislate in the matter of the religion for others on his own authority. The *Holy Qur'an* insists,

ثم جعلناك على شريعة من الأمر فاتبعها ولا تتبع أهواء الذين لا يعلمون . (الجاثية:

(١٨)

Then We put thee on the right Way of Religion; so follow thou that Way, and follow not the desires of those who know not. (45: 18)

In summary, the Islamic view of God's unity emphasises two important categories, these are: (i) God's absolute sovereignty over human beings; and (ii) the primacy of His law, the *Shari'ah*, in the conduct of all human affairs.

b. *The unity of Mankind*. Islam teaches that all people regardless of their racial, linguistic, cultural, or national origins are but one nation. They are members of the family of human beings. Therefore, they are in effect brothers and sisters.

يا أيها الناس اتقوا ربكم الذي خلقكم من نفس واحدة وخلق منها زوجها وبث منهما رجالا كثيرا ونساء . . . (النساء: ١)

O mankind! Fear your Guardian Lord, Who created you from a single Person, created out of it His mate and from them twain scattered (like seeds) countless men and women . . . (4: 1)

يا أيها الناس إنا خلقناكم من ذكر وأنثى وجعلناكم شعوبا وقبائل لتعارفوا إن أكرمكم عند الله أتقاكم . (الحجرات: ١٣)

O mankind! We created you from a single pair of a male and a female, and made you into nations and tribes that ye may know each other. Verily, the most honoured of you in the sight of God is who is the most righteous of you. (49: 13)

كان الناس أمة واحدة فبعث الله النبيين مبشرين ومنذرين وأنزل معهم الكتاب بالحق ليحكم بين الناس فيما اختلفوا فيه . (البقرة: ٢١٣)

Mankind was one single nation, and Allah sent Messengers with glad tidings and warnings; and with them He sent the Book in truth, to judge between people in matters wherein they differed. (2: 213)

The unity of mankind therefore means that all people are of one community. It is afterwards they come to differ in matters of religion and their social lives. The unity of mankind concept includes the idea of fundamental equality between all human beings. It is related in the Prophet Muhammad's *Hadith* that,

***A coloured man has no preference over a white man, nor a white man over a coloured one, nor an Arab over a non-Arab, nor a non Arab over an Arab, except for righteousness.***<sup>9</sup>

Thus, from the perspective of Islam the dignity of all people is the same, and the defence of that dignity should be available whatever the colour or the nationality. Divisions and conflicts between nations and communities arise despite this fundamental unity and equality of mankind. Consequently, co-operation, in the Islamic conception,

<sup>9</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Dar al-Ma'aref, Cairo, 1980, Hadith no. 22391.

promotes human unity and maintains mutual human interests. From this perspective, it would seem natural to suppose that co-operation and not conflict was the normal human condition. This implication of the unity of mankind leads to a questioning of the view that the condition between the Islamic State and non-Islamic State is one of warfare (*Jihad*) it will be later argued.

A further aspect of human equality is spiritual and is the practical consequence of the belief in one supreme God. It results in the spiritual liberation of an individual from subjection to any earthly authority. From the spiritual freedom of every human being to follow the spiritual affirmation of the equality of all people under one sovereign God. It further includes the idea that the human race, at birth, are all Muslims.

***Every child is born with a true faith (i.e., to worship no one but Allah Alone) but his parents convert him to Judaism, Christianity, or to Magainism.<sup>10</sup>***

Originally all humans were of one nation and consequently the judgement was the same for all people according to the tradition of Islam. The only way of categorisation is by the response of people to God, that is, by their faithful acceptance of God's guidance or their rejection of His revelation.

A third aspect of the concept of the unity of mankind, it could be argued, is the common obedience of humanity to Divine law. Every human being is the recipient of the Divine law; the *Shari'ah* it is not just a law for Muslims. He is endowed with intelligence, free will, and an innate capacity to distinguish between good and evil. An individual is not perfect, yet he is perfectible. Therefore the law and the compact of obedience are necessitated by the evil side in the nature of an individual. In the *Holy Qur'an* it can be recognised that a human being is viewed as a rational and responsible individual. Reason has been given to human beings to enable them to act freely in accepting the law and entering into a compact of obedience with God. The individual, furthermore, is responsible for his acts and his intelligence he determines the course of his action. Islam takes a rather optimistic view of the nature of man. The Prophet

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<sup>10</sup> Matraji, Mahmoud, *Translation of Saheeh al-Bukhari*, Vol. II, Dar al-Fikr, Beirut, 1993, p. 315.

Muhammad stated that a human being is created as pure by God, and upright by nature; he is inclined toward the good if properly directed by Divine law.

c. *The unity of the Law.* The universality of the values embodied in the Islamic law, *Shari'ah*, implies that its applicability is not limited to the Islamic community or, more narrowly, to the followers of Muhammad (the Companions). They apply to the human community at large. The Islamic values can be recognised by man's reason if a human being could free himself from passion and selfish interest.<sup>11</sup> However, it is not just the universal values that the *Shari'ah* contains that are applicable to all humans: it is the Divine law in its entirety that is applicable to the nation of humanity, Muslim and non-Muslim alike. The *Shari'ah* is derived from the *Qur'an*, understood as the final part of a series of Divine revelation through Prophets for all mankind.

شرع لكم من الدين ما وصى به نوحاً والذي أوحينا إليك وما وصينا به إبراهيم وموسى  
وعيسى أن أقيموا الدين ولا تتفرقوا فيه كبر على المشركين ما تدعوهم إليه الله يجتبي  
إليه من يشاء ويهدي إليه من ينيب . (الشورى: ١٣)

The same religion has He established for you as that which he enjoined on Noah, that which We have sent by inspiration to thee, and that which We enjoined on Abraham, Moses and Jesus: Namely, that ye should remain steadfast in Religion, and make no division therein: To those who worship other things than Allah, hard is the way to which thou callest them, Allah chooses to Himself those whom He pleases, and guides to Himself those who turn to Him. (42: 13)

Obviously, unbelievers do not accept this final Divine revelation and consequently do not view themselves as bound by the Divine law which is derived from it. Only Muslims lead their personal and communal life in accordance with these Divine laws. However, the *Shari'ah* is not just the instrument that regulates and conditions the behaviour of individual Muslims within the Muslim society: it is applicable to and must regulate all their dealings with non-Muslims, whether as states, groups like tribes, or individual non-Muslims. To that extent unbelievers are, in practice, bound by the Islamic Law.

<sup>11</sup> Bassiouni, N. Cheriff, "Islamic Concept, Law, and World Habeas Corpus, *The Rutgers Camden Law Journal*, 1, 2, (Fall 1969), p. 166.

### 3.3) Islamic Concept of International Relations *al-Siyar*

In the classical Muslim literature, the term “international relations” was not formalised by its modern academic name. Instead, Muslim jurists referred to *al-Siyar*, that is, to the law dealing with non-Muslims [most of which governs relations between Muslims and non-Muslims, but a small part of which affects only non-Muslims]. Contemporary jurists and scholars - for example, Yusuf al-Qaradawi, Muhammad Hamidullah, and AbdulHamid AbuSulayman - differ over the precise nature of the Islamic international relations (*al-Siyar*). According to Yusuf al-Qaradawi, the law of the Islamic international relations consists of International Law, Politics, *Fiqh*, and the Islamic History.<sup>12</sup> Hamidullah sees *al-Siyar* more narrowly as a special branch of law dealing with war, peace, and neutrality.<sup>13</sup> He defined Islamic international law as,

. . . part of the law and customs of the land and treaty obligations which a Muslim *de facto* or *de jure* State observes in its dealings with other *de facto* or *de jure* State.<sup>14</sup>

AbuSulayman almost agrees with Hamidullah when he argues that *al-Siyar* consist of *Jihad*, *Dar al Islam*, *Dar al 'Ahd* and *Dar al Harb*.<sup>15</sup>

The different views on *al-Siyar* are not easy to reconcile. A start can be made by drawing a distinction between the principles of Islamic international relations and their practice, the latter being found in historical situations in different geographical areas of the world etc. The principles are a distinct section of the totality of the *Shari'ah*. This distinct section are the laws which covers non-Muslims inside and outside the Islamic State and their relations to Muslims. These laws can be broken down into four sub-groups: (1) Relations between the Islamic State and non-Islamic states. (2) Relations between the Islamic State and non-Muslim religio-social groups e.g. tribes and individuals living outside the Islamic State. (3) Relations between the Islamic State and non-Muslim individuals and groups living inside the Islamic State, (4) Relations between Muslim individuals and non-Muslim individuals within the Islamic State

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<sup>12</sup> Al-Qaradawi, Yusuf, Al-Shari'ah wa al-Hyatt, al-Jazeera Satellite Channel, 8/3/1998, 23:00 GMT.

<sup>13</sup> Hamidullah, Mohamad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, p. 9.

<sup>14</sup> *Ibid.*, p. 3.

<sup>15</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, IIOIT, Herndon, 1994, p. 19.

covering such areas as marriage, family matters and commercial transactions. This fourth category will not be included in this thesis since the Islamic State is not involved.

Surprising as it may appear to anyone familiar with Western international relations theory, in which all relations between states or other units of analysis are external, in the Islamic theory any person who is not a member of the *Ummah*, whether a foreigner or a citizen of the Islamic State, is deemed to have international relations with the Islamic State and to be the subject of *al-Siyar*. This apparent paradox arises from the general principle that relationships between Muslims and non-Muslims are invariably treated as external or international, whereas no relationship between Muslims, however “external” they may seem to be (for example the relations between Muslim territorial rulers during the late period of the ‘Abbaside dynasty), is ever treated as a matter of external or international relations. All *Ummatic* relations are internal or domestic from the standpoint of *Shari’ah*.

A second element in an attempt to reconcile the diverse views of *Siyar* of the jurists involves a close examination of the three *Dars* or domains. This will establish, it is hoped, whether the narrower interpretation of *al-Siyar* by Hamidullah and AbuSulayman is justified or whether it omits some of the content of Islamic international relations. It will be suggested that the latter is the case, since the concept of the three *Dars* does not cover all relations between Muslims and non-Muslims. The mistake made, it will be argued, is to treat the part for the whole of *al-Siyar*.

The division of the world into *Dar al-Islam*, *Dar al-Harb* and, much later *Dar al-‘Ahd* or *Dar al-Sulh*, is nowhere mentioned in the *Holy Qur’an* or in the *Hadiths*, except in *Saheeh Muslim* under the term the House of Emigrants or *Dar al-Muhajirine*, which is not relevant to the present context. All three are juristic constructions made after a period of protracted warfare between the Islamic State and its enemies. In the years after the death of the Prophet Muhammad (632 AD), the Arabs with their duty to propagate Islam, spread the Islamic religion throughout Arabia, the Middle East, and North Africa. In the time of the second Caliph, Umar I, the Arabs controlled Egypt, Syria, Palestine, and most of ancient Persia. During the



period of the third Caliph, Uthman, the Islamic Empire spread west to Tripoli, north to the Taurus and Caucasus mountains, and east to what is now Pakistan and Afghanistan. In 711 AD, During the Umayyad dynasty, the Islamic Empire expanded to its maximum; by 732 AD the Arab-ruled area extended from the Atlantic Ocean to the boundaries of India and China.<sup>16</sup>

Muslim jurists considered war and hostility between the Muslims and other political entities to be the basic element which had led to this division and where a state of affairs was described according to the condition of the Muslims: victory and conquest, or defeat. Jurists set a difference in *Shari'ah* rules according to this division because of the occurring war between Muslims and their enemies.<sup>17</sup> Some Muslim jurists such as Ibn Hazm, for instance, held the view that,

*After the emigration of the Prophet to Madinah, Muslims had considered any part in the world except Madinah to belong to Dar al-Harb within which Jihad could legitimately be waged at any time or place.*<sup>18</sup>

The juristic division of the globe into *Dar al-Islam* and *Dar al-Harb* was for two main reasons according to AbdulWahab Khallaf,

1. Muslims in the beginning needed to unify their affairs, to emerge with their Islamic character, and direct their power and force toward a joint enemy. Their aim was to preserve the Islam entity and manifest a good impression of Muslims among nations.
2. Juristic characterisation of the reality of the previous relations between Muslims and others when war was the only factor controlling these relations, in the absence of an obligatory treaty. As a result, jurists pictured the actual state of war between Muslims and other nations as a permanent condition because warfare appeared to be incessant. In the jurist's eyes, wars in the remote past against the Persians and the Romans were followed by the defensive wars

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<sup>16</sup> Peretz, Don, *The Middle East Today*, Praeger Publisher, New York, 1988, p. 24.

<sup>17</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p.167.

<sup>18</sup> Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. VII, Dar Al-Itchad al-Arabi li al-Teba'a, Cairo, 1969, p. 353.

against the Mongols which eventually destroyed the Islamic State of the 'Abbasides. In turn, these wars were followed by the fanatical Christian Crusades during the Middle Ages. Because their campaigns against the enemy appeared to be ceaseless, jurists came to take the view that all states outside the Islamic State were hostile and some would be currently in a state of active belligerency against it.<sup>19</sup>

Three modern jurists have expressed this idea in similar terms. Al-Zohaily writes,

*War between two states results in dividing the international family into two teams: on one hand, the hostile team that includes belligerent states; and on the other hand the team which contains the non- belligerents, the neutral states, and the other members in the international family.*<sup>20</sup>

AbuSulayman stated this same idea but in slightly different words when he said,

*The early Muslims were confronted by unceasing aggression and persecution, and the non-Muslim powers basic attitude of hostility against Muslim ideals and society never changed. This inevitably left its mark on the thinking of the jurists. Thus, war and fighting became practically an integral and natural part of the relationship with non-Muslims, though some of the Jurists did not advocate initiation of fighting by the Muslims. They did advocate retaliation when Muslims were attacked.*<sup>21</sup>

Similarly, Mohammed Abu Zahrah emphasised,

*All jurists unanimously called the non-Islamic countries hostile state/s, because of the continuous war during the juristic diligence era [i.e. during the period of Ijtihad] arising from the enemies aggression and the Muslims defence.*<sup>22</sup>

If the juristic division of the globe into two opposing parts *Dar al-Islam* and *Dar al-Harb* thus reflected contemporary reality, a third *Dar* was introduced by Muslim jurists by the second century AH to bring Muslim principles into line with a new reality, namely, the existence of peaceful relations between the Islamic State and non-

<sup>19</sup> Khalf, AbdulWahab, *Elm Usul al-Fiqh*, Al-Dar al-Kuwaitiyah li Al-Teba'ah, Kuwait, 1968, pp. 69-76.

<sup>20</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p.167.

<sup>21</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, IIOIT, Herndon, 1994, pp. 43-44.

Islamic states resulting from a pledge or treaty (*'Ahd*). *Dar al-'Ahd* therefore denoted an intermediate status between *Dar al-Islam* and *Dar al-Harb* where non-Muslim states were at peace with the Islamic State which will be explained below.

None of these three *Dars* (which are examined more fully below) was mentioned in either the *Holy Qur'an* or the Prophetic *Sunnah*, but in the Book of *Saheah Muslim* another *Dar* is mentioned under the term The House of Emigrants or *Dar al-Muhajerine* “. . . then call them to change from their homeland to the *Dar al-Muhajerine* . . . [emigrants House].<sup>23</sup>

*Dar al-Muhajerine*, in the Prophetic *Hadith* means the city of Madinah. It was the target of all people who embraced Islam prior to the conquest of Makkah and who were seeking the refuge and protection of Muslims. Meanwhile, new followers of Islam in Makkah were encouraged by the Prophet to emigrate to Madinah in order to avoid oppression by the Quraishi.<sup>24</sup> However, that command to emigrate was cancelled by the Prophet after the Conquest of Makkah, when he said “*No migration after the conquest of Makkah*”.<sup>25</sup>

Not only were *Dar al-Islam*, *Dar al-Harb* and *Dar al-'Ahd* not mentioned in the *Qur'an* and *Sunnah*, but also it is difficult to see how these concepts could be applied to the situation of the early Muslims who were living in the city of Makkah with the Prophet Muhammad before their emigration to Madinah. Indeed, jurists of the classical period refer to Makkah before the *Hijrah* where the Prophet called people to Islam. Makkah was neither *Dar Islam* nor *Dar Harb*, however as the place where the Prophet called people to Islam, and the location of the nascent *Ummah*, perhaps Makkah could be called the House of Calling to Islam or *Dar al-Da'wa ila Allah*.\*

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<sup>22</sup> Abu Zahrah, Mohamad, *Al-'Alaqat al-Dowalyah fi al-Islam*, Dar al-Ketab Al-Hadeeth, Kuwait, p. 59.

<sup>23</sup> Ibn Majah, Muhammad Ibn Yazeed, *Sunan Ibn Majah*, Vol. II, Dar Ehya'a al-Kutub al-Arabiyyah, Cairo, 1987, p. 953 & Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 182.

<sup>24</sup> Lings, Martin, *Muhammad*, George Allen & Unwin Ltd., London, 1984, pp. 108-115.

<sup>25</sup> Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. VIII, Matba'at al-Halabi, Cairo, 1952, p. 25.

\* This concept has been developed from the writings of scholars' al-Qaradawi, Hamidullah and AbuSulayman. Though, it is not derived directly from any passage in their writings. For this reason, no sources can be quoted here. *Dar al-Da'wa*, as presented in this thesis, is as original interpretation of both the situation in Makkah before the *Hijrah* and, arguably, certain non-Muslim states in the present day.

### 3.3.1) The normality of war and peace

The idea of dividing the world into homelands or domains (*Dars*) appeared only after wars and hostilities erupted between Muslims and non-Muslims. AbuSulayman argues that the early Muslim experience of continual hostility at the hands of non-Muslim powers made contemporary jurists come to think of warfare as the normal relationship with non-Muslims. He suggests, however, that warfare should not be regarded as an integral or normal/natural part of these relations.<sup>26</sup> This is the issue which must now be explored.

In favour of the view that warfare between the Islamic State and non-Muslim powers was the norm is the fact of the prevalence of the war involving the Islamic State from the period after the *Hijrah* to the end of the 'Abbaside dynasty and the Christian crusades in particular, warfare was specially prominent during the early Muslim state to the end of the Umayyad Caliphate. Very many of these wars arose from the hostility of non-Muslim powers to the Islamic State but some Muslim jurists such as Imam al-Shafei'i take the view that even the *People of the Book* are not genuine monotheists in addition to rejecting the Prophethood of Muhammad. Jurist Al-Ramli argued that such unbelievers were blasphemers which meant Muslims had a duty to kill them.<sup>27</sup> The more normal view is that of Imam al-Shafei'i and his followers who argued that every Muslim has a duty to call the unbelievers to Islam. The call to Islam must be peaceful but if the unbelievers do not become Muslims or become protected persons within the Islamic State (*Dhimmi*) then it is the duty of Muslims to wage *Jihad* against them unless they are too feeble to wage war.<sup>28</sup> This stance towards non-Muslims is based upon verses in the Holy *Qur'an* and exhortation to *Jihad* by Prophet Muhammad in *Hadith*.

First, there are *Holy Qur'anic* verses which command Muslims to fight non-Muslims, such as,

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<sup>26</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, IIOIT, Herndon, 1994, pp. 43-44.

<sup>27</sup> Al-Ramli, ShamsAldean Muhammad Ibn ShihabAldean, *Nehayat al-Muhtaj ila Sharh al-Minhaj*, Vol. IV. Matba'at al-Halabi, Cairo, 1386 AH, p. 223.

<sup>28</sup> *Ibid.*, 224.

كتب عليكم القتال وهو كره لكم وعسى أن تكرهوا شيئا وهو خير لكم وعسى أن تحبوا شيئا وهو شر لكم والله يعلم وأنتم لا تعلمون . (البقرة: ٢١٦)

**Fighting is prescribed upon you, and ye dislike it; but it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you; but Allah knoweth, and you know not. (2: 216)**

Other verses issue a similar command but for a narrower group of non-Muslims,

فإذا انسلكوا الأشهر الحرم فاقتلوا المشركين حيث وجدتموهم وخذوهم واحصروهم واقعدوا لهم كل مرصد فإن تابوا وأقاموا الصلاة وعاءتوا الزكاة فخلوا سبيلهم إن الله غفور رحيم . (التوبة: ٥)

**But when the forbidden months are past, then fight and slay the Pagans whenever ye find them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers, and pay Zakah then open the way for them: for Allah is Oft-forgiving, most Merciful. (9: 5)**

Second, there are *Holy Qur'anic* verses which enjoin Muslims to martyrdom, that is to die in the way of Allah through *Jihad* such as:

ولئن قُتلتم في سبيل الله أو متم لمغفرة من الله ورحمة خير مما يجمعون . ولئن متم أو قُتلتم إلى الله تحشرون . (آل عمران: ١٥٧-١٥٨)

**And if ye are slain, or die, in the way of Allah, forgiveness and mercy from Allah are far better than all they could amass. And if ye die, or are slain, lo! It is unto Allah that ye are brought together. (3: 157,158)**

فليقاتل في سبيل الله الذين يشرون الحياة الدنيا بالآخرة ومن يقاتل في سبيل الله فيقتل أو يغلب فسوف نؤتيه أجرا عظيما . (النساء: ٧٤)

**Let those fight in the cause of Allah who sell the lie of this world for the Hereafter; to him who fight in the cause of Allah- whether he is slain or gets victory- soon shall We give him a reward of great (value). (4: 74)**

Similarly, the *Sunnah* contains many *Hadiths* which encourage Muslim to join *Jihad* and die in the Way of Allah such as:

***A journey undertaken in the morning or evening (for Jihad) in the way of Allah is better than (anything) on which the sun rises or sets.*<sup>29</sup>**

***The person who participates (in Holy battles) in Allah's cause and nothing compels him to do so except his belief in Allah and His Apostle, will be recompensed by Allah either with a reward, or***

<sup>29</sup> Matraji, Mahmoud, *Translation of Saheeh al-Bukhari*, Vol. IV, Dar al-Fikr, Beirut, 1993, p. 29.

*booty (if he survives) or will be admitted to Paradise (if he is killed in the battle as a martyr). Had I not found it difficult for my followers, then I would not remain behind any squadron going for Jihad and I would have loved to be martyred in Allah's cause and then made alive, and then martyred and then made alive, and then again martyred in His cause.*<sup>30</sup>

The Prophet said that a Muslim who did not fight in the way of Allah but died was a hypocrite,

*One who died but did not fight in the way of Allah nor did he express any desire (or determination) for Jihad died the death of a hypocrite.*<sup>31</sup>

Third, there are *Qur'anic* verses which not only prohibit Muslims to ally with the Pagans and Apostates, but even prohibit showing friendship to them. For example,

لا يتخذ المؤمنون الكافرين أولياء من دون المؤمنين ومن يفعل ذلك فليس من الله فشيء . . . (آل عمران: ٢٨)

**Let not the Believers take for friends or helpers unbelievers rather than Believers: if any do that, shall have no relation left with Allah . . . (3: 28)**

يا أيها الذين آمنوا لا تتخذوا اليهود والنصارى أولياء بعضهم أولياء بعض ومن يتولاهم منكم فإنه منهم إن الله لا يهدي القوم الظالمين . (المائدة: ٥١)

**O ye who believe! Take not the Jews and the Christians for your friends and protectors: they are but friends and protectors to each other; and he amongst you that turns to them (for friendship) is of them; verily Allah guideth not a people unjust. (5: 51)**

يا أيها الذين آمنوا لا تتخذوا عدوي وعدوكم أولياء تلقون إليهم بالمودة وقد كفروا بما جاءكم من الحق يخرجون الرسول وإياكم أن تؤمنوا بالله ربكم إن كنتم خرجتم جهادا في سبيلي وابتغاء مرضاتي تسرون إليهم بالمودة وأنا أعلم بما أخفيتم وما أعلنتم ومن يفعله منكم فقد ضل سواء السبيل . (المتحنة: ١)

**O ye who believe! take not My enemies and yours as friends (or protectors), offering them (your) love, even though they have (on the contrary) driven out the Messenger and yourselves (from your homes), (simply) because ye believe in Allah your Lord! if ye have come out to strive in My Way and to seek My Good Pleasure, showing friendship unto them in secret: for I know full well all that ye reveal; and any of you that does this has strayed from the Straight Path. (60: 1)**

<sup>30</sup> Ibid., p.30

<sup>31</sup> Ibid.

Finally, there is a *Hadith* which confirmed the necessity of fighting non-Muslims as a method of calling for Islam and enjoining Believers to die in the way of Allah. Prophet Muhammad said,

*I have been ordered (by Allah) to fight against the people until they testify that none has the right to be worshipped but Allah and that Muhammad is Allah's apostle, and offer the prayers perfectly and give the obligatory charity, so if they perform all that, then they save their lives and property from me except for Islamic laws, and then their reckoning (accounts) will be done by Allah."*<sup>32</sup>

On the bases of this *Hadith* and previous *Hadiths* and *Qur'anic* verses, some scholars have concluded that Muslims are not permitted to ally, adhere, and even build relationships with non-Muslims. In their view Islam was based on force after the *Hijrah*, and that compulsion in matters of religion took the form, primarily, of *Jihad* against all non-Muslims to force them to embrace Islam. The Prophet Muhammad, on this view, was the apostle of war. Majid Khadduri, for example, writes,

*The Muslim law of nations recognised no other nations than its own, since the ultimate goal of Islam was the subordination of the whole world to one system of law and religion, to be enforced by the supreme authority of the imam.*<sup>33</sup>

Similarly, Nageab Armanazi suggests,

*The Islamic division of Dar al-Islam and Dar al-Harb is similar to the Bolshevik rule, where it is supposed that Russia is the home of every communist, a house of peace for communists, and the rest of the world is the house of war, though it should be permeated by communism and where possible establish pro-communist regimes [satellite states].*<sup>34</sup>

The prevalence of *Jihad* during the period after the *Hijrah* until the end of the 'Abasside Empire was reflected in the juristic division of the world into two parts *Dar a-Islam* and *Dar al-Harb*, *Dar al-'Ahd* was a late juristic development reflecting the reality of relations between the Islamic State and non-Muslim powers in that several

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<sup>32</sup> Al-'Sqalani, Shehab Al-Dean Abu Alfadhli, *Fat'h al Bari bi Sharh Saheeh al-Bukhari*, Vol. VI, Matba'at al-Halabi, 1378 AH, p. 85.

<sup>33</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, pp. 44-45.

<sup>34</sup> Armanazi, Nageab, *International law in Islam*, PhD thesis, Damascus, 1930, p. 113.

non-Muslim powers had established peaceful relations with the Islamic State. Despite this fact and corresponding juristic conception it is probable that the majority of non-Muslim political entities were in *Dar al-Harb*, not in *Dar al-'Ahd*. This suggests that conflict not peace was still the norm. This view is reinforced by the fact that *Dar al-'Ahd* is composed of non-Muslim powers which have concluded peace with the Islamic State, having previously been *Harbi* powers at war with the Islamic State. Then finally these treaties were treated by the jurist as temporary truces lasting ten years at the most. However, facts overtook the juristic view for during the time of Salah al-Dean and the *Jihad* against the crusades these treaties had become permanent, suggesting that peace not war was the normal state of relations between the Islamic State and non-Muslims.

On the other hand, peace as the normal state of relations has several considerations in its favour as follows:

A. There is the unity of mankind to which division and conflict are, in principle, alien. The unity of mankind is seen in reality in relations within the Muslim *Ummah* where peace is the norm. *Dar al-Islam* is properly translated as the domain of peace.<sup>35</sup>

B. Hanafi, Maliki and the Hanbali jurists criticised the view of al-Ramli\* and others that the blasphemy of non-Muslims is a cause for killing them. They argued that non-Muslim's aggression against Islam is the reason for fighting and killing them.<sup>36</sup>

C. The basic Islamic attitude towards non-Muslims who are not hostile to Muslims is, in general, peace. This can be inferred from the following considerations:

1) The Muslims in Makkah before the *Hijrah* constituted the infant *Ummah* and they were subject to persecution by the non-Muslim Quraishi. During this period, God never commanded the Muslims to wage *Jihad* against these hostile Makkans. In other words, before the *Hijrah*, peace was the normal relationships between Muslims and

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<sup>35</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p. 136.

\* See footnote 27.

<sup>36</sup> Ibn Hamam, Kamal Al-Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. IV, Matba'at Mustafa Muhammad, Cairo, 1356 AH, p. 291.



non-Muslims. Islamic propagation (*Da'wa*) in Makkah was peaceful. The *Qur'anic* teaching of the Prophet and all Muslims is that they must behave towards non-believers with wisdom and beautiful preaching as quoted below.

... ولو كنت فظا غليظ القلب لانفضوا من حولك . (آل عمران: ١٥٩)  
 . . . wert thou severe or harsh-hearted, they would have broken away from about thee. (3: 159)

ادع إلى سبيل ربك بالحكمة والموعظة الحسنة وجادلهم بالتى هي أحسن . (النحل: ١٢٥)

Invite (all) to the Way of the Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious. (16: 125)

فإن أعرضوا فما أرسلناك عليهم حفيظا إن عليك إلا البلاغ . (الشورى: ٤٨)  
 If then they turn away, we have not sent thee as a guard over them; thy duty is but to convey (the Message). (42: 48)

The call to Islam must be with wisdom and discretion, meeting people on their own ground and convincing them with illustration from their own knowledge and experience, which may be very narrow, or very wide. Moreover, preaching must be, not dogmatic, not self-regarding, not offensive, but gentle, considerate, and such as would attract the attention of non-Muslims. Manner and arguments should not be acrimonious, but modelled on the most courteous and the most gracious example. Therefore, the Muslims are not guards set over people to free them from the need of exercising their limited free-will.

*Holy Qur'anic* verses are cited which stipulate that the cause of *Jihad* is for self defence, the protection and guarantee of freedom of the faith, and the prevention of iniquity. Self-defence as a cause of *Jihad* is commanded in the following verse,

وقاتلوا في سبيل الله الذين يقاتلونكم ولا تعتدوا إن الله لا يحب المعتدين . (البقرة: ١٩٠)

Fight in the cause of Allah those who fight you but do not transgress limits: for Allah loveth not transgressors. (2: 190)

It is sometimes supposed that this verse has been abrogated by a later verse, though this is rejected by the Jurist Ibn Taymiyyah. He wrote ,

*Repeal 'Naskh' needs evidence, the Holy Qur'an does not contain any verse which contradicts this verse, on the contrary it is upheld elsewhere.<sup>37</sup>*

Ibn Taymiyyah continues by interpreting this verse to mean injustice through aggression against the Muslims and is a cause for *Jihad*,

*The meanings of this verse, the prohibition of assault which is injustice is not permitted in any laws [legal system] in any circumstances does not accept the repeal.<sup>38</sup>*

*Jihad* for self-defence and for the protection of the faith is commanded in another verse,

أذن للذين يقاتلون بأنهم ظلموا وأن الله على نصرهم لقدير . الذين أخرجوا من ديارهم  
بغير حق إلا أن يقولوا ربنا الله ولولا دفع الله الناس بعضهم ببعض لهدمت صوامع وبيع  
وصلوات ومساجد يذكر فيها اسم الله كثيرا ولينصرن الله من ينصره إن الله لقوي  
عزيز . (الحج: ٣٩-٤٠)

To those against whom war is made, permission is given to fight, because they are wronged; and verily, Allah is Most Powerful for their aid. They are those who have been expelled from their homes in defiance of right, for no cause except that they say "Our Lord is Allah," did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. (22: 39-40)

In this verse, the cause of fighting for self defence can be found under "expelled from their homes"; and fighting for the cause of protecting the Islamic faith is under "Our Lord is Allah." It has been mentioned previously in this chapter that the causes of fighting non-Muslims is their hostility to the Islamic religion and its teachings, and consequently that it is fully justified that righteous people fight against a ferocious and mischief-loving people. However, the justification was far greater when the small Muslim community was not only fighting for its own existence against the Makkan Quraishi, but for the very existence of the faith in the One True God. They were exiled for their Faith while they had as much right to worship in Makkah as other Quraishi.

<sup>37</sup> Ibn Taymiyyah, TaqulDean Ahmad Ibn Shehab, *Resalat Al-Kital*, Matba'at Al-Sunnah Al-Muhammadiyah, Cairo, 1368 AH, p. 118.

<sup>38</sup> Ibid.

Abu J'afar Al-Nahas in his work *Al-Nasekh wa al-Mansukh*, mentioned that the Companion Ibn al-'Abbas noted,

*This it is the first verse concerning the fighting in the holy months which was prohibited according to and in consideration of Arabian traditions; then it became justified because of the detriment and assault on Muslims alienates them from Makkah. These were the main causes to permit fighting in the holy months.*<sup>39</sup>

In the *Qur'anic* verses the justification for *Jihad* are stipulated. Fighting for any other cause is therefore unlawful because it transgresses the limits commanded in the *Holy Qur'an*. The *Shari'ah* organised the principal attitude of fighting for its followers, which strongly recommends that: war is permissible for the purpose of self-defence and the protection of the Faith, and that it is waged within well-defined limits. That means fighting is forbidden for any other causes. However, when war is undertaken, it must be pushed with vigour, but not relentlessly and only to restore peace and freedom for the worship of God. It has been narrated that Prophet Muhammad, during his wars, caught many unbelievers as prisoners of war, some were executed, others were redeemed or discharged, the Prophet did not compel any of them to convert to Islam.

2) Jurists disagree over the *Hadiths* which support *Jihad*, fighting against non-believers and dying in the cause of God. The Shafei'ites, for instance, held the view that a *Hadith* such as,

***I have been ordered (by Allah) to fight against the people until they testify that none has the right to be worshipped but Allah and that Muhammad is Allah's Apostle, and offer the prayers perfectly and give the obligatory charity, so if they perform all that, then they save their lives and property from me except for Islamic laws, and then their reckoning (accounts) will be done by Allah.***<sup>40</sup>

<sup>39</sup> Al-Nahas, Abu J'afar, *Al-Nasekh wa al-Mansukh*, Matba'at Zaki Mujahed, Cairo, p. 190.

<sup>40</sup> Al-'Sqalani, Shehab Aldean Abu Alfadhil, , *Fat'h al Bari bi Sharh Saheeh Al Bukhari*, Vol. VI, Matba'at al-Halabi, 1378 AH, p. 85.

conflicts with the Prophet's teaching and with that of the *Shari'ah* about dealing with a peaceful approach to non-Muslims. Imam al-Shafei'i in his work *al-Umm* mentioned,

*The word **people** in that Hadith [the previous Hadith] means the Arabian Pagans in general, and the cause to fight them was their hostility to the Islam and to the Prophet Muhammad and their fighting him. Where the word **fight** does not mean to kill, it could be permissible to fight the person, but it is not permissible to kill him, which means: to push out the evil, not to call to Islam.*<sup>41</sup>

However, it can be argued that the prohibition against alliance and good relations with non-believers is made only to prevent harm to other Muslims or because it does not serve the other interests of them. According to the *Holy Qur'an*,

... تَلْقَوْنَ إِلَيْهِم بِالْمُودَةِ وَقَدْ كَفَرُوا بِمَا جَاءَكُمْ مِنَ الْحَقِّ يُخْرِجُونَ رَسُولَ اللَّهِ وَإِيَّاكُمْ أَنْ  
تُؤْمِنُوا بِاللَّهِ رَبِّكُمْ . (الْمُمْتَحِنَةُ: ١)  
... offering them your love, even though they have rejected the  
Truth that has come to you, and have (on the contrary) driven out  
the Messenger and yourselves (from your homes) simply because  
ye believe in Allah your Lord. (60: 1)

It has been mentioned earlier that a rejection of Islam is not a cause for fighting and killing non-Muslims. That cause is that non-Muslims fight against them and/or treat Muslims and Islam with hostility. Therefore, if these causes are ended and hostility has ceased as a consequence, relations with non-Muslims will return to normal, lawful peace and be based on equality. The exchange of mutual interests will not be forbidden. This judgement can be build on the base of the *Holy Qur'anic* commands which mentioned as follows,

لَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ  
وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ . إِنَّمَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ  
وَأَخْرَجُوكُمْ مِنْ دِيَارِكُمْ وَظَاهَرُوا عَلَى إِخْرَاجِكُمْ أَنْ تَوَلَّوْهُمْ وَمَنْ يَتَوَلَّهُمْ فَأُولَئِكَ هُمُ  
الظَّالِمُونَ . (الْمُمْتَحِنَةُ: ٨-٩)

Allah forbids you not, with regard to those who fight you not for your Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just. Allah only forbids you, with regard to those who fight you for your Faith, and drive you out of your homes, and support others in driving you out from turning to them (for friendship and

<sup>41</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al-Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 181.

**protection), it is such as turn to them (in this circumstances), that do wrong. (60: 8-9)**

Those verses have divided non-Muslims into two groups, those who are to the Muslims inoffensive, who did not fight them in the cause of Faith, or drive them out of their homes; this group is in the position to enjoy philanthropy and justice. The other is the opposite: they are in the camp of hostility, of fighting or co-operating with others against Muslims. Islam forbids making allies of them. Nevertheless, the *Shari'ah* insisted that protection or refuge to the individual enemy *Must'amin* should be offered, even in the time of war. In the *Holy Qur'an* it is written,

وإن أحد من المشركين استجارك فأجره حتى يسمع كلام الله ثم أبلغه مأمنه ذلك بأنهم قوم لا يعلمون . (التوبة: ٦)

**If one amongst the Pagans asks thee for asylum, grant it to him, so that he may hear the Word of Allah, and then escort him to where he can be secure, that is because they are men without knowledge. (9: 6)**

While the rights of non-Muslims under the Islamic state have been examined, it is important to elucidate the obligations of Muslims who live in a non-Muslim country. It can be said that: it is the duty of the Muslim to respect and adhere to the rules of that country which control relations between Muslims and both the people and the governments of these countries. The Muslims' rights are what the laws of these countries give to them. They must not exceed or break these laws either by imposture, perfidy or any other illegal (in the *Shari'ah*) behaviour. In the *Holy Qur'an*,

هل جزاء الإحسان إلا الإحسان . (الرحمن: ٦٠)

**Is there any Reward for Good-other than Good? (55: 60)**

However, there is an argument which justifies Muslims using sharp practices to relieve non-Muslims of their money, provided it is done without perfidy and imposture, even if such practices are prohibited in Islam against other Muslims. Against this argument is the Islamic traditions that Muslims have to deal in the same way with all people, without any consideration for colour, religion, nationality or the place where they live.

**D.** There are *Qur'anic* verses revealed after the *Hijrah* which pre-suppose that peace is the norm.

ولا تعتدوا إن الله لا يحب المعتدين . (البقرة: ١٩٠)  
 . . . do not transgress limits: for Allah loveth not transgressors.  
 (2: 190)

This verse can be interpreted to mean that the Islamic State must not initiate war because it is commanded to wage *Jihad* only as self-defence (as has been shown above). To abide by this verse means the Islamic State cannot wage war for any other reason/s; that would be to overstep the prescribed limits. Hence, peace must be regarded as the norm by the Islamic State. Another verse commands Muslims never to use compulsion in religion. In the *Holy Qur'an*,

كان الناس أمة واحدة فبعث الله النبيين مبشرين ومنذرين وأنزل معهم الكتاب بالحق ليحكم بين الناس فيما اختلفوا فيه . (البقرة: ٢١٣)  
 Mankind was one single nation, and Allah sent Messengers with glad tidings and warnings; and with them He sent the Book in truth, to judge between people in matters wherein they differed.  
 (2: 213)

This means that Islam requires Muslims to be tolerant of non-Muslims, whether they are individuals, groups or states. If this command is respected the Islamic State will not attack a non-Islamic State to spread Islam. Again the verse pre-supposes peaceful relations are normal between Muslims and non-Muslims.

The logic and compulsory characteristic for a global Islamic law (*Shari'ah*) issued by God, where *Shari'ah* by itself, as mentioned in a previous chapter, organised all the Muslims relations with others and among themselves. As Islam legislated *Jihad* to defend the Faith, it also legislated *Jihad* to defend the Islamic State. *Jihad* is not only a collective duty outside Islamic countries, it is also an individual duty inside them to protect these countries and recover what has been extorted from them. Charis Waddy in her work *The Muslim Mind* illustrated clearly *Jihad* when she said,

*Jihad . . . is divided into two. The Greater Jihad is fighting ones animal tendencies. The Lesser Jihad – fighting one behalf of the community, in its defence – is a duty incumbent on a Muslim provided he is attacked. A man has the right to defend his life, his property, and he has to organise himself along these lines.*<sup>42</sup>

<sup>42</sup> Waddy, Charis, *The Muslim Mind*, Longman Group Ltd., London, 1976, pp. 94-95.

Some Muslim rulers, like the Abbasides, established themselves in power by force and force was never far away from their rule thereafter. The prominence of force within their Empire may have coloured their attitude to force outside it, so that relations with non-Muslim states, became perceived primarily in terms of force and conflict. The prevalence of hostile relations for a time thus came to be viewed as a permanent state of affairs. This belief seems to have been adopted by the jurists of this period of the High Caliphate and influenced their juristic *Fiqh*.

In general, Muslim jurists have debated for decades to determine a common Islamic conception of the relations with other states or nations (*Ummahs*) which may be called international relations. Classical Muslim jurists therefore came to divide the globe into two domains,\* the domain of peace (*Dar al-Islam*) and the domain of war (*Dar al-Harb*). Later, the domain of treaty (*Dar al-'Ahd*) was the third domain added by Imam al-Shafei'i. He based it on the conciliation treaty concluded between the Prophet and the Christians of Najran and it denoted all countries and other political entities (like tribes) which had similar treaties with the Islamic State.<sup>43</sup>

It may be concluded therefore, that hostility was not the normal or natural relationship between Muslims and others. That relationship was peaceful with all nations (*Ummahs*) except for those of them which indicated their hostility to Islam and against the Muslims. War has been used as a means of spoiling the enemies' plots to frustrate their attempt to prevent *Da'wa* being spread and to eliminate injustice and tyranny. Muslim scholars recognised, therefore, Muslim and non-Muslim relations according to their satisfaction of the doctrines of both the *Holy Qur'an* and *Hadith*. Mohamad Abu Zahrah, for example, noticed,

*There are a group of jurists who recognise the peaceful relationships among Muslims and others, unless: an aggression against a Muslim country; or an anticipation of an aggression has to be occurred.*<sup>44</sup>

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\* There are no particular scholar who can rely on him as the first who used this division, but it seems that there Muslim jurists of the first Islamic century to call any territories which were not under the control of the Islamic State as *Dar al-Harb*. With the time this idea was improved. For further details, see chapter V.

<sup>43</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, pp. 103-104 & 109.

<sup>44</sup> *Ibid.*, pp. 53-54.

It is no exaggeration to say that the juristic division of the world to *Dar al-Islam*, *Dar al-Harb* and *Dar al-'Ahd* is based on the occurring relations among Muslims and non-Muslims, and was made by the Muslim jurists in the second century AH, and had not been created by the *Shari'ah*. Moreover, this division is a logical issue, it can be found that in the Roman law people were divided into three groups: the Citizens, the Latins and Foreigners. The latter called *the enemies*, if they do not have any protection treaty with Rome they were vulnerable to be being humiliated.<sup>45</sup> They lived in the country with no legal personality. P. Vatikiotis has confirmed this when he said,

*The millet idea was not an original invention of the Muslims . . . Romans and Byzantines practised such discrimination between the homoioi and the others, especially by the Byzantines as regards the Jews.*<sup>46</sup>

Therefore, juristic division was based on reality; and war was the cornerstone of this division. This does not mean to put the world under the control of two states, one of them includes all Islamic countries, while the other includes the rest of the world. AbdulWahab Khalaf, for example, assumed,

*This division mainly depends on the achievement of Muslims security and peace inside their countries. The basis of the difference between the two-domain spheres is the lack of safety and security. The Dar al-Harb is the one that does not maintain peace for Muslims, but it is a temporary matter which will be ended when the war is over.*<sup>47</sup>

It might be questioned whether in the light of historical events that the theory of classical Islamic international relations was determined by these facts and not by lofty religious-legal principles? Theoretically, of course, relations between the Islamic State and non-Muslim political entities were based on principles of Islamic law and justice, not on the ground of conquest of non-Muslims by the Islamic State, on the relation between winner and loser or between the stronger and the weaker. This is one of several obligations imposed on Muslims by the Islamic law. This was confirmed by the words of Bat Ye'or,

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<sup>45</sup> Al-Badrawi, Badro, *Madkhal ila al-Qanoun al-Romani*, Dar al-Kitab al-Arabi, Cairo, p. 198.

<sup>46</sup> Vatikiotis, P. J., *Islam and the state*, 1<sup>st</sup> Edit., Routledge, London, 1987, p. 87.

<sup>47</sup> Khalaf, Abdulwahab, *Nizam al-Dawlah al-Islamiyyah*, Dar al-Ansar, Cairo, 1397 AH, p. 69 (o. w.).



*The Islamic power granted the subjected Jewish and Christian peoples the right to collect taxes for their own communal institutions, the rights administer justice in matters of personal law, freedom of religious education and worship, and recognised by the official status of the head of each community.*<sup>48</sup>

Consequently, the previous debate leads to the necessity of understanding the categories of the juristic division of the world into different domains *Dars*, which will be expounded below.

### 3.3.2) The Domain of Peace *Dar al-Islam*

Muslim scholars see that every territory and people that has been under a stable Islamic government of a Caliph for a period of time is an Islamic State. Such government will cause the *Shari'ah* to be applied throughout the territory and among the people for a period of time. From the Islamic point of view, any change in government from Islamic rule to government by non-Muslims, where the *Shari'ah* is no longer implemented as previously and the Muslims may even be expelled from the territory, as in Palestine and perhaps Spain, is considered to be an extortion and occupation. The territory which was once an Islamic State or part of an Islamic State is now considered to be part of *Dar al-Islam*, with Muslims under a duty of restoring the territory to the Islamic State; Muslims must strive to liberate these occupied lands.<sup>49</sup> *Dar al-Islam*, it can be concluded, consists of the people and territories which are either currently within the Islamic State or which formed part of the Islamic State in the past.

This summary and conclusion is not consistent with Fuad Khuri's narrower account of *Dar al-Islam* as a political adaptation implying a territorial domain including Muslims and non-Muslims living under the Islamic public policy.<sup>50</sup> The Muslim community and *Dhimmi*s can only do this within the Islamic State. It is the only state which implements Islamic law. Muslim communities which live under non-Muslim governments will no doubt abide by the *Shari'ah* as far as possible, but they will not be

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<sup>48</sup> Ye'or, Bat, *The Dhimmi, Jews and Christian under Islam*, Fairleigh Dickinson University Press, London, 1985, p. 49.

<sup>49</sup> Al-Qaradawi, Yusuf, Al-Shari'ah wa al-Hyatt, al-Jazeera Satellite Channel, 8/3/1998, 23:00.

<sup>50</sup> Khuri, Fuad I., *Imams and Emirs*, Saqi Books, London, 1990, p. 29.

able to live in the fullness of its rules since the non-Muslim government will not enforce the *Shari'ah* throughout the state. There may also be some conflicts and confrontation with the non-Muslim population, as seen in Bosnia and Kosova during the 1990s. Khuri's argument specifically contradicts the standard juristic position that *Dar al-Islam* includes territories and sometimes people (assuming the Muslims have not been expelled) that were once part of the Islamic State.

The argument that *Dar al-Islam* consists of the people and territory of the Islamic State and those that were formerly part of it is complicated by the juristic argument over inhabited territory adjacent to the Islamic State. This border territory was not sharply demarcated like contemporary states boundaries, even after Caliph Umar I set up boundary posts on principle trade routes into the Islamic State. Consequently, it was often difficult to determine whether a mixed Muslim/non-Muslim population was part of the Islamic State or outside it. This difficulty would be greater if the population in question was Bedouin. Furthermore, outside the trade routes it was unclear where the territory of the Islamic State ended and that of the non-Islamic State began, and therefore where the rule of the *Shari'ah* ended. As a result of these uncertainties jurists had major problem of deciding how to treat these adjacent territories. The Hanbali jurists' position is that any country without Islamic rules and ruler, is not an Islamic State, even if it is adjacent to an Islamic one.<sup>51</sup> Jurists of the Shafe'i School consider the land where the *Shari'ah* is not applied is not Islamic, but a hostile state, even if it is occupied by Muslims.<sup>52</sup> Hanafite jurists, however, consider it an Islamic State as long as the Muslims are secure and the territory is adjacent to the Islamic State. If there is no safety for Muslims and *Dhimmi*s, if Islamic law is not enforced, and if the land is not adjacent to the Islamic State, then it is considered a hostile state. From another juristical point of view that country is not a hostile state, even if Islamic law is not enforced there or even is cancelled, so long as security is provided and it is adjacent to the Islamic state.<sup>53</sup>

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<sup>51</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *Ahkam ahl al-Dhimma*, Vol. I, Matba'at Jami'at Dimishq, Damascus, 1961, p. 366.

<sup>52</sup> Ibn Abedin, Muhammad, *Hashiyat Ibn Abedin*, Vol. IV, Al-Matba'ah al-Ameriyyah, 1326 AH, p. 175.

<sup>53</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea Al Sanay'a fi Tarteab al-Sharay'a*, Vol. VII, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 130.

In the light of these juristic views the original account given of *Dar al-Islam* can be reformulated as follows. *Dar al-Islam* is the country and people that receives an Islamic ruler, the Caliph, and adopts the *Shari'ah* in its entirety. Outside *Dar al-Islam* are the non-Islamic countries without an Islamic ruler and where Islamic law is not imposed; they are either hostile states or atheist countries. Between the two are the border territories (or marchlands/no-man's lands), which have different juristic views and are regarded as either part of *Dar al-Islam* or still outside its borders.

The classical jurists were concerned above all to determine who was with the Islamic State and who was against it. It was partly this concern which was applied to territory adjacent to the Islamic state that caused the different juristic views to arise. In present day circumstances a novel problem has occurred within the *Ummah* to which the categories of the classical jurists do not easily apply and which have generated many problems. Among the most important is: what is the norm for Islamic dominance and the performance of its law? Is it enough to implement the Islamic law on a personal status without the rest of the Islamic Law for a country to be included within *Dar al-Islam*? If that is the case, many veteran Islamic countries, such as Turkey (the last Islamic Empire), might be ejected from *Dar al-Islam*! Is it sufficient for Muslims to be able to perform their religious practices such as prayer and fasting in complete freedom for them to be included in an Islamic state? Many Islamic countries recently would not count as *Dar al-Islam* or part of it on such tests. What judgement can be given on the non-Muslim countries in which freedom of religious belief is fully protected and where Muslims can practice their religion sometimes even better than in many Islamic states? Of course, these non-Muslim countries cannot be counted as part of *Dar al-Islam*. However, logically there is no difference between these kinds of non-Muslim countries and other Islamic states in which the Islamic tradition is not performed completely.

Take the case of Turkey (the last Islamic Empire and a full active member in recent Islamic organisations) which gives a clear instance of such an Islamic State in which neither safety nor security could be obtained for Muslims or their establishments.

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\* France, for example, the majority of the French Muslims, 72% of 3 Million, believe that they have full freedom in practising their religious ceremonies, while the rest see that Islam has to be in the same level of the consideration of the Christianity in that country. *Asharq al-Awsat* newspaper, Vol. 6655, 16/2/1997,

Initially, it can be emphasised that Mustafa Kamal- later Ataturk- who became Turkey's strongman, tore Turkey from its Islamic roots when he introduced secularism in several phases such as the abolition of the Caliphate and the Ministry of the *Shari'ah* and Pious Foundations on March 1924. After this, he introduced secular education, the Arabic alphabet was banned and replaced by the Latin one when writing Turkish. Western style judicial systems were introduced, the closure of dervish retreats and religious sects were ordered, the adoption of the Western calendar, and finally the adoption of the principle of secularism in the Constitution of February 1937. In secularised Turkey, where 98% of the population are Muslims, all religious affairs are carried out by a central government organisation affiliated to the Prime Minister's office, namely the Department of Religious Affairs, established in 1924. The function of this organisation is to carry out tasks related to the beliefs, divine services, moral Islamic principles, and to enlighten citizens on religious matters. In the words of Feroz Ahmed,

*Until 1926, the Ottoman Empire and the republic had used the Islamic code of law, the Share'ah, though all the religious communities had been permitted to use their own personal laws relating essentially to the family and inheritance. Article 41 of the Treaty of Lausanne had guaranteed; these rights to the minorities. But the Jewish and Christian communities renounced this privilege and agreed to live under 3 common Western civil codes. In 1926, the government introduced the Swiss Civil Code, the Italian Penal Code, and a Commercial Code based largely on the German and Italian codes.<sup>54</sup>*

Focusing on the recent Turkish political situation, it can be seen that the country is ruled by the Kamalist *pasha-generals* even when it is under civilian government. The Kamalist *pasha-generals* are traditional defenders of the secularist system, ardently secularist, pro-American, and authoritarian. Islam is anathema to them. They have mounted three coups since 1960 when displeased by the antics of the politicians. Turkey's generals have made a series of close military and intelligence accords with Israel. These are designed to forge a regional anti-Islamic alliance, and gain support of the pro-Israel lobby in Washington. They bitterly oppose the Islamic civilian

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<sup>54</sup> Ahmed, Feroz, *The Making Of Modern Turkey*, Routledge, London, 1993, p. 80.

government, which is dominated by Prime Ministers Necmettin Erbakan of the Islamic Welfare Party. Erbakan calls for reintroduction of Islamic values into Turkish life; reorientation towards the Islamic east; loosening the old alliance with the US, and Kamalist *pasha-generals* and redirecting funds now spent on the military to social projects. He urges normalised relations with closer links to the Arabs, both of whom are deeply unloved by Turks.<sup>55</sup> In connection with this, both the Turkish elitists and the military characterised Erbakan as “unfit to govern” because of his Islamic dedication and seemingly aversion towards “westernising” Turkey.<sup>56</sup>

In April 1997 the Turkish National Security Council listed 18 anti-Islamic demands. At the top of the list was a call for educational reform that would require students to attend eight years of secular schooling- rather than the five years at present - before optional *Qur’anic* training.<sup>57</sup> The government statement gave no specific details of the cabinet’s plans. In connection with this. Law and order authorities kept up a campaign against Islam. Turkish security police arrested 21 people for putting on an Islamist play deemed to have insulted the security forces. In April 1997 they announced that they had closed down more than 20 buildings in two western districts where Islamists were holding *Qur’anic* lessons.<sup>58</sup>

The simple juristic division (or dichotomising) of the world in classical *Fiqh* had to be amended when it no longer corresponded to contemporary circumstances. The outcome was the addition of a third domain, *Dar al-‘Ahd*. In the light of the recent Turkish experience, it could be argued that the threefold juristic division of the world is no longer strictly accurate and so it is important for *Dar al-Islam* and *Dar al-Harb* to be revised and redefined to reflect modern realities. It has been concluded earlier that protection of Faith, Dogma and freedom of religious practice are the character of *Dar al-Islam*, therefore a new theoretical definition of *Dar al-Islam* could be: ‘the place (state, territory, city or even a house) where Muslims can practice their religion in

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<sup>55</sup> Eric, Margolis, *Turkey’s Split Personality*, The Foreign Correspondent, Toronto Ontario Canada, 30/3/1997.

<sup>56</sup> Moye, Carrie, *New Developments in Turkey Demand Crucial*, *Star Weekly Magazine*, Amman, Jordanian, 29/8/ 1996, p. 15.

<sup>57</sup> *The Jerusalem Post*, Testing Time For Turkey, Vol. 57557, Jerusalem, 28/4/1997.

<sup>58</sup> Salahuldein, Mohammed, *AlSera’a bayn al-‘Ailmaniyyah wa al-Share’ah fi Turkiyah*, *Al Madinah Newspaper*, Jeddah, Vol. 12427.

complete freedom, no matter where this place is located, or at when they practice it'. Similarly, *Dar al-Harb* can be defined as where the Islamic religion cannot be practised in complete freedom, where Muslims experience aggression, and are denied their most basic religious rights. This domain is located outside the past or present Islamic State. However, this does not mean that Muslims should relinquish those territories to non-Muslims where the *Shari'ah* is not implemented by the government (such as in Turkey). Instead, it implies the need to correct the governmental and ruling system and convert it into an Islamic one.

Additionally, it can be said that unless a declaration of war takes place, Islam instructs Muslims: (i) not to wage perpetual war with the nations of the world which are excluded from the sovereign jurisdiction of the Islamic State; (ii) not to fight, or even deal with hostiles among all non-Muslims throughout the world. Such an attitude can be categorised as perfidiousness or treachery which is not acceptable to the *Shari'ah*. The previous assumption can be based on the following *Qur'anic* verse,

وإما تخافن من قوم خيانة فانبذ إليهم على سواء إن الله لا يحب الخائنين . (الأنفال: ٥٨)

**If thou fearest treachery from any group, throw back (their Covenant) to them, (so as to be) on equal terms: for Allah loveth not the treacherous. (8: 58)**

Muslims in Western Europe and other non-Muslim countries - in which religious beliefs are protected - are not in *Dar al-Harb*. This is because of the following causes:

- a) None of these states or their leaders has declared war against Islam;
- b) There are treaties which systematise the relations between these countries and the Islamic states, and Muslims individuals should adhere to these treaties;
- c) Muslim individuals had entered those countries according to agreements which arranged their residence and protected their rights.

It has previously been noted that classical Islamic jurisprudence originally divided the globe into first two, then three domains, though neither division, it was suggested is applicable today. Some contemporary scholars, e.g. AbuSulayman, have

reinterpreted the three juristic *Dars* to try and fit them to the facts of the modern world. It is arguable, however, that a new concept and term is needed to describe present day realities outside *Dar al-Islam*. Just as *Dar al-'Ahd* was originally regarded as part of *Dar al-Harb* until it was conceptualised as separate *Dar*, so today another part of *Dar al-Harb* could be separated as a separate *Dar*, *Dar al-Da'wa ila Allah* which can be translated as “House of Calling to Islam” in which the call to Islam is the basis of relations between Muslims and others. The situation today is similar to that of the city of Makkah during the early time of the Prophet Muhammad, before his emigration to Madinah. Makkah at that time was neither *Dar Islam* nor *Dar Harb*: it was a place of call to Islam. The similarity between some Christian countries and Makkah before the *Hijrah* is that Muslims may freely make the call for Islam under the secular law of states. This law also guarantees Muslims freedom to practice Islam and for that there was no counterpart in pre-*Hijrah* Makkah. It seems implausible to describe such countries as hostile to Islam and part of *Dar al-Harb*. Furthermore, not all have treaties with Islamic states, which would make them part of *Dar al-'Ahd*. For these reasons it might make better sense to describe their position as neither *Dar al-Islam* nor *Dar al-Harb* nor *Dar al-'Ahd*, but as *Dar al-Da'wa*.

### 3.3.3) The Domain of War *Dar al-Harb*

*Dar al-Harb* has two main aspects: first, it is any part of the world that does not apply the religious and political rules of Islam because it is out of Islamic sovereignty; second, there are various countries called *Dar al-Harb* because of their enduring hostility or enmity to Islam, not because they are continuously fighting the Islamic State. Al-Kasani differentiated between *Dar al-Harb* and *Dar al-Islam* when he remarked that,

*The meaning of describing a state as either Islamic or blasphemy (and hostile) is not Islam or blasphemy, but security and fear. That means: If absolute security is for Muslims and absolute fear is for blasphemy, it is an Islamic state. But if absolute security is for non-believers and absolute fear is for Muslims, it is a hostile state. Since the rules are based on security and fear instead of*

*Islam and blasphemy, security and fear are considered more deserving.*<sup>59</sup>

Muslim jurists divide into two groups when characterising the *Dar al-Harb*. The first, which contains the majority,\* held the view that: it is a country or group of countries where Islam is not sovereign, Islamic rules are not applied, and no peace treaty or pacific relations with Muslims exist. It is a *Dar al-Harb* as long as it is hostile to Muslims and Islam. Aggression by it is to be expected, so Muslims must be ready and prepared to fight off the people of this state.<sup>60</sup>

The second, the minority, is the group of Hanafite jurists who assumed that Islamic sovereign authority and security of the Muslims and non-Muslims [*Dhimmis*] cannot turn the country or part of it into *Dar al-Harb*. Likewise, it cannot be a hostile state if the Muslims are in a minority, but Islamic sovereignty remains. Also, if people of a country apostatise Islam, win victory and apply the rules of polytheism, or when *Dhimmis* enjoying Muslim protection revoke the pledges and gain the leadership of their country, the country is not yet a *Dar al-Harb*, according to these jurists. However, they agreed that *Dar al-Harb* will turn into *Dar al-Islam* by applying the Islamic rules.<sup>61</sup> *Dar al-Islam* however does not turn into *Dar al-Harb* if this should cease to be the case. Spain and similar countries, according to this juristic view, are still part of *Dar al-Islam*.

Based on the Hanafites opinion, it can be concluded that the following two kinds of states had not been taken into account as they could not be related to the division of the two original *Dars*. These are: (i) states which had never known or achieved the sovereign authority of Islam, for example, the unexplored states or territories of the African or South American Jungles; (ii) other states that are not adjacent to *Dar al-Islam*. Consequently, it can be hypothesised that states which are not adjacent to *Dar al-Islam* and/or not expected to behave aggressively towards the Islamic State, are part

<sup>59</sup> Al-Kasani, Ala' Al-Din Ibn Mas'aud, *Bada' al-Sanay'a fi Tarteab al-Sharay'a*, Vol. IX, Matba'at al-Imam, Cairo, p. 4395.

\* The majority of the Malikites, the Shafei'ites, and the Hanbalites.

<sup>60</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *Ahkam ahl al-Dhimmah*, Vol. V, Matba'at Jami'at Dimishq, Damascus, 1961, p. 366.

<sup>61</sup> Ibid., p. 374.



of *Dar al-Islam*. To them, apply the definition of Muslims in isolation since they are distant countries.\*

However, both groups, which had different perspectives in characterising the *Dar al-Harb*, summarised their definition of *Dar al-Harb* as the state that has the security and sovereign authority of all *Harbis* under its own rules. The same jurists disagreed, however, in how *Dar al-Islam* might come to be *Dar al-Harb*. The Malikites, the Shafei'ites, and the Hanbalites stipulated four conditions by which any Islamic territory would convert to become *Dar al-Harb*. They differ from the Hanafites over these conditions, which are,

- 1) *Harbis* rule a state hostile to Islam and/or defeat the Islamic State;
- 2) People of an Islamic territory apostatise Islam;
- 3) *Dhimmis* who enjoying Muslim protection revoke their pledges and gain control of the country;
- 4) Dissent/rebellion against the *Imam* where dissidents manage to acquire their own sovereign state though the land of their state was initially, part of *Dar al-Islam*.<sup>62</sup>

The Hanafites, on the other hand, stipulated three conditions for any country, or territory, to consider as a *Dar al-Harb*; these are:

- 1) When dominion of the territory is by a non-Muslim ruler who behaves malignantly to the *Dar al-Islam*, and therefore prevents Islamic Law being implemented.
- 2) The country is adjacent to, or bordering, *Dar al-Islam* and from which an aggression could be anticipated.
- 3) Security and safety for Muslims and *Dhimmis* still remaining in the state is not provided.<sup>63</sup>

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\* Based on the Hanafites opinion, it can be argued that the provision of being adjacent to Muslims has to be ignored in recent time. Distances turned to be very near, the invention of the super sonic aircraft and the plastic missiles, make it very easy mission to reach any place in the world in short time.

<sup>62</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. IV, Hyderabad, 1335 AH, p. 302. & Al-Bahrawi, AbdulRahman al-Hanafi & Others, *Al-Fatawa al-Hindiyah*, Vol. II, Al-Matba'ah al-Ameriyyah, Bulaq, 1310 AH, p. 232.

Moreover, the *Dar al-Islam* will not become *Dar al-Harb* when non-Muslims capture it, as long as some of Islam's rules are implemented in it. In connection with this Ibn Hegir al-Haythamy's observation is relevant,

*The Islamic State never becomes a hostile (blasphemy) state. That can be confirmed by the saying of Prophet Muhammad in his Hadith "Islam is always superior and never inferior." If we consider an Islamic state seized by non-Muslims to become a hostile (blasphemy) state; this will be a null estimate. If Muslims can recover this state by military force they will regain it as their property and as it used to be before being seized by non-believers.*<sup>64</sup>

By now, it could be understood that the juristic idea of dividing the world into two or more *Dars* follows the historical development of the relation of an Islamic State with other non-Islamic states. It can be said that the Islamic *Shari'ah* meets with the international law when it considers the world as one nation.\* Within it, war is a temporary matter that results in a temporary enmity between two states. *Dar al-Harb* is thus limited to this the circle of warring states, including every other state which supports them morally, physically and ethically.

### 3.3.4) The Domain of Pledge *Dar Al-'Ahd*

As it has been mentioned earlier, Muslim jurists divide the world into two domains, those of *Dar al-Islam* and *Dar al-Harb*. The Shafei'ites added another part, which is the so-called domain of pledge or *Dar al-'Ahd*,\* which is not under Muslim rule, yet is a tributary relationship to the Islamic State by truce (*Sulh*) treaty. This truce is generally used in *Shari'ah* as the opposite of by force ('*Unwa*').<sup>65</sup> The first known *Dar al-'Ahd* in Islamic history was established by the Prophet Muhammad when he concluded a treaty of truce with the Quraishis, the leaders of Makkah, in the year 6 AH. Muslim jurists, in their efforts to organise the relations between the *Dar al-Islam*

<sup>63</sup> Munla, Khusru, *Dorar al-Hokam fi Sahrh Ghurar al-Ahkam*, Vol. I, Al-Matba'ah al-Sharafiyyah, Cairo, 1303 AH, p. 295. & Khan, Qadi, *Al-Fatawa al-Khaniyyah*, Vol. III, (NPS & NDS), p. 574.

<sup>64</sup> Ibn Hegir, Al-Hithami, *Tohfah al-Mohtag li Sharh al-Minhaj*, Vol. IV, Matba'at al-Halabi, Cairo, p. 230.

\* This could be seen in the mentioned *Qur'anic* verse: "Mankind was one single nation . . . ." (2: 213).

\* Some jurists called it *Dar al-Aman* or *Dar al-Muad'ah*.

<sup>65</sup> Gibb, H. A. R. & H. Kramers, *Short Encyclopedia Of Islam*, E. J. Brill, Leiden, 1974, p. 69.

and *Dar al-'Ahd* insisted that treaty or pledge granted peaceful relations between the two *Dars* should not be more than ten years, and could be renewed after that.<sup>66</sup>

Such a state of affairs came into reality during the time of the Caliphate but was not under Muslim control, yet it was not considered a part of *Dar al-Harb*. That was because it was linked to *Dar al-Islam* by a pledge (*'Ahd*). Because of this agreement, the two domains, *Dar al-Islam* and *Dar al-'Ahd*, were reconciled and enjoyed peaceful relations for the duration of the pledge or treaty.<sup>67</sup> However, Harris Proctor notes that the Hanafite jurists had never recognised *Dar al-'Ahd* as a separate domain (*Dar*). He quoted the Hanafi point of view when arguing that,

*If the inhabitants of the territory concluded a peace treaty and paid a tribute, it becomes part of Dar al-Islam and its people are entitled to the protection of Islam.*<sup>68</sup>

However, some Hanafi jurists such as Ibn al-Hamam differed from this view. He argued,

*It is a hostile state since we conciliated its people for a limited time. Even if they are reconciled with us and pay an annual tribute and are judged according to their own rules, we don't agree to this unless it is for the good of Muslims. These people have no commitments towards Muslim rules and they are all but Harbis.*<sup>69</sup>

In addition to the above view, al-Sarkhasi explained,

*It is true that it is called Dar al-'Ahd since it has rules of conciliation. However, it is considered as a hostile state since the rule of Islam is not conducted in that place.*<sup>70</sup>

Examining the previous three views, some Hanbalites jurists such as Abu Y'ala held and supported the Shafei'ites view.<sup>71</sup> However, the rest of the jurists, the Malikites and

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<sup>66</sup> Al-Far'a, Muhammad Ibn al-Hussein, *Al-Ahkam al-Sultaniyah*, Dar al-Fikr, Beirut, 1994, p. 58.

<sup>67</sup> Al-Tureaqi, Abdulah, Dr., *Al-Iste'anah bi Ghayr al-Muslimoun fi al-Fiqh al-Islami*, Riyadh, 1409 AH, p176.

<sup>68</sup> Proctor, J. Harris, *Islam and International Relations*, Pall Mall Press, London, 1965, p. 26.

<sup>69</sup> Ibn Hamam, Kamal Al-Dean, *Fath al-Qadear*, Vol. VI, Matba'at Mustafa al-Halabi, Cairo, 1356 AH, p. 462.

<sup>70</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. VI, Hyderabad, 1335 AH. p. 1893.

<sup>71</sup> Abu Y'ala, Muhammad Ibn al-Hussein al-Far'a, *Al-Ahkam al-Sultaniyah*, Dar al-Fikr, Beirut, 1994, p. 133.

the Hanbalites, supported the view of Ibn Hamam, the Hanafi.<sup>72</sup> In connection with this, the Shafei'ites view may be considered as the more accurate division because truce countries were not always under the conditions which were stipulated by Muslim jurists to be part of *Dar al-Islam*. In the words of Armanazi,

*The Shafei'ites view of the division of the world into three domains should be the basis of international relation between the Muslims and other nations to protect the interests of transactions and all political and commercial relations.*<sup>73</sup>

However, contrary to the Hanafites, both the Hanbalites and Shafei'ites considered the pledge state to be part of *Dar al-Islam*, since its people become *Dhimmi*s, enjoying Muslim protection upon reconciliation and the payment of *Jizyah* becomes due.<sup>74</sup> Al-Mawardi, for instance, when reckoning the lands of *Dar al-Islam*, included among them the lands of *Dar al-'Ahd*, if their people pay the *Jizyah*.<sup>75</sup>

The *Dar al-'Ahd*, moreover, could change to be *Dar al-Harb* if its rulers revoked the pledge and fought or behaved in a hostile way to *Dar al-Islam*. This was confirmed in the *Holy Qur'an* in the following verse,

وإن نكثوا أيمانهم من بعد عهدهم وطعنوا في دينكم فقاتلوا أئمة الكفر إنهم لا أيمان لهم  
لعلهم ينتهون . (التوبة: ١٢)

**But if they violate their oaths after their covenant, and attack your Faith, fight ye the chiefs of Unfaith: for their oaths are nothing to them: that thus they may be restrained. (9: 12)**

However, this does not allow Muslims to execute people of *Dar al-'Ahd*, even if they are prisoners of war. That could be based on the *Qur'anic* verse,

ويطعمون الطعام على حبه مسكينا ويتيما وأسيرا . (الإنسان: ٨)  
**And they feed, for the love of Allah, the indigent, the orphan, and the captive. (76: 8)**

And in the *Sunnah* the Prophet is reported to have said,

<sup>72</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 133.

<sup>73</sup> Armanazi, Nageab, *International law in Islam*, Ph.D. Thesis, Damascus, 1930.

<sup>74</sup> *Ibid.*, pp. 1699-1703.

<sup>75</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 150, 164.

***Render back your Trust to those to whom it is due, and do not act treacherously even with those who are unfaithful to you.*<sup>76</sup>**

### 3.4) *Ummah*, the main body of the Islamic community

The creation of the Islamic community *Ummah* was the turning point in the social, economical, and political life of Arabia. It was the nucleus of the Muslim *Ummah*, which gave birth to the classical Islamic community-state in Madinah, organised under the Islamic Law and conducting its affairs in the spirit of the teachings of Islam. The meaning of the term differs according to various authorities.

When the classical jurists dealt with the Islamic *Ummah*, they spoke of the believers vis-à-vis non-believers, which is a philosophical or ideological concept. On the other hand, they spoke of *Dar al-Islam* vis-à-vis *Dar al-Harb*, which is a matter of the extent of Muslim rule or jurisdiction and of Caliphate in relation to non-Muslim nations. The usage relates to the organisational and constitutional structure of political authority in Muslim lands.<sup>77</sup> However, the traditional concept of *Ummah* was not always religious in connotation, and many of the traditional writers have indeed distinguished between a religious and a social meaning of the term. The term *Ummah* is mentioned in sixty-four different places in the *Holy Qur'an*, but with different meanings.<sup>78</sup> At one point, for example, it was used to mean a “model” when Allah speaks about the Prophet Abraham,

إن إبراهيم كان أمة قانتا لله حنيفا ولم يك من المشركين . (النحل: ١٢٠)  
**Abraham was indeed a model, devoutly obedient to Allah, and true in faith, and he joined not gods with Allah. (16: 120)**

Or time or era

ولئن أخرنا عنهم العذاب إلى أمة معدودة ليقولن ما يحبسها ألا يوم يأتيهم ليس مصروفا  
 عنهم وحق بهم ما كانوا به يستهزئون . (هود: ٨)  
**If We delay the chastisement for them for a definite term, they are sure to say, “What keeps it back?” Ah! On the day it actually**

<sup>76</sup> Al-Termidhi, Muhammad Ibn Easa, *Sunan al-Termidhi*, Al-Maktabah al-Islamiyyah, Beirut, 1983, Kitab al-Beu'a.

<sup>77</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, International Institute of Islamic Thought, Herndon, 1994, p. 51.

<sup>78</sup> Al-Hadeethi, Nizar AbdulLateaf, *Al-Umma wa al-Dawla fi Siyasat al-Nabi wa al-Khulafa'a al-Rashidun*, 1<sup>st</sup> Edit., Dar al-Huriya, Baghdad, 1987, pp. 131-132.

reaches them, nothing will turn it away from them, and they will be completely encircled by that which they used to mock at! (11: 8)

And in some part as method and pattern,

أَمْ حَسِبْتُمْ أَنْ تُتْرَكُوا وَلَمَّا يَعْلَمِ اللَّهُ الَّذِينَ جَاهَدُوا مِنْكُمْ وَلَمْ يَتَّخِذُوا مِنْ دُونِ اللَّهِ وَلَا رُسُولِهِ وَلَا الْمُؤْمِنِينَ وَلِجَّةً وَاللَّهُ خَبِيرٌ بِمَا تَعْمَلُونَ . (التوبة: ١٦)

Do you think that you would be left alone while Allah has not yet known those among you who strive with might and main, and take none for friends and protectors except Allah, His Messenger, and the community of Believers? And Allah is well acquainted with all that ye do. (9: 16)

Or as a community,

إِنَّ هَذِهِ أُمَّتُكُمْ أُمَّةً وَاحِدَةً وَأَنَا رَبُّكُمْ فَاعْبُدُون . (الأنبياء: ٩٢)

Verily, this *Umma* of yours is a single *Umma* and I am your Lord and Cherisher: therefore serve Me and no other. (21: 92)

A common religion (or part of a religion) sometimes defines this community. It applies, occasionally, to any community,

بَلْ قَالُوا إِنَّا وَجَدْنَا آبَاءَنَا عَلَىٰ أُمَّةٍ وَإِنَّا عَلَىٰ آثَارِهِم مُّهْتَدُونَ . (الزخرف: ٢٢)

Nay! They say: "We found our fathers following a certain religion, and we do guide ourselves by their footsteps." (43: 22)

Jurists al-Baghdadi and al-Mawardi differ from the other Muslim jurists in their understanding of the concept *Ummah*. They were inclined to ascribe to the notion of *Ummah* a specifically religious connotation rather than a socio-historical one, and to argue for the unity of the community of believers in spite of the multiplicity of political leaderships. Theirs was, therefore, an ideological rather than a socio-historical discourse.<sup>79</sup>

Having unwillingly acknowledged the possibility of having more than one *Imam*, they found it necessary to insist on the unity of the Muslim religious community. The reality of division within the Islamic State had to be compensated for by over-emphasising the spiritual unity and oneness of the community. Al-Mawardi is therefore

<sup>79</sup> Al-Hassab, Fadil A., *Al-Mawaridi fi Nazariyyat al-Idarah al-Islamiyyah al-'Ammah*, Dar al-Tali'a, Beirut, 1984, pp. 69-71.

inclined to use *Ummah* and *Milla* interchangeably - the integration of the community cannot now be achieved politically and has thus to be emphasised religiously.<sup>80</sup>

Like al-Baghdadi, al-Mawardi was unable to comprehend that among the reasons behind the disintegration of the Islamic Caliphate there might have been some reasons related to the socio-historical division of the community of Muslims into various *Ummahs*, in the ethno-cultural sense. He chose instead to seek a juristic formula, however unrealistic, that would reinvest the formal unity of the *Sunni* community in spite of the growing dispersion of the centres of government.<sup>81</sup> However, another Jurist al-Shahristani distinguished in his book *al-Milal wa al-Nihal*, between *Ummahs* on the one hand, which according to his view nations such as the Arabs, the Persians, the Greeks and the Indians, and on the other hand *Milla*, which means the law or legislator (*Sharae*'), and *Nihla* means religion or religious order.<sup>82</sup>

Muslim thinkers had their different understanding of the concept *Ummah* where they attempted to reconcile the difference in the two meanings. Abu Nasr al-Farabi, for example, dealt with the *Ummah* as part of three communities which formed the Humankind. He divided the Humankind community into three types: the great, the middle, and the minor. The first covers all nations on the Earth, the second is the *Ummahs* which inhabit a particular part of the Earth, the third is the cities.<sup>83</sup>

N. Nassar in his book *Maḥmūl al-Ummah Baiyn al-Dean wa al-Tareikh* mentioned that al-Farabi used two other synonyms for the cities: Community *Jama'a*, or Gather *Jam'* (the latter includes tribe and clan). According to Nassar,

*Al-Farabi mentioned other Ummahs surrounding the Arabs such as the Abyssinians, Indians, Persians, Syrians, and Egyptians. Then referred to several characteristics of an Ummah: physical character, natural traits, and a common tongue, and*

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<sup>80</sup> Ibid.

<sup>81</sup> Nassar, Nasif, *Maḥmūl al-Ummah Baiyn al-Dean wa al-Tareikh*, Dar Al-Tall'a, Beirut, 1983, pp. 88-101.

<sup>82</sup> Khuri, Fuad I., *Imams and Emirs*, Saqi Books, London, 1990, p. 27.

<sup>83</sup> Salem, Mohamed Aziz, *Al-Fikr al-Siyasi wa al-Hukm fi al-Islam*, Muasast al-Shabab, Alexandria, p. 143.

*distinguished the Ummah as a group from the Milla as a set of views and deeds, ruling the life of a certain community.*<sup>84</sup>

Besides that assumption, Nassar added to al-Farabi's view,

*Muslims were people of a creed (Ahl al-Milla). An Ummah may possess a Milla or may not, and there are seven great Ummahs, including the Persians, Syrians, Greeks, Egyptians, Indians, Chinese and Turks. Each Ummah has some physical characteristics as well as a common tongue and one monarch. This may infer to a certain degree of confusion but it is certainly indicative of how he distinguishes between the concept of Ummah and that of Milla.*<sup>85</sup>

Nassar, finally, holds that there were Muslim scholars unlike al-Farabi, al-Mas'udi, for instance, who did not use the term *Ummah* in the religious sense, nor did he speak of an Islamic *Ummah*.<sup>86</sup>

Al-Farabi's view supported by some contemporary scholars. Rosenthal, for example, said,

*Ummah denotes originally a religious community, not necessarily of Muslims, since it is applied to the Jews of Medina who are an Ummah in themselves, and in the "Status" form together with the mu'minun, the believers (in Allah). The Ummat al-Islam "apart from the men (min duna-l-nas)", that is, all mankind outside the community of Muhammad in Medina. "Community" is here used by Muhammad in a religious, social and political sense.*<sup>87</sup>

Fred Donner, among the contemporary scholars, in his book *The Early Islamic Conquests*, illustrates what could be a pioneering definition of the concept and the aspect of the *Ummah*. Donner initially distinguished between tribe and *Ummah* when he said,

*The concept of a community of men was thoroughly familiar in Arabia. There was the tribe, for example, with which the umma is*

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<sup>84</sup> Nassar, Nasif, *Mafhum al-Umma Baiyn al-Dean wa al-Tareikh*, Dar al-Tali'a, Beirut, 1983, pp. 39-79.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Rosenthal, Erwin I. J., *Political Thought In Medieval Islam*, Greenwood Press, Westport, 1985, p. 25.



*commonly compared, and with which it shares some characteristics. And, although it is usually stated that the umma differed from the tribe in that it was based on ties of religion rather than of kinship, it seems clear that even the notion of religious ties extending across tribal groups was not known in pre-Islamic Arabia.*<sup>88</sup>

Donner then explained the uniqueness of the Islamic *Ummah* which distinguish it from others,

*What was unique was the concept of the umma, then, not the idea of community, or even the idea of a community defined by religion, but rather the uncompromising monotheism of the Islamic community that, by its rejection of paganism, in essence laid claim for the umma to the souls and bodies of the whole pagan population. The uniqueness of the umma and its character as monotheistic religious community transformed the act of breaking with the community from a social act into moral one. Such a break was not merely unfortunate or undesirable, but positively evil, because there was only one Islamic umma. To break ties with the umma was to break with both God and man; it was both a sin and crime . . . The regulation of the umma demanded that the tribal ties of believers be transcended . . . the political consolidation of the Islamic community [umma] was the concept of an absolute higher authority in the form of divine law . . . [which] became not only a set of abstract moral guidelines, but a true social and political legislation with a divine basis that was to be applied and observed by the umma.*<sup>89</sup>

Donner then concludes that,

*The umma was very different in its political and social implications from other Arabian religious communities, whether pagan, Jewish, or Christian. It not only facilitated, it demanded the breaking of the tribal ties. The umma . . . thus became the focus of a Muslim's social concern. Indeed, it was the insistence on rupturing the traditional ties of kinship in favor of the umma . . . [which] allowed it to expand.*<sup>90</sup>

Therefore, the concepts of *Ummah* and Islamic *Shari'ah* go together in an ideological attempt to cope with the disintegration of the Islamic State. The destruction of the old order by the Mongols sacking of Baghdad in 1258 AD had

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<sup>88</sup> Donner, Fred McGraw, *The Early Islamic Conquests*, Princeton University Press, Princeton, 1981, pp. 55-56.

<sup>89</sup> *Ibid.*, pp. 55-58.

disturbed the intellectual coherence of the jurists. Ibn Taymiyyah, for example, stood in marked contrast to contemporary jurists of the period. In his book '*Al-Siyasa al-Shar'aiyyah*' he places his main emphasis on the supremacy of the *Shari'ah* over the unity and the life of the community, and as the only means whereby a lasting, sound unity could be established for the *Ummah*.<sup>91</sup> Ibn Taymiyyah's view supported by some contemporary scholars such as Fuad Khuri who writes,

*Once a community surrenders to God's laws [Shari'ah] it joins Islam and becomes part of the Ummah . . . The Islamic Ummah is a form of universal religious brotherhood.*<sup>92</sup>

Another supporter to Ibn Taymiyyah's view was of E. Rosenthal, who said,

*The umma is a living reality created by the Prophet who, transcending family, clan and tribe, invited all Arabs to form the "Community of Muslims" (Ummat al-Islam). The brotherhoods inaugurated by him (mu'akhat) were associations of like-minded "believers" (mu'minin) which he valued more highly than mere brotherhood.*<sup>93</sup>

Unlike the above classical pioneer Muslim thinkers, AbdulRahman Ibn Khaldoun deserves special attention because of his distinctive sociological approach. In his work *al-Moqademah*, he gave his understanding of the term *Ummah* as a certain socio-historical, for example, of the Greeks, Persians, Egyptians, and he regards *Ummah* as a phenomenon that is of 'longer term' than that of Dynasty or state *Dawla*. He usually speaks of the Islamic community as a *Milla*, not an *Ummah*, for the meaning of the latter to him is more closely related to a concept of a group, people or race (although he does not seem to attach too much importance to the factor of language). He further relates the concept of *Ummah* to that of *Watan*- a term that expresses a certain relationship between a specific group and a specific territory, which is different from the term *Jiha*, which he uses in a purely geographical sense.<sup>94</sup>

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<sup>90</sup> Ibid.

<sup>91</sup> Ibn Taymiyyah, TaqulDean Ahmed, *Al-Siyasa al-Shar'iyah*, Dar al-M'arifah, Beirut, 1969, pp. 5-8.

<sup>92</sup> Khuri, Fuad I., *Imams and Emirs*, Saqi Books, London, 1990, p. 28.

<sup>93</sup> Rosenthal, E. K. J., *Political Thought in Medieval Islam*, Greenwood Press, Westport, 1985, pp. 24-25.

<sup>94</sup> Ibn Khaldoun, AbdulRahman Muhammed, *Al-Moqademah*, Al-Maktabah al-'Asryyah, Beirut, 1995, p. 153 o.w..

The mission of the members of the *Ummah*, individual and groups, is to be servants of God and spread God's rule. Guided by the word of God and the Prophet, the *Ummah* has a mission to create a moral social order. In the *Holy Qur'an* verse (3: 110) God describes Muslims as the best community evolved in mankind who, enjoining what is right and forbidding what is evil. This command has influenced Muslims practice throughout the centuries, providing a rationale for political and moral activism. Government regulation, Islamic Law, and implementing *Shari'ah* have all been justified as expressions of this moral mission to command the good and prohibit evil.<sup>95</sup>

The internal organisation of the *Ummah* is based on the profession of a common religion. Perpetual peace among its members, the general lifting of the blood feud and the union of the Muslims in one great nation was assumed. Its organisation was secured and defined by a common acceptance to the *Shari'ah*, in the first place, and then to those who exercise authority, which was simply the symbol of the supremacy of the *Shari'ah* which was implemented by, and upon the Islamic authority, even the Prophet himself was subordinate to the *Shari'ah*. It was to the *Shari'ah*, not to the authority that the believer owed his obedience, which was dependent on justice, theoretically a command entailing disobedience to God was not to be obeyed. The Prophet is reported to have said,

***There is no obedience for a man in disobedience the God.***<sup>96</sup>

### 3.5) The Islamic State, its nature and duties

The nature of the *Umma* as a community bound together by a common Faith Islam and a common Divine law *Shari'ah* means that the Islamic State is understood by the classical jurists, primarily in terms of the ruler or *Imam* whose primary function is to ensure the implementation of that Islamic law. To understand further the nature of the Islamic State, the difference between this state and the other non-Islamic states must be grasped. The fundamental difference between the Islamic State and other states is that

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<sup>95</sup> Esposito, John L., *Islam The Straight Path*, Oxford University Press, New York, 1991, p. 30.

<sup>96</sup> Al-Qastalani, ShihabAldean Ahmed Ibn Muhammad, *Irshad al-Sari li Sharh Saheeh al-Bukhari*, Vol X, Matba'at Bulaq, 1327 AH, p. 220.

in the former, sovereignty belongs to God while in a non-Islamic State it essentially belongs to human beings. This means two things: first that Islam is the official religion of the Islamic State and second the *Shari'ah* is implemented by the state. The fact that this is not the case in non-Islamic states leads Muslim jurists to describe them as blasphemy states.

After this point there is a divergence of views today between those who contend that the *Shari'ah* covers all situations, either actually or potentially (its adaption to new situations requiring the exercise of *Ijtihad*) on the one hand, and those who contend that within the Islamic State there is both *Shari'ah* law and non-*Shari'ah* law. There are certain commandments, prohibitions and guiding principles which have been explicitly laid down in the *Holy Qur'an* and explained by the Prophetic *Sunnah* such as the matrimonial relations and inheritance, which have to be incorporated in Muslim legal codes without any alteration. Where there is no explicit, mandatory role, the matter is understood to have been left to the discretion of the legislative organ of the Islamic State (Modern examples of such laws are European laws imported into Egypt, or aviation safety laws). This legislation, however, must never conflict with the fundamentals of Islam as laid down in the *Holy Qur'an* and the Prophetic *Sunnah*, that is, they must never conflict with the *Shari'ah*.

Thus, in the Islamic State human beings have limited rights of sovereignty – where sovereignty denotes primarily legislative capacity - while in all other states they arrogate to themselves unlimited sovereign rights or an absolute legislative capacity. This dispute over the character of law within the Islamic State is a contemporary controversy. Our concern, however, is with the Islamic State to the end of the great 'Abbaside Caliphate in 1258 AD where the gates of *Ijtihad* remained open and consequently the *Shari'ah* could be applied to any novel situation. Since the issue of non-*Shari'ah* law did not arise in this period it follows that it is unnecessary to decide between rival conceptions of law within the Islamic State (a decision which the author has neither the religious authority nor the competence to make).

Exploring modern Western literature, it can be found that scholars in dealing with the Islamic State announced shortage of materials which covered the early period of Islamic history. Ann Lambton, for example, explains this when she said,

*Unfortunately for the early and medieval period of Islamic history sources which tell us what people really thought are rare.*<sup>97</sup>

Consequently, Western scholars differ in describing the nature of the early Islamic State. Julius Wellhausen, for example, has argued that it is a theocracy.<sup>98</sup> Others described it as a state governed by a God or gods.<sup>99</sup> Arnold had a different view when he assumed that the classical Muslim state was a universal nomocracy, a system of government based on a legal code.<sup>100</sup> Still others, such as Fritz Kern, have suggested that it is a monarchical or oligarchic state with authority entrusted by force or reason to one or the few.<sup>101</sup> Finally, some characterise it as a religious community which had become a state.<sup>102</sup> In the Muslim classical literature, by contrast, the Islamic State is never defined by the jurists. However, contemporary Muslims thinkers, such as Taha Hussein, rejected Western definitions.

*Nothing can be more misleading than the concept that the state founded by the Prophet was theocratic state. Islam was and remains a religion prior to and beyond everything else. It guided people to their benefits in the current life and in the life hereafter, but it did not rip off their freedom when it gave them the liberty to choose between good and evil, private and public interests.*<sup>103</sup>

Jurist Al-Maududi sees that the Islamic State is completely different from any Western kind of state

*The Islamic Khilafat is a democracy which . . . is the antithesis of the Theocratic, the Monarchical and the Papal forms of*

<sup>97</sup> A. K. S. Lambton, Introduction, in Ferdinand, Klaus & Mozaffari, Mehdi, *Islam: State And Society*, Cruzon Press, London, 1965.

<sup>98</sup> Wellhausen, Julius, *The Arab Kingdom and its Fall*, Calcutta University Press, Calcutta, 1927, pp. 5-8.

<sup>99</sup> Smith, C. Ryder, *Encyclopædia of Religion and Ethics*, Vol. XII, Charles Scribner's Sons, New York, 1924, pp. 287-289.

<sup>100</sup> Arnold, Thomas W., *The Preaching of Islam*, 3<sup>rd</sup> Edit., Constable, London, 1935, pp. 4-5.

<sup>101</sup> Kern, Fritz, *Kingship and Law in the Middle Ages*, Oxford University Press, Oxford, 1939, pp. 27-34.

<sup>102</sup> Gabrieli, Francesco, *Muhammad and the Conquests of Islam*, World University Library, 1968, p. 91.

<sup>103</sup> Hussein, Taha, *Al-Fitnah al-Kubra*, Vol. I, Dar al-Ma'arif, Cairo, 1951, pp. 22-23.

*government, as also of the present-day Western Secular Democracy . . . what we Muslims call democracy is a system wherein the people enjoy only the right of Khilafat or vicegerency of God Who alone is the Sovereign. In our democracy the Khilafat is bound to keep within the limits prescribed by the Divine Code.*<sup>104</sup>

Arnold's view (see above) encouraged some contemporary scholars, such as Asghar Ali, to adopt the view that the first Islamic State was a nomocracy state, that is, merely as a vehicle for achieving security and order in ways conducive to the Muslims attending to their religious duties of enjoining good and preventing evil [*al-Amr bi al-M'arouf wa al-Nahy 'an al-Monkar*].<sup>105</sup>

The Islamic State came into existence after the Prophet's *Hijrah* from Makkah to Madinah. It was based on a protection pact - later known as the '*Aqabah Pact*' - with the leaders of the two leading tribes of Madinah, the *Aws* and the *Khazraj* (who were known later as the Helpers *Ansar*).<sup>106</sup> According to the pact, the Prophet bound himself never to forsake them when he undertook that,

*I make with you this pact on condition that the allegiance ye pledge me shall bind me to protect me as you protect your women and your children [yourselves] . . . I am yours and ye are mine. I will be the friend of your friends, the enemy of your enemies.*<sup>107</sup>

On the other side, the leaders of Madinah adhere to the Prophet: (i) to listen and obey in all sets of circumstances (ii) to spend in plenty as well as in scarcity; (iii) to enjoin good and forbid evil; (iv) to fear the censure of none in Allah's service; (iv) to defend the Prophet if he seeks their help and protect him as they would protect themselves.<sup>108</sup> In the year 622 AD the Prophet Muhammad moved to Yathrib, henceforth named the City of the Prophet, or shortly *the City*, al-Madinah, to build the first Islamic State.<sup>109</sup> On arrival at Madinah, the Prophet had two priorities: (i) to organise

<sup>104</sup> Maududi, Abul A'la, *First Principles of the Islamic State*, Islamic Publications, Lahore, 1978, pp. 25-26.

<sup>105</sup> See the debate of Asghar Ali Engineer in his work, *The Islamic State*, Advent Books, New York, 1980, pp. 32-51.

<sup>106</sup> Al-Mubarakphori, SafiulRahman, *The Sealed Nectar, Biography of the Noble Prophet*, Maktabat Dar us Salam, Riyadh, 1995, pp. 157-159.

<sup>107</sup> Irving, Washington, *Life of Mahomet*, Henry G. Bohn, London, 1852, p. 78.

<sup>108</sup> Lings, Martin, *Muhammad*, George Allen & Unwin Ltd., London, 1984, p. 111.

<sup>109</sup> Sherwani, Haroon Khan, *Muslim Political Thought and Administration*, Munshiram Manoharlal Publisher, 1981, p. 13.

the Muslims into a social polity; (ii) to provide it with protection to meet any external threat. In order to achieve the first goal, the Prophet constructed a Mosque where he imparted to the new Muslim polity the practical structures of Islam, and thus welded them into a disciplined community-state with a common ideology.

For the second aim, the Prophet made covenants\* (the constitution of Madinah) of peace, trust and alliance with the Jews. Christian and Pagan tribes of Madinah as allies of the Jews also secured and protected the Islamic State from any external aggression as a result of that alliance. They did not form a separate alliance with the Islamic State.<sup>110</sup> In that treaty the Prophet drew up a charter meticulously recording the terms of agreement, that is, the rights, duties and obligations of the Muslims and non-Muslims which provided the general structure of the constitution. The main characteristics of the Islamic State in that treaty were:

- 1) A religious-political organisation functioning under a written constitution (i.e. the *Constitution of Madinah*);
- 2) An ideological state based on the concepts and fundamental principles embodied in the *Holy Qur'an*;
- 3) A “federal” structure comprising two communities, the Muslims and non-Muslims, in one territory;
- 4) Safeguards to ensure the freedom of the new Islamic society from outside invasions;
- 5) Institutions to guarantee the domestic tranquillity and the provision of justice;
- 6) Institutions to protect equal personal security for all its citizens.

After the death of the Prophet, the period of the glorious Caliphate lasted thirty years (632-661AD). It was characterised by the expansion of the Islamic Empire and the appearance of various complex religious, social and political situations which were different from the polity of Madinah. Therefore, the Caliphs practised *Ijtihad* when they faced new situations or problems for which there is no legal judgement in the *Holy*

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\* This treaty known as “*The Constitution of Madinah*.” See appendix I.

<sup>110</sup> Irving, Washington, *Life of Mahomet*, Henry G. Bohn, London, 1852, p. 89.

*Qur'an* or the Prophetic *Sunnah*.<sup>111</sup> Exploring the period of the Caliphate, the period of the first Caliph Abu Bakr (632-634 AD) started with wars with the Arab tribes who rebelled *en masse* when they knew of the death of the Prophet. Many renounced Islam entirely; many attached themselves to new (false) prophets who arose in different places, still others were willing to remain Muslims at prayer but would not pay the *Zakah*.<sup>112</sup> The era of Abu Bakr is therefore characterised as the rise of the revolt of Arabia (the *Ridda*) as it was the chief problem with which he had to deal.<sup>113</sup> The era of Caliph Umar I (634-643 AD) was also extremely important in Islamic history. Umar I was considered as the real organiser of the Islamic State because almost all the institutions of authority were established during his Caliphate, such as, armies, state treasury, provinces, welfare schemes, taxation, and judicial services. These formed the basis of the Islamic States during and after his Caliphate.<sup>114</sup>

There have been widely different interpretations of the various events and bloody episodes that took place after the assassination of Umar I in 643 AD, among them the civil war which broke out and led to a situation of nearly complete chaos. These episodes, although involving doctrinal differences and disputes, have an important bearing on the development of the Islamic State. After the last of the Rashidoun Caliphs the basic character of the Islamic State underwent a fundamental transformation with the Umayyads (663-750 AD). The Caliphate became a dynastic government with the Caliph as a monarch. This was one of the chief criticisms levelled against the Umayyad during the later 'Abbaside period.<sup>115</sup> It is worth mentioning that the Umayyads use the title of *Khalifat Allah* (the Caliph of God) which almost certainly means that they regarded themselves as deputies of God, rather than as mere successors to the Prophet *Khalifat Rasoul Allah*, since it is unlikely that Caliph means

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111 Al-'Alimi, Khalid AbdulAteaf, *Kitab al-Al-Ahkam al-Sultaniyah li al-Mawardi*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 6.

112 Noldeke, Theodore, *Sketches From Eastern History*, Adam and Charles Black, London, 1892, p. 73.

113 Gabrieli, Francesco, *Muhammad and the Conquests of Islam*, World University Library, 1968, p. 92.

114 Al-Seuti, Jalal al-Din, *Tareikh al-Khulafa'*, Dar al-Fikr, Beirut, p. 128.

115 Watt, W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968, p. 39.



successor (one cannot be a successor of God). Furthermore, they saw no need to share their power with, or delegate it to, the emergent class of religious scholars.<sup>116</sup>

In the year 750 AD, the 'Abbasids came to power after they had succeeded in overthrowing the Umayyads and establishing their new dynasty which lasted for nearly four centuries (750-1158).<sup>117</sup> During that time the *Ulama* were embarrassed by the religious behaviour of some of the 'Abbaside Caliphs and there was unrest among some. A large number of them reconciled themselves to contemporary realities and tried to modify the theory of the Islamic State to suit the necessities of the new situation of a protracted struggle between the Caliphs and their Sunni and Shi'i opponents. Under the pressure of the rival claimants to power they formed a theory of government with a twofold aim: to vindicate and uphold the divine purpose of the Muslims state and to support the 'Abbaside Caliphs against all challenges to and encroachments on their authority.<sup>118</sup>

The first Islamic State, which was set up by Prophet Muhammad in Madinah, is considered to be the ideal model of the Islamic State. Muslims believe that whatever the Prophet did was perfect because he was not only the living embodiment of the *Holy Qur'an* but also acted under Divine guidance through revelations. On the other hand, the Caliphate remained one of the principal themes in the course of Islamic history and is often regarded as synonymous with the Islamic State. Muslim jurists and theorists of the classical period looked back to the glorious Orthodox Caliphate (632-661 AD), concentrated on the ideal state and its rulers, and propounded theories making the *Shari'ah* and its sources its basis. Al-Mawardi,\* al-Ghazali, Abu Yusuf, Ibn Taymiyyah are considered as the pioneering jurists who dealt with the political theory of the Islamic State. Ibn Khaldoun and al-Farabi shared the Muslim jurists theoretical efforts and are considered as the eminent theorists and philosophers of the classical period from the tenth to the eleventh centuries AH.

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<sup>116</sup> Hawting, G. R., *The First Dynasty of Islam*, Croom Helm, London, 1986, p.13.

<sup>117</sup> Kennedy, Hugh, *The Early Abbasid Caliphate*, Croom Helm Ltd., London, 1981, pp. 41-42.

<sup>118</sup> Rosenthal, E. K. J., *Political Thought in Medieval Islam*, Greenwood Press, Westport, 1985, 1962, p. 27.

\* The author decided to concentrate on al-Mawardi's book because it was the first scientific treatise on political science and state administration in the Muslim history. This does not mean that the other juristical works were less important, but because al-Mawardi's work left enduring influence on the Muslim political thought.

Al-Mawardi's\*\* book *Ordinances of Government (al-Ahkam al-Sultaniyah)* was the first in Muslim history to analyse systematically the Islamic State, political science and state administration because he mentioned that the Caliph had ordered him to write such a book. If there was such a literature on the Islamic State available before that time, the Caliph would surely not have issued his command.<sup>119</sup> In the words of Ann Lambton,

*His purpose was to give a legal exposition of the theory of government speculatively derived from the basis of theology and to set out the formal basis of government so that the ruler, knew his rights and duties.*<sup>120</sup>

Not all *al-Ahkam al-Sultaniyah* of al-Mawardi was concentrated on the Caliphate. In fact, only a small portion of the work is devoted to political theory, the rest was devoted to details of administration and rules of government, though these are linked directly to his concept of the Caliph. The significance of this is that an analysis of the Islamic State turns out to be an analysis of the Caliphate, directly or indirectly. In other words, al-Mawardi identified the Islamic State with the office of the Caliphate and the method of his rule. Al-Mawardi's preoccupation was with the internal aspect of the Islamic State. He had little to say on the subject of its external relations with non-Muslim states and individuals, except to note that one of the duties of the Caliph was to wage *Jihad* and in certain circumstances to make the arrangements for non-Muslims to become *Dhimmi*s. This theory left an enduring influence on Muslim political thought, therefore, later writers followed him in identifying the Islamic State with its head, the Caliph. In the introduction of his book he wrote,

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\*\* Abu al-Hassan al-Mawardi (974-1058) regarded as one of the most Muslim systematic political pioneer jurist of his time. He was not only a distinguished judge but also an author of great repute. He was a staunch Shafe'i jurist and had the good fortune of being equally favoured by both the Buwaihids and the 'Abbasids. Al-Mawardi writings include a commentary on the *Qur'an*, a voluminous work on Shafe'i jurisprudence, linguistic treatises, an anthology of aphorisms. His method is narrative and didactic and his major themes are supported by an abundance of quotations from the *Holy Qur'an*, the Traditions, the saying of the Orthodox Caliph, and venerable scholars, renowned for their sagacity or orthodoxy, like al-Hassan al-Basri, as well as numerous unnamed and unidentified philosophers, rhetoricians, and poets. For further details about the Buwaihids see Glassé, Cyril, *The Concise Encyclopædia Of Islam*, Stacy International, London, 1989., p. 80. During the time of al-Mawardi, the Hanbali Jurist Muhammad Ibn al-Fara'a, known as Abu Y'ala wrote a book with the same title and in the same subject. Examining the two books, it could find great similarity between them, they both referred to the same source and quoted from the works of Ibn Sallam, al-Waqidi, Yahya Ibn Adam, and Ibn Ja'far. Examining both books it could be found that Abu Y'ala used the descriptive method by mentioning only the view of the Hanbali School in the *Fiqhi* issues. However, al-Mawardi's book distinguished from Abu Y'ala's by the use of comparative approach in the *Fiqhi* subsidiary issues, al-Mawardi first mentions the Shafe'i view then compare it with the different of the Hanafi and the Maliki views. For further details see Da'wud M. S. & Muhammad F. A., *Al-Imam Abu al-Hassan al-Mawardi*, Alexandria, 1978, pp. 17-18 & Fakhri, Majid, *Ethical Theories In Islam*, E. J. Brill, Leiden, 1991, p. 158 & Al-'Alimi, Khalid AbdulAteaf, *Kitab al-Ahkam al-Sultaniyah li al-Mawardi*, Dar al-Ketab al-Arabi, Beirut, 1990, pp. 9-11.

<sup>119</sup> Rosenthal, E. K. J., *Political Thought in Medieval Islam*, Greenwood Press, Westport, 1985, p. 27.

<sup>120</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. 84.

*As the laws of governance are more applicable to those in authority but because these latter, being occupied with politics and management, are prevented from examining those laws as they are mixed with all the other laws. I have devoted a special book to them. Thus in response to the person to whom my obedience is due in this affair, I have made known to him the madhhabs of the fuqaha' so that he sees both that his rights are respected and that his duties are fulfilled and that he honours the dictates of justice in their execution and aspires to equity in establishing his claims and in the fulfilment of others claims.<sup>121</sup>*

The reason of the state is that God has laid down laws in order that issues might be satisfactorily settled and the principles of right, truth, and goodness may be widely known, as he said in the preface. Then he emphasised the necessity for the *Imamate* or Caliphate, which literally means presidentship, as guaranteeing the existence of the community and found out that the *Imamate* is derived from the *Shari'ah* but not for any other reason. Al-Mawardi says

*The institution of Imamate is necessary as a requirement of the Shari'ah and not as a requirement of reason. The appointment of an Imam by the consensus of the Muslim community is obligatory. The Imamate is established to replace prophecy in the defence of the faith and the administration of the world.<sup>122</sup>*

To put al-Mawardi's idea in modern form: what it means is firstly, that the real motive of the State is the rule of justice and truth, and secondly, it is the machinery of the State which sifts good from the bad, virtue from vice and the sanctioned from the prohibited.<sup>123</sup>

With an entire disregard of the fact of history during the four preceding centuries, al-Mawardi maintains that the office of Caliph is elective. This tells us that his treatise was not an analysis of how government was in fact organised but how it ought, in principle, to be organised. Thus the Caliphate should be organised on the same elective principles as were found among the Rashidoun Caliphs, as opposed to the practice of

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<sup>121</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 16.

<sup>122</sup> *Ibid.*, pp. 29-30.

<sup>123</sup> Sherwani, Haroon Khan, *Muslim Political Thought and Administration*, Munshiram Manoharlal Publisher, 1977, p. 74.

dynastic succession by the Umayyads and 'Abbasid. In the same fashion, he lays down qualifications for the candidates and electors. According to al-Mawardi,

*The instituted by means of election and the electors shall consist of persons with special qualifications, which are justice together with all its condition, knowledge of religion, and wisdom. Candidates must possess certain qualifications including assurance of his senses, assurance of his organs, judgement necessary for the administration and management of the affairs of the subjects, bravery, and descent from Quraish.*<sup>124</sup>

Al-Mawardi then gave quite a mass of detail regarding the election and appointment of the *Imam* and discussed the qualification of voters and candidates. He tried to make the theory fit in with what could be actual fact, namely that almost every *Imam* has one of two ways to be elected.

*Every Imam has to be appointed in one of the two ways, by election or by designation, that is, he may be elected by an electoral college (ahl al-hal wa al-'aqd), or he may be nominated by the reigning Imam.*<sup>125</sup>

Al-Mawardi states that authorised jurists disagree on the number of electors, where some assume that the *Imam* has to be elected by consensus of the *Ummah*, others saw that not less than five persons should elect the candidate, while still others were of the opinion that three persons are sufficient, and the last group held the view that one person is enough to elect the Caliph, namely the current Caliph. However, the Jurist stipulated, in both ways, that the *Ummah* has to agree upon the *Imam* and to give a pledge ('*Aqd*) for allegiance (*Bay'ah*) to him.<sup>126</sup>

In other words, each *Imam* may appoint his successor and yet the elective character of the institution may be preserved. This opinion has been advocated by al-Mawardi to advance another important opinion on the case of two candidates equally qualified for the office of the Caliph,

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<sup>124</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, pp. 31-32.

<sup>125</sup> Ibid., p. 33.

<sup>126</sup> Ibid., 35.

*The electoral college may nominate anyone of the two as Caliph without assigning any reason for the choice.*<sup>127</sup>

Nevertheless, if two people fulfil equally the condition of *Imamate*, the most advanced in years is the preferred choice. The election of a less qualified person in the presence of a more qualified person is legal, provided the former fulfils all the conditions of the *Imamate*. However, if two *Imams* are elected for the *Ummah* in two different towns, the *Imamate* is for the one who was elected first. Therefore, the existence of two *Imams* contemporaneously is illegal.<sup>128</sup> For example, Ann Lambton says,

*One of his [al-Mawardi] motives in this, too, was no doubt, implicitly to refuse recognition to the claims of the Fatimids. That he also incidentally excluded the claims of the Umayyads of Andalus was of little importance since they did not pose, as did the Fatimids, a political threat to the Abbaside.*<sup>129</sup>

However, al-Mawardi's view was not accepted by the classical or the contemporary Muslim scholars. Jurists Ali Al-Ash'ari\* opposed this view when he said,

*The existence of two Caliphs at the same time is possible if their territories are far flung and widely separated by a sea, which hinders easy communication between the two.*<sup>130</sup>

Similarly, AbdulWahab Khallaf, a contemporary Muslim scholar, assumes that,

*It is possible to have numerous Imams when Islam is broad and countries are distant in order to ease of control of the countries' affairs and understand Muslim citizens' needs.*<sup>131</sup>

Muhammad Hamidullah has explained the main cause of the multiplicity of Muslim states. Hamidullah assumes,

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid., pp. 35-38.

<sup>129</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. 90.

\* Ali Ibn Ismael al-Ash'ari (d. 334/935) was the defender of the *Sunni* views during his time against the *Shi'i* and the *Mu'tazilite* doctrines. See *Cambridge History of Islam*, Vol. II, 1970, pp. 812-813.

<sup>130</sup> Engineer, Asghar Ali, *The Islamic State*, Advent Books, New York, 1980, p. 73.

<sup>131</sup> Khalaf, Abdulwahab, *Nizam al-Dawlah al-Islamiyyah*, Dar Al-Ansar, Cairo, 1397 AH, p. 25.

*In the beginning there was no possibility of having more than one Muslim state. When Islam spread far and wide, and the Muslims did not form a compact whole with continuous and contiguous frontiers, the division of Islamic territory into many states was inevitable . . . With the downfall of the Umayyads, Spain became independent of the East. The Caliph Haroon al-Rashead created a buffer-state in North Africa, in a country where three realms met- the 'Abbaside Empire, the Idrisite Kingdom and the Umayyads Dominions of Spain; and handed it over to the family of Aghlabites who exercised full independence.<sup>132</sup>*

In spite of all changes which happened within the 'Abbaside dynasty during its decline in the power and the rise of other Islamic states, such as the Umayyad in Spain and the Fatimid in Egypt, it is remarkable that there was no one outside the 'Abbaside Caliph in Baghdad who had the courage to proclaim himself the successor of the Prophet or hold the title of the Caliph, a fact which proves the sanctity of the office of the Caliph even in the hour of its agony.<sup>133</sup>

Al-Mawardi then specified the public, religious, legal, and military functions and duties of the *Imam*. Among the important elements of the *Imam*'s duties are: (1) to defend the *Ummah* against its enemies; (2) restrain oppression and redress grievances; (3) enforce and exact the *Shari'ah*'s punishments; (4) maintenance of law and order to make people lead a peaceful life, and proceed in their economic activities freely, and travel safely; (5) organising and prosecuting *Jihad* against those who refuse to embrace Islam after being invited to do so. To prosecute this until they accept Islam or enter into a contract and became *Dhimmi*s; (6) collecting of *Kharaj* and *Zakat* without extortion or pressure, fixing of allowances and stipends from the state treasury *Bait al-Mal* to those who deserve, appointment of honest and sincere men to the principal offices of states to secure effective administration; (7) look into and apprise himself of the affairs of his dominions so that he may himself direct the national policy without engrossing himself in luxury or religious devotion are also the important duties of an *Imam*, according to Mawardi. Writing on the Caliph al-Mawardi said,

*When a person is duly elected as Imam then this should be announced in public, then people entrust all their affairs to him*

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<sup>132</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, p. 88.

<sup>133</sup> Sherwani, Haroon Khan, *Muslim Political Thought and Administration*, Munshiram Manoharlal Publisher, 1977, p. 71.

*and must give him their unquestioning obedience, and they must obey him.*<sup>134</sup>

It is permitted for the *Imam* to be addressed as the Caliph of the Prophet of God *Kalifat Rasoul Allah*, because he succeeded the Prophet of the God in his *Ummah*, said al-Mawardi. In general, the title *Khalifa*, which in the West became Caliph, means somebody who stands in the place of another, that is the absence or death of another person. However, Jurists were opposed to allowing the Caliph to be addressed as “the Caliph of God”, considering it a sort of libertinism; “succession is for someone who is absent or dead, but God is neither absent nor dead”.<sup>135</sup> When the first Caliph Abu Bakr was addressed as “Caliph of God” he said, “I am not the Caliph of God but the Caliph of the Prophet of God”.<sup>136</sup> The duty of the Caliph is to defend the faith, dispense justice, lead in prayer and in war, all in one. He is bound by the legislation (*Share'a*) to the loyal, effective discharge of these duties, either in person or by delegating his authority to his appointed officials, chief among them the minister (*Wazir*) and the judge *Qadi*, or, more often, to non-official persons who have usurped his effective power by force.<sup>137</sup>

On the basis that the duty of all Muslims is obedience to legitimate authority, al-Mawardi forbids the Caliph to be removed from office unless he is affected by some definite change in his physical or mental ability. Al-Mawardi sees that the *Imam* could forfeit his position on account of one of the following reasons:

1. The loss of probity on his part by reason of evil conduct or heresy. This is of two kinds:
  - (a) If he becomes a slave to his inordinate desires and flouts the prohibitions of the *Shari'ah*.
  - (b) The one connected with his faith, that is, if he holds opinions contrary to the principles of religion or twisted opinions as amounts to an abrogation of the accepted principles of Islam.

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<sup>134</sup> *Ibid.*, p. 50.

<sup>135</sup> Crone, Patricia & Hinds, Martin, *God's Caliph*, Cambridge University Press, Cambridge, 1986, p. 4.

<sup>136</sup> *Ibid.*

<sup>137</sup> Rosenthal, Erwin I. J., *Political Thought in Medieval Islam*, Greenwood Press, Westport, 1985, p. 26.

2. If there occurs a change in his person:

- (a) Loss of his Physical senses, that is, if he loses his mental faculties and his sight.
- (b) Loss of bodily organs, that is, if he loses two hands or feet.
- (c) Loss of personal ability to supervise and direct, that is, if:
  - (i) He is over-powered by one of his officials and his rule was opposed to the principles of religion and justice.
  - (ii) If he is captured by the enemy and there is no hope of his deliverance.<sup>138</sup>

However, some Muslim jurists stipulated the full obedience of the Muslims to their Imam, even if he was unjust (but he did not disobey God such as by committing sin). The Hanbali jurist Ibn Batta, for example, observed,

*You must abstain and refrain from sedition. You must not rise in arms against the Imams, even if they be unjust. The Caliph Umar said "if he [the ruler], oppress you, be patient; if he dispossess you, be patient." The Prophet, may God bless and save him, said to Abu Dharr: "Be patient, even if he be an Ethiopian slave."<sup>139</sup>*

If the *Imam* is over-powered by one of his legal officials who appropriates all authority to himself, but does not openly defy the *Imam*, the *Imam* continues in his office, provided the usurper rules in accordance with the injunctions of the *Shari'ah*, and in deference to the accepted norms of justice. This is to ensure that the functions of the *Imamate* should continue to be performed, and that the people do not fall prey to the ways of evil on account of the non-enforcement of the *Shari'ah*. If the governor or the usurper declares his allegiance to the Caliph and promises to maintain the unity of the Caliphate, and enforces the laws of *Shari'ah*, and co-operates with the *Imam* against the foes of Islam, the Caliph shall recognise his absolution by conferring on him the deed of investiture formally and publicly.<sup>140</sup>

<sup>138</sup> ShamsAldean, Muhammad Mahdi, *Nidham al-Hukm wa al-Idarah fi al-Islam*, 2<sup>nd</sup> Edit., Al-Mu'sasa al-Dowaliyya li al-Dirasat wa al-Nashr, Beirut, 1991, pp. 168-182.

<sup>139</sup> Lewis, Bernard, *The Political Language of Islam*, University of Chicago Press, 1984, pp. 101-102.

<sup>140</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, pp. 53-60.



Ibn Khaldoun, the pioneer Islamic thinker, places the State most positively in the centre of his intellectual concerns. Like al-Mawardi, the state (*Dawla*) in Ibn Khaldoun's understanding means government (or regime in power) but not a territorial 'structure with a juristic personality' that sues and can be sued.<sup>141</sup> The *Dawla* is a mix, it is composed of a natural dynamic factor which is tribal or group-mind solidarity '*Asabiyyah*', to which are added elements that result from the very existence of the State itself. Some of these are material, such as the accumulation of finance through tax extraction and the mobilising of armies using this money, and the appearances of royal grandeur and luxury. Others are psychological, derived from the people becoming used to submitting to its will and believing it their duty to do so.<sup>142</sup> Ibn Khaldoun conceives '*Asabiyyah*' as a social and ethnic identity based on kinship when he states that,

*Social solidarity is found only in groups related by blood ties or by other ties which fulfil the same function.*<sup>143</sup>

*Asabiyyah*, derived from *Asab* (meaning nerve), signifies internal cohesion, often brought about by unity of blood or faith. In the state setting, unity is brought about through the use of the force; but in an *Asabiyyah* setting; it arises voluntarily through the sharing of moral bonds, descent, marriage, ethnic origin, tribal affinity, faith or through some or all of these mixed together. According to Ibn Khaldoun, the *Asabiyyah* structure reaches its zenith when it blends with religion leading to conquest, as happened at the dawn of Islam. An *Asabiyyah* arrangement is always distinguished by two criteria: first, the element of exclusiveness, the groups' image of itself as unique; second, the non-hierarchical structure of its authority.<sup>144</sup>

However, it is this very '*Asabiyyah*' of the Arabs (as well as of other nomadic peoples studied by Ibn Khaldoun such as the Persians, Kurds, Turks and Berbers) who are the main factor in the downfall of their states and the ups and downs of their government. For not only does this '*Asabiyyah*' lose its vigour with the passage of

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<sup>141</sup> Khuri, Fuad I., *Imams and Emirs*, Saqi Books, London, 1990, p. 53.

<sup>142</sup> Ibn Khaldoun, Abdurrahman Ibn Muhammad, *Al-Moqademah*, Al-Maktabah al-'Asryah, Beirut, 1995, p.143.

<sup>143</sup> Ibid. p. 124.

<sup>144</sup> Khuri, Fuad I., *Imams and Emirs*, Saqi Books, London, 1990, pp. 52-53.

time, but as it assumes power its appetite for consumption and luxury expands, and the victors 'expenses will exceed their income', pushing people into more extraction and confiscation of wealth from the society, 'whereupon those who run factories and production get weaker, and with their weakness the head of the state weakens and his power wanes, and the state eventually falls'.<sup>145</sup>

Ibn Khaldoun, moreover, assumes that religion is a binding force which helps in the formation of states. There is also the secular or semi-secular form of the state, the basis of which is not a Prophetic mission, kingship (*Mulk*) or Dominion pure and simple, though even here religious precepts may play an important part. Here the unity of purpose or group-mind solidarity '*Asabiyyah*' must be the sense of unity and the resolve to work together for a definite purpose which goes a long way towards making strong and free nations.<sup>146</sup>

Ibn Khaldoun then distinguishes three kinds of regime according to its government and purpose: *Siyasah Diniyah*, politics (not government as it has been rendered by Rosenthal) based on the divinely revealed law (*Shar'*), the rational (not ideal as Rosenthal claims) Islamic theocracy; *Siyasah 'Aqliyah*, politics based on a law established by human reason; and *Siyasah Madaniyah*, politics of the ideal State of the philosophers, *Madinah Fadilah*, as in the writings of the Greek philosopher Plato.<sup>147</sup>

The state as such is the natural result of human life which requires association '*Ijtima*' and organisation: "human association is necessary; the philosophers express this in the saying: 'man is a citizen by nature'. This means that association is indispensable; it is civilisation *Madaniyah*, in their terminology synonymous with '*Umraun*'. Mutual help is necessary to satisfy man's need for food, clothing and housing, and man must unite with many of his kind to assure his protection and defence. Experience forces men to associate with others and experience, together with reflection, enables man to live. In addition to this rational explanation Ibn Khaldoun States that "this association

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<sup>145</sup> Al-Jabiri, Muhammad, *Al 'Asabiyyah wa al Dawla*, Dar Al Nashr Al Maghrabiyyah, Casablanca, 1982, p. 404-405

<sup>146</sup> Sherwani, Haroon Khan, *Muslim Political Thought and Administration*, Munshiram Manoharlal Publisher, 1981, p. 141.

<sup>147</sup> Rosenthal, Erwin I. J., *Political Thought In Medieval Islam*, Greenwood Press, Westport, 1985, p. 86.

is necessary for mankind, otherwise their existence and God's will to make the world habitable with them would not be perfect".<sup>148</sup>

In the classical Islamic literature, there is a common agreement that the paramount function of the Islamic State is to equalise the deployment of justice and freedom of belief among mankind. The Islamic State is responsible for emancipating man and allowing him freely to decide upon his own belief and practice.<sup>149</sup> In the modern period, Abu al-'Ala a-Maududi delineates the functions of the Islamic State as,

*The object of the [Islamic] state is not merely to prevent people from exploiting each other, to safeguard their liberty and to protect its subjects from foreign invasion. It also aims at evolving and developing that well-balanced system of social justice which has been set forth by God in His Holy Book. Its object is to eradicate all forms of evil and to encourage all types of virtue and excellence expressly mentioned by God in the Holy Qur'an . . . A state of this sort cannot evidently restrict the scope of its activity. Its approach is universal and all-embracing.*<sup>150</sup>

The previous aims of the Prophet's state at Madinah were the major concern and subject of the Islamic State thereafter. Islam had concentrated on them because the attainment of all other purposes and functions depends on the success of the Islamic state in securing the highest degree of order, consistent with the liberty of individuals and groups in Islamic society. This responsibility is articulated in the following *Holy Qur'anic* verses:

قاتلوا الذين لا يؤمنون بالله ولا باليوم الآخر ولا يحرمون ما حرم الله ورسوله ولا  
يدينون دين الحق . (التوبة: ٢٩)

**Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the Religion of Truth... (9: 29)**

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<sup>148</sup> Ibid.

<sup>149</sup> Al-Meheari, Saeed Abdullah, *Al-'Alaqat al-Kharejiyyah li al-Dawla al-Islamiyyah*, Muasat al-Resalah, Beirut, 1995, p. 29

<sup>150</sup> Maududi, Abul A'la, *Political Theory of Islam*, Islamic Publications, Lahore, 1978, p. 30.

Accordingly, Muslims bear firmly the responsibility to fight those who are iniquitous, who enforce their own thought and creed upon other people.<sup>151</sup>

إنما السبيل على الذين يظلمون الناس ويبغون في الأرض بغير الحق أولئك لهم عذاب عظيم. (الشورى: ٤٢)

**The blame (to fight and/or oppress) is only against those who tyrannise mankind and unlawfully commit outrages on the earth, those shall have a painful chastisement. (42: 42)**

According to Muhammad al-Saboni

*Under this structure the responsibility for Muslims, who have been appointed to be in the middle of the road, between two extremes, not purely religious, not purely secular.*<sup>152</sup>

Likewise, the function of the Islamic State may be defined in terms of the particular activities in which it engages. It has been mentioned earlier that among the traditions of the Islamic Law, *Shari'ah*, equalises the deployment and diffusion of justice and guarantees freedom of belief and thought among those who live within the Islamic territories. Both the Islamic authority and the *Ummah* have to be fully responsible toward those who are tyrannised by their own rulers and who are exposed forcefully and without their express consent to a certain thought or creed. This is confirmed by al-Kasani in his book *Bada'ea al-Sanay'a*,

*According to the Islamic Shari'ah, the Muslim authority is fully responsible for emancipating people and allowing them freely to decide upon their own belief and practice.*<sup>153</sup>

From these important sources on the nature of the Islamic State it is clear that it is not the purpose of that State, as a powerful political body, to perform any political or social roles in directing the attention of its subjects, or manipulating them, toward specific policies in order to facilitate the politicians dominant function. The Islamic State's main objective is to apply and enforce Islamic Law which is fully accepted by

<sup>151</sup> Al-Khawarezmi, Abu al-Qasim Mahmoud al-Zamakhshari, *Al-Kashaf*, Vol. II, Dar al-Fikr, p. 186.

<sup>152</sup> Al-Saboni, Muhammad Ali, *Mukhtasar Tafseer Ibn Katheer*, Vol. III, Dar al-Hadeeth, Cairo, p. 281.

<sup>153</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. VII, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p 113.

its citizens, who give their ultimate consent to their rulers to implement the terms and the provisions of the Islamic Law upon them.<sup>154</sup> It is also noteworthy that Ibn Khaldoun, like al-Mawardi, has little to say about the relationship between the Islamic State and non-Muslims.

The core of this chapter is focused on the fundamental principles of the Islamic State in order to establish its nature and relations with non-Muslims states, groups, and individuals. An important modern author, Abdulrahman Kurdi, in his pioneer work *The Islamic State* summarised the principles of the Islamic State as follows,

1. *Sovereignty*. The essence of sovereignty is the power of command and such a command must issue from a single will. Moreover, it has been noted earlier in this chapter that one of the main differences between the Islamic State and other states is sovereignty. The Islamic Law declared the essence of sovereignty to be the power to command and this supreme power must always belong to God Himself and to His revealed Messages. In the *Holy Qur'an*

ثم ردوا إلى الله مولاهم الحق ألا له الحكم وهو أسرع الحاسبين . (الأنعام: ٦٢)  
Then are they returned unto Allah, their True Protector, surely His is Command, and He is the Swiftest in taking account. (6:62)

... إن الحكم إلا لله أمر أن لا تعبدوا إلا إياه . . . (يوسف: ٤٠)  
... the Command is for non but Allah: He hath commanded that ye worship non but Him. (12:40)

لَا إِلَهَ إِلَّا هُوَ كُلُّ شَيْءٍ هَالِكٌ إِلَّا وَجْهَهُ لَهُ الْحُكْمُ وَإِلَيْهِ تُرْجَعُونَ . (القصاص: ٨٨)  
Everything (that exists) will perish except His Face. To Him belongs sovereignty and to Him you will be returned. (28:88)

These verses confirm that in the Islamic system the absolute sovereign, or command as it has been translated in some verses, is only for God alone and by extension sovereignty belongs to His final revealed message of Islam, as Muslims believe. However, the Islamic Law has bestowed upon the Islamic *Ummah* and upon its leadership a special sovereign power to be exercised when necessary.<sup>155</sup>

<sup>154</sup> Kurdi, Abdulrahman, *The Islamic State*, Mensell Publication Limited, London, 1984, p. 65.

<sup>155</sup> *Ibid.*, p. 37.

The Islamic conception of the sovereignty of God is perfectly straightforward and understandable. However, the sovereignty of the Caliph means the ultimate responsibility within the *Ummah* rests with him.<sup>156</sup>

2. *Justice*: Islam seeks to set up a just society and, therefore, attaches the greatest importance to justice, equity, and fair dealing. Initially, God in the *Holy Qur'an* mentions that,

والسما خلقها ووضع الميزان . (الرحمن: ٧)

And the Firmament has he raised high, and He has set up the balance of Justice. (55: 7)

إن الله يأمر بالعدل والإحسان وإيتاء ذي القربى وينهى عن الفحشاء والمنكر والبغى يعظكم لعلكم تذكرون . (النحل: ٩٠)

Allah commands justice, the doing of good, and giving to kith and kin, and He forbids all indecent, and evil and rebellion. He instructs you, that ye may receive admonition. (16: 90)

Then Allah commands Muslims,

يا أيها الذين آمنوا كونوا قوامين بالقسط شهداء لله ولو على أنفسكم والوالدين والأقربين إن يكن غنيا أو فقيرا فالله أولى بهما فلا تتبعوا الهوى أن تعدلوا وإن تلووا أو تعرضوا فإن الله كان بما تعملون خبير . (النساء: ١٣٥)

Oh ye who believe, stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents or your kin and whether it be against rich or poor; for Allah can best protect both. Follow not the lusts of your hearts lest ye swerve and if ye distort justice or decline to do justice, verily Allah is well acquainted with all that ye do". (4: 135)

إن الله يأمركم أن تؤدوا الأمانات إلى أهلها وإذا حكمتم بين الناس أن تحكموا بالعدل . (النساء: ٥٨)

Allah doth command you to render back your Trusts to those to whom they are due, and when ye judge between people that ye judge with justice. (4: 58)

Justice, moreover, is placed next to piety in different places in the *Holy Qur'an* such as,

والله يقضي بالحق والذين يدعون من دونه لا يقضون بشيء . (غافر: ٢٠)

<sup>156</sup> Rosenthal, E. K. J., *Political Thought in Medieval Islam*, Greenwood Press, Westport, 1985, p. 47.

**And Allah will judge with Justice and Truth: but those whom invoke besides Him, will not (be in position) to judge at all. (40:20)**

God is the Fountainhead of justice and the doing of justice is a religious duty. The entire community is responsible because no one dares to harm or encroach upon the rights of others. Since justice had to be done in God's name and according to His laws no one was above the law of God and there was no immunity from it for anyone. Indeed, the Prophet Muhammad himself never claimed any immunity. In short, everyone was equal before the law and enjoyed equal opportunities. The most important consequence of this was that appointments were made on the basis of merit alone and not on the ground of kinship, wealth or status.<sup>157</sup> Ibn Taymiyyah, for example, explain the nature of justice within the Islamic State when he said,

*The integrity of the official is essential for the preservation of public order and morale, and since the governor of the Muslim state is obliged to "command the good and forbid the evil" the political organisation of the Muslim community is superior to that of any other state. Justice has its origin and justification in the command of God.*<sup>158</sup>

In Islam, the judiciary has been made entirely independent of the executive. The task of the judge (*Qadi*) is to implement and enforce God's laws among His servants. He does not sit on the seat of justice in the capacity of a representative of the Caliph, or whoever is in authority, but as a representative of God. The *Qadi* is fully authorised to apply the law of God to the Caliph just as to any ordinary individual.<sup>159</sup> In his efforts to administrate and organise the judiciary, Caliph Umar I separated the judiciary from the other organs of the Islamic State departments, and set up an institution of juriconsults *Ifta'* consisting of capable and trustworthy scholars of law *Muftis* to give their legal opinions on its application and so to assist the *Qadi* and the public.<sup>160</sup> In the case of the administration of justice, moreover, the *Qadis* give due consideration to the local customs and habits of the people and accept them when they were not in conflict with the law laid down by Islam. It is narrated that Ibn Na'im, who was appointed a *Qadi* of

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<sup>157</sup> Al-Tabari, Mohamad Ibn Jarear, *Jami' al-Bayan 'an Ta'weal al-Qur'an*, Vol. XII, Dar al-Fikr, Beirut, 1995, p. 68.

<sup>158</sup> Rosenthal, E. K. J., *Political Thought in Medieval Islam*, Greenwood Press, Westport, 1985, p. 55.

<sup>159</sup> Maududi, Abul A'la, *Political Theory of Islam*, Islamic Publications, Lahore, 1980, p. 44.

Egypt in 737 AD, that he used to listen to the Copts speaking in their own language. Not only that, he talked to them in their language, and listened to the witnesses in their language and delivered his judgements in that language.<sup>161</sup>

Social justice in Islam was institutionalised by Islam when Muslims were (and are) required to pay *Zakah*, a voluntary charity for the poor, fix shares of inheritance for women and children, and a host of regulations regarding the just treatment of debtors, widows, the poor, orphans (90: 13-16) and slaves (24: 33). Those who practice usury are sternly rebuked and warned that they face “war from God and his Prophet”.<sup>162</sup>

If the rulers implement the justice of the *Shari'ah* among the citizens, who are thereby equal in their rights and duties, then it is the just Islamic State. The opposite is the unjust state in which groups of Muslims live together and dissent from the legal *Imam* for some specific reason/s. They may become fortified in their lands, choose another ruler and establish an army and have their own security.<sup>163</sup> The injustice of this state lies in the usurpation of a legal and legitimate ruler.

3. *Brotherhood*: in the *Holy Qur'an* God describes Muslims as brothers and protectors of one another, with a warning that unless they protect each other there will be tumult and oppression on earth. The Prophet Muhammad explained this concept when he said,

***The relationship of the believer for another believer is like the building, one supporting the others.***<sup>164</sup>

Among the principle priorities of Islam is the formation of the feeling of solidarity between all Muslims. This solidarity started when the Prophet and his few followers were bound together by the tie of faith against their pagan compatriots who sought their destruction. To the Prophet Muhammad, the principle of fraternal solidarity and brotherhood among Muslims was of transcendent importance and he succeeded in

<sup>160</sup> Ibn Khaldoun, AbdulRahman Ibn Muhammad, *Al-Moqademah*, Al-Maktabah al-'Asryah, Beirut, 1995, pp. 204-207.

<sup>161</sup> Iqbal, Afzal, *The Culture of Islam*, Institute of Islamic Culture, Lahore, 1967, p. 207.

<sup>162</sup> Esposito, John L., *Islam The Straight Path*, Oxford University Press, New York, 1991, p. 31.

<sup>163</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p. 170.

<sup>164</sup> Al-Nawawi, Yahya Ibn Sharaf, *Riyadh al-Saliheen*, Vol. 1, Dar al-Fikr, Beirut, 1993, p. 218.



implanting this so deeply in Muslim hearts.<sup>165</sup> In the infant Muslim society of Madinah he melted the distinction between the migrants *Muhajirun* and the supporters *Ansar* and imparted to them the injunction about the general structure of brotherhood,

إنما المؤمنون إخوة . (الحجرات: ١٠)

**The believers are but a single Brotherhood. (49: 10)**

Washington Irving illustrated this brotherhood between the *Muhajirun* and the *Ansar* when he said,

*To give them a new home, and link them closely . . . Mohamet [the Prophet Muhammad] established a brotherhood between fifty-four of them and as many of the inhabitants of Medina. Two persons thus linked together were pledged to stand by each other in weal and woe; it was a tie which knit their interests more closely even than of kindred.*<sup>166</sup>

Muslim brotherhood is not based on economic interests, race, or colour. It is based on Truth as revealed by the One True God. Not only is this brotherhood based on faith, it is also a part of the faith.<sup>167</sup> Consequently, the structure of the *Ummah* is based on the belief that Muslims contentedly follow, namely, that Islam made all Muslims brothers under the patronage of its exalted faith and determined this brotherhood among the faithful to be a nationality and classified all rights and duties accordingly. The Prophet said,

***The believers in their mutual kindness, compassion and sympathy are like the body. If one of the organs is afflicted, the whole body responds to it with wakefulness and fever.***<sup>168</sup>

It is true that sometimes a Muslim will dispute with another Muslim, and at times they fight, but this is not a permanent situation. L. Stoddard explained this when he said,

*The bond between Moslem and Moslem is . . . much stronger than that between Christian and Christian. Of course Moslems*

<sup>165</sup> Stoddard, Lothrop, *The New World Of Islam*, Chapman and Hall Ltd., London, 1921, p. 37.

<sup>166</sup> Irving, Washington, *Life of Mahomet*, Henry G. Bohn, London, 1852, p. 89.

<sup>167</sup> Khalid Baig, Faith and Fraternity, *Impact International*, Vol., 28, No. 3, March 1998, p. 5.

<sup>168</sup> Al-Nawawi, Yahya Ibn Sharaf, *Riyadh al-Saliheen*, Vol. I, Dar al-Fikr, Beirut, 1993, p. 219.

*fight bitterly among themselves, but these conflicts never quite lose the aspect of family quarrels and tend to be adjourned in presence of infidel aggression.*<sup>169</sup>

Relations between Muslims are therefore quite different in character from their relations with non-Muslims. Within the *Ummah*, where the ties of brotherhood unite all Muslims, relationships are always internal to the group. Those outside the group, non-Muslims, therefore have a different relationship with Muslims; it is intrinsically external. In principle then, international relations are relations between Muslims and non-Muslims, a relationship based upon revelation in the *Holy Qur'an*.

4. *Shura, the mutual consultation*: *Shura* is used in Arabic to denote a discussion held by a group of people in order to reach a firm decision in any matter. It can also be a discussion of alternatives for a person who seeks an opinion concerning a certain problem. Of the alternatives provided he then chooses one as a solution.<sup>170</sup> Among the Prophet's teaching to his Companions was the practice of *Shura* by consulting them on matters about which there was no revelation in the *Holy Qur'an*. He did that according to the *Qur'anic* teaching,

وشاورهم في الأمر فإذا عزمت فتوكل على الله إن الله يحب المتوكلين . (آل عمران: ١٥٩)

**Consult them (the believers) in matters of administration and when thou art resolved, then put thy trust in Allah. (3: 159)**

The Prophet aimed to accustom his Companions to think about general problems because he was concerned about teaching them to feel responsibility. He also wanted to apply God's command to institute *Shura* and accustom the *Ummah* to practise it. Consultation is useless if there is no freedom for expressing personal opinion. The Prophet Muhammad never blamed any of his Companions for making mistakes. The Prophet's teaching about the characteristics of successful leadership was emphasised to implement *Shura*. However the ruler should not waver once he has taken a decision and begun to act upon it. To waver might shake the peoples' confidence in him and

<sup>169</sup> Stoddard, Lothrop, *The New World Of Islam*, Chapman and Hall Ltd., London, 1921, p. 38.

<sup>170</sup> Kurdi, Abdulrahman, *The Islamic State*, Mensell Publication Limited, London, 1984, pp. 69-70.

lead to confusion among his followers.<sup>171</sup> The *Holy Qur'an* laid down the principle of *Shura* to guide the decision-making process of the community.

والذين استجابوا لربهم وأقاموا الصلاة وأمرهم شورى بينهم ومما رزقناهم ينفقون .  
(الشورى: ٣٨)

**Those who respond to their Lord, and establish regular prayer;  
who conduct their affairs by mutual consultation. (42: 38)**

A kind of *Shura* founded by the *Holy Qur'an* was the power for Muslims to choose their leadership. The *Holy Qur'an* does not provide specific details concerning suffrage or procedure for the election but requested from Muslims to settle all their affairs through *Shura*. Since public authority is a trust given to the person or persons on behalf of the *Ummah* to decide upon a course of conduct by *Shura*.<sup>172</sup> The first regulation of selecting the *Imam* was made by Caliph Umar I. The Caliph arranged that after his death five of the most distinguished of the old Companions of the Prophet should decide as to whom among themselves ought to succeed.<sup>173</sup>

According to the *Shari'ah*, authority and power to rule are trust *Amanah* of the people and not birth-right of anyone.

إن الله يأمركم أن تؤدوا الأمانات إلى أهلها وإذا حكمتم أن تحكموا بالعدل . (النساء: ٥٨)

**Allah doth command you to render back your Trusts to those to whom they are due; and when ye judge between people that ye judge with justice. (4: 58)**

This trust is indicated in another place in the *Holy Qur'an*,

الذين إن مكنهم في الأرض أقاموا الصلاة وآتوا الزكاة وأمروا بالمعروف ونهوا عن المنكر والله عاقبة الأمور . (الحج: ٤١)

**. . . establish regular prayer, pay Zakah and enjoin good upon the people and to restrain them from committing wrong. (22: 41)**

<sup>171</sup> Umari, Akram Diyab, *Madinan Society at the Time of the Prophet*, Vol. II, The International Institute of Islamic Thought, Herndon, 1995, p. 38, 55.

<sup>172</sup> Ahmed, Mumtaz, *State Politics and Islam*, American Trust Publications, Indianapolis, 1986, p. 35.

<sup>173</sup> Noldeke, Theodore, *Sketches From Eastern History*, Adam and Charles Black, London, 1892, pp. 77-78.

Muslims in their Islamic State, form a religious group tied by a unified religion and belief. At the same time, they form a political group tied by faithfulness and belonging to one nation. Islam is their religion, nationality, belief, worship, and rule. The constitution of their state is the *Shari'ah* which controls its rulers wills and desires, and forms their sovereignty. Their State is free to conduct its foreign affairs through the ruler, determine its peaceful relations with others based on equal sovereignty, again through the ruler, and it is free to declare war within the limitations imposed by the *Shari'ah*, once again through the *Imam*.

Lastly, Islam had been criticised recently that it is a single party religion, in which Muslims are not free to exercise any kind of political liberty. In reality, it must be said that because all Muslims embrace one doctrine, acknowledge, and ideological system which is Islam, this prevents any Muslim from nominating himself or asking to be appointed in any official position. Ibn Taymiyyah argues that the Prophet Muhammad insisted on avoiding running after public office or political position.<sup>174</sup> He supported his view by the following *Hadiths*,

**Abu Musa, said: I entered the Prophet's house with two men of my clan: both of them asked the Prophet, saying: O Messenger of God, would you please appoint us in one of these public offices which God has put in your hands?' The Prophet said: We, by God's name, do not appoint to the public offices [in our state] those who ask for them, nor anyone who is covetous for such a thing.**<sup>175</sup>

**AbdulRahman Ibn Samarah said: 'The Prophet told me: "O AbdulRahman, do not ask for public office, because if it has been given to you accordingly, you will be left to depend on yourself; but if you have been assigned to such an office without requesting it, you will be backed on this appointment by God."**<sup>176</sup>

**Abu Dharr al-Ghafari, said to the Prophet: "O Messenger of God, do you intend to assign me to one of these public offices?" The Prophet puts his hand on my shoulder saying: "O Abu Dharr you are such a delicate person, and authority is a trust as it will be a cause of humiliating regretfulness on Resurrection Day, but not**

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<sup>174</sup> Ibn Taymiyyah, TaqulDean Ahmed, *Al-Sysasah al-Shar'iyah*, Dar al-M'arifah, Beirut, 1969, p. 6.

<sup>175</sup> Matraji, Mahmoud, *Translation of Saheh Muslim*, Vol. III A, Dar al-Fikr, Beirut, 1993, p. 476.

<sup>176</sup> Ibid.

**for those who fulfil its obligation, and properly give the duties required thereon.”<sup>177</sup>**

**Abu Y’ala Ma’qil Ibn Yassar said: ‘I heard the Prophet say: “Any one who becomes responsible, by God ordained [holding such public office] and he cheats therein until his death. God has forbidden him to enter paradise.”<sup>178</sup>**

Therefore, it can be concluded from previous *Hadiths* that the main reason for not accepting self nomination is that public offices in the Islamic state are great burdens which will be accounted for by God in addition to personal deeds. They are, absolutely, not honorary social ranks or a means to make fortunes. Hence, Islam forbids people to ask for public office.

In summary, the Islamic State is conceived by Muslim authors primarily in terms of the ruler and his government. This was because the *Ummah* was understood to be a community united by its Divine law and religion. Unlike modern states in international law, which are conceived as legal entities where their municipal laws have a territorial jurisdiction, the Islamic State was not understood as a legal entity, but as a legitimate power whose main function was to implement the *Shari’ah* among the community of Muslims who were united by it. In their discussions of the Islamic State, the Muslim authors were pre-occupied with its internal aspects rather than its relations with non-Muslims. Insofar as the external relations of the Islamic State were discussed, the authors restricted their analysis to the duty of *Jihad* and the position of *Dhimmis* within the State. The important point for this thesis was that the Islamic State acts towards other non-Muslim states and non-Muslim groups and individuals through its Head, the ruler of *Imam*.

### **3.6) Groups of non-Muslims**

According to the *Shari’ah* people divided into two groups no matter what their races, nationalities, or colours:

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<sup>177</sup> *Ibid.*, p. 480.

<sup>178</sup> Al-Nawawi, Yahya Ibn Sharaf, *Riyadh al-Saliheen*, Vol. I, Dar al-Fikr, Beirut, 1993, p. 516.

- 1) Those who accepted and believed in Islam and its: teaching, book, and the Prophet Muhammad. These are called the Muslims or the believers;
- 2) Those who rejected Islam and its contents, they called non-Muslim or unbelievers. In the *Holy Qur'an*,

هو الذي خلقكم فمنكم كافر ومنكم مؤمن والله بما تعملون بصير . (التغابن: ٢)

**It is He Who has created you: and of you are some that are Unbelievers, and some that are Believers: and Allah sees well all that ye do. (64: 2)**

This division has a very important role in the legal stance of individuals inside the Islamic State, which created different rights, duties, and obligations for the believers and other categories within the Islamic State, and in applying the Islamic judgements upon each group.<sup>179</sup> The *Shari'ah* also regulates the relations between Muslims and those non-Muslims who live outside the Islamic State. There are some significant differences between the *Shari'ah* rules which apply to non-Muslims within the Islamic State and those who live outside it. Islam further distinguished within the category of unbelievers so that the rights and duties of both the Muslims and the non-Muslims will vary according to which type of non-Muslim groups in being considered. The *Holy Qur'anic* moreover categorised mankind according to,

إن الذين آمنوا والذين هادوا والصابئين والنصارى والمجوس والذين أشركوا إن الله

يفصل بينهم يوم القيامة إن الله على كل شيء شهيد . (الحج: ١٧)

**Those who believed, those who follow the Jewish, and the Sabians, Christians, Magians, and Polytheists, Allah will judge between them on the Day of Judgement, for Allah is witness of all things. (22: 17)**

According to the *Qur'anic* categorisation of mankind, the groups of non-Muslims are the Jews, the Sabians, the Christians, the Magians, the Polytheists elsewhere in the *Holy Qur'an* two other non Muslim groups mentioned – *Apostates* (45: 24) and *Polytheists* (4: 116). The Jews and the Christians called as the *People of the Book*.

A. *The People of the Book*. They are defined further as scripturaries, they are the eldest and best known group in the Islamic Law, having been mentioned in the *Holy Qur'an* and *Hadith* in various places. They are the nearer to the idea of *Towhead*, that

they worship God and believe in the Prophets, but they deny the Prophethood of Muhammad. Therefore, the Islamic legislation toward them differs from the other non-Muslim groups.<sup>180</sup> However, jurists differ in defining this group. The Hanafites, for instance, define them, as those who believe in any Divine religion and have scriptures such as the Bible, the Torah, and the Psalms.<sup>181</sup> Jurists of Hanbalite and Shafei'ite, however, restricted this character to the Jews and Christians only,<sup>182</sup> based on the *Holy Qur'anic* verse,

(الأنعام: ١٥٦) . . . أن تقولوا إنما أنزل الكتاب على طائفتين من قبلنا . . .  
**Lest ye should say: The Book was sent down to two Peoples  
 before us . . . (6: 156)**

Both Jews and Christians were mentioned in the *Holy Qur'an* in different verses such as,

إن الذين آمنوا والذين هادوا والصابئين من آمن بالله واليوم الآخر وعمل  
 صالحا فلهم أجرهم عند ربهم ولا خوف عليهم ولا هم يحزنون . (البقرة: ٦٢)  
**Those who believe and those who follow the Jewish and the  
 Christians and the Sabians, any who believe in Allah and the Last  
 Day, and work righteousness, shall have their reward with their  
 Lord; on them shall be no fear, nor shall they grieve. (2: 62)**

Lambton has argued that this group *Ahl al-Kitab* has been enlarged over time.

*There was some difference of opinion as to those who might be  
 admitted to this status. Originally . . . Jews, Christian and  
 Sabaeans; Zoroastrians were later added and given the status of  
 Ahl al-Kitab.*<sup>183</sup>

Some Muslim jurists of the Mughal Empire in India have even claimed that the *Polytheists* Hindus were *People of the Book*, while it is true that such sects as Hindus and *Zoroastrians* have structures there are important reasons why they should not be included in *Ahl al-Kitab*. This is because the categorisation of the non-Muslims should

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<sup>179</sup> Badran, Badran Abu al-'Aynayn, *Al-'Alaqa al-Ijtima'ayah byn al-Muslemeen wa Ghayr al-Muslemeen*, Dar al-Nahdha, Beirut, 1984, p. 13.

<sup>180</sup> Ibid., pp. 12-18.

<sup>181</sup> Ibn Abidin, Muhammad Amin, *Rad al-Mukhtar 'ala al-Dur al-Mukhtar*, Vol. III, Al-Matba'ah al-Ameriyyah, 1326 AH, p. 370.

<sup>182</sup> Ibn Qudamah, Abdullah Ibn Ahmed, *Al-Mughni*, Vol., VI, Matba'at al-Manar, 1348 AH, pp. 590-591.

<sup>183</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. 204.

be come from the main Islamic legislative sources in the *Holy Qur'an* and the Prophetic *Sunnah* and neither offer any support for their inclusion in the group, the *People of the Book*.

Islam preferred the *People of the Book*, in particular Christians, over other non-Muslim groups by providing them with various advantages such that they differ from Muslims only in minor judgements which the *Shari'ah* denied to them only to protect Islamic dogma, the Muslims and their interests.<sup>184</sup> Because of these small differences, Muslims are enjoined to avoid arousing bitterness or hostility to members of the *People of the Book*.

ولا تجادلوا أهل الكتاب إلا بالتي هي أحسن إلا الذين ظلموا منهم وقولوا آمنا بالذي أنزل إلينا وأنزل إليكم وإلهنا وإلهكم واحد ونحن له مسلمون . (العنكبوت: ٤٦)

And do not dispute with the People of the Book except by (the way) which is best, unless it be with such of them as transgress, and say, 'We believe in what has been sent down to us and sent down to you, and our God and your God is one, and to Him do we submit. (29: 46)

B. *The Sabians*. Literally *Sabian* means: the person who departed from one religion to another religion, the Arabs used to call the Prophet Muhammad *as-Sabi'* because he departed from the religion of Quraish to Islam.<sup>185</sup> Jurists have differed in defining this group, the Hanafite and Hanbalite, for instance, defined them as: a sect of the Christians, while the Malikites define them as a religious group between the Jews and Christians which do not have either a Divine Book or a religion.<sup>186</sup>

They are also called *Subbi* (plural *Subba*) and Nasoraeans, or Mandacans, and are in sometimes called the Christians of Saint John. They claim to be Gnostics, or Knowers of the Great Life. They are divided into three sects: the first is those who believe in frequent immersions in water. Their Book *Ginza* is written in a dialect of Aramaic. They have theories of Darkness and Light as in Zoroastrianism. They use the name *Yurdun* (Jordan) for any river.

184 Badran, Badran Abu al-'Aynayn, *Al-'Alaqa al-Ijtima'ayah byn al-Muslem wa Ghayr al-Muslem*, Dar al-Nahdha, Beirut, 1984, p. 18.

185 Hughes, Thomas Patrick, *A Dictionary of Islam*, W. H. Allen, London, 1885, p. 551.

186 Al-Jasas, Abu Bakr Ahmed Ibn Ali Al-Razi, *Ahkam al-Qur'an*, Vol. III, Matba'at al-Awqaf al-Islamiyyah, Alasatanah, 1335 AH, p. 91.



The second is the pseudo-*Sabians* of Harran, who attracted the attention of Caliph Mamuan-al Rashid in 830 AD by their long hair and peculiar dress. They probably adopted the name as it was mentioned in the *Holy Qur'an*, in order to claim the privileges of the People of the Book. They were Syrian Star-worshippers with Hellenistic tendencies, like the Jews contemporary with Jesus.

The origin of *Sabians* is the third group who played an important part in the history of early Arabia. They are known through their inscriptions in an alphabet allied to the Phoenician and the Babylonian. They had a flourishing kingdom in the Yemen tract in South Arabia about 800-700 BC, though their origin may have been in North Arabia. They worshipped the planets and stars such as the Moon, the Sun, and Venus. Probably the Queen of Sheba is connected with them. They succumbed to Abyssinia about 350 AD and to Persia about 579 AD, their capital was near San'a.<sup>187</sup>

C. *The Magians*. This group of different non-Muslim sects is the worst, according to Ibn al-Qayyim. The al-Khuramiyyah - the follower of Babik al-Khurmi - did not believe in any kind of God, forbidden conduct was lawful, for example, it permitted individual men to marry any of his prohibited females.<sup>188</sup> The cult of *Magians*, moreover, is a very ancient one. They consider Fire as the purest and noblest element and worship it as a fit emblem of God. Their location was in the Persian and Madina uplands and the Mesopotamian valleys. The *Magians* scripture is the Zend-Avesta, the bible of the Parsis. They were mentioned in the Gospels as the Wise men of the East. The *Magians Majus* mentioned only in one place in the *Holy Qur'an*,

والذين هادوا والصابئين والنصارى والمجوس . . . (الحج: ١٧)  
 . . . those who follow the Jewish, and the Sabians, Christians,  
 Magians . . . (22: 17)

D. *The Polytheists*. They are also called idolaters or pagans *Mushrikun*, the word used in the *Holy Qur'an* for idolatry is *Shirk*. In theological works the word *Wathani* is used for an idolater. The members of this group do not believe in the *Towhead* of God. They believe in the partnership of another thing with God such as idols, the

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<sup>187</sup> Ali, Abdulah Yusuf, *The Holy Qur'an Text, Translation and Commentary*, King Fahd Holy Qur'an Printing Complex, Al-Madinah Al-Monawarah, 1991, pp. 26-27.

angels and the sun. Paganism was the religion, which the Prophet Muhammad fought calling mankind to a new religion based on the oneness of God. Cyril Glassé writes of the Muslim position,

*This is the fundamental error at the root of all sin or transgression. It is the association of something with God other than God Himself. God is the Absolute. This means that He is Complete, He is Totality, He is Reality. Nothing can be added to Him, and nothing can be taken away. He is All-Possibility. He is One and Indivisible. To set anything alongside God as Reality is to commit the sin- the error that engages our consciousness and our beings- of "association", which is the only sin that God cannot forgive, because it denies Himself, and prevents forgiveness.<sup>189</sup>*

*Shirk* is the fundamental state of being in revolt against God, irrespective on any professed belief in other gods. It is also atheism, or the putting of nothingness in the place of God.<sup>190</sup> *Shirk* is the opposite of surrender to and belief in the one God, which the latter is acceptance and recognition of his Reality, knowledge, or Islam. Because Islam is knowledge, it is initiated by the act of recognition, the *Shahadah* is perceiving and declaring that "there is no god but God". The *Holy Qur'an* states that,

إِنَّ اللَّهَ لَا يَغْفِرُ أَنْ يُشْرَكَ بِهِ وَيَغْفِرُ مَا دُونَ ذَلِكَ لِمَنْ يَشَاءُ وَمَنْ يُشْرِكْ بِاللَّهِ فَقَدْ ضَلَّ ضَلَالًا  
بَعِيدًا . (النساء: ١١٦)

God forgiveth not (the sin of) joining other gods with Him; but He forgiveth whom He pleaseth other sins than this: one who joins others gods with Allah, hath strayed far, far away from the Right. (4:116)

E. *The Atheists*. They are non-Muslims who believe in the eternity of matter, and assert that the duration of this World is from eternity. They deny the Day of Resurrection and Judgement. In Arabic literatures, they are called *Dahreyoun*. Recently Communists are the nearest group to the Atheists. The term originates in the *Holy Qur'an* in the following verse,

وَقَالُوا مَا هِيَ إِلَّا حَيَاتُنَا الدُّنْيَا نَمُوتُ وَنَحْيَا وَمَا يُهْلِكُنَا إِلَّا الدَّهْرُ . (الجمعة: ٢٤)

<sup>188</sup> Al Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, 'Ighathat al-Lahfan min Masa'ed al-Shiyytan, Vol. II, Matba'at al-Halabi, Cairo, 1357 AH, pp. 247-248.

<sup>189</sup> Glassé, Cyril, *The Concise Encyclopaedia Of Islam*, Stacy International, London, 1989, p. 370.

<sup>190</sup> Ibn Qudamah, Abdullah Ibn Ahmed, *Al-Mughni*, Vol. VII, Matba'at al-Manar, 1348 AH, p. 796 & Ibn Abidin, Muhammad Amin, *Rad al-Mukhtar ala al-Dur al-Mukhtar*, Vol. III, Al-Matba'ah al-Ameriyyah, 1326 AH, p. 396.

And they say: "What is there but our life in this world, we shall die, and we live, and nothing but Time can destroys us . . . (45: 24)

F. *The Apostates*. The act of apostasy is called *Ridah* and an apostate is called *Murtadd*. In the *Holy Qur'an* the term apostate is mentioned as the "turning back from Faith" (2: 217 & 5: 54). The word is also applied to the period of insurgency and the rise of false prophets among the desert tribes, which followed the death of the Prophet Muhammad. The act of apostasy is the renunciation of Islam in favour of another religion or no religion at all.

It has been noted above that the *Shari'ah* discriminates among non-Muslim groups, one of the most clear examples of this is the unique punitive treatment of the apostate non-Muslims. An adult male apostate is liable to be executed if, after a warning and the lapse of three days, he continues in his error and does not recant. Only lunatics and drunkards are exempt as they are not held responsible for their acts of apostasy. Abu Yusuf and Imam Muhammad, of Hanafite School, considers an under age male who apostatised must be held responsible for his act, but he is not responsible until he comes of age. When the boy has become a man the death penalty will be imposed if he continues in his apostasy. Most Schools hold a female apostate in the same legal position as a male and so equally liable to suffer the penalty of death. However from the Hanafites point of view, she is not subjected to capital punishment, but she may be kept in confinement until she recants. The will of a male apostate is invalid but that of a female apostate is valid.<sup>191</sup>

In connection between apostasy and marital relations, if either the husband or spouse apostatises from the Faith of Islam, a divorce takes place *ipso facto*. The wife is entitled to the whole of her dowry and no sentence of divorce is necessary. If the husband and spouse both apostatise together, their marriage is generally allowed to continue. However, if, after their joint apostasy, either husband or spouse was singly to

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<sup>191</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at Al-Manar, Cairo, 1348 AH, pp. 213-215.

return to Islam, then marriage would be dissolved.<sup>192</sup> If a person upon compulsion becomes an apostate his spouse is not divorced nor are his lands forfeited.

According to Hanafite jurists, moreover, a male apostate is disabled from selling or otherwise disposing of his property. However, Abu Yusuf and Imam Muhammad - two famous followers of Imam Abu Hanifah - were differed from their master upon this issue. They considered a male apostate to be as competent to exercise every right as if he were still in the faith. If a boy under age apostatise, he is not to be put to death, but to be imprisoned until he comes to full age, when, if he continue in the stance of unbelief, he must be put to death. Lastly, the *Holy Qur'an* clarifies the punishment of any Muslim who become apostates as,

. . . ومن يرتدد منكم عن دينه فيمت وهو كافر فأولئك حبطت أعمالهم في الدنيا والآخرة وأولئك أصحاب النار هم فيها خالدون . (البقرة: ٢١٧)  
**. . . if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the Fire and will abide therein. (2: 217)**

These are the groups of non-Muslim who were found in the *Shari'ah*. Others have become known in more recent times but Islamic international relations in its classical forms was not based upon them. So, for example, on the method of Analogy (*Qiyas*) Muslim Jurist of the Mughal Empire extended the category of *People of the Book* to include Hindus on account of Scriptures. Whether this inclusion is valid or not, and it has been argued earlier that it is invalid, the plain fact is, Hindus were never a subject of classical Islamic international relations anymore than the Moonies.

Islamic *Shari'ah* requires Muslims to respects other religions and the interests, life, honour and properties of non-Muslim individuals and groups as long as the non-Muslims do not encroach upon the rights of Muslims or the Islamic State.<sup>193</sup> For example, should someone be tempted to violate the rights of the Islamic State, or disturb its peace, or endanger its security or exploit its peaceful policies, all Muslims must hasten to defend their country and suppress all attempts of such a nature.

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<sup>192</sup> Ibid.

<sup>193</sup> Tabarah, Afeaf AbdulFatah, *Roah al-Dean al-Islami*, Dar Al-'Ilm, Beirut, 1988, pp. 281-282.

أذن للذين يقاتلون بأنهم ظلموا وإن الله على نصرهم قدير. الذين أخرجوا من ديارهم  
بغير حق إلا أن قالوا ربنا الله ولولا دفع الله الناس بعضهم ببعض لهدمت صوامع وبيع  
وصلوات ومساجد يذكر فيها اسم الله كثيرا ولينصرن الله من ينصره إن الله لقوى  
عزيز. الذين إن مكناهم في الأرض أقاموا الصلاة وآتوا الزكاة وأمروا بالمعروف ونهوا  
عن المنكر والله عاقبة الأمور . (الحج: ٣٩-٤١)

To those against whom war is made, permission is given (to fight), because they are wronged; and verily Allah is Most Powerful for their aid. They are those who have been expelled from their homes in defiance of right, (for no cause) except that they say, "Our Lord is Allah" Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure, Allah will certainly aid those who aid His (cause); for verily Allah is Full of Strength, exalted in Might, able to enforce His Will. (22: 39-41)

And,

وإن جنحوا للسلم فاجنح لها وتوكل على الله أنه هو السميع العليم . (الأنفال: ٦١)  
But if the enemy incline towards peace do thou (also) incline towards peace, and trust in Allah: for he is the One that heareth and knoweth (all things). (8: 61)

Provided no such violation occurs, Islam requires Muslims to respect non-Muslims because it acknowledges all Divine *Books* and all the Prophets sent by God. In the *Holy Qur'an*,

قولوا آمنا بالله وما أنزل إلينا وما أنزل إلى إبراهيم وإسماعيل وإسحاق ويعقوب والأسباط  
وما أوتي موسى وعيسى وما أوتي النبيون من ربهم لا نفرق بين أحد منهم ونحن له  
مسلمون . (البقرة: ١٣٦)

Say: We (Muslims) believe in Allah and in what He has revealed to us, and in what He revealed to Abraham and Ismael and Isaac and Jacob and the tribes (of Israel), and in what was given to Moses and Jesus, and in what was given to (all) the prophets by their Lord. We make no distinction between any of them, and to Him do we submit. (2:136)

For this reason Islam aims to pluck out the religious grudges from Muslims. Moreover, it caused Caliph Umar I in his covenant with the people of Jerusalem, for instance, to ensure their safety, their property, their churches, their crosses, and all the

rituals belonging to their religion. Umar I, moreover, prohibited Muslims from occupying, destroying or damaging their places of worship or other property.<sup>194</sup>

Similarly, Islam orders the fulfilment of obligations undertaken by the Islamic State, including honouring treaties, provided that non-Muslim states fulfil their obligations and honour their treaties with the Islamic State. The *Holy Qur'an* commands,

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ . (المائدة: ١)

**O ye who believe! fulfil ( all) obligations. (5: 1)**

إِلَّا الَّذِينَ عَاهَدْتُمْ مِنَ الْمُشْرِكِينَ ثُمَّ لَمْ يَنْقُضُوا عَهْدَهُمْ شَيْئًا وَلَمْ يُظَاهَرُوا عَلَيْكُمْ أُولَئِكَ فَأَتَمُّوا إِلَيْهِمْ عَهْدَهُمْ إِلَىٰ مَدَّتِهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُتَّقِينَ . (التوبة: ٤)

**But the treaties are not dissolved with those Pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you; so fulfil your engagements with them to the end of their term: for Allah loveth the righteous. (9: 4)**

### 3.7) Summary and conclusion

In the Islamic international law, Muslims have to share in the fulfilment of their opulence and advancement, and by the same order, they should make valuable contributions to humanity at large. This provides for friendly relations, in the broadest sense of the world, with other people and states.

The term “international relations” was not formalised by its modern academic name. Instead, Muslim jurists referred to *al-Siyar*, that is, to the law dealing with non-Muslims [most of which governs relations between Muslims and non-Muslims, but a small part of which affects only non-Muslims]. Because this law determines how the Islamic State and more broadly the Muslim *Ummah* should behave towards non-Muslims and how non-Muslim individuals, groups and states should behave towards Muslims and the Islamic State, Islamic international relations theory is a prescriptive or normative one. The precise nature of the Islamic international relations (*al-Siyar*) after this point is contentious and contemporary jurists and scholars such as Yusuf al-

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<sup>194</sup> Muir, William, Sir, *The Caliphate, Its rise, Decline, and Fall, from Original Sources*, The Religious Tract Society, London, 1892, pp. 144-145.

Qaradawi, Muhammad Hamidullah, and AbdulHamid AbuSulayman, were found to differ over its character.

It has been argued that any person who is not a member of the *Ummah*, whether a foreigner or a citizen of the Islamic State, is deemed to have international relations with the Islamic State and to be the subject of *al-Siyar*. This apparent paradox arises from the general principle that relationships between Muslims and non-Muslims are invariably treated as external or international, whereas no relationship between Muslims, however “external” they (for example the relations between Muslim territorial rulers during the late period of the ‘Abbaside dynasty), is ever treated as a matter of external or international relations. All *Ummatic* relations are internal or domestic from the standpoint of *Shari’ah*.

Another key argument is that the early juristic division of the world into two opposing parts *Dar al-Islam* and *Dar al-Harb* reflected a contemporary reality after a period of protracted warfare between the Islamic State and its enemies. However, a third *Dar* was introduced by Muslim jurists by the second century AH to bring Muslim principles into line with a new reality, namely, the existence of peaceful relations between the Islamic State and non-Islamic states resulting from a pledge or treaty (*‘Ahd*). *Dar al-‘Ahd* therefore denoted an intermediate status between *Dar al-Islam* and *Dar al-Harb* where non-Muslim states were at peace with the Islamic State. Moreover, the juristic division of the world into *Dar al-Islam*, *Dar al-Harb* and, much later *Dar al-‘Ahd* or *Dar al-Sulh*, is nowhere mentioned in the *Holy Qur’an* or in the *Hadiths*, except in *Saheeh Muslim* under the term the domain or house of Emigrants *Dar al-Muhajiroun*, which is not relevant to the present context. Majeed Khadduri claims that the Islamic theory of international relations is to be found neither in the *Holy Qur’an* nor in the Prophet Muhammad’s *Hadiths*,<sup>195</sup> but while this is true of classical *Fiqh*, it has been argued that the Islamic international relations is part of the *Shari’ah* which is derived primarily from the *Qur’an* and *Sunnah* and is formulated in terms of a fundamental dichotomy between Muslims and non-Muslims. This dichotomy itself pre-supposes the fundamental Islamic belief in *Towhead* or the unity of God, the

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<sup>195</sup> Khadduri, Majid, *The Islamic Theory of International Relations*, J. Harris Proctor, *Islam and International Relations*, Pall Mall Press, London, 1965.

unity of humanity, and the unity of Divine laws. It may be true that the term “international law” itself has not been mentioned in the *Qur'an* or the *Sunnah*, but the *Qur'an* treats it in different verses and the deeds and the sayings of the Prophet Muhammad are frequently concerned with the principles of treating the various nations of non-Muslims.

It has been found that *Dar al-Harb* did not mean lasting enmity or war against the Islamic State or that hostility was the normal relationship between Muslims and others. That relationship was peaceful with all nations (*Ummahs*) except for those of them which indicated their hostility to Islam and against the Muslims. Islamic *Shari'ah* requires Muslims to respect other religions and the interests, life, honour and properties of non-Muslim individuals and groups as long as the non-Muslims do not encroach upon the rights of Muslims or the Islamic State, such as, should someone be tempted to violate the rights of the Islamic State, or disturb its peace, or endanger its security or exploit its peaceful policies, all Muslims must hasten to defend their country and suppress all attempts of such a nature. (22: 39-41 & 8: 61). Provided no such violation occurs, Islam requires Muslims to respect non-Muslims because it acknowledges all Divine *Books* and all the Prophets sent by God (2:136).

This conclusion was reached primarily after a short examination of the purposes of *Jihad*. It has been found that the *Qur'anic* verses which provide justification for *Jihad* stipulate that fighting is for self defence, the protection and guarantee of freedom of the Faith, and the prevention of iniquity. Fighting for any other cause is therefore unlawful and therefore forbidden because it transgresses the limits commanded in the *Holy Qur'an*. However, when war is undertaken, it must be pushed with vigour, but not relentlessly and only to restore peace and freedom for the worship of God. Significantly, it was narrated that Prophet Muhammad, during his wars, caught many unbelievers as prisoners of war, some were executed, others were redeemed or discharged, but the Prophet did not compel any of them to convert to Islam.

It was also concluded that the argument that Islam is based on a system of supremacy and subjection, and that in order to propagate its mission Muslims have declared war on all communities and nationalities until Islam rules over the entire



world, is mistaken. Against the view of Khadduri and some Western scholars who argue that the Muslim attitude to non-Muslims is hostile who must be either converted, subjugated or killed (except women, children, and slaves) it has been argued that hostilities only occur as a result of the behaviour of non-Muslims. Even the Muslim jurists themselves, the Hanafi, the Maliki and the Hanbali, criticised the view of the other jurists like al-Ramli that the blasphemy of non-Muslims is a cause for killing them. They argued that non-Muslims' aggression against Islam alone is the reason for fighting and killing them.

Moreover, the domain of pledge *Dar al-'Ahd* is composed of non-Muslim powers which have concluded peace with the Islamic State, having previously been *Harbi* powers at war with the Islamic State. At first, these treaties were treated by the jurist as temporary truces lasting ten years at the most. However, facts overtook the juristic view because during the time of Salah al-Dean (Saladin 6<sup>th</sup> Century AH, XII AD) and the *Jihad* against the Crusaders these treaties had become permanent, confirming the view that peace not war was the normal state of relations between the Islamic State and non-Muslims.

The conceptions of *Dar al-Islam*, *Dar al-Harb* and *Dar al-'Ahd* cannot readily be applied to the present day world, and this situation led to a suggestion for redefining *Dar al-Islam*. The core of this revised conception is still the protection of Faith, Dogma and the freedom of religious practice, however. *Dar al-Islam* is now defined as the place where the Muslim can practice his religious acts of devotion in complete freedom and *Dar al-Harb* is the place where the Islamic religious acts of devotion cannot be practised in complete freedom. *Dar al-Harb* is linked to aggression toward any Islamic object or behaviour, such as abuse of Muslims or destroying their place of worship and in other ways depriving Muslims of their most basic religious rights. Not all non-Muslim states are part of *Dar al-Harb* on this revised definition. Some of them protect religious belief and practice, including that of Islam, and show no hostility toward Muslims and Islam, yet they are not a part of *Dar al-Islam*. Such states arguably belong to a different *Dar* called the domain of calling to Islam, *Dar al-Da'wa*. The precedent for this fourth *Dar* was *Makkah* before the emigration of the Prophet and His Companions to Madinah, when *Dar al-Islam* and *Dar al-Harb* did not, as yet,

exist. After the emigration the Prophet named Madinah as *Dar al-Muhajiroun*. (See p. 87)

The view taken of Islamic international relation in this thesis is that it consists of the totality of Muslim relations with non-Muslims, but for practical purposes those relationships have been narrowed down to those between the Islamic State and non-Muslim individual groups and states. For this reason, this chapter undertook an extensive examination of the nature of the Islamic State. It concluded that the Islamic State is not theocratic, but is an ideological state set up by the will of the people in a constitutional manner, following the democratic principle of decision-making. It exists in order to implement the *Shari'ah* and secure the welfare of the entire community. While citizens may participate in its affairs, the Islamic State is conceived by Muslim authors primarily in terms of the ruler and his government. This was because the *Ummah* was understood to be a community united by its Divine law and religion. Unlike modern states in international law, which are conceived as legal entities where their municipal laws have a territorial jurisdiction, the Islamic State was not understood as a legal entity, but as a legitimate power whose main function was to implement the *Shari'ah* among the community of Muslims who were united by it. In their discussions of the Islamic State, the Muslim authors were pre-occupied with its internal aspects rather than its relations with non-Muslims. Insofar as the external relations of the Islamic State were discussed, the authors restricted their analysis to the duty of *Jihad* and the position of *Dhimmi*s within the State. The important point was that the Islamic State acts towards other non-Muslim states and non-Muslim groups and individuals through its Head, the ruler of *Imam*.

The analysis of the juristic principles relating to non-Muslim residents in the Islamic State either on a permanent basis (*Dhimmi*s) or temporarily (*Musta'min*) follows next. It will focus on the rights and obligations of them, including examinations of scholarly views that such theories were grounded neither on the *Holy Qur'an* nor on the *Sunnah*, all these will be found in the next chapter *Dhimmi*s and *Musta'min* in the Islamic State.

## CHAPTER IV

### DHIMMIS AND MUST'AMINS IN THE ISLAMIC STATE

## **Chapter IV: Dhimmis And Musta'min In The Islamic State**

- 4.1) Introduction
- 4.2) *Shari'ah* and the relations of Muslims and non-Muslims
- 4.3) Safeguard *Aman*
- 4.4) Covenant '*Ahd al-Dhimma*
  - 4.4.1) The Tribute *Jizyah*
  - 4.4.2) The land tax *al-Kharaj*
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- 4.5) Summary and conclusion

#### 4.1) Introduction

The characteristic form of the Islamic State to the end of the 'Abbaside Caliphate was that of a multi-cultural or more accurately, a multi-religious, polity. That is to say, that in addition to the Muslim citizens of this state there were non-Muslims who were allowed to practise their religion and were not forced to convert to Islam in conformity with God's command in the *Holy Qur'an*

لا إكراه في الدين . . . (البقرة: ٢٥٦)

**Let there be no compulsion in religion . . . (2: 256)**

These non-Muslims were either permanent or temporary residents within the Islamic State. The former – *Dhimmis* – could be described as full citizens of the Islamic State, receiving its protection in return for the payment of a poll tax (*Jizyah*), the latter – *Musta'mins* – were given a special kind of protection by the Islamic State covering the period of their temporary residency (*Aman*).

The relationships between the Islamic State and its temporary and permanent non-Muslim residents are at the level of the individual and of groups. Thus, that part of Islamic international relations which will be considered in this chapter are those between the Islamic State and its internal or resident non-Muslims. Surprising as it may appear to anyone familiar with Western international relations theory, in which all relations between states or other units of analysis are external, in the Islamic theory anyone who is not a member of the *Ummah*, whether a foreigner or a citizen of the Islamic State, is deemed to have international relations with the Islamic State.

This chapter will be concerned to explore and clarify this apparent paradox which rises from the general principle that relationships between Muslims and non-Muslims are invariably international, whereas no relationship between Muslims, however "external" they may be (for example the relations between Muslim territorial rulers during the late period of the 'Abbaside Empire), is ever treated as a matter of international relations. All *Ummatic* relations are internal or domestic.

#### 4.2) *Shari'ah* and relations of Muslims and non-Muslims

Throughout centuries, Muslim authorities safeguarded the rights and sanctities of non-Muslims within the Islamic State. Regardless of their disputes on different issues, Muslim jurist were unanimous in emphasising these rights and sanctities which are,

1) *Freedom of religions belief*. The Islamic view of freedom of religion and religious worship is expressed in the *Holy Qur'an*. The following verses concern non-Muslims who are not compelled to accept Islam.

لا إكراه في الدين قد تبين الرشد من الغي . . . (البقرة: ٢٥٦)

Let there be no compulsion in religion; truth stands out clear from Error . . . (2: 256)

ولو شاء ربك لآمن من في الأرض كلهم جميعاً أفأنت تكره الناس حتى يكونوا مؤمنين .

(يونس: ٩٩)

If it had been thy Lord's Will, they would all have believed,-all who are on earth! wilt thou then compel mankind, against their will, to believe! (10: 99)

لكل جعلنا منكم شرعةً ومنهاجاً ولو شاء الله لجعلكم أمة واحدة ... (المائدة: ٤٨)

To each among you, have We prescribed a law and an Open Way; if Allah had so willed, He would have made you a single People . . . (5: 48)

The phrase **(To each among you)** of the last verse (5: 48) has been interpreted in different ways by Muslim scholars. Al-Tabari's commentary reflected something of this diversity when he presented a superior explanation of the previous verses. First, he introduced two different views on **(To each among you)**. According to Al-Tabari,

*Some of them say: it means the adherent of various communities, i.e., Allah has set up for each community a law and a way . . . Others say: No, it means the community of Muhammad. They say that the meaning of the sentence was: We have already made the book, which we sent down upon Our Prophet Muhammad, O mankind, for everyone of you, i.e. who enters Islam and confesses about Muhammad; He is for me a Prophet!, as a law and way.*<sup>1</sup>

Al-Tabari adds,

*The first of the two explanations is correct, the explanation giving the meaning: for all people of the religious-communities*

<sup>1</sup> Al-Tabari, Mohamad Ibn Jarear, *Jami' Al-Bayan fi Ta'weal Al-Qur'an*, Vol. IV, Matba'ah al-Halabi, Cairo, 1373 A.H. p. 365.

*we have set up a law and a way. We say that the first is right because of the words of Allah, (If Allah had so willed, He would have made you a single People) If the words (To each among you) had referred to Muhammad's community and they are one single community the words (If Allah had so willed, He would have made you a single People) would not have been given, but Allah has given them and made them one single community. The meaning is therefore clear. However, the meaning of what the message from Allah to His Prophet Muhammad brings is as follows: Allah mentions what has been prescribed to the people of Israel in the Torah, and what deeds were laid upon them. Then He mentions that He made Jesus the son of Mary followed the steps of the Prophets before him and sent the Bible upon him and he ordered him who followed him to do the works prescribed therein. Then He mentioned our Prophet Muhammad and says of him that He sent the Scripture in truth, confirming the scripture that came before it, and he ordered the deeds mentioned therein. The judgement of what has been sent down upon him is different from the other books, and He explains that He has already set up for Muhammad and his community a different law than that of the previous Prophets and communities, and that his religion [Islam] and the previous religion are one with regard to Allah, observing what He ordered and prohibited. And they are different with regard to that which has been prescribed for each of them and his community, and what has been made legal and prohibited for them.<sup>2</sup>*

Moreover, the Islamic Law and practice regarding the public performance of religious rites and communal festival by the non-Muslims are equally generous. In their own places of worship, non-Muslims are allowed to practice their religious ceremonies, they are only restricted from openly blowing horns (conches) in public places. In connected with this, al-Kasani mentioned that,

*Within the boundaries of their own places of worship, the non-Muslims can perform their rites and no Islamic Authority will interfere therein.<sup>3</sup>*

Therefore, it must be understood that at the best time of Muslim civilisation religious liberty was granted by the rulers to all the various sects and denominations

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<sup>2</sup> Ibid., 366.

<sup>3</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Shar'aya*, Vol. VII, Sharekat al-Matbou'at al 'Alamyah, 1327 AH, p 113.

of their subjects. Fanaticism was never carried to the extent of compelling any community to embrace Islam.<sup>4</sup>

2) *Granting protection of their lives and properties and philanthropy in dealings with them.* The most important protection to be guaranteed to any non-Muslims, whatever his belief, is from internal persecution, tyranny and injustice. Muslims are duty bound to spare their hands and tongues from hurting all non-Muslim and to protect them against any enmity internal and external, for God does not like tyrants but punishes them quickly in this world or gives them greater punishment in the next world.<sup>5</sup> This right of non-Muslims may be viewed clearly in the word of jurist al-Qurafi,

*The covenant of protection imposes upon us certain obligations toward the Ahl al-Dhimmah. They are our neighbours, under our shelter and protection upon the guarantee of Allah, His Messenger and the religion of Islam. Whoever, violates these obligations against any one of them by so much as an abusive word, by slandering his reputation, or by doing him some injury or assisting in it, has breached the guarantee of Allah, His Messenger and the religion of Islam.*<sup>6</sup>

Ibn Hazm agrees with al-Qurafi that the duty of all Muslims is to protect the *Dhimmi*s. In other words, the duty of protecting *Dhimmi*s is not confined to the Islamic authority, but is an obligation imposed upon all Muslims. Ibn Hazm said,

*If enemies at war come to our country aiming at a certain Dhimmi, it is essential for us that we come out to fight them with all our might and weapons since he is under the protection of Allah and His Messenger, If we did anything less than this, it means we have failed in our agreement for protection.*<sup>7</sup>

In the *Sunnah*, Prophet Muhammad strictly recommended and emphasised the duties of Muslims toward non-Muslims, warning anyone against violating non-Muslims who live in the Islamic State with the wrath and punishment of God. He said,

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<sup>4</sup> Zaydan, Jurji, *History of Islamic Civilization*, Vol. IV, E. J. W. Gibb Memorial, Leyden, 1907, p. 179.

<sup>5</sup> Al-Tabari, Mohamad Ibn Jarcar, *Jami' Al-Bayan fi Ta'weal Al-Qur'an*, Vol. V, Matba'ah al-Halabi, Cairo, 1373 AH, p. 156.

<sup>6</sup> Al-Qurafi, Ahmed Ibn Idris, *Al-Furuq*, Vol. I, Al-Matba'ah al-Tunisiyyah al-Rasmiyyah, 1302 AH, pp. 14-15.

<sup>7</sup> Ibid.



**He who oppresses a person from among the People of the Covenant, or infringes on his right, or puts a responsibility on him which is beyond his strength, or takes something from him against his will, I shall dispute with him on the Day of Resurrection.**<sup>8</sup>

The full force of this duty laid upon Muslims was brought out by the jurist Ibn Abedin who says,

*Since Muslims are given a responsibility to protect the blood and property of non-Muslims, and since the persecution of weak persons at the hands of the strong is considered as one of the greatest crimes, the persecution of non-Muslims in an Islamic State will be considered to be a greater crime than the persecution of Muslims by non-Muslims.*<sup>9</sup>

3) *Permissibility for Muslim men to marry women of the People of the Book.* It was the Prophet's practice to follow the scriptuaries in such matters that are not prohibited for Muslims by God and not specifically regulated for them either. In connection with this, two *Hadiths*, both related by Ibn 'Abbas, are commonly quoted. The first *Hadith* is,

**The Prophet used to copy the people of the scriptuaries in matters in which there was no order from Allah, The people of the scriptuaries used to let their hair hang down, while the pagans used to part their hair. So the Prophet let his hair hang down first, but later he parted it.**<sup>10</sup>

The second *Hadith* is as follows,

**When God's messenger fasted on the day of Ashura and commanded that it should be observed as a fast, he was told that it was a day held in honour by Jews and Christians, and said: "If I am spared until next year, I shall fast on the ninth."**<sup>11</sup>

The Islamic legislation toward the *People of the Book* differs from that applicable to the other non-Muslim groups. Consequently, Muslims have a positive approach towards the *People of the Book* and in particular to the Christians. They differ from other non-Muslims in the nature of their disbelief and scripture, but they have a

<sup>8</sup> Abu Daoud, Sulayman Ibn Al Ash'ath, *Sunan Abu Daoud*, Vol. IV, Al-Matba'ah al-Taziyah, Cairo, p. 205.

<sup>9</sup> Al-Qaradawi, Yusuf, *Ghayr al-Muslimoun fi Mujtama' al-Islam*, Cairo, 1977, p.12.

<sup>10</sup> Khan, Muhammed Muhsin, *Sahih Al-Bukhari, Arabic-English*, 4<sup>th</sup> Edit., Vol. VII, Dar al-Arabiah, Beirut, 1985, p. 525.

<sup>11</sup> Matraji, Mahmoud, *Translation of Saheh Muslim*, Vol. II A, Dar al-Fikr, Beirut, 1993, p. 341.

common stock of legal prescriptions with Muslims, which other non-Muslims do not.

In the *Holy Qur'an*,

لتجدن أشد الناس عداوة للذين آمنوا اليهود والذين أشركوا ولتجدن أقربهم مودة للذين آمنوا الذين قالوا إنا نصارى ذلك بأن منهم قسيسين ورهبانا وأنهم لا يستكبرون. وإذا سمعوا ما أنزل إلى الرسول ترى أعينهم تفيض من الدمع مما عرفوا من الحق يقولون ربنا آمنا فاكتبنا مع الشاهدين . (المائدة: ٨٢-٨٣)

**Strongest among men in enmity to the Believers wilt thou find the Jews and Pagans; and nearest among them in love to the Believers wilt thou find those who say, "We are Christians": because among these are men devoted to learning, and men who have renounced the world, and they are not arrogant. And when they listen to the revelation received by the Messenger, thou wilt see their eyes overflowing with tears, for they recognise the truth: they pray: "our Lord we believe, write us down among the witnesses. (5: 82-83)**

Muslims and Christians are close enough to each other to allow Muslim males to marry Christian females, and to share Christians' food in so far as it is good. Prophet Muhammad himself, for instance, took Mary al-Qibtyah as his wife based on the *Holy Qur'anic* verse,

اليوم أحل لكم الطيبات وطعام الذين أوتوا الكتاب حل لكم وطعامكم حل لهم والمحصنات من المؤمنات والمحصنات من الذين أوتوا الكتاب من قبلكم إذا آتيتموهن أجورهن محصنين غير مسافحين ولا متخذي أخدان . . . (المائدة : ٥)

**This day are (all) things good and pure made lawful unto you, the food of the People of the Book is lawful unto you and yours is lawful unto them, lawful to you in marriage are not only chaste women who are believers but chaste women among the People of the Book, revealed before your time when ye give them their due dowers, and desire chastity, not lewdness, taking them as lovers. (5: 5)**

This verse also explains the actual existence of various religious groups, namely that those with a scripture of Divine revelations are something willed by God. Such bodies have a reason to vie one to another with good works.

#### 4.3) Safeguard covenant *Aman*

*Aman* is similar to the protection convention for *Dhimmis*\* in that it can be written or unwritten treaty. It differs from the protection convention by providing the

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\* See 4.4.

safeguards of safe conduct and security to non-Muslims on a temporary basis.\* This safeguard is pledged to non-Muslims by the Muslims, either by the Islamic authority or by individuals. Nothing, however, is reciprocated by the non-Muslim/s.\* Ibn Arafah, of the Malikites, defined the *Aman* as,

*Keeping away from shedding the blood of Harbis or their slaves, and holding back from taking their property as long as they live stable under the rule of Islam for a definite period of time.*<sup>12</sup>

Such a pledge can be given to any individual of *Dar al-Harb*, the so-called *Harbi*, when he/she enters an Islamic territory. He/she will be a *Musta'min*, that is, a person to whom this protection has been pledged. Ann Lambton, for instance, has explained the origin and procedure of *Aman*,

*The custom of giving safe conduct (Aman) to strangers or outsiders had prevailed among the Arab tribes before Islam. By it, a stranger who was in principle outlawed outside his own group received for his life and property the protection of a member of a group to which he did not belong and the protection of that group as a whole. Islam continued the institution of Aman.*<sup>13</sup>

The *Qur'anic* teaching of *Aman* can be found in the following verse,

وإن أحد من المشركين استجارك فأجره حتى يسمع كلام الله ثم أبلغه مأمنه ذلك بأنهم قوم لا يعلمون (التوبة: ٦)

If one amongst the Pagans asks thee for asylum, grant it to him, so that he may hear the Word of Allah, and then escort him to where he can be secure, that is because they are men without knowledge. (9: 6)

And in the *Hadith* of the Prophet Muhammad,

***The covenants of all Muslims are equal; they are one hand against others; the lowliest of them can guarantee their protection. Beware, a Muslim must not be killed for an infidel, nor must one who has been given a covenant be killed while his covenant holds. If anyone introduces an innovation, he will be responsible***

\* It is a tradition founded prior to Islam, and remained after when the person gives a full protection to others. It has been narrated, for instance, that after Caliph Ali, the fourth Orthodox Caliph, defeated 'Aisha, the widow of the Prophet, in the battle of the Camel, Marwan Ibn al-Hakam, one of 'Aisha's supporters, given an *Aman* by Malik Ibn Masm'a, the leader of 'Anizah tribe. Al-Tabari, Mohamad Ibn Jarrear, *Tareikh al-Umam wa al-Muluk*, Vol. III, al Matba'ah al Hussayniyah al Masriyah, Cairo, p. 56.

\* See Chapter V, 5.2 for the implications of this omission.

<sup>12</sup> Al-Hattab, Muhammad Al-Maghrabi, *Mwahib al-Jalil li Sharh Mukhtasar Khalil*, Matba'at al-Sa'adah, Cairo, 1328 AH, p. 360.

<sup>13</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. 202.

**for it. If anyone introduces an innovation or gives shelter to a man who introduces an innovation (in religion), he is cursed by Allah, by His angels, and by all the people.<sup>14</sup>**

It may be inferred that: the term *Aman* is almost exclusively concerned with the granting of temporary security. It was used as a synonym of *Dhimmah* during the early period of the Islamic Empire, thereafter the elaboration of it was distinguished from the concept of *Dhimmah* and extended to cover non-Muslims who lived outside the *Dar al-Islam* and belonged to the *Dar al-Harb*.<sup>15</sup> The continued affinity between *Dhimmi* status and the status of *Musta'min* in the later period of the Islamic Empire was noted by Joseph Schacht,

*The position of Musta'min resembles in general that of the Dhimmi, except that he is not obliged to pay Jizyah for a year; should he remain in Islamic territory longer, he is made a Dhimmi.*<sup>16</sup>

*Aman* is not given to persons of *Dar al-'Ahd* because they are covered by the protection afforded by the treaty. *Aman* at the level of individual persons is therefore given only to *Harbis*. As a consequence, a *Musta'min*, person who obtains *Aman*, could be defined as follows: a non-Muslim who is an enemy alien, who is not protected by any kind of security treaty and whose country is at war with the Islamic State. Under this condition his life and property are completely unprotected by law unless he has been given *Aman*. The protection given to such non-Muslims can vary. Altogether, there are five kinds of *Aman* that could be given to the *Musta'min*:

1) The singular *Aman*. It is given to between one to ten *Harbis*, such as a small caravan or a small castle. The four *Sunni* Schools of *Fiqh* agreed that only the Muslim can confer this sort of *Aman*, not *Dhimmi*s or *Mu'ahed* (members of *Dar al-'Ahd*) or other *Musta'min*, even if they fight side by side with the Muslims.<sup>17</sup> That is because the Prophet equalised the lives of all Muslims when he said, "**The covenants of all Muslims are equal**", and distinguished them from those of *Harbis* or unbelievers. Such

<sup>14</sup> Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. VIII, Matba'at al-Halabi, Cairo, 1952, pp. 27-28.

<sup>15</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. 202.

<sup>16</sup> Schacht, Joseph, *An Introduction to Islamic Law*, Oxford University Press, London, 1975, p. 131.

<sup>17</sup> Al-Shafai'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, pp. 196-197. & Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 70. & Anas, Malik Ibn, *Al-*

*Aman* was known before Islam, indeed the Prophet himself enjoyed it at the beginning of the Islamic *Da'wa*. Ibn al-Qayyim in his work *Zad al-M'aad* reported,

*The Prophet Muhammad, in his return from Taif to Makkah, despatched a man from Khuza'ah tribe to Al-Mt'im Ibn 'Adi, a notable in Makkah, volunteered to respond to the Prophet Muhammad's appeal for Aman, Al-Mt'im accepted and offered Aman to the Prophet and asked him to enter Makkah under his protection. Therefore, non-of the Qurashies can attack the Prophet.*<sup>18</sup>

Al-Kasani, of the Hanafites School, denied the validity of *Dhimmi's Aman*, even if the *Dhimmi* was empowered by a Muslim to pledge *Aman*.<sup>19</sup> Muslim jurists stipulated that the Muslim individual who gives *Aman* has to be an adult, free, male or female. The Malikites, Shafei'ites, and Hanbalites jurists approved of Muslim slaves giving *Aman*, but the Hanafites jurists deny the slave this right, unless he joins *Jihad* or is empowered by his master to do so.<sup>20</sup> It is true that neither the Prophet nor Caliph Abu-Bakr had approved the slaves giving the *Aman*. However, Caliph Umar I approved it when he said,

*The slave of the Muslims is from the Muslims, his covenants is [the same as] the Muslims covenants.*<sup>21</sup>

If the slave's *Aman* was not permitted the Caliph Umar I could not give this approval. As noted above, only Hanafi jurists refused to accept the legitimacy of this kind of *Aman*, except under two specific conditions.

2) The general *Aman*. This kind of *Aman* can be given only by the *Imam* or his representatives and it is pledged to all *Harbis* or a large number of them. This is confirmed by the words of al-Sharkasi,

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*Moddawanh al-Kobra*, Vol. III, Dar al-Fikr, Beirut, 1991, p. 42. & Al-Ramli, Shams Al-Dean Muhammad Ibn Shihab Al-Dean, *Nehayat al-Muhtaj ila Sharh al-Minhaj*, Vol. VII, Matba'at al-Halabi, Cairo, 1386 AH, p. 217.

<sup>18</sup> Ibn al-Qayyim, Shams Al-Dean Muhammad Ibn Bakr, *Zad al-M'aad*, Vol. II, Al-Matba'ah al-Masriyah, Cairo, 1914, pp. 46-47.

<sup>19</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea Al Sanay'a fi Tarteab Al Sharay'a*, Vol. VII, Sharekat Al-Matbou'at al-'Alamyah, 1327 AH, p. 106.

<sup>20</sup> Al-Qurtobi, Muhammad Ibn Ahmed, *Al-Jame'a li Ahkam al-Qur'an*, Vol. VIII, Dar al-Kotoub, Cairo, 1369 AH, p. 76.

<sup>21</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. IX, Matba'at al-Manar, 1348 AH, p. 241 & , p. 241 & Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, p. 243 & Al-Bayhaqi, Ahmed Ibn Al-Hussein, *Al-Sunan al-Kobra*. Vol. IV, Dar al-Fikr, Beirut, 1994, p. 94.

*The Imam, by the authority and power he has, is the only one entitled to guarantee safety for huge number of people.*<sup>22</sup>

3) The *Aman* by conclusion of a truce. Under such *Aman* only the *Imam* or his representatives can give it to the enemy on condition that they have ceased fighting. The Arabic term for that is *al-Muwada'ah* or *al-Muhadanah*. The *Harbis* properties, lives, and families are entitled to full protection by Muslim authorities as long as they enjoyed the benefits of this *Aman*. Hence, according to the Islamic Law, under this *Aman* it is not permitted to extradite the *Musta'mins* to their countries under any circumstances.<sup>23</sup>

4) The *Aman* by custom (عرف). This sort contains two categories, these are:

a) The messenger, the modern term is "the negotiator" who is sent on a mission carrying a message to the *Imam*. He will be permitted to proceed without *Aman*, since he possesses diplomatic immunity or is negotiating the disengagement of forces in wartime under a flag of truce. However, if it is found that he lacked the letters of credence or that he had no message to deliver or showed any sort of perfidiousness, he was liable to be killed.<sup>24</sup>

b) The merchants who according to the Arabian customs were permitted to enter Islamic territories while Muslim merchants, reciprocally entered non-Islamic territories. However, this customary sort of *Aman* was changed recently. Merchants are not now permitted to enter a state at war with their country. If the *Imam* found that the transactions with *Musta'mins* threaten the security or the economy of the country, he is entitled to exclude them from entering the *Dar al-Islam*.<sup>25</sup>

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<sup>22</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 72 & Anas, Malik Ibn, *Al-Moddawanah al-Kobra*, Vol. III, Dar al-Fikr, Beirut, 1991, p. 42 & Al-Ramli, Muhammad Ahmed, *Nehayat Al Muhtaj ila Sharh Al-Minhaj*, Vol. VIII, Matba'at al-Halabi, Cairo, p. 80 & Al-Bahuti, Mansour Ibn Uonis, *Kashaf al-Qina'*, Vol. III, Dar al-Fikr, Beirut, 1982, p. 104.

<sup>23</sup> Al-Shafel'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, pp. 196-197. & Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 70.

<sup>24</sup> Al-Bahuti, Mansour Ibn Uonis, *Kashaf al-Qina'*, Vol. III, Dar al-Fikr, Beirut, 1982, p. 87.

<sup>25</sup> Ibid.

5) The *Aman* for dependants (بالتبعية). Under this sort of *Aman*, the family and the wealth of the *Musta'min* would join him in his temporary stay in *Dar al-Islam*. However, if he died in the *Dar al-Islam*, the *Aman* granted was still valid for his property and his heirs could take it out of the *Dar al-Islam* if they wanted to do so. However, there was a dispute between the jurists regarding the *Musta'min's* property if he died after he returned to *Dar al-Harb*, leaving his property in the *Dar al-Islam*. The Malikites and the Hanbalites, on one hand, argued that it could be taken out of the *Dar al-Islam* by the heirs or sent by the Islamic government to them in *Dar al-Harb*. If, however, the identity of the heirs was not known, then the property could be handed over to the deceased's government.<sup>26</sup> The Shafei'ites, on the other hand, argued that such property could be legitimately confiscated by the state.<sup>27</sup> The Hanbalites assume that if the *Musta'min's Aman* terminated for any reason, the *Aman* of his family could still be valid for his family, slaves, and wealth.<sup>28</sup>

*Aman* serves a very useful purpose. Without it, it would be impossible to establish the temporary peaceful relationship between Muslims and other non-Muslims during the period of hostile relations. It can also allow non-Muslims to travel in Islamic territory during periods of hostilities as well as of peace. *Aman* does not have a special form; it can be concluded by using any words which give the required meaning, directly or indirectly. Even cue words or signs are considered to be binding terms in these covenants.<sup>29</sup> Accordingly, the head of the Islamic State could grant *Aman* by any approved enunciation, sign, or written message.<sup>30</sup> It has been narrated that Caliph Umar I wrote to the commander of the Muslim army, Sa'ad Ibn Waqas,

. . . If a non Arabic [Harbi] individual meets one of your soldiers and gives him a sign by his body or even by his tongue and he [the Muslim soldier] does not understand that sign, they [the

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<sup>26</sup> Ibid., p. 636.

<sup>27</sup> Al-Shafei'i, Muhammad A., *Al-Umm*, Vol. IV, Al Matba'ah Al 'Amereyah, Cairo, 1322 AH, p. 191.

<sup>28</sup> Al-Bahuti, Mansour Ibn Uonis, *Sharh Muntaha al-Iradat*, Vol. II, Dar Al-Fikr, Beirut, 1982, p. 636.

<sup>29</sup> Al-Azadi, Abuda'ud Sulayman Ibn Al-Ash'ath, *Sunan Abuda'ud*, Vol. II, Al-Maktabah al-Asryyah, Beirut, 1950, p. 76.

<sup>30</sup> Al-Rafei'i, Abdulkaream Ibn Muhamad, *Fath al-'Aziz bi Sharh al-Wageaz*, Vol. XVI, A document in Al-Azhar Library, Cairo, pp. 99-100.

*non-Muslims] have Aman with the Muslims. Then assume that sign is a request for Aman.<sup>31</sup>*

On the organisation side of *Aman*, it can be said that once the *Harbi* becomes a *Musta'min*, he is allowed to live temporarily in *Dar al-Islam*, bring with him his family, children and slaves; to visit any city of *Dar al-Islam* except the *Holy* cities of the *Hijaz*.<sup>32</sup> Muslim jurists disagree regarding the *Musta'mins* visit to the *Holy* cities of *Hijaz*. While the Shafei'ites, Hanbalites assumed that it is forbidden, the Hanafites agreed that *Musta'min* could enter Makkah but not live there. Malikites permitted them to enter Makkah except for the *Holy Mosque*.<sup>33</sup> Al-Tabari, for instance, said,

*Abu Sufiyan entered al-Madinah as [it] appears [from the] al-Hudaybia treaty, and although he was polytheist, the Muslims did not harm him, which gives evidence of the permission for their entry to Madinah.<sup>34</sup>*

As for their entry into *Dar al-Islam* during cease-fire, this is not obligatory unless the treaty so stipulates and such matters are left to the decision of the *Imam*. He may permit their entry into some parts or all of *Dar al-Islam* according to what will serve the interests of *Dar al-Islam* or which the contract makes necessary. He, moreover, may set rules and regulations to organise their entry to and exit from *Dar al-Islam*, and for their life therein according to the tradition followed among states.<sup>35</sup>

Again, the Muslim jurists disputed the duration of the *Aman*. While the majority of the Shafei'ites and the Hanafites jurists agreed that, by necessity, it must not be more

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<sup>31</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafals, Beirut, 1987, p. 49.

<sup>32</sup> Al-Marghitani, Ali Ibn Abu Bakr, *Al-Hedayah, Sharh Bidayat al-Mubtade'*, Vol. III, Matba'at al-Halabi, Cairo, 1956, pp. 131-132.

<sup>33</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at al-Manar, 1348 AH, p. 531 & Ibn Najeem, Zain Al-Dean Ibn Ibraheem, *Al-Ashbah wa al-Nadhaer*, Dar al-Fikr, Damascus, 1986, p. 167 & Al-Jasas, Abu Bakr Ahmed Ibn Ali Al-Razi, *Ahkam Al-Qur'an*, Vol. IV, Matba'at al-Awqaf al-Islamiyyah, Alasatanah, 1335 AH, p. 279 & Abu Y'ali, Muhammad Ibn al-Hussein al-Far'a, *Al-Ahkam al-Sultaniyah*, Dar al-Fikr, Beirut, 1994, p. 179.

<sup>34</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. III, Al-Matba'ah al-Hussayniyah al-Masriyah, Cairo, p. 100.

<sup>35</sup> Al-Hattab, Muhammad Al-Maghrabi, *Mwahib al-Jalil li Sharh Mukhtasar Khalil*, Vol. III, Matba'at al-Sa'adah, Cairo, 1328 AH, p. 381.



than four months. On the other hand, the Hanbalites permitted the *Harbi* to live in *Dar al-Islam* for up to ten years.<sup>36</sup>

During their stay in *Dar al-Islam*, the *Musta'mins* have the same rights as the *Dhimmis*, the only exception is that they do not have to pay the *Jizyah*. They are at liberty to enjoy the security of the state and equal justice, to practise their religious belief, and to use the services of the state such as education and transportation, and to work in commerce. Abu Yusuf in his work *Kitab al-Kharaj* remarked,

*Musta'min can enter into commercial transactions during his stay in Dar al-Islam within the limitations of the law, but he is not allowed to buy any weapons or slaves or any other kind of instruments useful in war. If his purchases of contraband were considered void, the Musta'min would be given back his money and the weapons returned.*<sup>37</sup>

*Shari'ah* commands the *Imam* to support the *Musta'mins* if they lose their property by offering them shelter and help to return to their own country. In connection with their obligations to the *Dar al-Islam*, they have to respect the religious beliefs and practices of the Muslims and abstain from saying or doing anything which harms Muslims or the teaching of Islam, such as usury transactions which might be construed as lack of respect for Islam.<sup>38</sup>

The status of *Musta'min* will be changed to *Dhimmi* under three conditions:

- (1) if *Musta'min* requests a period of *Aman* which exceeded one year, then he must pay the poll tax *Jizyah* and become a *Dhimmi*;
- (2) If he buys land or property which comes under the land-tax *Kharaj*, which is evidence of his interest of living in *Dar al-Islam* for long time;
- (3) If a female *Musta'min* marries a Muslim or a *Dhimmi* she takes on the status of her spouse. However, if a *Musta'min* male marries a *Dhimmi* female he would not become *Dhimmi*. He can take her back with him to *Dar al-Harb*. However,

<sup>36</sup> Al-Bahuti, Mansour Ibn Uonis, *Kashf al-Qina'*, Vol. I, Dar Al-Fikr, Beirut, 1982, p. 695.

<sup>37</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, p.188-189.

the reverse does not apply; the female *Musta'min* cannot take a *Dhimmi* with her to *Dar al-Harb*.<sup>39</sup>

By the expiry time of the *Aman*, the *Musta'min* has four choices: (i) Embrace Islam; (ii) Become a *Dhimmi* by paying the *Jizyah*; (iii) Quit *Dar al-Islam*; (iv) Gain an extension to his/her stay in *Dar al-Islam* under the stance of necessity from the *Imam*.

If a *Musta'min* commits a crime in *Dar al-Islam* he will be under the *Shari'ah* and its system of criminal punishment in exactly the same way as a *Dhimmi*. In connection with this, the Hanafites differ from another Schools of *Fiqh* in not applying Islamic law to *Musta'mins* if they committed a crime which is against their religion, but they would be punished by Islamic provisions if they have committed a crime against individuals within *Dar al-Islam*.<sup>40</sup> Ibn Hamam explained the Hanafites point of view as follows,

*Musta'mins do not enter Dar al-Islam for residence, but for a specific purpose such as trading or acting as a messenger or for transit, and there is nothing in seeking protection by which he is obliged by all the Shari'ah provisions for crimes and transactions. They are only obliged to what agrees with his purpose in entering Dar al-Islam. So they must not be unjust and should do no harm, as long as Muslims provide them with justice and non-harm. Crimes of retribution and defamation relate to the rights of worship. Hence, Musta'min should be punished for these two crimes as for other crimes which harm rights of individuals [like compulsion and dissipation]. As for other crimes that do not touch the rights of individuals, he is not under obligation. This means that implementing punishment requires control over the venue of the crime and the time at which it was committed.*<sup>41</sup>

To simplify the previous point of view, it can be said that crimes where the *Shari'ah* differentiates between Muslims and non- Muslims are those which are based

<sup>38</sup> Al-Badawi, Ism'ael, *Ikhtisasat al-Sultah al-Tanfithiyah fi al-Dawlah al-Islamiyyah*, 1<sup>st</sup> Edit., Cairo, 1977, p. 183.

<sup>39</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Deniyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 252 & Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. III, Matba'at Mustafa al-Halabi, Cairo, 1356 AH, pp. 131-132.

<sup>40</sup> Al-Hasri, Ahmed, *Nadhariyat al-Hukm wa Masader al-Tashre'a fi Ausul al-Fiqh al-Islami*, Maktabat al-Kuliyat al-Azhariyah, 1981, pp. 215-224.

<sup>41</sup> Ibn Hamam, Kamal Al Dean, *Sharh Fath al-Qadeer*, Vol. IV, Al-Matba'at al-Ameriyyah, Cairo, pp. 155-156.

purely on religion and offences against it. Therefore, it is unjust to apply penalties on the non-Muslims for acts that are not prohibited in their religion. For example, a non-Muslim may be punished for drunkenness but not for drinking alcohol. Another example is that Islam imposes fasting on Muslims and considers non-fasting and eating openly during fasting day/s as two sins. Non-Muslims are therefore not punished for not fasting but only if they eat openly. This is because their actions will hurt Muslims' feelings.

The Islamic Law defines crimes as those actions prohibited by *Shari'ah* which *Allah* punished with a *Hadd* or discretionary punishment; in the case of mere suspicion of such an act, immunity is required by the dictates of the *Shari'ah*; when the occurrence of a criminal act has been properly established, then the full consequences, necessitated by rulings of the *Shari'ah* ensue.<sup>42</sup> Hence, it can be understood that if the action is subject to no punishment mentioned in the *Holy Qur'an* or in the *Sunnah* then it is not a crime, though it may be a sin or an evil act, as well as possibly blameless. Therefore, crime can be defined as an action which the *Shari'ah* explicitly forbids and for which it normally prescribes a punishment for the offender.

Crimes, according to the Islamic criminal law are divided into three categories. AbdulQadir Audah in his pioneering work *Al-Tashri' al-Jinai' al-Islami* has stated these categories as follows:

- 1) Those for the Divinely prescribed punishments (*Hudoud*) such as adultery, highway robbery, alcohol-drinking, and theft;
- 2) Those for retaliation and compensation or blood-money including murder. Retaliation means doing exactly to the offender what he has done to the victim. Compensation means the money which the offender or his relatives pay to the victim or to the relatives of the victim in the case of murder. Therefore, the relatives have the right to forgive the offender and thereby prevent the execution of capital punishment for the crime of murder he committed. Instead, they

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<sup>42</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam Al-Sultaniyah wa Al-Welayat Al-Deniyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 361.

accept compensation. Alternatively, they may choose to demand capital punishment and, in addition, compensation.

3) The discretionary punishments, where there is no specific punishment mentioned in the *Shari'ah*. The decision belongs to the judge to make a suitable judgement and punishment for crimes such as treason, violence and usury.<sup>43</sup>

According to the Islamic criminal law if the *Musta'min* commits a crime of the first category, particularly highway robbery or adultery with a Muslim female, they are subject to Divinely prescribed punishments. The Hanafites differ by arguing that he is not liable for *Hudoud* punishment if he commits adultery with a non-Muslim female or is involved in highway robbery.<sup>44</sup> The Shafei'ites, the Malikites and the Hanbalites, on the other hand, agreed that he has to be punished according to the *Qur'anic* verse:

إنما جزاء الذين يحاربوا الله ورسوله أن يقتلوا أو يصلبوا أو تقطع أيديهم وأرجلهم من خلاف أو ينفوا من الأرض ذلك لهم خزي ولهم في الآخرة عذاب عظيم. (المائدة: ٣٣)  
**The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, the cutting off of hands and feet from opposite sides,\* or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter. (5: 33)**

Ibn Taymiyyah explained the agreement of the three Schools of *Fiqh* when he remarked that,

*The punishment of highway robbery is the execution and crucifixion if the guilty kills and pillages the money. He is executed without crucifixion if he kills without pillaging. If he pillaged the money without killing, then his hand and foot will be cut from opposite sides [that means crucifixion]. But if he just scares the public without killing and pillaging then he has to be exiled from the land by either imprisonment in another city or expulsion from his residence to another country.*<sup>46</sup>

<sup>43</sup> Audah, AbdulQadir, *Al-Tashri' al-Jinai' al-Islami*, Mu'asasat al-Risalah, Cairo, 1994, pp. 78-83.

<sup>44</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. IX, Matba'at al-Sa'adah, Cairo, 1931, p. 55.

\* It means right hand and left foot.

<sup>46</sup> Ibn Taymiyyah, TaqulDean Ahmad, *Al-Sysasah al-Shar'iyah*, Dar al-M'arifah, Beirut, 1969, pp. 82-83.

However, Muslim jurists differed over the crime of theft. The Hanafites, unlike the other three Schools of *Fiqh*, assumed that the *Musta'min* who committed theft is not liable for punishment, while the Shafei'ites, the Malikites and the Hanbalites assumed that he has to be punished according to the *Shari'ah*. Also, if a Muslim is involved in a crime of theft against a *Musta'min*'s property, then he is subjected to the *Hudoud* punishment mentioned in the *Holy Qur'an*,

والسارق والسارقة فاقطعوا أيديهما جزاء بما كسبا نكالا من الله والله عزيز حكيم .  
(المائدة: ٣٨)

**As to the thief male or female cut off their hands, a retribution for their deed and exemplary punishment from Allah, and Allah is Exalted in Power, Full of Wisdom. (5: 38)**

Regarding the second sort of crime, Muslim jurists agreed that if a *Musta'min* murders a Muslim, a *Dhimmi* or another *Musta'min* in *Dar al-Islam*, he will be subjected to the punishment of retaliation and compensation like a Muslim. Moreover, if a Muslim kills a *Musta'min* he is subjected to the same punishment because under *Aman* the life and property of the latter are fully protected.<sup>47</sup>

Lastly, for the punishment of the third category of crimes, it has been mentioned earlier that the judge has the right to punish the *Musta'min* if he is involved in such crimes with the punishment being suitable to the charge the same as any other individual who lives in the *Dar al-Islam*.<sup>48</sup>

Muslim jurists, moreover, differ regarding the causes that terminate *Aman*. The Hanafites, the Shafei'ites and the Hanbalites rejected the view of the Malikites when they argued that if the *Musta'min* leaves *Dar al-Islam*, or the duration of *Aman* expires, the *Aman* would be terminated and the *Musta'min* has to leave the country. Moreover, the head of the Islamic State can expel *Musta'min* and repudiate the *Aman* at any time if he discovers that the *Musta'min* have either concealed a harmful purpose or if his presence in *Dar al-Islam* is inconsistent with Muslim interests.<sup>49</sup>

<sup>47</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, pp. 224-225.

<sup>48</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol. VII, Al-Matba'ah Al-'Ameriyah, Cairo, 1322 AH, p. 326.

<sup>49</sup> Anas, Malik Ibn, *Al-Moddawanh al-Kobra*, Vol. III, Dar al-Fikr, Beirut, 1991, pp. 83-85.

A general point that is pursued in this thesis is whether all relations between the Islamic State and non-Muslims are contractual or treaty relations. It has been found that Muslim jurists treated *Aman* as a treaty or contract because it was a pledge of protection to a *Harbi* and pledges have the status of covenants, treaties or contracts in the classical *Fiqh*. It should be noted however that *Aman* would not count as a treaty or contract in international law because they can only be made by parties which are formally equal and where there is a reciprocity in the terms of the agreement. In the *Shari'ah*, the legal status of Muslims is not equal to that of non-Muslims because of the importance it attaches to the distinction between belief in Islam and unbelief. Secondly, where only one side benefits, as is the case in *Aman* (the *Musta'min* receive protection from the Islamic State) while the other party does not (the Islamic State receives no tax or other benefit from the *Musta'min*), then the arrangement lacks the element of reciprocity essential to a contract or treaty in international law.<sup>50</sup> This absence of reciprocity is due to the fact that the two parties – the Islamic State and the *Harbi*s – are not formal or legal equals under the *Shari'ah*. The legally superior Islamic State confers protection on the legally inferior *Harbi*s. In addition the two are unequal in their power or strength, but this does not effect the issue of the presence or absence of a contract or treaty which is a purely legal fact. *Aman* is a pledge of protection and so a treaty in the *Shari'ah*, though it would not qualify as a treaty in international law.

#### 4.4) Convention '*Ahd al-Dhimmah*

The protection convention is unlike a normal treaty in which all terms, conditions and obligations must be written. It can be either a written or an unwritten treaty between the Muslim *Imam* and a religious group of people. It has the essential feature of a treaty or contract, namely, reciprocity; in exchange for permanent protection by the Islamic State the *Dhimmi* group pays poll-tax (*Jizyah*). Consequently, this could be added as a new category of the Islamic treaty to be two kinds, the written and the non-written treaties.

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<sup>50</sup> Akehurst, Michael, *A Modern Introduction to International Law*, 3<sup>rd</sup> Edit., George Allen and Unwin, London, 1977, pp. 30-32, 121. Akehurst argues that the parties to a treaty enter into legal obligations to each other. It is also of relevance to note his comment on page 121 that a unilateral promise by a state will be legally binding upon that state if it intends that result. (Nuclear Tests case, ICJ reports, 1974, pp. 253, 267-8) This legally binding promise by a state is, arguably, the counterpart to *Aman* in international law.

The non-Muslims who live permanently within the Islamic State called *Ahl al-Dhimmah* or the covenanted people *Dhimmis*, they pay the *Jizyah* and their relations are organised by a written or an unwritten arrangement with the Islamic authority which is equivalent to a treaty. Gibb and Bowen defined a *Dhimmi* as,

*A non-Muslim subject of a Muslim ruler. Relations with the ruler are regulated by contract once the non-Muslim community is incorporated in the Domain of Islam. Under special conditions the contract provides for the toleration of the infidel Dhimmi and allows him to practise his religion, what is offered the non-Muslim is in return for the payment of a special poll tax Jizyah.*<sup>51</sup>

Al-Maududi in his work *Rights of Non-Muslims in the Islamic State* has classified the non-Muslims who inhabit the Islamic territories into three different categories.

- 1) Those who accept the hegemony of a Muslim State whose affairs are to be decided by the terms of the appropriate treaty are called *Dhimmis*. The Muslim State is duty bound to abide by all the terms of such a treaty.
- 2) Those who fought against Muslims until they were defeated and they were overpowered they are *Conquered People*. They automatically become the *Dhimmah* or the responsibility of the Islamic State. They will pay a fixed amount of *Jizyah* and the Islamic law will protect their lives, property honour and places of worship.
- 3) Lastly, those who clearly happen to be residing permanently in the Muslim State as its citizens.<sup>52</sup>

It is difficult to see the distinction between categories 1 and 3. Number 3 appears to be an example of an un-written agreement and, perhaps, Maududi thinks that number 1 refers to a written treaty. This same point applies to Hamidullah's argument.

Muhammad Hamidullah added another category to that of al-Maududi.

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<sup>51</sup> Gibb & Bowen, *Islamic Society and the West*, in Vatikiotis, P. J., *Islam and the state*, 1<sup>st</sup> Edit., Routledge, London, 1987, p. 87.

<sup>52</sup> Maududi, Abul A'la, *Rights of Non-Muslims in Islamic State*, Islamic Publications, Lahore, 1976, pp. 2-5.

- 4) Resident aliens who have opted voluntarily to live in a Muslim State.<sup>53</sup>

The importance of the *Dhimma* to the Islamic State is that its members become citizens of that state through the treaty and their permanent residence therein. Because of its importance, Muslim jurists affirmed and insisted that the *Imam*, his deputy or the *Imam's* representative must conclude this treaty. The jurists considered the treaty to be void if someone other than those mentioned previously concludes it.<sup>54</sup>

*Aqd al-Dhimma* also has very important effects. One of these is the termination of an existing war and the hostile relations between the Muslims and the non-Muslims who become *Dhimmis*. This implies that the Muslims will avoid launching or becoming involved in another war against them unless they violate the convention. For their part, the non-Muslims cease to be at war with the Islamic State when they accept reconciliation with it, and agree to pay it the *Jizyah*. The treaty of *Dhimma* preserved their: lives; souls, personal and group properties (e.g. their churches) and honour according to the terms and conditions detailed within the text of the treaty. As for protecting them from foreign aggression, jurists insisted that the *Imam* has to provide full protection to them in any part of *Dar al-Islam* or in the adjacent territories. In this respect, the protection offered to *Dhimmis* is the same as that offered to Muslim citizens of the Islamic State. However, if *Dhimmis* are in the *Dar al-Harb* and still pay the *Jizyah* they will not be protected unless they have stipulated that condition in the convention.<sup>55</sup>

In *Dar al-Islam* where all citizens - Muslims and *Dhimmis* - are subject to the same law, *Dhimmis* will not be forced to be governed by the whole of the *Shari'ah*. They are subject to the criminal law, but because of the strong link between personal law and their religious belief and practices all personal affairs will be organised in accordance with this personal law. *Dhimmis* can therefore follow the rules of their

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<sup>53</sup> Hamidullah, Mohamad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, p. 111.

<sup>54</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at al-Manar, 1348 AH, p. 505 & Al-Dardear, Ahmed, *Al-Sharh al-Sagher*, Vol. III, Matba'at Madani, Cairo, 1963, p. 308 & Al-Bahuti, Mansour Ibn Uonis, *Kashaf al-Qina'*, Vol. III, Dar al-Fikr, Beirut, 1982, p. 117.

<sup>55</sup> Al-Mawardi, Ali Muhammad, *Al-Hawi al-Kabir*, Vol. XIX, Maktabat al-Azhar, Cairo, p. 165 & Al-Nawawi, Yahya Ibn Sharaf, *Rawdat al-Talibean*, Vol. X, Dar al-Fikr, Beirut, 1993, p. 322.



religions with regard to what is lawful and what is forbidden.<sup>56</sup> Accordingly, some Muslim jurists permitted them even to sell and drink wine, eat pork and trade in those commodities inside their community.<sup>57</sup> Bat Ye'or, for instance, confirms

*... they were granted the right of self-administration according to the laws of their religions as well as . . . freedom of worship, movement, and residence, which proved precious guarantees.*<sup>58</sup>

It is a matter of principle that the *Dhimmis* were entitled to have their own civil suits adjudicated by their own judges without governmental interference.<sup>59</sup> However, whenever *Dhimmis* opt for the *Shari'ah* as the rule in their personal law, the *Shari'ah* will apply to them even if the members of their community insist on their being tried according to their preceding personal law. The cases of *Dhimmis* are to be decided by no one else but their co-religionists in accordance with their personal, traditional or religious law.<sup>60</sup> The *Holy Qur'an* mentions,

فإن جاءوك فاحكم بينهم أو أعرض عنهم وإن تعرض عنهم فلن يضروك شيئا وإن

حكمت فاحكم بينهم بالقسط إن الله يحب المقسطين . (المائدة: ٤٢)

If they do come to thee, either judge between them or decline to interfere; if thou decline, they cannot hurt thee in the last; if thou judge, judge in equity between them; for Allah loveth those who judge in equity. (5: 42)

Islam, moreover, developed rights and obligations of the *Dhimmis* and constituted a law which regulated and governed their relations with Muslims, both individuals and authority. Muslim jurist formalised these rights and obligations, they derived some of these rules from the *Holy Qur'anic* legislation, and others from decrees issued by the succeeding Caliphs, particularly from the charter of Caliph Umar I with the Christians of Jerusalem. Simon Ockley<sup>61</sup> stated the terms of the charter as follows:

- 1) The Christians shall build no new churches, either in the city or the adjacent territory;

<sup>56</sup> Anas, Malik Ibn, *Al Moddawanh al-Kobra*, Vol. IV, Dar al-Fikr, Beirut, 1991, p. 162.

<sup>57</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol. V, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 44. & Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. X, Dar al-Itihad al-Arabi li al-Teba'a, Cairo, 1969, p. 210.

<sup>58</sup> Ye'or, Bat, *The Dhimmi, Jews and Christian under Islam*, Fairleigh Dickinson University Press, London, 1985, p. 49.

<sup>59</sup> Sherwani, Haroon Khan, *Muslim Political Thought and Administration*, Munshiram Manoharlal Publisher, 1977, pp. 27-28.

<sup>60</sup> Al-Jasas, Abu Bakr Ahmed Ibn Ali Al-Razi, *Ahkam al-Qur'an*, Vol. II, Matba'at al-Awqaf al-Islamiyyah, Alasatanah, 1335 AH, p. 460.

- 2) They shall not refuse the Muslims entrance into their churches, by night or day;
- 3) They shall also open the doors of their houses to all passengers and travellers;
- 4) If any Muslim is on a journey, they are obliged to entertain him gratis for the period of three days;
- 5) They should not talk openly of their religion, nor persuade anyone to join it, neither should they hinder any of their relations from becoming Muslims if they have an inclination to it;
- 6) They shall respect Muslims, for example, if they were seated they should stand;
- 7) They should not be like the Muslims in their dress, caps, shoes, turbans, nor should they part their hair like Muslims do, nor should they speak in the same way or use the same names as Muslims;
- 8) They shall not use saddles, bear arms, or use Arabic in the inscriptions of their seals;
- 9) They shall not sell any wine;
- 10) They must always wear the same kind of clothes with a girdle around their waists;
- 11) No cross is to be placed upon their churches. Crosses and their books must not be displayed openly in the streets of the Muslims;
- 12) They shall not ring, only toll, their bells, nor shall they take any servant that had once belonged to the Muslims;
- 13) Their houses shall not overlook Muslim houses.

These rules were met with great criticism. Jirji Zaydan, for example, insists,

*The text of the charter displays a desire to persecute and oppress the Christians that is unlike what appears in the other charters and treaties that belong to the beginning of Islam; it is also unlike what is otherwise known of Omar's justice and gentleness towards the people of the Covenant [Dhimmis] and can be inferred from the narrative of his life. That life exhibits veracity in thought, word, and deed, and so when a Moslem injured a*

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<sup>61</sup> Ockley, Simon, *The History of the Saracens*, 4<sup>th</sup> Edit., Henry G. Bohn, London, 1847, pp. 211-212.

*Christian it was Omar's custom to obtain satisfaction for the injured party, even though the Moslem was one of the most eminent of the Companions.*<sup>62</sup>

Zaydan then mentions al Mawardi's twelve conditions and duties, which agrees with the text of Umar's charter, except that it is arranged in headings and clauses. According to al-Mawardi these conditions divided into two categories, the first six are obligatory while others are desirable. Zaydan mentioned these twelve duties; however, in his first condition, he combined three points- who has to pay, the amount of *Jizyah*, and the penalty if he refuses to pay it.<sup>63</sup>

Under these conditions and duties, the convention may subsequently become void if the *Dhimmi*s performed one of the following:

- 1) Reviling or showing any disrespect to the *Holy Qur'an*;
- 2) Insulting the Prophet of Islam;
- 3) Attacking the religion of Islam;
- 4) Injuring the life or the property of a Muslim. Nor should they abjure his belief or induce him to apostatise;
- 5) Marrying Muslim women or entering into sexual connection with them;
- 6) Co-operating with the enemy, such as disclosing secrets of the Muslims to the enemy or passing on intelligence to the enemy.

The next conditions are desirable conditions. Non-Muslims are not required to do any of these unless they are written in the convention. However, unlike the previous conditions, non-performance of any or all of these are not considered to terminate the convention:

- 7) Drinking wine or eating pork or showing their crosses in public (some added that they are not permitted to sell wine and pork);
- 8) Changing their outward appearances by wearing distinctive clothes.

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<sup>62</sup> Zaydan, Jurji, *History of Islamic Civilization*, Vol. IV, E. J. W. Gibb Memorial, Leyden, 1907, pp. 126-127.

<sup>63</sup> *Ibid.*, p. 129.

- 9) Riding on horseback, but they are allowed to ride donkeys and mules.
- 10) Their houses should not be higher than Muslims' houses.
- 11) Ringing their church bells loudly or raising their voice loudly in prayer or their talk of Jesus.
- 12) Their dead should not be wept over loudly and their burial must be concealed from Muslims. They must be buried in a place away from Muslim quarters.

These obligatory and non-compulsory conditions show that Joseph Schacht was mistaken when he claimed that,

*Neither offences against individual Muslims, including even murder, nor refusal to pay the tribute, nor transgression of the other rules imposed upon the non-Muslims, are considered breaches of the treaty.*<sup>64</sup>

Truly speaking, the occurrence of one of the previous offences mentioned by Schacht should breach the convention, though in the words of Ann Lambton,

*The essential condition imposed upon them [the Dhimmis] was the obligation to pay Jizyah.*<sup>65</sup>

The *Shari'ah* has imposed obligations on Muslims toward the *Dhimmis* because they are under the pledge of *Allah*, his Messenger, and the pledge of the Muslim community; they are under the protection of Islam. According to the *Shari'ah*, they are guaranteed the protection of their life, property, and honour, and they enjoy all the legal rights enshrined in exactly the same way as Muslims in the *Shari'ah*. These obligations towards the non-Muslims are summarised by (Amir Siddiqi) as follows:

- 1) The Islamic State has to offer them the full protection from both external and internal ignominious acts or attacks against them.
- 2) They are exempted from military conscription unless they want to enlist.

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<sup>64</sup> Schacht, Joseph, *An Introduction to Islamic Law*, Oxford University Press, London, 1975, p. 131.

<sup>65</sup> Lambton, Ann K. S., *State and Government in Medieval Islam*, Oxford University Press, Oxford, 1985, p. 204.

- 3) The Islamic State is fully responsible for providing a living for the non-Muslim permanent resident who cannot work or cannot find a decent job.\*
- 4) Non-Muslims who live within the Islamic State have to use the Islamic Court in all their legal cases. However, the Islamic Court shall provide them with a permanent, respectable expert for the cases involving their creed and personal statute, under full supervision of the Islamic Court.
- 5) The Islamic State shall enact the necessary law to determine the type of professions in which they shall be allowed to work.
- 6) Non-Muslims have the full right to leave the Islamic State temporarily or permanently at any time. All travel rules and requirements designed for the Islamic State's citizens, such as the necessity of documentation and permission, applies equally to the *Dhimmis* unless their departure affects the security of the state.
- 7) Their children must enjoy all the levels of education in Islamic State. Moreover, they can establish their own educational institutions that will be supervised by the Islamic authority.
- 8) Finally, all other regulations and laws not concerning religious duties, which apply to the Islamic State other citizens shall be tacitly applied to all non-Muslim permanent residents.<sup>66</sup>

*Dhimmis* have to pay three sorts of taxes to the Islamic state: *Jizyah*, *Kharaj*, and the Tithe.

#### 4.4.1) The Tribute *Jizyah*

*Jizyah* was initially known during the time of the Pharonic Egyptian. It was found on the papyri of the first (seventh) century besides the *Jizyah* as the principal tax in gold, only the payment in kind is mentioned. For the Sassanians and Byzantines the

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\* Refer to the story of Caliph Umar I with the Jew in Hamidullah, Muhammad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, pp. 113-114.

<sup>66</sup> Siddiqi, Amir, *Non-Muslims Under Muslim Rule & Muslims Under Non-Muslim Rule*, The Jamiyatul Falah Publications, Karachi, 1969, pp. 1-9.

main source of revenue, and hence of the tribute payment, was the land-tax, which bore the Aramaic of Kharaj. This term was identified with the Arabic *Kharaj*.<sup>67</sup>

Muslim jurist agreed on the meaning of *Jizyah* to be: “the amount of money that *Dhimmi* pays to the Islamic authority, or the contract that regulates this payment.”<sup>68</sup> They differ, however, in defining the term itself. While Ibn Taymiyyah, for instance, defines it as,

*The tax which is imposed on the heads of the people of the book (Christians and Jews) who join the Dhimmah of Muslims.*<sup>69</sup>

Ibn Qudamah, on the other hand, defined it as,

*The payment taken from the disbeliever for his living in the Dar al-Islam every year.*<sup>70</sup>

Moreover, they still differ in dealing with the effects of *Jizyah* on the status of the *Dhimmi*s. In connection with this, al-Bahuti, for example, defined *Jizyah* as,

*The acknowledgement of some non-Muslims of their atheism with the condition of payment of the Jizyah and following the revisions of the religion.*<sup>71</sup>

Dissimilarly, al-Mawardi defined it as,

*The People of the Book shall admit of staying in the Dar al-Islam with a Jizyah they pay for themselves every year.*<sup>72</sup>

From another point of view different to the above two, al-Ghazali illustrated it as,

*By the payment of the Jizyah, they acknowledge that they have been protected and defended in our country and that they owe obedience from their side.*<sup>73</sup>

<sup>67</sup> Gibb, H. A. R. & H. Kramers, *Short Encyclopedia Of Islam*, E. J. Brill, Leiden, 1974, p. 92.

<sup>68</sup> Ibn Qudamah, AbdulRahman Ibn Muhammad, *Al-Sharh al-Kabir*, Vol. II, Matba'at al-Manar, 1348 AH, pp. 201-202 & Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. IV, Dar al-Itihad al-Arabi li al-Taba'a, Cairo, 1969, p. 228.

<sup>69</sup> Ibn Taymiyyah, TaqulDean Ahmed, *Al-Syasah al-Shar'iyah*, Dar al-M'arifah, Beirut, 1969, pp. 113-114.

<sup>70</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. IX, Matba'at al-Manar, 1348 AH, p. 328.

<sup>71</sup> Ibn Al-Najar, TaqulDean Muhammad Ibn Ahmed, *Montaha al-Iradat*, Vol. II, Matba'at al-Halabi, Cairo, p. 127.

<sup>72</sup> Al-Mawardi, Ali Muhammad, *Al-Hawi al-Kabir*, Vol. XIX, Maktabat al-Azhar, Cairo, p. 163.

<sup>73</sup> Al-Ghazali, Muhammad Ibn Muhammad, *Al-Wajez*, Vol. II, Matba'at Hoash Kadam, 1318 AH, p. 198.

Regardless of the juristic disagreement on the definition, what can be concluded is that the jurists agree that the status of *Dhimma* is strongly connected with the payment of the *Jizyah*; without the *Jizyah* there is no *Dhimma* status.

The legislation does not provide any details about the currency in which *Jizyah* is to be paid. In the time of the Prophet Muhammad it was sometimes paid in gold, as happened with the people of Yemen and Tabouk, and sometimes in the form of ornaments, garments, and cattle, as in the *Jizyah* of the people of Najran. *Jizyah* was sometimes assessed for an entire village and in other times it was a per capita (poll) tax. Its value might be increased or decreased according to the condition of the people and the need of Muslims.<sup>74</sup> The case of Cyprus gives an example of such a condition. It was during the time of Caliph 'Uthman the *Jizyah* was 7200 golden *Dinars*, then the Caliph AbdulMalik Ibn Marwan added 1000 *Dinars*, Caliph Umar II cancelled that addition, then Caliph Hisham Ibn AbdulMalik returned the 1000 *Dinars*, this remained the same until the time of the 'Abbaside Caliph Abu Ja'far al-Mansour who returned the *Jizyah* to its original amount.<sup>75</sup>

In brief, *Jizyah* is a tax on *Dhimmis* who live in the *Dar al-Islam*. Other Muslim citizens bear many financial burdens, such as *Zakah* and other burdens. *Jizyah* was paid in return for the benefit of public services from the Islamic State, its protection and preservation of them from any internal or external aggression. Moreover, *Jizyah* is in return for their exclusion from their duty of military service for the Islamic State.<sup>76</sup> Jurist al-Khateab remarked that,

*Jihad is not for the non-Muslim even if he is one of the People of the Book [Dhimmis], as he pays the Jizyah to us in order to defend him, not for him to defend us.*<sup>77</sup>

Afzal Iqbal comments on this issue. He said,

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<sup>74</sup> Ibn Al-Athear, Ali Ibn Muhammad, *Al-Kamil fi al-Tareikh*, Vol. II, Dar Sader, Beirut, 1979, p. 191 & Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. VIII, Matba'at al-Halabi, Cairo, 1952, p. 65.

<sup>75</sup> Al-Beladhuri, Ahmed Ibn Yahya, *Futuh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, p. 159.

<sup>76</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 78.

<sup>77</sup> Al-Khateab, Muhammad, *Al-Iqna'a*, Vol. IV, Matabe'a al-Sha'b, Cairo, 1966, p. 227.

*In case, however, they [the Dhimmis] are employed on military duty, the normal tax is payable by them [the Jizyah] was no longer due to the treasury.<sup>78</sup>*

Jurists disputed who should and who should not pay *Jizyah*. On the one hand, the Shafei'ites and the Hanbalites, agreed that *Jizyah* shall be accepted only from the *People of the Book* (i.e. Jews and Christians) even if they were Arabs or Magi who worship fire.<sup>79</sup> On the other hand, the Hanafites and the Malikites assumed that *Jizyah* is taken from all non-Muslims except from the Arab idolaters (heathen).<sup>80</sup> Later jurists agreed that *Jizyah* is not accepted from the Arab idolaters.<sup>81</sup> Some such as al-Awza'i, al-Thawri, and some of the Malikites agreed that *Jizyah* should be taken from all non-Muslims, whether they are scripturaries, idolaters, Arabs, or non-Arabs.<sup>82</sup>

Under certain conditions jurists excluded *Dhimmis* from paying the *Jizyah*. These were:

a) *Embracing Islam*. *Jizyah* will be void completely if a *Dhimmi* embraces Islam, whether he embraced it during the year or after *Jizyah* elapsed. Nothing is to be taken from him even if he had not paid *Jizyah* for many previous years<sup>83</sup> and the status of *Jizyah* will be changed to *Zakah*. Jurists admitted that with the evidence of the Prophetic *Hadith* **"No *Jizyah* shall be paid by a Muslim."**<sup>84</sup>

Some jurists, particularly the Shafei'ites and Hanafites, considered that *Jizyah* is to be cancelled for the full year in which the *Dhimmi* embraced Islam. However, *Jizyah* for the years preceding his embrace of Islam, it shall be a debt which he has to pay.

<sup>78</sup> Iqbal, Afzal, *The Culture of Islam*, Institute of Islamic Culture, Lahore, 1967, p. 87.

<sup>79</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol., IV, Al-Matba'ah al-'Amereyah, Cairo, 1322 AH, pp. 97 & 105. & Al-Ramli, Muhammad Ahmed, *Nehayat al-Muhtaj ila Sharh al-Minhaj*, Vol. VII, Matba'at al-Halabi, Cairo, p. 221.

<sup>80</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. VII, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 110. & Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. I, Hyderabad, 1335 AH, p. 102.

<sup>81</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *Ahkam Ahl al-Dhimma*, Damascus, Matba'at Jami'at Dimishq, 1961, p. 20.

<sup>82</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p. 714.

<sup>83</sup> Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. VI, Matba'at al-Halabi, Cairo, 1356 AH, p. 55 & Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 80-81 & Ibn Al-Najar, TaqulDean Muhammad Ibn Ahmed, *Montaha al-Iradat*, Vol. II, Matba'at al-Halabi, Cairo, p. 130 & Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea Al Sanay'a fi Tarteab Al Sharay'a*, Vol. IX, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 4334.

<sup>84</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. III, Dar al-Ma'aref, Cairo, 1980, p. 291.



However, some jurists did not accept this view. They assumed that *Jizyah* shall not cease even in the year in which the *Dhimmi* has embraced Islam. In their view it must be paid for the part of the year preceding his conversion to Islam, because *Jizyah* is a debt which shall not be erased. As *Jizyah* is a compensation for sparing life and providing peace and security which are enjoyed by the *Dhimmi*, he has to pay for these benefits received.<sup>85</sup>

An argument against the view of the Shafei'ites and Hanafites that *Jizyah* of pre-Islam years of the *Dhimmi* still remains as debt is that cancellation of *Jizyah* will encourage unbelievers to embrace Islam. This view is supported by the strong Prophetic *Hadith*,

***Islam wipes out all the previous [sins] missed.*<sup>86\*</sup>**

b) *The Death*. Jurists of the Hanafites, Malikites agreed that *Jizyah* is cancelled by death for the year or the years before the *Dhimmi* died and for the full amount or part of it (based on his financial status). Accordingly, nothing is to be taken from the inheritance of the deceased against what he had to pay of *Jizyah*.<sup>87</sup> However, the Shafei'ites differentiate between death during the year and death after the due date of the *Jizyah* payment. If the *Dhimmi* died during the year of the *Jizyah*, this did not cancel the *Jizyah*, either for the part of that year or the years preceding it.<sup>88</sup>

In connection with this, since *Jizyah* is paid at the end of the year it should be noted that the juristic opinion which calls for cancellation of the *Jizyah* for the *Dhimmi* during the full year in which he died meets the condition of necessity. That is the deceased *Dhimmi* could not pay this tax at the end of the year due to his death which owes nothing to his own will, but is the will of God. As for the arrears of debts for previous years, these are not to be cancelled (unless he was poor) as he joined the Islamic State for protection and all the other rights of the *Dhimmi*s for which he must

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<sup>85</sup> Al-Sherazi, Ibraheem Ibn Ali, *Al-Muhatheeb*, Vol. II, Matba'at al-Halabi, Cairo, p. 252 & Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. IX, Matba'at al-Manar, Cairo, 1348 AH, p. 342.

<sup>86</sup> Matrajli, Mahmoud, *Translation of Saheeh Muslim*, Vol. I, Dar Al-Fikr, Beirut, 1993, p. 155-156.

\* This means that: when a non-Muslim embrace Islam, all sins he committed regarding worship will be wiped. However, offences committed against people will not be wiped unless they (the people) forgive him (the non-Muslim).

<sup>87</sup> Al-Zaila'ai, Fakhir Al-Dean Ibn Uthman, *Tabyyeen al-Haq'iq*, Vol. III, Dar al-Fikr, Beirut, 1991, p. 278.

<sup>88</sup> Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, pp. 66-67.

pay. Therefore, in order not to have procrastination and wasting of the financial rights of the Islamic State, this right should be taken from his inheritance.

c) *Overlapping the Jizyah*. The Hanafites jurists decided that a *Dhimmi* whose payment of *Jizyah* has not been collected over several previous years for whatever reason shall pay only the *Jizyah* of the present year.<sup>89</sup> They argued that there is no need to collect the *Jizyah* from previous years because the purpose of this tax can be achieved by the payment of a single year. That purpose is not to maximise revenue for the Islamic State: it is to ensure that the non-Muslim citizen of the Islamic State shows lowliness, humiliation and his subjection to the rule of Islam. If the *Dhimmi* paid *Jizyah* for all the past years when his non-payment was discovered, then the intention of the tax would be to accumulate money for the Islam state instead of securing the required attitude and pattern of behaviour by the *Dhimmi*.<sup>90</sup>

In addition, *Jizyah* has been legislated as a penalty to the non-Muslims for their disbelief in Islam. Thus, if *Jizyah* is imposed for past non-payment this would be undesirable because a retrospective punishment. The purpose of *Jizyah* as punishment is achieved within the current year and additional retrospective *Jizyah* would constitute needless, purposeless punishment.<sup>91</sup>

Against this view was that of Ibn al-Qayyim, of the Hanbalite, and Abu Yusuf, of the Hanafite. They held the view that the debt of *Jizyah* shall not expire as a result of non-payment over time. They held it should be collected completely for all past years because it is a debt to the Islamic State for its protection for those years which has not been cancelled by the creditor, the Islamic State.<sup>92</sup> In other word, like all financial obligations by debtors, it has to be met in full in the absence of cancellation (or other modification of the terms of the debt) by the creditor.

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<sup>89</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 82.

<sup>90</sup> Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalam*, Vol. VI, Matba'at al-Halabi, Cairo, 1356 AH, p. 55.

<sup>91</sup> *Ibid*.

<sup>92</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *Ahkam Ahl al-Dhimmah*, Damascus, Matba'at Jami'at Dimishq, 1961, p. 61.

d) *Failure of protection*. If the Islamic State cannot protect the *Dhimmis*, *Jizyah* is no longer owed. There is evidence that *Jizyah* was in return for protection because when some Moslem leaders felt that they were not able to protect the *Dhimmis* they returned the *Jizyah* to them. For example, when the Romans collected their forces to attack the northern borders of the Islamic State, the Muslim commander Abu Ubaidah Ibn al-Garrah wrote to all his rulers to return the *Jizyah* to all *Dhimmis* who had paid it to the Islamic State.<sup>93</sup>

e) *Loss of necessity*. In the cases of poverty, illness, blindness and senility the *Jizyah* payment is automatically cancelled. If one of these causes occurs within the payment year, *Jizyah* payment is not required, and *Dhimmis* have to be supported by the Islamic authority through Muslim public treasury (*Bait al-Mal*). It has been narrated by al-Tabari that Caliph Umar II sent to his governor of Khurasan to “collect *Jizyah* firmly if they can afford to pay it, or if you appeal against exacting payment due to the lack of money, write to me and I will enable you to provide (the *Dhimmis*) for their needs.”<sup>94</sup>

Jurists stipulated that *Jizyah* is due annually on every *Dhimmi* who is male, of military age, adult, free, and in work. They exempted *Dhimmis* who are monks, hermits, women, poor, children, and slaves from paying the *Jizyah*. The amount of the *Jizyah* to be collected was eighty-four *Dirhams* for the rich, twenty-four *Dirhams* for the middle classes, and twelve *Dirhams* for ordinary and working classes, such as tailors and farmers.<sup>95</sup> *Jizyah*, moreover, has not to be levied beyond the capacity of any *Dhimmi*. In the Prophetic *Hadith* it states,

***Whoever oppresses a Dhimmi subject or taxes him beyond his capacity, then I shall be the opposite party to him in the litigation.***<sup>96</sup>

*Jizyah*, moreover, has to be collected with kindness and condescension to the *Dhimmis* by the tax collector without any disgrace of insult or humiliation. Imam al-Shafei'i stated,

<sup>93</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, p. 166.

<sup>94</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. IV, al-Matba'ah al-Hussayniyah al-Masriyah, Cairo, p. 70.

<sup>95</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, pp. 69-72. & 253-256.

*Jizyah should be taken in general without beating or abusing the Dhimmis. Humility means that they must implement the order, not be beaten or harmed.*<sup>97</sup>

Jurist al-Nawawi commentated on al-Shafei'i's view,

*This means of treatment, which means degrading them, is null and void and carrying it out is a big mistake.*<sup>98</sup>

Jurist Abu Yusuf said,

*Nobody of the Dhimmis should be beaten [to force them] to pay Jizyah. They must not be left under the sun, and no harm should be done to their bodies. They must be treated kindly and be imprisoned until they give the Jizyah, then they should be taken out of the prison.*<sup>99</sup>

However, in some cases if *Dhimmis* are obstinate or procrastinate in payment but are capable of paying *Jizyah*, resorting to imprisonment of such *Dhimmis* is permissible. Abu Thawr, for example, mentioned,

*They (the Dhimmis) should be treated kindly in collecting the Jizyah. They should not be beaten or imprisoned unless one of them has a contract and has not fulfilled it, so the Imam may imprison him.*<sup>100</sup>

In the *Sunnah*, there are various Prophetic *Hadiths*, which warn Muslims against any high handedness towards the *Dhimmis*. The Prophet is reported to have said,

***Whosoever persecuted a Dhimmi or spoilt his right or took work from him beyond his capacity, or took something from him with evil intentions. I shall be a complainant against him on the Day of Resurrection.***<sup>101</sup>

Most notably, according to verse which was introduced in the *Qur'an*,

عن يد وهم صاغرون . (التوبة: ٢٩)  
... with willing and feel[ing] themselves subdued. (9: 29)

<sup>96</sup> Ibid.

<sup>97</sup> Al-Shafei'i, Muhammad A., *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 127.

<sup>98</sup> Al-Khateab, Muhammad, *Al-Iqna'a*, Vol. II, Matabe'a al-Sha'b, Cairo, 1966, p. 247.

<sup>99</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, p. 123.

<sup>100</sup> Al-Tabari, Mohamad Ibn Jarrear, *Ikhtilaf al-Foqaha'*, Leiden, 1933, p. 232.

<sup>101</sup> Al-Bayhaqi, Ahmed Ibn Al-Hussein, *Al-Sunan al-Kobra*. Vol. IV, Dar al-Fikr, Beirut, 1994, p. p. 205.

Imam al-Shafei'i explained this verse as referring to the domination *Hukm* of Islam, which the *Dhimmis* were under. On the authority of this passage, he demanded a very humiliating method of paying *Jizyah*, and that *Dhimmis* are obliged by the provisions of Islam, subjected to Islam and to the sovereignty of the Islamic State.<sup>102</sup>

When examining jurists' explanation of the motives for paying *Jizyah*, their consensus is replaced by differences of view. Ibn al-Qayyim argued that,

*Since Dhimma requires non-Muslims to pay Jizyah, these agreements were meant to punish the non-believers. This opinion reflects the prevailing tense relationship between Muslims and others.*<sup>103</sup>

A. AbuSulayman has explained Ibn al-Qayyim's position on three grounds. These are:

- 1) The cumulative effect of centuries of tension in communal relationships within the Muslims territories;
- 2) The effects of the Mongol and Crusaders invasions;
- 3) The general confusion in understanding the theoretical bases of Islam.<sup>104</sup>

However, AbuSulayman's explanation does not provide the real meaning of Ibn al-Qayyim's position. This is because the differences among the Muslim jurists, Ibn al-Qayyim is one of them, are not related to AbuSulayman's grounds. They basically belong to *Ijtihad* in explaining Islamic rules and judgements according to the *Holy Qur'anic* texts and the Prophet's *Hadiths*.<sup>\*</sup> Religious verdicts were usually not subjected to the effects of invasions, cumulative effect of centuries of tension in communal relationships, or conflicts and enmity among Muslims and others. That is because the relations between Muslims and non-Muslims is governed by Islamic principles, and not by historical events. Khalid Ishaque, for instance, argues that,

<sup>102</sup> Al-Shafei'i, Muhammad A., *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 223.

<sup>103</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, IIOIT, Herndon, 1994, p. 28.

<sup>104</sup> *Ibid.*, pp. 28-29.

<sup>\*</sup> See the causes of disagreement among Muslim jurists in chapter II, 2.5.

*Some early personalities have acquired a dominant position in Islamic studies such that their decisions or views, even though their time frame has changed, are held to be sacrosanct, and anyone suggesting a change is charged with blasphemy.*<sup>105</sup>

Islam paid serious attention to the *Dhimmis* and concerned itself with their affairs. *Dhimmis* had a kind of social security against infirmity, sickness and indigence. An example of which is mentioned in the treaty between the Muslim commander, Khalid Ibn al-Walead, and the Christians of Iraq,

*Old people who are unable to work, the sick and poor people who are supported by their families will be exempted from paying Jizyah, and they will be financially supported by the Muslims as long as they live in the Dar al-Islam.*<sup>106</sup>

f) *Sharing the Islamic Military forces.* If *Dhimmis* serve in the Islamic armed forces or give aid, such as military or logistical support to the Islamic military forces, they will be automatically exempted from paying *Jizyah*. For example, that the Muslim commander Habib Ibn Musallama al-Fohry invaded “al-Garagouma”. Its people asked him for protection in return for their help and support for the Muslims in the mountain of “al-Luckam”. They pledged help to Muslims in their wars, but did not get the spoils of war from the defeated enemy of the Muslims.<sup>107</sup>

g) *Exemption by the Imam.* *Jizyah* is tax similar to any other tax and can be waived whenever it is deemed necessary. In the history of the Islam they are many rulers who have abolished payment of *Jizyah* by *Dhimmis*. The Prophet Muhammad himself expressed the wish to exempt all the Copts from paying *Jizyah*; when his son Ibrahim, by his Coptic wife Mariah, died. The Prophet is reported to have said,

***Had Ibrahim survived, I would have exempted all the Copts from paying the Jizyah.***<sup>108</sup>

Had the *Jizyah* been obligatory in all circumstances on *Dhimmis*, the Prophet would have never expressed his desire of exempting the Copts. From this it may be

<sup>105</sup> Khalid Ishaque, Problems of Islamic Political Theory, in Mumtaz Ahmad, *State Politics and Islam*, American Trust Publications, Indianapolis, 1986, p. 25.

<sup>106</sup> Al-Badawi, Ism'ael, *Ikhtisasat al-Sultah al-Tanfithiyah fi al-Dawlah al-Islamiyyah*, 1<sup>st</sup> Edit., Cairo, 1977, p.183.

<sup>107</sup> Al-Beladhuri, Ahmed Ibn Yahya, *Futuh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, p. 164.

<sup>108</sup> Ibn Sa'ad, Muhammad, *Ketab al-Tabaqat al-Kubrah*, Vol. I, Dar Beirut, Beirut, 1980, p. 144.

concluded that permanent reconciliation on the basis of *Jizyah* or not is possible according to interests, needs and the traditions followed by the Islamic State.

#### 4.4.2) The Land Tax *al-Kharaj*

The word *Kharaj* is derived through the Persian from Aramaic *halak* as used in the Persian Empire. It originally meant tribute in a general sense to which unbelievers in Muslim lands were liable.<sup>109</sup> Some Muslim jurists, particularly Imam Abu Hanifah, therefore, used the term *Kharaj* as a synonym for *Jizyah*.<sup>110</sup> However, the remainder of Muslim jurists used it to denote the land tax which *Dhimmi*s have to pay to the Islamic authority.<sup>111</sup> Jurist al-Jasas in his work *Ahkam al-Qur'an* defined *Kharaj* as follows,

*It is a compulsory financial payment by the Dhimmi for his land.*<sup>112</sup>

It should be noted that in the *Shari'ah* there is a sort of territory called the tithe lands *al-Ardh al-'Ashreeh*. This land belongs to people who embrace Islam without prior suppression or defeat in war, and were not subject to taxation before the appearance of Islam. The land of Madinah is an example of such a territory, owned by genuine landlords, Arabs or non-Arabs. Such lands are not subject to the tax of *Kharaj*. The only tax that should be paid is the *Zakah*, that is, a tithe or ½ tithe.<sup>113</sup>

Legislation and the organisation of the collection of *Kharaj* occurred during the time of the Caliph Umar I. It is of two kinds:

1) *The land's product Kharaj*. It is imposed on the land according to its area and agricultural products. Caliph Umar I legislated that on each arable or cultivated

<sup>109</sup> Gibb, H. A. R. & H. Kramers, *Short Encyclopedia Of Islam*, E. J. Brill, Leiden, 1974, p. 245.

<sup>110</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, p. 132.

<sup>111</sup> Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. IV, Matba'at al-Halabi, Cairo, 1356 AH, p. 367.

<sup>112</sup> Al- Jasas, Abu Bakr Ahmed Ibn Ali Al-Razi, *Ahkam al-Qur'an*, Vol. III, Matba'at al-Awqaf al-Islamiyyah, Alasatanah, 1335 AH, p. 430.

<sup>113</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, pp. 144-145.

land the tax should be levied on every *Kafeas* and on each *Gareab*.<sup>\*</sup> The amount was a *Dirham* on each cultivatable piece of land, and five *Dirhams* on a *Gareab* of vegetables, ten *Dirhams* for the *Gareab* of grapes.<sup>114</sup> However, the Hanafites, the Hanbalites, and the Shafei'ites stipulated the utilisation of the land as the decisive factor. Thus, cultivatable land requires that the landlord pays the *Kharaj* even though he may not have planted it.<sup>115</sup> Such *Kharaj* has to be paid annually and if the product of the land fails for some reason *Kharaj* has to be cancelled for that year.<sup>116</sup>

2) *The Estimated Kharaj*. Under this sort of *Kharaj* the payment due differs from one land to another. The Hanbalites and the Shafei'ites agreed that this is the decision of the *Imam* or who ever is empowered to raise or lower the *Kharaj*. It is not necessary to follow the amount imposed by Caliph Umar I.<sup>117</sup> The Hanafites, on the other hand, agreed that *Imam* can lower the *Kharaj* but insisted he could not raise it.<sup>118</sup> In support of the first view, it should be noted that *Kharaj* payments did vary from time to time and the authoritative observation of Abu Yusuf suggests that Caliph Umar I intended this outcome,

*When Caliph Umar legislated the Kharaj, he did not say, "this Kharaj is determined forever and also who has to pay it." [Nor did he say] "it is not permissible either for me or for the Caliphs after me to lower or raise its sum."*<sup>119</sup>

Muslim jurists stipulated the factors which a collector of the *Kharaj* has to take into account when estimating the tax on any land. They are: the area of land, its products and their values, its remoteness from cities, and its productivity.<sup>120</sup>

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<sup>\*</sup> The *Gareab* is an old Islamic cadastral measure, each *Gareab* equals 1366.0416 cm. The *Kafeas* is an old Islamic scale of weight, each *Kafeas* equals 2.751 kg. See Al-Rayis, Muhammad Dhiy' al-Dean, *Al-Kharaj fi al-Dawlah al-Islamiyyah*, 1<sup>st</sup> Edit., Matba'at Nahdhat Masr, Cairo, 1957, p. 277-279 & 302-305.

<sup>114</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 79.

<sup>115</sup> Al-Bahrawi, AbdulRahman al-Hanafi & Others, *Al-Fatawa al-Hindiyah*, Vol. II, Al-Matba'ah al-Ameriyyah, Bulaq, 1310 AH, p. 237. & Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 154. & Abu Y'ali, Muhammad Ibn al-Hussein al-Far'a, *Al-Ahkam al-Sultaniyah*, Dar al-Fikr, Beirut, 1994, p. 153.

<sup>116</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, pp. 82-83.

<sup>117</sup> Ibn Al-Najar, TaqulDean Muhammad Ibn Ahmed, *Montaha al-Iradat*, Matba'at al-Halabi, Cairo, p. 734.

<sup>118</sup> Al-Bahrawi, AbdulRahman al-Hanafi & Others, *Al-Fatawa al-Hindiyah*, Al-Matba'ah al-Ameriyyah, Bulaq, 1310 AH, pp. 238-239.

<sup>119</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, p. 84.

<sup>120</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, pp. 143-144. & Abu Y'ali, Muhammad Ibn al-Hussein al-Far'a, *Al-Ahkam al-Sultaniyah*, Dar al-Fikr, Beirut, 1994, pp.



Accordingly, the Hanafites, the Hanbalites and the Shafei'ites such *Kharaj* has to be collected on every seasonal crop and cancelled if the land has not been planted. However, if the landlord has failed to plant it due to personal incapacity, the Hanafites agreed that the *Imam* has to take the land and collect the *Kharaj* by either: (i) selling the land; (ii) financing its planting; (iii) renting it to others who will plant it. However, the Shafei'ites and the Hanbalites insisted that the Imam has to enforce the landlord to either rent the land or sell it. Abu Yusuf saw that the landlord had to be supported by the Islamic authority to be able to work and plant his land.<sup>121</sup>

Regarding the lands that have to be subjected to *Kharaj*, jurists divided as follows:<sup>122</sup>

1) Those which are conquered by force. Ibn Sallam in his book *Al-Amwal* noted that the Caliph Umar I refused to exempt a *Dhimmi* of Iraq who embraced Islam from paying the *Kharaj* because his land was conquered by force.<sup>123</sup>

2) Those which formed part of a treaty between their owners and the Muslims. They are of two sorts:

a) Where reconciliation through treaty provides that the land should be used for the benefits of Muslims, it is permitted by the Imam for them to continue their ownership and pay the tax. This land is subject to a levy which is determined forever and does not end if the owners adopt Islam, or if they are evacuated and replaced by other *Dhimmis*. These lands cannot be sold as they are consecrated. Those who live in them should pay alms therefore.

b) If polytheists conclude a treaty of reconciliation with the Muslims, their land will continue to be owned by them as long as they are non-Muslims and continue to pay *Kharaj*, which in this context is similar to *Jizyah*. If they become Muslims the tax is no longer paid and as Muslims they have to practice all

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150-151 & Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. IV, Matba'at Mustafa al-Halabi, Cairo, 1356 AH, p. 363.

<sup>121</sup> Ibn Abdin, Muhammad Amin, *Rad al-Mukhtar ala al-Dur al-Mukhtar*, Vol. III, Al-Matba'ah al-Ameriyyah, 1326 AH, pp. 364-365.

<sup>122</sup> Al-Marghitani, Ali Ibn Abu Bakr, *Al-Hedayah, Sharh Bidayat al-Mubtade'*, Vol. IV, Matba'at al-Halabi, Cairo, 1956, p. 359. & Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. II, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 54-58.

<sup>123</sup> Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, p. 87.

disposals according to *Shari'ah* such as sale, mortgage and gifts.

- 3) Those lands which are taken without fighting to become a part of *Dar al-Islam*. *Dhimmi*s give life to this fallow land.
- 4) Those tithe lands owned by *Dhimmi*s.

Lastly, unlike *Jizyah*, *Kharaj* does not end on the lands conquered by force even if the *Dhimmi* embraced Islam. The Hanafites assumed that *Kharaj* is a financial tax imposed on the land which can be regarded as a rent, consequently the tenant has to pay it regardless of his religion. However, the Shafei'ites and the Malikites differed with the Hanafites, in their assumption that *Kharaj* is similar to the *Jizyah* in that if a disbeliever embraces Islam he will be exempted from paying the latter and therefore he is no longer required to pay the former tax, *Kharaj*.<sup>124</sup>

#### 4.4.3) The Commercial Tax '*Ushur*'

*Dhimmi*s are obliged to pay a tax on any commercial transactions, known in the *Shari'ah* as the tithe '*Uushur*'. It was legislated by *Ijma'* during the time of the Caliph Umar I.<sup>125</sup> '*Ushur*' was imposed only upon the money *Dhimmi*s transferred for commercial purposes within *Dar al-Islam*. The sum is  $\frac{1}{2}$  tithe. Muslims also have to pay this tax but for them it is called *Zakah*, and the amount is  $\frac{1}{4}$  tithe 2.5%. *Musta'mins* pay a tithe on whatever they bring into *Dar al-Islam*.<sup>126</sup> Jurists disputed the minimum quantity required to be tithed. The Hanbalites stipulated twenty Dinars or more to be tithed whereas the Malikites and the Hanbalites did not stipulate a minimum quantity but stated a  $\frac{1}{2}$  tithe must be paid on any amount.<sup>127</sup>

Muslim jurists differed over the tithing of *Dhimmi*s. Two trends can be seen:

<sup>124</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Deniyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 265.

\* In English tithe means 1/10. However, in *Shari'ah* the sum could be differ according to the financial transaction.

<sup>125</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. II, Matba'at al-Sa'adah, Cairo, 1931, p. 199.

<sup>126</sup> Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, p. 533 & Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. II, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 35 & Ibn Qudamah, Abdullah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at al-Manar, 1348 AH, p. 518.

<sup>127</sup> Ibn Qudamah, Abdullah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at al-Manar, 1348 AH, 519 & Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, pp. 535-536.

1) Jurists of the Hanafites, the Malikites, and the Hanbalites considered that the tithe was imposed upon the *Dhimmi*s from the earliest days of Islam. They based this view on two pieces of evidence. The first was the Prophetic *Hadith* “**No tithe on Muslims, but it is on the Jews and Christians.**”<sup>128</sup> The second piece of evidence was the command of Caliph Umar I to Imam Anas Ibn Malik to collect ¼ tithe from Muslim and ½ tithe from *Dhimmi* and a tithe from *Harbi*.<sup>129</sup>

2) The Shafei’ites maintained that no tithe has to be collect from the *Dhimmi*s unless there is a reconciliation between them and the Islamic State.<sup>130</sup> This was confirmed by the words of al-Shawkani,

*What is imposed on Jews and Christians [the People of the Book] under conciliation treaties is to pay Jizyah or tithes and nothing else.*<sup>131</sup>

Jurists, moreover, differed over tithing of forbidden goods (under Islam) such as wine and pork. The Hanafites and the Malikites agreed to tithing wine and pork if it was traded. The Hanbalites and the Shafei’ites did not permit tithing of such items.<sup>132</sup>

#### 4.5) Summary and conclusion

The conclusion of this chapter relate to permanent or temporary non-Muslim residents in the Islamic State, which are matters of Islamic international relations. That is why, in both cases, their relationship with the Islamic State is regulated by a treaty.

Permanent non-Muslim residents (*Dhimmi*s) are full citizens of the Islamic State and the treaty which governs their relations with the Muslim citizens is a permanent one. Its principal feature was reciprocity by which the *Dhimmi*s receive protection

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<sup>128</sup> Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. IX, Matba'at al-Halabi, Cairo, 1952, p. 237.

<sup>129</sup> Al-Shaybani, Muhammad Ibn Al-Hassan, *Al-Siyar al-Kabear*, Vol. V, Al-Dar al-Mutahedah li al-Nashr, Beirut, 1975, p. 2134 & Ibn Sallam, Abu 'Ubayd al-Qasim, *Al-Amwal*, Dar al-Fikr, Beirut, 1975, p. 410 & Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. IX, Matba'at al-Manar, 1348 AH, p. 340.

<sup>130</sup> Al-Khateab, Muhammad, *Mughni al-Muhtaj ila Ma'arefat Ma'ani al-Fath al-Minhaj*, Vol. IV, Matba'at al-Halabi, Cairo, 1958, p. 247.

<sup>131</sup> Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. IX, Matba'at al-Halabi, Cairo, 1952, pp. 238-239.

from the Islamic State in return for the payment of a poll tax (*Jizyah*). All terms, conditions and obligations of the treaty must be written and are concluded between the Islamic State and a non-Muslim political entity such as a state, city, tribe or group of people.

The *Dhimma* treaty has two very important consequences. The first of these is that it can terminate an existing war and end the hostile relations between the Muslims and the non-Muslims when they become *Dhimmis*. A second important effect of the *Dhimma* treaty is that *Dhimmis* become citizens of the Islamic State through the treaty and their permanent residence therein. Therefore, Muslim jurists affirmed and insisted that the *Imam*, his deputy or the *Imam*'s representative must conclude this treaty; it is void treaty if someone other than those mentioned previously concludes it.

Since the relations between the Islamic State and its non-Muslim citizen/residents is a contractual one, the treaty is terminated if its terms are not fulfilled. In addition to non-payment of *Jizyah* the *Dhimma* treaty becomes void if the *Dhimmis* performed any one of the following actions:

- 1) Reviling or showing any disrespect to the *Holy Qur'an*;
- 2) Insulting the Prophet of Islam;
- 3) Attacking the religion of Islam;
- 4) Injuring the life or the property of a Muslim. Nor should they abjure his belief or induce him to apostatise;
- 5) Marrying Muslim women or entering into sexual connection with them;
- 6) Co-operating with the enemy, such as disclosing secrets of the Muslims to the enemy or passing on intelligence to the enemy.

For its part, the Islamic State must provide its non-Muslim citizens with full protection, freedom to practise their religion and treat them like Muslim citizens

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<sup>132</sup> Al-Marghitani, Ali Ibn Abu Bakr, *Al-Hedayah, Sharh Bidayat al-Mubtade'*, Vol. I, Matba'at al-Halabi, Cairo, 1956, p. 535 & Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. II, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 38, & Al-Bahuti, Mansour Ibn Uonis, *Kashaf al-Qina'*, Vol. I, Dar al-Fikr, Beirut, 1982, p. 727.

except that it exempts them from the duty of *Jihad*, otherwise it voids its treaty with this group.

*Musta'mins* are temporary non-Muslim residents in the Islamic State and their relationship is regulated by a temporary treaty – written or unwritten - with that state. By it the Islamic State provides a *Musta'min* with protection (*Aman*) covering the period of his temporary residency. Unlike the *Dhimma* treaty, which is between the Islamic State and a group, the treaty of *Aman* is between the Islamic State and a non-Muslim individual. Originally *Aman* was given by a Muslim individual to a non-Muslim, as the Prophet's daughter gave to her non-Muslim husband, but in a later development *Aman* was given by the Islamic State exclusively. It can be terminated if a *Musta'min* leaves the Islamic State, or the duration of *Aman* expires, or if *Musta'min* has concealed a harmful purpose or his presence in the Islamic State is harmful to Muslim interests.

Finally, an important conclusion of this chapter is that Muslim jurists treated *Aman* as a treaty or contract because it was a pledge of protection to a *Harbi* and pledges had the status of covenants, treaties or contracts in classical *Fiqh*. It was noted however that *Aman* did not count as a treaty in international law, because treaties can only be made by parties which are formally equal and where there is a reciprocity in the terms of the agreement. In the *Shari'ah*, the legal status of Muslims is not equal to that of non-Muslims because of the importance it attaches to the distinction between belief and unbelief. Secondly, where only one side benefits, as is the case in *Aman* (a *Musta'min* receives protection from the Islamic State) while the other party, the Islamic State, receives no tax (unless he is involved in commerce) or other benefit from the *Musta'min*, then the arrangement lacks the element of reciprocity essential to a contract or treaty in international law. Consequently, *Aman* as a pledge of protection to temporary non-Muslim residents of the Islamic State does not count as a treaty in international law, though in Islamic international law it is a clear example of a temporary treaty with non-Muslims.

This chapter has examined two special kinds of treaty, *Dhimma* and *Aman*. In the next chapter the general features of all treaties will be examined in addition to the

special features of treaties of friendship and commodities exchange, the truce treaty, and finally the conciliation treaty.

## CHAPTER V

# THE CLASSICAL CONCEPTION OF TREATY IN SUNNI ISLAM

## **Chapter V: Classical Conception Of Treaty In Sunni Islam**

- 5.1) Introduction
- 5.2) Definition of treaty
- 5.3) Incentive of treaties
- 5.4) Legitimate prerequisites for concluding treaties
  - 5.4.1) The authority
  - 5.4.2) Terms of the treaty
- 5.5) Stages of treaty
  - 5.5.1) Negotiation
  - 5.5.2) Writing the treaties
  - 5.5.3) Signing treaties
  - 5.5.4) Ratification of the treaties
  - 5.5.5) Exchange and deposit of the treaties
  - 5.5.6) Legitimacy of the treaties
  - 5.5.7) Termination of treaties
    - a) Revocation
    - b) Abrogation
- 5.6) Kinds of treaties
  - 5.6.1) Treaties of friendship and commodities exchange
  - 5.6.2) Truce treaty
  - 5.6.3) Conciliation treaty
- 5.7) Jurisdiction of criminal law and extradition treaties
- 5.8) Summary and conclusion



### 5.1) Introduction

Over the laws of treaty, the *Shari'ah* and modern international law meet and differ in some aspects. In the *Shari'ah* treaties are classified according to the nature of relations between the parties, while the subject matter of a treaty is not considered. Therefore, in the *Shari'ah* there are only two kinds of treaties, whatever their subject, (i) permanent treaty; (ii) temporary treaty.<sup>1</sup> A second feature of Islamic treaties is that the parties are always non-Muslims and the Islamic State. By contrast in international law several distinctions are drawn between treaties and, of course, the parties are not normally identified by religion.

In international law a treaty obtains its character according to its subject matter. Therefore there are various kinds of treaty such as commercial, military and trade treaties. Treaties in international law present a great variety of other aspects according to their elaboration, interpretation, modification, effects, violation and so forth, all of which call for a specific analysis. Paul Reuter holds that the basic means of classifying treaties in international law is numeral, that is, by the number of the parties. This means treaties can be classified under two categories, either: bilateral or multilateral.<sup>2</sup> Ali Abu Haif added another method to categorise treaties according to their duration, therefore they are either a temporary treaty or a permanent treaty.<sup>3</sup> Aziz Muhammad suggested another categorisation of treaties linked to their theme. He divided treaties into two kinds (i) Contractual treaties, which aims to achieve legal results among the concluding parties. Examples of such treaties are coalitions, trade treaties, joint defence and friendship treaties. (ii) Legislated treaties, which include general rules regulating the parties. An example of such treaty is the United Nations Charter.<sup>4</sup>

The purpose of this chapter is to analysis the *Shari'ah*'s rules regarding treaties, including when they are lawful and when they are forbidden, who has the authority to make treaties, and how treaties are formed, revoked or abrogated. Where it is relevant

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<sup>1</sup> Abu Haif, Ali Sadiq, *Public International Law*, 12<sup>th</sup> Edit., Knowledge Foundation House, Alexandria, 1972, pp. 526-627.

<sup>2</sup> Reuter, Paul, *Introduction to the Law of Treaties*, Pinter Publishers, London, 1989, pp. 27-28.

<sup>3</sup> Abu Haif, Ali Sadiq, *Public International Law*, 12<sup>th</sup> Edit., Knowledge Foundation House, Alexandria, 1972, p. 526.

<sup>4</sup> Muhammad, Aziz Shokry, *An Introduction To Public International Law*, Dar al-Fikr, Beirut, 1973, pp. 376-377.

and illuminating, comparisons will be made with the counterpart provision or rule in international law. In this chapter four kinds of treaties will be analysed: treaties of friendship, truce, conciliation, extradition. In the previous chapter (IV) the (temporary) *Aman* and (permanent) '*Ahd al-Dhimma*' convention were extensively examined, both of which are traditionally classified as treaties. It was found that *Aman* did not qualify as a treaty in international law because of the absence of reciprocity, though in classical *Fiqh* it is treated as a legal covenant. On the other hand, the '*Ahd al-Dhimma*' was found to count as a genuine treaty international law in addition to one in Islamic law since the payment of *Jizyah* in return for protection by the Islamic State secured the necessary element of reciprocity. Neither *Aman* nor '*Ahd al-Dhimma*' will be re-examined further in this chapter therefore. Finally, two important kinds of treaty are omitted from this chapter because of the extensive literature involved and their fundamental importance in the context of this thesis. These are treaties of neutrality and alliance, and they will be analysed in the two following chapters.

## 5.2) Definitions of treaty

In Arabic a treaty is a pledge (عهد). Several things may be pledged, for example, to safeguard and protect person/s; anything sworn on oath such as "I swear to God, I will . . ." or promised in such a way as to create a binding obligation, such as a guarantee; a mutual pledge or covenant/contract. Pledges may also be of allegiance, such as those in the letters sent to the *Imam* by local Muslim governors in the Islamic Empire to stress the justice and equity of their administration and their fidelity to the ruler of the Islamic State, the *Imam*<sup>5</sup> (Only where there are mutual pledges by the two parties will a contact or treaty exist in international law. Thus the meaning of treaty in Arabic is much wider than in contemporary international law).

Closely related to the term pledge is the word vow (حلف) which has four meanings: pledge, accord, swearing an oath, and kinship. Arabic scholars have differed in defining vow, some defined it as an oath; where others see that it is a pledge and protection since there is some difference between the two terms. Still others understand vow as

one of God' names to whom is ascribed all perfection and majesty.<sup>6</sup> However, the words vow, pledge, covenant and oath are linguistically different, but they can be used to convey the same meaning with some specific explanation.<sup>7</sup>

Pledge, it has been noted above, may be mutual as well as unilateral. Whenever two persons or two groups agree upon, or commit themselves, to fulfilling an agreement for their mutual benefit and if they confirmed and documented it in a way that would ensure care, commitment, and fulfilment, then it is called a "covenant." In the Arabic language, the term "covenant" is derived from the word "rope" or "binding cord." If they (i.e. the two parties) stress their pledge by swearing, then it called an "oath." Clearly, then, using vow as pledge is the general meaning of the term. In the Arabic language, moreover, the denotation of swearing is derived from the word meaning "oath" and hence is called the *Covenant of Allah*.<sup>8</sup>

The term treaty did not appear in early Islam, either in the text of the *Holy Qur'an* or in the *Hadiths*. Closely connected terms like agreement and contract are not present either. The terms pact and pledge as synonyms for treaty first appear in the *Fiqh* literature of the Islamic jurists. They also used the term safeguard *Aman* instead of the word treaty. The jurists agreed that the treaty of fundamental importance was that of reconciliation between Muslims and non-Muslims. For example, Jurist al-Kasani defined treaty as reconciliation,

*Reconciliation is a treaty for peacemaking and ending fighting.  
When we say that two groups have reconciled, it means that they  
pledged not to fight each other.*<sup>9</sup>

Al-Asfahani characterised a treaty as that which organises the relations of the non-Muslims with the Islamic State,

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<sup>5</sup> Al-Bostani, Karam & Others, *Al-Monged fi al-Loughah al-Arabiyyah*, Dar Al-Shorouq, Beirut, p. 535.

<sup>6</sup> Ibn Kathear, Emad Al-Dean Ism'ael, *Tafsear al-Qur'an al-Atheam*, Vol. IV, Dar Ehya'a Al-Kotoub al-Arabiah, Cairo, 1932, p. 120.

<sup>7</sup> Al Zohaily Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p. 345.

<sup>8</sup> Ridha, Muhammad Rashead, *Tafsear al-Manar*, Vol. V, Matba'at al-Manar, Cairo, p. 185.

<sup>9</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. IX, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 3424.

*It is connected with a disbeliever who enters [Dar al] Islam for protection or whoever has [made] pledges with Muslims.<sup>10</sup>*

Reconciliation is also central to al-Mawardi's conception of treaty which is defined as the agreement between the Islamic State and non-Muslims for a cease-fire,

*It is the case when Harbis [are] reconciled to stop fighting for more than ten years . . . It is peace and reconciliation upon a pledge to forbid fighting and strife".<sup>11</sup>*

In the light of this discussion, the meaning of a treaty in Islamic *Fiqh* is: "A legally binding agreement between two parties with a full commitment to keep the provisions of the agreement, especially reconciliation, truce or peace-keeping between Muslims and polytheists, which is based upon mutual pledges.<sup>12</sup> It will be shown later in this chapter that these pledges are normally written in a treaty document.

Finally, under the *Shari'ah* treaties between the Islamic State and non-Muslim states or political/religious groups are no different from contracts made between individuals. The public character of treaties in Western theory and the private nature of contracts is absent from classical *Fiqh* in which the public/private distinction is not made. As Hamed Sultan has pointed out every part of the *Shari'ah* treats individuals and groups (including states) at the same level because every part comes from the same source. For this reason also the *Shari'ah* does not distinguish external from internal spheres, according to Sultan. It organises them equally.<sup>13</sup>

The Islamic conception of treaty may be usefully contrasted with the idea of treaty in international law. First, in international law a treaty always involves mutual pledges between the parties to it.\* L. Oppenheim has defined international treaty as,

<sup>10</sup> Al-Asfahani, al-Ragheb, *Mufradat al-Qur'an al-Kareem*, Al-Matba'ah al-Maymaniyyah, Cairo, 1324, p. 100.

<sup>11</sup> Al-Mawardi, Ali Muhammad, *Al-Hawi al-Kabir*, Vol. XIX, Matba'at al-Azhar, Cairo, p. 113, 203.

<sup>12</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. IV, Hyderabad, 1335 AH. p. 154.

<sup>13</sup> Sultan, Hamed, *Ahkam al-Qanoun al-Dowali fi al-Shari'ah al-Islamiyyah*, Dar al-Nahdha, Cairo, 1970, pp. 206-207.

\* Paul Reuter has noted the considerable variations between the terms used in the International Law of treaties when he said "The meaning of most of the terms used in the modern law of treaties is extremely variable, changing from country to country and from Constitution to another, and it could even be said to vary from treaty to treaty: each treaty is, as it were, a microcosm laying down in its final clauses the law of its own terms." This observation has been neglected in the brief account of treaties in International Law for reasons of space and because it might be thought to be an exaggeration of the differences.

*A pledge or a concluded contract between two states or more regarding various affairs taken by concerned parties.*<sup>14</sup>

However, in the eight edition of his book *International Law* Oppenheim redefines the international treaty as follows,

*International treaties are any convention that has a contractual nature between States, or organisations of States, creating legal rights and obligations between the parties.*<sup>15</sup>

In other words, a treaty in international law has a narrower meaning than in Islam where any single pledge is treated as a treaty. Ali Abu Haif, for instance, has pioneered a method to explain this approach,

*The point behind the opinions given by most of the western scholars is that the term "treaty" should be given to the important international conventions which have political concern as political conventions and it is changed to "convention" or "accord" according to the importance of reconciliation and coalition or like. What is concluded by states away from political affairs has no practical results. It is customary to use the term treaty or convention as two synonyms.*<sup>16</sup>

International law like the *Shari'ah*, conceives that treaties will normally take a written form. For example, Lord McNair has defined a treaty as,

*A written agreement by which two or more States or international organizations create or intent to create a relation between themselves operating within the sphere of international law. Expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law.*<sup>17</sup>

And in the Vienna Convention of 1969 treaty is defined as follows,

*An international convention agreement concluded between States in written form and governed by international law, whatever*

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<sup>14</sup> .Oppenheim, Lauterpacht Hersch, *International Law*, D. McKay, New York, 1952-1955, p. 877.

<sup>15</sup> Jennings, Robert & Watts, Arthur, *Oppenheim's International Law*, Vol. I, 9<sup>th</sup> Edit., Longman, London, 1992, p. 1199.

<sup>16</sup> Abu Haif, Ali Sadiq, *Public International Law*, 12<sup>th</sup> Edit., Knowledge Foundation House, Alexandria, 1972, p. 527.

<sup>17</sup> Reuter, Paul, *Introduction to the Law of Treaties*, Pinter Publishers, London, 1989, p. 23.

*embodied in a single instrument or in two or more related instruments and whatever its particular designation.*<sup>18</sup>

The Vienna Convention concerns only the written conventions between the states regardless the form and the title, and it excluded the verbal agreements. In figure (g) of article 2 of the Vienna Convention,

*'Party' means a State that has consented to be bound by the treaty and for which the treaty is in force.*

Article 2 introduces a further difference between treaties in the international law and the *Shari'ah*. In international law, as it makes clear, the parties to a treaty must be states. By contrast, in the *Shari'ah* one party to a treaty is the Islamic State but the other party may be either a *Harbi* state, a *Harbi* group such as a tribe, or a non-Muslim individual person. In particular, there is no counterpart in international law to the so-called "safeguard covenant" (*Aman*) or to the *Dhimma* treaty between the Islamic State and a non-Muslim group of citizens, by which they acquire their citizenship of the Islamic State. Not only is there this difference in the conception of parties to a treaty, but also the Islamic treaty is always between a Muslim party and non-Muslims. This crucial feature of treaties arises from the fact that they form part of Islamic law and embody religious concepts. In international law this religious difference in the parties is not an element of a treaty, nor do religious concepts form the context and, to some extent, the content, of international law treaties.

### 5.3) Incentive of treaties

There are different motives for concluding treaties according to the goal being pursued. Under the Islamic law, treaties have to fulfil the nation's welfare, spread justice and prevent insecurity, conflict and bloodshed. Islam approves treaties that pay regard to justice and equity, and offer support.<sup>19</sup> Apart from these motives, two other incentives to conclude treaties under the *Shari'ah* are also of special importance:

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<sup>18</sup> Jennings, Robert & Watts, Arthur, *Oppenheim's International Law*, Vol. I, 9<sup>th</sup> Edit., Longman, London, 1992, p. 1199.

<sup>19</sup> Al-Deak, Mahmud Ibraheem, *Al-Mu'ahadat fi al-Shari'ah al-Islamiyyah was al-Qanoun al-Dowali al-'Aam*, Matabe'a al-Bayan, Dubai, 1984, p. 106.

1) *To block or to ward off an anticipated danger or avoid a probable distress.* In such conditions of necessity, such as an avoidable danger to the *Ummah*, the *Imam* can and should take the initiative and conclude a treaty to avert the danger. An example of such treaty was the one concluded by Prophet Muhammad with the Jewish tribes of Madinah, when he arrived at that city, in order to ensure their hostility was avoided and that they refrained from attacking the new Islamic State.<sup>20</sup>

2) *For the benefit and to the advantage of the Ummah.* The motive of such treaty could be the wishes of Muslims for their enemy to adopt Islam, to submit to Islam's power or, if Muslims are not strong enough to face the enemy in battle, to originate a cease-fire.<sup>21</sup> An example of this was the Prophet's treaty of *Hudaybia*. Al-Marghastani of the Hanafites argued that a treaty which reconciled their enemy to the Muslim state was to the advantage of Muslims and he characterised it as a kind of non-military *Jihad* that replaces the armed conflict,

*If reconciliation with the enemy is to the advantage of Muslims, it [the treaty] becomes a significant Jihad, as long as it keeps Muslims safe and avoids evil. If the treaty is not for the common advantage of the Muslims it will not be a significant image of Jihad, especially when there is no specific time of reconciliation.*<sup>22</sup>

Continual benefit to the *Ummah* was not an essential element during the period when a treaty was in force, however. The existence of the pledge made the treaty unconditional and performance of the treaty by Muslims was not conditional on its continuing advantages to them,

*It is not necessary to keep the motive of interest [of the Ummah] during the treaty period, because this opinion contradicts the most important principle of Islam which is keeping the commitment. According to the Prophet Muhammad's Hadith: Pledge is faithfulness not perfidy.*<sup>23</sup>

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<sup>20</sup> Lings, Martin, *Muhammad*, George Allen & Unwin Ltd., London, p1983, pp. 125-130.

<sup>21</sup> Al-Deak, Mahmoud Ibraheam, *Al-Mu'ahadat fi al-Shari'ah al-Islamiyyah was al-Qanoun al-Dowali al-'Aam*. Matabe'a al-Bayan, Dubai, 1984, pp. 106-107.

<sup>22</sup> Lings, Martin, *Muhammad*, George Allen & Unwin Ltd., London, p1983, pp. 125-130.

<sup>23</sup> Al-Marghastani, Ali Ibn Abu Bakr, *Al-Hedayah fi al-Mobtada'*, Vol. II, Matba'at Al-Halabi, Cairo, p. 138.

In summary, Islam allows many incentives for making treaties according to the legitimate purposes they serve. They should all be concluded for the common benefit of Muslims, by for example, promoting public utility, removing harm, easing a mission or spiteing an enemy. They must be based on the terms of *Shari'ah* and according to what the *Imam* and his advisors decide is for the welfare of Muslims.

It may be useful to compare the Islamic point of view on the goals and motives for making treaties with those of international law. It agrees with the *Shari'ah* that treaties have a huge variety of goals - political, social, military, economic, legislative, permanent or temporary and so on - and consequently of motives for making them. According to the Vienna Convention the purpose of treaties may be any of the following:

- 1) Reconciliation between conflicting states;
- 2) Exchanging various benefits and utilities;
- 3) Military treaties as "joint defense treaties" between states;
- 4) Promotion of social and cultural matters;
- 5) Organizing navigation among states;
- 6) Changing borders of the state territories;
- 7) Protecting general sovereignty rights, citizens' rights, residence, and others.

These goals and the corresponding motives for making a treaty in international law are also legitimate purposes and hence valid motives under the *Shari'ah*.<sup>24</sup>

However, they differ over the rules that validate them, those of the *Shari'ah* or international law. A treaty concluded by a Muslim with a non-Muslim must be subject to the *Shari'ah* and fulfil its requirements if it is to be valid. It is not invalidated if it conflicts with international law. A treaty concluded under international law, whoever are the parties, must comply with, and not contradict, the rules of international law. If

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<sup>24</sup> Al-Meheari, Saeed Abdullah, *Al-'Alaqat al-Kharejiyah li al-Dawla al-Islamiyyah*, Muasasat al-Resalah, Beirut, 1995, pp. 192-194.



a treaty conflicts with the *Shari'ah* it is not thereby invalidated from this international (secular) legal point of view<sup>25</sup>

#### 5.4) Legitimate prerequisites for concluding treaties

In Islam, each treaty has to satisfy specific conditions to be legitimate and binding. These conditions have to be harmonise with the instructions of the *Shari'ah* and achieve common-good for both concluded parties. Thus, treaties which are not based on proper principles, rightness, justice, settle disputes or bridge any differences, cannot bring any welfare to the concluding parties and sound rules are liable to corruption and disrespect. Therefore, according to the *Shari'ah* those treaties will result in the desired objectives and assure the nation stability, established prerequisites consist of the following categories:

##### 5.4.1) The authority

According to the *Shari'ah*, the *Imam* is the supreme leader of the *Ummah* or who ever the *Imam* appoints as his deputy. As Islam considers the nation policy to be *legitimate policy* in the matters of interest delegated to the ruler so as to bring welfare to Muslims, even in absence of a legal term. The Shafei'ites, the Malikites and the Hanbalites Schools of *Fiqh*, insisted that the *Imam* or his deputy shall represent the Muslim party of convention. It is an important issue because the *Imam*, is the only person entitled to handle Muslim matters, being the best to recognise Muslims interest. If ordinary Muslims or even political leaders conclude any contract on behalf of the *Ummah*, without any authorisation from the *Imam*, then the contract is void.<sup>26</sup> However, the Malikites assume that it is the *Imam*'s decision to ratify or revoke the contract (treaty) according to whether it is in the Muslims' benefit or not.<sup>27</sup> In this regard, Ibn Qudamah noticed,

*Truce or protection treaties cannot be concluded except by the Imam or his deputy and not by anybody else. These treaties are contracts with disbelievers; so the extensive view of the Imam in*

<sup>25</sup> Shokri, Mohammed Aziz Dr., *Introduction to International Law in Peacetime*, Dar al-Fikr, Cairo, 1973, p. 382.

<sup>26</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at Al-Manar, Cairo, 1348 AH, p. 459.

<sup>27</sup> Ibn-Mousa, Khaleal Ibn Ishaq, *Mukhtasar Khaleal fi Fiqh al-Imam Malik*, Matba'at al-Halabi, Cairo, p. 92.

*what is good for Muslims is essential in this case. Authorising any other person to conclude treaties rather than the Imam or his deputy, including stopping Jihad permanently, will be invalid.*<sup>28</sup>

Al-‘Auqbi of the Shafei’ites agreed,

*The truce with any other non-Muslims nation or territory cannot be concluded except by the Imam or the person he deputises, because if it is left to any unauthorised individual to conclude truces for Muslims with non-Muslims (with whom fighting is the alternative) the harm will be greater. Authorisation is only given to the Imam or his deputy. If the Imam views that the truce leads to prosperity, he will conclude it; otherwise, he will not approve it.*<sup>29</sup>

The Malikite jurists allow treaties to be concluded by people other than the *Imam*, but they are invalid until approved by him,

*Treaties that are concluded by individuals, groups or army leaders should be reported to the Imam. If he approves, treaties will then be valid.*<sup>30</sup>

A modern scholar, Majid Khadduri, holds that deputies of the *Imam* may conclude truces, treaties of friendship and cease-fire treaties whenever needed, but always subject to his approval,

*In the conduct of foreign relations, the Imam may delegate his powers to the commanders in the field or to provincial governors; these were often given full powers to negotiate, to conduct a jihad and to divide the spoil. But the Imam retains a veto by his right to refuse to ratify a treaty or by his right to repudiate any arrangement, should it prove harmful to Muslim interests. He may even punish his deputies if they act contrary to what is deemed to be Islam’s interests.*<sup>31</sup>

In Islamic history, all treaties after the time of the Prophet Muhammad were signed by the commanders of the Islamic army and approved later by the Caliph. An exception was that treaty between the Caliph Umar I and the Patriarch of Jerusalem. The

<sup>28</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. IX, Matba’at al-Manar, 1348 AH, p. 298.

<sup>29</sup> Al-‘Auqbi, Muhammad Ibn Hussein, *Takmilat al-Magmou’a ‘ala Sharh al-Muhathab*, Vol. XIX, p.439.

<sup>30</sup> Al-Meheari, Saced Abdullah, *Al-‘Alaqa al-Kharejiyah li al-Dawla al-Islamiyyah*, Muasat al-Resalah, Beirut, 1995, p. 247.

Patriarch demanded that the treaty should be signed by the Caliph himself rather than by his representative.<sup>32</sup> According to the *Shari'ah*, the *Imam* or his authorised representative only are entitled to conclude a treaty. The *Shari'ah* does not stipulate whether the signatory to the treaty from the opposite party is of the same rank or not; he could be the head of state, or the leader of a religious group, or even a governor of a territory. There are even examples where the head of the opposite party is not involved in signing a treaty on behalf of his group. The Prophet did not ask the leaders of the Quraish to sign the treaty of Hudaibiya, with himself as the other signatory, as head of the Islamic State. Consequently, a representative of the Quraish, but not its leader, signed on behalf of this group.<sup>33</sup>

It has been seen in the previous chapter that *Aman* was originally pledged by individual Muslims to *Harbis* in the Islamic State on a temporary basis. Subsequently, only the Imam or his approved deputy had the authority to make this pledge of protection.

Reviewing the juristical opinions, it is clear that there was unanimity among them that only the head of the Islamic State, the *Imam*, or his deputy was entitled to conclude a treaty with *Harbis*. Any other treaty concluded with *Harbis* is invalid unless it is expressly approved by the *Imam*. Inevitably, this meant that legitimate protection could not be given by Muslim rebels in territory which they control and which jurists regarded as either inside or outside *Dar al-Islam*.

Comparing this Islamic legislation with the modern theory of decision-making, it could be said, in summary, that the foreign policy scholars of international relations such as Graham Allison, attempt to explain foreign behavior in terms of the Rational Actor Model or "Classical" Model, in which policy choices are seen as the more or less purposive actions of unified governments based on logical means of achieving given objectives. The Rational Actor Model has proved useful for many purposes, such as the output of sub-national organisations following standard operating procedures, or

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<sup>31</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 153.

<sup>32</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 482-483, 487 & Al-Tabari, Muhammad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. IV, Al-Matba'ah al-Hussayniyah al-Masriyah, Cairo, p. 159.

engaging in a problem-solving search.<sup>34</sup> Allison's explanation of the decision-making approach has focused on the organisational process which explains government action as the output of large organisations functioning according to standard operating procedures and search processes.<sup>35</sup> Although, the decision-making process is continuous, three stages can be identified. These are: the *pre-decision stage*, which refers to the period preceding the taking of a decision; the *choice stage*, which refers to the period during which the decision is made; and the *post-decision stage*, which refers to the period after the decision is taken. Allison, however, distinguished three models:

1. *The Rational Policy Model*. This approach assumes that the government is the primary actor in world politics. It even argues that all governmental actions are planned and were intended to meet different demands.<sup>36</sup>
2. *The Organisational Process Model*. This approach envisages governmental behaviour less as a matter of deliberate choice and more as independent outputs of several large organisations, only partly co-ordinated by government leaders.<sup>37</sup>
3. *The Bureaucratic Politics Model*. This model offers an alternative perspective to the rational actor approach. It draws considerable attention to the foreign policy literature and explains the impact of organisational behaviour on decision-making. Moreover, this approach explains that governments consist of individuals who have significant discretion: here power is shared, action is not.<sup>38</sup>

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<sup>33</sup> Banaja, Saeed Muhammed, *Al-Mabade' al-Asasiyah li al-Alaqat al-Dowaliyah wa al-Doblomasiyah Waqt al-Silm wa al-Harb*, Moasasat al-Risalah, Beirut, 1985, p. 62.

<sup>34</sup> Allison, Graham T., *Essence of Decision, Explain the Cuban Missile Crisis*, Little, Brown, Boston, 1971, pp. 10-30.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p. 5.

<sup>37</sup> *Ibid.*, pp. 67.

<sup>38</sup> *Ibid.*, pp. 144-145.

In the context of the classical Islamic State, in which the *Imam* is the supreme ruler of the *Ummah*, decisions about making treaties are taken by him or by whomever the *Imam* appoints as his deputy, as has been shown above. His decisions as the major actor should be directed towards achieving the objectives of the *Ummah* (see the next section 5.4.2), consequently the Rational Policy Model seems more applicable to the position of the *Imam* as decision-maker than either of the other two models of Alison, namely, the Organisation Process and the Bureaucratic Politics models. This is because the Rational Policy model is exclusively focused on the key decision-maker, unlike the other two models which include a role for other organisations in the foreign policy decision-making process. In the writing of the Muslim jurists attention is paid exclusively to the role of the *Imam* or his deputy in concluding treaties: no attention is given to role of other organisations, if any, in this process. The limited applicability of decision-making theory in this context highlights the major difference between a Western theory of international relations and the classical *Sunni* theory. The Western theory is purely empirical and claims to explain how policy decisions are in fact made. By contrast, the Islamic theory is normative and is concerned not with how foreign policy decisions are reached in the Islamic State, but with the issue of who is entitled or authorised to make decisions in foreign policy etc.

In international law, by contrast to the *Shari'ah*, treaties may be negotiated by the head of state or his deputies. Whether or not it is then valid will depend upon the law of the state/s concerned. In many cases a negotiated treaty only becomes valid if it has been approved by the legislature. Article 46 of the Vienna Convention makes it clear that whatever is the exact provision of a state's internal law a treaty will not be violated if it is valid.<sup>39</sup>

#### 5.4.2) Terms of the treaty

In Islam, a treaty exists once the terms had been agreed between the parties even though the terms are yet to be written down. It then becomes binding on both

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<sup>39</sup> Akehurst, Michael, *A Modern Introduction to International Law*, 3<sup>rd</sup> Edit., George Allen and Unwin, London, 1977, p 130.

parties.<sup>40</sup> However, mere agreement on the terms by the parties is insufficient to lead to a valid treaty. For that to happen the terms agreed upon must be legitimate from an Islamic point of view, that is, in conformity with the *Shari'ah*. The Prophet Muhammad is reported to have said,

***Any stipulation which contradicts the Book of Allah is invalid.***<sup>41</sup>

It might appear that this *Hadith* was contradicted by what the Prophet Muhammad did in the treaty of *Hudaybia* when he accepted the Quraish's condition that he and his companions have to return to Madinah without practising the Lesser Pilgrimage ('*Umrah* ') that year. In reality, the Prophet's decision was not in conflict with the Islamic commands, because in such a case the leader can make his decision according to the Muslims' interest, and under the condition of necessity.<sup>42</sup> Necessity is given an extensive place in the works of the Islamic jurists. But it had to be flexible in practice and could even diverge from an Islamic rule where this was justifiable in the estimation of the owners of objective opinions (*Ahl al-hal wa al-Aqd*) and jurists.<sup>43\*</sup>

The legal rules decide the previous point comes under "necessity permits the forbidden" and "if two evils contradict, the lesser should be committed" and "preventing evils."<sup>44</sup> The situation, moreover, is to be an exceptional when it is found that the regular conditions with their terms cannot satisfy the required interests. This situation needs to be faced by some other rules that suit the exceptions new to Islam society. Muslim jurists, moreover, concluded the necessity as follows:<sup>45</sup>

- 1) It should be found not expected such as under a severe blockade or fear of losing lives and properties.

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<sup>40</sup> Al-Shaybani, Muhammad Ibn Al-Hassan, *Al-Siyar al-Kabear*, Vol. IV, Al-Dar al-Mutahedah li al-Nashr, Beirut, 1975, p. 60.

<sup>41</sup> Al-'Sqalani, Shehab Aldean Abu Alfadhli, *Fath al Bari bi Sharh Saheeh Al Bukhari*, Vol. V, Matba'at al-Halabi, Cairo, 1378 AH, p. 353.

<sup>42</sup> Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. VII, Dar al-Itihad al-Arabi li al-Teba'a, Cairo, 1969, p. 493.

<sup>43</sup> Al-Mawardi, Ali Muhammad, *Al-Hawi al-Kabir*, Vol. XIX, Maktabat al-Azhar, Cairo, p. 206 & Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. VII, Dar al-Itihad al-Arabi li al-Teba'a, Cairo, 1969, p. 493.

\* For further details and examples see footnotes 19-21.

<sup>44</sup> Ibn Najeem, Zain Al-Dean Ibn Ibraheam, *Al-Ashbah wa al-Nadhaer*, Dar al-Fikr, Damascus, 1986, p. 89.

<sup>45</sup> Ibid.

- 2) Impossibility of behaving or taking action if the usual conditions make it impossible for the individual or the public authority to behave according to legitimate principles while making choices.
- 3) The harm gained by the exceptional action is less than that of the usual one.
- 4) The working of the necessity rules is limited to the time of their need and is not to be extended after.
- 5) It has to be estimated accurately just to face the harm according to the *Qur'anic* verse,

فمن اضطر غير باغ ولا عاد فلا إثم عليه . (البقرة: ١٧٣)

**But if one is forced by necessity without wilful disobedience nor transgressing due limits, then is he guiltless . . . (2: 173)**

Consequently, if a treaty deviates from this fundamental condition and the *Holy Qur'anic* teachings, then it is considered to be void. The strong viewpoint of Islamic jurisprudence stresses that “a treaty cannot be divided” which means that it is not acceptable to agree upon some terms and reject others.<sup>46</sup> However, because the treaty is a contract between two parties by virtue of specific terms, therefore Muslim jurists agreed and insisted that the Islamic authority has to carry out all terms of the contracts, as well as the other party/s have to carry out and fulfil the correct legalised terms, but they do not have to fulfil or keep the incorrect terms. Moreover, if the treaty concludes unfair terms, or conflicts with the moral principles or criminal law - such as the drugs trade - Islam consider it as illegal treaty and has to be void. The *Holy Qur'an* mentions,

وتعاونوا على البر والتقوى ولا تعاونوا على الإثم والعدوان واتقوا الله إن الله شديد العقاب . (المائدة: ٢)

**Help ye one another in righteousness and piety, but help ye not one another in sin and rancour; fear Allah: for Allah is strict in punishment. (5: 2)**

However, there was a dispute between jurists on the essential terms of contracts, therefore they (i.e. the Muslim jurists) divided into two groups, each has its own creed and followers.

1) The Hanbalites considered the terms of treaty to be correct as long as God does not forbid them and the terms do not contradict *Shari'ah*. Even if one of the terms is essential to achieve the purpose of the treaty, it is still forbidden if it is in conflict with the *Shari'ah*. Legal correctness is the basis of treaty terms, on this view, and no term is forbidden or nullified unless it contradicts *Shari'ah*. On this view of treaties every term must be lawful if the treaty is to be lawful: if just one term contradicts the *Shari'ah* or its principles then it invalidates the entire treaty.<sup>47</sup>

2) The Hanafites, the Shafei'ites and the Malikites all stress that the legally valid terms of a treaty are those which satisfy both parties or which they considered to be legitimate according to specific evidence that is used in proving *Shari'ah* terms such as *Ijma'*, *Qiyas*, *Istihsan*, *Maslaha*.<sup>\*</sup> Any terms not mentioned or permitted by these Islamic sources, they considered as unlawful or void. However, if a treaty contains, for example, nine lawful terms and one that is unlawful, that treaty as a whole is not nullified by that one term. The legal consequence of this term is that it is not binding on the parties, while the remaining lawful terms have a binding effect on both parties.<sup>48</sup>

The previous debate leads to the conclusion that the *Imam* has to be confined by two conditions when he concludes a treaty and fulfils its terms:

- a) The general interest of the Islamic State must be served, as all jurists unanimously agree.
- b) The subject of the contract is not to be of what is forbidden or what contradicts the spirit or general bases of the *Shari'ah*.

The words of Faraj Sanhory support the previous scholars' debate. Sanhory remarked,

*The power authorised to the Imam is not an infinite one, but the Shari'ah draws the limits and the frame that the leader has to*

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<sup>46</sup> Al-Khateab, Muhammad, *Mughni al-Muhtaj ila Ma'arefat Ma'ani al-Fath al-Minhaj*, Vol. IV, Matba'at al-Halabi, Cairo, 1958, p. 263.

<sup>47</sup> Ibn Taymiyyah, TaqulDean Ahmed, *Fatawa Ibn Taymiyyah*, Vol. III, Riyadh, 1381 AH, p. 326.

<sup>\*</sup> For further information regarding these terms, see chapter II.

<sup>48</sup> Al-Adawy, Mahmoud Shawkat, *Nadhariyat al-'Aqd*, Al-Azhar University, 1976, Cairo, p. 139.



*practice his authority within. He is not allowed to go beyond them.*<sup>49</sup>

As a result, the ruler and political powers in the Islamic State have been specified by the *Shari'ah* through clear, binding rules and bases which must not be violated, as Fouad al-Nadi stated,

*The political power in the Islamic State is dependent upon the interest achieved by concluding the treaty. If there is no benefit or there is a harm, the Head of the Islamic is not allowed to practice this power since it is against Islamic law. Concerning reconciliation treaties, jurists put some conditions as: The treaty has to achieve the general interest of an Islamic State, have a limited period of time and should be free from invalid or incorrect clauses. All these conditions represent limits that the Caliph is not allowed to go beyond.*<sup>50</sup>

The jurist al-Sarkhasi decided that a legally valid treaty must fulfil two conditions: it must be made by a competent, legitimate authority (and not by, for example, those who usurp government by assassination) or by legally valid terms which do not conflict with Islamic law. If either condition is not fulfilled the treaty lacks legal validity.<sup>51</sup> Moreover, Muslim jurists determined which illegitimate terms make a treaty void. Jurist al-Bahuti, for instance, in his work *Kashf al-Qina'* summarised these terms as follows,

- 1) If terms interdict a clear Islamic rule.
- 2) If terms are against the dignity and of Islam and Muslims and they magnify the strength of polytheists.
- 3) If terms stipulate that enemy seizes control over Muslims lands and practices illegitimate acts on these lands.<sup>52</sup>

Imam Ahmed Ibn Hanbal, moreover, illustrated a clear view of the Hanbalites School in this theme when he mentioned,

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<sup>49</sup> Sanhory, Faraj, *Tareikh al-Fiqh al-Islami, Literature, The Higher Institute of Law, Cairo University, Cairo, p. 58.*

<sup>50</sup> Al-Nadi, Fouad Muhammad, *Mabda al-Mashro'aia wa Dhawabit Khodou'a al-Dawlah li al-Qanoun fi al-Fiqh al-Islami*, 2<sup>nd</sup> Edit., Dar al-Kitab Al-Jame'i, Cairo, 1980, p. 194.

<sup>51</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. V, Hyderabad, 1335 AH, pp. 1786-1787.

<sup>52</sup> Al-Bahuti, Mansour Ibn Uonls, *Kashaf al-Qina'*, Vol. III, Dar Al-Fikr, Beirut, 1982, pp. 112-114.

*One illegitimate term will make the whole treaty invalid.*<sup>53</sup>

In addition to the above assumption, Ibn Qudamah said,

*The treaty is to be void if it contains an illegitimate term except when the two parties agree on revoking the treaty whenever any party wants to. Polytheists may use this term to violate peace and security that makes the treaty meaningless.*<sup>54</sup>

### 5.5) Stages of treaty

According to the *Shari'ah*, the procedural technique of conclude an Islamic treaty can be broken down into six stages, which are:

#### 5.5.1) Negotiation

It is the first stage where parties discuss the terms and conditions of what is to be agreed upon. This procedure was known since the early time of Islam. An example of that is the negotiation between the Prophet Muhammad and the Quashes prior to concluding the treaty of *Hudaybiya* when both parties stated and discussed their proposed terms and conditions.<sup>55</sup> In the words of Majid Khadduri,

*While pilgrimage was an immediate reason for entering into treaty negotiations, the circumstances on both sides indicated that at last temporarily there was an equilibrium of power.*<sup>56</sup>

#### 5.5.2) Written treaties

Islamic *Shari'ah* assumes when the terms of the treaty are agreed, they are mutual pledges but not yet a treaty. For a treaty to develop from these pledges they have to be first written down.<sup>57</sup> Examining the Islamic treaties, it appears that the forms of treaties were very short because they were for a specific purpose: either for a cease-

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<sup>53</sup> Ibid.

<sup>54</sup> Ibn Al Najar, TaqulDean Muhammad Ibn Ahmed, *Montaha al-Iradat*, Vol. I, Matba'at al-Halabi, Cairo, p. 328.

<sup>55</sup> Al-Mubarakphuri, SaffulRahman, *The Sealed Nectar, Biography of the Noble Prophet*, Maktaba Dar us Salam, Riyadh, 1995, pp. 340-341.

<sup>56</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 211.

<sup>57</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. IV, Hyderabad, 1335 AH, p. 60.

fire and conciliation (*Muhadanah*), or a poll tax *Jizyah*, or to safeguard/protection (*Aman*). Treaties usually started by mentioning the names of God thus “*In the Name of God, the Most Gracious, the Most Merciful*”<sup>58</sup> followed by the names of parties and their ranks (the rank of the Prophet was: *Muhammad the Messenger of Allah*) then the main body or purpose of the treaty and its terms. These were expressed in very clear phrases to avoid any misunderstanding.<sup>59\*\*</sup> The procedure of writing agreements is one of Islam’s principles of treatment, both among the Muslims themselves and with others. This was mentioned in the *Holy Qur’an* in various places, in which it is legislated that writing is a general principle to affirm agreements. The following verse is an example of that,

يا أيها الذين آمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه وليكتب بينكم كاتب بالعدل ولا  
يأب كاتب أن يكتب كما علمه الله فليكتب وليملل الذي عليه الحق وليتق الله ربه ولا  
يبخس منه شيئا . (البقرة: ٢٨٢)

O you who believe! when ye deal with each other, in transactions involving, future obligations in a fixed period of time reduce them to writing let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear Allah his Lord and not diminish aught of what he owes. (2: 282)

After the expansion of the Islamic Empire, and particularly during the Umayyad era, treaties became more complex, therefore the Caliphs invented a new position called “the writer of messages”. His duty was to draw up, write and then stamp the treaties and the official letters of the Caliph.<sup>60</sup>

### 5.5.3) Signing treaties

This procedure was known since the time of Prophet Muhammad. He stamped every letter and treaty written on his behalf.<sup>61</sup> It was mentioned previously that in the

<sup>58</sup> Al-Saleh, Subhi, *Al-Nudhom al-Islamiyyah*, Beirut, 1968, p. 305.

<sup>59</sup> Banaja, Saeed Muhammed, *Al-Mabade' al-Asasiyah li al-Alaqa al-Dowaliyah wa al-Doblomasiyah Waqt al-Silm wa al-Harb*, Moasasat al-Risalah, Beirut, 1985, p. 64.

<sup>\*\*</sup> The Islamic treaty does not have a specific form, it differs from one to another according to its subject. However, it has to have the main elements which have been mentioned in this part.

<sup>60</sup> Sultan, Hammed, *Ahkam al-Qanoun al-Dowali fi al-Shari'ah al-Islamiyyah*, Dar al-Nahdha, Cairo, 1970, p. 208.

<sup>61</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. ii.

*Shari'ah* the Caliph or whomever he authorised are only persons entitled to sign and stamp the treaty. Islamic treaties therefore always bear the names, the signatures and their date as well as the stamps of the authorised persons.<sup>62</sup> Moreover, it may be said that the Islamic treaty was unique at this time where it required witnesses to put their signatures on the treaty. Searching for this method in the counterpart treaties in international law shows that this procedure is not required.

#### 5.5.4) Ratification of treaties

In the *Shari'ah*, confirmation of any treaty concluded or to be cancelled has to be done either by the directed approval of the *Imam* or through the use of consultation on the part of the supreme jurists (*Shurah*). After these informal consultations there emerge later the Advisory Council *Majlis al-Shurah* which confirms such treaties. An example of the first procedure was the *Hudaybia* treaty where the Prophet Muhammad approved the treaty without consulting his followers.<sup>63</sup> An example of the second procedure was the treaty between the Islamic State and the Cypriots during the time of 'Abbasides and under the governorship of Abdulmalik Ibn Salih Ibn 'Abbas. When the Cypriots raised a rebellion the governor was forced to cancel the treaty, and so he addressed a question to leading jurists of his time such as al-Layth Ibn Sa'ad, Imam Malik Ibn Anas, Sofyan Ibn 'Uyayna, Musa Ibn A'yun, Ismael Ibn 'Ayyash, Yahya Ibn Hamza, Abu Ishaq al-Fazari and Makhlad Ibn al-Hussein seeking a legal opinion to justify his decision.<sup>64</sup>

#### 5.5.5) Exchange and deposit of treaties

Such a process was known prior to Islam. The document of the boycott by the Quraish of the Banu Hashim and Banu AbdulMutalib because of their support for the Prophet Muhammad in the period of his early calling to Islam is an example for such a

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<sup>62</sup> Ganzori, AbdulAdheam, *Mabade'a al-'Alaqat al-Dowalyah al-Islamiyyah*, Maktabat al-Alat, Asyot, p. 386.

<sup>63</sup> Al-Mawardi, Ali Muhammad, *Al-Ahkam al-Sultaniyah wa al-Welayat al-Deniyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 165.

<sup>64</sup> Al-Beladhuri, Ahmed Ibn Yahya, *Futuh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, pp. 159-160.

procedure. In order to confirm their support of that document, the Qurashi hung it inside the *K'abah*.<sup>65</sup> In Islamic history, Prophet Muhammad always insisted on two written copies of each treaty. As for instance, he did in the case of the treaty of *Hudaybia*.<sup>66</sup>

### 5.5.6) Legitimacy of the treaties

This is the final and the most important stage of every treaty. Searching the *Shari'ah*, it can be found different Divine verses and Prophetic *Hadiths* order and encourage Muslims to conclude treaties with non-Muslims, and it insists that Muslims have to respect and fulfil their obligations and not break them. Wahbah al-Zohaily, for instance, has mentioned that,

*Islam established the structures of treaties firmly and as a way of achieving the interest of all Muslims. The Imam, the Muslim supreme ruler, has the right to pledge with non-Muslims for the sake of religion and the benefits of Muslims.*<sup>67</sup>

The legitimacy of treaties is to be found in both the *Qur'an* and *Sunnah* as follows:

a) In the *Holy Qur'an* it is revealed that Islam rejected all polytheists, with the exception of allies during the fixed period of the pledge. Allah is concerned with allies of the Muslims who keep their commitment. Allah, moreover, has directed Muslims to conclude peaceful relations and reconciliation-truce treaties with those who fail to keep their pledge. Muslims should accept peace,

وإن جنحوا للسلم فاجنح لها وتوكل على الله . . . (الأنفال: ٦١)

**But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah . . . (8: 60)**

Where a peace treaty exists already, the *Qur'an* recognises that other non-Muslims may join the non-Muslim party to that peace treaty.

<sup>65</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 44.

<sup>66</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. II, Matba'at al-Halabi, Cairo, 1955, 747.

<sup>67</sup> Al-Zohaily Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, 1981, p. 349.

إلا الذين يصلون إلى قوم بينكم وبينهم ميثاق . . . (النساء: ٩٠)

**Except those who join a group between whom and you there is a treaty (of peace) . . . (4: 90)**

A peace treaty with non-Muslims endures so long as they fulfil their side of the agreement,

الذين عاهدتم من المشركين ثم لم ينقصوكم شيئا ولم يظاهروا عليكم أحدا . . .  
(التوبة: ٤)

**(But the treaties are) not dissolved with those Polytheists whom ye have entered into alliance and who have not subsequently failed you in ought, nor aided any one against you . . . (9: 4)**

In this situation Muslims are obliged to fulfil their side of the agreement,

فآتموا إليهم عهدهم إلى مدتهم . . . (التوبة: ٤)

**So fulfil your engagements with them to the end of their term . . . (9: 4)**

Muslims have been commanded by Allah to keep their commitments towards all their engagements in covenants, pledges, treaties, and vows. In the *Holy Qur'an*, Allah stresses and confirms the fulfilment of concluded treaties, and illustrates these pledges as *His Covenant*. In the *Shari'ah*, any covenant concluded between two parties started or ended by the Name of Allah, or containing any vows/oaths in the Name of Allah, is called the *Covenant of Allah* (عهد الله). This is confirmed by the *Holy Qur'anic* verses,

أوفوا بعهد الله إذا عاهدتم ولا تنقضوا الإيمان بعد توكيدها وقد جعلتم الله عليكم كفيلا إن الله يعلم ما تفعلون . (النحل: ٩١)

**Fulfil the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made Allah your surety; for Allah knoweth all that ye do. (16: 90)**

And,

... وأوفوا بالعهد أن العهد كان مسئولا . (الإسراء: ٣٤)

**... and fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning). (17: 34)**

In other place, God describes Muslims whose fulfil their engagements by,

... إنما يتذكر أولوا الألباب . الذين يوفون بعهد الله ولا ينقضون الميثاق . والذين يصلون ما أمر الله به أن يوصل ويخشون ربهم ويخافون سوء الحساب . (الرعد: ١٩-٢١)

... It is those who are endued with understanding that receive admonition. Those who fulfil the Covenant of Allah and fail not in their plighted word. Those who join together those things which Allah hath commanded to be joined, hold their Lord in awe, and fear the terrible reckoning. (13: 19-21)

In this regard, al-Qurtobi in his efforts to explained the previous verses commented that,

*These verses of the Holy Qur'an show that complete piety and upright morality are a fulfilment of pledge.*<sup>68</sup>

Because of the significance of fulfilling treaties, the *Holy Qur'an* stresses and confirms their legitimacy. The *Qur'an* reveals Allah as cursing and threatening those who fail to fulfil their pledges, covenants and treaties,

والذين ينقضون عهد الله من بعد ميثاقه ويقطعون ما أمر الله به أن يوصل، ويفسدون في الأرض، أولئك لهم اللعنة ولهم سوء الدار . (الرعد: ٢٥)

**But those who break the Covenant of Allah, after having plighted their word thereto, and cut asunder those things which Allah has commanded to be joined, and work mischief in the land; on them is the Curse; for them is the terrible Home. (13: 25)**

In another verse, Allah describes those who break their obligation as losers in the life,

الذين ينقضون عهد الله من بعد ميثاقه ويقطعون ما أمر الله به أن يوصل ويفسدون في الأرض أولئك هم الخاسرون . (البقرة: ٢٧)

**Those who break Allah's Covenant after it is ratified, and who sunder what Allah has ordered to be joined, and work mischief on the earth; these cause loss only to themselves. (2: 27)**

From the *Holy Qur'an* there is a clear message that the promises in treaties must be kept and their terms fulfilled. It is in this sense that treaties are legitimate; they are legitimated by Allah.

<sup>68</sup> Al-Qurtobi, Muhammad Ibn Ahmed, *Al Jame'a li Ahkam al-Qur'an*, Dar al-Kotoub, Cairo, 1369 AH, p. 239.

b) In the *Sunnah* can be found various examples of the Prophet's conduct and statements by him confirm the legitimacy of treaties in Islam. Taking his conduct first, the Prophet Muhammad concluded numerous treaties with non-Muslims.<sup>69</sup> His first treaty with them was concluded after his emigration from Makkah and was with the Jews and polytheists in Madinah and the surrounding areas. AbdulRahman Azam has described this treaty as,

*It is one of the most precious, interesting and honourable international conventions in Islamic history. It deserved to be a beacon for Muslims in the principles of their relations with non-Muslims. Besides, it marks the commencement of the Islamic State as a recognised state.*<sup>70</sup>

Jurist Muhammad Hamidullah describes it as,

*A contract of good neighbourliness, of defensive alliance and of co-operation against the enemy. It aims at establishing and maintaining communities, each with its sovereignty over its own people and freedom of religious propaganda. All the signatory parties are to support each other and protect their beliefs and homes against enemies.*<sup>71</sup>

The treaty of Madinah\* between Muslims, Jews and polytheists was the first Islamic international treaty. Through it, the Prophet Muhammad founded the Islamic State and established its relations with other political entities. Muslims became citizens of this state as a single unified nation, regardless of their race and party spirits. The Prophet Muhammad set the curriculum and principles of the important treaties such as *Hudaybiya* treaty with Quraish tribe in 628 AD which can be considered as a basic pledge for non-Muslims to enjoy Muslim protection.

In his *Hadiths*, the Prophet Muhammad affirmed that commitments must be kept, pledges fulfilled and treaties implemented. He is reported to have said that,

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<sup>69</sup> For treaties of the Prophet see Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 43-369.

<sup>70</sup> Azam, AbdulRahman, *Al-Risalah al-Khalidah*, 1<sup>st</sup> Edit., Jordanian Ministry of Education, Aman, 1975, p. 92.

<sup>71</sup> Hamidullah, Mohamad, *The Muslim Conduct of State*, Sh. Muhammad Ashraf, Lahore, 1977, pp. 264-265.

\* See the full text of the treaty in appendix I of this thesis.



**No faith in whoever is untrustworthy. He has no religion [he is not a Muslim] who does not fulfil his pledge.**<sup>72</sup>

In another *Hadiths*, the Prophet insisted that,

**On the Day of Judgement, there will be a flag for every person guilty of the breach of faith. It will be raised in proportion to the extent of his guilt; and there is no guilt of treachery more serious than the one of committed by the ruler of public.**<sup>73</sup>

And,

**Whosoever has concluded a pact with others, he should neither tie a knot nor open it on (that bond) until its time expires.**<sup>74</sup>

From these Prophetic *Hadiths*, it may be concluded that in Islam the principle of pledges is fidelity not without perfidy. This view was confirmed by Ibn Hazm when he noted that,

*The Prophet paved the way for spreading the call to Islam [D'awa] by pledging non-Muslims, urging faithfulness and concluding peace and reconciliation conventions with peace lovers who are not blocking D'awa way. He also reconciled the tribes that settled between Madinah and Red sea coast like "Banu Dhumrah" after the first invasion that he led, the "Al-Ibowa" battle or "Dwan" battle.*<sup>75</sup>

Ahmed Safwat sites the text of this reconciliation treaty and its terms in his book *Jamharat Rasa'el al-Arab* as follows,

*This is a message from Muhammad the Prophet of God to Banu Dhumrah, you are safe for your property and lives; you are supported to win the victory over your enemy; but you are not to fight God's religion. If the Prophet calls for your support, you act and reply. In return, you will have the protection of God and His Messenger, and you will have victory over your enemy if you are righteous.*<sup>76</sup>

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<sup>72</sup> Al-Bayhaqi, Ahmed Ibn Al-Hussein, *Al-Sunan al-Kobra*, Vol. IX, Dar al-Fikr, Beirut, 1994, p. 231.

<sup>73</sup> Matraji, Mahmoud, *Translation of Saheh Al Bukhari*, Dar al-Fikr, Beirut, 1993, p. 328.

<sup>74</sup> Al-Azadi, Abuda'ud Sulayman Ibn Al-Ash'ath, *Sunan Abuda'ud*, Vol. III, Al-Maktabah al-Asryyah, Beirut, 1950, p. 83.

<sup>75</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. II, Matba'at al-Halabi, Cairo, 1955, p. 54.

<sup>76</sup> Safwat, Ahmed Zaki, *Jamharat Rasa'el al-Arab*, Vol. I, Matba'at al-Halabi, Cairo, 1936, p. 70.

Like the *Holy Qur'an*, then, the Prophetic *Sunnah* legitimated: pledges, covenant and treaties. Thereafter, the Caliphs followed the *Shari'ah* commands over pledges, covenants and treaties. For example, Umar I gave the Christians of Jerusalem an integral protection\* for their property, souls, and churches with no harm to their religion, property and churches. This was under one condition, that none of the Jews were allowed to live in Jerusalem according to the request of the Patriarch of the city.<sup>77</sup>

The legitimacy of treaties has a third aspect. The actual treaties, such as the *Constitution of Madinah*, concluded by the Prophet form part of the legislation of the *Shari'ah*. In this way, their legitimacy was enhanced over that which the Prophet conferred by his *Hadiths* and his acts of concluding treaties. Given this legitimacy of treaties, their fulfilment is part of and dependent upon their faithfulness towards Islam.

International law meets with the *Shari'ah* in stressing that all parties have to respect their obligations. Treaties in international law are binding and states have to be bound by them. Therefore states are not permitted unilaterally to terminate an in-force treaty for any reason. In connection with that, article 26 and the first part of article 27 of Vienna Convention insisted that,

- *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*
- *A party may not invoke the provisions of its internal law as justification for its failure to perform the treaty.*<sup>78</sup>

However, unlike the Islamic State, the international community has procedures and sanctions which have been legislated by its organisations against states which change the scope of the operation of a treaty, alter its rights or obligations, cheating on its fulfilment, or in other ways fail to fulfil the terms of a treaty. The international community or its organisations may act against such breaches of treaties by public condemnation, by commercial and other sanctions in addition to political embargoes

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\* This pledge became known as "the Pledge of Umar." According to various scholars it organised the relations between the Muslims and religious groups who were living in the Islamic territory.

<sup>77</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. V, Al Matba'ah al Hussayniyah al Masriyah, Cairo, p. 2405.

<sup>78</sup> Reuter, Paul, *Introduction to the Law of Treaties*, Pinter Publishers, London, 1989, pp. 172-173.

against the non-implementing states, and, finally, by using military force to compel states to perform their international obligations.

In the matter of the stages of treaties in the *Shari'ah*, there is a parallel with international law and its multiple treaty stages. In international law, a treaty text is first drawn up, this draft is then authenticated and further revised if necessary. After this it is approved by the parties, then formally signed and both become bound by the treaty if it completes its final stage of endorsement by the legislature. At each stage, a number of procedural techniques come into play: initialling, signature, exchange, deposit or communication of certain instruments, and various notifications. However, these techniques have no magical power of their own. Their legal effect essentially depends on the meaning given to them by the parties. This meaning in turn is established by usage and by the conduct of the parties in each particular case.<sup>79</sup>

Therefore, it could be concluded that the international law meets with the *Shari'ah* in organising the procedural technique of the treaty.

#### 5.5.7) Termination of treaties

A treaty which has been negotiated, written down, signed, exchanged, deposited and ratified is then normally implemented in practice. Pledges, covenants and treaties in Islam are treated as having a sacred character and are, therefore, to be respected. Fulfilment of a pledge or treaty is a sign of genuine Faith, while its revocation is a sign of hypocrisy. Fulfilment, moreover, is considered as a first degree of fulfilment with Allah before it is with the others. Commitments should be permanently respected since their fulfilment is required in the *Holy Qur'an*:

وأوفوا بعهد الله إذا عاهدتم ولا تنقضوا الإيمان بعد توكيدها وقد جعلتم الله عليكم كفيلا .  
(النحل: ٩١)

Fulfil the Covenant of Allah when ye have entered into it, and brake not your oaths after ye have confirmed them; indeed ye have made Allah your surety; for Allah knoweth all that ye do.  
(16: 91)

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<sup>79</sup> Ibid., pp. 44-45.

Specifically, the fulfilment of agreements is required by the *Shari'ah* through the clear injunction in the *Holy Qur'an*,

فَأْتَمُوا إِلَيْهِمْ عَهْدَهُمْ إِلَىٰ مَدَّتِهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُتَّقِينَ . (التوبة: ٤)

**So fulfil your engagements with them to the end of their term: for Allah loveth the righteous. (9: 4)**

The Muslim is bound in all his behaviour by the law of Allah and he is not allowed to cross the limits set by Allah in his life. Even in his love and enmity, starting and ending relations, engaging in conciliation or hostilities, he is obliged to deal with the others by the honour of Islam and its word. For example, the *Qur'anic* injunction to do good and avoid evil (7: 157& 9: 71) is applied elsewhere in the *Holy Qur'an* to the matter of enmity or hostility,

وَلَا تَسْتَوِ الْحَسَنَةُ وَلَا السَّيِّئَةُ، إِدْفِعْ بِالَّتِي هِيَ أَحْسَنُ، فَإِذَا الَّذِي بَيْنَكَ وَبَيْنَهُ عَدَاوَةٌ كَأَنَّهُ وَلِيٌّ حَمِيمٌ. (فصلت: ٣٤)

**Nor can Goodness and Evil be equal. Repel (evil) with what is better: then will he between whom and thee was hatred become as it were they friend and intimate. (41: 34)**

In general, the honour of Islam requires that the Muslim should,

وَيَدْرُؤُونَ بِالْحَسَنَةِ السَّيِّئَةَ أُولَئِكَ لَهُمْ عَقَبَى الدَّارِ . (الرعد: ٢٢)

**. . . and turn off Evil with good: for such there is the final attainment of the (Eternal) Home. (13: 22)**

Thus, in Islam when a treaty is concluded between Muslims and others, it should be fulfilled as long as its terms conform to the letter and spirit of Islamic law and it brings welfare to Muslims. If the *Imam* dies or is dismissed from office the treaty he concluded is not terminated. A treaty concluded by the *Imam* is on behalf of the Islamic State and therefore continues to be legally binding upon the state and his successors after he ceases to be its head. They must continue to fulfil its terms.<sup>80</sup>

If a treaty is to be terminated on the Muslim side it can only be done by the *Imam* as he alone in the Islamic State has authority to make or confirm a treaty/pledge and also to terminate one.<sup>81</sup> A treaty may also be terminated by non-Muslims either by

<sup>80</sup> Al-Khateab, Muhammad, *Mughni al-Muhtaj ila Ma'arefat Ma'ani al-Fath al-Minhaj*, Vol. IV, Matba'at al-Halabi, Cairo, 1958, pp. 261-262. & Al-Nawawi, Yahya Ibn Sharaf, *Rawdat al-Talibean*, Vol. X, Dar al-Fikr, Beirut, 1993, p. 337.

<sup>81</sup> Al-Badawi, Ism'ael, *Ikhtisasat al-Sultah al-Tanfithiyah fi al-Dawlah al-Islamiyyah*, 1<sup>st</sup> Edit., Cairo, 1977, p. 194.

revocation or by abrogation. It is important to distinguish between abrogation and revocation in Islam. Revocation is considered to be the failure to keep commitments undertaken in the treaty/pledge and can be done by one of the two parties. It is a breach of the treaty/agreement, it is considered as perfidy because it is not preceded by a caution or warning and it legally terminates the treaty in the *Shari'ah*. The *Shari'ah* requires the fulfilment of a treaty and consequently forbids its revocation by the *Imam*. In the case of revocation of a truce treaty the result is to restart the war by the side or the sides on which perfidy occurs.<sup>82</sup> Abrogation, on the other hand, means a legal procedure of agreement by both parties to end a treaty for a specific reason or reasons. For example, if the two contracting parties show no desire to fulfil the treaty up to the end of its term they may agree to abrogate this treaty. Another example would be the abrogation of a treaty when its time limit expires and the two parties do not renew it. A third possible example of legal abrogation is where one of the two parties to the treaty ceases to exist as a legal entity and there is no successor regime to inherit its legal obligations. In practice, in the classical *Fiqh*, the only method of abrogation was the expiry of the treaty and its non-renewal.

In the *Shari'ah* the legal consequences of terminating a treaty are as follows:

1) *Abrogation*:

- a) *By expiry of the treaty's time limit.* With the exception of the *Dhimma* treaty, all treaties concluded by the *Imam* must be limited to a specific period of time and the fulfilment of the terms is limited to this temporary period. Once the terminal date has been reached, the treaty is no longer valid and is terminated. The options open to both parties are either to continue this new legal state, renew the treaty for a further period of time, or conclude a new treaty. Jurists agreed that a treaty period might be

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<sup>82</sup> Madkour, Muhammad AbdulSalam, *Al-Madkhal li al-Fiqh al-Islami*, Dar al-Nahdha al-Arabiyyah, Cairo, 1960, p. 58.

extended to exceed the agreed limit if it is for the general benefit or welfare of the Muslim community.<sup>83</sup>

- b) *By mutual agreement*: if a contracting party does not want to keep the treaty to its end, the party seeking abrogation should inform the other party in writing or through messengers or its ambassadors. Provided the other party agrees to this arrangement, the treaty is abrogated. But, in the absence of such an agreement, the treaty will be unilaterally revoked if the initiating party proceeds with its intention to terminate the treaty.<sup>84</sup>

## 2) Revocation:

- a) *Violation of the treaty's provisions*: Islam recognises that a treaty is revoked by the non-fulfilment of its terms by one or both parties, or by the actions of a party which conflicts with those terms. The legal consequence of a non-Muslim party violating a treaty in either of these ways is for this revocation of the treaty to terminate it. The further legal consequence of this revocation is explicitly stated in the *Qur'an*,

وإن نكثوا إيمانهم من بعد عهدهم وطعنوا في دينكم فقاتلوا أئمة الكفر انهم  
لا إيمان لهم لعلهم ينتهون . (التوبة: ١٢)

**But if they violate their oaths after their covenant and attack your Faith, fight ye the chiefs of the Unfaith: for their oaths nothing to them: that thus they may be restrained. (9: 12)**

- b) *Treachery or betrayal*. Whenever the non-Islamic party to a temporary treaty acts treacherously toward the Islamic State, the treaty has been revoked and the Islamic legal consequence is its termination. Moreover, if the Islamic State as a party to such a treaty has good grounds for supposing that such treachery can be anticipated by the other party then again the treaty is revoked and legally terminated.

<sup>83</sup> Al-Ramli, Shams Al-Dean Muhammad Ibn Shihab al-Dean, *Nehayat al-Muhtaj ila Sharh al-Minhaj*, Vol. VIII, Matba'at al-Halabi, Cairo, 1386 AH, p. 101.

<sup>84</sup> Ghanemi, Muhammad Tal'at, *Ahkam al-Mu'ahadat fi al-Shari'ah al-Islamiyyah*, Monsha'at al-Ma'arif, Alexandria, pp. 144-146.

وإما تخافن من قوم خيانة فأنبذ إليهم على سواء إن الله لا يحب الخائنين .  
(الأنفال: ٥٨)

**If thou fearest treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms: for Allah loveth not the treacherous. (8: 58)**

Mere suspicion of future perfidy is, however, not sufficient. The expected treachery of the non-Islamic party should have noticeable indications such as picking a quarrel with Muslims, committing malicious offences against them and violating some of the treaty's terms. In such cases, the treaty is revoked by the Muslims even when it is not yet expired and up to that point still in force. This is the only situation in which the Imam is permitted to unilaterally revoke a treaty. Once he knows of the treachery or the betrayal by the non-Muslims he is not allowed to use military force against them until they have been notified that the Islamic pledge has been revoked (so that they are not taken by surprise).<sup>85</sup> Al-Sherazi in his book *Al-Muhatheb* confirmed this,

*When the Muslim ruler sends a message to the adversaries' ruler informing him of the justified pledge revocation, the Muslims have to give enough time to be sure that this notification has reached all parts of the adversaries country. Otherwise, Muslims will not do any act of aggression on their enemies since it will be considered as an act of treachery that is not a conduct of a real Muslim.*<sup>86</sup>

Islam stresses that a warning and notification of the revocation of a treaty/pledge must be given to the other party three days before rescinding the pledge. This requirement cannot be legally avoided by the Muslims before undertaking hostilities against their former treaty partners. However, resort to armed conflict is only legitimate after the other party's response to notification of revocation of pledge leaves the Muslims with no alternative but that of fighting. Since the consequences of rash actions are heavy, Muslims are required to be patient and give the other party the opportunity to make amends, abide by his commitments and thereby remove the need for war.<sup>87</sup>

<sup>85</sup> Sabiq, Sayed, *Fiqh al-Sunnah*, Vol. III, 11<sup>th</sup> Edit., Dar al-Fath li al-A'alam al-Arabi, Cairo, 1994, pp. 98-99.

<sup>86</sup> Al-Sherazi, Ibraheam Ibn Ali, *Al-Muhatheb*, Vol. II, Matba'at al-Halabi, Cairo, p. 263.

<sup>87</sup> Sabiq, Sayed, *Fiqh al-Sunnah*, Vol. III, 11<sup>th</sup> Edit., Dar al-Fath li al-A'alam al-Arabi, Cairo, 1994, pp. 96-108.

In the case of *Dhimmis*, a different legal rule applies in the case of their treachery. *'Aqd al-Dhimma* is a permanent treaty and cannot be revoked by the *Dhimmi* group. As citizens of the Islamic State, the *Dhimmis* are under the control of the Islamic authority and it does not fear harm from them as it does from *Harbis* outside the Islamic State.<sup>88</sup> When some *Dhimmis* act treacherously the *Dhimma* treaty is therefore not revoked for all *Dhimmis*, but only for those who have acted in this way. In the legal opinion of Imam al-Shafei'i,

*Dhimmification is not to be revoked for all Dhimmis, revocation is only for those who act treacherously.*<sup>89</sup>

4) *War*. In international law, all treaties are terminated by war.<sup>90</sup> However, this is not true in the case of *Shari'ah*. The truce treaty is ended by war, but classical Muslim jurists held that neither *Aman* nor commercial treaties would be effected by the legal status of war between the Islamic State and *Harbis*. As has been shown in chapter IV, *Aman* is given to individual *Harbis* whose country is hostile to the Islamic State. It is not given to the people of *Dar al-'Ahd* whose country has a truce treaty with the Islamic State.

Commercial treaties continue during the state of war provided that the merchants are not dealing in commodities that strengthen the situation of hostile state.<sup>91</sup> However, it could be argued that all commercial transactions with the enemy should be cancelled because the entire economy directly or indirectly supports the war effort of a country the life of which it is a mainstay. A more drastic measure than forbidding trade in certain goods was undertaken by the Prophet Muhammad before the battle of Badr. He imposed a complete trade embargo on the Quraish by cutting their trade route in order to tighten the

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<sup>88</sup> Al-Sherazi, Ibraheem Ibn Ali, *Al-Muhatheeb*, Vol. II, Matba'at al-Halabi, Cairo, p. 263. & Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. VIII, Matba'at al-Manar, 1348 AH, p. 463.

<sup>89</sup> Al-Shafei'i, Muhammad A., *Al-Umm*, Vol. IV, Al Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 107.

<sup>90</sup> Oppenheim, M. A., *International Law*, Vol. II, 7<sup>th</sup> Edit., Longmans, London, 1952, p. 302.

<sup>91</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 88 & Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. VII, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 102 & Al-Sherazi, Ibrahim Ibn Ali, *Al-Muhatheeb*, Vol. I, Matba'at al-Halabi, Cairo, p. 281.



Muslim's grip around their throat and force them to change their attitude towards Muslims.<sup>92</sup>

Despite this example of the Prophet, Classical Muslim jurists only prescribe the restriction of trade with enemy merchants: they do not recommend it ends completely. The argument for this, and the remainder of the jurists prescriptions on commercial treaties are examined in section (6.6.1) below.

## 5.6) Kinds of treaties

It has to be said, initially, that the classical Muslim jurists did not distinguish between a treaty and a contract, they considered all relations between the Islamic authority and its Muslims and non-Muslims citizens are contract such as the election of the Imam *Bay'ah*, the poll-tax the *Jizyah* and so on.<sup>93</sup> However, modern Muslim scholars made the distinction by the beginning of the 20<sup>th</sup> century. They distinguish a treaty from a contract in two respects: (i) the parties; and (ii) the subject. In a contract, the parties may be individuals or groups in addition to states. In any treaty, on the other hand, the parties are two or more states who conclude an agreement which is formally signed by authorised persons such as the heads of state or their representatives. The treaty's subject is a kind of international relations, affecting importantly the relations among states of the international community. In the case of a contract, however, almost anything other than this is the subject matter of the binding agreement. A contract will count as a treaty if its parties are both states and its subject matter is to do with their relations.<sup>94</sup> This distinction is not made in classical *Fiqh*. The parties to a contract may be states, groups or individuals, but this is also true of treaties. Similarly, there is no distinction in their subject matter; treaties are not restricted to relationships between states as modern Muslim scholars have argued.

It has been mentioned earlier that Muslim jurists classified treaty under two categorisations: the temporary and the permanent treaties. Most treaties concluded

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<sup>92</sup> Lings, Martin, *Muhammad*, George Allen & Unwin Ltd., London, 1984, pp. 135-137.

<sup>93</sup> Ghanemi, Muhammad Tal'at, *Ahkam al-Mu'ahadat fi al-Shari'ah al-Islamiyyah*, Monsha'at al-Ma'arif, Alexandria, p. 46.

during the time of the Prophet, the four Orthodox Caliphs, the Umayyads, and the 'Abbasids eras were temporary treaties. The only permanent treaties were the protection pledges to non-Muslim individuals of the Islamic State, which called *'Ahd al-Dhimma*.<sup>95</sup> The motives behind that, have been explained by Wahbah Al-Zohaily, who mentioned,

*Enmity, non-truce and continuous war status between the Muslims and other states or communities were the main reasons which persuaded Muslims to refuse concluding any permanent treaty with the non-Muslims. Recently, it could be said that concluding a permanent peace treaty among the Muslims and others is lawful because the main object of calling for Islam is achieved within its natural field through the Propagandists and the Preachers to Islam.*<sup>96</sup>

Muslim jurists limited the Islamic treaties to the purposes of: friendship and trade exchange, conciliation, protection pledges, safeguard covenants, and armistice treaties.<sup>97</sup> Therefore, these treaties will be discussed in the following part according to the previous classification, concentrating initially on the temporary treaties and latter on the permanent one.

### 5.6.1) Treaties of friendship and commodities exchange

Islamic jurists of the classical period conventionally treat these two kinds of treaty together in their treatises on *Fiqh* and this convention will be followed here. The reason for so doing will be explained at the end of the section.

The aim of such treaties is to create a situation of goodwill and co-operation, particularly in the commercial field. Commerce, according to the *Shari'ah*, is one of the professions which if practiced within the bounds of the Islamic law might secure the Muslim worldly recompense without compromising religious duties. In the words of Majid Khadduri,

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<sup>94</sup> Shalabi, Mohammed Mustafa, *Al-Madkhal fi al-T'areaf bi al-Fiqh al-Islami*, Dar al-Nashr al-'Arabiyyah, Beirut, 1969, p. 367.

<sup>95</sup> Al Makrizi, TaqulDean Ahmed Ibn Ali, *Imta'a al-Asma'a*, Vol. XI, Lajnat al-Ta'leef, Cairo, 1941, p. 448.

<sup>96</sup> Al-Zohaily, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, p. 354.

<sup>97</sup> Gabir, Hosny Muhammad, *Al-Dawlah wa al-'Alaqat al-Dwaliyah fi al-Islam*, Document in Al-Azhar Library, p. 50.

*Throughout Islamic history, commerce was highly esteemed and the merchants contributed to the wealth and prosperity of society at the height of Muslim power. Although few were the merchants who could influence public policy, there were men in business, like the jurist Abu Hanifah, whose influence surpassed many in high authority. The process of exchanging commodities among nations, honoured by the Arabs before Islam, persisted throughout the centuries as one of the most significant professions in Muslim society.<sup>98</sup>*

Among the examples of the Islamic friendship and commodities exchange treaties comes the that treaty concluded by the ruler of Egypt during the time of the Caliph Uthman Ibn Affan with the Christians of Nubia, which stipulated amity, good neighbourliness as well as mutual assistance where the ruler supplied them with food, grain and slaves.<sup>99</sup>

However, jurists bound the Muslim merchants to abide by the general rules of the Islamic transactions, which define the contents and stipulations of a contract which has to be free from usury and illegitimate commodities such as wine, pork flesh along with other items forbidden by the *Shari'ah*.<sup>100</sup> Friendship and commodities exchange treaties should be temporary according to Muslim jurists. They assumed that the duration of this type of treaties would be less than four months, basing their judgement on the *Qur'anic* verse,

فسيحوا في الأرض أربعة أشهر واعلموا أنكم غير معجزي الله وأن الله مخزي  
الكافرين. (التوبة: ٢)

**Go ye, then for four months, (as ye will), throughout the land, but know yet cannot frustrate Allah (by your falsehood) but that Allah will cover with shame those who reject Him. (9: 2)**

There is a consensus among the Malikite jurists to prohibit commercial transaction with *Dar al-Harb*, therefore such treaty is considered to be void.<sup>101</sup> However, the majority of jurists, particularly the Hanafites, were more tolerant and expatiated on the

<sup>98</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 224.

<sup>99</sup> Gibb, H. A. R. & H. Kramers, *Short Encyclopædia Of Islam*, E. J. Brill, Leiden, 1974, p. 69.

<sup>100</sup> Al-Shaybani, Muhammad Ibn Hussein, *Al-Siyar al-Kabear*, Vol. I, Al-Dar al-Mutahedah li al-Nashr, Beirut, 1975, p. 133

<sup>101</sup> Ibn Roshd, Muhammad Ibn Ahmed, *Moqadimat Ibn Roshd*, Vol. II, Dar al-Fikr, Beirut, 1991, p. 278.

obligations of Muslims who are involved in such transactions with *Dar al-Harb* as well as its citizens. Al-Kasani remarked,

*Jurists stated that it was a usual practice that Muslim traders enter a hostile state and the Harbis enter an Islam state; and they exchange clothes, commodities, food and the like except items used as war supplies.*<sup>102</sup>

It is noteworthy to state that commodity exchange with the *Harbis* should be in accordance with safeguard covenants *Aman* that given to them. The jurists formulated certain limitations upon the free exchange of commodities with the merchants of *Dar al-Harb* and the kinds of commodities imported as well as the advantages accrued to *Dar al-Islam* regarding the exchange of commodities with other countries.<sup>103</sup> The general principle was explained by Imam al-Ghazali, who said

*It is legitimately forbidden to export to the Dar al-Harb or to any other hostile state weapons and war materials, foods, horses or war supplies.*<sup>104</sup>

One of the limitations determined by most of the jurists on the free exchange of commodities with the merchants of *Dar al-Harb* was payment of the tithe '*Aushour*', the percentage of 10 % tax on their commodities.<sup>105</sup> The *Imam* is the only one who is entitled to lower or raises this tax according to the interests of the Islamic State. Moreover, the first Caliph who set the tithe tax was the Orthodox Umar I. It has been narrated that Abu Mousa al-Ash'ari wrote to Umar informing him that Muslim traders who went to *Dar al-Harb* paid taxes of 10% to the authority of that state. Umar replied:

*Take from the merchants of the Dar al-Harb whatever they take from the Muslim merchants, and take from the Dhimmis half of the set tax; and from Muslims one Dirham for each 40 Dirhams provided that the trade exceeds 100 Dirhams. If the trade value*

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<sup>102</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea Al Sanay'a fi Tarteab Al Sharay'a*, Vol., VII, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 102.

<sup>103</sup> Al-Ghazali, Muhammad Ibn Muhammad, *Kitab Ihya'a 'Ulum al-Dean*, Vol. II, Matba'at Hoash Kadam, 1334 AH, pp. 59-60.

<sup>104</sup> Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. VII, Dar al-Itihad al-Arabi li al-Teba'a, Cairo, 1969, p. 962.

<sup>105</sup> Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. III, Matba'at al-Halabi, Cairo, 1356 AH, p. 224.

*is 200 Dirhams take 5 Dirhams and if it is more take with the same ratio.*<sup>106</sup>

It may be inferred from this that the Islamic authority was dealing with foreign merchants according to equality or retaliatory measures.

It is worth mentioning that commercial treaties and treaty of friendship were conventionally bracketed together in classical *Fiqh*, and this convention has been followed here. The reason for their conjunction is that the non-Muslim subject of these two treaties was normally the same individual, a merchant. Such a merchant who traded within the Islamic State will receive *Aman* (temporary protection) from the Islamic authority and the commercial treaty of buying and selling could obviously be concluded within a few months. During that period and under the protection of the Islamic authority and all Muslim citizens of the Islamic State that individual is very likely to be party to a treaty of friendship. Its temporary nature therefore reflects the temporary residence of this merchant *Musta'min* in *Dar al-Islam*.

It is arguable that there is a second non-mercantile situation in which a friendship treaty may be concluded. This is after a war between the Islamic State and the *Harbis* and the establishment of *Dar al-Sulh* or *al-'Ahd*. This *Dar* has been defined (4.3.4) as the territory which is not under Muslim rule, yet is in tributary relationship to the Islamic State by temporary truce (*Sulh mo'waqt*).<sup>107</sup> For the duration of this third position between *Dar al-Harb* and *Dar al-Islam*, it is reasonable to suppose a friendship treaty is concluded between the two former belligerents, the Islamic State and the people of *Dar al-Sulh/'Ahd*.

### 5.6.2) Truce treaty

In Arabic, such a treaty is called *Muhadana* (مهادنة), *Hudna* is the singular. It means a cease-fire between two parties for a certain period of time. In juristical work, the Shafei'ites defined it as,

<sup>106</sup> Abu Yusuf, Y'aqub Ibn Ibrahim Ibn Habib, *Al-Kharaj*, Al-Matba'ah al-Salafiyah, Cairo, p. 135.

<sup>107</sup> See chapter III, 3.3.4.

*The conciliation with Harbis, whether they keep their religion or convert, to stop fighting for a certain period of time, whether or not a recompense is given.*<sup>108</sup>

Scholar al-Kasani, of Hanafites, defined truce as,

*It is the condition of conciliation during which each party is to refrain from fighting the other party.*<sup>109</sup>

The Malikites defined it as,

*It is conciliation with Harbis to refrain from fighting for a certain period of time, with or without giving recompense.*<sup>110</sup>

H. Gibb and H. Kramers have defined the Islam's view of truce as,

*Evidently, dislike the implication that there could be any territory in a status of neither Islam nor war, and therefore outside of Muslim conquest, maintained that this was not relay a Sulh or 'Ahd but only a trust (hudnah) and arrangement for an exchange of commodities.*<sup>111</sup>

Concluding truce treaties fulfilled only between the authorities of belligerents, and has to be signed by their leaders, their deputies or the delegated persons such as commanders of armies with a stipulation that they have to have full authority from their leaders. If the opposite party is a representative of a territory, then the Muslim ruler of any adjacent territory is to conclude the truce treaty with him.<sup>112</sup>

In the regulation of such treaties, Muslim jurists agreed that truce treaties are of two kinds: (i) those of general truce - to stop fighting in all fields of war; and (ii) those of specific truce - to stop fight in one particular the war fields. According to time, they are either unlimited, which means that any party may resume fighting at any time after

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<sup>108</sup> Al-Khateab, Muhammad, *Mughni al-Muhtaj ila Ma'arefat Ma'ani al-Fath al-Minhaj*, Vol. IV, Matba'at al-Halabi, Cairo, 1958, p.260.

<sup>109</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea Al Sanay'a fi Tarteab Al Sharay'a*, Vol., IX, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 3424.

<sup>110</sup> Ibn Qudamah, AbdulRahman Ibn Muhammad, *Al-Sharh al-Kabear*, Vol. II, Matba'at al-Manar, 1348 AH, p. 206.

<sup>111</sup> Gibb, H. A. R. & H. Kramers, *Short Encyclopedia Of Islam*, E. J. Brill, Leiden, 1974, p. 69.

<sup>112</sup> Al-Zohailly, Wahbah, *Athar al-Harb fi al-Fiqh al-Islami*, Dar al-Fikr, Beirut, p. 357.

notifying the other party or they are limited to a certain period of time after which any party can resume fighting when the two parties cannot reach an agreement for conciliation.<sup>113</sup> However, jurists differed according the margin of time, while the Shafei'ites assumed that truce can never last for more than 10 years referring to the case of Hdaybia treaty,<sup>114</sup> other jurists, such as al-Mawardi, assumed that it should not be more than four months,<sup>115</sup> based on the *Holy Qur'anic* verse,

فسيحوا في الأرض أربعة أشهر واعلموا أنكم غير معجزي الله وأن الله مخزي الكافرين.  
(التوبة: ٢)

**Go ye, then for four months, (as ye will), throughout the land, but know yet cannot frustrate Allah (by your falsehood) but that Allah will cover with shame those who reject Him. (9: 2)**

Other jurists, such as al-Bahuti, adopted the view that the duration could be less than a year.<sup>116</sup> However, it may be said that limitation of time has been left to the *Imam* unless the parties stipulated in the treaty a particular time for it to have validity. In classical *Fiqh*, a valid truce treaty will always be temporary, however long or short is that period of time. However, Muslim jurists still dispute about the limitation time of the treaty, they hold the same views of the previous treaty. Yet, the Shafei'ites hold that timing treaty is for people not for properties, therefore they permitted conciliation to be given for unlimited time for properties as well as women <sup>117\*</sup>

This is also true of treaties which are renewed after they have expired. Here, the treaty may be explicitly renewed for a further period of time or it may be renewed implicitly for a further period of time, provided that neither party objects by word or deed. Thus, it may appear that truce treaties during the period of the classical *Fiqh* became permanent because they lasted very much longer than ten years, for example the treaty with Nubia during the time of the third Orthodox Caliph 'Uthman. In reality,

<sup>113</sup> Al-Badawi, Ismael, *Ikhtisasat al-Sultah al-Tanfithiyah fi al-Dawlah al-Islamiyyah*, 1<sup>st</sup> Edit., Cairo, 1977, p. 127.

<sup>114</sup> Al-Shafei'i, Muhammad A., *Al-Umm*, Vol. IV, Al-Matba'ah al-'Ameriyah, Cairo, 1322 AH, pp.110, 111.

<sup>115</sup> Al-Mawardi, Ali Muhammad, *Al Ahkam al-Sultaniyah wa al-Welayat al-Denyah*, Dar al-Ketab al-Arabi, Beirut, 1990, p. 138.

<sup>116</sup> Al-Bahuti, Mansour Ibn Uonis, *Kashaf al-Qina'*, Vol. III, Dar al-Fikr, Beirut, 1982, p. 95.

<sup>117</sup> Al-Shafei'i, Muhammad A., *Al-Umm*, Vol. IV, Al-Matba'ah al-'Ameriyah, Cairo, 1322 AH, p. 111. See also, Gabir, Hosny Muhammad, *Al-Dawlah wa al-'Alaqat al-Dwaliyah fi al-Islam*, Document in Al-Azhar Library, pp. 53-54.

\* This is because, on the one hand, women do not always practice or become involved in wars or military activities. On the other hand, properties, as personal belongings, under a valid treaty affecting them and cannot be attacked or taken by the Islamic State, even if the treaty with the non-Muslims owners of the properties is terminated or cancelled for any reason.

such treaties were simply continually renewed but temporary truces and that no permanent condition of peace obtained. Similarly, al-Qaradawi has argued authoritatively that a permanent peace treaty between an Arab state and Israel was invalid from the Islamic point of view, *inter alia*, because it claims to be permanent and not a temporary truce treaty.<sup>118</sup> Such a treaty is only valid from the (secular) point view of international law.

Based on the previous debate, it could be said that status of hostility remained but was suspended during the period of truce between the two belligerents. Once the truce ends the belligerents resume their rights of fighting until another truce ends the conflict or it is ended by the victory of the Islamic State. If the *Harbi* state wins this war the post war condition will not be regarded as permanent by the Islamic State, but a suspension of hostility.<sup>119</sup> The international law relating to a cease-fire has similarities to this part of the law of *Shari'ah*. In the words of Oppenheim,

*They [the belligerents] are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals, on all points beyond the mere cessation of hostilities.*<sup>120</sup>

A variant of this treaty is where non-Muslims not only establish a cease-fire, but also seek protection from the Islamic State. This variant treaty is for the *Musalihoun*, a group of people which seeks protection from the Islamic State and which, if it is within its power, is given to the group against its *Harbi* enemies. Moreover, if the treaty is concluded in return for money paid by them to the Muslims, but Muslims fail to provide that protection in the duration of the treaty, Muslims should not take the money. If they already have taken all/or part of it, they should return it to the group.<sup>121</sup>

There is a further condition that is almost essential to truce treaties, that is, the way in which compensation for military losses in war falls on the belligerent states. Islam

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<sup>118</sup> Al-Qaradawi, Yusuf, *Al-Quds fi al-Wa'y al-Islami*, *Journal of Islamic Jerusalem Studies*, Vol. I, Dunblane, Winter 1997, p. 14.

<sup>119</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, *Matha'at al-Sa'adah*, Cairo, 1931, p. 89.

<sup>120</sup> Oppenheim, Lauterpacht Hersch, *International Law*, Vol. II, D. Mckay, New York, 1952-1955, pp. 546-547.

<sup>121</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. V, Hyderabad, 1335 AH, pp. 1862-1863.



accept this condition, provided it is explicitly agreed in the treaty. However, what it does reject is the humiliation of the former enemy by forcing it to pay excessive reparations. The *Shari'ah* point of view is that compensation for losses is permissible but not to a punitive level. Moreover, Islam permits compensation to be paid for up to the value of the enemy losses in the truce treaty where the Muslims were the aggressors in the conflict.<sup>122</sup>

### 5.6.3) Conciliation treaties

Although the term conciliation (موادعة) is frequently used in conjunction with truce treaties (see above section 5.6.2) it is possible that there may be conciliation treaties which are not connected to a truce, which are not treaties of alliance, such as the Declaration of Madinah, and are also neither *Dhimma* treaties nor *Aman* pledges. This possibility is not recognised in classical *Fiqh* and for this reason the discussion which follows is highly tentative. The reason for the analysis that follows is that not only is there a juristically unrecognised type of treaty, but also this type of treaty— if it exists— is unique in having no direct or indirect connection with *Jihad*. Other treaties are linked to *Jihad* in various ways: (i) truce treaties suspend *Jihad* for a fixed period of time; (ii) alliance treaties with non-Muslims are formed in order to pursue *Jihad*, (iii) *Dhimma* treaties are often, but not always, made after the *Harbis* have been defeated in *Jihad*. For those *Harbis* who do not become *Dhimmis* after a *Jihad*, they are always vulnerable to a *Jihad* so long as they remain *Harbis* instead of becoming *Dhimmis*. (iv) Pledges of *Aman* are made to *Harbis* whose country is in armed conflict with the Islamic State and commercial treaties with *Harbi* merchants will continue to be implemented during the *Jihad* against their country.

A conciliation treaty is close to a truce treaty because it is concerned with establishing peaceful relations between the Islamic State and non-Muslim groups. However, this does not mean either is a peace treaty in the modern international law sense of the term because such a peace treaty legally terminates a state of war between two belligerents, normally after a period of cease-fire. However, in classical *Fiqh* no

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<sup>122</sup> Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. IV, Matba'at al-Halabi, Cairo, 1952, p. 46.

such treaty is possible. Hostilities can be suspended for a specific period of time by the truce treaty, but Islamic law, as interpreted by the jurists of the classical period, allows no possibility of permanently terminating hostilities with *Harbis*. The cease-fire or truce treaty, it has been previously noted, is frequently linked with conciliation, as for example in the Malikite view already cited,

*It is conciliation with Harbis to refrain from fighting for a certain period of time, with or without giving recompense.*<sup>123</sup>

The distinction between a truce treaty which leads to conciliation of *Harbis* to the Islamic State and a conciliation treaty is that in the latter case the peaceful relations established by the treaty do not follow an armed conflict between the Muslims and non-Muslims. A conciliation treaty, properly speaking, does not suspend hostilities that actually exist, but is a pact intended to prevent such hostilities occurring. The treaty concluded by the Prophet Muhammad with the Jews tribe of the north of Madinah after the battle of *Khaybar* is an example of conciliation in a truce treaty. The Prophet Muhammad accepted their request for conciliation with the Islamic State in return for relinquishing half of their lands and allowing them not to convert to Islam instead.<sup>124</sup> In this example the Prophet followed the *Holy Qur'an*,

وإن جنحوا للسلم فاجنح لها وتوكل على الله . (الأنفال: ٦١)  
**But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah . . . (8: 60)**

This clear example of truce and conciliation treaty may be contrasted with several other peace pacts concluded between the Prophet as head of the Islamic State and the heads of non-Muslim groups.

The Prophet wrote a letter to the (Makokus) of the Egyptian Copts calling him and them to convert to Islam. The Prophet assured him of the safety of him and his people and of their heavenly reward if they did so, and their sinfulness if they refused the call to Islam. In response to this call the Makokus invoked peace upon the Prophet, welcomed his envoys and stated he had read and understood his call to Islam. He

<sup>123</sup> Ibn Qudamah, AbdulRahman Ibn Muhammad, *Al-Sharh al-Kabear*, Vol. II, Matba'at al-Manar, 1348 AH, p. 206.

<sup>124</sup> Ibn Al-Qayyim, Shams Al-Dean Muhammad Ibn Bakr, *Zad al-M'aad*, Vol. III, Al-Matba'ah al-Masriyah, Cairo, 1914, pp. 143-144.

declared his belief that God had sent Muhammad as his final Messenger and revealed to him the *Holy Qur'an* and said he would be the first to walk to the Prophet [i.e. accept his call to Islam], but because he ruled a great kingdom he could not do so. Finally, he sent two respectable female slaves, a cloak and a mule to ride.<sup>125</sup>

It is obvious from this exchange of letters that the seven stages of making a treaty (see section 5.5.7) are absent, so formally or *de jure* no treaty existed. Nevertheless, it could be argued that there was a *de facto* peace pact for the following reasons. First, the Makokus made several friendly gestures to the Prophet, including welcoming his envoys, sending him various presents, recognising him as the seal of the Apostles and Messenger of the revealed *Qur'an*, and indicating his frustrated desire to accept the call to Islam. This indicates a strong desire to have good relations with the head of the Islamic State on the part of the Coptic leader that is, his desire to achieve conciliation with the Muslims. Second, the Makokus never paid *Jizyah* to the Islamic State and so the Coptic community never became *Dhimmi*s at this time. Third, during the lifetime of the Prophet and the Caliphate of Abu Bakr, the Islamic State enjoyed peaceful relation with the Copts until the conquest of Egypt under Caliph Umar I, a peaceful status which an unwritten understanding between the Muslims and the Copts would help to explain.

The treaty of Maqnah (year 5 or 9 after the *Hijrah*) is in fact a long letter which the Prophet sent to Hunanyah and the people of Khaybar and Maqnah<sup>126</sup>. It too lacks the several stages of concluding a treaty, like the letter to the Makokus. In it the Prophet stated that he had received a revelation that the people of Maqnah could return to their villages and houses under the protection of Allah and the Prophet, where they would become a self-governing community. Yet no *Jizyah* would be required of them, and they would not be treated as *Dhimmi*s in other ways (for example in their clothing or shaving their heads). The letter also stated that no Muslim army would attack them and that they would be helped and supported by the Islamic State, including financially, if

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<sup>125</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 135-139.

<sup>126</sup> *Ibid.*, p. 124. The author notes doubts about the authenticity of this document. One of the reason why some scholars have doubted it is because it is written by Ali Ibn Abu Talib in Hebrew.

they needed it.<sup>127</sup> But unlike the alliance treaty with Jews of Madinah, there was no provision for mutual help, including military assistance. For this reason, the treaty was no more of an alliance treaty than it was a *Dhimma* treaty. The conciliatory character of the treaty was shown not only in the return of the villagers in safety and under protection, but also in the fact that they were not prevented from entering Mosques. However, there is no evidence either in al-Tabari, or in al-Waqidi or even in al-Maqreasi, that the Jewish tribe of Maqnah had previously been defeated in a war against the Islamic State. For this reason it was not a conciliatory truce treaty, but an independent *de facto* conciliation treaty.

Although these documents do not constitute treaties in the formal, legal sense, nevertheless, it is reasonably clear that as head of the Islamic State, the Prophet was attempting to achieve a conciliation between that state and the Copts, in the first case, and between it and the people of Maqnah, in the second case. Yet, in neither case had there been a preceding of war with the conciliated group and so neither was a truce treaty. From various provisions in the Prophet's letters there are several reasons for supposing that they are not treaties of *Dhimma* or alliance. And so, it seems not unreasonable to conclude that in both cases an additional kind of treaty is involved, a conciliation treaty.

### 5.8) Jurisdiction of criminal law and extradition treaties

Under the *Shari'ah*, crime can be categorised under two headings: (1) Crimes for which there is a fixed penalty; (2) Crimes where the *Qadi* decides the punishment the so-called *T'azear*.<sup>\*</sup> Generally speaking, the rules of these two criminal codes in *Shari'ah* are enforced on all crimes committed in *Dar al-Islam* regardless of the nationality or the religion of the doer, including all Muslims, *Dhimmis*, and *Musta'mins*. If, however, a crime is committed in *Dar al-Islam* but the criminal

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<sup>127</sup> *Ibid.*, pp. 121-124. See this document in appendix II.

<sup>\*</sup> Under the *Shari'ah*, *T'azear* or discretionary punishment starts from flogging through jail and exile to an Islamic territory and could even as far as capital punishment.

absconds to *Dar al-Harb* to escape punishment, the punishment does not lapse or become null and void, whether the criminal is a Muslim or non-Muslim.<sup>128</sup>

Crimes committed outside *Dar al-Islam* have a different legal position. Whether they were committed by Muslim or non-Muslim residents of *Dar al-Islam* the general rule is that the *Shari'ah* is not legally applicable to these crimes and the offenders. This is because the *Imam's* duty is to implement punishment under the *Shari'ah* within territories under his authority. Since *Dar al-Harb* is outside the *Imam's* authority, and he lacks the ability to enforce *Shari'ah* punishments there, such punishment is not obligatory.<sup>129</sup>

An exception to the rule that the *Shari'ah* law and punishment do not apply in *Dar al-Harb* can occur during wartime. If Muslims soldiers are camped in *Dar al-Harb* and within the camp a crime is committed either by a Muslim or non-Muslim that crime is punishable as if it were committed in *Dar al-Islam*. That it is subject to the *Shari'ah* law. The reason for this is that the Muslim encampment is held by soldiers of the Islamic State and therefore subject to its control. Given this control, the authority of the *Imam* to implement the *Shari'ah* within the encampment exists and therefore the crime is treated as if it is committed in *Dar al-Islam*. Any crimes committed outside the Muslim camp are not subject to the *Imam's* authority and must be treated like any crime committed in *Dar al-Harb*.<sup>130</sup>

Jurists were agreed upon the legitimacy of applying the *Shari'ah* to crimes committed within the Muslim camp in *Dar al-Harb*, but they differed over the timing of implementing the punishment. The Hanafites and Hanbalites suggested that punishment should be delayed until return to *Dar al-Islam*.<sup>131</sup> The Malikites and the Shafei'ites held that punishment should be executed immediately, provided the

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<sup>128</sup> Al-Kasani, Abu Bakr Ibn Mas'aud, *Bada'ea al-Sanay'a fi Tarteab al-Sharay'a*, Vol. VII, Sharekat al-Matbou'at al-'Alamyah, 1327 AH, p. 131.

<sup>129</sup> Audah, AbdalQadir, *Al-Tashri' al-Jinai' al-Islami*, Mu'asasat al-Risalah, Cairo, 1994, p. 280.

<sup>130</sup> Ibid., p. 132.

<sup>131</sup> Ibn Hamam, Kamal Al Dean, *Fath al-Qadeer, Sharh al-Hedayah li al-Marghalani*, Vol. IV, Matba'at Mustafa al-Halabi, Cairo, 1356 AH, p. 154 & Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. X, Matba'at al-Manar, 1348 AH, pp. 439, 537.

commander was entitled to do this.<sup>132</sup> If the commander lacked this authority, punishment would not be implemented until the criminal was returned to *Dar al-Islam*. Umar I was the first to delay the punishment of Muslim soldiers until they returned to *Dar al-Islam*,<sup>133</sup> even though as Caliph he was entitled to impose the punishment on the criminal within the Muslim camp.

Under the condition of necessity the *Shari'ah* permits the *Imam* to conclude a treaty of extradition. Where such a treaty exist the Islamic State is obliged to extradite a person accused of a crime in the non-Islamic State. Muslim jurists, however, disputed the precise condition of extradition. The Malikites argued that when an extradition treaty with a non-Muslim state existed, the terms of that treaty must be fulfilled when application was made to the Islamic State for the extradition of an accused person.<sup>134</sup> The Hanafites and some Malikites jurists differed from the majority Malikite position by arguing that extradition from the Islamic State could only be of non-Muslims. Muslims, they held, should not be extradited to a non-Muslim state as this would give non-Muslims mastery over Muslims.<sup>135</sup> The Shafei'ite position differed from both the Hanafite and Malikite views. They held that a person could only be legitimately extradited to a non-Muslim state if that person had a tribe there to defend him. If the accused person had no such tribe then extradition was not lawful. This view was based on the fear that extraditing Muslims to a non-Muslim state would lead to polytheists tempting the Muslim away from Islam.<sup>136</sup> Although the Shafei'ites view was clearly intended to applied to the extradition of Muslims, it does not appear to be applicable to non-Muslims since they need no tribe to safeguard them from apostasy. The Hanafite, Shafei'ite and minority Malikite juridical positions are at variance with Prophetic practice. After concluding the agreement of the Hudaibiya treaty, the Prophet Muhammad returned the Qurashi, Abu Jandal, to his people in Makkah who

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<sup>132</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. II, Matba'at al-Manar, 1348 AH, p. 258. & Anas, Malik Ibn, *Al-Muddawanh al-Kobra*, Vol. XVI, Dar al-Fikr, Beirut, 1991, p. 91.

<sup>133</sup> Al-Qurashi, Ghalib AbdulKafi, Dr., *Awlawiyah al-Farouq al-Siyasiyyah*, Dar al-Wafa'a li al-Tiba'ah wa al-Nashr, Mansorh, 1990, pp. 318-319.

<sup>134</sup> Ibn Qudamah, Abdulah Ibn Ahmed, *Al-Mughni*, Vol. X, Matba'at al-Manar, 1348 AH, p. 510.

<sup>135</sup> *Ibid.*, Vol. IV, p. 296.

<sup>136</sup> Al-Sherazi, Ibraheam Ibn Ali, *Al-Muhatheb*, Vol. III, Matba'at al-Halabi, Cairo, p. 277.

had requested his extradition.<sup>137</sup> Abu Jandal was not accused of any crime except that of converting to Islam which, from the Quraishs point of view, was a criminal offence.

A special condition applies to the extradition of a *Musta'min*. Provided there is an extradition treaty in force he cannot be extradited to any non-Islamic State except the one that is a treaty partner as this would contradict the *Aman* given to him. The general rule is that an extradition treaty between the Islamic State and the non-Islamic State must conform to the condition of *Aman* given by the Islamic State and only to this state is extradition legitimate.<sup>138</sup>

Where there is no extradition treaty, the Islamic State will not extradite any citizen, whether Muslim or non-Muslim (including the *Musta'mins*), to a non-Islamic State that requests their extradition, whatever the crimes of which they are accused. This provision of the *Shari'ah* also prohibits the extradition of a Muslim who holds the nationality of a state within *Dar al-Harb* if he emigrated from there to *Dar al-Islam*.<sup>139</sup>

If a crime is committed in the Islamic State there is no possibility of extradition. The accused person is tried under the *Shari'ah* as previously noted. However, in the present day where there is more than one Islamic State the question of extradition from one to another can arise. Jurists now argue the *Shari'ah* does prevent extradition of a wanted person to another Islamic State on criminal charges, unless that person had been previously tried and punished for that crime according to the *Shari'ah*. Islamic law prohibits a person from being punished twice for a crime committed. Jurists argued that extradition from one Islamic State to another where the accused person has not already been tried and punished is legitimate as both states are part of *Dar al-Islam*. Each Islamic State is considered as a part of *Dar al-Islam* and a representative of Islam, so that there is no objection to extradition as long as the legal provisions of both states are the same.<sup>140</sup> In the later period of the 'Abbaside Empire it could be argued the Islamic State had broken up into three Islamic states based in Spain, Egypt and at

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<sup>137</sup> Al-Mubarakphuri, SafiulRahman, *The Sealed Nectar, Biography of the Noble Prophet*, Maktaba Dar us Salam, Riyadh, 1995, pp. 341-342.

<sup>138</sup> Audah, AbdalQadir, *Al-Tashri' al-Jinai' al-Islami*, Mu'asasat al-Risalah, Cairo, 1994, pp. 300-301.

<sup>139</sup> Ibid.

Baghdad. However, classical *Fiqh* ignored these divisions and continued to assume the existence of a single Islamic State whose head was the *Imam* or 'Abbaside Caliph. Therefore, the question of extradition from the Islamic State to another Islamic State could never arise. All that was legally possible was the removal of an accused person from one region to another for trial within the Islamic State.

Expulsion and exile by the Islamic State in accordance with the *Shari'ah* has some affinity to extradition. No Muslims can be lawfully exiled from *Dar al-Islam* to *Dar al-Harb*, just as they cannot be extradited in the absence of the extradition treaty. This same provision applies to *Dhimmis*. However, both Muslims and *Dhimmis* may be lawfully exiled to another region within of *Dar al-Islam*.<sup>141</sup> Temporary non-Muslim residents of the Islamic State cannot enter *Dar al-Islam* except with *Aman* or as consequence of a conciliation treaty between his country and Islamic State. The Islamic authority is entitled to expel such a person once the period of their temporary residents has ended. It also has the right to expel temporary non-Muslim residents before the expiry time if they violate public security or if they become suspicious as for example if they are suspected of spying.<sup>142</sup>

### 5.9) Summary and conclusion

One of the two main conclusions of this chapter is that the parties to treaties in Islam are always non-Muslims and the Islamic State. In classical *Fiqh* there is no evidence of treaties between members of the Muslim *Ummah*. This confirms our hypothesis that Islamic international relations are always between believers and unbelievers, whether at the level of individuals, groups or states, and never between Muslims in any capacity. In this respect, Islamic international law differs from Western international law where the latter identifies the parties to a treaty as states and does not distinguish between them in terms of religion. A second conclusion was that in Islamic

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<sup>140</sup> Audah, AbdalQadir, *Al-Tashri' al-Jinai' al-Islami*, Mu'asasat al-Risalah, Cairo, 1994, pp. 297-299.

<sup>141</sup> *Ibid.*, p. 304.

<sup>142</sup> Al-Sherazi, Ibraheam Ibn Ali, *Al-Muhatheeb*, Vol. II, Matba'at al-Halabi, Cairo, p. 294. & Ibn Qudamah, Abdullah Ibn Ahmed, *Al-Mughni*, Vol. X, Matba'at al-Manar, 1348 AH, p. 520 & Ibn Hamam, Kamal Al-Dean, *Fath al-Qadeer*, *Sharh al-Hedayah li al-Marghalani*, Vol. IV, Matba'at Mustafa al-Halabi, Cairo, 1356 AH, p. 294.



law there are two kinds of treaty, whatever their subject matter, permanent and temporary treaties.

In Islam, each treaty has to satisfy specific conditions to be legitimate and binding. First its terms have to be in harmony with the instructions of the *Shari'ah* and achieve common-good for both parties. If the treaty includes unfair terms, or conflicts with moral principles or criminal law - such as the drugs trade - Islam consider it as illegal treaty and is void. Second, in Islam, a legally valid treaty must be made by a competent, legitimate authority. According to the *Shari'ah*, the *Imam* or his authorised representative only are entitled to conclude a treaty. If ordinary Muslims or even political leaders conclude any contract on behalf of the *Ummah*, without any authorisation from the *Imam*, then the contract is void. The *Shari'ah* does not stipulate whether the signatory to the treaty from the opposite party is of the same rank or not.

In Islam a formal treaty has to be negotiated, written down, signed, exchanged, deposited and ratified then normally implemented in practice. Unlike international law where a treaty involves mutual pledges by the parties to it, in Islam a unilateral pledge may constitute a treaty. When a treaty is concluded between Muslims and others, it should be fulfilled as long as its terms conform to the letter and spirit of Islamic law and it brings welfare to Muslims. Where the terms of a treaty conflict with those objectives, the treaty is not binding upon Muslims, either in its entirety or only on respect of those particular terms. The *Shari'ah* obligates all Muslims to carry out provisions agreed upon in the covenant and show full respect to the agreement made by the *Imam* or his authorised representatives. If the *Imam* dies or is dismissed from office the treaty he concluded is not terminated. A treaty concluded by the *Imam* is on behalf of the Islamic State and therefore continues to be legally binding upon the state and his successors after he ceases to be its head. The *Imam* alone in the Islamic State has authority to terminate a treaty. A treaty may be terminated by non-Muslims either by revocation (the failure to keep commitments undertaken in the treaty/ pledge and can be done by one of the two parties), or abrogation (a legal procedure of agreement by both parties to end a treaty for a specific reason or reasons).

Comparing this Islamic legislation with the modern theory of decision-making of the international relations, it has been found that among the three models of decision-making the *Rational Policy Model* seems more applicable to the position of the *Imam* as decision-maker than either of the other two models, namely, the *Organisation Process* and the *Bureaucratic Politics* models. The *Rational Policy* model is exclusively focused on the key decision-maker, unlike the other two models which include a role for other organisations in the foreign policy decision-making process. However, the limited applicability of decision-making theory in this context highlights the major difference between a Western theory of international relations and the classical *Sunni* theory. The Western theory is purely empirical and claims to explain how policy decisions are in fact made. By contrast, the Islamic theory is normative and is concerned not with how foreign policy decisions are reached in the Islamic State, but with the issue of who is entitled or authorised to make decisions in foreign policy etc.

In addition to the *Dhimma*, *Aman* and alliance treaties discussed in other chapters, this chapter analysed four kinds of treaty: treaties of friendship and commodities exchange, truce treaties, the conciliation treaty, and extradition treaty. Taking each of these four in turn:

Commercial treaties and friendship treaties were conventionally bracketed together in classical *Fiqh*, because the non-Muslim subject of these two treaties was normally the same individual, a merchant. Such a merchant who traded within the Islamic State will receive *Aman* from the Islamic authority and the commercial treaty permitting him to buy and sell. Such a person would almost certainly receive friendship in the form of good will and cooperation, particularly in the commercial field, through a friendship treaty. Because of the temporary nature of *Aman*, and because his commercial dealings could normally be concluded within few months, it is very likely that this treaty of friendship will be temporary in keeping with his temporary residence as a merchant *Musta'min* in the Islamic State.

Truce treaties are temporary and concluded only between the authorities of belligerents. They have to be signed by their leaders, their deputies or the delegated persons such as commanders of armies with a stipulation that they have to have full

authority from their leaders. They are of two kinds: (i) those of general truce - to stop fighting in all fields of war; and (ii) those of specific truce - to stop fight in one particular the war fields. Muslim jurists differed according the margin of time, some permit it for 10 years, the others , assumed that it should not be more than four months, but it has been let to the *Imam*. Truce treaties during the period of the classical *Fiqh* became permanent because they lasted very much longer than ten years, notably, after the wars against the crusaders. However, the status of hostility remained but was suspended during the period of truce between the two belligerents. A variant of this treaty is where non-Muslims not only establish a cease-fire, but also seek protection from the Islamic State. In the way in which compensation for military losses in war falls on the belligerent states, Islam accept this condition, provided it is explicitly agreed in the treaty. However, what it does reject is the humiliation of the former enemy by forcing it to pay excessive reparations.

Conciliation treaties are often linked with truce treaties but it was found that some conciliation treaties are not connected to a truce nor were they treaties of alliance, and neither were they *Dhimma* treaties nor *Aman* pledges. A conciliation treaty is close to a truce treaty because it is concerned with establishing peaceful relations between the Islamic State and non-Muslim groups. However, the distinction between a truce treaty which leads to conciliation of *Harbis* to the Islamic State and a conciliation treaty is that in the latter case the peaceful relations established by the treaty do not follow an armed conflict between the Muslims and non-Muslims. A conciliation treaty does not suspend hostilities that actually exist, but is a pact intended to prevent such hostilities occurring. The existence of these independent conciliation treaties was not noticed in classical *Fiqh* or by modern scholars.

Finally, extradition treaties. Under the condition of necessity the *Shari'ah* permits the *Imam* to conclude a treaty of extradition. Muslim jurists disputed the precise condition of extradition. The Malikites argued that when an extradition treaty with a non-Muslim state existed, the terms of that treaty must be fulfilled when application was made to the Islamic State for the extradition of an accused person. The Hanafites and some Malikites jurists argued that extradition from the Islamic State could only be of non-Muslims. Muslims, they held, should not be extradited to a non-Muslim state as

this would give non-Muslims mastery over Muslims. The Shafei'ites held that a person could only be legitimately extradited to a non-Muslim state if that person had a tribe there to defend him. If the accused person had no such tribe then extradition was not lawful. This view was based on the fear that extraditing Muslims to a non-Muslim state would lead to polytheists tempting the Muslim away from Islam. Although the Shafei'ites view was clearly intended to applied to the extradition of Muslims, it does not appear to be applicable to non-Muslims since they need no tribe to safeguard them from apostasy. The Hanafite, Shafei'ite and minority Malikite juridical positions are at variance with Prophetic practice.

A special condition applies to the extradition of a *Musta'min*. Provided there is an extradition treaty in force he cannot be extradited to any non-Islamic State except the one that is a treaty partner as this would contradict the *Aman* given to him. The general rule is that an extradition treaty between the Islamic State and the non-Islamic State must conform to the condition of *Aman* given by the Islamic State and only to this state is extradition legitimate. Where there is no extradition treaty, the Islamic State will not extradite any citizen, whether Muslim or non-Muslim (including the *Musta'mins*), to a non-Islamic State that requests their extradition, whatever the crimes of which they are accused. This provision of the *Shari'ah* also prohibits the extradition of a Muslim who holds the nationality of a state within *Dar al-Harb* if he emigrated from there to *Dar al-Islam*.

In the later period of the 'Abbaside Empire it could be argued the Islamic State had broken up into three Islamic states based in Spain, Egypt and at Baghdad. However, classical *Fiqh* ignored these divisions and continued to assume the existence of a single Islamic State whose head was the *Imam* or 'Abbaside Caliph. Therefore, the question of extradition from the Islamic State to another Islamic State could never arise. All that was legally possible was the removal of an accused person from one region to another for trial within the Islamic State. However, in the present day where there is more than one Islamic State the question of extradition from one to another can arise and solution to this problem are further evidence of the dynamic, progressive character of *Fiqh*. Jurists now argue the *Shari'ah* does prevent extradition of a wanted person to another Islamic State on criminal charges, unless that person had been previously tried and

punished for that crime according to the *Shari'ah*. Islamic law prohibits a person from being punished twice for a crime committed. Jurists argued that extradition from one Islamic State to another where the accused person has not already been tried and punished is legitimate as both states are part of *Dar al-Islam*. Each Islamic State is considered as a part of *Dar al-Islam* and a representative of Islam, so that there is no objection to extradition as long as the legal provisions of both states are the same.

In the next chapter the subject of investigation is whether the status of neutrality was possible in Islamic international law in addition to the status of neutralisation brought about by the implementation of truce treaties as discussed in this chapter.

## CHAPTER VI

### LEGITIMACY OF NEUTRALITY IN SUNNI ISLAM

## **Chapter VI: Legitimacy Of Neutrality In Sunni Islam**

- 6.1) Introduction
- 6.2) Definition of neutrality
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## 6.1) Introduction

Neutrality is an idea found in groups through the ages who prefer to be far from disputes to avoid damage and harm. It is a materialistic incident before being a legal system. Nations of the old ages knew neutrality as a political materialistic act, but neutrality as an institution in international law was not recognised except in the late Middle Ages when Grotius called for the theory of just wars. Grotius in his work *Von der Neutralität und Assistenz in Kriegszeiten*, for instance, clarified neutrality under two general rules; the first is that neutrals shall do nothing which may strengthen a belligerent whose cause is unjust, or hinder the movement of a belligerent whose cause is just. The second rule is that, during a war in which it is doubtful whose cause is just, neutrals shall treat both belligerents alike, in permitting the passage of troops, in supplying provisions for the troops, and in not rendering assistance to persons besieged.<sup>1</sup>

The treatment of neutrality by Grotius shows, on the one hand, that, apart from the recognition of the fact that third parties could remain neutral, not many rules regarding the duties of neutrals existed, and, on the other hand, that the granting of passage of troops of belligerents, and the supply of provisions to them, was not considered illegal.<sup>2</sup> Consequently, what could be found out from the previous debate is that neutrality is of two kinds, either (i) temporary neutrality or neutrality by an individual decision, which means a decision could be taken by a state/states in a dispute for a temporary period in observance of this state/states for its interests with the belligerents; (ii) permanent neutrality.

In 1758 AD, the Western scholars recognised such teaching. L. Oppenheim, for instance, in his book *International Law* mentioned,

*Vattel . . . used the term 'neutrality' and gives the following definition: 'Neutral nations, during the war, are those who take no one's party, remaining friends common to both parties, and*

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<sup>1</sup> Oppenheim, Lauterpacht, *International Law*, 7<sup>th</sup> Edit., Vol. II, Longmans, New York, 1952, pp. 625-626.

<sup>2</sup> Ibid.



*not favouring the armies of one of them to the prejudice of the other.*<sup>3</sup>

In modern Western literature, neutrality has been defined as an undertaking to guarantee the permanent neutrality. In the work of Arnold McNair, for instance, neutrality has been defined as follows,

*The condition where a state undertakes by treaty to guarantee the permanent neutrality of another state, the treaty usually involves two obligations upon the guarantor: (a) a promise to respect the permanent neutrality of the state, and (b) a promise to compel the other state to respect the neutrality of the same state; it is to the second promise that the word 'guarantee' is the more appropriate, for guarantee is essentially a trilateral transaction.*<sup>4</sup>

K. J. Holsti drew the distinction between neutrality and neutralisation when he said,

*Neutrality refers to the legal status of a state during armed hostilities . . . These rules state, for example, that a neutral may not permit use of its territory as a base for military operations by one of the belligerents, may not furnish military assistance to the belligerents, and may enjoy free passage of its nonmilitary goods on the open seas and, under conditions, through belligerents blockades. A neutralized state is one that must observe these rules during armed conflict but that, during peace, must also refrain from making military alliances with other states.*<sup>5</sup>

Von Glahn added another distinction between the two terms when he said,

*The status of permanent neutrality . . . is imposed on the neutralized state by a group of outside powers, whereas a neutral state voluntarily adopts its status at the outset of conflict between others countries or even in peacetime . . . A neutralized state is also forced to agree not to enter into an alliance requiring its participation in any future conflict.*<sup>6</sup>

Therefore, in order to understand the legitimacy of neutrality and to examine the theme accurately according to the Islamic law, it should firstly recall the Islamic idea

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<sup>3</sup> Ibid., p. 626.

<sup>4</sup> McNair, Arnold, *The Law of Treaties*, The Clarendon Press, Oxford, 1961, pp. 239-240.

<sup>5</sup> Holsti, K. J., *International Politics, A Framework for Analysis*, 3<sup>rd</sup> Edit., Prentice/Hall International, New Jersey, 1977, p. 113.

<sup>6</sup> Glahn, Gerhard Von, *Law Among Nations*, 7<sup>th</sup> Edit., Allyn and Bacon, London, 1996, pp. 54-55.

of dividing the world into *Dar al-Islam* and *Dar al-Harb*, which has examined early in this thesis, in order to find out if Islam legitimises neutrality.

In fact, it was found out that the *Dar al-Islam* is where the *Shari'ah* law is applied, and all the inhabitants are performing their religious practices in complete freedom. However, if the case is opposite, then it is *Dar al-Harb* even if it claims that it is an Islamic State and Islam is the religion of its inhabitants. Moreover, *Shari'ah* does not embody all non-Islamic States under *Dar al-Harb*. A non-Islamic State that is not in hostile relation with the Islamic State and does not threaten the society of believers prevents the reaching of Islamic mission is considered to be out of the subject of *Dar al-Harb* and the Islamic State has to have a fair and good relation with it. It could say, moreover, that this is because Islam never starts and does not create enmity with others.

In the Islamic theory of international relations, it can be found that when Muslim jurists divided the world into *Dar al-Islam* and *Dar al-Harb* they assumed that all non-Muslim territories are a part of *Dar al-Harb* unless there is a treaty to organise their status and relations with *Dar al-Islam*. During the 'Abbasides, jurists added a third domain called *Dar al-'Ahd*\* based on the situation of the conciliation treaty between the Islamic State and non-Muslims. What could be found here, is the impossibility of non-Muslims to adopt a neutral stance in armed hostility between the Muslims and non-Muslims without the approval of that stance by the Islamic State.

Islam legislates that Muslims must retaliate against aggressors for their act/s of aggression as a means of self-protection. Therefore, the base of relations between Muslims and other non-Muslim nations or religious political entities is peace, and war is a temporary circumstance. Permanent hostility should not prevail between *Dar al-Islam* and *Dar al-Harb*, as relations should remain peaceful. Accordingly, Islam admits neutrality and neutralisation as materialistic reality and as a moderate situation between war and a peaceful relationship.

Consequently, it must seem clear that the notion and the fact of neutrality was not distinguished by the early Muslim jurists, as they did not treat the issue in separate

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\* For further details see chapter III.

literatures, or even, chapters in their works. However, they describe neutrality as provisions partly in the laws of peace and partly in the laws of war, it is not easy to glean all matters relevant to the main purpose in this chapter.

Among the literature dealing with the status of neutrality between the Islamic State and non-Muslims is the modern work of Majeed Khadduri *War and Peace in the Law of Islam*. In his work, Khadduri made great effort to distinguish cases of neutralisation in the classical period of Islam which resemble the status of neutral nations in the modern world. However, Khadduri did not analyse in detail these cases, including the obligations involved, which he claimed to have distinguished. He considered that there was an Islamic idea of neutrality which was a matter of fact in Abyssinia, Nubia and Cyprus, though he did not examine their legal status in terms of the *Shari'ah*. In the absence of that analysis, Khadduri has no way of knowing whether there is an Islamic conception of neutralisation and, if there is, whether it is applicable to those three cases. Khadduri's assumption about neutralisation appears to be based on or at least strongly influenced by the idea that the Islamic State remains in a permanent state of war with the inhabitants of the states of *Dar al-Harb* to destroy unbelief or to ensure that unbelievers become dependants within the Islamic State. On this view, the whole world is divided into two hostile domains *Dars* and there is no room for neutrality. Khadduri never claims neutrality to be a legal status, only neutralisation,

*Neutralization, therefore, not neutrality, may be said to have been permissible in Muslim legal theory.<sup>7</sup>*

When Khadduri talked about neutralisation he seems to have meant *Dar al-'Ahd* or the domain of truce treaties, though arguably he was restating the status of *Dar al-'Ahd* in a new way.

Khadduri's argument against the possibility of neutrality, though not of neutralisation, depended on his view of a permanent state of war between the Islamic State and *Harbi* states. Some other commentators have doubted this view of *Jihad* and argued that it is employed for certain specific purposes, such as self-defence, and ends when that purpose has been achieved. Thereafter, it is suggested, relations with the

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<sup>7</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 252.

*Harbis* return to a peaceful condition.<sup>8</sup> Rather than attempting to decide between these two views on warfare, this chapter will examine the *Shari'ah* and its application to see whether it permits neutrality in addition to the neutralisation of which Khadduri writes.

## 6.2) Definition of neutrality

In the Islamic law, the terms *Hiyad* and *Hiyadah* are used synonymously for the modern term neutrality. Pre-Islamic and early Islamic Arab, employed the term *I'tizal*. Though this term now applies only to a particular school of Muslim philosophical and theological thought, even in the scholastic since it was suggested by the neutral attitude with which the Mu'tazalites adopted towards the other two sects, the *Sunnis* and the Kharijites.<sup>9</sup>

The terms *Hiyad* (حياد), *Hiyadah* (حياده) and *I'tizal* (اعتزال) were known amongst the Arabs for a long time before Islam. However, the term *I'tizal* was more familiar among the Arabs than the terms *Hiyad*, *Hiyadah*. *I'tizal* (noun) derives from the verb '*Azala* (عزل) which has different meanings, scientifically it means to isolate or separate (one substance) from another; in politics it means depose or removal from office; and medically means contraception or coitus interruptus, which is the act or practice of preventing sex from resulting in the birth of a child.

What is crucial to this thesis is the use of these terms within the politics of the Islamic State. In fact, it could be said that since the Prophet Muhammad emigrated to Madinah, he started to conclude treaties with other tribes of the region. Some of these treaties were bilateral alliance treaties; however, those who refused to ally with the new state in Madinah chose to sign neutral treaties under the Prophet's conditions that they are not to help any of the belligerents, neither Quraish nor the Muslims.<sup>10</sup>

<sup>8</sup> AbuSulayman, AbdulHamid A., *Towards an Islamic Theory of International Relations*, International Institute of Islamic Thought, Herndon, 1994, pp. 43-44.

<sup>9</sup> Ibn Mandhore, Muhammad Ibn Makram, *Lisan al-Arab*, Vol. XI, Dar Beirut, Beirut, 1956, p. 440.

<sup>10</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. I, Matba'at al-Halabi, Cairo, 1955, p. 591.

Theologically, the term *Mu'tazilah* did not originally mean accession from Orthodoxy, and was not, therefore, ex-cogitated by the *Sunnis* with the implied sense of blame or contempt as a declaration of heterodoxy. That name was chosen, or at least, accepted by the early *Mu'tazalites* in the sense of neutrals "those who participated with neither of the two factions, viz. the *Sunnis* and the *Kharijites*," in the grave politico-religious question as what to consider a sinful man such as whether he nevertheless remained a believer or the commission of sin rendered him an Unbeliever.<sup>11</sup>

### 6.3) Legitimacy of neutrality in Islam: the sources

In Islam, there is no objection to recognising neutrality and neutralisation as legal systems, with the evidences from the *Holy Qur'an* and the *Sunnah*.

#### 6.3.1) The *Holy Qur'an*

The teaching on neutrality was very clear as mentioned in the *Qur'anic* verse,

إلا الذين يصلون إلى قوم بينكم وبينهم ميثاق أو جاءوكم حصرت صدورهم أن يقاتلوكم أو يقاتلوا قومهم ولو شاء الله لسلطهم عليكم فلقاتلوكم فإن اعتزلوكم فلم يقاتلوكم وألقوا إليكم السلم فما جعل الله لكم عليهم سيلا . ستجدون آخرين يريدون أن يأمنوكم ويأمنوا قومهم كل ما ردوا إلى الفتنة أركسوا فيها فإن لم يعتزلوكم ويلقوا إليكم السلم وكفوا أيديهم فخذوهم واقتلوهم حيث ثقتموهم وأولئك جعلنا لكم عليهم سلطانا مبينا . (النساء: ٩٠-٩١)

Except those who join a group between whom and you there is a treaty (of peace), or those who approach you with hearts restraining them from fighting you or fighting their own people. If Allah had pleased, He could have given them power over you, and they would have fought you: therefore if they withdraw from you (l'tizal)\* but fight you not, and (instead) send you (guarantees of) peace, then Allah hath opened no way for you (to war against them). Others you will find that wish to be secure from you as well as that of their people: every time they are sent back to temptation, they succumb thereto: if they withdraw not from you nor give you (guarantees) of peace besides restraining their hands, seize them and slay them wherever ye get them: in their case We have provided you with a clear argument against them. (4: 90-91)

<sup>11</sup> Ibn Mandhore, Muhammad Ibn Makram, *Lisan al-Arab*, Vol. XI, Dar Beirut, Beirut, 1956, p. 440 & Al-Amean, Shareaf Yahya, *Mu'ajam al-Firaq al-Islamiyyay*, Dar al-Adhwa', Beirut, 1986, p. 227 & Gibb, H. A. R., *Islam*, 2<sup>nd</sup> Edit., Oxford university Press, London, 1974, pp. 77-78 & Rosenthal, Erwin I. J., *Political Thought in Medieval Islam* Greenwood Press, Westport, 1985, pp. 114-115.

\* This is a verb illustrating the neutral stance.

Al-Tabari in his work *Jami' al-Bayan 'an Ta'weal al-Qur'an* explained the previous verse as follows:

*It is predicted that the hypocrites among the inhabitants of Madinah would not help their allies the Jews of Banu al-Nadhear, but would remain neutral. Neutrality here is of the non-believer group in relation to conflict between the Islamic State and a Jewish tribe, in the case of fights with the Muslims.*<sup>12</sup>

Like all classical Muslim jurists, al-Tabari does not treat the neutrality of the Islamic State as a relevant topic. If it is true that other jurists commenting on these verses have interpreted them in the wider context of *Dhimmi* status and *Aman*.

In connection with the *Qur'anic* verses (4: 90-91) Jurist al-Nahas put his view to illustrate the cause of the status of neutrality in Islam when he said,

*These verses were revealed after Makkah's conquest and war stopped between the Prophet and the Arab polytheists. These verses, moreover, were not abrogated.*<sup>13</sup>

Al-Nahas makes it clear that those polytheists are not subject to warfare by the Islamic State. In his account of the meaning and application of these verses in particular “if they avoid fighting you do not fight them” where either (i) *Dhimmis*; (ii) in alliance; or (iii) neutrals.<sup>14</sup>

Therefore, it may be argued that those excluded from killing are those polytheists who are either: (i) under the protection of the Islamic State. As a third party, this could be achieved by seeking protection from the Islamic State within a treaty of military alliance, or under the protection of the Islamic State through a *Dhimma* treaty by which they are exempt from taking part in *Jihad* and forbidden to attack the Islamic State (ii) declaring their neutrality to the Islamic State, as the verse says “if they avoid fighting you do not fight them”.

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<sup>12</sup> Al-Azadi, Abuda'ud Sulayman Ibn Al-Ash'ath, *Sunan Abuda'ud*, Vol. XIX, Al-Maktabah al-'Asryyah, Beirut, 1950, p. 23.

<sup>13</sup> Al-Nahas, Abu J'afar, *Al-Nasekh wa Al-Mansukh*, Matba'at Zaki Mujahed, Cairo, p. 111.

<sup>14</sup> *Ibid.*

(Scholar) al-Jassas in his work *Ahkam al-Qur'an* gave more details for this theme. Al-Jasas assumed,

*As for those who used to enter the Islamic State and wish not to fight either the Muslims or their own people (who are in a hostile relation with the Muslims), then those, according to the Qur'an, have decided to adopt a neutral stance I'tizal. That is because they are performing Aman, which imposes upon them the duty of not joining one belligerent or the other (i.e. the Muslims or their own people).<sup>15</sup>*

Similarly, Jurist Ibn Kathear added that in the case of non-Muslims under *Aman* in the Islamic State that,

*Those who want to have gains from both the two parties [The Muslims and their own people] but feel hostility towards Muslims, Islam does not tolerate them. God describes them as "Others you will find that wish to be secure from you as well as that of their people: every time they are sent back to temptation, they succumb thereto: if they withdraw not from you nor give you (guarantees) of peace besides restraining their hands, seize them and slay them wherever ye get them". They pretend to love Muslims but change when they return to their people to avoid the harm from both sides. They realise their interests must be protected against both sides. These are they who are a dangerous element in their neutrality I'tizal.<sup>16</sup>*

Therefore, in the authoritative interpretation of the *Qur'anic* verse (4: 90-91) it has been found that there are three versions of neutral status. These are (i) the status of *Dhimmis* who are exempt from participating *Jihad* with the Islamic State; (ii) non-Muslims under the protection of *Aman*; (iii) those who seek and offer neutrality to the Islamic State. Hence, it should be noticed that neutrality, in the classical Muslim literature, is being discussed in terms of individuals and the Islamic State in the first two cases, not between the Islamic State and non-Muslim states, or between two non-Muslim belligerents, however in the third case the relationship could be between the Islamic State and a non-Islamic State.

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<sup>15</sup> Al-Jasas, Abu Bakr Ahmed Ibn Ali Al-Razi, *Ahkam al-Qur'an*, Vol. III, Matba'at al-Awqaf al-Islamiyyah, Alasatanah, 1335 AH, p. 190.

<sup>16</sup> Ibn Kathear, Emad Al-Dean Ismael, *Tafseer al-Qur'an al-'Atheam*, Vol. I, Dar Ehya'a al-Kotoub al-Arabiah, Cairo, 1932, pp. 532-533.

### 6.3.2) Neutrality in the *Sunnah*

In the *Sunnah*, the terms '*Azl* and '*I'tizal* are used under all meanings. In the usage of separation, in a Hadith narrated by Imam al-Bukhari, the Prophet is reported to have said,

***This tribe of Quraish would kill (people) of my Ummah. They (the Companions) said: What do you command us to do (in such a situation)? Thereupon he said: Would that the people remain aside from them I'tizal (and not besmear their hand with the blood of the Muslim)!***

And,

***The best man is ... (he) who retires (اعتزل) to a narrow valley to worship his Lord.***

In the usage of coitus interruptus, Abu Saeed al-Khudri, a companion of the Prophet said,

***We got a female captive in the war booty and we used to coitus interruptus (عزل) with them. So we asked Allah's Apostle about it and he said: Did you really do that? He repeated that thrice, and then said: There is no soul that is destined to exist but will come into existence, till the Day of Resurrection.***

In the political issue, Ghalib al-Qurashi said,

***Umar Ibn al-Khatib deposed (عزل) Khaled Ibn al-Walead from the commandship of the Islamic armies and replaced him by Abu 'Ubayda Ibn al-Jarah.<sup>17</sup>***

Searching the classical Muslim history of the treaties that provide for '*I'tizal* neutrality or documents related to the issue that contain reference to neutrality, it may be said that they are numerous. However, a few of them are more important, which may be quoted with interest. Ibn Higr al-'Sqalani reported,

***The Prophet was to send the Muslims to invade Banu Medlig tribe, Suraqa Ibn Malik al-Madlagi, who was a companion of the Prophet and of that tribe, said "I told him [the Prophet] you***

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<sup>17</sup> Al-Qurashi, Ghalib AbdulKafi, Dr., *Awlawiyah al-Farouq al-Siyasiyyah*, Dar al-Wafa'a li al-Tiba'ah wa al-Nashr, Mansorh, 1990, p. 91.



*want to send to my people and I want you to make a truce treaty with them. If your people [Quraish] embrace Islam, they will do the same, but if they do not, do not be rough with them". The Prophet caught Khalid's hand and told him go and do what Suraga wants. Khalid reconciled with Banu Medlig a truce treaty that: "they do not provide any military help against the Prophet, if Quraish has embraced Islam they will do the same. Consequently, any tribe allied with Banu Medlig will be with them and under their protection."<sup>18</sup>*

It is worth mentioning that the tribe of *Banu Medlij* was linked with Quraish through a so-called *Elaf* (إلاف)\* which was a sort of commercial treaty to offer protection to the Quraishis when they passed through the territory of *Banu Medlig*. Such a treaty was popular during that time between the Quraish and the northern tribes on their way to Syria in Summer and the tribes to the south of Makkah encountered on the Winter journey to Yemen. Therefore, the Prophet's treaty with *Banu Medlig* is similar to what is so-called, recently, *the legal status*, which is a non-belligerent in wartime that has certain rights and obligations not extended to the belligerents.<sup>19</sup> This means the tribe of *Banu Medlig* gave no military assistance to either the new Islamic State or the Quraish.

Ibn Sa'ad in his work, *al-Tabaqat al-Kubra*, mentioned the following event,

*During the war of the Prophet with the Jewish tribe of Banu al-Nadhear, who was allied to the tribe of Ghatafan and had also secured the promise of help on the part of the neighbouring Jewish tribe of Banu Quraidhah. Believing in the aid of these formidable allies, the Banu al-Nadhear refused to comply with the request of the Prophet. Under the treaty, to contribute towards the payment of the blood money of some of the allies common to them and the Muslims. onsequently hey ere besieged in the fortresses. The Banu Quraidhah, however, remained neutral I'tizal and rendered no help to the Banu al-Nadhear. And similar to the attitude of Ghatafan.<sup>20</sup>*

<sup>18</sup> Al-'Sqalani, Ahmed Ibn Hijr, *Tahtheab al-Tahtheab fi Rejal al-Hadith*, Vol. I, Majlis Da'irat al-Ma'aref, Hyderabad, 1325 AH, p. 284.

\* See page 293.

<sup>19</sup> Holsti, K. J., *International Politics, A Framework for Analysis*, 3<sup>rd</sup> Edit., Prentice/Hall International, New Jersey, 1977, p. 113.

<sup>20</sup> Ibn Sa'ad, Muhammad, *Al-Tabaqat al-Kubrah*, Vol. II, Dar Beirut, Beirut, 1980, pp. 57-58.

The neutrality to which Ibn Sa'ad refers is that of a non-Islamic tribe in relation to the Islamic State and non-Islamic clan. There is no reference to the Islamic State as a neutral in this passage which mentioned by al-Waqidi,

*- Under the treaty of Hudaibiya, refugees from Makkah had to be extradited even if they were Muslims. Knowing this, Abu Busair, who escaped from Makkah, did not go either to Madinah or to Makkah, but took refuge between the two cities. This attitude of Abu Busair and of his comrades to live aloof is also called I'tizal.<sup>21</sup>*

In the treaty of *al-Hudaibiya* between the Islamic State and Quraish, there is provision for neutrality. Figure five of the treaty reads as follows,

*. . . and that between us is a tied-up breast, and that there shall be no secret help violating neutrality, and no acting unfaithfully.<sup>22</sup>*

Latter, during the time of Caliph 'Uthman, the Muslims concluded a treaty with the governor of Cyprus. The neutral *I'tizal* in that treaty mentioned in the following part,

*The Muslims would not attack Cyprus, but at the same time, they [the Muslims] would not defend them if any other power attacked them.<sup>23</sup>*

This example shows, that the status of *I'tizal* was applied to the Islamic State. Up to this point, *I'tizal* has been applied to non-Muslim political entities (Jewish tribes) in relation to other non-Muslim political entities and the Islamic State. The only exception to this, is where non-Muslim individuals are neutral between the Islamic State and a non-Muslim political entity under *Dhimmi* status and *Aman*. Or where Muslim individuals (like Abu Busair) are neutral between the Islamic State and similar non-Muslim (*Harbis*) political entities.

#### 6.4) Neutrality among the Muslims

Muslim jurists mentioned some instances of *I'tizal* neutrality between the Muslims and non-Muslims in various literatures. However, searching their literary works, it

<sup>21</sup> Al-Waqidi, Muhammad Ibn Umar Ibn Waqid, *Al-Maghazi*, 'Aalam al-Kotoub, Beirut, 1965, pp. 370-371, 387.

<sup>22</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 80.

<sup>23</sup> Al-Belathuri, Ahmed Ibn Yahya, *Fotoh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, pp. 152-153.

could be found that, nearly, none of them had reviewed neutrality among the Muslims themselves. To highlight this theme it may be said that the *Qur'anic* teaching in this theme is very clear,

وإن طائفتان من المؤمنين اختلفتا فأصلحا بينهما فإن بغت إحداهما على الأخرى فقاتلوا  
التي تبغي حتى تفيء إلى أمر الله فإن فاءت فأصلحا بينهما بالعدل وأقسطوا إن الله يحب  
المقسطين . (الحجرات: ٩)

**If two parties among the Believers fall into a fight, make ye peace between them; but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one [party] that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just). (49: 9)**

The *Shari'ah* shows that a neutral stance by a Muslim is not always acceptable as it admits injustice and breaks the unity of the *Ummah*. Islam orders the Muslims to interfere: firstly, with peaceful methods to specify the wrongful party and try to halt him; secondly, if he refuses then follow the *Shari'ah's* order to resolve the dispute by fighting the transgressor. The strong party in the Islamic *Ummah* could adopt such a measure.

However, it is important to say that neutrality among the Muslims themselves appeared during the time of Caliph 'Uthman, where there was a great struggle between the Companions about 'Uthman's ability to rule the *Ummah*. They (i.e. the Companions) divided into three groups, those who were with his deposition from office, among these were 'Amr Ibn al-'Aas, Muhammad Ibn Abu Bakr, Talha Ibn 'UbaidAllah. Those who were against, among them were Mu'awiyah Ibn Abu-Sofyan, Saeed Ibn al-'Aas, Abdullah Ibn al-'Abas, Al-Hasan Ibn Ali Ibn Abi Talib, Abdullah Ibn Al-Zubir. The third adopted neutrality with non-interference in the crisis, among those were, Sa'ad Ibn Abi Waqas, Ali Ibn Abi Talib, Al-Zubir Ibn al-'Aawam, Talha Ibn al-Zubir, 'Aisha- the Prophet's widow.<sup>24</sup>

Later, during the time of Caliph Ali, another important example of a neutral stance occurred between the Muslims and took place in the war between Caliph Ali and 'Aisha. Companions such as Sa'ad Ibn Abi Waqas, Abdullah Ibn Umar Ibn al-Khatib,

<sup>24</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. II, Dar al-Ma'arif, Cairo, 1962, pp. 665-678.

Saeed Ibn al-‘Aas and al-Mughirah Ibn Sh’ubah adopted a neutral stance in that war.<sup>25</sup> The latter two were with ‘Aisha on her way to fight Ali, but they returned to the middle way and adopted *I’tizal*.<sup>26</sup> According to al-Tabari,

*Al-Mughirah Ibn Sh’ubah and Saeed Ibn al-‘Aas left Makkah with them [i.e. ‘Aisha and her supporters] for a distance, then Saeed asked al-Mughirah: “What is the suggestion”. Al-Mughirah replied: “It is, I swear by God, the I’tizal, their theme will not succeed, if he [i.e. Ali] wins, we go to him and we say: it was our mistake and we obey you. Then they adopted I’tizal.”*<sup>27</sup>

### 6.5) Neutrality among Muslims and non-Muslims

There are practical considerations in which the Islamic State admitted neutrality to non-Islamic nations that did not become involved in any military actions against the Islamic State, both prior to and after they concluded a treaty of neutrality. Among these nations were Abyssinia, Cyprus, and Nubia. Majeed Khadduri names these three countries as examples of neutralisation and many later writers have endorsed his view without adding to it or questioning his assumption (arguably contrary to classical *Fiqh*) that these countries harm Muslims, the Islamic State or Islam itself.\*

#### 6.5.1) Status of Abyssinia, Ethiopia

To some scholars, Abyssinia is regarded as the classical example of a non-Muslim state which Islam voluntarily declared to be immune from the *Jihad*. The history of the relations of Prophet Muhammad with Negus, the Monarch of Abyssinia, put this country in a favourable light vis-à-vis the Islamic State. Martin Lings in his book *Muhammad* has reported

*When the Prophet saw that although he had escaped persecution himself many of his followers did not, he said to them: “If ye went to the country of Abyssinia, ye would find there a king under*

<sup>25</sup> Iqbal, Afzal, *The Culture of Islam*, Institute of Islamic Culture, Lahore, 1967, p. 247.

<sup>26</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. III, Dar al-Ma’arif, Cairo, 1962, pp. 3-8.

<sup>27</sup> *Ibid.*, p. 8.

\* The statuses of these nations have been examined by various scholars, both Muslims and Westerns. Therefore the searcher believes that nothing will be added to the historical events, only the examination of the views of some scholars, particularly of Majeed Khadduri in this regard.

*whom none suffereth wrong". So some of his companions set off for Abyssinia; and this was the first emigration in Islam.<sup>28</sup>*

Because the Muslim emigrants were well received by the Negus, and because he refused to hand them over to the deputation of the chiefs of Quraish but decided to protect the emigrants, and also because of his favourable reply to the Prophet's letter of invitation to accept Islam which persuaded the Negus to embrace it, the Muslims were well disposed toward Abyssinia. The Prophet Muhammad is reported to have said,

***Leave Abyssinia as long as they left you.<sup>29</sup>***

In his work *Bidayt al-Mujtahid wa Nihayt al-Muqtasid*, Jurist al-Qurtobi of the Malikites noted,

*Imam Malik said that: it is not permitted to start war with either Abyssinia or Turks because of the narrated Prophetic Hadith.<sup>30</sup>*

Consequently, traditions were supported by practice. Owing to the fact that when the Islamic State started its expansion, Abyssinia became immune from *Jihad*, when all the Islamic State's neighbours territories were under an offensive attack. This is precisely what Imam Malik meant.

However, it has to be observed that according to *Shari'ah*, the country which is excluded from the *Jihad* must belong either to *Dar al-Islam* or *Dar al-'Ahd*. Therefore, since Islamic Law was not enforced in Abyssinia territory – a criterion, which determines whether a territory is *Dar al-Islam* or not- it could not be regarded as part of *Dar al-Islam*, even though its ruler had accepted, or rather recognised, Islam as a religion and Prophet Muhammad as the Apostle of God. M. Khadduri mentions,

*If Abyssinia is neither Dar al-Islam nor Dar al-Harb, it must therefore belong to the intermediary territory which may be called Dar al-Hiyad, or the world of neutrality. Since it is a territory which Islam had voluntarily declared to be outside the*

<sup>28</sup> Lings, Martin, *Muhammad*, George Allen & Unwin Ltd., London, 1984, p. 80.

<sup>29</sup> Al-Bayhaqi, Ahmed Ibn Al-Hussein, *Al-Sunan al-Kobra*. Vol. IX, Dar al-Fikr, Beirut, 1994, p. 176 & Al-Nasa'i, Ahmed Ibn Shu'ayb Ibn Ali, *Sunan al-Nasa'i*, Vol. VI, Dar al-Basha'ir al-Islamiyyah, Beirut, 1986, p. 44 & Al-Azadi, Abuda'ud Sulayman Ibn Al-Ash'ath, *Sunan Abuda'ud*, Vol. IV, Al-Maktabah al-Asryyah, Beirut, 1950, p. 162.

<sup>30</sup> Al-Qurtobi, Muhammad Ibn Ahmed, *Bidayt al-Mujtahid wa Nihayt al-Muqtasid*, Vol. I, Dar al-Ma'rifah, Beirut, 1981, p. 306.

*bounds of its area of expansion; it formed, accordingly, a neutralised territory which Islam was under legal obligation to refrain from attacking as long as it reciprocally refrained from attacking Muslim territory.*<sup>31</sup>

However, to examine Khadduri's view, it is important to recall the definition of the domain of covenant *Dar al-'Ahd* in order to understand the status of Abyssinia. It has been said that *Dar al-'Ahd* is a territory not under the Muslim rule, yet is in a tributary relationship to Islam by agreement *Sulh* being generally used in *Shari'ah* as the opposite of force.\* Therefore, while the relationship with Abyssinia was not systemised by a treaty which organised the relations between the two parties, it may be said that it was a new situation in Islamic international relations. However, what can be understood from Khadduri's argument is that the status of Abyssinia was a material case founded because of the difficulties, which could face the Muslims if they thought about fighting the Abyssinians. Khadduri, moreover, relayed his argument on a statement of the scholar Abu al-Hassan Muhammad Ibn Abd al-Hadi who assumes that: "the reason for Prophet Muhammad's warning against an attack on Abyssinia was "Ethiopia's roughness and the mountains and rugged valleys and seas that lie between it and the Muslims."<sup>32</sup>

It is true that the distance which separates Abyssinia from Arabia is very far, and the geography of that country makes it very hard for the early Muslims to travel there. However, it may not be true that those were the reasons for the Prophet's warning, otherwise the Muslims would not make any kind of conquest. It may be said, moreover, that the geography of middle Asia is the same of Abyssinia where the Muslims reached that area during the time of Caliph Umar I, which occurred after few years of the death of the Prophet. On the other hand, the status of Abyssinia was organised under a legal status made by the Prophet's command, which is a part of the *Shari'ah* legislation, to the Muslims under the condition that the Abyssinians would not attack the Muslims. In connection with this, the Prophet's command was based on the Negus' attitude toward the Muslims, and not because of any kind of truce, or friendship treaties.

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<sup>31</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 258.

\* See chapter III, 3.3.4.

<sup>32</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 256.

Moreover, Khadduri assumed that the status of Abyssinia was “*a neutralised territory*”. However, according to Holsti’s definition of a neutralised state: the state must observe neutrality rules during armed conflict but that, during peace, must also refrain from making a military alliance with other states.<sup>33</sup> Therefore, whether Abyssinia became an ally of another state, it is impossible to tell, but there is no evidence to support this assumption. Out of that, it could be said that Abyssinia, during the early conflict between the Muslims and the Quraishs, was in a neutral stance but not a neutralised territory as Khadduri assumed. Therefore, this may correct Khadduri’s assumption regarding the debate of Abyssinia in the early time of the Islamic State.

Moreover, it has to be said that the neutral status of Abyssinia does not remain for a long time. The Abyssinians attacked Jeddah, on the western coast of Arabia, in 150AH - 770AD - during the time of the ‘Abasside Caliph Abu Ja’far al-Mansour, which encouraged the Caliph to attack Abyssinia.<sup>34</sup> However, there are no convenient documents which illustrate in detail that clash between the Islamic State and the Abyssinians.

Lastly, it can be said that the assumption of Khadduri that the status of Abyssinia was a neutralised state is wrong, it can be said that it was a neutral stance organised according to the request of the Prophet and under the specific condition that they (i.e. the Abyssinians) would not attack the Muslims, but if they do the Muslims are free to protect themselves and counter attack, which, was seen to happen during the time of the ‘Abasside Caliph Abu Ja’far al-Mansour.

### 6.5.2) Status of Nubia

Most scholars, whose deal with the Islamic theory of international relations, classified the status of Nubia under neutral stance. However, it could be argued that Nubia was not under neutral stance, which will be shown in the following work.

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<sup>33</sup> Holsti, K. J., *International Politics, A Framework for Analysis*, 3<sup>rd</sup> Edit., Prentice/Hall International, New Jersey, 1977, p. 113.

<sup>34</sup> Basha, Muhammad Mukhtar, *Al-Tawfeqat al-Ilahiya fi Muqaranat al-Tawareakh al-Hijriyah bi al-Senean al-Efranjiah wa al-Qipteyah*, Vol. I, al-Mu’asasah al-Arabiah li al-Dirast wa al-Nashr, Cairo, 1980, p. 185.

Historically, during the time of Caliph Uthman, Egypt's Governor Abdullah Ibn Abi Sarh concluded in 651 AD a reconciliation treaty with the people of that territory under the condition that they (the Nubians) pay the Muslims three hundred and sixty head of slaves. The texts of the treaty reads as follows:

*In the name of God the Most Gracious the Most Merciful, This is a covenant from the Amir Abdullah Ibn Sa'ad Ibn Abi Sarh to the Majesty of Nubia and all the people of his kingdom, a covenant binding upon the young and small of the Nubian people, from the frontier of Aswan to that of 'Alwah. Abdullah Ibn Sa'ad makes them safeguard [Aman] and conciliation [Hudnah] between them and their Muslim neighbours of south Egypt, together with other Muslims and Dhimmis. You people of the Nubia are secure under the safeguard of Allah and His Apostle Muhammad the Prophet peace be upon him, that we will neither attack you nor wage war against you, nor allow others to attack you (lit: nor make rides against you) as long as you adhere to the conditions between us and you. You may enter our country as travellers not as settlers, we may enter your country as travellers not settlers. You have to protect those Muslims or their allies who are in your country or travel there until they depart. You have to restore to the land of Islam [Muslim authority] every run-away slave of the Muslims who fled to you, you must not take possession on him, nor prevent or thwart a Muslim who comes to take him and must help him [the Muslim] until he leaves. You have to take care of the mosque which the Muslims have built in the courtyard of your city, you do not prevent anyone from praying in it, you must sweep it, illuminate it and respect it. Every year you have to pay three hundred and sixty head of slaves to the Imam of the Muslims, they have to be of the medium type of slaves of your country, free from bodily defects, both male and female and not among them extremely old men or old women, nor child under age, these you shall hand over to the ruler of Aswan. The Muslims have no obligation to repel an enemy who attacks you or prevent him [engaging in military action] from the frontier of 'Alwah to the land of Aswan. If you give refuge to a [run-away] slave of a Muslim, or kill a Muslim or ally, or attempt to ruin the mosque which the Muslims have built in your city, or withhold any of the three hundred and sixty slaves, then this truce [Hudnah] and safeguard [Aman] is disavowed from you [shall be cancelled] and we and you shall return to hostility until Allah judges between us, for He is the best of all judges. Upon this conditions we are bound by the covenant of Allah and His pledge and that of His Apostle the Prophet Muhammad; and you stand pledged to us by those you hold most holy in your faith, by the Messiah and*



*the Disciples and all those you venerate in your religion and community. Allah be the witness between us and you on that.*<sup>35</sup>

With close consideration to the text of covenant, it can be seen that the main text of the treaty is similar to any other Islamic treaty concluded between a Muslim commander and non-Muslim territory ruler, which come as a result of the Islamic conquest. With careful reading of the interpreted text of the treaty, moreover, it can be said that the treaty between the Muslims and the Nubians is a merger of different treaties in one. First, it includes a provision for general *Aman* and that it can be given by the *Imam* only, or his representatives, to all *Harbis* or to a large number of them. Under the terms of the treaty, the power and authority of the *Imam* or his representatives entitles them only to guarantee safety for a large number of people. This can be found in the following parts of the treaty:

- *Abdullah Ibn Sa'ad makes them to a safeguard [Aman] and truce [Hudnah];*
- *You people of the Nubia are secure under the safeguard of Allah and His Apostle Muhammad the Prophet of peace be upon him.*

It has been concluded in chapter IV that *Aman* is not given to persons of *Dar al-'Ahd* because they are covered by the protection given by the treaty which organises their status.\*

It is, moreover, a conciliation truce and non-aggression treaty, as can be found under the following article,

*We will shall neither attack you nor wage war against you, nor allow others to attack you as long as you adhere to the conditions between us and you.*

It has been mentioned in chapter V that under the *Shari'ah* the *Imam* or his representatives are the only ones who are entitled to estimate the duration of the treaty as temporary or permanent, based on its importance. Moreover, the status of hostilities

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<sup>35</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 530-531.

\* For further details see chapter IV.

returned between the two states which had previously been involved in warfare when the king of Nubia in 955 and again in 956 AD attacked Aswan in the south of Egypt.<sup>36</sup>

It is a treaty of extradition, the following part explains that when he said,

*You have to restore to the land of Islam [Muslim authority] every run-away slave of the Muslims who fled to you, you must not take possession on him, nor prevent or thwart a Muslim who comes to take him and must help him [the Muslim] until he leaves.*

However, this treaty does not show the Muslims commitment regarding the same condition. Nevertheless, it could be reciprocity because this condition applies in the status of travelling,

*You may enter our country as travellers not as settlers, we may enter your country as travellers not settlers.*

If there were commercial transactions between the Muslims and the Nubians, where the Muslims gave the Nubians food for the same value of the slaves; then it is a treaty of friendship and commodities exchange, which aimed to create a situation of goodwill and co-operation, particularly in the commercial field. This could be confirmed by the words of Majeed Khadduri,

*The tribute, known as the baqt, was not in the form of Jizyah, for neither had the Nubians become Dhimmis nor was the annual payment a sign of submission. It was rather a reciprocal trade agreement.*<sup>37</sup>

Similarly, Gibb and Kramers in their work *The Short Encyclopaedia of Islam* mention,

*Among the examples of the Islamic friendship and commodities exchange treaties, the treaty concluded by the ruler of Egypt in the reign of the Caliph Uthman Ibn Affan with the Christians of Nubia, which stipulated amity, good neighbouring as well as*

<sup>36</sup> Basha, Muhammad Mukhtar, *Al-Tawfeqat al-Ilahiya fi Muqaranat al-Tawareakh al-Hijriyah bi al-Senean al-Efranjyiah wa al-Qipteyah*, Vol. I, al-Mu'asasah al-Arabiah li al-Dirast wa al-Nashr, Cairo, 1980, p. 376.

<sup>37</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 260.

*mutual assistance where the ruler supplied them with food, grain and slaves.*<sup>38</sup>

Therefore, it can be found out that the status of Nubia was not organised under the status of neutrality. Consequently, the searcher assumes that the status of Nubia does not apply on the neutrality principle, the reconciliation concluded between the Muslims and the Nubians could be considered as a treaty of permanent unlimited reconciliation, even without imposing the *Jizyah*. However, Khadduri has a different classification for the status of Nubia, describing it as that of neutralisation,

*. . . the nature of the treaty is such that [Nubia] did not pay tribute to Islam for the maintenance of peace . . . This status . . . is a qualified status of neutralization.*<sup>39</sup>

Hence, what can be concluded is that the exemption from paying tribute is not a crucial cause to obtain the status of neutrality by any part of *Dar al-Harb*. Nubia was neither neutral nor neutralised, but was party to a multiple treaty which organised its relation to the Islamic State. The crucial purpose of the multiple treaty was a non-aggression pact. This meant that the Muslims aimed to stop fighting with the Nubians more than forcing them to adopt neutrality, to gain benefits from newly established commercial transactions with them, and finally, to protect the Muslims and their religious places in Nubia. It could be argued, moreover, that the conditions laid down by the Muslims meant that it was a truce treaty under Islamic law. Unfortunately history contains no comment from the Nubians on this treaty so their view on it is unknown.

Lastly, what can be concluded from this part is that the treaty of Nubia was to be adhered to by all Muslim rulers. This is because the Islamic Law of treaties insists that Muslim rulers must respect and adhere to Islamic treaties even when they were concluded by previous rulers. The Islamic State, during its peak military power, was able to attack and conquer Nubia and add it to the Islamic territories.

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<sup>38</sup> Gibb, H. A. R. & H. Kramers, *Short Encyclopædia Of Islam*, E. J. Brill, Leiden, 1974, p. 69.

<sup>39</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 261.

### 6.5.3) Cyprus

During the time of the Caliph 'Uthman Ibn Affan, Cyprus was subject to the Romans when it attacked by Mu'awiyah Ibn Abi Sofyan in 648 AD. Mu'awiya concluded a treaty with the ruler of Cyprus. Al-Tabari narrated the text of the treaty, which read as follows,

*The conciliation with Cyprus concluded that the Cypriots pay a Jizyah of 7000 Dinars to the Muslims annually, and the same amount to the Romans, which the Muslims shall not prevent that tribute to be paid. The Muslims shall not attack the Cypriots nor to fight on their behalf their enemies. They [the Cypriots] have to inform the Muslims the movements of their enemies, the Romans; the Imam of the Muslims shall designate their Patriarch among them, and they do not marry with the Romans territories except by our [the Muslim ruler's] permission.<sup>40</sup>*

In his work *Futuh al-Buldan*, Ahmad Ibn Yahya Al-Balathuri added,

*The treaty concluded between Mu'awiyah and the Cypriots stipulated that: when the Muslims were engaged in a naval expedition, they would not harm the Cypriots nor were the Cypriots under obligation to support them or anyone against them.<sup>41</sup>*

Sir George Hill added,

*Mu'awiya exacted an equal sum, though apparently he raised no objection to the continuation of the payment to the Greek treasury; presumably he considered it to be no business of his if the Cypriotes could be induced to pay twice over . . . it shows that the Caliph made no claim to be the sole ruler of Cyprus.<sup>42</sup>*

In 654 AD, the Cypriots violated their treaty with the Muslims when they offered ships to the Romans as an aid to an expedition on the sea; therefore Mu'awiyah re-attacked Cyprus and confirmed with the Cypriots a treaty on the terms of the treaty previously concluded. However, by the year 689 AD the influence of the Muslims was considerably reduced by Caliph AbdulMalik Ibn Marwan who renewed the treaty with the Emperor Justinian II (It had originally been made with the earlier Emperor,

<sup>40</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. II, Dar al-Ma'arif, Cairo, 1962, p. 602.

<sup>41</sup> Al-Balathuri, Ahmed Ibn Yahya, *Futuh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, pp. 152-153.

Constantine IV, in 678). Under the treaty, the Caliph engaged himself to pay 1000 nomismata, 365 horses and the same number of slaves annually to the Roman Empire. The treaty provided for the division between the two powers the revenues of Cyprus.<sup>43</sup> In connection with this, Majeed Khadduri assumed,

*The position of Cyprus was extremely precarious, ranging from a dependent status under Byzantine or Muslim rule, to complete independent status, when the two rival powers agreed to respect Cyprus' independence, each [were] satisfied with half of the annual tribute.*<sup>44</sup>

Majeed Khadduri, in another part of his treatise, added more details to the history of Cyprus history when he wrote,

*Cyprus was a Byzantine tributary island when it was attacked by Mu'awiya I in AD 648 . . . a treaty was concluded by which Cyprus was made a buffer state . . . In AD 654, Mu'awiya attacked Cyprus again . . . and sent to the island 12,000 men and created a mosque. Further, Mu'awiya erected a city on the island and transplanted from Ba'labakk (Baalbek) a few men and a garrison that remained until Yazid, Mu'awiya's son, sent them back and ordered the city destroyed.*<sup>45</sup>

During the time of Caliph Haroon al-Rashead, the Cypriots raised a rebellion to free their country of the *Jizyah*. The governor was to cancel the treaty with the Cypriots, though AbdulMalik Ibn Salih al-'Abbas, the governor of Egypt, requested a legal Fatwa from the jurists of his time. Among those jurists was Musa Ibn A'yun's who said,

*I have heard from al-Awza'i that: in regard to a similar case of some people who, after conciliation with the Muslims, then conveyed information about their secret things and pointed them out to unbelievers [their enemies]: 'if they are Dhimmis, they have thereby violated their covenant and forfeited their Dhimification. It belongs to the governor; he could kill or crucify them, if he so desires. But if they had been taken by conciliation, they are not entitled to the Muslim's Dhimma, then the governor*

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<sup>42</sup> Hill, George Sir., *A History Of Cyprus*, Vol. I, Cambridge, University Press, 1949, p. 284.

<sup>43</sup> Al-Belathuri, Ahmed Ibn Yahya, *Futuh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, pp. 152-153.

<sup>44</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 263.

<sup>45</sup> *Ibid.*, p. 262.

*would repudiate their treaty, for Allah loveth not the machinations of deceivers.*<sup>46</sup>

Another Fatwa was of Imam Malik Ibn Anas - the founder of the Malikite Sunni School who said,

*The Aman of the Cypriots is of old standing, and has been carefully observed by their governors, because they considered their recognition on their conditions [of the treaty] is humiliation and belittlement, and a source of strength to the Muslims, in view of the Jizyah paid to them [the Muslims] and the chance they had of attacking their enemies [the Muslim's enemies].*<sup>47</sup>

Examining the previous debate, as well as the historical events, it can be said that to judge accurately on the status of Cyprus, one should find out, first, the kind of relationships which connected Cyprus with the Byzantine Empire. Unfortunately, no such treaty is available or even mentioned in the Islamic literature to clarify the obligations of the two parties (i.e. the Cypriots and the Byzantine). Therefore, we should assume that it was a matter of paying tribute, but not any other kind of alliance.

What can be concluded concerning the status of Cyprus is that: (i) It was organised to be an indirect alliance between the Islamic State and Cyprus. This could be confirmed with that mentioned in the 648 AD treaty, which reads: *"They [the Cypriots] have to inform the Muslims the movements of their enemies, the Romans"*\*; (ii) The status of Cyprus changes in 654 to be a part of *Dar al-Islam*. This was confirmed by the word of Khadduri when he said: *"Mu'awiya erected a mosque"*, this was because during the early time of the Islamic Empire, Muslims have no religious freedom to build their places of worship unless these places are located in *Dar al-Islam*. On the other hand such an assumption can be confirmed by the word of George Hill when he said *"it shows that the Caliph made no claim to be the sole ruler of Cyprus"*, and Khadduri's words: *"Mu'awiya sent to the island 12000 men . . . erected a city"*; (iii) Then, in 689 the evidence is inconclusive about the precise status of

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<sup>46</sup> Al-Belathuri, Ahmed Ibn Yahya, *Futuh al-Buldan, Maktabat al-Nahdha al-Masriyah*, Cairo, 1951, p. 161.

<sup>47</sup> *Ibid.*, pp. 160.

\* See similar examples in chapter VII.

Cyprus in this period. The best conjecture is that it reverted to something like its previous status of indirect alliance with the Islamic State.

Examining the nature of the treaty itself, it can be said that paying tribute to the Islamic State does not mean that the Cypriots were *Dhimmis*, this leads to say that the treaty concluded between the two parties was a conciliation treaty *Muhadanah*, which can be confirmed by the controversial *Fatwa* of Jurist Musa Ibn A'yun. However, in the *Fatwa* of Imam Malik, the treaty shaped by a general *Aman*, can be given by the *Imam* or his representative who was Mu'awiya. Accordingly, one could conclude that the status of Cyprus was not organised under the status of neutrality more than it was arranged under a treaty of conciliation. This corrects the mistake of Majeed Khadduri and other writers who assume that Cyprus was a neutral territory or buffer state between the Byzantine and Islamic Empires.

#### 6.6) Rights and duties of neutrals

The previous examples of Abyssinia, Nubia and Cyprus may be multiplied but unfortunately none of them describes rights and duties of neutrality. The jurist al-Sarakhasi in his great two works *Sharh al-Siyar al-Kabir* and *Al-Mabsut*, however, reproduced the rights and duties of neutrals in various places. Not every occurrence of them in his writings will be examined as the main features of this legal status can be gathered from a part of the total number. Every last detail of the rights and obligations of neutrals vis-a-vis states actually engaged in war is therefore not analysed since the purpose of this section is to determine their principle features.

If a state [A] is in a treaty of peace with the Muslims and is attacked by a third state [B] which took prisoners and enslaved them [of state A], subsequently the Muslims waged an independent war against this state [state B] and captured the prisoners of their friendly state [of state A], they would be slaves of the Muslims. For the third state had not violated the jurisdiction of the Muslim State in capturing them. If the third state [state B] secures its capture, it will become the rightful owner of the same.<sup>48</sup> This means, it will not be an infringement of neutrality to appropriate the

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<sup>48</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Sharh al-Siyar al-Kabir*, Vol. IV, Hyderabad, 1335 AH, pp. 134-135.

property of a friendly state if it was duly acquired by a third state from whom it passed lawfully to the Muslims.

(ii) If a Muslim citizen [A] is remaining in a foreign country [B] which has purchased the booty captured by a third nation [C] from a fourth one [D], the Muslim citizen may lawfully purchase that property (in spite of the fact that this state had remained neutral in that war).<sup>49</sup> From this, it may be understood that ownership was vested in the country which captured the booty and that foreign countries plunder each other and acquire ownership of persons and properties. Therefore it is lawful for the Muslim resident to purchase this booty just as any other property owned by the country where he is residing. Similarly, if a Muslim resides in a country that had captured booty from a third State, he may purchase that booty, as ownership was vested in that country of residence. If a non-Muslim country was attacked and plundered by a third non-Muslim state, the Muslim citizen residing in the former may lawfully purchase booty from the latter, aggressor state.

(iii) If Muslim citizens are staying in a foreign country [A] which is attacked by a third state [C], they must not fight against that third State (which is not actually at war with the Islamic State) except when they find their security in danger. In this case, they may fight against that third state in self-defence (not in breach of the neutrality of their own Muslim State).<sup>50</sup> The precedence of this is provided by Ja'far Ibn Abu Talib, the cousin of the Prophet Muhammad and the other Muslims in their refuge in Abyssinia during what was so-called the first Abyssinia emigration *Hijrah*. When the Negus, the Abyssinian monarch, was in danger of losing his power and was attacked by some of his followers, the Muslims were prepared to take up arms in favour of the Negus because they were afraid that the new ruler might not offer them the same asylum.<sup>51</sup>

(iv) If the subjects of a foreign country come to the Islamic territory by permission of *Aman* and intend to proceed to a third state which is at war with the Muslims, in order to join forces with them against the Muslim State, passage will be denied them.

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<sup>49</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 97.

<sup>50</sup> *Ibid.*, pp. 97-98.

<sup>51</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. I, Matba'at al-Halabi, Cairo, 1955, p. 287.



For the passport secured for them is only freedom of stay and freedom of return to their own country. Beyond this, the Islamic State has the right in denying them all that is harmful to the Muslims. No doubt if one or two of them want to proceed to the third state for commercial purposes, this may not be denied them.<sup>52</sup> However, it may be said that the case is different if they are a formidable force, in such case it will be similar to what is called “benevolent neutrality” which is permitting public armed forces of one state to pass through Muslim territory. This is mentioned in the following quotation,

*If they are a formidable force, and enter Muslim territory by permission in order to cross to another territory to fight their enemies, and they were attacked, while in the Muslim territory, by an enemy, the Muslim State is not obliged to come to their rescue even when it is in its power. The case is different when non-Muslim subjects of the Muslim State are attacked by foreigners, in which case it is the duty of the Muslim State to protect them.*<sup>53</sup>

(v) If the ships of the enemy carry goods belonging to neutral states or ships belonging to the neutral states carry goods belonging to the enemy states.<sup>54</sup> It can be said that in such cases it comes under the specific principle that assumes “the safety of the owner renders the property safe” which is similar to “a respect due to a property is according to the respect due to its owner.”

### 6.7) Islamic system of neutrality

It has been noticed that *Shari'ah* recognised the idea of neutrality earlier than international law. However, as a legal system and a part of the countries' sovereignty, scholars of the international law recognised this theme in the late of the 18<sup>th</sup> century. Nevertheless, in *Shari'ah* such a notion can be traced, which resembles the modern system of neutrality. In order to know how far such a system is jurisprudentially accepted, it must be, initially, assumed that the *Shari'ah* has approved of neutrality as a political fact, because there were some nations, such as Abyssinia, who adopted neutrality between the Islamic State and its enemies. Therefore, if Islam admits

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<sup>52</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, pp. 121-122.

<sup>53</sup> *Ibid.*, Vol. IV, p. 109.

<sup>54</sup> *Ibid.*, Vol. I, p. 142.

neutrality as a materialistic event, there is no objection to admit it as a legal system, as what is important is the result. However, what is the system of neutrality that *Shari'ah* approves, comparing it with what it is known in the international law? Some scholars such as Majeed Khadduri concluded that the Islamic system of a neutral state is,

*The state which regards its normal relations with the entire world as permanently hostile and permits short intervals of peace only when regulated by treaties obviously has no place left for the country which chooses to be on good terms with that state and also with its enemies. If neutrality is taken to mean the attitude of a state which voluntarily desires to keep out of war by not taking sides, no such a status is recognized in Muslim legal theory. For Islam must ipso jure be at war with any state which refuses to come to terms with it either by submitting to Muslim rule or by accepting a temporary peace arrangement. The world, it will be recalled, was sharply divided under Muslim law into two divisions: the Dar al-Islam . . . and the Dar al-Harb . . . No jurists, however, would approve of a country being allowed to choose without Islam's consent an intermediary status between Dar al-Islam and Dar al-Harb. Islam refrained from attacking certain territories which were regarded . . . Such territories, constituting a separate division of the world, may be called Dar al-Hiyad.<sup>55</sup>*

The term “neutrality” is absent from the *Shari'ah* as a legal system, nevertheless, its meaning, it could be argued, was realised due to the establishment of friendly relations between the Islamic State and non-Islamic political entities. In connection with this, it should be considered that under the *Shari'ah* war is a necessity for specific purposes, and with the end of these purpose, relations between belligerents should returns to the normal status of peace. It can be argued that the Islamic system of neutrality is based on a legal status and not on the actual *status quo*. All relations with non-Muslims have to be conducted on the basis of the Islamic religion, especially its law. Muslims have little or no choices to make; they must follow the commands of the *Shari'ah* in their dealings with non-Muslims.

The Prophet's commands concerning Abyssinia are an illustration of this system of legal rules governing relations with non-Muslims. All his treaties are legitimate in Islam and as part of the *Sunnah* are a source of the *Shari'ah*. The single treaty between the Islamic State and Nubia, and the several treaties between it and Cyprus,

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<sup>55</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, pp. 252-253.

are not like the Abyssinian treaty as they were concluded after the Prophet's death under the Caliphate. Despite the fact that Abyssinia was under the general *Qur'anic* teaching "**Fight all unbelievers**", the Prophet in fact exempted Abyssinia from *Jihad* by the Muslims because of its neutral stance in the military struggle between the Muslims and their Quraish enemies. An additional factor was that the monarch Negus offered shelter to the Muslim emigrants in Abyssinia and later embraced Islam, thereby implanting the nucleus of *Da'wa* in his country, that is, spreading the Islamic mission in Abyssinia. In his effort to explain the status of Nubia, Majeed Khadduri says,

*Nubia's position was neither Dar al-Islam, for Islamic law was not in force in the territory, nor in Dar al-Harb. It may be argued that Nubia was Dar al-'Ahd, as it was in the treaty relations with Islam; but since the nature of the treaty is such that it did not pay tribute to Islam for the maintenance of peace as in other tributary relations) but paid rather on a reciprocal basis, it follows that its position resembles in some respects that of Ethiopia, defined by the terms of the treaty which gave her a special status in Muslim law. This status, agreed upon by both parties to last for the duration of the treaty, is a qualified status of naturalization.<sup>56</sup>*

However, a part of the importance of this chapter is to find out how the neutral stance of the Islamic State could be specified toward an existing war or dispute? Because, as said earlier, the lack of the classic literature in this issue, therefore it is possibly saying that the position of the Islamic State is classified under the provision of the Islamic *Shari'ah*, any existing war or dispute is of four kinds:

1) Between two Muslim parties. This issue has been examined earlier in this chapter, where Muslims have to resolve their disputes and neutrality is not accepted among them.

2) If a war or dispute takes place between a Muslim State and a non-Muslim political entity. According to the Islamic teaching of Muslim Brotherhood, all Muslims have to support that Muslim State, which is a must either individually or among the Muslim States, based on the *Qur'anic* teaching which call the Muslims to

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<sup>56</sup> Ibid., p. 261.

support each other against those who encroach upon them. Among the *Qur'anic* teaching,

والمؤمنون والمؤمنات بعضهم أولياء بعض . . . (التوبة: ٧١)

**The Believers, men and women, are protectors, one of another . . .  
(9: 71)**

In the tradition of the Prophet Muhammad, there are *Hadiths* request from Muslims to support each other,

***The Muslim is a brother to the Muslim, he neither oppress him nor disappoints him.*<sup>57</sup>**

This was Muslim brotherhood illustrated clearly during the time of the second Caliph Abu-Bakr when he requested from the Muslims of Yemen to support the Islamic State in its fight against the Romans of Syria.<sup>\*58</sup>

3) Between two non-Muslim states. The *Shari'ah*'s teaching orders the Muslims not to interfere and to adopt a neutral stance, unless one among the belligerents is an ally of the Islamic State and asked it to fulfil the commitment of their alliance treaty. In those circumstances, the Islamic State should fulfil its treaty obligations and uphold that state. The Prophet himself declared war against *Quraish* when he found out their responsibility in attacking his ally Banu Khuza'ah. Nevertheless, if there is a truce or a reconciliation treaty between the Islamic State and the belligerents, such treaties should be fulfilled by non-interference.

4) Between two non-Muslim countries with no treaties to organise the military relations between the Islamic State and the belligerents, then the Islamic State should adopt a neutral stance.

To sum up, the neutrality principle is to be determined in Islam as per *Shari'ah*'s provisions, and is specified by the nature of the dispute and the relation between Muslims and others as per the concluded treaties.

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<sup>57</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Dar al-Ma'arif, Cairo, 1980, Hadith no. 7756.

\* See the full text of the Caliph's request in the next chapter.

<sup>58</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 397-399.

## 6.7) Summary and conclusion

In this chapter Khadduri's thesis that the Islamic State can only have peaceful relations with neutralised states is challenged by distinguishing between neutralisation and neutrality. Neutralisation according to Khadduri is the condition of previously *Harbi* states which have concluded a temporary truce treaty with the Islamic State. Neutrality is the legal status of non-participation in war either by the Islamic State in a war between two non-Muslim states\* or the non-participation of a non-Muslim state in a war between the Islamic State and another non-Muslim state. Such a status was not possible on Khadduri's thesis because his interpretation of *Jihad* was of permanent hostility between the Islamic State and other states suspended in a few cases for short period by truce treaties. Khadduri's conception of permanent *Jihad* was challenged in the previous chapter and rejected in favour of the view that normal relations between the Islamic State and non-Muslim states were peaceful. It is in this context that an Islamic theory of neutrality becomes possible.

Within the Islamic law the terms *Hiyad* and *Hiyadah* are used in a way which is synonymous with the modern term "neutrality." In pre-Islamic and early Islamic Arabia, the term employed was *I'tizal*, though, this term now applies only to a particular school of Muslim philosophical and theological.

In the *Shari'ah* there is evidence in the *Holy Qur'an* and the Prophetic *Sunnah* to the legitimacy of neutrality. In the *Holy Qur'an*, it has been found that the authoritative interpretation of the *Qur'anic* verse (4: 90-91) -which mentioned '*Atizal*'-there are three versions of neutral status. These are (i) the status of *Dhimmis* who are exempt from participating *Jihad* with the Islamic State; (ii) non-Muslims under the protection of *Aman*; (iii) those who seek and offer neutrality to the Islamic State. Therefore, neutrality, in the classical *Fiqh* is discussed in terms of individuals and the Islamic State in the first two cases, not between the Islamic State and non-Muslim states or between two non-Muslim belligerents. However in the third case the relationship could be between the Islamic State and a non-Islamic State. In the *Sunnah*

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\* In the *Fiqh* literature, there is no discussion of this logical possibility. Jurists were only interested in the possibility of neutrality by a non-Muslim state or states. Despite this, the Islamic State was, as a matter of fact, neutral in wars between non-Muslims states during the Abbaside Empire, for example those in Northern Europe. In short, the Islamic State was often *de facto* neutral, but never *de jure* neutral. Neutrality is always secured by a treaty with the Islamic State, but when the Islamic State is itself neutral no such treaty exists.

the status of *I'tizal* was applied by the Prophet and after that by the Caliphs to the Islamic State. Up to this point, *I'tizal* has been applied to non-Muslim political entities (Jewish tribes) in relation to other non-Muslim political entities and the Islamic State. The only exception to this, is where non-Muslim individuals are neutral between the Islamic State and a non-Muslim political entity under *Dhimmi* status and *Aman*. Or where Muslim individuals are neutral between the Islamic State and similar non-Muslim (*Harbis*) political entities.

Khadduri's thesis about neutralisation was examined in detail in the three cases – Abyssinia, Nubia and Cyprus – which he used to argue his case. In the case of Abyssinia, Khadduri's assumption that its status was regulated by a *Sulh* treaty was incorrect. No such treaty existed. Its relations with the Islamic State were a new situation in Islamic international relations, one which was organised at the Prophet's command (which is a part of the *Shari'ah* legislation) and by which Muslims were forbidden to attack Abyssinians unless there were first attacked by them. The Prophet's command was based on the Negus' attitude toward the Muslims, and not because of any kind of truce or friendship treaties. Using Holsti's definition of a neutralised state, it was also found that Abyssinia did not qualify as neutralised. But on Holsti's definition of neutrality, Abyssinia was a neutral state during the early conflict between the Muslim and the Quraish because it took no part in the conflict, supported neither side, and made no military alliance with other states.

In the second case Nubia, Khadduri argued it had a qualified status of neutralisation. However, after examining the treaty between Egypt's Governor Abdullah Ibn Abi Sarh with the people of Nubia, it has been concluded that the status of Nubia was neither that of neutralisation nor of neutrality, but it was a party to a multiple treaty which organised its relation to the Islamic State. The crucial purpose of the multiple treaty was a non-aggression pact. This meant that the Muslims aimed to stop fighting with the Nubians more than forcing them to adopt neutrality, to gain benefits from newly established commercial transactions with them, and finally, to protect the Muslims and their religious places in Nubia. The conditions laid down by the Muslims meant that it was also a truce treaty under Islamic law.

In the third case, it was concluded that the status of Cyprus was an indirect alliance with the Islamic State, confirmed in the 648 AD treaty, '*They [the Cypriots] have to inform the Muslims the movements of their enemies, the Romans.*' In 654 AD its status changed to become arguably a part of *Dar al-Islam*. This was confirmed by the word of Khadduri when he said: "*Mu'awiya erected a mosque*", this was because during the early time of the Islamic Empire, Muslims had no religious freedom to build their places of worship unless these places were located in *Dar al-Islam*. On the other hand, against this conclusion is the fact that the Caliph made no claim to be the sole ruler of Cyprus, even though, in Khadduri's words, "*Mu'awiya sent to the island 12000 men [and] . . . erected a city*". Then, after 689 AD the evidence is inconclusive about the precise status of Cyprus. The best conjecture is that it reverted to something like its previous status of indirect alliance with the Islamic State.

It has been concluded, moreover, that the nature of the treaty between the Muslims and the Cypriots does not mean that they were *Dhimmi*s, this leads to say that the treaty concluded between the two parties was a conciliation treaty *Muhadanah*, which can be confirmed by the controversial *Fatwa* of Jurist Musa Ibn A'yun. However, in the *Fatwa* of Imam Malik, the treaty was shaped by a general *Aman*. Accordingly, it is concluded that the status of Cyprus was not organised under the status of neutrality, nor of neutralisation because there was no previous war with Islamic State, but was arranged under a treaty of conciliation. Majeed Khadduri and other writers who assumed that Cyprus was a neutralised or neutral territory or a buffer state between the Byzantine and Islamic Empires are therefore mistaken.

In the Islamic system of neutrality, all cases of neutrality in Islam were organised and legitimated on a religious basis. The *Qur'anic* texts and the *Sunnah* tradition, as well as the practices of the Muslims rulers, are the proofs which show that Islam admits the neutral position of the non-Muslims political entities. Moreover, it could be admitted that, under the *Shari'ah*, neutrality is permitted, whether it is temporary or permanent, but it should be organised under a particular treaty which specifies the status of the neutral party as well as its obligations towards the Islamic State. Islam admits temporary neutrality (as well as temporary neutralisation) by non-Muslims toward an existing war between the Islamic State and non-Muslim political entities. Permanent neutrality does not harmonise with the Islamic teaching unless it is

organised through a treaty with the Islamic State. Islam, moreover, insists that Muslims should respect a neutral attitude because not respecting neutrality is opposite to the principle of fulfilling charters ordered by Islam. However, if the neutral state violates its obligations, for example by helping the enemy, this ends the neutrality treaty.

As for the individuals of the neutral state, if they are in the territory of belligerents they may remain in that territory, providing that they follow the restrictions imposed by the belligerent state in which they are living. In particular, within those restrictions, they should make no contact with the state at war with the state in which they remain or with any of its individual citizens. As for the effect of war on the *Must'amin* individuals of the neutral state, because they enter the Islamic State under the *Aman* and by an agreement between the Islamic state and their neutral state, their lives, assets and properties are protected so long as they make no contact, or cause a reasonable suspicion of making such a contact, with the enemy state at war with the Islamic State.

Because of the affects of the war, in some circumstances the citizens of the belligerents should follow the laws of their countries. Most states prevents its citizens to contact the enemies individuals, this refers to the legislation and legal regulations of each state. However, in Islam war does not lead to a complete severance of commercial relations with the state fighting the Islamic State. However, it is permissible as a military measure or as an economic pressure on enemy, to cut commercial relations. Therefore, the trade of the neutral state has full freedom provided that it should not strengthen one party through arms.

Although neutrality, like neutralisation, is an external relation between the Islamic State and non-Muslims, there is a kind of Islamic neutrality within the *Ummah* in certain circumstances. The teachings of the *Shari'ah* shows that a neutral stance by a Muslim in a conflict between two Muslims is not always acceptable as it admits injustice and breaks the unity of the *Ummah*. Islam orders the Muslims to interfere: firstly, with peaceful methods to specify the wrongful party and try to halt him; secondly, if he refuses then follow the *Shari'ah's* order to resolve the dispute by fighting the transgressor. The strong party in the Islamic *Ummah* could adopt such a



measure. Thus, if war is waged between two Islamic sects, the Islamic State has to follow the *Qur'anic* teaching which requests from the Islamic State not to remain neutral, but to interfere by using peaceful methods to correct the wrongful party and try to end his aggression. However, if he refuses, the *Shari'ah* orders that the dispute is resolved by using force against the transgressor. However, Muslim individuals could remain neutrals in such circumstance.

If non-Islamic states or political groups are not at war with the Islamic State they may be related to it either by truce treaties and neutralisation, by neutrality treaties, by conciliation treaties or by treaties of alliance. This last kind of treaty will be examined in the following chapter.

## CHAPTER VII

### CLASSICAL CONCEPTION OF ALLIANCE IN SUNNI ISLAM

## **Chapter VII: Classical Conception Of Alliances In Sunni Islam**

- 7.1) Introduction
- 7.2) Alliances in the Jahiliyyah and Islam
- 7.3) Legitimacy of alliances
  - 7.3.1) Alliances among Muslims
  - 7.3.2) Alliances with the non-Islamic entities
- 7.4) Aims of alliance
- 7.5) Methods of alliances
- 7.6) Elements and requirements of alliance
- 7.7) Disintegration of alliances
- 7.8) Summary and conclusion

## 7.1) Introduction

The lack of a common definition of alliance is perhaps the first indication that the literature is characterised by a marked absence of agreement on many issues. Scholars use the terms *alliance*, *coalition*, *pact* and *bloc*; however, it is important to note that some scholars differentiate between an alliance and a coalition. In the Dictionary of English, for instance, *alliance* could be found under the following definition,

*A close agreement between countries, groups, families, etc. for a shared purpose or for the protection of their interests.*<sup>1</sup>

*Coalition* is defined as,

*A union of separate political parties for a special purpose (esp. for a government), use, for a limited period of time.*<sup>2</sup>

*Pact* as,

*A solemn agreement esp. between opposing groups or nations.*<sup>3</sup>

*Bloc* has given the definition of,

*A group of people (esp. politicians), political parties, or nations that act together.*<sup>4</sup>

There is therefore no great difference between the four definitions when they concentrate on the parties. It is clear they must be equals; a nation has to ally with its counterpart, another nation, families with families, states with other states. A family or any other non-state group, however, could not ally with a state.

On other hand, various Western scholars have put their own definition on the word alliance. Edward Gulick defines alliance as,

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<sup>1</sup> Longman., *Dictionary of Contemporary English*, 2<sup>nd</sup> Edit., Longman, Essex, 1987, p. 26.

<sup>2</sup> Ibid., p. 186.

<sup>3</sup> Ibid., p. 739.

<sup>4</sup> Ibid., p. 98.

*A bilateral or trilateral agreement for offensive or defensive purposes.*<sup>5</sup>

And coalition as,

*A similar agreement signed by four or more powers or a conjunction of several alliances directed toward the same end.*<sup>6</sup>

In Gulick's definitions there are some distinctions which should be noticed. However, the differences are not all that clearly stated: consequently, these terms will be treated as essentially one and the same for the purpose of this thesis.

Among the various modern definitions of alliances, the one considered most appropriate for the purpose of the present study is that offered by Robert Osgood, who states,

*An alliance ... reflects a latent war community, based on general co-operation that goes beyond formal provisions and that the signatories must continually cultivate in order to preserve mutual confidence in each others fidelity to specified obligations.*<sup>7\*</sup>

There are important differences between modern alliances and those commonly found in the middle centuries. Modern alliances tend to be larger and more concerned with internal threats. In addition, they are characterised by permanent planning, executive machinery and a high level of military integration. Basically, the structures of international alliances vary widely, and all sorts of patterns have appeared at different times in ancient and modern history.<sup>8</sup>

Therefore, it is no simple matter to identify all alliances of all relevant types in the whole Islamic era and ascertain their scope, membership and duration. Consequently, the basic interest of this chapter is the focusing on the military alliances and those in which military components are involved during the early time of the Islamic State and

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<sup>5</sup> Gulick, Edward V., *Europe's Classical Balance of Power*, Cornell University Press, New York, 1955, p. 78.

<sup>6</sup> Ibid.

<sup>7</sup> Osgood, Robert E., *Alliances and American Foreign Policy*, Johns Hopkins Press, Baltimore, 1968, p. 19.

\* This definition could draw attention to the fact that alliances represent a special type of co-operation. This is an aspect that not only has often been neglected, but that may be particularly relevant in the past and maybe in contemporary world.

<sup>8</sup> Luard, Evan., *The Balance of Power, The system of International Relations, 1648-1815*, St. Martin's Press, New York, 1991, p. 261.

particularly during the time of Prophet Muhammad and the four Orthodox Caliphs. However, the searcher will not hesitate to quote examples from other eras if there is the need to help the aim of this study. In this chapter, moreover, the Muslim scholars views regarding the military alliances will be reviewed and analysed in terms of a number of important elements, such as aims, methods, structures and system.

Due to the lack of any scientific Islamic theory in this regard, the searcher will rely on the *Syrah* of the Prophet to find out the important required elements of alliance between the Islamic State and a non-Islamic political entity.\* In order to achieve a full understanding of Islamic military behaviour, it is initially important to look at the nature of alliances. However, it should be noted that analysing alliances has a wide range of difficulties. This was confirmed by Michael Nicholson when he argued that,

*Unfortunately the analysis of alliances is not easy. That this is likely to be a problem is indicated by the sheer numerical size of the possibilities.*<sup>9</sup>

On the other hand, alliances have commonly been identified with aspects of international relations with the potential to lead to conflict, specifically in reference to the balance of power. On one level, alliances could be viewed as a natural mechanism of the international system; while on another level, the formation of alliances appears to be an appropriate strategy through which national decision-makers sought a pooling of resources, either to increase the weight on their side of the scale or to move their own weight over to that side which would ultimately be heavier.<sup>10</sup>

It is often the case that a state can make its promises and threats more credible, and the sum total of its possible rewards and penalties larger, by joining an alliance or by organising one. In sum, an alliance is an essential instrument for exercising influence and power, in international no less than in domestic politics. Most often no single person, group, or nation is strong enough to prevail alone in a major decision; most often each can prevail only with the help of a coalition, or not prevail at all.

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\* This term refers to any non-Islamic party with which the Islamic State may be in alliance. It could be a group of people, like a tribe, a single individual, such a foreign merchant, or a non-Islamic State.

<sup>9</sup> Nicholson, Michael, *Formal Theories in International Relations*, Cambridge University Press, New York, 1989, p. 188.

<sup>10</sup> Beer, Francis A., *Alliances*, Holt, Rinehart & Winston, Inc., 1970, pp. 4-5.

The basic interest of this chapter is in focusing on military alliances, and those in which military components were involved, during the early time of the Islamic State and particularly during the time of Prophet Muhammad and the four Orthodox Caliphs. This chapter will review and analyse the Muslim Scholars' views regarding military alliances in terms of a number of important elements, such as the aims, methods, structures, parties and system. However, due to the lack of any systematic or scientific Islamic theory of alliance in classical *Fiqh*, this chapter tries to discover and systematise the most important elements required in an alliance between the Islamic State and a non-Islamic political entity. It will be concerned in particular to support the claim that treaties with non-Muslims are legitimate in Islam, provided certain conditions are fulfilled, but that there can be no alliances in Islam, that is, within the Muslim *Ummah* where brotherhood prevails.

## 7.2) Alliance in the *Jahiliyyah* and Islam

In classical Muslim thought, alliance (*Hilf* حلف) was extensively debated. Basically, there is no distinction between the juridical and linguistic meaning of the term "alliance" in both the Arabic language and *Fiqh*. Ibn Mandhore in his book *Lisan al-Arab* defined alliance as,

*It is an agreement of collaboration and mutual aid. The Plural is Ahlaf, which is derivative from Hilf "an oath". It is, moreover, a pledge between people to patronise, support, and agree on specific matter.*<sup>11</sup>

*Hilf* is what is known as a particular idiomatic notion, which is the military pact. Thus, from the searcher's point of view, military alliances could be defined accordingly as,

*The pacts, or agreements convened between two or more nations, by which each is obliged to act upon the terms of such a pact by assisting the other by fighting side by side in case of attack, or defending each other in case of aggression. Combat may begin on the spot, if justifiable. Defence may imply consultations and contacts between concerned parties so they may be able to settle the dispute. Otherwise, a*

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<sup>11</sup> Ibn Mandhore, Muhammad Ibn Makram, *Lisan al-Arab*, Vol. IX, Dar Beirut, Beirut, 1956, pp. 53-54.

*battle and military engagement would be necessary according to the advantages of each ally.*

In the immediate period of *Jaheliyah* in Arabia before Islam, and in the early phases of the Islamic State, there were no states in the academic sense. There were only the so-called City-States which were tribes allied together to control a particular geographic area and impose their own law on it. In the words of Asghar Ali,

*. . . there was no state machinery or any similar repressive organ, neither in Mecca, nor in Medina. The people were used to living a free life uncontrolled by any external authority except, of course, the tribal traditions. The repressive organs of a state like the police and army were also unknown. There was no law except the tribal traditions.*<sup>12</sup>

In addition, the Arabs, like other nations, knew alliances in the form of *tribal alliances* for other particular purposes such as support, co-operation on the matters of revenge, sacrifice and blood ransom or, alternatively, for permanent co-operation. Consequently, military force was used as the main element to fulfil the objectives of the *tribe alliances*, which could be identified as military alliances. Moreover, when the people of that time were allies, they used to say “*My blood is yours, you inherit me and I inherit you, you defend me and I defend you*”<sup>13</sup> or “*Your blood-seeking is [my] blood-seeking and [your] blood-remitting is my blood-remitting*”<sup>14</sup> then he renders his ally the sixth of his inheritance. Therefore, Islam rescinded that sort of alliance when the *Holy Qur'an* insisted that,

وأولو الأرحام بعضهم أولى بعض. (الأنفال: ٧٥)

**. . . but kindred in by blood have prior rights against each other.  
(8: 75) [but in-law relatives have priority –over blood relatives- in  
reliance on each other].**

Alliances, moreover, were of great concern to Arabs since it consolidated the tribe's power and security, it was related to the concept of protection. The solidarity of the kinship group meant that the group protected its individual members. W. Montgomery Watt, for instance, mentions three devices which increased the size and

<sup>12</sup> Engineer, Asghar Ali, *The Islamic State*, Advent Books, New York, 1980, p. 24.

<sup>13</sup> Al-Tabari, Mohamad Ibn Jarear, *Jami' Al-Bayan 'An Ta'weal Al-Qur'an*, Vol. V, Dar al-Fikr, Beirut, 1995, p. 34.



strength of the group or extended the circle of those obliged to help it, these are: attached to the group as clients (*Mawla* مولى), neighbourly protection (*Jiwar* جوار) and the main interest of this chapter- alliance or federation (*Hilf*). According to Watt,

*This was ostensibly between equals, and might be between several individuals or groups; but sometimes, especially when it was between two of whom one was stronger than the other, an element of superiority and inferiority crept in, and the confederate (halif) was hardly distinguishable from the client.*<sup>15</sup>

Alliances were also in great vogue in all parts of Arabia. Many ceremonies were observed at the time of “signature”. People used to celebrate by putting drops of blood in wine before drinking it, smearing themselves with scents and making a fire, the so-called *Coalition Fire*.<sup>16</sup> Moreover, there were alliances of the so-called system of (*Elaf* إيلاف,) which organised the security and protection of the commercial caravans.\* This system was developed by the Quraishite who concluded or obtained charter forms with the rulers of Syria, Abyssinia, Persia and Yemen to safeguard and protect their caravans of trade to their territories in perfect immunity during their trade journeys to the south in winter and to the north in the summer.<sup>17</sup> A. Y. Ali mentions

*In those days of general insecurity, their prestige as custodians of Makkah enabled them [Quraishite] to obtain Covenants of security and safeguard from the rulers of neighbouring countries on all sides.*<sup>18</sup>

### 7.3) Legitimacy of alliance

There are different kinds of military alliances in the Islam. There is, on one hand, the alliance among the Muslims themselves; and on the other hand those between the Islamic State and non-Islamic political entities which can be divided into two categories, (i) the civil alliance; (ii) the military alliance. There are two kinds of

<sup>14</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Matba'at al-Halabi, Cairo, 1955, p. 297.

<sup>15</sup> Watt, W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968, pp. 7-8.

<sup>16</sup> Al-Qalqashandi, Ahmed, *Sobh al-A'ash*, Vol. I, Al-Matba'ah al-Amiriyah, Cairo. 1931, p. 409.

\* See page 263.

<sup>17</sup> Al-Qassimi, Dhafir, *Nidham al-Hukm fi al-Shari'ah wa al-Tareakh al-Islami*, Dar al-Nafais, Beirut, 1990, pp. 13-14.

<sup>18</sup> Ali, Abdulah Yusuf, *The Holy Qur'an Text, Translation and Commentary*, King Fahd Holy Qur'an Printing Complex, Al-Madinah Al-Monawarah, 1991, p. 2015.

military alliance: (a) against the Muslim rebels, and (b) against the other non-Islamic entities. The legitimacy of these alliances will be explored in what follows:

### 7.3.1) Alliance among the Muslims

It has been concluded in the previous chapter that Classic Muslim jurists permitted the existence of different Islamic political entities (such as the Fatimid state in Egypt, or the Emirate of Cordoba, nominally in the 'Abbaside Islamic State) at any one time. These Muslim jurists insisted that it is indisputable that the rulers of the Islamic polities have to ally against their enemies. By examining their viewpoint, it could be found that there are two different opinions in this regard. The followers of the first, among them Ibn Taymiyyah and Ibn al-Qayyim,<sup>19</sup> assume that an alliance among the Muslim themselves is absolutely not permitted and it is null and void, based on the Prophetic *Hadith*,

***Islam supports and increases the power of the Jahiliyyah's alliances; However no alliance in Islam.***<sup>20</sup>

Jurist Ibn al-Qayyim said,

*If an alliance necessitates something violating Islam, it is forbidden. And if it necessitates what Islam necessitates, it has no effect and no benefit.*<sup>21</sup>

Accordingly, all other proofs are nullified with the previous *Hadith*. In the view of the second group (who were supported by the majority of the Muslim jurists, such as Imam Anas Ibn Malik, Imam Abu Hanifah, Imam al-Nawawi and others) there is only one kind of alliance that is permitted between Muslims. It must be an alliance to achieve inviolability, support the oppressed, deter the unjust, remove grievances, establish rapport in place of antagonism or prevent bloodshed and spread security. The *Jahiliyyah* alliance called *al-Fodhoul* and its principles are a clear example of such a lawful alliance (see below). All other alliances contain unlawful or prohibited terms and conditions and therefore are forbidden to Muslims. They fall into two broad

<sup>19</sup> Al-Tabari, Mohamad Ibn Jarear, *Jami' Al-Bayan 'An Ta'weal Al-Qur'an*, Matba'at al-Halabi, Cairo, 1968, pp. 35-36 & Ibn Taymiyyah, Taq al-Dean Ahmed, *Fatawa Ibn Taymiyyah*, Riyadh, 1381 AH, pp. 92-98.

<sup>20</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. I, Dar al-Ma'aref, Cairo, 1980, p. 600.

groups - those related to inheritance and those involving support for oppression.

a) *Inheritance*. Muslim jurists agreed that the *Jahiliyyah* practice of allies inheriting from one another due to their alliance was abrogated by the *Qur'an*. The relevant verse was (8: 75) which taught that in-law relatives had priority over blood relatives in reliance upon each other. Imam Abu Hanifah, however, rejected this view, or rather he allowed allies to inherit under a special condition,

*An inheritance between the two allies is lawful if the deceased has no heirs.*<sup>22</sup>

b) *Supporting oppression*. Muslim jurists agreed to prevent an alliance which would support oppression. They proscribed alliances with people of dubious or bad character, such as supporters of oppression, in order to realise Islamic teachings in general, and fraternity under God and similar acts, in particular. Imam Anas Ibn Malik approved this view as well as some jurists such as al-Nawawi and Ibn Hajar Al-'Sqalani.<sup>23</sup>

On the face of it there is a disagreement between the Hanbalite jurists Ibn Taymiyyah and Ibn al-Qayyim, on the one hand, and the jurists of the other three *Sunni* Schools of law, on the other hand, the former insisting there can be no alliance in Islam, the latter allowing alliance in a limited case – *al-Fodhoul*. However, if the *al-Fodhoul* agreement examined closely it turns out to be a kind of brotherhood agreement since it is made within the tribe. Thus the *al-Fodhoul* alliance to which the Prophet referred was an agreement made by some senior members of the Quraish tribe and this kind of alliance was accepted and endorsed by the Prophet in these words.

***I attended the Fodhoul alliance at the house of Abdullah Ibn Gad'an, I do not like this alliance to be nullified even in return for the means of an easy life. However, if I were to call for similar***

<sup>21</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *Tahtheab Sunan Abu Da'aud*, Vol. IX, Dar al-Ma'arif, Beirut, 1980, p. 142.

<sup>22</sup> Al-Bahrawi, AbdulRahman al-Hanafi & Others, *Al-Fatawa al-Hindiyah*, Vol. VI, Al-Matba'ah al-Ameriyyah, Bulaq, 1310 AH, p. 447 & Al-Jasas, Abu Bakr Ahmed Ibn Ali Al-Razi, *Ahkam al-Qur'an*, Vol. II, Matba'at al-Awqaf al-Islamiyyah, Alasatanah, 1335 AH, p. 185.

<sup>23</sup> Al-Nawawi, Yahya Ibn Sharaf, *Sharh al-Imam al-Nawawi 'Ala Saheeh Muslim*, Vol. XVI, 3<sup>rd</sup> Edit., Dar al-Fikr, Beirut, 1978, pp. 81-82 & Al-'Sqalani, Shehab Al-Dean Abu Alfadhl, *Fat'h al-Bari bi Sharh Saheeh Al-Bukhari*, Vol. X, Matba'at al-Halabi, Cairo, 1378 AH, pp. 501-502.

***alliance in Islam I would accept it.*<sup>24</sup>**

*Al-Fodhoul* alliance in Islam will be examined more extensively in section 7.3.2 below. For the moment it is sufficient to note that it is an internal agreement between members of the same group and though this group in the *Jahiliyyah* period was not the *Ummah* the principle of brotherhood it contained was the one which Islam adopted for the *Ummah*. It is in this sense that the Prophetic *Hadith*, previously cited, is to be understood,

***Islam supports and increases the power of the Jahiliyyah's alliances; however no alliance in Islam.*<sup>25</sup>**

Within the *Ummah* the relationship between its members from the beginning of the Islamic State has been that of brotherhood.\* Imam al-Bukhari reported the following,

***A'asem narrated: I said to Anas Ibn Malik: "Did you reach you that the Prophet said: "There is no alliance in Islam" Anas said: "The Prophet made an alliance of brotherhood between the Quraishs, Emigrants [Muhajirun], and the Helpers [Ansar] in my house".*<sup>26</sup>**

When the Prophet was reported to have made an alliance of brotherhood, it is clear that the term 'alliance' is used here in a metaphorical sense as the Emigrants and the Helpers were both Muslim groups and not two externally (and therefore formally) related bodies. The relationship of brotherhood is far stronger than the contractual relation of alliance. In alliances between non-Muslims or between Muslims and non-Muslims, there were specific purposes in every case and the relationship created to achieve them could always be terminated for specific reasons. In contrast, the 'alliance' of brotherhood could not be terminated for any cause or reason. A good example of that occurred during the time of the second Caliph Abu-Bakr when he requested from the Muslims of Yemen their support for the Islamic State in its fight against the Romans of Syria. Scholar Hamidullah mentions Abu-Bakr's letter as follows,

*From the Caliph of the Messenger of God to whom who reach*

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<sup>24</sup> Ibid.

<sup>25</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. I, Dar al-Ma'aref, Cairo, 1980, p. 600.

\* See chapter III, 3.4.

<sup>26</sup> Ibid., Vol. VIII, p. 35.

*him my letter from the believers and Muslims of the people of Yemen. Peace be upon you, I thank to you my God, Who is the only Lord. Allah imposes Jihad upon believers and commands them by saying "Go ye forth, (whether equipped) lightly or heavily" and He says "and struggle, with your goods and your persons in the Cause of Allah", Jihad is a religious duty and Allah has put great reward for it. We have called upon the Muslims who are living with us to perform Jihad against the Romans, they were rushed to obey that, they camped and got ready to fight . . . Therefore rush you servants of Allah to your Lord's duty and to one of the two glorious either the death in the Cause of Allah or the manifest Victory.<sup>27</sup>*

Here in this letter, there is no reference to an implementation of the terms and conditions of a formal treaty of alliance. Instead, Abu Bakr simply calls upon his fellow Muslims to join the *Jihad* against the Romans. This is an example of the brotherhood alliance within the *Ummah* in action.

### 7.3.2) Alliance with the non-Islamic entities

It is a matter of discretion among the Muslim jurists as to who approved and to who prohibited it. A well-known difficult point among the Muslim jurists is the question of alliance with non-Muslims in *Jihad*. This issue is entangled with many others. Each issue should be defined apart from the others, including whether the Islamic State is in a position to seek military aid or ally with a non-Muslim political entity. The following work will attempt an answer to this problem.

(i) *The civil alliance*. Nearly, all Muslim jurists strongly permitted the use of non-Muslim entities, individuals or groups, in the affairs of civil life. This is confirmed by all *Hadiths* which deal with this point. Jurist Ibn Sa'ad, for instance, noted,

*The Prophet and Abu Bakr hired a man from Banu Al-Dail (tribe) who was a follower of the idolatrous of Quraish to guide them in their immigration to Madinah.<sup>28</sup>*

<sup>27</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 397-399.

<sup>28</sup> Ibn Sa'ad, Muhammad, *Ketab al-Tabaqat al-Kubrah*, Vol. I, Dar Beirut, Beirut, 1980, p. 229.

Similarly, Ibn Ishaq reported,

*The Prophet was told that Safwan Ibn Umayyah had some shields and weapons. The Prophet sent to him - he was still idolatrous - asking for those shields and weapons. Safwan asked: "In spite of my teeth, Muhammad?" The Prophet answered no, on loan, and insured until we give them back. So, (Safwan) gave him a hundred shields with ample weapons.<sup>29</sup>*

(ii) *The military alliance.* Using non-Muslims entities in the military fields, particularly during war, caused a disagreement among the Muslim jurists. Imam Malik reported, for instance, that the Prophet said in the battle of *Badr*,

***I do not ask for the help of a polytheist.*<sup>30</sup>**

Ibn Hazm in his work *Al-Muhali* contradicts this and similar *Hadiths* when he narrated the following evidences:<sup>31</sup>

- 1) The Prophet used Jews in his conquests and allocated them arrows just like the Muslims. Moreover, the Muslim commander Sa'ad Ibn Aby Waqas used Jews in one of his conquests.
- 2) Imam al-Sha'abi was asked about Muslims who used the *Dhimmi*s in their wars. Imam al-Sha'abi answered: "I have witnessed Muslim rulers who would use adherents of these two religions. They would share (the booty) with them, and exempt them from their tributes.

Similarly, Imam al-Shafei'i had made a clear dividing line in this theme when he said,

*What is narrated is that the Prophet only used Muslims in the battle of Badr. He refused the help of the non-Muslims because at that time he was in the position to decide to use the non-Muslims or not. However, this was abrogated when the Prophet, after two years, used a number of Jews from Banu Qayniqa' and [later] in the battle of Hunayn when he sought the help of the polytheist Safwan Ibn Umayyah.<sup>32</sup>*

<sup>29</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawiyah*, Vol. IV, Matba'at al-Halabi, Cairo, 1955, p. 67.

<sup>30</sup> Ibn Majah, Muhammad Ibn Yazeed, *Sunan Ibn Majah*, Vol. II, Dar Ehya'a al-Kutub al-Arabiyyah, Cairo, 1987, p. 100.

<sup>31</sup> Ibn Hazm, Ali Ibn Ahmed, *Al-Muhali*, Vol. VII, Dar al-Itihad al-Arabi li al-Taba'a, Cairo, 1969, pp. 542-543.

<sup>32</sup> Al-Shafei'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al-Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 261.

It could be argued that the Prophet refused the help of the non-Muslims when he was in strong and military effective. On the face of it, in the previous debate, there is an obvious clash between the *Hadith*, which reported by Imam Malik and the opinion of the jurist Ibn Hazm. This was consistent with the view *Fatwa* of Imam al-Shafei'i who said,

*If the Imam thinks that a non-Muslim is wise and honest with Muslims, and there was a need for him to help the Muslims, then it is permissible. If it is not, then it is prohibited to seek to ally with them (i.e. the non-Muslims).*<sup>33</sup>

This means that the *Imam* is the only one entitled to decide the benefit of an alliance with the non-Muslims. Ibn Hazm argued for alliance with non-Muslims when the Islamic State was strong and militarily effective. However, if the Islamic State in a weak military position, two issues arose (i) seeking a military alliance with infidels against the Muslim rebels; (ii) seeking a military alliance with a non-Muslim political entity/s against another non-Muslim political entity/s.

(i) *Alliance against the Muslims rebels*. Muslim jurists disagreed on this theme. Ibn Taymiyyah and Ibn al-Qayyim and some of the Shafei'ites, on one hand, refused the military help of non-Muslims against the Muslim rebels. The Shafei'ite members declared that: "*Harbis*, *Dhimmis*, and those who must be fought against by Muslims must not be used in war against the Muslim rebels". This was because the status of the *Harbi* is organised under the specific, temporary, *Aman* condition, which does not allow the *Musta'mins* to become involved in any of the affairs of the Islamic State. Under the *Dhimma* treaty which is based on the *Shari'ah* status of *Jizyah*, *Dhimmis* were originally exempt from joining military activities of the Islamic State. If they volunteered for war the *Jizyah* would be dropped automatically.\* However, the Hanafites, on the other hand, permitted the Islamic State to seek military help from non-Muslim individuals or groups.<sup>34</sup> In the words of Abu Muhammad, of the Hanafites,

<sup>33</sup> Al-Khateab, Muhammad, *Mughni al-Muhtaj ila Ma'arefat Ma'ani al-Fath al-Minhaj*, Vol. IV, Matba'at al-Halabi, Cairo, 1958, p. 221.

\* For further details of the statuses of *Harbis* and *Dhimmis*, see chapter IV.

<sup>34</sup> Al-San'ani, Muhammad Ibn Ismael, *Soubul Al Salam*, Vol. IV, Matba'at al-Babi al-Halabi, Cairo, 1985, p. 1767.

*If Muslims are on the verge of death, and were obliged to, without any other way out, it is permissible to resort to mercenaries and be defended by Harbis and Dhimmis. Just as long as Muslims are sure they adhere to (the teaching of) their religions, and do not harm a Muslim, a Christian, or Jewish soul, property or honour unjustly. This is evident in the Qur'an: "He details to you what has been prohibited for you except what you have been forced to". This is general to everyone obliged to unless a text or consensus forbids it. If a Muslim knows, individually or in a group, that whom he called to his aid Harbis or Dhimmis or mercenaries are harming the Muslims or Dhimmis unjustly, he is forbidden to use their help even if he is to die. Muslims should surrender to God's will and obey even if they lose their lives and their properties. They are to fight to the death in order to die as a dignified martyr.<sup>35</sup>*

Hence, it could be argued that the Islamic State could recognise that *Dhimmis*, *Harbis*, individuals or groups of mercenaries and others of whom they asked for aid, are supporting and not harming Muslims. In the history of Islam, there are countless examples of non-Muslims who have supported the Islamic State with arms in time of war.

Among the examples of Muslims receiving military support or in alliance with non-Muslims are the following: the Banu Tay's participant in the battle of the bridge *Al-Jisr* under the leadership of al-Muthana; in the battle *Al-Buwaib* the Christian tribe of Banu Taghlib joined the war on the side of the Muslims. A member of the tribe killed the commander of the Persian army.<sup>36</sup> It may be concluded that the Islamic State is permitted to ally with non-Muslims against Muslims challenging or rebelling against its authority.

(b) *Alliance with a non-Muslim polity against another non-Muslim political entity.* Muslim jurists disagree on this point and have divided into two groups. The first group, including Imam Ahmed Ibn Hanbal and jurist al-San'ani, refused to accept such an alliance, citing the following Prophetic *Hadiths* and *Qur'anic* verses in support for their case. The *Qur'anic* verses

يا أيها الذين آمنوا لا تتخذوا اليهود والنصارى أولياء بعضهم أولياء بعض ومن يتولهم

<sup>35</sup> Al-Ghazhban, Monear, *Al-Tahalof al-Siyasi fi al-Islam*, 2<sup>nd</sup> Edit., Dar al-Salam, Cairo, 1988, pp. 167-168.

<sup>36</sup> Azam, AbdulRahman, *Al-Risalah al-Khalidah*, 1<sup>st</sup> Edit., Jordanian Ministry of Education, Aman, 1975, p. 211.



منكم فإنه منهم إن الله لا يهدي القوم الظالمين. (المائدة: ٥١)

O ye who believe! Take not the Jews and the Christians for your friends and protectors; they are but friends and protectors to each other; and he among you that turns to them (for friendship) is of them; verily Allah guideth not a people unjust. (5: 51)

يا أيها الذين آمنوا لا تتخذوا بطانة من دونكم لا يألونكم خبالا ودوا ما عنتم قد بدت البغضاء من أفواههم وما تخفي صدورهم أكبر قد بينا لكم الآيات إن كنتم تعقلون . (آل عمران: ١١٨)

O ye who believe! Take not into your intimacy those outside your ranks: they will not fail to corrupt you. They only desire for you to suffer: rank hatred has already appeared from their mouths: what their hearts conceal is far worse. We have made plain to you the Signs, if ye have wisdom. (3: 118)

يا أيها الذين آمنوا لا تتخذوا عدوي وعدوكم أولياء تلقون إليهم بالمودة وقد كفروا بما جاءكم من الحق يخرجون الرسول وإياكم أن تؤمنوا بالله ربكم . (المتحنة: ١)

O ye who believe! Take not my enemies and yours as friends (or protectors), offering them (your) love, even though they have rejected the Truth that has come to you, and have (on the contrary) driven out the Messenger and yourselves (from your homes), (simply) because ye believe in Allah your Lord. (60: 1)

And the Prophetic *Hadith*

*... no alliance in Islam.*<sup>37</sup>

And

*I do not ask for the help of a polytheist.*<sup>38</sup>

Against these Prophetic *Hadiths*, it is clear that other *Hadiths* provide strong evidence between Muslims and non-Muslims, and these may have been ignored by the first group. Imam al-Bukhari narrated that,

**A'asem narrated: I said to Anas Ibn Malik: "Did you reach you that the Prophet said: "There is not alliance in Islam" Anas said: "The Prophet made an alliance of brotherhood between the Quraishs [Muhajerean] and the Ansar in my house".**<sup>39</sup>

He also narrated that the Prophet said,

**Allah may support this religion (i.e. Islam) even with an evil**

<sup>37</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. I, Dar al-Ma'aref, Cairo, 1980, p. 600.

<sup>38</sup> Al-San'ani, Muhammad Ibn Ismael, *Soubul Al Salam*, Vol. IV, Matba'at al-Babi al-Halabi, Cairo, 1985, p. 1767.

<sup>39</sup> Matraji, Mahmoud, *Translation of Saheh Al-Bukhari*, . Vol. VIII, Dar Al-Fikr, Beirut, 1993, p. 35.

**wicked man.**<sup>40</sup>

And that he also said,

**Allah may back up this religion by non-Muslims nations.**<sup>41</sup>

Imam al-Termedhy confirmed this when he narrated that Prophet Muhammad said,

**Fulfil the alliance of Jaheliyah, it adds to Islam power, and do not conclude alliance in Islam.**<sup>42</sup>

According to al-Termedhy, **do not conclude alliance in Islam** meant that the Prophet stressed that the brotherhood of Muslims is stronger than military coalitions or alliances.<sup>43</sup> However, Islam does not deny the objectives for which alliances are concluded, as long as these objectives achieve dignity and protect the virtue of mankind. The Prophet praised some alliances that were known in the *Jaheliyah*, particularly, the *al-Fodhoul* alliance. The story of this alliance was narrated in Ibn Hisham's work *al-Syrah al-Nabawyah* as follows,

*It was called for it in Makkah at the time of Gerhem, and concluded by persons all of them had the name of Fadhl: Al-Fadhl Ibn al-Hareth, Al-Fadhl Ibn Weda'ah, and Al-Fadhl Ibn Fodhalah. The Quraish tribe held a meeting of this group at the house of Abdullah Ibn Gad'an, one of their notables, in Makkah after the number of their leaders increased. This caused enmity to grow, so members of the meeting decided to form an alliance and considered Makkah to be sacred and a place of safety for the people. Raiding, fighting, plundering and unfairness are not allowed in Makkah. They agreed on removing grievances and giving back the rights to the oppressed.*<sup>44</sup>

Prophet Muhammad attended a meeting of the *al-Fadhl* alliance. Shortly after he had been honoured with the ministry of the Prophethood he witnessed this league and commented on it with very positive words. The Prophet said,

<sup>40</sup> Ibid., Vol. IV, p. 245.

<sup>41</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. Dar al-Ma'aref, Cairo, 1980, Musnad al-Basriyyen.

<sup>42</sup> Al-Termedhi, Muhammad Ibn Easa, *Sunan al-Termedhi*, Al-Maktabah al-Islamiyyah, Beirut, 1983, Kitab al-Siyar.

<sup>43</sup> Ibid.

<sup>44</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. I, Matba'at al-Halabi, Cairo, 1955, p. 92-93.

***I attended the Fodhoul alliance at the house of Abdullah Ibn Gad'an, I do not like this alliance to be nullified even in return for the means of an easy life. However, if I were to call for similar alliance in Islam I would accept it.***<sup>45</sup>

The *al-Fodhoul* alliance, moreover, existed in the Islamic history for a long time after the death of Prophet Muhammad. Ibn Hisham in his book narrated the following event,

*There was a financial dispute between al-Hussein Ibn Ali Ibn Abu Talib –the grand son of the Prophet- and al-Walid Ibn 'Utbah Ibn Abu Sofyan the governor of Madinah. The latter used his authority to discriminate against the former. Al-Hussein then requested from al-Walid to treat him fairly, or he will take his sword and call for al-Fodhoul alliance in the Mosque of the Prophet. Abdullah Ibn al-Zobear, al-Mosawar Ibn Noafal al-Zohri and AbdulRahman al-Tayimi. As a result, al-Walid Ibn Abu Sofyan did justice to al-Hussein.*<sup>46</sup>

If this event, as described, is analysed, the following salient facts emerge (a) Those who supported al-Hussein's call were those who lead the tribes which founded *al-Fodhoul* alliance. (b) Al-Hussein's call for *al-Fodhoul* alliance was not of *al-Jahiliyyah* for two reasons: (i) if it had been for *al-Jahiliyyah* call, his Umayyads enemies, would use it against him and his allies, and there is no evidence that this ever took place; (ii) if it had been for *al-Jahiliyyah* call, Muslim jurists would not hesitate to condemn such a *Jahiliyyah* call and there is no jurists' condemnation recorded.

Various jurists mentioned that the cause for the Prophetic *Hadith* "***I do not ask for the help of a polytheist***" was the aim to recruit the polytheists to convert to Islam. In the word of jurist al-San'ani,

*When the Prophet rejected the help of the polytheist person in Badr battle, he [the Prophet] perceived that the polytheist desired to embrace Islam and was seeking for a cause to do so. The Prophet's refusal impelled him to embrace Islam.*<sup>47</sup>

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid., Vol. I, pp. 124-125.

<sup>47</sup> Al-San'ani, Muhammad Ibn Ismael, *Soubul Al Salam*, Vol. IV, Matba'at al-Babi al-Halabi, Cairo, 1985, p. 1767.

Seeking alliance with non-Muslims, or their participation in the Islamic army, is based on Muslims' need and as estimated by the *Imam*, who is the only one entitled to consider the *Ummah's* interest and wise policy according to the jurists.<sup>48</sup>

On the other hand, in answer to the *Qur'anic* verse (5: 51) it could be said that this verse is not unconditional and to be applied to every non-Muslim. To interpret it as such contradicts the injunctions of the *Qur'an* which enjoin affection and kindness to the good and peace-loving people of every religion, as well as the verses which permit Muslim males to marry the women of the *People of the Book*. Allah says about Christians that,

... ولتجدن أقربهم مودة للذين آمنوا الذين قالوا إنا نصارى ذلك بأن منهم قسيسين  
ورهبانا وأنهم لا يستكبرون . (المائدة: ٨٢)  
... and nearest among them in love to the Believers wilt you find  
those who say, "we are Christians". Because among these are  
men devoted to learning. And men who have renounced the  
world, and they are not arrogant. (5: 81)

The *Qur'anic* verses cited earlier (3:118 & 60: 1) were revealed in connection with those people who were hostile to Islam and made war upon the Muslims. Al-Tabari, for instance, explained in his book *Jami' al-Bayan 'an Ta'weal al-Qur'an*, the meaning of the verse (3:118)

*This verse was revealed for a group of Muslims in Madinah during the time of the Prophet. They were associated with some Jews [of Madinah], their pre-Islamic hypocritical allies. Before the advent of Islam the Muslims had considered them as their intimates because of their friendly and very close relationship. Allah forbade the Muslims to continue in that friendship or even to consult the Jews in any of the Muslims' affairs.*<sup>49</sup>

As for the verse (60: 1), al-Tabari said,

*This verse was for the polytheists and pagans of the Quraish who*

<sup>48</sup> Al-Sarkhasi, Muhammad Ibn Ahmed, *Al-Mabsut*, Vol. X, Matba'at al-Sa'adah, Cairo, 1931, p. 23 & Al-Ghazali, Muhammad Ibn Muhammad, *Al-Waseat*, Vol. VII, Matba'at al-Halabi, Cairo, p. 143 & Al-Mawardi, Ali Muhammad, *Al-Hawi al-Kabir*, Vol. XIX, Maktabat al-Azhar, Cairo, p. 37 & Al-Shafel'i, Muhammad Ibn Idris, *Al-Umm*, Vol. IV, Al-Matba'ah al-'Amereyah, Cairo, 1322 AH, p. 117.

<sup>49</sup> Al-Tabari, Mohamad Ibn Jarear, *Jami' Al-Bayan 'An Ta'weal Al-Qur'an*, Vol. IV, Matba'at al-Halabi, Cairo, 1968, pp. 80-84.

*had driven out the Prophet and his followers from Makkah.*<sup>50</sup>

Accordingly, those al-Tabari mentioned are those whom the Muslims are forbidden to support or assist – including being their ally – and also not to entrust them with secrets at the expense of their own religion and community. The characters of such people are that they conceal great enmity and hatred for the Muslims in their hearts and their tongues express some of this hostility. These are the people with whom Islam prohibited any sort of friendship and alliance. However, the *Qur'an* has not dismissed the hope of possible reconciliation. The *Qur'an*, moreover, did not declare complete and utter disappointment in them, but encouraged Muslims to entertain the hope that better relations could be established with them; in effect, a statement of assurance that hostility and deep hatred would be changed to be friendship. In the *Holy Qur'an*,

عسى الله أن يجعل بينكم وبين الذين عاديتم منهم مودة والله قدير والله غفور رحيم .  
(الممتحنة: ٧)

It may be that Allah will establish friendship between you (the Muslims) and those whom ye (now) hold as enemies. For Allah has power (over all things); and Allah is oft-Forgiven, Most Merciful. (60: 7)

Islam, then, does not reject alliances between Muslims and non-Muslims, even of the *Jaheliyah* kind. More evidence can be given for the permissibility of such *Jaheliyah* alliances. An example is *al-Mottaybean* alliance which called for virtue and the implementation of justice in the *Jaheliyah* time. The Prophet Muhammad is reported to have said,

***I attended with my uncles al-Mottaybean alliance when I was a youth [before he had been honoured with the Ministry of the Prophethood] I would not like to terminate it even if it is for the most valuable of the camels [Homr al-Ne'am].***<sup>51</sup>

Ibn Kathear explained the reason behind that confederacy when he mentioned that,

*It was the conflict between Banu Abdumanaf and Banu Abduldar to provide protection, service and support for the visitors of*

<sup>50</sup> Ibid., Vol. XXVIII, pp. 73-74.

\* These are red camels. In the past these kinds of camels were the most expensive and only wealthy people owned them.

<sup>51</sup> Ibn Hanbal, Ahmed Ibn Muhammad, *Musnad al-Imam Ahmed Ibn Hanbal*, Vol. II, Dar al-Ma'aref, Cairo, 1980, p. 404 & Ibn Kathear, Emad Al-Dean Ismael, *Al-Bidaya wa al-Nihaya*, Vol. II, Maktabat al-Ma'arif, Beirut, 1980, pp. 291-293.

*Makkah. Therefore, the Quraish broke up to two sides, and pledged to assist and support one side against the other. The war was about to erupt before their masters favoured reconciliation and concluded a pledge to prevent bloodshed. It was called this [al-Mottaybean alliance] because while concluding, they brought a bottle of perfume and put it in the K'abah; and everyone dipped his hand in it declaring and pledging support.*<sup>52</sup>

These *Hadiths* about *Jahiliyyah* alliances are evidence of Muslims in alliance with non-Muslims. They prove that such alliances were permissible because they were supported by the presence of the Prophet and his declaration he would never violate such alliance when he said “**if I were to call for similar alliance in Islam I would be accepted**”.

Moreover, the *Shari'ah* permits Muslims to be under the protection of non-Muslims if they are weak. In the early Islamic history, the Prophet himself sought such protection. In his work “*The Sealed Nectar*” SafiulRahman al-Mubarakphori, for instance, mentions the following event,

*When he (the Prophet) was a short distance from Makkah, he retired to Hira' Cave. Whence he despatched a man from Khuza'ah tribe to Al-Akhnas Ibn Shuraiq seeking his protection. The latter answered that he was Quraish's ally and in no position to offer protection. He despatched the messenger to Suhail Ibn 'Amr, but to no avail: Al-Mut'im Ibn 'Adi, a notable polytheist in Makkah, volunteered to respond to the Prophet's appeal for protection. He asked his people to prepare themselves fully armed and then asked the Prophet to enter Makkah. The Prophet entered Makkah directly to the Holy Sanctuary . . . Abu Jahl asked Mut'im if he is protector or conversion, the latter replied “it was merely protection”. The Prophet never forgot Mut'im's favour. At the conclusion of the battle of Badr, he declared that “if Mut'im had been still alive and asked for the release of the Quraishite captives, I would not deny him his request”.*<sup>53</sup>

Other evidence of Muslims receiving assistance from non-Muslims when they were in a weak situation was the situation immediately after the Emigration. The Prophet's treaty with the Jews of Madinah, which was later called the *Constitution of*

<sup>52</sup> Al-Halaby, Ali Ibn Burhan al-Din, *Al-Syrah al-Halabiyah*, Vol. I, Dar al-Ma'arif, Beirut, 1980, pp. 213-214.

<sup>53</sup> Al-Mubarakphori, SafiulRahman, *The Sealed Nectar, Biography of the Noble Prophet*, Maktaba Dar us Salam, Riyadh, 1995, pp. 128-129 & Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. I, Matba'at al-Halabi, Cairo, 1955, pp. 419-

*Madinah*\* has several clauses in which the Jews agree to assist the Muslims, despite the neighbourly protection given to the former by the latter.

- *The Jews bear expenses along with the believers so long as they continue at war.*
- *It is for the Jews to bear their expenses and for the Muslims to bear their expenses. There is to be (mutual) 'help' between them against whoever wars against the people of this document. Between them there is to be (mutual) giving of advice, consultation, and honourable dealing not treachery. A man is not guilty of treachery through (the act of) his confederate. 'Help' is (to be given) to him who is wrong.*
- *The Jews bear expenses along with the believers so long as they continue at war.*
- *Between (the people of this document?) is (mutual) 'help' against whoever attack Yathrib suddenly (without provocation?).*<sup>54</sup>

The *Constitution of Madinah* is thus incontrovertible evidence of alliance between the Muslims and their non-Muslims counterpart by which the latter undertake to assist the former. If it is objected that the *Constitution* was a *Dhimma* contract, it should be pointed out that *Dhimma* contracts did not exist at this time. The *Jizyah* tribute and *Dhimma* contracts were legislated after the 6<sup>th</sup> year of the *Hijrah* according to the Muslim jurists, whereas the Prophet's treaty with the Jews at Madinah was in the first year of *Hijrah*. Furthermore, the treaty contained terms that are absent from the *Dhimma* contract, such as military support for the Muslims, while the *Dhimma* contract obligates Muslims to protect the *Dhimmis* and not the opposite.

Jurist al-Shawkani in his work, *Nail al-Awtar*, argued that after an initial prohibition, alliances became permissible Islam under certain conditions,

*Alliance with non-Muslims was prohibited, and later was permitted if they are controlled by the Imam, who can measure the needs of his Ummah, and the only one who has the decision*

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422 & Ibn Al-Qayyim, Shams Al-Dean Muhammad Ibn Bakr, *Zad al-M'ad*, Vol. II, Al-Matba'ah al-Masriyah, Cairo, 1914, pp. 46-47.

\* See appendix I.

<sup>54</sup> Watt, W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968, p. 131-133 & Khadduri, Majid, *War and Peace in the Law of Islam*, 2<sup>nd</sup> Edit., John Hopkins Press, Baltimore, 1979, p. 208.

*to ally with non-Muslims.*<sup>55</sup>

There is documentary evidence that in the second year after the *Hijrah* the Prophet contracted treaties of alliance and mutual assistance with two pagan tribes near Yanbu on the coast of the Red Sea called *Banu Ghifar* and *Banu Mudlig* and their allies, the *Banu Dhumrah*. The treaties are similar in their main parts,

*Their lives and money are safe. Help is assured them if anybody attacks them aggressively. If the Prophet requires their help, they will help him, and it is incumbent upon them to support him except in wars waged for religion. This is valid as long as a sea wets the shells.*<sup>56</sup>

In its normal, natural meaning, the last sentence quoted above indicates the treaty was of permanent duration. The treaty had nothing to do with either the sea or with shells, it was in essence a treaty of military alliance, and so it seems reasonable to infer that this colourful provision was intended to show that the treaty was intended to be permanent, not temporary. However, this is a wholly speculative interpretation, and is not consistent with the argument advanced in chapter V that all treaties of the Prophet were temporary, except the *Dhimma* treaty, which was permanent. Despite the protection given to these tribes by the Islamic State and their exclusion from *Jihad*, under the treaty terms, neither was a *Dhimma* treaty because there is no mention of *Jizyah* payment in return for protection. The status of this treaty is explored further below in conjunction with a similar treaty concluded between the Islamic State and the Banu al-Ashja' tribe against the Quraish.

A leading contemporary jurist-scholar, Yusuf al-Qaradawi, in his pioneering book *The Lawful and Prohibited in Islam* argues for military alliances with non-Muslims in parallel to their treaties over technical matters. In the latter case, it is clear that the Muslims need to seek help in these matters to remedy their weaknesses and aim for self-sufficiency. In the case of military alliances the Muslims' need for assistance is implicit. Al-Qaradawi writes,

*There is no harm done if Muslims, at either the private or*

<sup>55</sup> Al-Shawkani, Muhammad Ali, *Nail al-Awtar*, Vol. IX, Matba'at al-Halabi, Cairo, 1952, p. 89.

<sup>56</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 267.



*governmental level, seek help from non-Muslims in technical matters which have no connection with the religion – for example, in medical, industry, or agriculture. At the same time it is of course extremely desirable that Muslims become self-sufficient in all such fields . . . Going considerably beyond this, scholars say that it is permissible for the leader of the Muslims to seek help from non-Muslims, especially the People of the Book, in military matters, and to give them an equal share of the spoils with the Muslims.*<sup>57</sup>

#### 7.4) Aims of alliance

Historically, it can be found that the Islamic State has derived benefits from alliances which would be denied to it if it acted independently. Usually, states can obtain different advantages from being allied with different powers of different size. Why then do Muslims choose to undertake or shun external commitments? And why do they elect to join a particular alliance in preference to another? There is a wide range of objectives that persuaded the Islamic State to join alliances. After reviewing the Prophet's treaties, it can be found that there are two important elements:

1) *Accretion of the Islamic power.* Traditionally, the significant value of alliances has been the degree to which a state increases another's power through the alliance. When the Prophet concluded his treaty with the Jews and the Christians of Madinah (*the Constitution of Madinah*) he aimed to increase the power of the Muslims against the Quraish, the main enemy of the first Islamic State. That was because the Muslims alone lacked the means to confront the Quraish or its allies. This notion underlies the historic operation of the balance of power, where a combination of Muslims and non-Muslims joined together against other non-Muslim groups to prevent either one or the other from gaining a hegemonic position. The Muslims position is not to defend or restore the balance of power as such: it is to enhance its own position within it. John Spanier has noted the connection between alliances and the politics of maintaining a balance of power. Spanier remarks,

*Alliance is a major technique in the balance of power politics*

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<sup>57</sup> Al-Qaradawi, Yusuf, *The Lawful and the Prohibited in Islam*, International Islamic Federation of Student Organization, Kuwait, 1989, p. 342.

*engaged in by states preserving common threat.*<sup>58</sup>

An example of what Spanier means here was the alliance between the Prophet Muhammad, as head of the Islamic State, with the leader of Banu al-Ashja', according to Watt, against the Quraish. The text of the treaty was cited by W. M. Watt as follows:

*These are the (the terms) on which Nu'aym Ibn Mas'aud Ibn Rukhaylah al-Ashja'i made confederacy (halafa); he made confederacy with him on the basis of help and counsel (nashr, nashah), so long as [mount] Uhud is in its place as long as the sea wets a piece of wool. Ali wrote it.*<sup>59</sup>

Taking the final sentence of the treaty in its normal meaning it conveys the idea that the treaty was intended to be permanent, like the alliance and mutual assistance treaties with the two pagan tribes of Yanbu mentioned earlier. As in that case, the terms of the treaty show that it was not a *Dhimma* agreement, because there was no mention in the text of the treaty of *Jizyah* payment. Other evidence seems to confirm this judgement. The phrase, "as long as the sea wets a piece of wool", was also used in an earlier alliance treaty in conjunction with other similar expressions like, "as long as the sun rises on [mount] Thabia"; "as long as people join the Umra [lesser] pilgrimage to Makkah"; "as long as [mount] al-Khshaban remains in place"; "as night follows day"; "as long as a camel takes a rest", to reinforce the words of the alliance treaty that it was "an alliance for ever and ever". These expressions are taken from the alliance treaty between AbdulMutalib, the Prophet's grandfather, with the Khuza'ah tribe. "As long as the sea wets a piece of wool" in this treaty thus meant 'forever' and it is reasonable to assume it had a similar meaning in the alliance for (military) help and counsel concluded by the Prophet with the Banu al-Ashja' tribe.<sup>60</sup>

2) *The Protection of strategic interests of the Islamic State.* The kind of strategic interests which the Islamic State may seek to secure through an alliance can most easily be seen in the *Constitution of Madinah*. Several provisions of the alliance

<sup>58</sup> Spanier, John., *Games Nations Play*, Nelson, London, 1972, p. 191.

<sup>59</sup> Watt, W. Montgomery, *Muhammad at Medina*, Oxford University Press, London, 1956, p. 357 & Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 286.

<sup>60</sup> See the text of the treaty in the work of Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 274.

promote the internal security of the Islamic State and its domination. Those treaty articles which are most relevant to these strategic interests were:

- *Any dispute or quarrel between the parties of this agreement which may lead to an unfortunate result, shall be referred to Allah and Muhammad;*
- *The interior of Yathrib will be sacred to the possessors of this document;*
- *No protection is to be given (in the name of the family) except by the permission of that family;*
- *Each party shall have his share from his own side;*
- *None of the Jews will leave the territorial jurisdiction of the Islamic State without the permission of Muhammad.\**

A second group of strategic interest of the Islamic State which the alliance served were in the political, military and financial spheres. The more important of these treaty articles were:

- *If the Jews were invited to conclude peace, they must adhere to peace with the Muslims. If they were invited by the Muslims to the same, they will have the same obligations.*
- *The Jews shall contribute to the cost of battle with the believers as long as they fight;*
- *Never shall a polytheist grant Quraish goods or persons nor shall he prevent a believer from an attack on Quraish.*

Military aid to Muslims was not confined to the *Constitution of Madinah* treaty. It was also the chief objective of the Prophet's treaty with the Christians of Najran in the South of Arabia. According to the terms of that treaty,

*The people of Najran are expected to lend the Muslims shields, horses, animals and other objects . . . If there was war in Yemen and Ma'arra, they must supply clothes for thirty persons, thirty horses and thirty camels. If some of what was lent was destroyed or perished, the people of*

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\* It has to be mention, in connection with this regard, that there are various interpretations to the *Constitution of Madinah*, such interpretations have mistakes in the English meaning, among these mistakes is the interpretation of Majeed Khaduri for this article when he translated the Arabic text "وأنه لا يخرج منهم أحد إلا بإذن محمد" as: "No Jew is allowed to join [the Muslims in battle] without the authorization of Muhammad." Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 208.

*Najran shall be compensated.*<sup>61</sup>

This Islamic conception of the strategy of alliance is parallel to the way in which Western scholars have approached the subject of alliances. Hans Morgenthau, for example, draws attention to the fact that, typically, an alliance is against a third party, just as the Najran alliance was directed against the people of Yemen and Ma'arra.

*A typical alliance is directed against a specific nation or group .  
.. which threatens the community of interests.*<sup>62</sup>

In his book *International Politics*, G. R. Berridge identified the essential feature of a treaty of alliance which was clearly present in the Constitution of Madinah.

*Alliance is a contractual commitment entered by two or more states [or a state and a religion group or groups of people] to engage in co-operative military action in the event of an external or internal attack in specified circumstances. It is the one way in which a state might maintain military commitment to other states, and the entente is an alternative.*<sup>63</sup>

George Liska in his work *Alliance and the Third World* draws attention to other purposes in an alliance other than mutual military assistance.

*The aim of great power of entering into an alliance is to disguise control over the lesser ally's actions. The actual purposes of such an alliance may be as varied as hegemonial dominance, restraint to foster equilibrium and peace, and surveillance to guard against disastrous ventures or surprises.*<sup>64</sup>

The *Constitution of Madinah* established the Muslims in a hegemonic position in relation to their Jewish allies, particularly in the neighbourly protection articles and in the article which required the unbelievers to be bound by a treaty that the Muslims had concluded.

- *Whenever (the believers) are summoned to conclude and accept (or live under) a treaty, they conclude and accept it; when in turn they summon (unbelievers) to a similar (treaty), they are bound (to observe it) towards*

<sup>61</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 179.

<sup>62</sup> Morgenthau, Hans J., *Politics among Nations*, 4th Edit., Alfred A. Knopf, New York, 1967, p. 176.

<sup>63</sup> Berridge, G. R., *International Politics*, Wheatsheaf Books, Sussex, 1987, pp. 155-157.

<sup>64</sup> Liska, George., *Alliances and the Third World*, John Hopkins Press, Baltimore, 1968, p. 32.

*(the unbelievers) except in the case of those who fight about religion. (incumbent) on every man is their share from their side which is towards them.*<sup>65</sup>

Despite securing Muslim superiority in the Islamic State, the main purpose of this alliance and of others concluded by the Prophet was to achieve objectives that could only be obtained by securing the military assistance of non-Muslims.

It can be concluded that in the early period of the Islamic State when Muslims realised that they cannot by themselves achieve their objectives, they sought to construct either permanent or temporary military alliances. Thus, they relied upon, and made commitments to others who faced similar problems or who shared similar objectives. These alliances would normally be implemented in two ways: (i) by providing troops and military assistance such as weapons; (ii) by offering other support, such as spying. The second form of implementation of an alliance shows that the Islamic State does not conclude alliances only when its military weakness consists in lack of troops or military equipment: shortage of military information may also be a form of military weakness.

There are numerous examples of such military alliances with non-Muslims concluded during the period of the Islamic wars of conquest in the time of the four Orthodox Caliphs. It has been narrated, for instance, that during the time of the Caliph Umar I, the Muslim commander Nu'aim Ibn Muqrin concluded a treaty with the people of Raiy in Central Asia. Under the terms of the treaty the people of Raiy undertook to act in good faith, serve and guide the Muslims in that territory, never to act faithlessly, and never to help secretly the enemies of the Muslims.<sup>66</sup> Another example, also in the period of the Caliphate of Umar I, was the treaty between the Muslim commander Habib Ibn Maslam al-Fihri and the people of Al-Gargomah, in Syria. The people of that territory asked the Muslims to exclude them from paying *Jizyah* in return for providing help and logistical support to the Muslim army.\* They pledged their help and support to the Muslims in their wars, by spying on all military activities of the Romans in that territory and giving that information to the Muslims. They also

<sup>65</sup> Watt, W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968, p. 133.

<sup>66</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. II, Dar al-Ma'arif, Cairo, 1962, p. 537.

pledged to share with the Muslims their captured booty if they participated in the Muslim wars of conquest.<sup>67</sup> Still, another example is the treaty which was concluded during the time of the Caliph 'Uthman between Mu'awiyah Ibn Abu Sofyan, an army commander, and the people of Cyprus. The treaty stipulated that the Cypriots would have to inform the Muslims if they recognised any anti-Muslim military activities by the Romans.<sup>68</sup>

Finally, it has to be noticed that when Muslim jurists examined and discussed the purposes of the Islamic State entering into an alliance with non-Muslims they never considered the aims and objectives of the other party/s. Although these factors may have been irrelevant in classical *Fiqh*, the purposes for which non-Muslims allied themselves to the Islamic State seem to have been for protection or to gain military and financially benefits. Non-Muslims reasons for concluding an alliance with the Islamic State could be seen when *Khuza'ah* tribe sought protection from the Prophet under an earlier *Jahiliyyah* alliance with his grandfather. The Prophet expressed his ignorance of this alliance, but honoured it by affirming it remained in force with the Islamic State. In his work Ibn Hajar remarked,

*The origin in the Prophet's loyalty to Banu Khuza'ah was that Banu Hashim [the tribe of the Prophet] and Banu Khuza'ah were allies in the Jahiliyyah and continued their alliance after Islam . . . Despite that there were Muslims in Khuza'ah when the Quraishs attacked, but the origin of alliance had been before that time.*<sup>69\*</sup>

### 7.5) Methods of Alliance

The alliances of the first Islamic State were organised and co-ordinated in a variety of different ways. This section will examine the methods which were commonly

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\* Modern term for such helping is "logistic supplies" which contain housing, catering and other sort of services which provide to armies, and excluding any sort of military weapons or reservoir.

<sup>67</sup> Al-Belathi, Ahmed Ibn Yahya, *Kitab Fotoh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, p. 159.

<sup>68</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. II, Dar al-Ma'arif, Cairo, 1962, p. 605.

<sup>69</sup> Al-'Sqalani, Shehab Aldean Abu Alfadhl, *Fath al Bari bi Sharh Saheeh Al Bukhari*, Vol. V, Matba'at al-Halabi, Cairo, 1378 AH, pp. 337-338.

\* The Prophet's commitment to the Jahiliyyah alliance of his grandfather bears out the typical feature of alliances, namely, their contractual commitment. G. R. Berridge delineated this commitment when he wrote "Alliance is a contractual commitment entered into by two or more states to engage in co-operative military action in the event of an external or internal attack in specified circumstances. It is the one way in which a state might maintain military commitment to other states, and the entente is an alternative. Berridge, G. R., *International Politics*, Wheatsheaf Books, Sussex, 1987, pp. 155-157.

adopted in those alliances, which might serve as useful examples for the Islamic theory of alliance. However, it has to be noticed that some of the Prophet's and the Caliphs' truce treaties were characterised with a kind of alliance. These methods could be summarised as follows:

1) *Commitment of allies*. This is through an agreement, written or not, by which when one ally is attacked, the other ally will automatically or after consultations move against the attackers, thereby implementing the alliance. The treaties between the Prophet and the Khuza'ah and the Banu Dhumrah tribes are examples of such an alliance. In fact, his treaty with the latter was a truce treaty, but it contained an alliance commitment;

*Help is assured them if anybody attacks them aggressively. If the Prophet requires their help, they will help him, and it is incumbent upon them to help him except in wars waged in the name of religion.*<sup>70</sup>

The Prophet was compelled to fight the Quraish because of their responsibility for their ally the Banu Bakr which attacked the ally of the Islamic State, the Banu Khuza'ah tribe, on the terms of his treaty with this tribe.<sup>71</sup> The *Treaty of Joint Defence and Economic Co-operation*, promulgated in 1950 within the Arab League adopted the same method. Article 2 of the treaty, for instance, reads as follows:

*- The Contracting States consider any act of armed aggression made against any one or more of them or against their forces to be directed against them all, and therefore in accordance with the right of legal defence, individually and collectively, they undertake to hasten to the aid of the state or states against which such an aggression is made, and to take immediately, individually and collectively, all means available, including the use of armed force, to repel the aggression and restore security and peace.*<sup>72</sup>

2) *Augmentation of the armed forces*. This method applies when the Islamic State or its ally/allies, are involved in some military operations, with troops, weapons and

<sup>70</sup> Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 267.

<sup>71</sup> Al-Waqidi, Muhammad Ibn Umar Ibn Waqid, *Al-Maghazi*, Vol. II, 'Aalam al-Kotoub, Beirut, 1965, p. 610.

<sup>72</sup> Osmunczyk, Edmund Jan., *The Encyclopedia of the United Nations and International Agreements*, Taylor & Francis, London, 1990, p. 510.

other material from other members, in order to help the troubled ally initiate or conduct military action with or without direct involvement of its allies. The treaty between the Prophet and the Christians of Najran is a clear example. Ibn Hisham, for instance, mentioned,

*The people of Najran are expected to lend the Muslims shields, horses, animals and other objects . . . If there were war in Yemen and Ma'arra, they must supply clothes for thirty persons, thirty horses and thirty camels. If some of what was lent had destroyed or perished, the people of Najran shall be compensated.*<sup>73</sup>

3) *Giving access to territory.* An ally can help its partner by giving a right of passage for troops or by allowing its territory to be used by its ally for military purposes, such as, in the present day, for military bases. An example of such a territory alliance is the treaty between the Muslim commander Suraqa Ibn 'Amr and Shahrabraz, the king of Armenia, by which the king allowed Armenian territory to be used to provide bases for the Muslim army.<sup>74</sup>

4) *Logistical supply.* An ally may supply its military partner with strategic military or civil supplies, when their ally is unable to supply it themselves. An example of such an alliance was the treaty concluded during the time of Caliph 'Uthman between the Muslim commander Mu'awiyah Ibn Abu Sofyan and the people of Armenian in 653 AD. The Armenians were exempted from paying *Jizyah* for three years in return for supplying and catering for 15000 Muslim soldiers. For their part, the Muslims are obliged to support the Armenians and fight for them if they are attacked by the Romans.<sup>75</sup>

Further, there are indirect methods of supporting the military objectives of the ally. These could include the supply of certain non-military resources, such as financial grants and loans, in addition to providing strategic (i.e. economic) information. In modern academic literature, Western scholars have argued extensively on this theme. Bulloch and Morris have pointed out that in many cases, such agreements do not

<sup>73</sup> Khadduri, Majid, *War and Peace in the Law of Islam*, John Hopkins Press, Baltimore, 1979, p. 179.

<sup>74</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. II, Al-Matba'ah al-Hussayniyah al-Masriyah, Cairo, p. 540.

<sup>75</sup> Al-Beladhuri, Ahmed Ibn Yahya, *Futuh al-Buldan*, Maktabat al-Nahdha al-Masriyah, Cairo, 1951, p. 209.



necessarily imply a sort of alliance. They claim that there are many countries, which engage in sales of weapons and military equipment or even the supply of technical officers who are not attached with any political or military conditions.<sup>76</sup> However, George Liska insists that assisting and providing military support to non-aligned states signify a type of alliance. Liska argues,

*Assistance to a non-aligned state may be part of alliance policy. It may be intended to reconcile "neutrals" with the assisting power alliance with another state in the region; or assistance to the non-aligned country may aim at developing it into a power which could help promote security and stability in changed conditions of the future.*<sup>77</sup>

#### 7.6) Elements and requirement of alliance

It has been found out in the definitions of the Western scholars that the alliance parties have to be on the same level, if one party is a state the other should be a state, and the same is true for the political parties or the groups. However, the *Shari'ah* is different from international law in that the parties can be on the same or different levels because there is no distinction between public and private spheres in Islam. Therefore, the Islamic State can conclude an alliance with a group of people, or several individuals, or a nation. The Prophet, for example, allied with the Jewish tribes in the first year of the *Hijrah* to support his new state.\* He (i.e. the Prophet) allied with Safwan Ibn Umayyah, an individual, in the battle of *Hunayn* to support and fight with the Muslims,<sup>78</sup> which could show that the Islamic State has the option to select with whom to ally.

An alliance requires from its creation a basic community of interests between the allies, which does not cover commercial and economic interests alone, but which covers all general interests - as military, political and economic. The Islamic State, therefore, usually constructed military alliances to act as deterrents against those who were making demands against its interests or posing an immediate military threat.

<sup>76</sup> Bulloch, John & Harvey Morris., *The Gulf War*, Methuen London Ltd., London, 1989.

<sup>77</sup> Liska, George, *Nations in Alliance*, John Hopkins Press, Baltimore, 1968, p. 41.

<sup>78</sup> Ibn Hisham, Abd Almalik, *Al-Syrah al-Nabawyah*, Vol. IV, Matba'at al-Halabi, Cairo, 1955, p. 67.

Alliances always add precision, especially in the form of limitation, to an existing community of interests, to general politics and to concrete measures serving them. At the same time, alliances are capable of adding precision and limitation with regard to the prospective common enemy. Moreover, the interests which nations have in common are not typically so precise and limited as to geographic region, objective and appropriate politics. Hence, even if mutual military needs exist, the creation or maintenance of an alliance often requires a convergence of interest that goes beyond common interests in security.<sup>79</sup> Hans Morgenthau asserts,

*An alliance attempts to transform a small fraction of the total interest of the contracting parties into common policies and measures. Some of these interests are irrelevant to the purpose of the alliance, some support them, and others diverge from them.*<sup>80</sup>

### 7.7) Disintegration of alliance

Alliance, as with any other treaty, comes under the Islamic *Shari'ah* which organises all aspects of Muslims affairs. Therefore the same causes which terminate any treaty can terminate the alliance treaty. However, in Islamic history, there was one main cause which led to disintegration all military alliances between the first Islamic State and other nations, that was the violation of the main conditions of the alliance.<sup>81</sup>

Based on the assumption that *Shari'ah* insisted that Muslims have to be honest, and fulfil their engagements, alliances on the Muslims side was obviously durable and during the time of the Prophet none no alliance contracted by him was terminated by the Islamic State. Treaties only terminated by non-Muslims by violating their obligations. A clear example is the alliance of the Prophet Muhammad with the Jewish tribe of Banu Quraidhah, when they betrayed their alliance with the Muslims

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<sup>79</sup> Morgenthau, Hans J., *Politics Among Nations*, 4<sup>th</sup> Edit., Alfred A. Knopf, New York, 1967, p. 176.

<sup>80</sup> *Ibid.*, p. 179.

<sup>81</sup> Al-Tabari, Mohamad Ibn Jarear, *Tareikh al-Umam wa al-Muluk*, Vol. II, Dar al-Ma'arif, Cairo, 1962, p. 95.

and intrigued with the enemy during the siege of Madinah.<sup>82</sup>

In conclusion, during the search for disintegration of the alliance amongst the Islamic State and non-Muslims, the author has found that none of the classical Muslim jurists had discussed, on the one hand, the causes which lead to disintegration of alliances between the two parties. On the other hand, they did not formalise any kind of theory which could arrange the military alliance between the Islamic State and the non-Muslims. From these consideration, a theory of Islamic alliance between the Islamic State and non-Muslim entities can be illustrated. The basic element of the alliance is the permission of the *Shari'ah* for alliance between the two parties (i.e. Muslims and non-Muslims), while such an alliance has to fulfil and to meet with the following conditions and objectives:

- It must support and increase the Islamic power, and it must not enable the non-Muslims to control and threaten the high interests of the Islamic State or its power and resources;
- There must be a necessity forcing the Islamic State to seek help or ally with non-Muslims. Under the necessity and in some circumstances, such as weakness of military resources where the Muslims find out that they have to conclude an alliance with unfair and unjust conditions. Consequently, it is permissible to accept these conditions until they achieve their objectives;
- Under the acceptance of an alliance with unfair and unjust, conditions must not include any terms which are prohibited by the *Shari'ah* such as supporting evils and sins;
- The *Imam* is the only one who has the right to decide such necessity;
- In the military field, non-Muslims have to fight separately or under the Muslim commanders, but Muslim troops must always fight under a Muslim commander;
- Alliance should not lead Muslims to accept non-Islamic ideologies in part or as a whole and consider as a denunciation Islam or leads to

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<sup>82</sup> Watt, W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968, p. 22.

harmful effects on Islamic culture;

- Seeking military support or alliance should be first with the People of the Book. However, if it is inapplicable then with any other nations or religious groups under certain conditions;
- Allies parties, Muslims and non-Muslims, have to share spoils equally;
- Non-Muslims have to be trusted by Muslims in order to fulfil the main condition for seeking help from, or allies, with the non-Muslims;
- All terms and conditions of alliances have to be made by the Muslims, but if non-Muslims put their conditions they must conform to the *Shari'ah*;
- Alliance has not to bind the Islamic State with its conditions. The Islamic State has to be free to end its commitment to ally with the non-Muslims at any time if it finds that such an alliance is no longer for its benefit and does not serve its strategic interests. In other words alliance has to be temporary (which is a logical consequence of the necessity condition).

### 7.8) Summary and conclusion

The conclusions reached in this chapter confirm and developed the key finding of chapter III, namely, that the Islamic theory of international relations is based on a distinction between Muslims and non-Muslims. This fundamental dichotomy is reflected in the Islamic theory of alliances. Briefly, there are no legitimate alliances within the *Ummah*, but alliances can be legitimately concluded not merely between non-Muslim states but also between the Islamic State and non-Islamic states or tribes.

In chapter III, it was found that the core meaning of *Ummah* was a nation or community of believers who rejected polytheism in favour of an uncompromising monotheism and among the members of which peace was the ideal norm. The basis of that peace was the idea that all *intra-Ummatic* relations should be fraternal. The principle involved – brotherly relations – appeared to be derived from the *al-Fodhoul* intra-tribal alliance of the *Jahiliyyah* period. It was found that the Prophetic *Hadith*

about the relationship between the Emigrants and the Helpers as “an alliance of brotherhood” and another *Hadith* which explicitly excluded alliances within the *Ummah*, “no alliances in Islam” were the Islamic foundations of this ideal of fraternal and peaceful relations among Muslims. Thus, if some Muslims require military aid and assistance from other fellow Muslims, that help will be directly requested and not be sought through a (prohibited) alliance. The example of Abu Bakr’s request as Caliph to the Yemeni Muslims for military support in the *Jihad* against the Romans was cited in support of the Islamic rule against alliances within the *Ummah*.

In contrast, it was found that there was a consensus among the jurists that the Islamic State is permitted to enter into a military alliance with non-Muslim states or tribes, normally when it is militarily weak through lack of weapons, expertise, military personnel, strategic information and access to territories. Where such military weakness is found the Muslim jurists interpreted the situation of the Islamic State as one of necessity, even if of dire necessity. The Hanafite jurists further argued that such a military alliance must never endanger the Muslims but always be to their advantage on the basis of confirmed *Hadiths*. All Muslim jurists agreed, however, that necessity permitted sinners, the immoral and the dissolute could all be enrolled under the banner of Islam to fight rebels and aggressors against the *Ummah*. Similarly, *Harbis*, *Dhimmis* and immoral Muslims could be enrolled in the war against rebels and aggressors.

One of the hypotheses to be tested in this thesis has been the conventional academic belief that all treaties, including alliances, in Islam are temporary, except for the *Dhimma* treaty which is permanent. In this chapter, an examination of the alliances between the Islamic State and the Banu Ghifar, the Banu Mudlig and their allies the Banu Dhumrah, in addition to the alliance with Banu al-Ashja’ tribe showed clearly that these treaties of alliance were intended to be permanent. This intention was conveyed by such phrases as, “as long as the sea wets a piece of wool” or “as the sea wets the shells”. In short, there can be permanent military treaties of alliance (as well as temporary alliances) in addition to the permanent *Dhimma* treaty.

Despite their extensive discussion of the legitimacy of alliances with non-Muslims, the jurists in fact failed to provide any overall theory of the nature of military

alliances between the Islamic State and non-Muslim political entities. They were concerned to some extent with the purposes of alliances. It was found that the classical Muslim jurists were apparently uninterested in the reasons for non-Muslims becoming allies of the Islamic State since they never examined their motives for concluding an alliance. (They were, however, greatly exercised by non-Muslims terminating alliances by violating or betraying their alliance obligations or intriguing with the enemy of the Islamic State, whereas Muslims were under an Islamic obligation to fulfil them, like all treaties.) However, they gave extensive attention to the examination of the aims, objectives and purposes of the Islamic State in making an alliance with non-Muslims. Altogether, six objectives were identified and analysed: (i) the accretion of Islamic power; (ii) protection of strategic interests; (iii) augmentation of the armed forces; (iv) logistical supplies; (v) indirect support such as financial aid; (vi) access to territory.

In the next chapter (VIII) some of these findings will be applied in a case study of the military alliance of 1990-91 between the Muslim states and non-Muslim states against Iraq, focusing on the legislative side of that alliance according to the Islamic Law. The key difference between this alliance and those considered legitimate by the classical jurists was that in 1990 the enemy state was Muslim, whereas in the classical period it was always a non-Muslim state or tribe.

## CHAPTER VIII

### CASE STUDY: THE MILITARY ALLIANCE OF 1990-91

*The Iraqi Invasion of Kuwait and the Counter Military Alliance*

## **Chapter VIII: Case Study, The Military Alliance Of 1990-91**

- 8.1) Introduction
- 8.2) The military alliance
- 8.3) The *Ummah*'s reaction
- 8.4) *Shari'ah* and Legality of the Iraqi Invasion
- 8.5) 1990 alliance under the Islamic conditions
- 8.6) Summary and conclusion



### 8.1) Introduction

The Iraqi invasion of Kuwait in August 1990 shook up the Islamic world as it has rarely been disturbed before. Old alliances crumbled, new ones were forged and close friends fell out. Fear, anger and bitterness spilled over the Arab and Islamic world after Iraq invaded Kuwait, an invasion, which deeply split the Arab world.

This event came after several rapid shifts in the balance of regional power. During the early 1970s, the region the so-called “the twin pillar” composed of, on the one hand, Iran and Saudi Arabia with their military powers and huge economic resources, two countries which relied heavily upon the United States and Western Europe to give them full military support. On the other hand, there was Iraq, who was considered as a pro-Soviet and linked with Moscow by a military co-operation treaty to arm its military forces with the most intensive Soviet weapons.<sup>1</sup> Therefore, it could be said that the military situation in the region, during that time, was relatively stable where power was distributed equally between the two camps, led by Iraq and Iran who had signed an agreement in 1975 to organise the navigation in Shat al-Arab. This procedure of balance was confirmed by the words of Arnold Wolfers,

*Under normal circumstances, with several nations seeking to maximize their power position through the various methods and techniques of balance of political powers, no one nation gains hegemony, and a precarious equilibrium is maintained.*<sup>2</sup>

However, by the end of the 1970s crucial changes occurred with effect to long-term consequences in the regional balance of power, these are: (i) In 1979 Egypt signed a single peace treaty with Israel, which led to the ostracism of Cairo from the Arab political domain and a freeze in its political relations with, nearly, all Arab states; therefore, the only power which was accessible to supplement the power vacuum was Iraq with its massive military, political and economical power. (ii) The occurrence of the Iranian revolution in 1979, which contributed by sweeping away the Iranian monarchy and replacing it with a revolutionary regime which adopted an extremist and fundamentalist view and was hostile to the West as well as to its Arab

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<sup>1</sup> Ehteshami, Anoushiravan, *War and Peace in the Gulf*, Ithaca Press, Reading, 1991, p. 97.

<sup>2</sup> Wolfers, Arnold, *Discord And Collaboration*, John Hopkins Press, Baltimore, 1962, p. 120.

Gulf States neighbours. That caused a sort of isolation to the new Iranian government, because neither the Arab Gulf States nor the West were willing to co-operate or support it. (iii) The invasion of the Soviet troops in Afghanistan compelled the West to stand impotent, and transformed the region's political landscape yet again.

All these crucial changes prepared an opportunity for Iraq to regain Shat al-Arab waterway, which was believed to have been sign away to Iran in 1975 because Iran's support for the Iraqi Kurds forced Iraq to sign the Algiers Agreement in 1975. In exchange for Iran cutting off aid to the Kurds, the Iraqis conceded to Iranian demands for a revision for their mutual border, especially where it ran down to the Shat al-Arab waterway.<sup>3</sup> Therefore, Iraq in 1980 after a year of the Iranian revolution moved its massive military power to attack the Iranian territories to fulfil a quick victory. However that victory changed to be a war of eight years which effected badly on the Iraqi economic position. Consequently, the conflict bred complex alliances in the region, where the Arab Gulf states supported Iraq; Syria, Libya and Israel, and on some occasions they backed Iran. Therefore, the conflict did not divide neatly along Arab vs. Iranian lines, but an Arab alliance against Arab/non Arab states.<sup>4</sup>

In 1980 six of the Arab Gulf states, Saudi Arabia, Kuwait, UAE, Qatar, Bahrain and Sultanate of Oman formalised the Gulf Co-operation Council (GCC), which is a political and military establishment to counter the threat of the Iraq-Iran war. In this council, the states created a joint defence military power called the Gulf Rapid Deployment Forces located in the north of Saudi Arabia which contained a small contingent of highly trained troops under Saudi command.<sup>5</sup> However, by the end of the Iraq-Iran war in 1988 a change in the balance of power had taken place. Iraq, with its military might virtually intact, emerged as the pre-eminent power in the region. Confident of its power, Iraq flexed its military muscle in Lebanon, and engaged in ominous political rhetoric against the USA, such as the demand in February 1990 that the US withdraw its navy from the Persian Gulf, and Israel, when the Iraqi President threatened in 2 April 1990 to "make fire eat half Israel" if it tries to do anything, like

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<sup>3</sup> McKnight, Sean, Saddam Hussein and the Iraqi Army, in Patrick A. J. Cordingley, *The Gulf War Assessed*, Arms and Armour Press, London, pp. 24-25.

<sup>4</sup> Ehteshami, Anoushiravan, *War and Peace in the Gulf*, Ithaca Press, Reading, 1991, p. 111.

attack Iraq. Finally, Iraq adopted an aggressive stance against its small neighbour, Kuwait, and when all attempts at political extortion ended in an impasse, it resorted to military invasion.<sup>6</sup>

This exposed the weakness of the GCC, despite its Rapid Deployment Force. That resulted in the GCC states seeking military help from the West, and formalising an alliance to counter the Iraqis and liberate Kuwait. This confirmed what has been found out in the balance of power theory, which was mentioned by Gordon Schloming,

*The balance of power refers to a policy of promoting a power equilibrium, in the recognition that unbalanced power is dangerous. Prudent states that are at a disadvantage in the balance of power will (or at least should) form alliances against a potential hegemonic state or take other measures to enhance their ability to restrain a possible aggressor.*<sup>7</sup>

However, the creation of a regional security structure was the most pertinent security issue for the GCC members. Arab brotherhood had not provided enough protection and as King Fahd had observed at the GCC summit in Doha on 24 December 1990,

*We cannot but admit that the Arab order has failed facing up to the disaster that has befallen us, and has contributed only slightly in dealing with it. This order must be revised and reviewed, and perhaps the lesson that we drew from what happened is that co-operation between brothers must be through Arab institutions that work in a sound and scientific way . . . at the forefront of our preoccupation is the establishment of economic co-operation between Arab states.*<sup>8</sup>

It is thus plausible to argue that the Iraqi invasion of Kuwait was a consequence of a disequilibrium in the regional balance of power resulting from various causes, including the Iraq-Iran war with its massive impact upon the Iraqi economy.

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<sup>5</sup> Sandwick, John A., *The Gulf Cooperation Council*, Westview Press, Washington, 1987, pp. 169-173, 193-203.

<sup>6</sup> Pimlott, John, *The Gulf Crisis and World Politics*, in Patrick A. J. Cordingley, *The Gulf War Assessed*, Arms and Armour Press, London, p. 37.

<sup>7</sup> Schloming, Gordon C., *Power And Principle In International Affairs*, Harcourt Brace Jovanovich College Publishers, 1991, p. 83.

<sup>8</sup> Saudi Press Agency (SPA), 24/12/1990.

To this invasion there were three major, but conflicting, responses. The first response was of a group, which included Egypt, Saudi Arabia and Syria at the head of a narrow majority opposed to the Iraqi take-over and committed to reversing it. The second response included such countries as Algeria and Tunisia who chose to adopt a neutral stance; and the third response was that of the PLO, Yemen, Sudan, Mauritania and Jordan which was broadly sympathetic to Iraq. Unfortunately, the failure of the Arab countries to find an Arab solution to the crisis intensified the dispute. In the words of Lawrence Freedman and Efraim Karsh,

*The gap between Saddam and the other Arab leader was simply too wide to bridge, and the two parties realized this fact. An immediate Iraqi withdrawal from Kuwait was an impossibility. An eventual evacuation depended on the readiness of other leaders to sacrifice the family of al-Sabah and to acquiesce in Iraqi hegemony over Kuwait.*<sup>9</sup>

What made clear that the divisions had been deep and enduring was a decision taken by a majority of just 12 of the 20 members of the Arab League who attended an emergency Arab summit on 10 August 1990 in Cairo. The conference was to solve the crisis under the umbrella of the Arab League, but the concrete position of the Iraqi delegation was not to discuss the Kuwaiti issue or withdraw its troops from Kuwait which compelled the summit to vote on a resolution to commit forces to Saudi Arabia in order to defend the country against possible Iraqi invasion and stand alongside the United States presence there.<sup>10</sup>

The Arab resolution backed Saudi Arabia's invitation to American troops and fighter planes to defend it (i.e. Saudi Arabia) and its oilfields against a possible Iraqi attack. It was, moreover, crucial for the Saudi government which had resolved within about twenty-four hours of the Iraqi invasion to call for American military support. In connection with this, King Fahd, of Saudi Arabia, explained the reason behind his invitation to the Western troops. On 8<sup>th</sup> August during his meeting with the US secretary of Defence the King said,

*We have to do this . . . The Kuwaitis waited, they waited too long*

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<sup>9</sup> Freedman, Lawrence & Karsh, Efraim, *The Gulf Conflict*, Faber and Faber, London, 1993, p. 72.

<sup>10</sup> *International Herald Tribune* newspaper, 11-12/8/1990 & the *Independent Newspaper*, London, 11/8/1990.

*and now there is no longer a Kuwait, and all the Kuwaitis are living in our hotel rooms . . . We did not have the luxury of time; we faced immediate danger.*<sup>11</sup>

The resolution of the Cairo summit said, “the Arab Countries voted to send a force to protect Saudi Arabia and other Gulf States, and to demand an Iraqi withdrawal from Kuwait; the token force would join other forces in the region. They, the Arab Countries, also endorsed United Nations sanctions against Iraq”.<sup>12</sup>

On the 13<sup>th</sup> of August 1990, another effort was made by the Arab League to solve the conflict. The foreign ministers of twelve Arab states: Egypt, Morocco, Syria, Saudi Arabia, Lebanon, Bahrain, Qatar, UAE, Oman, Kuwait, Djibouti and Somalia met in a special session of the Arab League in Cairo to persuade Iraq to withdraw from Kuwait, and to co-ordinate their own response to the crisis in the Gulf. The final statement of the meeting requested that Iraq respond to the Arab efforts to solve its dispute with Kuwait according to the Arab League Charter which forbids the resort to force or to threaten the use of it to settle differences and disputes between Arab states, which is the road to destruction and annihilation.<sup>13</sup> However, the absence of eight countries: Iraq, Algeria, the PLO, Tunisia, Yemen, Sudan, Mauritania and Jordan, all in the pro-Iraqi camp provided a vivid demonstration of the rift in the Arab world since the invasion of Kuwait. Libyan officials arrived in Cairo for the talks, and taking part in efforts to draft a resolution reiterating the position that Iraq must withdraw from Kuwait.<sup>14</sup>

In fact, no Arab State had wholeheartedly supported the invasion. According to the Arab League Charter “it is not allowed for any Arab state to interfere in the affairs of another, or take it over by force”. Even Yemen, which had supported Iraq, urged Baghdad to withdraw its invasion troops. A carefully worded Yemeni statement

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<sup>11</sup> Woodward, Bob, *The Commanders*, Simon & Schuster, London, 1991, p. 271.

<sup>12</sup> *Time* magazine, New York, 20/8/1990. p. 33.

<sup>13</sup> *The Economist* magazine, 25 August 1990, pp. 11 & 48.

<sup>14</sup> *Ibid.*

published on the 7<sup>th</sup> August 1990 said, "Iraq and Kuwait should seek a peaceful settlement".<sup>15</sup>

During the Gulf crisis and after the war, many accounts of the Gulf crisis were published though none of them either explained the real facts which led to building the alliance of 1990 or, in particular, accounted adequately for the Saudi perspective on that crisis. The books of Khaled Bin Sultan *Desert Warrior*; *The Commanders* by Bob Woodward and *Secret Dossier* by Pierre Salinger may be considered as vital sources which present information which are unavailable in any similar works. The first book offers details of the "official" and public Saudi views during the crisis, and clears up the answers in various debates about the cause/s which compelled the Saudi government to rely on Western (Christian) forces instead of the Arab and Islamic troops to counter the Iraqi invasion of Kuwait and the threat to Saudi Arabia. The other two books reveal more information about the American role in the Gulf crisis. However, another startling book in Arabic called *Harb Talid Okhra* (War and the One After) by Sa'ad al-Bazzaz,\* presents candid revelations about what happened inside Iraq just before the Gulf crisis and includes the real motive behind the war. The important issue in this book is that it articulates the Iraqi perspective. Therefore the reader will notice that the author relies on these four books because each of them explains the view of the main three parties which were involved in the Gulf crisis.

## 8. 2) The military alliance

Arab countries, particularly Saudi Arabia and Egypt, were betrayed by the Iraqi President after he gave, their leaders, his word that he would not invade Kuwait, and they saw no particular reason to trust him anymore, even after his promises not to invade Saudi Arabia and later to withdraw from Kuwait.<sup>16</sup> However, initially Saudi Arabia favoured an Arab solution to the crisis and end it without resorting to the military force (as of course did many Arab states). A former Soviet envoy to the Middle East Yevgeni Primakov, for instance, in his meeting with the press stated,

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<sup>15</sup> *The Times* newspaper 8/8/1990

\* Sa'ad al-Bazzaz is familiar with the Iraqi President and many top *Ba'thist* officials, he was the head of the Iraqi TV and Radio committee during the 1990 crisis.

<sup>16</sup> *The Financial Times* newspaper, 16/2/1991.

*In fact I can certify that King Fahd was hoping very sincerely for the possibility of getting Iraq out of Kuwait without resorting to military forces.*<sup>17</sup>

It was not until it became clear that this objective was unlikely to be achieved when the Iraqis annexed Kuwait on the 8<sup>th</sup> August 1990. Saudi Arabia, as well as Egypt and Syria, recognised that an external solution to the problem would be necessary. Accordingly, the Saudi government accepted the enormous risks involved in calling the military assistance of the USA. The Saudi government's fear was clarified by what Khaled Bin Sultan\* said,

*Saddam already had far more troops than he needed in Kuwait, but all the reports we received indicated that he was steadily reinforcing his vast army there . . . Inevitably, it suggested he had some further objectives. In the meantime, we seem to be witnessing an operational pause, which was not unexpected – a pause which Saddam could secure his first-stage objective, resupply his forces, move in combat support elements . . . give his field commanders a chance to complete their operational plans and then assign them combat missions for the next stage.*<sup>18</sup>

Another point of view similar to the one above, is Norman Schwarzkopf,\* who mentioned,

*The worst-case scenario had materialized. The conquest of all Kuwait had taken less than three days and it looked as if the Iraqis weren't planning to stop there . . . three divisions of the Republican Guard that had led the initial attack into Kuwait began massing tanks and artillery along the border of Saudi Arabia and bringing supplies forward. We had to assume they were getting ready to cross [into Saudi Arabia].*<sup>19</sup>

When any country feels that its independence and stability may be threatened, it quickly adopts one or more military measures to ensure its security and protect its most vital interests. Hassan al-Badri has found out four measurements that have to be

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<sup>17</sup> Rashid, Nasser Dr. & Shaheen, Esbar Dr., *Saudi Arabia and the Gulf War*, International Institute of Technology, Joplin, 1992, p. 277.

\* Prince Khaled Bin Sultan al-Saud is a member of the Saudi Royal family, he was the Commander-in-Chief of the Coalition forces.

<sup>18</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, pp. 11-12.

\* The commander general of the Western military forces of the 1990 military alliance.

<sup>19</sup> Schwarzkopf, H. Norman, *It Doesn't Take A Hero*, Bantam Press, London, 1992, p. 299.

taken by any country subjected to a foreign threat. The country has to:

- 1) Increases its own military capability (i.e. buying weapons, increase manpower, improve the tactical and operational combatants) which cannot be available immediately or when it is needed because of the different political, economical and security restrictions.
- 2) Or, adding to its military capability another allied military power/s through co-operation or merger in a military bloc or coalition. This requires a high degree of common interests and objectives of major importance to the allies.
- 3) Or, weakening its enemies power by deprivation of its friends through neutralising them or winning them over. This method requires a very strong financial and political-moral capability.
- 4) Finally, announcing its neutrality which is conditional upon the countries credibility, usefulness and respect for such neutrality.<sup>20</sup>

Therefore, assuming that Iraq was to invade Saudi Arabia after Kuwait, the Saudi military forces, with all its modern equipment, was simply not able to counter the Iraqi forces, because of the lack of both manpower and battle experience. Neither was an Arab nor an Islamic military power able to counter the Iraqi military forces. Egypt, for instance, one of the Arab predominant military powers, had fallen well behind Iraq in numbers of men under arms, and it was in no position to assert itself against a battle-hardened Iraq. Likewise, Syria was tied down in a confrontation with Israel, which would not allow it to send massive military power to counter Iraq.\* Khaled Bin Sultan has explained this point when he said,

*After an appraisal of the political and military situation was that the ratio of Saudi land forces to Iraqi land forces was one to fifteen; while the ratio of all GCC land forces to Iraqi land forces was one to seven. If the whole Egyptian army could have come to the aid of the GCC, the ratio would still have been one to two. If we had been able to bring in both the Egyptian and the Syrian armies, the ratio would have been about one to one. But of course, it was wholly unrealistic to imagine that either Egypt or Syria, or indeed our GCC partners, could have lent us all their land forces . . . An Islamic State like Pakistan was deeply*

<sup>20</sup> Al-Badri, General Hasan, *Al-Ta'awun al-'Askari al-'Arabi al-Mushtarak*, Dar al-Mareakh, Riyadh, 1982, pp. 15-16.

\* See appendices IV & V.



*preoccupied by its confrontation with India, while Bangladesh and Malaysia were not very strong and . . . a long way away . . . As only the Americans could stop him [Saddam] and reverse his aggression, they were welcome to come [to Saudi Arabia].*<sup>21</sup>

Based on al-Badri's assumption, it can be said that Saudi Arabia, due to the fast changes in events during that time was unable either to increase its own military capability or to announce its neutral stance. The only option was to build up co-operation with another military power, one which could and would give support to the military power of Saudi Arabia, in order to counter the Iraqi threat. This was the United States. Saudi Arabia later used all its political and financial power to weaken Iraq's power by depriving it of its friends through either neutralising or winning them over to the alliance side. Such a procedure was used, for example, with China and the former Soviet Union by established a working political relation with the former, and a full political relation including a grant of 1,500 million US Dollars loan to the latter.<sup>22</sup>

Most notably, the measurements which were taken by the Saudi government met with article two of the *Joint Defence and Economic Co-operation Treaty* of the Arab League, which states that

- The contracting States consider any armed aggression made against any one or more of them or their armed forces, to be directed against them all. Therefore, in accordance with the right of self-defence, individually and collectively, they undertake to go without delay to the aid of the State against which such an act of aggression is made, and immediately to take, individually or collectively, all steps available, including the use of armed force, to repel the aggression [aggressor] and restore security and peace.<sup>23</sup>

Since the beginning of the conflict, the Saudi government attempted to give its request for Western military aid a religious-legal basis (*Fatwa*). In his meeting with the American Secretary of Defence, King Fahd of Saudi Arabia requested that the

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<sup>21</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, pp. 21-26.

<sup>22</sup> Harrison, Martin, Saudi Arabian's foreign policy: relations with the superpowers, *CMEIS, University of Durham*, No. 46, Feb. 1995, p. 30 & *Okaz* newspaper, Jeddah, 2/8/1995.

<sup>23</sup> Macdonald, Robert W., *The League of Arab States*, Princeton University Press, Princeton, 1965, 328.

decision to deploy the American military forces in Saudi Arabia would be accompanied and facilitated by an authoritative Islamic ruling. The purpose of this ruling was to broaden public support for the Saudi request for military aid from the United States and other non-Muslim countries among the world-wide Islamic *Ummah*.<sup>24</sup>

The Saudi Supreme Council of Senior *Ulama*, the fifteen Islamic scholars whose authority in religious and social matters is universally accepted throughout the kingdom and who rule on religious matters of the country, declared its support for the government's decision to allow Western and Arab troops to enter the kingdom. Their statement *Fatwa*\* declared that

*The Council of the organisation of Senior Ulama approves the measures by the ruler [King Fahd] in inviting forces equipped with arms which frighten and deter anyone wishing to invade this land [Saudi Arabia]. This is a duty, which the present circumstances impose on him and decision which the painful reality makes necessary.*<sup>25</sup>

The jurists of the Council lacked trust in the Iraqi government and for this reason they issued their *Fatwa* to the Saudi government legitimating its invitation to the United States troops as the only ones able to help to counter the Iraqi enemy.

### 8.3) The *Ummah*'s reaction

The Saudi decision to seek military help from the West caused a great split within the *Ummah*. The main fear of the *Ummah* was not based on a religious view: it was the fear of a new crusade or of Western bullying to control the Islamic resources, and/or a new Christian force in occupation of a part of the Islamic world. This will be discussed in greater detail in what follows.

It is worth mentioning that the first response among the Islamic *Ummah* was taken by the OIC, the foreign ministers whose members were meeting in Cairo between 1-5

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<sup>24</sup> Bulloch, John & Morris, Harvey, *Saddam's War*, Faber and Faber, London, 1991, p. 173.

\* See appendix VIII.

<sup>25</sup> *Saudi Press Agency (SPA)*, 14/8/1990.

August 1990 when the invasion occurred. The final statement of the OIC condemned Iraq and called for an immediate withdrawal of the Iraqi troops from Kuwait. The OIC resolution also declared support for the ousted Kuwaiti government as the legitimate government of the country.<sup>26</sup> However, Iraq, Jordan, Sudan, Mauritania, and the PLO abstained, while Libya and Djibouti did not attend the vote and later they refrained from approving the resolution. The conference resolution touched on the theme of the Saudi request for military help from the Western countries, but the conference ended before this took place.<sup>27</sup>

However, within the Muslim world, there were three main official stances in relation to the dilemma of the Iraqi invasion of Kuwait: The first was against Iraq. Saudi Arabia, Egypt, Syria, Morocco, the Gulf states, Pakistan, Bangladesh and Turkey represented this stance by their participation in the anti-Iraq alliance. The second position was that of an official claim of neutrality, coupled with the demand for withdrawal of Iraqi forces from Kuwait and the United States and Western forces from the region. At the heart of this trend lay Iran, but Tunisia and Algeria can also be included. Iran's position for ending the war, enjoyed a positive international response, which showed the extent of influence that Iran could potentially have in the whole setting and reconstructing of the Middle Eastern security structure. The third position belonged to the Islamic countries that supported Iraq against the alliance. Jordan, Sudan, Yemen, PLO, Mauritania exemplify this stance. It led to a deterioration of their relationship with the United States and the West, as well as the Islamic countries of the alliance.

However, there was overwhelming support for Iraq against the alliance coalition by the public in the countries of the first (anti-Iraqi) camp. In Pakistan, for example, the widespread attitude amongst the military was reflected in the remarks of the Army Chief-of-Staff at the end of January 1991, describing the war as part of a Zionist strategy.<sup>28</sup> Another criticism came from AbdIstarr Niazi, the Minister of Local Government, who accused the United States of wanting to grab the oilfields of the region. Niazi, moreover, condemned the Saudi's decision to request Western help

<sup>26</sup> Middle East News Agency (MENA) Cairo, 4/8/1990 & Riyadh TV, 2/8/1990.

<sup>27</sup> *The Washington Post* newspaper, 4/8/1990 & *Okaz* newspaper 5/8/1990.

against Saddam.<sup>29</sup> However, such views did not prevent Pakistan, the close ally of Saudi Arabia, dispatching 11,000 men to join the allied forces.

In Turkey, which participated indirectly in the military operations against Iraq, there were large anti-war demonstrations in the capital Ankara when the war began. Similar demonstrations of varying sizes took place in Bangladesh, Pakistan and Morocco. However, these demonstrators failed to make any impact upon their governments to adopt a pro-Iraqi stance. According to Nadheer Rashead the Jordanian Interior Minister, rights could not be obtained by demonstrations or by condemnations because this was irresponsible behaviour.<sup>30</sup>

In Tehran, when the war began, the Iranian Parliament issued a statement condemning the crimes of "world arrogance" led by the Americans, in slaughtering Muslims, the innocent and defenceless people of Iraq and the violation of God's sacred sanctuary and also the actions of the multinational forces in the land of divine inspiration Saudi Arabia.<sup>31</sup> Hazhir Temourian, for instance, illustrated the Iranian stance when he said,

*Iran, which has condemned the presence of Western troops in Saudi Arabia in more vehement terms than it has used to describe Iraq's invasion of Kuwait, is reliably learnt [sic.] to have told the United States and Britain to overthrow President Saddam Hussein without delay, as well as to leave the area promptly. However, Tehran issued a warning to the Western allies not to bomb any of Iraq's Shiite holy sites.*<sup>32</sup>

Even in Saudi Arabia itself, the day the Saudi government announced publicly the arrival of the United States troops on Saudi soil it published prominently the opinion of several lesser-known members of the *Ulama* counteracting the decision by the government. They based their condemnation on the pretence that Muslims are

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<sup>28</sup> Malik, J. Mohan, India's Response to the Gulf Crisis, *Asian Survey*, No. 9, September 1991, p. 849.

<sup>29</sup> *The News International newspaper*, Karachi, Pakistan, 25/11/1990.

<sup>30</sup> In a meeting with the Middle East Broadcasting Centre TV (MBC), London, 6.00 p.m., 13 February 1998.

<sup>31</sup> *Iran News Agency*, 1<sup>st</sup> February 1991.

<sup>32</sup> *The Times newspaper*, 10/1/1991.

forbidden to seek support from non-Muslims to fight the Muslims, which, according to the *Shari'ah's* teaching, their view was completely incorrect.\*

In Egypt a statement was signed by forty-three of the best known Egyptian jurists and scholars. Their statement condemned the Iraqi government for its invasion of Kuwait, characterising it as a crime, and called for an Arabic or Islamic solution for the crisis. They warned that reliance on foreign countries [non-Muslim/Arab] to solve an Arab problem is a sort of resort to an abominable act. They insisted that "if any military action should take place it should be under the umbrella of the United Nations and with its name."<sup>33</sup>

In summary, the *Ummah's* fear was of a new kind of crusade and Western interfering in Muslim affairs. Therefore the Iraqis, in their efforts against the alliance, concentrated on such issues and gave the crisis a shape of new Islamic Christian confrontation, it described the Western forces as the new invaders and called for a *Jihad* against these forces. This propaganda effort was aided by the historic relations between the Middle East and the West, as the Financial Times newspaper noted,

*The history of relations between the Christian West and the Muslim Middle East is not a happy one. The crusades by which medieval Europe strove to liberate the Holy Lands from Islamic control were marked by barbarity.*<sup>34</sup>

Another view similar to this was expressed by John Bulloch and Harvey Morris in their work *Saddam's War*,

*Growing Arab fears that the America build-up was part of neo-colonialist enterprise were fed by propaganda from Baghdad, with the Iraqi regime casting itself in the heroic role of defender of the poor against greedy Western powers and tight-fisted and reactionary Arabs.*<sup>35</sup>

However, prior to analyses the Iraqi's called to wage a *Jihad* against the UN coalition forces, it is important to understand three important facts. Firstly, the

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\* For more details regarding the legitimacy of alliance between the Muslims and non-Muslims entities see chapter VII.

<sup>33</sup> *Al-Ahram* newspaper, Cairo, 21/8/1990.

<sup>34</sup> *Financial Times*, No Holy War, London, 17/1/1991.

meaning of *Jihad*, in the work of Charis Waddy “*The Muslim Mind*” a clear explanation of *Jihad*. Waddy says,

*Jihad . . . is divided into two. The Greater Jihad is fighting ones animal tendencies. The Lesser Jihad – is fighting on behalf of the community, in its defence – is a duty incumbent on a Muslim provided that he is attacked. A man has the right to defend his life, his property, and he has to organize himself along these lines. Why you [Muslims] fight is important. It is quite clear that they did not go out to acquire wealth, land, riches, though these were a by-product. Their purpose was to fight in the path of God.*<sup>36</sup>

Secondly, the real cause of the 1990 crisis. Hafiz al-Asad, the Syrian President, gave his answer to this when he said,

*The issue is not that of foreign troops, because the problem started before the foreign troops came into the area and it was the “problem” that brought us the foreign troops . . . The problem is the Iraqi occupation of Kuwait.*<sup>37</sup>

While the Iraqi invasion of Kuwait was the main cause of the crisis and led directly to the intervention of the Western (Christian) forces in Muslim affairs, the aims of the Iraqi invasion of Kuwait requires some explanation. Musallam Ali has given an academic explanation to the invasion when he said,

*The tremendous economic and human losses brought about by the war with Iran 1980-88 made it extremely difficult for the Iraqi government to retain the always precarious allegiance of its various ethnic minorities. No sooner had the war with Iran ended and a cease-fire agreement had been signed then the political strength and social unity of Iraq as a nation began to falter . . . Aware of the discontent of the people, the government mounted a two-pronged campaign: first, it sought to revive Iraqi nationalism . . . second, it proffered various measures to alleviate the economic plight of the Iraqi people . . . When this two-pronged approach failed, the government finally resorted to the invasion of Kuwait in an attempt to resolve all the problems. Kuwait represented an economic prize sufficient to solve all the financial ills which had befallen Iraq . . . The humiliation of Kuwait would, it was believed, do much to reinvigorate Iraqi*

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<sup>35</sup> Bulloch, John & Morris, Harvey, *Saddam's War*, Faber and Faber, London, 1991, p. 173.

<sup>36</sup> Waddy, Charis, *The Muslim Mind*, Longman Group Ltd., London, 1976, pp. 94-95.

<sup>37</sup> Heikal, Mohammed, *Illusion of Triumph*, Harper Collins Publisher, London, 1992, pp. 200-201.

*nationalist sentiments and restore Iraqi national pride. It was against this complex interplay of factors that the invasion of Kuwait occurred.*<sup>38</sup>

An Iraqi scholar called Sa'ad al-Bazzaz presented candid revelations, and, perhaps, the real motives behind the invasion. According to Al-Bazzaz,

*Economic considerations were primary. The war with Kuwait was inevitable. After eight years of attrition Iraq could not build on its previous economy and create a high standard of living. It became necessary therefore, to find a permanent solution to the economic predicament, with its problem of debt, a solution which can only be geo-political would provide new sources for the Iraqi economy.*<sup>39</sup>

Tariq Aziz, the Iraqi Foreign Minister during the crisis, explained the Iraqi philosophy behind the invasion of Kuwait. Aziz said,

*The intention was to bring about a military coup, through which a new indigenous regime would replace the ruling family. As a result, in the ashes of the ruins we will build a political understanding rather than a politics of confrontation, to unite, to become one after the long separation, and finally, Iraq will be able to solve its economic problems with a lung open to the sea.*<sup>40</sup>

Kiren Chaudhry added further explanations to the economical difficulty of the Iraqi regime when he said,

*There was another dimension to Iraq's economic difficulties. It was not only the effects of the war with Iran itself that were responsible for the economic crisis but the economic strategy employed to solve that crisis.*<sup>41</sup>

Hence, while saying that the Iraqi call for a *Jihad* not for wealth, land and riches but only for the path of God; it could only be waged against non-believers, therefore *Jihad* is forbidden against fellow Muslims. Therefore, since the UN coalition contained substantial numbers of Muslims, both Arab and non-Arab, consequently it

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<sup>38</sup> Musallam, Musallam Ali, *The Iraqi Invasion of Kuwait*, British Academic Press, London, 1996, p. 64.

<sup>39</sup> Al-Bazzaz, Sa'ad, *Harb Talid Okhra*, Al-Ahliyyah lilnashr wa al-Tawziy'a, Amman, 1992, p. 34.

<sup>40</sup> *Ibid.*, p. 37.

<sup>41</sup> Chaudhry, Kiren Aziz, On the Way to the Market: Economic Liberalisation and Iraq's Invasion of Kuwait, *Middle East Report*, May-June 1991, pp. 14-23.

could be stated that the Iraqi statement was not accurate. In connection with this, it may be of interest to quote a statement by Majeed Khadduri and Edmund Ghareeb who clarified the Iraqi call to wage a *Jihad* against the UN forces,

*In the case of the Gulf crisis . . . since Iraq, an Islamic country, attacked another Islamic country, the declaration of jihad against unbelievers was irrelevant. Moreover, as Iraq was governed by the Ba'th Party, considered by opponents a secular political Party, its declaration of the Jihad was questioned, although the Ba'th Party has never officially declared the separation of religion from the state.*<sup>42</sup>

It is no exaggeration to say that the previous statements give evidence that the Iraqi calls for *Jihad* was for its own benefit. Religion was used as an expedient to achieve its goal. These goals were summarised by the Iraqis themselves as: solving all the Iraqi's economic and financial difficulties; giving Iraq an extra outlet to the Gulf; and creating a puppet regime in Kuwait to serve Iraqi interests.

Nevertheless, Iraqi used propaganda, in its efforts to exploit Islamic and anti-Western sentiment, adopted the issue that the Western Christian forces come to occupy the two holiest cites, Makkah and Madinah, in Saudi Arabia. One commentator noted that,

*It was a major strategy of the Iraqis to attempt to separate the Arab people from their government by appealing to them directly as brother Arabs with an obligation to mount a Jihad in order to defend Islam's holy places in Mecca from foreign forces.*<sup>43</sup>

Moreover, the Iraqi government organised an Islamic conference in Baghdad to sustain the Iraqi leader (Saddam Hussein) and his policy. Of the one thousand people (approximately) who attended that conference, the majority were members of Islamic militant groups such as HAMAS, Islamic Jihad, Islamic Salvation Front of Algeria and other groups.<sup>44</sup> Unusually, the participants at the conference called for the Iraqi President, Saddam Hussein, leader of the hitherto determinedly secular Ba'ath party, to be declared the Caliph of the Muslim world. Moreover, among the participants of

<sup>42</sup> Khadduri, Majid & Ghareeb, Edmund, *War in the Gulf, 1990-91*, Oxford University Press, Oxford, 1997, p. 257.

<sup>43</sup> Matthews, Ken, *The Gulf Conflict and International Relations*, Routledge, London, 1993, p. 66.

<sup>44</sup> *The Financial Times* newspaper, 10/1/1991.



the conference there were some who had previously been very hostile to Saddam. Sheikh Assad Tamimi,\* was one. He said,

*I had been a long time foe of President Saddam Hussein, but I am supporting the Iraqi President because Saddam has announced a holy war, and he wants to protect Makkah from the unbelievers. Mr. Saddam's return to Islam has marked a high point in the Islamic awakening.*<sup>45</sup>

In addition, other religious groups throughout the Arab world have rallied to the Iraqi President's call to keep Westerners out of Saudi Arabia where the two holiest cities, Makkah and Madinah, are situated. All across North Africa religious groups, such as the Islamic Salvation Front (ISF) announced support for the man they have always despised as an atheist.<sup>46</sup> In addition, Mass demonstrations in the Middle East were commonplace and popular recruiting centres were established in Jordan and North Africa which received thousands of would-be volunteers for Iraq. Arab parliamentary resolutions supported Iraq, and Arab and Islamic delegations and conferences proliferated. A plethora of radical and paramilitary groups backed Iraq, and although the stance of many Arab groups was not always simple Iraq essentially received the support of the PLO and the more radical Palestinian groups; George Habash's PFLP, Ahmed Jibril's PFLP-GC, Abu al-Abbas's PLF, and Abu Nidal's Fatah Revolutionary Council. Many of the Palestinian groups threatened to attack the United States interests in the event of fighting breaking out. The armed groups sympathetic to Iraq also represented a threat to the major Arab Coalition states Egypt, Syria and Saudi Arabia.<sup>47</sup>

In Egypt, the Muslim Brotherhood, an influential and much less radical religious group than HAMAS, the Islamic Jihad and the ISF, made a statement announcing their condemnation and opposition to the American military intervention in the Gulf crisis, and for an immediate withdrawal of the United States troops from the region. Finally, the statement asserted that the Muslim Brothers movement does not ratify any

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\* The leader of the emergent Islamic Jihad in Jordan and a participant in Baghdad's conference.

<sup>45</sup> Ibid.

<sup>46</sup> *The Guardian* newspaper, 1/9/1990.

<sup>47</sup> Murden, Simon, *Emergent Regional Powers and International Relations in the Gulf: 1988-1991*, Ithaca Press, Reading, 1995, pp. 230-231.

resort to force in order to resolve disputes between either the Arab or the Muslim countries, and refused any military intervention from an Arab or a Muslim state against another state.<sup>48</sup>

Khaled Bin Sultan responded to those who incriminated Arabs for allying with Western Christian countries instead of with the Arab and Muslim states during the 1990 Gulf crisis. Khaled says,

*During and after the Gulf crisis, some Arab intellectuals argued that it was a crime for Arab states, such as Saudi Arabia, Egypt and Syria, to ally themselves with the United States against another Arab state, and that by doing so we had subverted the principles of Arab nationalism and destroyed the Arab consensus. The real threat to the Arabs, they said, came not from Saddam Hussein but from the West. Others even went so far as to portray Saddam as a hero of Arab nationalism brought down by a Western or a Zionist conspiracy. Such attitudes reflect the pain some Arabs feel at the West's colonial carve-up of the Arab world early this century, at its role in creating Israel after World War Two, and at the blind support the United States has given Israel ever since, even when this ran counter to American's own national interests.*<sup>49</sup>

Khaled added that,

*Many Arabs also feel an understandable nostalgia for the distant past when their civilization and power were unrivaled. But views such as these offend against contemporary reality. Regardless as it may be from an Arab perspective, "Arab nationalism," the credo of most Arabs, has so far resulted in coherent political action, while an "Arab consensus" has been more often absent than present in most of the great events affecting our area . . . Certainly, the invasion of Kuwait has resulted in immense damage to the Arabs: quite apart from the tragic loss of life, it has caused material losses of hundreds of billions of dollars, forced hundreds of thousands of people from their homes, and created deep-seated divisions in the Arab world, marked at the popular level by mutual hate and suspicion. This is perhaps its [the crisis's] most dangerous legacy. We, in the Kingdom . . . in our hour of need the nationality of the troops that come to our*

<sup>48</sup> *Lewa' al-Islam* newspaper, Cairo, Vol. 39.

<sup>49</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, p. 169.

*aid was our last concern. If your house is on fire, you are not too concerned about who helps you extinguish the flames.*<sup>50</sup>

The Saudi government attempted to dampen feelings against the anti-Iraqi alliance, among the world *Ummah* and opposed the Iraqi allegations. In September 1990 *Dar al-Ifta'*, the Saudi-based authority of Islamic guidance, summoned a group of Muslim jurists who had criticised the build up of Western forces on Saudi soil to a conference in the Saudi capital, Riyadh, organised by Imam Muhammad Bin Saud University. The conference's final statement condemned the Iraqi occupation of Kuwait and supported Saudi Arabia in its reliance on Western troops to face the Iraqi direct invasion threat.<sup>51</sup>

Moreover, as a counter to the Iraqi issue, the League of Muslim World (MWL) made a statement on the 8<sup>th</sup> August 1990 calling for an immediate withdrawal of the Iraqi forces from Kuwait under supervision of Islamic forces.<sup>52</sup> Later, the League organised two conferences in Makkah. The first was in September 1990, where more than 300 Muslim jurists, scholars and thinkers from 80 countries were invited. That conference aimed to: (i) organise a visit for those participants to the two holy cities of Makkah and Madinah to ensure that they were not being defiled by the presence of the United States forces in Saudi Arabia; (ii) discuss the result of the Iraqi occupation of Kuwait, the direct threat to Saudi Arabia and other Arabian Gulf countries and the subsequent Arab, Islamic and foreign military build-up to defend the Arabian Gulf states; (iii) give legal judgements regarding the previous issues.<sup>53</sup> Accordingly, Dr. Abdullah Omar Naseef, the Secretary General of the Muslim World League announced,

*The Muslim World League's adoption of a declaration and fifteen resolutions regarding the American forces. The declaration condemned Iraq's invasion of Kuwait as un-Islamic and accepted the US build-up as an emergency measure, which should be a*

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<sup>50</sup> *Ibid.*, pp. 169-170.

<sup>51</sup> *The Times* newspaper, 10/1/1991.

<sup>52</sup> *Al-Sharq al-Awsat* newspaper, London, 12/8/1990.

<sup>53</sup> *Okaz* newspaper, Jeddah, 14/9/1990. For further details see appendix VII.

*temporary solution and it should be removed as soon as possible.*<sup>54</sup>

In January 1990, the MWL organised the second conference, which nearly all famous Muslim jurists and Scholars participated in that conference. Among them, for instance, the famous Jurist Sheikh Muhammad al-Ghazali, the Mufti of Egypt, the Mufti of Saudi Arabia, the Secretary General of the Islamic Conference Organisation OIC, the Secretary General of the MWL and others.<sup>55</sup> The conference was aimed at discussing the Gulf crisis particularly the legitimacy of the Western back up for Saudi Arabia, and the Iraqi occupation of Kuwait. The final statement of the conference contained various resolutions, the most important were: (i) a condemnation of the Iraqi government for its invasion of Kuwait and its consequent looting and destroying of the Kuwaiti properties. (ii) The legality of seeking military help of the non-Muslims to help counter the Iraqi military threat to Saudi Arabia. (iii) The conference requested the restoring of the sanctioned legitimate Kuwaiti authorities to rule the country; (iv) establish a permanent Military Muslim power under the supervision of the OIC and that the Islamic countries resort to it when any future dispute occurs.<sup>56</sup>

#### **8.4) Shari'ah and legality of the Iraqi invasion**

Regardless of Iraq's main reason, and any other causes, for the invasion, all laws, secular or divine, forbid military invasion. In the League of Arab States\*, for instance, article 5 of the League's Charter insists that,

*- Any resort to force in order to solve disputes arising between two or more member states of the League is prohibited.*<sup>57</sup>

Similarly, in the Charter of the UN, article 2 insists on the same principles, which reads as follows,

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<sup>54</sup> Ibid.

<sup>55</sup> *Al-Madinah newspaper*, Jeddah, 13/1/1991.

<sup>56</sup> Ibid.

\* Iraq and Kuwait are both members of the organisation.

<sup>57</sup> Macdonald, Robert W., *The League of Arab States*, Princeton University Press, Princeton, 1965, p. 321.

- *All Members shall settle their international disputes by peaceful means in such a manner that international peace and securities, and justice, are not endangered.*
- *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, in any other manner inconsistent with the purposes of the United Nations.*<sup>58</sup>

Even the Iraqi President himself, on many occasions, forbade invasion and called for action to be taken if an Arab country invades another Arab country. In a speech to Arab lawyers delivered on 28<sup>th</sup> November 1988, for instance, Saddam said,

*An Arab country does not have the right to occupy another Arab country . . . God forbid, if Iraq should deviate from the right path, we would want the Arabs to send their armies and move to overwhelm another Arab state, the Arabs would have the right to deploy their armies to keep it in check. How will it be possible for us to live together and trust each other, if the minimum mutual trust is lacking? . . . Walking with your brother and your gun at the ready is like keeping the company of Chicago gangsters.*<sup>59</sup>

The legitimacy of the Iraqi invasion of Kuwait from the *Shari'ah* perspective, must begin with the observation that the invasion occurred in August, the month of Muharram in the Islamic calendar. In the *Shari'ah* Muharram is one of four forbidden months in Islam,\* which were described by the *Holy Qur'an*,

إن عدة الشهور عند الله اثنا عشر شهرا في كتاب الله يوم خلق السماوات والأرض منها أربعة حرم ذلك الدين القيم فلا تظلموا فيهن أنفسكم . (التوبة: ٣٦)

**The number of months in the sight of Allah is twelve (in a year) so-ordained by Him the day He created the heavens and the earth; of them four are sacred; that is the right religion so wrong not yourselves therein. (9: 36)**

In the *Sunnah*, Prophet Muhammad is reported to have said that,

***Time has completed a cycle and come to the state of the day when Allah created the heavens and the earth. The year is constituted of***

<sup>58</sup> Leland M. Goodrich, *Charter of the United Nations*, 3<sup>rd</sup> Edit., Columbia University Press, New York, 1969, pp. 36-37.

<sup>59</sup> Rashid, Nasser Dr. & Shaheen, Esbar Dr., *Saudi Arabia and the Gulf War*, International Institute of Technology, Joplin, 1992, p. 159.

\* The others are: Dhu al-Qa'adah, Dhu al-Hijjah and Rajab.

**twelve months, of which four are sacred; three of them consecutive, viz. Dhu al-Qa'adah, Dhu al-Hijjah and Muharram, and the fourth is Rajab.**<sup>60</sup>

During these months all military actions have to be frozen unless it is self-defence. Even in the *Jahiliyyah* time, Arabs tribes were to restrain themselves from fighting and delay all their military activities until the passing of these months. Therefore, it could be concluded that Iraq committed a forbidden sin by invading Kuwait in that month.

*Shari'ah*, moreover, forbids betrayal. In the *Holy Qur'an*,

ولا تجادل عن الذين يختانون أنفسهم إن الله لا يحب من كان خوانا أثيماً. (النساء:

(١٠٧)

**Contend not on behalf of such as betray their own souls; for Allah loveth not one given to perfidy and sin. (4: 107)**

And in the *Sunnah*, the Prophet said,

***On the Day of Judgment there will be a flag for every person guilty of breach of faith, and it will be raised in proportion to the extent of his guilt; and there is no guilt of treachery more serious than the one committed by the ruler of people.***<sup>61</sup>

The Iraqi leadership in their effort to invade Kuwait betrayed everyone. Fred Halliday, for instance, noted that,

*The international community, including Egypt, were assured by Saddam that he would not invade Kuwait, but on August 2 he did so.*<sup>62</sup>

In his meeting with the Egyptian President in Baghdad in July 1990, the Iraqi President gave his word, and assured Mubarak that he would not use force against Kuwait. The Iraqi President's assurance was mentioned in Saddam's meeting with the United States ambassador to Baghdad during the same month in the Iraqi capital Baghdad. The Iraqi President said,

<sup>60</sup> Al-Naysaburi, Muslim Ibn al-Hajaj, *Saheeh Muslim*, Dar Ihya'a al-Turath al-Arabi, 1985, Hadith no. 3179.

<sup>61</sup> Matraji, Mahmoud, *Translation of Saheeh Muslim*, Vol. III A, Dar Al-Fikr, Beirut, 1993, p. 329.

<sup>62</sup> Halliday, Fred, *Islam and the Myth of Confrontation*, I. B. Tauris Publication, London, 1996, p. 78.

*Mubarak [the Egyptian President] told me that they [the Kuwaiti government] were scared. They said troops were only 12 miles north of the Arab League (border) line. I said to him that regardless of what is there, whether they are police, border guards or army – regardless of how many they are, and what they are doing – assure the Kuwaitis and give them our word that we are going to do nothing until we meet with them.*<sup>63</sup>

Similarly, Many Iraqi officials declared that Iraq would not use force to resolve its dispute with Kuwait. In his meeting with the United States officials, the Iraqi ambassador to Washington announced that Iraq is not going to move against anyone (i.e. Kuwait).<sup>64</sup>

The Iraqi invasion caused various kinds of great damage to the Islamic *Ummah*. The most important of these will be summarised, with the understanding that there are many more that have not been mentioned. Islamic *Shari'ah* forbids discord (*Fitna*) and commands Muslims to avoid evoking it. In the Holy texts of *Qur'an*,

واتقوا فتنة لا تصيبن الذين ظلموا منكم خاصة واعلموا أن الله شديد العقاب . (الأنفال: ٢٥)

**And fear the trial (Fitna) which affecteth not in particular those of you who do wrong: and know that Allah is strict in punishment. (8: 25)**

In another verse, the *Qur'an* insists that,

والفتنة أشد من القتل . (البقرة: ١٩١)

**... for Persecution [Fitna] is worse than slaughter. (2: 191)**

Islam, moreover, forbids killing innocent people. During the first few days of the invasion, between 100 and 200 Kuwaiti citizens were killed including the Amir's half-brother Sheikh Fahd al-Ahmad al-Sabah.<sup>65</sup> The Kuwaiti Government estimated that

<sup>63</sup> Rashid, Nasser & Shaheen, Esbar, *Saudi Arabia and the Gulf War*, International institute of Technology, Joplin, 1992, p. 148.

<sup>64</sup> The Editors of the Time Magazine, *Desert Storm*, Little Brown & Co., Boston, 1991, p. 9.

<sup>65</sup> Rengger, N. J., *Treaties and Alliances of the World*, 6<sup>th</sup> Edit., Cartermill, London, 1995, p. 400.

some 1000 civilians were murdered during the Iraqi occupation, with many more forcibly deported to Iraq.<sup>66</sup>

The Islamic teaching is very clear regarding this theme. The *Holy Qur'an* contains various verses which forbid killing innocents, and threaten those who commit such an act with great punishments in this life and in the life to come. Among the *Qur'anic* verses,

... أنه من قتل نفسا بغير نفس أو فساد في الأرض فكأنما قتل الناس جميعا ومن أحياها فكأنما أحيا الناس جميعا. (المائدة: ٣٢)

That if any one slew a person it would be as if he slew the whole people and if any one saved a life it would be as if he saved the life of the whole people. (5: 32)

ولا تقتلوا النفس التي حرم الله إلا بالحق. (الإسراء: ٣٣)

Nor take life except for just cause. (17: 33)

والذين لا يدعون مع الله إلها آخر ولا يقتلون النفس التي حرم الله إلا بالحق ولا يزنون ومن يفعل ذلك يلق أثاما . يضاعف له العذاب يوم القيامة ويلقى فيه مهانا. (الفرقان: ٦٨-٦٩)

Those who invoke not, with Allah, any other god, nor slay such life as Allah has made sacred except for just, nor committed fornication and any that does this meets punishment. The Chastisement on the Day of Judgement will be doubled to him and he will dwell therein in ignominy. (25: 68-69)

In the *Sunnah*, Prophet Muhammad is reported to have said that,

***Abusing a Muslim is an evil doing (Fusuq) and killing him is disbelief (Kufr).***<sup>67</sup>

And

***Your bloods, your properties and your honours are sacred to you like the sacredness of this day [the Day of sacrifice in the month of Hajj] of yours, in this city [Makkah] of yours . . . So do not return after me infidels some of you striking the necks of others [killing each other].***<sup>68</sup>

And

<sup>66</sup> Freedman, Lawrence & Karsh, Efraim, *The Gulf Conflict*, Faber and Faber, London, 1993, p. 68.

<sup>67</sup> Matraji, Mahmoud, *Translation of Saheh Al-Bukhari*, Vol. I, Dar Al-Fikr, Beirut, 1993, p. 51.

<sup>68</sup> Al-Naysaburi, Muslim Ibn al-Hajaj, *Saheh Muslim*, Dar Ihya'a al-Turath al-Arabi, 1985, Hadith no. 2173.



***Avoid the seven noxious things . . . Associating anything with Allah, magic, killing of one whom Allah has declared inviolate without a just cause, devouring the property of an orphan, dealing in usury, fleeing on the day of fighting, and calumniating the chaste, innocent, believing women.***<sup>69</sup>

Under the law of war crimes\* of the United Nations, any of the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such as: (i) Killing members of the group; (ii) Causing serious bodily or mental harm to members of the group; (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) Imposing measures intended to prevent births within the group.<sup>70</sup> Richard Stevens has summarised Iraqi war crimes during the occupation in these words,

*Iraqi violations of the law of war were widespread and premeditated. They included taking hostages, torture and murder of civilians, looting civilian property, looting cultural property, indiscriminate attacks on noncombatants by the launching of SCUD missiles against cities rather than specific military objectives, illegal employment of sea mines, mistreatment of prisoners of war, and unnecessary destruction of property, as evidenced by release [of] oil into [the] Arabian Gulf and the destruction of hundreds of Kuwaiti oil wells.*<sup>71</sup>

Iraqi environmental crimes began on 19<sup>th</sup> January 1991, when the valves were opened on the Sea Island terminal near Kuwait City and marine oil tankers load was dumped into the Gulf. At the time an estimated 11 million barrels of oil were released and the oil slick was marked as one of the worst-ever oil-related ecological disasters, covering an area of about 240 square miles. On 21<sup>st</sup> January the Wafrah Kuwaiti oilfields and storage facilities were set on fire, producing a large amount of smoke.<sup>72</sup>

Hence, it must be observed that while Islam forbids arbitrariness, transgression, and oppression, it permits those who were effected by any sort of previous humiliation to defend themselves. This confirmed by the *Holy Qur'anic verses*

<sup>69</sup> Siddiqui, Muhammed Moinuddin, *The Major Sins*, Dar al-Fikr, Beirut, 1993, p. 22.

\* According to this law "war crimes" is the technical expression for a violation of the law of war and every violation of the law of war is a war crime.

<sup>70</sup> UN Commission on Human Rights UNCOHR. Report no. E/CN.4.Sub.2/1996/26 on 16/7/1996.

<sup>71</sup> Stevens, Richard P., *The Iraqi Invasion of Kuwait*, International Education and Communication Group, Washington.

<sup>72</sup> Brown, Neville, The Blazing Oil Wells of Kuwait, *World Today*, Vol. 47, No. 6, June, 1991.

والذين إذا أصابهم البغي هم ينتصرون . وجزاء سيئة سيئة مثلها فمن عفا وأصلح فأجره على الله إنه لا يحب الظالمين . ولمن انتصر بعد ظلمه فأولئك ما عليهم من سبيل . إنما السبيل على الذين يظلمون الناس ويبغون في الأرض بغير الحق أولئك لهم عذاب أليم.  
(الشورى: ٣٩-٤٢)

And those who, when an oppressive wrong is inflicted on them, (are not cowed but) help and defend themselves. The recompense for an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah: for Allah loveth not those who do wrong. But indeed if any defend himself after a wrong (done) to him, against such there is no cause of blame. The blame is only against those who oppress people with wrongdoing and insolently transgress beyond bounds through the land, defying right and justice: for such there will be a Chastisement grievous. (42: 39-42)

Islam, moreover, forbids looting, violation and vandalism. The Prophet in his conquests prevented Muslims from looting. He is reported to have said,

***He who has ever committed pillage or plunder is not from us [the Muslims].***<sup>73</sup>

During the Iraqi invasion, when the Iraqis found a house that was empty they would paint a red cross on the door and come back with a truck or a van and take everything out of it. Nearly all the equipment in the country was moved to Iraq by the Iraqi troops. Among the long list of the vital equipment which was looted from Kuwait was all hospital equipment, such as ambulances and laboratories; the sports equipment of the three main sports centres; the Universities' equipment, such as libraries. All the records from the Institute of Science Research was looted. This had been done intelligently, overseen by men who were scientists. At the civil airport, all emergency fire equipment and all navigational, flight and maintenance simulators, and all machine-shop tools. From the National Bank everything was taken including safes and computers. All equipment of the Kuwait National Oil Company KNOC, and the oil terminals' equipment was moved to Iraq. At *Filaka* Island, two ferries were taken and latter seen in use in Basra. From the Kuwaiti Army, all the military equipment was moved including Hawk anti-aircraft missiles.<sup>74</sup> N. J. Rengger mentioned that,

<sup>73</sup> Al-Jawziyah, Muhammad Ibn Abu Bakr Ibn Al-Qayyim, *Zad al-M'aad*, Vol. III, Al-Matba'ah al-Masriyah, Cairo, 1914, pp. 95-96.

<sup>74</sup> Simpson, John, *From the House of the War*, Hutchinson, London, 1991, pp. 166-168 & New York Times newspaper, 14/8/1990.

*Iraq had transferred between US\$ 3,000 million and US\$ 5,000 million in gold, foreign currency and goods from Kuwait and that this had significantly increased Iraq's financial reserves which had stood at an estimates US\$ 6,500 million before the invasion.*<sup>75</sup>

Moreover, the Iraqi troops prior to their withdrawal from Kuwait proceeded to destroy the country. Among its destruction were hundreds of Kuwaiti oil wells and the base structure of the country. The *Shari'ah* makes it incumbent upon those who commit vandalism to accept responsibility for what have done. Jurist Ibn AbdulSalam in his work *Qawa'ed al-Ahkam* insists that,

*Whoever intends to destroy properties belonging to others, he has to refund what he destroys.*<sup>76</sup>

Therefore, looting is another sin which can be added to the evils of invading a Muslim country in a forbidden month and killing innocent people, which is regarded as war crimes committed by the Iraqi government during its invasion of Kuwait.

Islam requests from Muslims to solve their disputes according to the Islamic *Shari'ah* teaching, which is based on the *Qur'anic* verse,

وإن طائفتان من المؤمنين أقاتلتا فأصلحوا بينهما فإن بغت إحداهما على الأخرى فقاتلتا  
التي تبغي حتى تفيء إلى أمر الله فإن فاءت فأصلحوا بينهما بالعدل وأقسطوا إن الله يحب  
المقسطين . (الحجرات: ٩)

**If two parties among the Believers fall into a fight, make ye peace between them; but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just). (49: 9)**

In chapter VI, it was concluded that this *Holy Qur'anic* verse implied neutrality. However, it could also be used as a method to solve disputes among the Muslims themselves. Muslims are obliged to solve all their disputes peacefully and unite against the aggressor. During the crisis nearly all Arab and Islamic states involved, as well as the International community, presented peace proposals or projects to solve the dispute. All these proposals concentrated on two main issues: on the one hand, the

<sup>75</sup> Rengger, N. J., *Treaties and Alliances of the World*, 6<sup>th</sup> Edit., Cartermill, London, 1995, p. 401.

failure of Iraq to withdraw from Kuwait; on the other hand, the restoration of the legitimate authorities in Kuwait. Dr. Sayed al-Taweal,\* in his effort to explain the Islamic teaching in solving a dispute between the Muslims said,

*This (Qur'anic) verse [49: 9] gave the method that the Ummah has to follow against oppression and tyrants. The Islamic Ummah has to confront, strongly, this group in order to frighten it and return it to the right path and solve the cause of dispute, and to create peace founded on justice and equality.<sup>77</sup>*

In preference for a peaceful settlement of the crisis, the MWL, the Organisation of the Islamic Conference (OIC), as well as the other Islamic organisations such as the Arab League (LAS) and the Gulf Co-operation Council (GCC), decided that before resorting to force, an appeal to Iraq to withdraw was necessary. The Secretary General of the OIC, for instance, offered his good office to Iraq on the 14<sup>th</sup> January 1991, a day before the UN Security Council Resolution 678 was to take effect by the use of force against Iraq. He appealing to the Iraqi President to give orders to the Iraqi forces in Kuwait to withdraw quickly and unconditionally to avoid unforeseen consequences.<sup>78</sup>

After the failure of all peace efforts, there was the need to use force to compel Iraq to withdraw from Kuwait and establish order among the Muslim countries. In order to fulfil that the only Muslim countries that could counter Iraq were Saudi Arabia, Egypt and Syria. However, because of the shortage of manpower other non-Muslim countries participated with them in expelling the Iraqi forces from Kuwait.

In International Law, there are measures similar to the Islamic one. In the Charter of the United Nations, under chapters VI and VII, articles 38-48 reads as follows.<sup>79</sup>

- The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek

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<sup>76</sup> Al-Silami, 'Az Aldean Ibn AbdulSalam, *Qawa'ed al-Ahkam fi Masaleh al-Anam*, Vol. II, Mu'asasat al-Rayan, Beirut, 1990, p. 330.

\* Dean of Faculty of Arabic and Islamic Studies, al-Azhar University, Cairo.

<sup>77</sup> Group of Muslim jurists, *Ra'i al-Islam fi Jarimat Saddam*, al-Zahra' li al-I'lam al-Arabi, Cairo, 1991, p. 83.

<sup>78</sup> Arab News newspaper, Jeddah, 15/1/1991.

<sup>79</sup> Simma, Bruno, *The Charter of the United Nations*, Oxford University Press, New York, 1994, pp. 560-655.

a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

- The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

- In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

- The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

- Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.\*

- All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities,

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\* Article 42.

including rights of passage, necessary for the purpose of maintaining international peace and security.

- Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
- The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.
- The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
- Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Out of the previous debate, it can be found that *Shari'ah* and secular (international) laws condemn the use of force to solve disputes. The *Shari'ah*, as seen in the previous *Qur'anic* verses, orders Muslims to build their brotherhood and avoid using force to solve their disputes. However, if a member of the *Ummah* transgress on another member, state or individual, the *Ummah* has to unite against the aggressor and use all available methods to end the conflict. The *Shari'ah* permits victims of oppression to defend themselves, but in a rational way.

No doubt, secular (international) laws, such as the UN charter and the charter of the Arab League, or any similar charters, forbids aggression, and calls for a peace settlement for any conflict. The UN Charter, for example, meets with the *Shari'ah* law in permitting self-defence if exposed to aggression or threat under article 51.

### 8.5) 1990 alliance under the Islamic conditions

It has been indicated in the previous chapter that the hypothesis of alliance in Islam assumes that alliance with non-Muslim entities (e.g. tribes and states) is lawful under conditions of necessity\* to fight against either non-Muslims or Muslim rebels who threaten the Islamic State's security and stability. Moreover, according to our hypothesis, such an alliance has to be covered by a treaty organising the participation of these forces. However, among the Muslims themselves the need for such a treaty to secure their participation in war is unnecessary because relations among the Muslims are based upon brotherhood and assumes that all Muslims are united in the *Umma*. AbdulKhalek Hassouna, stated that,

*Each Muslim feels himself a member of one Islamic nation, and this contributes to the promotion of co-operation and joint efforts. This feeling is manifest in one of the Prophet's tradition [Hadith] sayings, "The faithful are like the members of the body: if one of them complains all the others feel restless and feverish".*<sup>80</sup>

Consequently, for the Muslim forces - particularly the Egyptians, the Syrians, the Pakistanis and the Bangladeshis - no bilateral treaties were signed. Their presence as part of the coalition forces could be explained either in terms of membership of the Arab League, or in terms of membership of the UN, or both. Taking the Arab League first, its *Joint Defence and Economic Co-operation Treaty* provides a legal basis for their participation in the anti-Iraq coalition. This treaty could be described as a brotherhood defence treaty. It is different from any other international alliance treaty such as NATO or the former Warsaw Pact, because Arabs have a common language, religion and history. Moreover, according to the Islamic teaching Muslim brotherhood is stronger than any other relations such as Arab brotherhood. Jurist Sayed Sabiq, for instance, mentions

*These relations are characterised by their moral nature. Unlike other materialist relations, they do not come to an end when the*

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\* For further details of the term, see chapter IV, 4.4.2.

<sup>80</sup> Waddy, Charis, *The Muslim Mind*, Longman Group Ltd., London, 1976, p. 182.

*need no longer exists. These links are stronger than the relations of blood, colour, language, homeland and financial interests.*<sup>81</sup>

In addition, or alternatively, their participation in the 1990 coalition had a legal basis in the article 51 of the UN Charter which affirms the inherent right of individual or collective self-defence against armed attack, and UN Security Council resolution number 678 (November 1990). Under paragraph 2 of this resolution and in accordance with Chapter VI of the UN Charter, the Security Council authorised member states co-operating with the Kuwaiti government “to use all necessary means to uphold and implement resolution 660 (1990) [calling for Iraq’s immediate and unconditional withdrawal from Kuwait] and all subsequent resolutions [661, 662, 664, 666, 667, 669, 670, 674 and 677. August-November 1990] and to restore international peace and security in the area. Paragraph 3 requested member states to provide appropriate support for actions taken under paragraph 2.”<sup>82</sup> However, it appears to be the case that the Muslim states joined the anti-Iraq coalition not through the provisions of treaties (although as member states they were bound by the UN Charter and UN Security Council Resolutions made in accordance with it in relation to the use of armed force against Iraq), but in the Islamic/*Ummatic* way, namely, by volunteering their help to fellow Muslims or after a request from the Saudi government. Unlike the non-Muslims’ participation in the 1990 coalition, Muslim states only needed a request from the Saudi government to take part, and sometimes they offered their help without any such request or invitation. The Afghan Mujahedin, is a clear example of such a case. They offered their help to the Saudis without any official request from the Saudi Government, but because of the Islamic call of the Muslim World League and the OIC.<sup>83</sup> Significantly, as a non-Government Organisation (NGO), the Afghani Mujahedin were not bound by the UN Charter.

In the 1990 anti-Iraq coalition forces two main parties had formalised an alliance, on one hand Saudi Arabia, and on the other hand the United States. The rest of the alliance consisted of thirty-eight countries worldwide. Some were involved directly in military activities with their troops, such as UK, France, Egypt and Syria, while the

<sup>81</sup> Sabiq, Sayed, *Fiqh al-Sunnah*, 11<sup>th</sup> Edit., Vol. III, Dar al-Fath li al-A'alam al-Arabi, Cairo, 1994, p. 69.

<sup>82</sup> Nye, Joseph S. Jr. & Smith Roger K., *After the Storm*, The Aspen institute, New York, 1992, pp. 357-365, 372-373.

<sup>83</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, pp. 248, 302.



others-like Singapore, Senegal, Japan, Turkey, and the Philippines- participated indirectly, by providing medical supplies or financing the alliance for example. It is worth mentioning that except for the military forces of the two main parties, all other forces were symbolic and made no change in the balance of power. The Islamic military forces, for instance, were in total 90.000 soldiers only.\* This is confirmed by Nigel Pearce,

*Of the 40 nations, 18 took part in military operations against Iraqi forces (by land or air), although Pakistan and Senegal (and an infantry battalion of Afghan Mujahedin) took up purely defensive positions in Saudi Arabia. The Americans [for example] provided two-thirds of the allied forces, which eventually numbered nearly three-quarters of a million.<sup>84</sup>*

Non-Muslim forces, especially the United States and the European forces, came to support Saudi Arabia in 1990 under treaties which provided for military assistance. In the case of the Americans, as mentioned earlier, their presence in Saudi Arabia was regulated by a secret treaty between the Saudi and the US governments. No detailed information about this treaty has been released. In the case of the British, French, and other non-Muslim military forces no such bilateral treaties appear to have existed. Indeed, it was publicly announced that military assistance by these countries and the United States was provided under the treaty terms of the UN Charter, in order to implement and enforce UN resolutions upon Iraq (see page 354 above). These resolutions were imposed by an alliance of the military forces under the leadership of the United States and Saudi Arabia. It can therefore be concluded that non-Muslim forces were engaged against Iraq on the basis of treaty alliances unlike Muslim forces which participated in the conflict against Iraq, on the basis of giving assistance to fellow Muslims in need and/or in response to a request for such assistance by the Saudi government. Thus, the essential feature of the Islamic rule about military co-operation between an Islamic State and Muslims, on the one hand, and non-Muslims, on the other hand, was implemented in the coalition of 1990-91.

Other specific conditions have also to be fulfilled if an alliance between the Islamic State and non-Muslims is to be legitimate. Some conditions could not be implemented

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\* For full details see appendix VI.

<sup>84</sup> Pearce, Nigel, *The Shield and the Sabre*, HMSO, London, 1992, p. 46.

because of the change of time and political and military situations, such as sharing spoils of the war, which in the past included slaves. Nevertheless, if there were genuine spoils during the 1990-91 crisis they were, on the Arab side, the liberation of Kuwait and ending the threat of an Iraqi invasion of Saudi soil; and, on the Western side, the destruction of the Iraqi military capabilities. Most of the other Islamic conditions were, however, implemented in the 1990-91 alliance.

1) The alliance has to support and increase the Islamic power and must not enable the non-Muslims to control and threaten the vital interests of the Islamic State, such as its power and resources. The 1990 military alliance supported and increased the Saudi military power to counter a possible Iraqi invasion of Saudi soil, and moreover changed the balance of power in favour of this country. In August 1990, the military forces of Saudi Arabia were 95,000 men to confront 200,000 Iraqi troops in Kuwait alone. In January 1991, however, the military forces available to counter the Iraqi forces were 700,000 troops. Under the conditions of the 1990 alliance the non-Muslim powers were not able to control or threaten the high interests of the Islamic State, such as its power and resources.

2) There must be a necessity forcing the Islamic State to seek help, co-operation and/or alliance with non-Muslim powers. Because of the shortage of military manpower, the Saudi ability to cope with the Iraqi military power was impracticable. Another important necessity was: the condition to meet the Iraqi invasion of Kuwait and to counter the threat to Saudi Arabia, which was in danger from Iraqi invasion. Dr. Sayed al-Taweal, for instance, mentions,

*In Islamic history, there are various evidences which permit seeking help from non-Muslims to defend the lives, homeland, and sacred places . . . What Saudi Arabia and other Gulf states have done is categorised under necessity which permits any forbidden approach as necessary to save and protect lives.*<sup>85</sup>

From another point of view, Lawrence Freedman and Efraim Karsh, noticed that,

*The Saudi military was generally well equipped . . . However, it was extremely small compared with the Iraqi forces and lacked battle experience. Besides, all that faced Iraq at this point was*

<sup>85</sup> Group of Muslim jurists, *Ra'i al-Islam fi Jarimat Saddam*, Al-Zahra' li al-I'lam al-Arabi, Cairo, 1991, p. 85.

*the National Guard, which had been mobilized on 4 August. There was no way that it could cope without the American forces. The CIA estimated the capital, Riyadh, 275 miles away from Kuwait, could be reached within three days.*<sup>86</sup>

3) Under the acceptance of an alliance with non-Muslims the conditions must not include any terms which are prohibited by the *Shari'ah* such as supporting evils and sin. It can be argued that the alliance of 1990 did not harm either Islam or the Muslims beliefs, an evidence of such is that the non-Muslim troops were not allowed to enter Makkah or Madinah. Peter de la Billiere confirmed that when he stated that,

*. . . when the war was over it would be apparent that the Christian forces had not defiled the cradle of Islam.*<sup>87</sup>

The alliance of 1990-91 instead of harming Islam or the Muslims, gave the opportunity for non-Muslims to make contact with the Muslims to discover the genuine teachings of Islam, which consequently led many American and Western soldiers to embrace Islam. In connection with that the Saudis organised a programme of lectures for non-Muslim forces with the aim of explaining the beliefs, rituals and practices of Islam. Khaled Bin Sultan has written that,

*While the [1990-91] crisis lasted . . . a large number of American servicemen and women converted to Islam, no doubt influenced by the contacts they had made with our civilian population. They would visit the religious authorities and declare themselves publicly as Muslims . . . Eventually there were more than 2000 of them.*<sup>88</sup>

This claim is supported by the later, post-war crisis between Iraq and the UN, which occurred over Iraq's refusal to allow unrestricted access to the UN weapons inspectors in the November of 1997 and called "*The UN weapons inspectors crisis.*" During that crisis the United States and Britain mobilised their forces to strike Iraq in order to apply the Security Council resolution regarding the inspection and right to destroy the Iraqi weapons of mass destruction. As the Washington Post stated,

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<sup>86</sup> Freedman, Lawrence & Karsh, Efraim, *The Gulf Conflict*, Faber and Faber, London, 1993, p. 88.

<sup>87</sup> De La Billiere, Peter Sir, *Storm Command*, Harper Collin Publishers, London, 1993, p. 37.

<sup>88</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, p. 214.

*Saudi Arabia has not given the United States permission to conduct operations . . . which would be serious and sustained enough to damaged the Iraqi civilians.*<sup>89</sup>

What can be concluded is that the United States and the Western states could not unilaterally impose their decision on Saudi Arabia. In 1997-98 as in 1990-91 Saudi Arabia refused to allow its Western partners to use its territories for military action against Iraq unless it was satisfied about legitimacy of such proposed action.<sup>90</sup>

4) The head of the Islamic State, the *Imam*, is the only one who has the right to decide such necessity. When the Iraqi invasion of Kuwait has occurred, none of the Saudi government were entitled to make a decision to seek help from the Arabs and Western nations except the Monarch of Saudi Arabia. Dick Cheney's mission of August 1990 presupposed this invitation under conditions of necessity,

*Dick Cheney, the American Secretary of Defence, travelled to the Middle East on 6 August primarily on a coalition-building mission. The invitation had to come from the Saudis but the Americans themselves were instrumental in ensuring that the invitation was sent.*<sup>91</sup>

Bob Woodward added,

*During the meeting with King Fahd, Dick Cheney, the US Defence Secretary, insisted that the [US] President asked me to assure you that we will stay as long as you want us. We will leave when you no longer need us. We are not seeking bases but you are a long way away . . . After the danger is over, our forces will go home.*<sup>92</sup>

5) In the military field, non-Muslims have to fight separately or under Muslim command. Muslim troops however must always fight under a Muslim commander. The command structure in Desert Storm was explained by the US General Colin Powell as follows,

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<sup>89</sup> Jon, Harris, US Contracting Allies in Bid Pressure Iraq, *The Washington Post*, 25/1/1998.

<sup>90</sup> *Al-Hyatt* newspaper, London, 15-17/2/1998.

<sup>91</sup> Matthews, Ken, *The Gulf Conflict and International Relations*, Routledge, London, 1993, p. 65.

<sup>92</sup> Woodward, Bob, *The Commanders*, Simon & Schuster, London, 1991, pp. 296-270.

*On the delicate subject of who would take the decision to initiate military action only the Saudi government commands their forces and we command our forces. We are co-located in the Ministry of Defence building and so we make sure that our plans are synchronised.*<sup>93</sup>

Khaled Bin Sultan , the Saudi commander confirmed this,

*From the very start, the King, the Crown Prince . . . agreed that Saudi forces were not to serve under any command but their own. They could not serve under American command.*<sup>94</sup>

6) The Islamic State in a situation of necessity is required to seek military support or alliance first from the People of the Book. However, if this is unavailable then it may seek such support from any other nations or religious groups (under certain conditions). In the 1990 crisis, the Saudi government sought military support first from the United States under a bilateral treaty of alliance and from the United Kingdom and France firstly as allies of the United States and subsequently, formally, under the UN Charter. It did not seek military support from the Soviet Union or any other communist states. Long after the alliance with the major Western powers had been formed, other Christian states offered various forms of supports to the coalition and Japan as a non-Christian country contributed financial support to the coalition.<sup>95</sup>

7) Alliances should not lead Muslims to accept non-Islamic ideologies, either in part or as a whole, nor should they result in such things as denunciation of Islam or any other ideas which badly affect Islamic culture,

*As the center of the Muslim world, we could not afford to be as flexible as some other countries in matters of public behaviour . . . From the very start, I made crystal clear to Schwarzkopf that the King [of Saudi Arabia] had laid down firm guidelines regarding the entertainment of the troops: there was to be no singing or dancing by entertainers. President Bush [of the United States] himself could not make us bend on this issue. Some time later, however, Schwarzkopf came to me with the news that Bob Hope was planing to come to Saudi Arabia, accompanied by Brook Shields and a troupe of cheerleaders from Texas. "Bob*

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<sup>93</sup> *The Finincial Times*, 14/11/1990.

<sup>94</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, pp. 36-37.

<sup>95</sup> Watson, Bruce W., *Military Lessons of the Gulf War*, Greenhill Books, London, 1993, p. 193.

*Hope is very welcome" I told him, "but the others, no way. That is the clear answer I can give you. But please feel free to try another channel, if you like – either through James Baker [the US Secretary of State] in Washington or direct to Prince Sultan [the Saudi Minister of Defence]. But I can assure you the answer will be no".<sup>96</sup>*

Guy Garcia confirmed this in the *Time* magazine,

*The Bob Hope Christmas Show was subjected to prior censorship. In deference to Saudi Muslim sensibilities, the Pentagon banned the Pointer Sisters and Marie Osmond from performing for the troops in Saudi Arabia.<sup>97</sup>*

Janice Simpson added more details when she illustrated the control of the Saudis on the American entertainment media during the Gulf conflict of 1990-91. Simpson said,

*Even so, all tapes and transmissions coming into the country [Saudi Arabia] are monitored to avoid offending the sensibilities of the Saudi hosts. That rules out programs containing make-out scenes, women wearing tight or revealing clothing and displays of religious icons. Programmers for the VH-1 cable network, which sponsored the show, did exclude some videos from the program, including all by Madonna, but Cher passed muster by wearing jeans and a jacket. When Bob Hope staged his Christmas show for the troops, the Saudis passed the word that they weren't happy about his female troupers and that only women accompanied by their husbands were welcome in the kingdom. Thus the only woman on the tour was Hope's wife Dolores.<sup>98</sup>*

8) Non-Muslims have to be trusted by Muslims to fulfil the main condition for seeking help from, or alliance, with the non-Muslims. In his visit to Saudi Arabia during the first days of 1990-91 crisis, Dick Cheney, the US secretary of defence, in his meeting with King Fahd insisted that his country (the United States) had come to the assistance of Saudi Arabia in 1962 against Yemen and Egypt. Another example of the United States backing its allies in the region was the protection of the oil tanker shipments in the Gulf in 1987-88, he said. Cheney went on to say that the assistance

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<sup>96</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, p. 212.

<sup>97</sup> Garcia, Gay, *Time* magazine, 11/2/1991, p. 17.

<sup>98</sup> *Ibid.*, 4/3/1991, p. 72.

of Saudi Arabia in the crisis was a commitment that the United States would not take lightly. He assured the king that the United States would commit a force to defend Saudi Arabia which could do the job and deter Iraqi forces. The US secretary of defence confirmed the US President's assurance he would not be seeking bases in Saudi Arabia for US forces. They would stay only as long as the Saudi government wished.<sup>99</sup>

9) All terms and conditions of alliances have to be made by the Muslims. In the treaty of the 1990's alliance, the Saudi government, as the main party who called for that alliance put regulations which organised behaviours and attitudes of the foreign troops inside Saudi Arabia. In the words of Khaled Bin Sultan,

*As the hosts, the Saudis had to lay down the terms of reference, and the other members of the Coalition had to refer to them. If they did not like the terms, they could negotiate and try to change them. But at the end of the day, that is how it was.*<sup>100</sup>

10) Muslims are free to end their alliance with the non-Muslims if at time they find that such alliance has become disadvantageous. In connection with this, it maybe of interest to quote a statement of General Colin Powell, the Chairman of the US Joint Chiefs-of-Staff, who said,

*We are here at the invitation of the government of Saudi Arabia and we will leave when they wish us to leave and we believe that our purpose in being here has been served. I don't know how long that will be. We have no desire to be a permanent presence in the kingdom.*<sup>101</sup>

In summary, the military alliance of 1990, which was formed between an Islamic country and non-Islamic countries did meet with the basic elements of the Islamic theory of alliance.

## 8.7) Summary and conclusion

In this chapter, various facts have been found in connection to the relation between

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<sup>99</sup> Woodward, Bob, *The Commanders*, Simon & Schuster, London, 1991, pp. 267-70.

<sup>100</sup> Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, pp. 36-37.

Muslims and non-Muslims particularly in the Islamic and international law of military relations. The crisis, it was concluded, was a result of the disequilibrium in the regional balance of power after the Iraq-Iran war. Its impact on the Iraqi economy was what finally compelled Iraq to invade Kuwait to resolve all its post war problems. The most important feature regarding the 1990 crisis however was the fact that Muslim countries formed an alliance with non-Muslim countries against a Muslim country, Iraq.

*Fiqh* of the classical period dealt with alliances between the Islamic State and non-Muslim countries or groups against a non-Muslim country or group, therefore the situation in 1990 of an alliance against Iraq by both Muslim and non-Muslim states was a novel situation not covered by classical *Fiqh*. The 1990 alliance has been examined according to the theory of the Islamic military alliances in chapter VII. The case for Iraq in this conflict has also evaluated according to Islamic criteria.

Iraq was opposed in 1990-91 by a coalition of a Muslim and non-Muslim armed forces under the flag of the United Nations and with the authority of UN Security Council resolutions. However, within the coalition the presence of the Western powers was secured by military alliance between Saudi Arabia and the United States and the provisions for self defence under the UN Charter which secured the military presence of France and the United Kingdom and other Western support. By contrast, the presence of the Muslim powers in the coalition forces was secured through a brotherhood call for aid and assistance by the head of an Islamic country (Saudi Arabia) in conjunction with the Muslim World League and the Organisation of the Islamic Conference to the entire Muslim *Ummah* and specifically by the Saudi King to Muslim heads of state for troops and military weapons and equipment. In short, the anti-Iraq coalition reflected the fundamental claim which had been argued in this thesis, namely, that Islamic international relations are between Muslims and non-Muslims (here in the form of treaties) and that relations between Muslims are never international, but always internal or *Ummatic*.

It has been found that the military alliance of 1990, which was formed by Saudi Arabia and the West met all the ten crucial elements of the theory of Islamic alliance.

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<sup>101</sup> *Washington Post* newspaper, 14/11/1990



It supported and increased the power of Saudi Arabia without the non-Muslim states gaining control over this state, its resources and its other interests. The alliance was sought by Saudi Arabia in a situation of necessity resulting from the invasion and occupation of Kuwait by Iraq and its subsequent military threat to invade the Saudi soil. The existence of this situation of necessity was decided by the proper Islamic authority which in this case was the Saudi head of state, King Fahd. The King, in accordance with the Islamic requirement, first sought military support in this situation from the People of the Book, namely, the USA, France and the UK. Subsequently, these allies were completely trusted by the Saudis to fulfil the terms of the alliance. These terms of the treaty of alliance were not in conflict with the *Shari'ah* nor were unjust. Again, in conformity with the requirement of Islam all terms and conditions of the alliance were made by the Saudi government and agreed to by its Christian allies, for example, over the behaviour of Christian ground forces on Saudi soil. Moreover, in general the alliance was found to have caused no harm to Islam or to the Muslims allies and not conflict with their strategic interests. Neither the formation of the alliance nor the presence of Christian troops in Saudi Arabia for military operations against Iraq and Iraqi occupied Kuwait resulted in the adoption of new non-Islamic ideologies or beliefs. In fact the opposite occurred. There were many recorded cases of US troops embracing Islam during their stay in Saudi Arabia. During military operations, it was found that American and other Western armed forces were under Western command, while Muslim troops and some Western forces fought under the Muslim command of Khaled Bin Sultan. Shortly after the end of the hostilities the armed forces of the Western states began to withdraw from Saudi Arabia and their withdrawal was completed by the end of 1991. All this was in accordance with the Islamic requirement that alliances are temporary and that the Islamic State may terminate them when it decides it no longer needs the military support of its allies.

Moreover, it has been found that the support, which the Muslims, worldwide, gave to Iraq was not support for the aggression and occupation of Kuwait, but it was a support for an Arab Muslim country against the Christian powers and a rejection of the military role that the Christian West had played in the Islamic World. The support began from the day the foreign troops landed in Saudi Arabia, and it was enhanced later when Iraq was bombarded by the alliance. This opposition of the Muslim world to the Gulf War, both manifests and raises issues about the nature of the (Christian)

West's presence in the (Muslim) Middle East over a long historical period and its impact on the Third World's perception of their relationship with the US and the West.

Despite this (largely) popular Muslim support for Iraq, it was concluded that the Iraqi invasion had no Islamic backing, because it was not for any religious purpose. As Iraq summarised its case, it had sought to solve the Iraqi economic and financial difficulties, to give Iraq an extra outlet on the Gulf, and finally to create a puppet regime in Kuwait to serve Iraqi interests. The Iraqis, however, did use religion as a means to achieve their goals notably when they called upon all Muslims to wage *Jihad* against the UN forces in the Gulf, which according to the genuine nature of *Jihad*, Muslims have to wage against non Muslims. Saddam's call to *Jihad* was in part a war against the armed forces of other Muslim states.

Another crucial fact that has been found is that the Muslim countries have no dynamism to resolve their differences and disputes. If, prior to the Gulf crisis, such dynamism was obtainable, then the Iraqi invasion could not have taken place. Therefore, it is important to say that the Muslim world has to have such a mechanism via the Muslim World League or the Organisation of the Islamic Conference to resolve differences and disputes among the Muslim *Ummah* in order that relations could not reach such a crisis as in 1990s.

The next chapter is the conclusion. It will draw together conclusions from the previous chapters and it summarises the most important findings of this thesis.

## CHAPTER IX

## THE CONCLUSION

## **Chapter IX: The Conclusion**

9.1) Introduction

9.2) The Findings

9.3) Recommendations

### 9.1) Introduction

The purpose of this thesis was to examine a major segment of Islamic international relations theory, namely, that portion which is concerned with peaceful relations as distinct from that other major segment which is about *Jihad* or Islamic warfare. Nevertheless, some discussion of *Jihad* is required by this thesis in four different treaties – *Dhimma*, *Must'amin*, truce and alliance – are to be fully understood. In addition, the key concepts of *Dar-al-Islam*, *Dar al-Harb* in chapter III are unintelligible without an extensive understanding of the nature and purposes of *Jihad*. For this reason and in order to determine the possibility of neutrality in Islamic international relations theory, the purposes of *Jihad* were analysed on pages 94-98. Most of the thesis is, however, concerned with peaceful relations in this theory and attention is focused on the key organising concepts, treaties, including alliance and neutral status. Part of the purpose of this study has been to clarify the fundamental differences between Islamic international relations theory and Western international relations theory and show the relevance of Islamic international relations theory in the present day, including exploring the kind of difficulties which can occur in applying it to contemporary circumstances. The thesis has sought to achieve these objectives by testing a number of hypotheses concerning either Islamic international relations theory or treaties and neutrality. These hypotheses were:

1. That the Muslim juridical division of the world into two domains, *Dar al-Islam* and *Dar al-Harb*, or three domains with the addition of *Dar al-'Ahd (Sulh)*, was not based on legal-religious grounds. At least one other domain existed during the lifetime of the Prophet *Dar al-Da'wa*. This *Dar* may have some relevance to contemporary conditions.
2. The real basis of Islamic international relations consists of relations between Muslims and non-Muslims. All relations between Muslims (within the *Ummah*) are internal or non-international, even though they could be relations between independent Islamic heads of government.
3. That the basis of the Islamic theory of international relations is Islamic Law. This law, it will be argued, is treated in Islamic international relations theory as binding upon both Muslims and non-Muslims alike;

international relations should be conducted in practice in accordance with the *Share'ah*. It is further hypothesised that this law is dynamic, progressive, and flexible enough to meet the changing circumstances of time and place

4. Islamic international relations theory is normative, but not like normative Western international relations theories. They are moral theories: it is a theory framed on Divine Law (*Share'ah*).
5. The Islamic theory unlike most Western theories, recognises no distinction between public and private affairs at the international level.
6. Relations between the Islamic State (not states) and non-Muslim states are fundamentally pacific, not hostile. Peace not war is the normal state of affairs. War, hostility and *Jihad* exist or are employed for certain specific purposes, such as self-defence. This hostility ends when that purpose has been achieved.
7. That all peaceful international relations (i.e. except *Jihad*) are contractual in form.
8. There is a separate Islamic theory of international relations which differs fundamentally from Western theory of international relations.
9. Legal persons involved in contracts or treaties can be either individuals, various groups like tribes or religious communities, non-Muslim states and the Islamic State (not-states).
10. Military alliance between the Islamic State and non-Muslim countries is legitimate in Islamic international relations theory under certain conditions.
11. In addition to treaties of truce, friendship, commercial, alliance, and safe-guard *Aman* there is a further kind of treaty hitherto unrecognised in juristic or other scholarly commentaries; conciliation treaties.
12. That neutrality as well as neutralisation is permissible in Islam to meet the necessity of the Islamic State.

## 9.2) The Findings

The findings in relation to these hypotheses will now be considered in turn.

1) It has been found that in classical *Fiqh* the interrelated concepts of the domain of peace or Islam *Dar al-Islam* and the domain of hostility or war *Dar al-Harb* formed the basis of classical Islamic international relations theory. (pp. 84-100) Neither concept was mentioned in the *Holy Qur'an* or the *Sunnah* and therefore it was concluded that they had no legal-religious *Share'ah* basis. (p. 100) It was found the dual concepts were formulated by jurists early in the classical period of *Fiqh* (the exact date is unknown) and reflected the preponderant character of relations between Muslims and non-Muslims, namely, the hostility and prevalence of *Jihad* between them. (p. 92) In classical *Fiqh*, *Dar al-Islam* meant the people and territories within the Islamic State, or which had once been part of it wherein the *Share'ah* was applied. (p. 102) *Dar al-Harb* was that part of the earth and its population outside *Dar al-Islam*, that is, those peoples and territories outside the Islamic State where the *Share'ah* was not applied. A further and crucial characteristic of *Dar al-Harb* was its hostility to Islam and the Islamic State and it was this that was the fundamental cause of war between the two domains. (p.108) Later, in the second century AH a third intermediate domain between *Dar al-Islam* and *Dar al-Harb* was added, the domain of pledge *Dar al-'Ahd* or *Dar al-Sulh*. These antithetical domains were brought into line with changed circumstances, namely, the growth of temporary truce treaties and peaceful relations with formerly hostile states or groups by the addition of this third domain *Dar* which reflected the increasingly normal peaceful relations between the Islamic State and the non-Islamic external world. (p. 87)

Yet, the outside world was imperfectly mirrored in the triple domains of classical *Fiqh*. Neither *Dar al-Islam*, *Dar al-Harb* or *Dar al-'Ahd* was applicable to the situation of the first Muslim in Makkah before the *Hijrah*. There was no Islamic State and despite the hostility they encountered from the Quraish this was not *Dar al-Harb* at this time. The best way of describing the Makkah situation before the *Hijrah* is in terms of a forth *Dar*, namely, the domain of calling to Islam *Dar al-Da'wa*. (p. 88) Like the three domains of classical *Fiqh*, it too has no *Share'ah* basis, unlike *Dar al-Muhajiroun* the domain of Emigrants (or Madinah after *Hijrah*) which is mentioned in the Prophetic *Hadith* narrated by Imam Muslim. (pp. 85-87)

In contemporary circumstances the original two domains *Dar al-Islam* and *Dar al-Harb* of classical *Fiqh* were found to be largely inapplicable to the modern world. Accordingly the two domains were tentatively redefined in a way which made them relevant to present day circumstances. *Dar al-Islam* is any place where Muslims can practice their religion in complete freedom, wherever located, or whenever practised. *Dar al-Harb* is where the Islamic religion cannot be practised in complete freedom, where Muslims experience aggression, and are denied their most basic religious rights. Even with this redefinition of the two domains there are certain countries which are difficult to fit into one or the other, because although they are not Islamic countries, yet they are not hostile to Islam and Muslims nor do they deny them religious freedom. They cannot be classified as part of *Dar al-'Ahd* either because they have no truce treaties with the Islamic State/s. It was proposed to group all such countries in a fourth domain, the domain to calling to Islam *Dar al-Da'wa*. (pp. 107-108)

2) The thesis raised a more fundamental question through the discussion of the three domains of classical *Fiqh* and their possible applicability in the contemporary world. The two original domains were derived from a historically transitory, hostile, relation between Muslims and non-Muslims which was converted into juristic or theoretical concepts. This had become inadequate to describe the contemporary world after the second century AH, hence the addition of *Dar al-'Ahd* to redefine the Muslim/non-Muslim relationship. Instead of framing Islamic international relations theory in terms of two, three or even four domains, it was argued that the more fundamental relationships of Muslims to non-Muslims was the foundation of Islamic international relations theory. This was argued in two ways. First, that all relations between all Muslims are internal or *Ummatic* and consisted of Islamic brotherhood. Second, that all relations between Muslims and non-Muslims are external or between foreigners, including relations between citizens of the Islamic State and even Muslim husband and non-Muslim wife. These arguments may be summarised as follows.

The revelation that all Muslims form a single brotherhood (*Holy Qur'an* 49: 16) is the basis of the argument that inter-Muslim relations are never external. The Prophet likened their relationship to a wall where one part supports the rest or like a body which suffers when one of its organs is ill, thereby indicating the high degree of



solidarity, interdependence and mutual support within the *Ummah*. The case of *Ansar* and *Muhajiroun* at Madinah exemplified the brotherhood relationship because although the two groups came from the very different tribes, environments and polities of Makkah and Madinah, and would be counted as foreigners in Western international relations theory, their solidarity and interdependence based on Islam meant their interests were closer than those of blood kinsmen. (pp. 140-142) The call to *Jihad* to the Muslims of Yemen against the Romans of Syria by Caliph Abu Bakr was cited as an example of internal *Ummatic* relationships among Muslims. Instead of seeking an alliance with the heads of various polities in Yemen, which would have occurred if they were non-Muslims, the head of the Islamic State summoned his Muslim brothers of Yemen to perform their religious duty of *Jihad* alongside other Muslims from Madinah and elsewhere. If all relations between members of the Muslim *Ummah* are internal, it follows that all other relations will be external, that is, relations with all non-Muslims. This view is confirmed by the nature of *Share'ah*. It has two parts, one organising man's relations with Allah, the other his relations with his fellow human beings. The latter is subdivided into that part which applies to members of the Muslim *Ummah* and the other part which regulates relations between the Muslim *Ummah* organised as the Islamic State, on the one hand, and non-Muslim individuals, groups and states, on the other hand. This subdivision of the *Share'ah* is termed *al-Siyar* and it is the law governing the external relations of the Islamic State with non-Muslims. (pp. 83-84) The *Qur'anic* basis of Islamic international relations theory is summarised in the findings for the next hypothesis.

3) In the *Holy Qur'an* (3: 110) the fundamental difference between Muslims and non-Muslims is revealed and this single verse contains the basis of Islamic international law and Islamic international relations theory, namely, the religious distinction between the Islamic *Ummah*, based on belief in Allah (وَتُؤْمِنُونَ بِاللَّهِ) and implementation of His law by doing good and forbidding evil (تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ), on the one hand, and unbelievers who do not adhere to Islamic law, on the other hand. Since every part of the *Qur'an* is a source of *Share'ah*, it follows that *Siyar* and the fundamental conception of Islamic international relation theory is this element of the *Share'ah*. (p. 71) In chapter II, the fundamental unities of Allah and his laws and also the unity of mankind were examined. Allah's laws were revealed

through the a series of Prophets culminating in the Prophet Muhammad for the whole of mankind, though at each stage only part of the human race believed in God and followed his law. Thus in the final Divine revelation to mankind through the Prophet Muhammad only Muslims responded to his message and became bound by Allah's law in its final form. But because this law was revealed for all mankind it must provide the rules and norms of international relations between Muslims and non-Muslims. In this sense, that part of the *Share'ah* which regulates these relations, *al-Siyar*, is binding upon both parties. In other words, Islamic international relations theory excludes the possibility of relations between states being conducted on the basis of secular international law or on secular moral or other principles, except in so far as these may be found in Islamic law or, at least, do not contradict the *Share'ah* or its principles. Finally, it was hypothesised that the *Share'ah* is dynamic, progressive and flexible enough to meet changes of time and pace. This does not mean that existing Islamic law is under constant modification for once a rule had been established to cover a particular case in *Fiqh* that rule never changes thereafter. The flexibility of the *Share'ah*, it was found, lies in its ability to be expanded to cover new cases or situations for which either there is no rule or the existing rule relates to circumstances which have changed significantly from those for which the rule was formulated (chapter II). Through the use of analogy *Qiyas*, in particular, a juristic consensus *Ijma'* was able to arise over how the *Share'ah* applied to such new situations (for example the Imam al-Shafei'i himself changed some of his *Fatwas* and personal judgement when he moved from Iraq to Egypt) or new phenomena, such as organ transplants. A recent development has been the Islamic Jurisprudence Council, 1983 in Jeddah, consisting of expert Muslim jurists of the highest level of knowledge in both the sciences of *Share'ah* and detailed source evidence, in place of the judgements of a single jurist. These new juristic rulings are evidence of the dynamic and progressive character of *Fiqh*, for *Fiqh* changes by way of enlargement in applying the *Share'ah* to what is new. As a result, it can be argued that the gate of *Ijtihad* (legal judgement/opinion) has been reopened.

4) In chapter VIII certain international relations theories were applied to the Gulf region up to 1990-91. However, there was no Islamic equivalent to the theories of balance of power and decision-making because those theories were empirical and explanatory in character. It may be argued that the key concepts of *Dar al-Islam* *Dar*

*al-Harb* and *Dar al-'Ahd* were empirically based since they were drawn from the actual historical experience of relations between the Islamic State and non-Muslims. Moreover, these concepts in Islamic international relations theory do not function in a normative way: they purport to describe and (up to a point) explain hostile and non-hostile relations between Muslims and non-Muslims.(pp. 101-113, 256) To this extent, a case could be made for part of Islamic international relations theory not being normative. Western international relations theory has also a non-empirical, normative branch, but this branch is based on moral and political philosophy. Islamic international relations theory is also normative. It details the ways Muslims should behave toward non-Muslims (their religious-legal duties and obligations toward unbelievers) and the duties of non-Muslims to the Islamic State and, through it, to all Muslims. The important point about the normative nature of the Islamic international theory is that it is entirely legal and consists of a branch of Divine Law, the *Share'ah*, called *al-Siyar*.

5) It was found that under the *Share'ah* treaties between the Islamic State and non-Muslim states or political/religious groups were no different from contracts made between individuals. The public character of treaties in Western international law and international relations theory and the private nature of contracts is absent from classical *Fiqh* in which the public/private distinction is not made. (Modern Muslim scholars have, however, attempted to introduce the public/private distinction into Islamic law). Hamed Sultan was cited for his comment that every part of the *Share'ah* treats individuals and groups (including states) at the same level because every part comes from the same source. (p. 204)

6) It was hypothesised that relations between the Islamic State and non-Muslim states or other polities were fundamentally pacific, not hostile. The thesis that peace, not war, was the normal state of affairs was justified by criticising Khadduri's argument for permanent war and questioning the assumptions made by some classical jurists which underpin their conception of *Dar al-Islam* and *Dar al-Harb*, by clarifying the purposes for which *Jihad* may legitimately be fought. The argument of AbuSulayman was confirmed that the prevalence of warfare in the early centuries of the Islamic State gave rise to the fundamental pair of concepts *Dar al-Islam* and *Dar al-Harb* and the hostility between them, or that peace was temporary and abnormal.

However, this situation resulted from the constant aggression against the Islamic State by non-Muslims states and polities. So, unless that non-Muslim hostility was assumed to be permanent, there could be no reason for supposing that warfare was the normal relationship between the Islamic State and the non-Muslims. The alternative explanation for the prevalence of warfare in the first few centuries of Islam, put forward by Khadduri, Armanazi and others, was that Islam is based upon force, the Prophet Muhammad was an apostle of war and that the Islamic State would wage *Jihad* until Islam embraced the entire world. This explanation was rejected for several reasons.

It is a tenet of Islamic Faith that mankind is a unity, consequently division and conflict are, in principle, alien to it. That division and conflict is not the responsibility of the Islamic State for jurists overwhelmingly rejected the argument of jurists, such as al-Ramli, that the rejection of Islam by non-Muslims was a legitimate cause for fighting and killing them. Instead, the basic Islamic attitude towards non-hostile unbelievers is, in general, peaceful even before the *Hijrah* when the Muslim *Ummah* was being attacked *Jihad* was not permitted to them and Allah required that they behave towards non-believers with wisdom, discretion and beautiful preaching. Allah commands that the call to Islam must be made by meeting people on their own ground and convincing them with illustration from their own knowledge and experience. Moreover, preaching must be, not dogmatic, not self-regarding, not offensive, but gentle, considerate, and such as would attract the attention of non-Muslims. Manner and arguments should not be acrimonious. *Qur'anic* verses after the *Hijrah* were cited to show that peace was presupposed as normal between Muslims and non-Muslims. In addition, further *Hadiths* were cited to put in context the *Hadith* narrated by Imam al-Bukhari in which the Prophet says he has been ordered by Allah to fight until all people confess their Faith, pray to Allah and pay the *Zakah*. In context, the *Hadiths* show that the Prophet teaching is for a peaceful approach and that this is required by the *Share'ah* also. Finally, it was argued that *Jihad* was only legitimate for self-defence, against injustice and for the protection and guarantee of freedom of the Faith. These three causes in conjunction with the *Qur'anic* verse prohibiting the transgression of limits (2: 190) meant that *Jihad* could not be waged legitimately for any other reason. Furthermore, the three legitimate causes for *Jihad* all indicate that it

is temporary and not a permanent state of war; hostilities end when the purpose or cause has been achieved. (Section 3.3.1)

7) The hypothesis about peaceful international relations between Muslims and non-Muslims was that they were organised by voluntary contractual treaties between the Islamic State and non-Muslims individuals, groups and states. This was found to be true of almost all such peaceful relations, given that *Aman* is counted as a treaty in Islamic law. However, there was one exception to the rule that Muslim relations with non-Muslims are organised in terms of treaties: neutrality. On the argument that the neutrality (not neutralisation) of Abyssinia was recognised by the Prophet Muhammad as head of the Islamic State and that he commanded his subordinates accordingly, it was found that no treaty or even an informal agreement was involved.

8) It was found that there is a separate Islamic theory of international relations which differs fundamentally from Western theory of international relations in several respects. First and foremost, it is a normative theory derived from Islamic Divine Law, though it has an explanatory element in the empirically derived concepts of *Dar al-Islam*, *Dar al-Harb* and *Dar al-'Ahd*. Second, it treats international relations not as interstate relations or even as relations between states and groups like NGO's, but as relations between Muslims and non-Muslims. Relations between Muslims rulers or between different Muslim polities are not counted as foreign relations, but as internal *Ummatic* brotherhood relations. Relations between non-Islamic states and non-Islamic groups or individuals do not feature in the Islamic theory of international relations, they are never discussed. Logically, however, they are relations internal to that sphere of the world that Muslim jurists termed *Dar al-Harb* and therefore not foreign relations. Nevertheless, the status of all such relations must be a matter of pure speculation because the Islamic theory is silent about them.

9) In relation to hypothesis no. 7, it has been found that all peaceful international relations are organised contractually in terms of treaties with the sole exception of neutrality. It was found that the parties to these treaties were, on the one hand, the Islamic State and, on the other hand, non-Muslim individuals, groups and states. (Contractual relations between individual Muslims and non-Muslims were excluded from this thesis in the Introduction with the exception of the early *Aman* treaty

discussed in chapter IV.) The *Aman* treaty, it was found in chapter IV, was between the Islamic State and individuals from non-Muslim societies that were labelled as *Harbi*, or hostile, by the classical jurists. It was noted, however, that originally *Aman* could be given by an individual Muslim to an individual or up to group of ten non-Muslims. Jurists argued over whether individual Muslim slaves could give *Aman*, but the majority rejected the Hanafites denial of their competence to give *Aman*. (p.168) Later, the Islamic State came to monopolise giving *Aman*. When it provided general *Aman* it could be not only for an individual, but also for a very large group of *Harbis* not just ten. (p. 169) During the period of classical *Fiqh* and contrary to the contemporary position, the Hanafite and Malikite jurists, it was found, held that *Aman* allowed non-Muslims to visit Makkah and Madinah, though not the *Holy Mosque*. This was disputed by Shafei'ite and Hanbalite jurists. (p. 171) The Islamic State also concluded treaties with tribal groups, such as the alliance with the Jewish tribes in the *Constitution of Madinah*, or with religious communities, such as the treaty concluded between the Caliph Umar I and the Christian Patriarch of Jerusalem. (pp. 210-211) Under that treaty, the people of Jerusalem became *Dhimmis*. However, *Dhimma* treaties could be concluded with states as well as groups, such as the one with Persia after its military defeat by the Islamic State and before its people embraced Islam. Cyprus was another example of a treaty concluded with a state, though in this case its relationship was much more complex than that between Persia and the Islamic State. (p. 221)

10) Some contemporary Muslim jurists, particularly during the Gulf crisis 1990-91, publicly doubted the Islamic validity of an alliance between Muslim states and Western Christian states. (pp. 341-345) In chapter VII, however, it was found that classical *Fiqh* allows for the possibility of a legitimate military alliance between the Islamic State and non-Muslim polities or groups, such as the alliance between the Jewish tribes of Madinah and the infant Islamic State in the first year AH. It was further found that the classical jurists did not discussed treaties of alliance in any systematic way. Consequently, it proved necessary to collect together all the conditions which must be present in order to legitimate an alliance and which are mentioned in various locations in classical *Fiqh*. Altogether there were eleven such conditions:

The Islamic State must be in a situation of necessity such as military weakness or lack of resources. Only the *Imam* or head of state is entitled to decide whether such a situation of necessity exists. An alliance must support and increase the power of the Islamic State and not enable the non-Muslims to threaten or control it. The terms of alliance must be fair and just, but above all, they must be consistent with the *Share'ah*. Muslims should normally set the terms and conditions of the alliance, but when they do not, the terms must conform to the *Share'ah*. Muslims must not be led into accepting non-Islamic ideologies, or those which denounce Islam and harm its culture, through forming the alliance. An alliance should first be sought with the People of the Book, and only after this with other religious communities. All allies have to be trusted. A legitimate alliance ensures the order of battle will be one in which Muslim troops will always fight under a Muslim commander, whereas non-Muslim troops may either fight under him or under a non-Muslim commander. Where there are spoils of war, these have to be shared equally between the Muslims and their non-Muslim allies unless different terms have been agreed. No valid alliance can be permanently binding upon the Islamic State. (This final condition in classical *Fiqh* was found to be incorrect. In several treaties of the Prophet, the terms were worded in a way which indicated the alliance was intended to be permanent (pp. 310-312) "*as long as a sea wets the shells*." Subject to these conditions, an alliance between the Islamic State and non-Muslim polities was Islamically valid in classical *Fiqh* and, similarly, such an alliance between a Muslim state/s and non-Muslim state is valid in Islam today. For reasons discussed in relation to hypotheses no. 2, there can of course be no alliance between Muslim states.

In the final chapter, it was found that the alliance between Islamic and non-Islamic States during the Gulf crisis of 1990-91 fulfilled the conditions listed in the previous paragraph, and consequently was an Islamically valid alliance despite the objections to it voiced by some modern scholars and jurists.

11) Several varieties of treaty were distinguished in the thesis, of which treaties of *Dhimma*, *Aman*, truce, friendship, commerce, extradition and alliance were the most important. However, it was found that another treaty did not fit into any of these types of treaty and it was argued that it was a separate type of treaty hitherto unrecognised in classical *Fiqh* or in scholarly commentaries. This newly recognised kind of treaty is

a conciliation treaty. It differed from a truce-and-reconciliation treaty, the type of treaty to which it was closest, in that it was not concluded after a war. The situations in which the Prophet concluded conciliation treaties was after a call to Islam to the people of Maqnah and the Makokus of the Egyptian Copts. (pp. 243-245)

12) Majeed Khadduri had argued that neutralisation is permissible in classical *Fiqh*, and he interpreted neutralisation to mean the status of non-Muslim groups or states which had concluded a temporary truce treaty with the Islamic State and so had peaceful relations with it for the time being. The situation of these non-Muslim states of *Dar al-'Ahd*, or what Khadduri calls *Dar al-Hiyad*, was not one of neutrality according to Khadduri. The argument which excludes the possibility of neutrality in the relations between the Islamic State and non-Muslims was rejected however. The neutrality of non-Muslim state in a conflict between the Islamic State and some other/s non-Muslim polities is impossible on the thesis that the Islamic State is permanently at war with the non-Islamic world until all of it embraces Islam, or concludes a treaty or accepts *Dhimmi* status within the Islamic State. This interpretation of *Jihad* was rejected (see above hypothesis no. 6) and consequently neutrality was, in principle, possible. (pp. 279-282) Such a status was found to be the situation of Abyssinia during the life time of the Prophet, for although the Abyssinian were neither Muslims nor *Dhimmis*, the Prophet exempted them from *Jihad*. (p. 281) Although the Islamic State was, as a matter of fact, neutral in many wars between non-Muslim polities, no discussion of this *de facto* situation could be found in classical *Fiqh*. The jurists were simply interested in the possibility of neutrality of a non-Muslim polity in a war between the Islamic State and another such polity. However, they were concerned about what action should be taken by Muslims when fighting broke out between Muslims. In this situation they maintained that neutrality was not permissible and that other Muslims must take the side of the victim and end the aggression. (pp. 264-266)

### 9.3) Recommendations

This thesis has argued that a viable and relevant Islamic theory of international relations exists today if the three domains are removed from classical *Fiqh* to leave a theory of Muslim relations with non-Muslims. Some modern scholars, such as AbuSulayman, have seen the need for an Islamic theory of international relations



which is fully applicable in the modern world in which the Caliphate has been abolished and where non-Muslim states are in the ascendant. However, several major omissions exist in our treatment of this theme. First, it has been an analysis of *Sunni Fiqh*: the *Shi'i* perspective and School of *Fiqh* has been intentionally excluded for reasons of space. A comparison between *Shi'i Fiqh* and that of the four *Sunni* law Schools could prove to be very fruitful. For the same reasons of space, Muslim/non-Muslim social relations, like marriage between Muslim men and non-Muslim women, have been left out of the thesis, though an important modern work of *Fiqh* on this subject was noted in the introduction to the thesis. Additional work could also be carried out into non-*Dhimmi* treaties in the time of the 'Abbaside Empire. This thesis concentrated on such treaties in the time of the Prophet and the four Orthodox Caliphs given the legal importance of this Tradition in Islam, but the later application of these treaties under the 'Abbaside Caliphs would be beneficial. In the thesis, for example, it was noted that truce treaties had exceeded the temporary period of ten years during the Empire, and had in fact become permanent in the time of Saladin. In short, the re-examination of the Islamic theory of international relations through treaties, alliances and neutrality is a major task to which this thesis has made a modest contribution.

Finally, Dr. Yusuf al-Qaradawi has published and broadcast on an entirely new feature of Muslim/non-Muslim relations in the twentieth century, the position of Muslims who are permanent residents in Western countries. This new dimension also requires to be integrated into a contemporary re-assessment of Islamic international relations theory.

## APPENDICES

## **Appendices**

- I) The Constitution of Madinah.
- II) The Prophet's treaty with the people of Maqna.
- III) Tribe in Arabia during the first century AH 622-718 AD.
- IV) Armed Forces of Iraq and Saudi Arabia in 2<sup>nd</sup> August 1990.
- V) The Military Forces of Iraq, Saudi Arabia, The GCC, Egypt and Syria 1990.
- VI) The Islamic forces in the Gulf war 1990-91.
- VII) The Muslim World League statement about the Gulf crisis 1990-91.
- VIII) *Fatwa* of the Saudi Supreme Council of Senior *Ulama* about the Iraqi invasion of Kuwait.

## Appendix I: The Constitution of Madinah\*

1. They are a single community distinct from (other) people.
2. The Emigrants of Quraysh, according to their former approved practice, pay jointly the blood-money (incurred by one) among them, and ransom the captive of them, (doing this) with upright dealing and justice between the believers.
3. Banū 'Awf, according to their former approved practice, pay jointly the previous blood-wits and each sub-group ransoms its captive, (doing this) with upright dealing and justice between the believers.
4. Banū l-Ḥārith, according to their former approved practice, pay jointly the previous blood-wits, and each sub-clan ransoms its captive(s), (doing so) with uprightness and justice between the believers.
5. Banū Sā'ida . . . (as 3).
6. Banū Jusham . . . (as 3).
7. Banū n-Najjār . . . (as 3).
8. Banū 'Amr b. 'Awf . . . (as 3).
9. Banū n-Nabīt . . . (as 3).
10. Banū l-Aws . . . (as 3).
11. The believers do not forsake a debtor among them, but give him (help), according to what is fair, for ransom or blood-wit.

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\* Watt, W. Montgomery, *Islamic Political Thought*, Edinburgh University Press, Edinburgh, 1968, pp. 130-134.

12. A believer does not ally himself with the client of (another) believer without (the latter's) consent.
13. The God-fearing believers are against whoever of them acts wrongfully or seeks (? plans) an act that is unjust or treacherous or hostile or corrupt among the believers; their hands are all against him, even if he is the son of one of them.
14. A believer does not kill (another) believer (in vengeance) for an unbeliever, and does not 'help' an unbeliever against a believer.
15. The security (or protection) of God is one; the granting of 'neighbourly protection' by the least of (the believers) is binding on them (all); the believers are patrons (and clients) of one another to the exclusion of (other) people.
16. A Jew who follows us has (a right to) the same 'help' and support (as the believers), so long as they are not wronged (by him) and he does not 'help' (others) against them.
17. The peace of the believers is one; no believer makes peace (separately) apart from (other) believer(s), but (in any peace maintains) equality and fairness between them.
18. In every party that makes a razzia with us, one takes turns with another (at riding? at all military duties?).
19. The believers exact vengeance for one another where a man gives his blood in the way of God. The God-fearing believers are under the best and most correct guidance.
20. No idolater (among the clans of Medina?) gives 'neighbourly protection' for goods or person to (any of) Quraysh, nor intervenes on his behalf against a believer.
21. When anyone wrongfully kills a believer, the evidence being clear, then he is liable to be killed in retaliation for him, unless the representative of the victim is satisfied (with a payment). The believers are solidly against (the murderer), and may do nothing except oppose him.
22. A believer who has agreed to what is in this document and has believed in God and the Last Day may not 'help' or shelter a 'disturber'. Upon whoever 'helps' and shelters him is the curse and wrath of God on the day of

- 
- resurrection. Nothing will be accepted from him as compensation or restitution.
23. Wherever there is anything about which you differ, it is to be referred to God and to Muḥammad for a decision.
  24. The Jews bear expenses along with the believers so long as they continue at war.
  25. The Jews of Banū 'Awf are a community along with the believers. To the Jews their religion and to the Muslims their religion. (This applies) both to their clients and to themselves, with the exception of anyone who has done wrong or acted treacherously; he brings evil only on himself and on his household.
  26. For the Jews of Banū n-Najjār the like of what is for the Jews of Banū 'Awf.
  27. For the Jews of Banū l-Hārith the like . . .
  28. For the Jews of Banū Sā'ida the like . . .
  29. For the Jews of Banū Jusham the like . . .
  30. For the Jews of Banū l-Aws the like . . .
  31. For the Jews of Banū Tha'laba the like of what is for the Jews of Banū 'Awf, with the exception of anyone who has done wrong or acted treacherously; he brings evil on himself and his household.
  32. Jafna, a subdivision of Tha'laba, are like them.
  33. For Banū sh-Shuṭayba the like of what is for the Jews of Banū 'Awf; honourable dealing (comes) before treachery.
  34. The clients of Tha'laba are like them.
  35. The 'intimates' of (particular) Jews are as themselves.
  36. None of (the believers) goes out (on a razzia) without the permission of Muḥammad, but a man is not prevented from avenging wounds. If a man kills (another un-awares, or, more generally, acts rashly), (he involves only) himself and his household, except where he has been wronged. God is the truest (fulfiller) of this (document?).
  37. It is for the Jews to bear their expenses and for the Muslims to bear their expenses. There is to be (mutual) 'help' between them against whoever wars against the people of this document. Between them there is to be (mutual) giving of advice, consultation, and honourable

- dealing, not treachery. A man is not guilty of treachery through (the act of) his confederate. 'Help' is (to be given) to him who is wronged.
- 38. The Jews bear expenses along with the believers so long as they continue at war.
- 39. The valley (or oasis) of Yathrib is sacred for the people of this document.
- 40. The 'protected neighbour' (of a believer) is (in respect of the right to protection) as the man himself, so long as he does no harm and does not act treacherously.
- 41. No woman is given 'neighbourly protection' without the consent of her people.
- 42. Whenever among the people of this document there occurs any 'disturbance' or quarrel from which disaster for (the people) is to be feared, it is to be referred to God and to Muḥammad, the Messenger of God. God is the most scrupulous and truest (fulfiller) of what is in this document.
- 43. No 'neighbourly protection' is given to Quraysh and those who help them.
- 44. Between (the people of this document?) is (mutual) 'help' against whoever attacks Yathrib suddenly (without provocation?).
- 45. Whenever (the believers) are summoned to conclude and accept (or live under) a treaty, they conclude and accept it; when in turn they summon (unbelievers) to a similar (treaty), they are bound (to observe it) towards (the unbelievers) except in the case of those who fight about religion. (Incumbent) on every man is their share from their side which is towards them.
- 46. The Jews of al-Aws, both their clients and themselves, are in the same position as belongs to the people of this document while they are thoroughly honourable in their dealings with the people of this document. Honourable dealing (comes) before treachery.
- 47. A person acquiring (? guilt) acquires it only against himself. God is the most upright and truest (fulfiller) of what is in this document. This writing does not intervene to protect a wrong-doer or traitor. He who goes out is safe, and he who sits still is safe in Medina, except whoever does wrong and acts treacherously. God is 'protecting neighbour' of him who acts honourably and fears God, and Muḥammad is the Messenger of God.

## Appendix II: The Prophet's Treaty with the people of Maqnah.\*

بسم الله الرحمن الرحيم

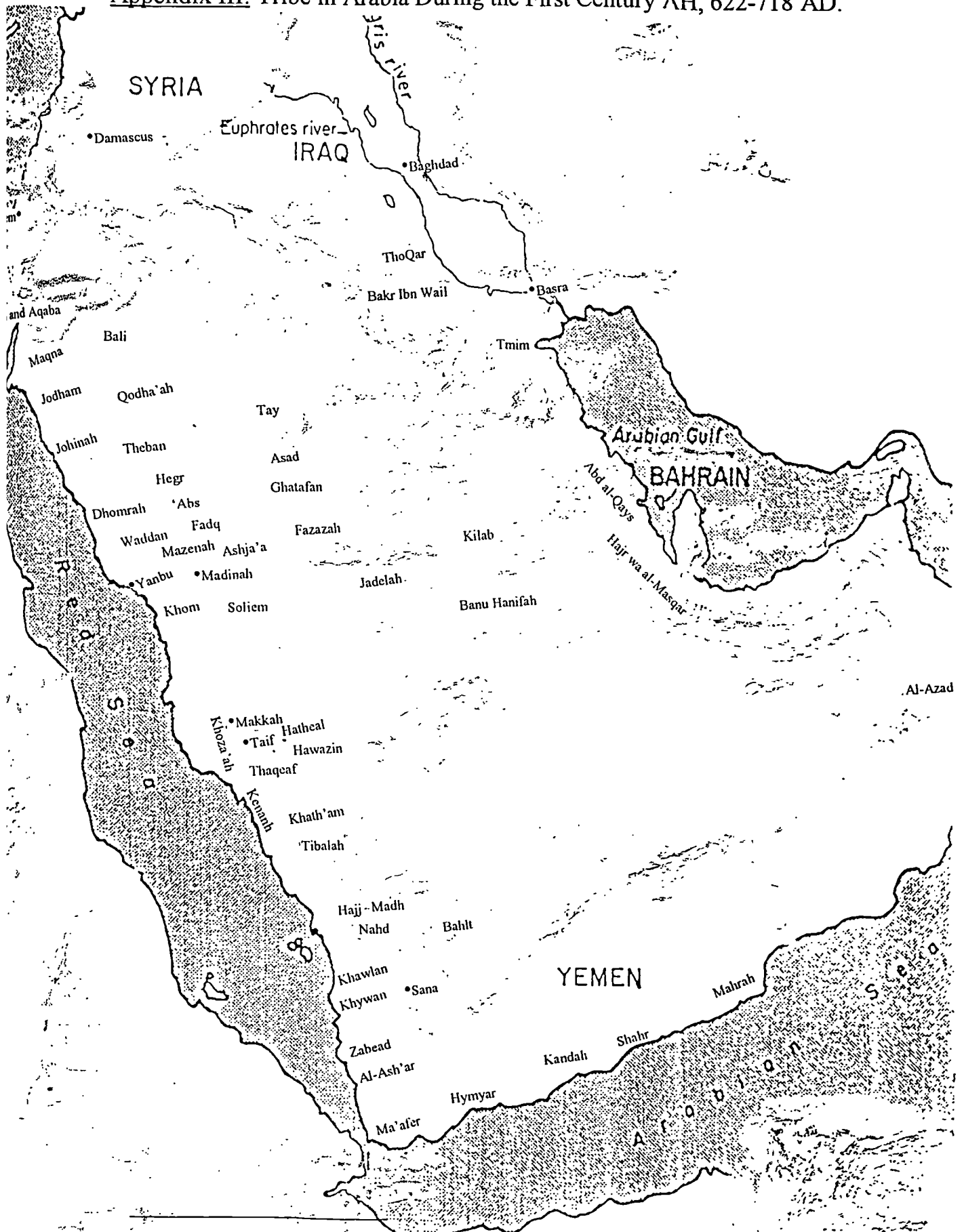
هذا كتاب من محمد رسول الله لُحْنِيْنَا ، ولأهل خيبر والمقنا ولذراريهم ، ما دامت السموات على الأرض . سلام أنتم ، إني أحمد إليكم الله الذي لا إله إلا هو . أما بعد : فإنه أنزل عليّ الوحي أنكم راجعون إلى قراكم وسكنى دياركم ، فارجعوا آمني بأمان الله وأمان رسوله ، ولكم ذمة الله وذمة رسوله على أنفسكم ، ودينكم ، وأموالكم ، ورفيقكم ، وكل ما ملكت إيمانكم . وليس عليكم أداء جزية ، ولا تُجْزَ لكم ناصية ، ولا يَطَأُ أرضيكم جيش ، ولا تُحْشِدُونَ ولا تُحْشِرُونَ ولا تُعْشِرُونَ ولا تظلمون ، ولا يجعل أحدٌ عليكم رسماً ، ولا تُمنعون من لباس المشفقات والملونات ، ولا من ركوب الخيل ولباس أصناف السلاح . ومن قاتلكم فقاتلوه ، ومن قتل في حربكم فلا يُقَاد به أحد منكم ولا له دية . ومن قتل منكم أحد المسلمين تعمداً فحكمه حكم المسلمين . ولا يُفْتَرى عليكم بالفحشاء ، ولا تُنْزَلون منزلة أهل الذمة ، وإن استعتم تعانون وإن استرقدتم ترفدون . ولا تطالبون ببضاعة ولا صفراء ولا سمراء ولا كراع ولا خلقة ولا شد الكشي ولا لباس المشهرات ؛ ولا يُقَطع لكم شئ نعل ، ولا تُمنعون دخول المساجد ، ولا تُحْجَبون عن ولاية المسلمين ، ولا يُؤلى عليكم وال إلا منكم أو من أهل بيت رسول الله . ويوسع لجنازكم إلا ( إلى ؟ ) أن تصير إلى موضع الحق اليقين . وتكرموا لكرامتكم ولكرامة صفية ابنة عمكم . وعلى أهل بيت رسول الله وعلى المسلمين أن تكرم كريمكم ويعفوا عن مسيئكم . ومن سافر منكم وهو ( فهو؟ ) في أمان الله وأمان رسوله . ولا إكراه في الدين . ومن منكم اتبع ملة رسول الله ووصيته ، كان له رُبع ما أمر به رسول الله لأهل بيته ، تُعطون عند عطاء قريش وهو خمسون ديناراً ، ذلك بفضل مني عليكم . وعلى أهل بيت رسول الله وعلى المسلمين الوفاء بجمع ما في هذا الكتاب . فمن أطلع لُحْنِيْنَا وأهل خيبر والمقنا بخبر فهو أخير له ومن أطلع لهم بد[شر] فهو شر له . ومن قرأ كتابي هذا ، أو قرأ عليه وغيره أو خالف شيئاً مما فيه ، فعليه لعنة الله ولعنة اللاعنين من [ الملائكة ] والناس أجمعين ، وهو بريء من ذمتي وشفاعتي يوم القيامة وأنا خصمه ، ومن خصمني فقد خصم الله ، ومن خصم الله فهو في النار ، والـ[ . . . . . ]ة وبئس المصير . شهد [ الـ ]له الذي لا إله إلا هو وكفـ[سى] به شهيداً وملائكته [ حملة عد]رته ومن حضر من المسلمين .

وكتب علي بن أبو [ ! ] طالب بخطه ، ورسول الله يُملي عليه حرفاً حرفاً ، يوم الجمعة لثالث [ ! ] ليال خلت من رمضان سنة خمس مضت من الهجرة . شهد [عمار] بن ياسر وسلمان الفرارسي [ ! ] مولى رسول الله وأبو ذر الغفاري .

\* Hamidullah, Mohamad, *Al-Wathaeq al-Siyasyah li al-Ahd al-Nabawy wa al-Khelafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, pp. 121-124.



Appendix III: Tribe in Arabia During the First Century AH, 622-718 AD.\*



\* Hamidullah, Mohamad, *Al-Watha'iq al-Siyasiyah li al-Ahd al-Nabawy wa al-Khulafah al-Rashedah*, 6<sup>th</sup> Edit., Dar al-Nafais, Beirut, 1987, p. 257.

**Appendix IV: Armed Forces of Iraq and Saudi Arabia in 2 August 1990.\***

| COUNTRY                       | IRAQ       | SAUDI ARABIA |
|-------------------------------|------------|--------------|
| Total Regular Armed Forces    |            |              |
| (A) Active                    | 1,000,000  | 67,800       |
| (B) Reserves                  | —          | —            |
| <b>GROUND FORCES</b>          |            |              |
| (A) Regular Army              |            |              |
| Active                        | 955,000    | 40,000       |
| Reserves                      | —          | —            |
| (B) Para-military             |            |              |
| Active                        | 250,000    | 7,000        |
| Reserves                      | 600,000    | —            |
| <i>In Service Equipment</i>   |            |              |
| Battle Tanks                  | 5,500      | 550          |
| Armoured Combat Vehicles      | 7,500      | 1,600        |
| Major Artillery               | 3,500      | 475          |
| Combat Helicopters            | 159        | —            |
| Aircraft                      | —          | —            |
| <b>AIR FORCES</b>             |            |              |
| Regular Air Force             | 40,000     | 22,000       |
| <i>In Service Equipment</i>   |            |              |
| Combat Aircraft               | 689        | 189          |
| Combat Helicopters            | —          | —            |
| <b>NAVAL FORCES</b>           |            |              |
| Regular Navy                  | 5,000      | 9,500        |
| <i>In Service Equipment</i>   |            |              |
| Surface Combatants            |            |              |
| (Aircraft Carriers,           |            |              |
| Cruisers, Destroyers,         | 5          | 8            |
| and Frigates)                 | (frigates) | (frigates)   |
| Patrol and Coastal Combatants | 38         | 12           |
| Mine Warfare Vessels          | 8          | 5            |
| <b>MARINE FORCES</b>          |            |              |
| Regular Marine Corps          | —          | 1,500        |
| <i>In Service Equipment</i>   |            |              |
| Battle Tanks                  | —          | —            |
| Armoured Combat Vehicles      | —          | 140          |
| Major Artillery               | —          | —            |

\* International Institute of Strategic Studies, *The Military Balance 1990-1991*, London Autumn 1990.

Appendix V: Military Forces of Iraq, Saudi Arabia, the GCC, Egypt and Syria 1990.\*

| WEAPONS                          | IRAQ                                      | BAHRAIN | OMAN   | QATAR | SAUDI ARABIA |                | UAE               | EGYPT   | SYRIA   |
|----------------------------------|---|---------|--------|-------|--------------|----------------|-------------------|---------|---------|
|                                  |   |         |        |       | Armed Forces | National Guard |                   |         |         |
| Total Armed Forces               | ACTIVE<br>1,000,000<br>RESERVE<br>850,000 | 6,000   | 29,500 | 7,500 | 67,500       | 55,000         | 44,000<br>623,000 | 450,000 | 404,000 |
| Main Battle Tanks (MBT)          | 5,500                                     | 54      | 39     | 24    | 550          |                | 131               | 3,190   | 4,000   |
| Light Tanks                      | 100                                       |         | 36     |       |              |                | 76                |         |         |
| Infantry Fighting Vehicles (AFV) | 1,500                                     |         | 2      | 30    | >500         |                | 30                | 470     | 2,250   |
| Armored Personnel Carriers (APC) | 6,000                                     | 103     | 6      | 160   | 1,100        | 1,100          | 510               | 2,745   | 1,500   |
| Self-Propelled Artillery (SP)    | 500                                       |         | 12     | 6     | 275          |                | 20                | >140    | 186     |
| Towed Artillery                  | 3,000                                     | 14      | 63     | >8    | 200          | 68             | 77                | 1,120   | 2,000   |
| Multiple Rocket Launchers (MRL)  | 200                                       |         |        |       | >14          |                | 58                | 300     | 250     |
| Combat Aircraft (CBT AC)         | 689                                       | 24      | 57     | 18    | 189          |                | 91                | 475     | 558     |
| Attack Helicopter (AH)           | 159                                       | 12      |        | 20    |              |                | 19                | 74      | 100     |

\* Sultan, Khaled Bin, *Desert Warrior*, Harper Collins Publisher, London, 1995, p. 20.

Appendix VI: Islamic Military Forces in the Gulf Crisis 1990.\*

|              |   |
|--------------|---|
| Afghanistan  | 300 mujahedin (i.e. the anti-government guerrilla movement) |
| Bahrain      | 3,500 troops  |
| Bangladesh   | 2,000 troops  |
| Egypt        | 40,000 troops; 400 tanks; 300 artillery pieces              |
| Kuwait       | 7,000 troops  |
| Morocco      | 2,000 troops  |
| Niger        | 400 troops  |
| Oman         | 2,500 troops  |
| Pakistan     | 10,000 troops   |
| Qatar        | 4,000 troops; 24 tanks                                      |
| Saudi Arabia | 95,000 troops; 550 tanks                                    |
| Senegal      | 500 troops  |
| Syria        | 20,000 troops   |
| UAE          | 4,000 troops  |

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\* Matthews, Ken, *The Gulf Conflict and International Relations*, Routledge, London, 1993, p. 313.

## Appendix VII: The Muslim World League Statement about the Gulf Crisis 1990.\*

بسم الله الرحمن الرحيم

الحمد لله رب العالمين والصلاة والسلام على سيدنا محمد أفضل المرسلين وعلي آله وصحبه أجمعين ...

وبعد :

فنظرًا للأحداث الجلي التي نزلت بمنطقة الخليج من اجتياح القوات العراقية للكويت وتهديدها المملكة العربية السعودية ودول الخليج الأخرى وما تبعه من الاستعانة بالقوات العربية والأجنبية لمساندة قواتها .

فقد دعت رابطة العالم الإسلامي إلى مؤتمر إسلامي عالمي ضم علماء المسلمين ومفكرهم من أنحاء العالم حيث انعقد في الفترة من ٢١ — ٢٣ صفر ١٤١١هـ الموافق ١٠ — ١٢ سبتمبر ١٩٩٠ م .

وقد تداول أعضاء المؤتمر في الأحداث الخطيرة انطلاقًا من واجبهم الديني ومسؤوليتهم الإنسانية والتاريخية .

وحرصًا على استمرار وازدهار الأخوة والقربى والجوار .

وإدراكًا للأخطار والتحديات التي تهدد الأمة في حاضرها ومستقبلها في كيانها المعنوي والمادي .

وبعد مداولات استغرقت ثلاثة أيام واتسمت بروح الأخوة الإسلامية والصراحة والموضوعية .

\* The Muslim World League, Makkah, 13/9/1990.

أصدر المؤتمر القرارات والتوصيات التالية :

أولاً : لما كانت نصوص القرآن والسنة قد قضت بأن كل المسلم على المسلم حرام دمه .. وماله .. وعرضه ، فإن المؤتمر يقرر إدانة العدوان العراقي على الكويت وانتهاب الأموال والممتلكات وتدمير المؤسسات واستباحة الحرمات وإدانة حشد القوات العسكرية على حدود المملكة العربية السعودية تهديداً لأمنها وأمن دول الخليج .

ثانياً : يطالب المؤتمر النظام العراقي بسحب قواته من أرض الكويت فوراً ودون شرط ، وبسحب القوات التي حشدتها على حدود المملكة العربية السعودية وعودتها إلى داخل أراضي العراق ، وإنهاء كافة آثار الاحتلال والتهديد وتحمل كافة التعويضات عما أحدثته قوات الاحتلال العراقي من إتلاف وسرقات .

ثالثاً : يطالب المؤتمر بعودة الشرعية الكويتية إلى تسلم مقاليد الحكم في بلادها .

رابعاً : لما كانت قواعد الشريعة الإسلامية تلزم بالوفاء بالعهود والمواثيق للمسلمين وغيرهم ، وتحمي الرسل والسفراء والمقيمين في البلاد الإسلامية من غير المسلمين في أنفسهم وأموالهم ، ووفقاً لما قرره القوانين الدولية والأعراف الدبلوماسية ، فإن المؤتمر يطالب النظام العراقي بالالتزام بهذه المواثيق واحترامها .

خامساً : فيما يتعلق بالاستعانة بالقوات الأجنبية فإن المؤتمر بعد الاطلاع على بحوث العلماء ، يقرر أن ما حدث من استعانة المملكة بقوات أجنبية لمساندة قواتها في الدفاع عن النفس إنما اقتضته الضرورة

الشرعية ، والشرعية الإسلامية تجيز ذلك بشروط الضرورة المقررة شرعاً .

ومتى زالت أسباب وجود هذه القوات من انسحاب العراق من الكويت وعدم تهديد المملكة ودول الخليج ، فإنه على هذه القوات مغادرة المنطقة .

ويناشد المؤتمر الدول الإسلامية تكوين قوة إسلامية دائمة تحت إشراف منظمة المؤتمر الإسلامي تلجأ إليها الدول الإسلامية عند حدوث النزاعات بينها .

سادساً : يرى المؤتمر أنه يتعين على المسلمين تجديد التوبة والرجوع إلى الله تعالى وتصحيح المسار في جميع شئون الحياة وفقاً للكتاب والسنة ، كما يتعين عليهم تكوين الشباب إيماناً وعسكرياً حتى يواجهوا الأخطار المحدقة بالأمّة للدفاع عن بيضة الإسلام .

كما يقرر المؤتمر أن إعداد القوة اللازمة لحفظ أمن المسلمين في مجتمعاتهم والدفاع عنهم ضد الأخطار قد أصبح متعيناً على المسلمين .

سابعاً : يناشد المؤتمر الحكومات والهيئات الإسلامية السعي لمنع وقوع الحرب وتحقيق الأمن والسلام في المنطقة .

ثامناً : يناشد المؤتمر الحكومات والهيئات والشعوب الإسلامية بذل الجهود لتحقيق وحدة المسلمين بإقامة سوق إسلامية وتكامل اقتصادي فيما بينها ومعاهدة دفاع مشترك .

تاسعاً : يناشد المؤتمر الحكومات الإسلامية بتطبيق الشريعة

الإسلامية في كل مناحي الحياة القضائية والسياسية والاقتصادية وغيرها ، مع العناية بإقامة الشورى في حياة المسلمين وتطهير المجتمعات الإسلامية من آفة الربا وتنقية وسائل الإعلام مما يخالف تعاليم الإسلام .

عاشراً : يستمر هذا المؤتمر في حالة انعقاد دائمة وتكون له لجنة متابعة أعماله والتنسيق مع الهيئات والمنظمات الإسلامية في معالجة الموقف ، وتكوين وفود للدول والشعوب والهيئات الإسلامية لبيان حقيقة ما جرى وخطورته على مستقبل المسلمين وضرورة الإسهام في معالجة المشكلة . كما يدعو المؤتمر العلماء والمفكرين المشاركين فيه إلى الإسهام في معالجة القضية من خلال مجال عملهم والهيئات العاملين فيها كل حسب اختصاصه .

حادي عشر : يدعو المؤتمر الهيئات الإسلامية إلى إقامة مؤتمرات وندوات لتوعية المسلمين في الموضوعات التي عالجها المؤتمر مستفيدة من الأبحاث والدراسات التي قدمت فيه .

ثاني عشر : يؤكد المؤتمر على ضرورة مشاركة المنظمات الإسلامية الإغاثية وفي مقدمتها هيئة الإغاثة الإسلامية العالمية والهلل الأحمر الدولي في إغاثة منكوبي كارثة الخليج في كافة الدول ذات العلاقة .

ثالث عشر : يؤكد المؤتمر على أن هذه الفتنة المفجعة يجب ألا تشغل المسلمين عن قضاياهم الأساسية والمصيرية وفي مقدمتها قضية المسجد الأقصى والقدس وفلسطين وقضايا المجاهدين الأفغان وقضية كشمير وقضايا الأقليات المسلمة المضطهدة في العالم .

رابع عشر : يقدم المؤتمر بمناسبة انتهاء أعماله الشكر للحكومات



والهيئات والشعوب الإسلامية التي وقفت مع الشعب الكويتي في محنته وشجبت العدوان العراقي الغاشم وأيدت المملكة العربية السعودية فيما اتخذته من إجراءات .. ويخص بالذكر حكومة خادم الحرمين الشريفين والشعب السعودي وحكومات الشعوب الإسلامية الأخرى على وقوفها مع الشعب الكويتي المسلم والرعاية التي أحيط بها . كما يشكر المؤتمر الأمانة العامة لرابطة العالم الإسلامي على دعوتها لحضور هذا المؤتمر والترتيبات الممتازة التي وضعتها مما ساعد على إنجاز أعماله في الوقت المحدد له .

وصلى الله وبارك على سيدنا محمد وعلى آله وصحبه أجمعين . .  
والحمد لله رب العالمين .

صدر في مكة المكرمة بتاريخ

١٤١١/٢/٢٣ هـ

١٩٩٠/٩/١٢ م

## Appendix VIII: Fatwa of the Saudi Supreme Council of Senior Ulama.\*

الحمد لله رب العالمين والعاقبة للمتقين ولا عدوان الا على الظالمين والصلاة والسلام على  
 نبينا محمد وعلى آله وصحبه ومن اهتدى بهداه ولزم سنته الى يوم الدين محمد ؛  
 لانه لم يلبس من علم هيئة كبار العلماء وفهرهم في المملكة العربية السعودية ما حدث على  
 حدودها من حشود قوات كبيرة وعدوان على دولة مجاورة من دولة العراق ولد بلغ الهيئة ماثلثه  
 وكالات الانباء وشتم وسائل الاعلام ونقله القاريون من الدولة المعتدى عليها الكويت من امور لظهوره  
 وجرائم خطيرة واستهتار بالقيم وانتهاء لحرمة الجوارس والجمع اعظم من وصفه والسعيد من وعظ بخسيرة  
 وهذا هو الذي حدا بولاة الامر في المملكة العربية السعودية الى ان يأخذوا باسباب حماية بلادهم  
 واهلها ومقوماتها من التعرض لشل ما تعرضت له جارتهم الكويت وأن يطلبوا اعانة الدول العربية وغير  
 العربية لدفع الخطر المتوقع والتوقيف بوجهه العدو وان المرتكب من مبرك مداممة البلاد ولد حلققت  
 وقائع الأحوال في الكويت أن هذا العدو ولا يوثق بوعده ولا تؤمن لحياته .

ولذا فان بيان الحكم الشرعي في هذه المسألة امر حتمي ليكون الناس في هذه البلاد وفي  
 غيرها على بصيرة من الأمر وعلى لهم الواقع عن طريق طائفتهم لهذا قرر مجلس هيئة كبار العلماء  
 عقد جلسة خاصة لأصدار هذا البيان لموضح للناس فيه ضرورة الدقام من الأمة ومقوماتها بجميع الوسائل  
 الممكنة وان الواجب على ولاية امرها السادة لا تخال كل وسيلة تصد الخطر وتوقف رحمة الشر وتؤمن  
 للناس سلامة دينهم ومالهم واعراضهم وما لهم وتحفظ لهم ما ينعصون به من امن واستقرار . .

لذا فان مجلس هيئة كبار العلماء يؤيد ما اتخذته ولي الأمر ولله الله من استقدام قوات مؤهلة  
 بأجهزة قاذرة على الحافة وارهاب من اراد العدو ان على هذه البلاد وهو امر واجب عليه تسليمه  
 الضرورة في الظروف الحاضرة ويحتسب الواقع المؤلم وقواعد الضرورة وانتهى توجب على ولي امر المسلمين  
 أن يستعين بمن تتوفر فيه القدرة وحصول السكون وقد حل القرآن والسنة النبوية على لزوم الاستعانة ان  
 واخذ العدو قبل قوات الأوان وعلى الله على نبينا محمد وآله وصحبه وسلم . .

هيئة كبار العلماء

عبد العزيز بن عبد الله بن صالح  
 عبد الرزاق بن عبد الله بن صالح  
 عبد الله بن عبد الله بن صالح  
 عبد الله بن عبد الله بن صالح  
 عبد الله بن عبد الله بن صالح

عبد الله بن عبد الله بن صالح  
 ابراهيم بن محمد بن عبد الله بن صالح  
 صالح بن عبد الله بن صالح  
 عبد الله بن عبد الله بن صالح

عبد الله بن عبد الرحمن البسام

محمد بن صالح العثيمين

صالح بن فوزان الفوزان

حسن بن جعفر العثيمين

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